

THE INTERSECTION OF §504, IDEA & DYSLEXIA

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I. Guiding Principles for Understanding the Intersection

A. The Supremacy Clause

Article VI of the United States Constitution, commonly referred to as the “Supremacy Clause” provides that

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The general rule created by this provision is that federal law trumps state law. Where a state law prevents compliance with federal law, or serves as an obstacle to accomplishing the full purpose or objective of Congress, state law is ignored and federal law is obeyed. *California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989). That federal law is supreme does not mean that states are unable to create laws that complement or add protections to existing federal law. For example, federal disability law in the form of §504, IDEA and the ADA create a floor of benefits and protections– the minimum that must be provided. Should a state desire, it can always provide additional services, resources and protection to disabled students, so long as the state law is consistent with the federal, and the rights, resources, etc., promised by federal law continue to flow to eligible students.

Allowable state action. Under the 1997 reauthorization of the IDEA, states were given the option of creating a new special education eligibility category for young students, ages 3-9, with developmental delays. 34 C.F.R. §300.7(b). Based on that authority, each state could decide whether or not to take advantage of the new category. Texas chose to adopt it, but only partially, creating the developmentally delayed label for students between the ages of 3 and 5. TEX. EDUC. CODE §89.1040(c)(13). Since the state could ignore the label entirely or provide it for a particular age range, the Texas decision to use some, but not all of the authority was consistent with federal law and did not run afoul of the supremacy doctrine.

State action trumped by Supremacy Clause. On the other end of the spectrum is Chapter 37 of the Education Code which provides at §37.007 for the mandatory expulsion of students for certain types of conduct. Since a student with disabilities under either special education or §504 will be entitled to manifestation determination, and since the behavior may be linked to either disability or inappropriate placement, that state law requires expulsion for a particular offense may not matter. Federal disability law cannot be avoided by an inconsistent state law, or for that matter, by local school district policy..

B. 504 & IDEA (Special Education) are federal laws providing significant procedural protections for eligible disabled students and their parents.

For both IDEA and Section 504, the federal government, either through Congress or the Department of Education, has determined that decisions about eligibility and services for disabled students are too important to be given to one person. As a result, whether a student is eligible under federal law and what that child gets at school because of eligibility are decisions to be made by the appropriately constituted committee, as outlined by federal law.

The ARD Committee or IEP Team: The IDEA regulations mandate that identification, evaluation and placement of students in special education be accomplished by a committee—a multi-disciplinary team composed of a variety of educators and the parent. (*See* 19 TEX ADMIN. CODE §89.1050). In Texas, we call these teams Admission, Review, and Dismissal (ARD) Committees, elsewhere, they are known as IEP Teams. Specifically, the ARD Committee must include the child’s parents, a regular education teacher if the student is or may participate in regular education classes, the child’s special education teacher, a representative of the public agency (with power to supervise the provision of services), a diagnostician, other individuals at the discretion of the parent or school, and, if appropriate, the child. The school’s failure to have in attendance all the required personnel results in a violation of IDEA. (*See, for example, Searcy Public Schools*, 30 IDELR 825 (SEA Ark. 1999), where the district’s failure to have in attendance a regular education teacher at a manifestation determination meeting resulted in the voiding of the teams’s decision because the committee was not properly constituted.)

The Section 504 Committee is responsible for §504 identification, evaluation, and placement. Unlike the IDEA, §504 does not dictate the titles or people who must be members of the Committee. Instead, the regulations require that the §504 Committee is a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. §104.35(c)(3). The parents are not required members of the Committee (although best practice dictates that they have involvement in the evaluation and placement process, and receive the notices required by the procedural protection provision.) There is no maximum number of members, and the regulations provide no guidance on the level of knowledge required.

Both laws require appropriately constituted committees to make educational decisions for disabled students. The direct result is that, for a special education or 504 child, when any individual person or group of persons, other than the appropriate ARD Committee/IEP Team or the §504 Committee, makes identification, evaluation or placement decisions for the child, that person or group is violating the student’s rights under federal law.

