

# Through a Glass Darkly: Eligibility under the IDEA—The Blurry Boundary of the Special Education Need Prong

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Special education is a leading sector of litigation in the K–12 public school context.<sup>1</sup> The vast majority of this burgeoning litigation<sup>2</sup> is under the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> The gateway consists of the overlapping pair of identification issues<sup>4</sup>—child find<sup>5</sup> and eligibility.<sup>6</sup> Both of these issues ultimately rest on the cornerstone of the need for special education.<sup>7</sup> For example, systematic analyses of the case

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1. *E.g.*, Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (revealing the upward trajectory of IDEA litigation within the relatively level trend of K–12 litigation within the past three decades).

2. *E.g.*, Perry A. Zirkel, National Update of Case Law 1998 to the Present under the IDEA and Section 504/ADA (2019), <https://perryzirkel.files.wordpress.com/2019/05/national-update-05.01.19.pdf> (available in the “Case Law Updates” section).

3. 20 U.S.C. §§ 1400–19 (2018).

4. *E.g.*, Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 EDUC. L. REP. 30 (2018).

5. “Child find” refers to the ongoing obligation under the IDEA to conduct an evaluation within a reasonable period of time for students reasonably suspected of eligibility. *E.g.*, Perry A. Zirkel, “*Child Find*”: *The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014). For the legal contours of evaluation, the connector at the overlap between child find and eligibility, see, for example, Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 368 EDUC. L. REP. 594 (2019).

6. Eligibility under the IDEA depends on meeting the criteria for a “child with a disability,” defined as a child with one or more of the enumerated classifications, such as specific learning disabilities “who, by reason thereof, needs special education and related services.” 20 U.S.C. § 1401(3)(A) (2018). The IDEA regulations include the definitions of each of the enumerated classifications, which each explicitly or, in the case of SLD, implicitly includes an adverse effect on educational performance. 34 C.F.R. § 300.8(c) (2020).

7. Ultimately, the need for special education implicates the difference from general education, because if general education suffices to meet the needs of the child in one of the IDEA’s recognized classification, they do not need special education. Thus, the need prong inevitably raises the issue of the dividing line between general and special education.

TABLE 1.

Time Period (no. of cases)	Primary Decisional Factor	Comments
1980 to mid 2006 (n = 85 cases) <sup>8</sup>	severe discrepancy	no RTI cases
mid 2006–late 2012 (n = 26 cases) <sup>9</sup>	severe discrepancy	2 RTI cases
late 2012–end 2014 (n = 16 cases) <sup>10</sup>	need for special ed.	no RTI cases
2015–late 2017 (n = 25 cases) <sup>11</sup>	need for special ed.	4 RTI cases
late 2017–late 2019 (n = 14 cases) <sup>12</sup>	need for special ed.	no RTI cases (2 in background)

law concerning eligibility for the common classifications of specific learning disability (SLD),<sup>13</sup> other health impairment (OHI),<sup>14</sup> and

8. PERRY A. ZIRKEL, *THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY* 69 (rev. ed. 2006). The tabulation expressly excluded three identified additional cases which focused on the use of IQ testing in the Ninth Circuit. *Id.* Of the eighty-five cases, seventeen were court decisions. *Id.*

9. Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Latest Case Law*, 41 COMMUNIQUE, Jan./Feb. 2013, at 10. Of the twenty-six cases, sixteen were court decisions. *Id.*

10. Perry A. Zirkel, *The Legal Meaning of Special Education Eligibility: The Most Recent Case Law*, 43 COMMUNIQUE, June 2015, at 4. Of the sixteen cases, ten were court decisions. *Id.*

11. Perry A. Zirkel, *The Legal Meaning of Special Education Eligibility: The Latest Case Law*, 46 COMMUNIQUE, May 2018, at 14. Of the twenty-five cases, nine were court decisions. *Id.*

12. Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205 (5th Cir. 2019); R.Z.C. v. N. Shore Sch. Dist., 755 F. App'x 658 (9th Cir. 2018); Burnett v. San Mateo-Foster City Sch. Dist., 739 F. App'x 870 (9th Cir. 2018); Jefferson Cty. Bd. of Educ. v. Rajeeni M., 75 IDELR ¶ 184 (N.D. Ala. 2019); William V. v. Copperas Cove Indep. Sch. Dist., 75 IDELR ¶ 124 (W.D. Tex. 2019); D.H.H. v. Kirbyville Consol. Indep. Sch. Dist., 2019 WL 5390125, *adopted by* 75 IDELR ¶ 4 (E.D. Tex. 2019); R.F. v. S. Lehigh Sch. Dist., 74 IDELR ¶ 292 (E.D. Pa. 2019); T.W. *ex rel.* K.J. v. Leander Indep. Sch. Dist., 74 IDELR ¶ 12 (W.D. Tex. 2019); Lubbock-Cooper Indep. Sch. Dist. v. Sherri D., 74 IDELR ¶ 17 (N.D. Tex. 2019); G.D. v. W. Chester Area Sch. Dist., 70 IDELR ¶ 180 (E.D. Pa. 2017); Maplewood Sch. Dist., 119 LRP 42897 (Ohio SEA Sept. 27, 2019); Jefferson Cty. Bd. of Educ., 119 LRP 28530 (Ala. SEA July 1, 2019); Ann Arundel Cty. Pub. Sch., 119 LRP 12164 (Md. SEA Dec. 14, 2018); Lenoir Cty.-Kinston Bd. of Educ., 117 LRP 22709 (N.C. SEA May 11, 2017). Thus, ten of these fourteen decisions were at the judicial level.

13. See *supra* notes 8–12 and accompanying text.

14. Perry A. Zirkel, *ADHD Checklist for Identification under the IDEA and Section 504/ADA: An Update*, 366 EDUC. L. REP. 585 (2019); Perry A. Zirkel, *ADHD Checklist for Identification under the IDEA and Section 504/ADA*, 293 EDUC. L. REP. 15 (2013).

emotional disturbance (ED)<sup>15</sup> all revealed that the increasingly predominant linchpin is the need “prong.”<sup>16</sup> For SLD, which continues to be the most frequent classification under the IDEA,<sup>17</sup> the following longitudinal summary of the eligibility case law, including hearing officer decisions, illustrates the shift to the primacy of the need prong.<sup>18</sup>

Because it is the need for special education, the need prong inevitably depends on the meaning of special education. The special education literature has repeatedly addressed this definitional issue without providing a set of judicially useful criteria.<sup>19</sup> The previous legal

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15. Perry A. Zirkel, *Checklist for Identifying Students Eligible under the IDEA Having an Emotionally Disturbance (ED): An Update*, 286 EDUC. L. REP. 7 (2013).

16. Most courts analyze eligibility under the IDEA as consisting of two decisional prongs—(1) classification and (2) the resulting need for special education. *E.g.*, *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 208 (5th Cir. 2019); *Culley v. Cumberland Valley Sch. Dist.*, 758 F. App’x 301, 304 (3d Cir. 2018); *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 73 (1st Cir. 2016). A few courts divide eligibility into three parts, with the intermediate one being adverse effect on educational performance, but the final and crucial step is still the need prong. *E.g.*, *Doe v. Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342, 344 (S.D. Ill. 1987).

17. See NAT’L CTR. FOR EDUC. STATISTICS, CHILDREN AND YOUTH WITH DISABILITIES (2019), [https://nces.ed.gov/programs/coe/indicator\\_cgg.asp](https://nces.ed.gov/programs/coe/indicator_cgg.asp) (reporting that SLD accounts were almost twice the percentage of the next most frequent classification).

18. The hearing officer decisions are those published in the only national database that includes a sampling of the case law at the administrative level, LRP’s SpecialEdConnection®. This source includes decisions in the print reporter series, the Individuals with Disabilities Education Law Reports (IDELR) and those only included in the electronic database, designated with an “LRP” citation. Equating to the two prongs for eligibility, the primary decisional factors are severe discrepancy, which is historically the predominant criterion for the SLD classification, and the need for special education. In contrast to severe discrepancy, the more modern approach for the SLD classification prong is response to intervention (RTI), which is required option for states as of the 2004 IDEA amendments. *E.g.*, Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60 (2010) (finding that approximately thirteen states had selected RTI as the mandatory approach approximately five years after the effective date of the 2004 amendments to the IDEA). Moreover, as the Comments column of the table shows, RTI has not been at issue in most of these cases. Thus, it is not the explanation for the shift. See also Perry A. Zirkel, *The Trend in SLD Enrollments and the Role of RTI*, 46 J. LEARNING DISABILITIES 473 (2013) (finding that the RTI has not accounted for reversal of the enrollment trend for SLD).