Parent rights. The parents of students with disabilities are granted rights under federal law in addition to those rights enjoyed by the parents of regular education students. As you might expect, **the rights of special education parents are numerous and significant.** The IDEA envisions a system whereby schools and parents work jointly in the planning and development of the IEP. Parents are consensus members of the ARD— equal participants in the ARD committee process under the law. Parents are entitled to notice of their rights, prior notice of meetings, and the right to inspect records. Parents can refuse consent to evaluation, can demand independent evaluations at the district’s expense, and can demand that ARD meetings be

scheduled to discuss concerns. When the parent disagrees with the ARD Committee, the parent can seek a due process hearing (an often complex piece of litigation that can spawn appeals to federal court), can file complaints at the Texas Education Agency (TEA) or OCR, or request mediation. While complaint resolution is not necessarily expensive, it is time-consuming, and can result in an obligation to provide additional services to the student. Briefly **the rights of parents under Section 504 are more limited.** Parents are not required members of §504 committees, but are entitled to notice of rights, prior notice of 504 meetings and post-meeting notice of what occurred. Should parents disagree with the identification, evaluation or placement of their §504-eligible student, they are able to complain to OCR, sue the district, or request a due process hearing. In summary, §504 and special education provide a procedural framework of protections to disabled students and their parents. As federal laws, §504 and special education carry the weight of the Supremacy Clause. To the extent that state law is inconsistent, or frustrates the purposes of either §504 or special education, the offending state law must yield.

C. The Texas Dyslexia Law must work consistently with federal law.

Under the Texas dyslexia law, each school district must implement a program to assess and serve students with dyslexia. The language of that requirement is interesting, in that it refers to “treatment” of students with dyslexia rather than providing educational services to students. TEX. EDUC. CODE §38.003(b). The law also refers to the process of dyslexia assessment as “diagnosis.” TEX. EDUC. CODE §28.006(a)(1) & (b). The use of medical terminology with respect to these students, but not for students suffering other types of disabilities is unexplained but seems to indicate that the legislature wanted these students to be viewed and treated differently.

In 1992, the State of Texas adopted the first set of procedures to implement the state’s dyslexia program. That initial set of guidelines was commonly referred to as the “Green Book” because of its green cover. It was replaced by the Red Book in 1998. The current handbook of dyslexia guidelines, entitled *The Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders*, is referred to as the “Purple Book.” The latest version of the handbook was not intended to introduce legal changes or changes in procedures, but to clarify language, especially with reference to assessment and identification. Purple Book, at p. v. For many districts, especially those that attempted to perform the duties enumerated under state law without reference to federal law, the new language will make clear that changes in district procedures are required for compliance. That districts have been confused by the state dyslexia law is no surprise. **The initial state dyslexia law did little to coordinate the efforts it required of public schools with the requirements of federal law under 504 and special education.** Since the first handbook, each succeeding effort has brought the state dyslexia law and federal disability laws closer into harmony. Such coordination is required so that districts complying with state law do not lose track of the duties that might also be owed to students with dyslexia under federal law.

II. Federal Program Eligibility for Students with Dyslexia

A. Special Education and the Learning Disability (LD)

Dyslexia is not specifically listed in the IDEA as one of the qualifying categories of disability. Instead, dyslexia is considered a subcategory within the term “specific learning disability.” *Letter to D’Amato*, 17 IDELR 466 (OSERS 1991). “Specific learning disability” means “a

disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia.” 34 C.F.R. §300.7(c)(10)(i). In order to screen out learning disorders related to other physical impairments or to causes other than disability, the regulations specifically exclude as learning problems disorders that are “primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” §300.7(c)(10)(ii).

Merely having dyslexia or some other learning disorder does not guarantee special education eligibility. In Texas, for example, LD eligibility also depends on the severity of the disability. State rules provide

A student with a learning disability is one who has been determined by a multidisciplinary team to meet the criteria for specific learning disability.... and in whom the team has determined whether a severe discrepancy between achievement and intellectual ability exists.... A severe discrepancy exists when the student’s assessed intellectual ability is above the mentally retarded range, but the student’s assessed educational achievement in areas specified in 34 C.F.R. §300.541, is more than one standard deviation below the student’s intellectual ability. 19 TEX. ADMIN CODE §89.1040(c)(9)(A).

Finally, even if the child is disabled and a severe discrepancy exists, there is no special education eligibility unless the child also by reason of that disability, “needs special education and related services.” 34 C.F.R. §300.7(a)(1).