19. *E.g.*, JAMES M. KAUFFMAN ET AL., SPECIAL EDUCATION: WHAT IT IS AND WHY WE NEED IT (2d ed. 2018); Barbara D. Bateman et al., *What Is Special Education?*, in ENDURING ISSUES IN SPECIAL EDUCATION (Barbara D. Bateman et al. eds., 2015); Daniel P. Hallahan & Paige C. Pullen, *What Is Special Education Instruction?*, in ENDURING ISSUES IN SPECIAL EDUCATION

commentary has agreed only that the judicial interpretations are confusing and conflicting.<sup>20</sup> Moreover, the prior commentary has not focused on the need prong, instead either devoting undue attention to other, nuanced eligibility elements<sup>21</sup> or arguing for more general non-restrictiveness.<sup>22</sup> Finally, the prior commentary has not addressed the

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(Barbara D. Bateman et al. eds., 2015); Edward J. Kame-enui, *Special Education As “Specially Designed Instruction,”* in ENDURING ISSUES IN SPECIAL EDUCATION (Barbara D. Bateman et al. eds., 2015); Bryan G. Cook & Barbara R. Schirmer, *What Is Special About Special Education?*, 37 J. SPECIAL EDUC. 200 (2003); Sharon Vaughn & Sylvia Linan-Thompson, *What Is Special About Special Education for Students with Learning Disabilities?* 37 J. SPECIAL EDUC. 140 (2003); Douglas K. Detterer & Lee A. Thompson, *What Is So Special About Special Education?*, 52 AM. PSYCH. 1082 (1997); Douglas Fuchs & Lynn S. Fuchs, *What’s “Special” About Special Education?*, 76 PHI DELTA KAPPAN 522 (1995); Samuel L. Kirk, *What Is Special About Special Education?*, 19 EXCEPTIONAL CHILD. 138 (1953); Margaret J. McLaughlin, *Defining Special Education*, 29 J. SPECIAL EDUC. 200 (1995); Thomas E. Scruggs & Margo A. Mastropieri, *What Makes Special Education Special?*, 29 J. SPECIAL EDUC. 224 (1995); Richard C. Sheerenberger, *What Is Special Education?*, 13 MENTAL RETARDATION 47 (1975); Darrel J. Mase & F. E. Lord, *What Is Special About Special Education?* 19 EXCEPTIONAL CHILD. 95 (1952).

20. E.g., Robert A. Garda, *Who Is Eligible under the Individuals with Disabilities Education Improvement Act*, 35 J.L. & EDUC. 291, 294, 334 (2006) [hereinafter Garda, *Who Is Eligible*] (proposing, in light of conflicting and unprincipled eligibility interpretations, specific standards for each of the elements in the IDEA definition of child with a disability); Robert A. Garda, *Untangling Eligibility Requirements under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 450, 511–12 (2004) [hereinafter Garda, *Untangling Eligibility Requirements*] (recognizing general confusion in determining IDEA eligibility and proposing a need standard “when any area of educational performance is poor or below average”); Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1174 (2007) (observing the general lack of agreement among scholars and courts as to the boundaries of special education); see Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 84–86 (2009) (characterizing the prevailing confusion as a “mess” and proposing less restrictive judicial interpretations of eligibility and separately cabined, more rigorous standards for FAPE); cf. Torin D. Togut & Jennifer E. Nix, *The Helter Skelter World of IDEA Eligibility for Specific Learning Disability*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 568, 608–10 (2012) (proposing various recommendations, including removing the severe discrepancy approach, to “move from the current Helter Skelter world of SLD eligibility into a world of predictability and stability”).

21. See Garda, *Untangling Eligibility Requirements*, *supra* note 20, at 461–481 (“educational performance”), 481–86 (“adversely affects”).

22. E.g., Hensel, *supra* note 20, at 1202 (arguing against restricting eligibility to the “truly disabled”); Weber, *supra* note 20, at 152–60 (recommending that courts engage in a clean-up that is “straightforward” but not restrictive). *But cf.* Garda, *Who Is Eligible*, *supra* note 20 at 312, 331 (including within broader proposal for judicial interpretations of the various fine-grained eligibility standards that “need” equate to any area of educational performances being poor or below average performance and that “special education” mean significant adaptations in content, method or delivery not provided to general education students).

agency interpretations<sup>23</sup> and court decisions during the most recent decade.

Plumbing the line between general and special education has become both increasingly important and increasingly difficult in recent years. The importance is evident in the continuing concern with over- and under-identification of students with disabilities generally<sup>24</sup> and with regard to the disproportionality of minority students specifically,<sup>25</sup> culminating in recent respective controversies in Texas<sup>26</sup> and nationally.<sup>27</sup> The difficulty, accentuated against the backdrop of the ongoing push for fuller inclusion of special education students in general education,<sup>28</sup> is the result of two movements in K–12 education that have further blurred the boundary between general and special education: (1) various general education interventions, including response to intervention (RTI) and multi-tiered

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23. The administering agency for the IDEA is the Office of Special Education Programs (OSEP), which is within the U.S. Department of Education. For the legal weight of OSEP policy documents in IDEA litigation, see Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 EDUC. L. REP. 671 (2017).

24. E.g., Jay P. Greene, *Fixing Special Education*, 82 PEABODY J. EDUC. 703, 705–08 (2007) (discussing over-identification as the foundation for his proposed market-driven solution).

25. E.g., Rebecca A. Cruz & Janelle E. Rodl, *An Integrative Synthesis of Literature on Disproportionality in Special Education*, 52 J. SPECIAL EDUC. 50 (2018) (discussing the mixed results of the research in light of methodological and conceptual differences).

26. E.g., David E. DeMatthews & David S. Knight, *The Texas Special Education Cap: Exploration into the Statewide Delay and Denial of Support to Students with Disabilities*, 27 EDUC. POL'Y ANALYSIS ARCHIVES 1 (2019) (discussing systemic under-identification for special education in Texas that led to federal corrective action).

27. E.g., Council of Parent Attorneys & Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28 (D.D.C. 2019) (rejecting the current administration's postponement of the prior administration's more rigorous and uniform standards for racial and ethnic disproportionality in discipline of special education students).

28. E.g., Michael F. Giangreco, Diane M. J. Baumgart & Mary Beth Doyle, *How Inclusion Can Facilitate Teaching and Learning*, 30 INTERVENTION SCH. & CLINIC 273 (1995) (advocating the practical benefits of inclusive education); Moira Kirby, *Implicit Assumptions in Special Education Policy: Promoting Full Inclusion for Students with Learning Disabilities*, 46 CHILD YOUTH CARE F. 175, 186 (2017) (discussing the trend toward full inclusion including its "redefining [of] special education"); Wayne S. Sailor & Amy B. McCart, *Stars in Alignment*, 39 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 55 (2014) (advocating a schoolwide approach to inclusive education via RTI/MTSS).

strategies and supports (MTSS)<sup>29</sup>; and (2) laws that provide for identification and interventions or accommodations for students that overlap with IDEA eligibility.<sup>30</sup>

The purpose of this article is to canvas the relatively recent agency interpretations and judicial rulings specific to the boundary issue of the need prong of IDEA eligibility in relation to these cumulatively boundary-blurring movements.<sup>31</sup> Section I provides the framework in terms of the definitional criteria and operational process under the IDEA regulations. Sections II and III synthesize the recent and relevant agency interpretations and illustrative court decisions. Section IV provides a proposal for a multi-factor approach for determining this crucial criterion of IDEA eligibility.

## I. IDEA FRAMEWORK

The IDEA legislation defines special education as “specially designed instruction . . . to meet the unique needs of a child with a disability.”<sup>32</sup> This definition is largely circular in its use of “specially designed” in place of “special” and “instruction” in place of “education,” with the only

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29. The IDEA encourages the use of RTI and MTSS in two ways: (1) requiring states to at least permit RTI for identification of students with SLD, and (2) allowing for up to 15% of IDEA funds for “early intervening services” for students “who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.” 20 U.S.C. §§ 1413(f), 1414(b)(6) (2018). For the more general structural consideration of the place for special education in such multi-tiered frameworks, see, for example, Douglas Fuchs, Lynn S. Fuchs & Pamela M. Stecker, *The “Blurring” of Special Education in a New Continuum of General Education Placements and Services*, 76 EXCEPTONAL CHILD. 301 (2010) (discussing the two opposing approaches to RTI in relation to the boundary with special education). For the current legal contours of RTI and MTSS, see Perry A. Zirkel, *The Law on RTI and MTSS*, 373 EDUC. L. REP. 1 (2020).

30. The two major models are the IDEA and Section 504 (a federal civil rights law), with Section 504 providing wider definitions of disability and FAPE than the IDEA provides, e.g., Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 EDUC. L. REP. 886 (2017), and the increasing number of state laws that require identification and interventions for students with dyslexia, e.g., Perry A. Zirkel, *Update of the Law and Students with Dyslexia: Identification and Intervention*, 318 EDUC. L. REP. 603 (2015).