For the child with dyslexia who is eligible under the IDEA, the Purple Book requires that the ARD Committee include “appropriate reading instruction on the student’s individualized education program (IEP). Appropriate reading instruction includes the descriptors listed in the chapter on Instruction for Students with Dyslexia.” Purple Book at p. 9, ¶2. Note that for a special education eligible student, the ARD Committee determines placement. While that group should certainly consider input from the dyslexia program, the dyslexia program rules do not govern the child’s placement to the extent that they are inconsistent with the IDEA. Additional IDEA concerns are discussed on page 10.

B. Section 504 Eligibility.

To be eligible under §504, one must be “qualified” [which, in Texas, roughly equates to being between three and twenty-two years of age and a resident of the school district, 34 C.F.R. §104.3(k)(2).] and “handicapped.” Note that since this regulation was drafted, the Americans With Disabilities Act was passed, and the term “handicapped” has been replaced with “disabled.” Handicapped persons” means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. §104.3(j)(1).

Eligibility is determined by an appropriately constituted Section 504 Committee which

completes the evaluation process and applies the eligibility criteria. Evaluation means that the Committee, through its review of data from a variety of sources, looks at how the disability impacts this student's access to the programs and activities of the school district. The eligibility definition requires not only the existence of a disability, but also that the disability rise to a particular level of impact, referred to as a "substantial limitation." While every district is allowed to create its own definition of substantial limitation [*Letter to McKethan*, 23 IDELR 504 (OCR 1994).], the phrase is typically understood to mean that the disability significantly impacts the student at school, depriving him of an equal opportunity to participate in, or benefit from, the school's programs and activities. [*See, for example*, the definition of substantial limitation provided pursuant to the ADA, at 29 C.F.R. § 1630.2(j).(1).] Note that for a 504-eligible student, the 504 Committee determines placement. While that committee should certainly consider input from the dyslexia program, the dyslexia program rules do not govern the child's placement to the extent that they are inconsistent with 504.

A little commentary: The Purple Book continues to make an unfortunate and incorrect reference to prongs two and three of the 504 eligibility definition. Section 504 Committees only look at prong one to determine whether a student is eligible for services. Strangely, Question 2 in the Purple Book provides "Thus a student whose reading difficulties substantially limit learning may be regarded as having a disability within the scope of 504." The sentence is misleading for it misunderstands the three eligibility prongs and what is received under each. The only student eligible under 504 for services (that is, the only kids for whom a committee meets and creates an accommodation plan) are those students who are eligible under prong one. While a "record of" an impairment or being "regarded as having" an impairment by the school give rise to anti-discrimination protection under §504, these two prongs do not trigger the school district's obligation to provide a free appropriate public education or FAPE. **"Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services."** *OCR Senior Staff Memo*, 19 IDELR 894 (OCR 1992) [bracketed material added by author]. Put more bluntly: "Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were." *Id.*

III. Texas Dyslexia Law Eligibility

While the Texas Commissioner of Education is required by the Texas law to provide recommendations for districts with respect to dyslexia testing, the local school board of each district is given the responsibility of approving a program for testing students. TEX. EDUC. CODE § 28.006(a)(1) & 7.102(c)((28). A key element in the state scheme for identification of students with dyslexia is the use of screening instruments in grades K-2. Based on these early screenings, districts can determine whether additional testing in the form of assessment is necessary. Clear from the Purple Book is the desire that the screenings occur early so that assessment, if necessary, can also occur early in a child's educational career—"the earlier the better." Purple Book, at p. 3.

Screening vs. Assessment. A major change from the Red Book to the Purple Book is the distinction in the procedures between a "screening" and an "assessment." A "screening" is an initial cursory examination given to all students in a school or classroom to identify those who may have a particular problem. Purple Book, Appendix C, Glossary of Terms p. 15. An

“assessment” is defined as individualized measures appropriate for a student’s reading level used to determine if a student is eligible for the dyslexia program. *Id.*, at 13. At the risk of oversimplification, think of screening as a huge net cast over a grade level or class to catch kids with possible problems, and assessment as a smaller net used to separate out a particular child from that group for additional testing to determine the nature and extent of the problem.

A little commentary: While the drafters of the Purple Book are to be commended for their overall effort, it does seem a bit odd that while creating a distinction between screening and assessment, the definition of screening begins by calling it “an initial assessment.”

Assessment of a student for dyslexia triggers the protections of Section 504. “When students are singled out for individualized assessment, the procedures for assessing students for dyslexia must be carried out within the requirements of Section 504 including notification of parents, opportunity for parents to examine relevant records; use of valid measures; and evaluation and placement by a team of persons knowledgeable about the student, meaning of the evaluation data, and placement options.” Purple Book Appendix D, Question 1, ¶3. When dyslexia testing moves beyond screening to assessment, the 504 process is triggered. Appropriate Section 504 notice of rights must be sent to the parent, together with notice of 504 evaluation and request for consent for initial evaluation. Dyslexia program eligibility and placement is determined through the 504 evaluation process by a properly constituted Section 504 Committee (the group of knowledgeable people). To emphasize that the dyslexia evaluation and eligibility process is the 504 process, the Purple Book refers to the persons evaluating the child as a “committee of knowledgeable persons.” Note, however, that while the 504 language is adopted, and the 504 regulations form the basis of the group’s makeup, state law adds some extra elements. **Under Texas law, the 504 committee evaluating for dyslexia eligibility must also have knowledge of:**

- The reading process;
- Dyslexia and related disorders;
- Dyslexia instruction;
- District or charter school, state, and federal guidelines for assessment;
- The student being evaluated;
- The assessments that were used; and
- The meaning of the collected data. [Purple Book, at p. 14.]

While federal law only requires knowledge of the child, the meaning of the evaluation and the placement options, state law requires a higher level of knowledge with respect to reading and reading disorders when the eligibility of a child on the basis of dyslexia is considered. Should the student already be special education eligible, and should the ARD Committee desire a dyslexia assessment (or should dyslexia assessment be a part of the student’s FIE), the ARD Committee reviewing the evaluation must contain folks with the required types of knowledge described above in addition to those required under federal law.

Additional factors in evaluation. Note that when the 504 Committee or ARD Committee under special education is also determining a student’s eligibility into the dyslexia program, the Committee must also consider a variety of state law factors enumerated by Education Code Section §38.003 and 19 Texas Administrative Code §74.28:

- The student’s unexpected lack of appropriate progress;
- The student’s exhibiting characteristics associated with dyslexia;
- The student’s having adequate intelligence, the ability to learn;
- The student’s receiving conventional instruction; and
- The student’s lack of progress not being due to sociocultural factors such as language differences, irregular attendance and lack of experiential background. [Purple Book, at 5].

As a practical matter, with the exception of adequate intelligence and the ability to learn, the factors to be considered are not foreign to 504 Committees or to ARD Committees. Under both special education and 504, the appropriate committee is required to screen out non-disability reasons for the student’s classroom difficulties. Having been denied previous educational experience, not speaking English or nonattendance can all manifest themselves as failure in the classroom, and therefore be misinterpreted as evidence of disability. Special education and 504 require that eligibility arise when the student’s difficulties are disability-based. The Texas dyslexia law simply takes an additional step by screening out disabilities other than dyslexia (mental retardation, for example) which, rather than dyslexia, impair or prevent a student’s reading. In essence, Texas law takes the position that one can be too severely disabled for eligibility into the dyslexia program. That position can be stated in a more politically correct way: the dyslexia program is not designed to meet the needs of more severely disabled students. *(See the discussion below on placements by special ed or 504 of students into the dyslexia program who fail to meet district criteria).*

Severity of disability & dyslexia program eligibility. Importantly, eligibility for the dyslexia program lacks an important element found in both special education and in 504. Under both federal laws, the mere existence of disability does not create program eligibility. Instead, the disability must rise to a particular level of severity or impact on the student’s performance at school. The Texas dyslexia law has no such requirement. Instead, if the committee of knowledgeable persons determines that the student has dyslexia, and has adequate intelligence and the ability to learn (more on that later), he is eligible for the dyslexia program. “Once it has been determined that a student has dyslexia, the school district or charter school shall provide an appropriate educational program for the student.” Purple Book, at p. 5-6.

Interestingly, the dyslexia program seems to follow a “maximize potential” standard. The Purple Book indicates that identification of a student with dyslexia must be determined based on the student’s having characteristics of the disorder, adequate intelligence, and “the student has not made academic progress commensurate with potential.” Purple Book, Question 25, ¶1. While the Purple Book focuses on struggling readers who are not progressing in its suggestions on when to assess [Purple Book, Questions 10, 12, 13, 15], it seems clear from this language that struggling is not required for eligibility. Instead, where students are not performing to their potential because of dyslexia, the program is available. This is a concept of eligibility entirely foreign to both 504 and special education.