31. For the separable issue of eligibility of 504-only students in K–12 schools, see, for example, *Culley v. Cumberland Valley Sch. Dist.*, 758 F. App’x 301 (3d Cir. 2019); Perry A. Zirkel, *Identification of Students Under Section 504: An Alternative Eligibility Form*, 357 EDUC. L. REP. 39 (2018).

32. 20 U.S.C. § 1401(29) (2018).

differentiating criterion being individualization in terms of meeting the child's "unique" need.

In turn, the regulations define special education as:

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—(i) [t]o address the unique needs of the child that result from the child's disability; and (ii) [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.<sup>33</sup>

Again, the reference to "content, methodology, or delivery of instruction" would seem to be all-encompassing, but the appropriate adaptations not only implicate individualization in terms of unique needs but also clarify that these needs are connected to the child's disability and that the adaptations are for the child's opportunity to meet the standards of the general education curriculum.

The regulations also observe that a child who is advancing from grade to grade without being retained in grade and without failing a course is not categorically excluded from the need requirement.<sup>34</sup> The extent of this

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33. 34 C.F.R. § 300.39(b)(3) (2019). In the commentary accompanying the regulations, the Department of Education rejected a commenter's request to add to the definition by distinguishing the expansion in general education of "flexible grouping, diagnostic and prescriptive teaching, and remedial programming." Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,577 (Aug. 14, 2006). The Department concluded that the definition was sufficiently clear and that the suggested distinction was unnecessary. *Id.* Similarly, the Department denied another commenter's request to add a definition of "accommodations" and "modifications" in this section, reasoning that although these "terms of art" concern adaptations in environment, presentation, method, or content, they do not represent "examples of different types of 'education.'" *Id.*

34. 34 C.F.R. § 300.101 (2019). This non-exclusion overlaps with the substantive standard for FAPE. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999–1000 (2017) (repeating the *Rowley* standard of reasonable calculation for passing marks and grade-to-grade advancement and generalizing it to eligible students in mainstream, or "fully integrated," classrooms). However, the overlap between eligibility and FAPE can cause confusion if not carefully considering the difference between these two separate concepts under the IDEA. For example, here academic advancement is a non-exclusion for eligibility, whereas for FAPE reasonable calculation of academic advancement is substantively sufficient; thus, the advancing child who might qualify as eligible could be substantively entitled to what she had already attained.

non-exclusion is not clear, especially in relation to the aforementioned meeting-standards for the general curriculum criterion.

Additionally, both the legislation and regulations clarify that “related services” are not a stand-alone basis for eligibility, but rather only as an adjunct of special education to the extent necessary.<sup>35</sup> Thus, the need for a related service does not suffice for the need prong, which is for special education.

Finally, the steps in the identification process include (1) parental consent,<sup>36</sup> (2) an evaluation report within a prescribed period,<sup>37</sup> and (3) a determination of initial or continued eligibility by a team, including the parent.<sup>38</sup> Upon reaching or continuing eligibility, the child is entitled to an individualized education program (IEP) and all of the other protections of the IDEA.<sup>39</sup>

## II. AGENCY INTERPRETATIONS

The early OSEP policy interpretations were largely circular.<sup>40</sup> The agency’s interpretations accompanying the 2006 regulations declined definitional elaboration or clarification.<sup>41</sup> In 2007, OSEP announced its interpretation that the need prong was not limited to academic performance.<sup>42</sup> However, it was not until 2012 that OSEP added a

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35. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2020) (“[if] required to assist a child with a disability to benefit from special education”). The limited exception is for a related service that state law consider to be special education. 34 C.F.R. § 300.8(a)(2) (2020).

36. 34 C.F.R. § 300.300 (2020).

37. *Id.* §§ 300.301 (initial evaluation), 300.303 (reevaluations); *see also id.* §§ 300.304–300.305 (procedures and criteria).

38. *Id.* § 300.306.

39. *Id.* §§ 300.320–300.537.

40. *E.g.*, Letter to Pawlisch, 24 IDELR 959 (OSEP 1996) (“If [subtle] modifications are considered ‘specially designed instruction’ because they constitute individualized instruction planned for a particular student, they could be deemed special education”); Letter to Smith, 19 IDELR 494 (OSEP 1992) (the plain meaning of the words “specially designed instruction” is education planned for a particular individual or “individualized instruction”).

41. *See supra* note 33.