A dyslexia program on every campus? Yes. The Texas Administrative Code requires at 19 TAC §74.28, that each campus provide a dyslexia program. There is no exception for middle or high school campuses. The district may, if the parent approves, offer additional

dyslexia services at a centralized location. Interestingly, the rule provides that the existence of centralized services “shall not preclude” each student from receiving services at his or her campus. *Id.*, See also, Purple Book Questions 28 & 29 and Purple Book page 6.

IV. Problem Areas

A. Every child assessed for dyslexia in Texas gets a 504 evaluation, but not every child with dyslexia is 504.

The Purple Book is quite clear in its statement that merely having dyslexia does not qualify an individual as 504. Purple Book, Question 2. But Texas state law requires that the dyslexia assessment occur through the 504 evaluation process. In other words, a student must go through a Section 504 evaluation in order to be eligible for the state’s dyslexia program. Purple Book, Question 1, ¶3. That is the source of some confusion—some have taken the evaluation requirement to mean that all students evaluated for the dyslexia program are eligible under 504. That position is incorrect. State law merely requires that dyslexia program eligibility be determined consistent with 504 procedures. So although a 504 evaluation is conducted (in which the dyslexia assessment is part of the evaluation data) there is no guarantee that even if the child has dyslexia, he will still meet the substantial limitation or other requirements of 504 eligibility. To ensure that the 504 Committee reaches dyslexia eligibility, the Purple Book encourages the Committee to look at dyslexia program eligibility first, and then determine whether the student is Section 504-eligible. Purple Book, p. 5.

When a student is assessed for dyslexia, the §504 evaluation can produce a variety of outcomes:

- 1. The student qualifies 504 and has dyslexia.** The committee of knowledgeable people would create a 504 plan for the student with modifications and a behavior management plan if necessary. The student’s placement may also include placement in the dyslexia instructional program if the Committee determines such placement appropriate.
- 2. The student qualifies 504 but does not have dyslexia.** The committee of knowledgeable people would create a 504 plan for the student with modifications and a behavior management plan if necessary. Federal law would also allow the committee of knowledgeable people to place the student in the dyslexia program, if such placement were appropriate for him, and even if he did not meet state or local eligibility criteria.
- 3. The student does not qualify as 504, but does have dyslexia.** When the student’s dyslexia does not rise to the level of substantial limitation, dyslexia program eligibility is possible even when §504 eligibility is not. This result explains why the Purple Book asks the Committee to look at dyslexia program eligibility first, since otherwise the committee would find no 504 eligibility and stop, as its federal work is through.
- 4. The student does not qualify 504 and does not have dyslexia.** The committee of knowledgeable persons takes no additional action, unless referral to another district program is appropriate for the child (such as a campus study team with authority to create modifications).
- 5. The student is so disabled that the group of knowledgeable persons refers the student to special education.** The committee of knowledgeable people may, in the process of

evaluation, determine that the child is very disabled, and may need special education and related services, in which case, a referral to special education ought to occur at that time. Note however, that neither the dyslexia program nor 504 is a prerequisite to IDEA eligibility for students with dyslexia (or any other impairment). The Purple Book makes clear that “[a] student may be referred for special education evaluation at any time a disability and need for special education are suspected.” Purple Book, Question 18. Once referred to IDEA, the IDEA procedures will control rather than 504.

A little commentary: It should be no surprise that a student with dyslexia can, depending on severity, be eligible under special education, or Section 504, or perhaps only under the Dyslexia program. It is also quite possible that a student with dyslexia can be so academically gifted that he will never be suspected as having dyslexia.

OCR takes a different approach, requiring 504 evaluation for students with dyslexia when the dyslexia program fails to meet their needs. In *Karnes City*, OCR determined that the district’s practice of serving a dyslexic student in the district dyslexia program, which services resulted in the student’s success, was an appropriate intervention prior to attempting 504. It approved of the district’s practice of using dyslexia program interventions first, and moving forward with 504 or special education “if at any time the instructional interventions implemented for the student are unsuccessful[.]” *Karnes City (TX) ISD*, 31 IDELR 64 (OCR 1999). This position is far less complicated than that taken by the state in the Purple Book which requires an evaluation prior to individual assessment for the dyslexia instructional program. Because of differences in eligibility criteria, it is possible for a student to be eligible and receive services in the school’s dyslexia program while not qualifying under §504. This result arises from the preventive focus of the dyslexia program, which can provide services to a student who is not yet substantially limited, and therefore, not yet eligible for §504 services under prong one (having no current physical or mental impairment that substantially limits a major life activity). That result is underscored by *Karnes City*, where the district successfully served a student in the dyslexia program and then three years later *at the parent’s request*, the student was found ineligible under Section 504 despite continuing dyslexia services. Following the Purple Book guidance on evaluation will not violate §504, so Texas districts need to follow it, even though the result is evaluating students under 504 prior to trying the regular education dyslexia program.

B. Concerns for ARD Committees serving students with dyslexia

Under the Commissioner’s Rules for Special Education, one of the areas of ARD Committee responsibility involves reading diagnosis. For a special education student who does not perform satisfactorily on a reading instrument to diagnose reading development and comprehension, the ARD shall determine the manner in which the student will participate in an accelerated reading instruction program. 19 TEX. ADMIN. CODE §87.1050(a)(7), TEX EDUC. CODE §28.006(g).

1. LRE favors the regular ed dyslexia program over resource class. Since LRE demands that special education students be educated with regular or non-IDEA students to the maximum extent appropriate, the ARD must consider for the IDEA-student with dyslexia, whether the student’s reading needs can be appropriately met outside of special education settings, namely in dyslexia labs or classes. If the ARD determines that the student’s reading needs can be met through the dyslexia program rather than the resource setting, then LRE considerations would prefer the ARD to not place the student in the resource class.

Can a student who is not eligible for the state dyslexia program be placed there by the ARD Committee/IEP team or 504 committee? A sticking point in some districts is the requirement that eligibility under the state dyslexia law requires a student to possess adequate intelligence and the ability to learn. It should be understood that this requirement makes perfect sense, as it attempts to screen out students with disabilities that are so severe as to make reading an impossibility. There are no state guidelines in place with respect to “adequate intelligence” leaving that standard or cut-off point to the discretion of the district. Purple Book, Question 27. Informal inquiries by the author have determined that the standard for adequate intelligence set by Texas school districts ranges from a 70 to a 100 IQ.

While the “adequate intelligence” requirement is understandable (the state would prefer to focus this program on students at a certain level), state-created eligibility criteria cannot prevent a properly constituted 504 Committee or ARD Committee from placing a student in the dyslexia program when the committee feels such placement is appropriate. While the dyslexia program may not be designed with this child in mind, elements of that program may nevertheless be appropriate for students who are placed there by federal law. The real difficulty arises from district politics and budget concerns. The dyslexia program worries about stretching its available funds to meet the needs of LD students placed by ARD Committees, and gets angry at special ed which has funding but is refusing to set up a program of its own. While the funding problem is understandable, LRE requires ARD Committees and 504 Committees to place the student in the setting providing the maximum exposure to nondisabled peers while still meeting his needs appropriately. Where placement of a special education student in a regular education program can be an effective element in an IEP, federal law strongly favors that program over one where the student would only be exposed to disabled students. **Checks & balances are in place to prevent abuse.** Special ed and 504 have legal exposure for inappropriate placements. If either was simply using the dyslexia program to avoid creating its own placement, and the dyslexia program is inappropriate for the child placed there, the school is exposed to a due process challenge for denial of FAPE and a possible compensatory services award. It is then in the best interests of all concerned that a special education student or a 504 student who does not meet dyslexia program criteria is only placed there under federal law when the program is appropriate to his needs.

2. Eligibility has its privileges. A Texas special education hearing officer found that a 3-month delay in placing a student in a dyslexia program after the ARD had determined it necessary was a violation of IDEA. The school had argued that there were no open slots in the program during that time, but the Hearing Officer awarded the parents reimbursement for private dyslexia services they had obtained on their own. *Bryan S. v. Northside ISD*, Docket No. 128-SE-1294 (Spec. Ed. Hearing Officer O’Hanlon– May 24, 1995). A cynical take on this decision is that, despite the availability of the regular education dyslexia program to a broad range of students (some of whom may be regular education students who are performing well), districts ought to give priority to the students who can successfully sue them (IDEA students). Another lesson applies to districts that use a traditional “start as a group” approach to providing dyslexia services where a group of students begins the program at the same time and progress together until completing the program. While

certainly efficient, a common problem plagues the practice. What happens to the student determined eligible after the class on the campus has begun? Having missed out on the early lessons, he can't readily jump into the middle with the rest of the group, and waiting for the next semester may cause problems in light of the *Northside* decision.

3. Dyslexia methodology choices remain with district. The Supreme Court in *Rowley* recognized that educators, not parents, get to choose educational methodologies in order to implement IEP's. As a result, hearing officers are to respect the school's choice, so long as the student is receiving educational benefit. Dyslexia methodology is treated the same way. *Elizabeth E. v. Corpus Christi ISD*, Docket No. 363-SE-600 (Spec. Ed. Hearing Officer Hicks– August 31, 2000)(The hearing officer refused to order that the school use the parent's preferred Scottish Rite program as the district's DISTAR dyslexia program met the student's basic needs for a multisensory program.)

4. Dyslexia services and ESY. Although the school recognized that the student had dyslexia and required dyslexia services, its ESY program did not have an available dyslexia component during the summer. The hearing officer found that reading was the main area of educational need and potential regression, and thus Benjamin needed ESY services that included some dyslexia programming. The hearing officer ordered reimbursement for the dyslexia services privately obtained by the parent. *Benjamin S. v. Richardson ISD*, Docket No. 041-SE-1097 (Spec. Ed. Hearing Officer Hicks– May 5, 1998). It should be clear that regardless of the structure of the regular education dyslexia program, if the ARD wants extra hours, or summer services, the program will have to adapt. Of course, special education needs to be sensitive to the funding and logistical problems this may create. The dyslexia program and special ed. need to work together to get this done.

C. Kids in dyslexia program who never had a 504 evaluation.

Since dyslexia program eligibility requires the identification of dyslexia (and the ruling out of other factors that may prevent or hamper reading), assessment naturally precedes eligibility into the program. The definition provided in the Purple Book for "assessment of dyslexia" reinforces the point. Under that definition "assessment for dyslexia" means "measures that are given to determine if a student is eligible for dyslexia services." Purple Book, p 13 (parenthetical material omitted). Under the Purple Book framework, dyslexia program eligibility is established through an evaluation conducted pursuant to Section 504 procedures. What happens then when a student has appeared in the dyslexia instructional program without benefit of evaluation? As a practical matter, confusion caused by the state handbooks has resulted in the placement of many students in the program without jumping through §504 hoops.

If students are currently in the dyslexia program that did not arrive there through a proper 504 evaluation, what do you do? First, don't panic. Most districts in Texas probably have this problem to some degree. As you review files, consider §504 evaluations on those who appear to be substantially limited. Over time, and assuming that the district is currently using proper procedures, those students who should have been evaluated §504 will receive the appropriate evaluation, and no additional students will be added to the program *sans* evaluation. Note that this only solves the federal problem (since state law requires that *all* students assessed for the dyslexia program pass through a 504 evaluation).

D. Why won't the district buy my kid a computer?

Once a student has been determined eligible for 504 or special education, the committee's attention shifts to services. Here, districts sometimes face the battle of parents who are entrenched in beliefs that a particular device (a computer with voice recognition software, for example) is essential for FAPE and must be provided at no cost to parents. (*See, for example, Alief(TX) ISD*, 17 IDELR 770 (OCR 1991)(parents unsuccessfully demand computer with voice recognition where data supports finding that other services and devices are appropriate); *Letter to Anonymous*, 29 IDELR 1089 (OSEP 1997)(parent letter to President Clinton asking how the parent can get federal funds for a computer).

It is important to recognize that the cost of a device or the difficulty of providing a particular service are of no concern to federal law. If the service or device is necessary for FAPE, expense or inconvenience does not matter. Note that OCR has seriously chastised schools where the decision about what services or devices to provide to eligible students is made on the basis of cost and convenience rather than on the basis of proper FAPE considerations. (*See, for example, Modoc County* where OCR found a pattern of "school officials controlling IEP team decisions, disapproving requests or suggestions with no explanation, imposing procedural delays, intimidating staff and parents, and instructing staff to generalize IEP's.... [These officials] presented no educational justification for their decisions and accepted no arguments." OCR finds that to the extent that evaluation and placement decisions were made by anyone other than the appropriate ARD Committee or IEP team, they were in violation of 104.35(c). *Modoc County (CA) Office of Education*, 24 IDELR 580 (OCR 1996).

Does that mean that the cost of a service or device cannot be considered? NO. For IDEA and 504 eligible students, the district's obligation is to provide FAPE. Services and devices are part of that obligation. At the risk of over-simplification, when a child has a particular need, the committee has the responsibility to meet the need appropriately. The needs of a student who is unable to write because of a cast on his wrist, for example, could be met by allowing him to tape record classroom instruction and his homework assignments, allowing him to dictate answers to a scribe, or providing a computer with voice recognition technology. While the computer is certainly within the realm of the appropriate, it does not have to be chosen. The committee is free to select from among the three appropriate alternatives, and within appropriate alternatives, select on the basis of cost and convenience. After all, if the group of things from which the selection is made is appropriate, any one of the items within the group is appropriate too.

E. He's not learning disabled, he's dyslexic.

Perhaps foreshadowing the state dyslexia law, a parent argued that the school labeled her son "learning disabled" rather than "dyslexic" merely to put him in a district special education program that already existed. *Lamar (TX) Consol. ISD*, 17 IDELR 1055 (OCR 1991). According to the parent, all of her son's records refer to the student as "learning disabled" rather than "dyslexic" and as a result, his placement was inappropriate. The student received one hour of resource class, Scottish Rite tapes, highlighting, shortened assignments in math, and oral testing. OCR concluded that "although this student has been labeled only LD, he is, in fact, receiving a program for dyslexic students. Dyslexia is only one of several handicapping conditions that

fall under the label of LD. Therefore, it is concluded that the district did not merely label the student LD to fit the district's existing program.”

A little commentary: The stigma that attaches to special education continues to complicate eligibility and placement where parents have a preferred description of their student's condition. Texas law, by creating a special dyslexia program, probably added to the trouble, since some parents want to see the word “dyslexia” on the door, and on the paperwork rather than special education or resource. Calm, and perhaps repeated, explanation of the programs and discussion of the parent's feelings about special education are the only real answers to the stigma problem.

F. Dueling data: When Sylvan and the school don't agree about the student's needs

At times the school finds itself defending its position that a child is not disabled against data obtained from an outside learning center. Where the parents rely on the data obtained from the center to indicate that the child is disabled, what can the school do? In a Massachusetts case, a hearing officer made some interesting findings with reference to school evaluation data, and data developed by Sylvan Learning Centers.

Through its literature and the testimony of its Director of Education (Levitre), Sylvan Learning Center makes clear that the standardized testing that it administers is for the purpose of determining placement within a Sylvan program. The testing of Student was done by a certified teacher who is trained by Sylvan to administer its standardized testing for a particular purpose. **The Sylvan Director of Education made clear in her testimony that the testing by Sylvan is not for the purpose of nor should it be used to determine whether a student has a learning or reading disability....** [I]t would not be appropriate to rebut [the school diagnostician's] findings relevant to Student's possible disabilities solely on the basis of inconsistent testing performed by Sylvan. *New Bedford Public Schools*, 101 LRP 1399 (SEA Ma. 2001).

Of course, while not every learning center, and perhaps not every Sylvan Learning Center will employ the same testing practices, this case prompts some questions that schools need to ask when confronted by a battle of data.

G. Help, Let me out! Dismissal from the Dyslexia Program

For students who have been placed in the dyslexia program by the 504 Committee (that is, they were 504-eligible) or by the ARD Committee/IEP Team (meaning they are special education-eligible) removal from the dyslexia program will occur when the program is no longer appropriate for the student pursuant to federal law, and the appropriate committee takes action to change the IEP or 504 accommodation plan. For students who are only eligible for the dyslexia program (and not special ed or 504), the Purple Book provides the following guidance.

The local district or charter school should, as with any alternative program, establish criteria for exit. Even after exit, the student, in order to be successful, may require some continuing supports in the general program. Under §504, the district or charter school must provide those supports or related aids and services. Additionally, the campus may

want to routinely monitor the progress of the student to be sure that the student maintains successful reading performance. [Purple Book, Question 31.]

A little commentary: The author is uncertain where the 504 duty to provide supports or related aids and services to non-504 eligible students comes from. Certainly, for eligible students (either under IDEA or 504) the district has a continuing duty to provide an appropriate program. Inherent in that duty is the obligation to periodically review the student's progress and the appropriateness of his placement, and to make changes as required. For non-504 or non-special education kids, the only duty is to refer and evaluate when eligibility for the federal program is suspected. There is no general duty under 504 to provide "related aids and services" to non-eligible students. Additionally strange is that the 504 duty allegedly applies to students who are no longer even eligible for the dyslexia program.