42. Letter to Clarke, 48 IDELR ¶ 77 (OSEP 2007). The nonacademic needs include the affective area, social skills, and classroom behavior. Letter to Anonymous, 55 IDELR ¶ 172 (OSEP 2010). The continuing line of OSEP policy letters regarding gifted students who were

significantly controversial interpretation about the boundary between general and special education.<sup>43</sup> More specifically, OSEP opined that “services that may be considered ‘best teaching practices’ or ‘part of the district’s regular education program’ does not preclude those services from meeting the definition of ‘special education.’”<sup>44</sup> More recently and modestly, while focusing on the IEP contents rather than the eligibility need prong, OSEP provided a definition of the general education curriculum as “the curriculum that is based on the State’s academic content standards for the grade in which [the] child is enrolled.”<sup>45</sup> This definition harmonized the IDEA with the general education legislation, the Elementary and Secondary Education Act (ESEA),<sup>46</sup> but it did not align well with the aforementioned<sup>47</sup> beyond-academic interpretation.

### III. COURT DECISIONS

Court decisions concerning the need prong have proliferated in recent years. The selection presented here is a relatively representative sample

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“twice exceptional” reinforced this extension. *E.g.*, Letter to Anonymous, 55 IDELR ¶ 172 (OSEP 2010) (providing examples of a child with high cognition and ADHD meeting the need prong in terms of organizational skills, homework completion and classroom behavior or a child with Asperger’s Syndrome doing so in terms of affective areas, social skills and classroom behavior); *see also* Letter to Delisle, 62 IDELR ¶ 240 (OSEP 2013) (rejecting the use of a “cut score” for SLD need prong); Memorandum to State Directors of Special Education, 65 IDELR ¶ 181 (OSEP 2015) (encouraging dissemination of *Delisle* letter, extending beyond SLD to, for example, high cognition students with ED).

43. Letter to Chambers, 58 IDELR ¶ 170 (OSEP 2012).

44. *Id.* at \*2. The focus of this policy letter was FAPE, which is the specially designed instruction in the IEP after the determination that the child is eligible. In this interrelated aspect of eligibility and FAPE, OSEP further clarified that the district must provide the child with “specially designed instruction that addresses the unique needs . . . that results from the child’s disability, and ensures access by the child to the general curriculum, even if that type of instruction is being provided to other children, with or without disabilities, in the child’s classroom, grade, or building.” *Id.*

45. Dear Colleague Letter, 66 IDELR ¶ 227, at \*3 (OSERS/OSEP 2015).

46. 20 U.S.C. §§ 6301–04 (2018).

47. *Supra* note 42 and accompanying text. Similarly focused on the overlapping FAPE stage, another policy letter served as a reminder that whether with or without adoption of the common core standards, access to the general curriculum is not itself sufficient under the IDEA, because special education must also address the child’s individual needs. Letter to Anonymous, 60 IDELR ¶ 47 (OSEP 2012).

that illustrate the blurred boundaries between special and general education. Although the focus is recent decisions on the judicial level, the first pair of selected cases extends down to the administrative level and, for the first case to earlier years, to show the limited and abortive attempts at a more definitive boundary.

### A. Unsuccessful Efforts

First, in an early eligibility case arising in Pennsylvania, which then was a two-tier state,<sup>48</sup> the review panel ruled that a student with attention deficit disorder (ADD) did not qualify for the need prong even though he was receiving various interventions in general education.<sup>49</sup> Citing the aforementioned<sup>50</sup> definition in the IDEA regulations along with analogous case law from other jurisdictions,<sup>51</sup> the review panel derived a multi-factor test for the need prong, requiring the interventions that the child receives in general education to be: “(1) adaptations in content, methodology, or delivery, (2) truly necessary, rather than merely beneficial for the child, (3) designed or implemented by certified special education personnel, and (4) not available regularly in general education.”<sup>52</sup> However, on appeal the federal district court reversed the panel’s ruling, ignoring the proffered multi-factor test<sup>53</sup> and concluding that the panel “erred in focusing on [the student’s] grades while disregarding [the student’s] potential.”<sup>54</sup>

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48. The IDEA permits states to choose between a one-tier arrangement for administrative adjudication, consisting of an impartial hearing officer level prior to judicial review, or a two-tier arrangement that adds a review officer level before judicial review. 34 C.F.R. § 300.514(b) (2020). The number of two-tier jurisdictions has steadily dropped to only seven states. Jennifer F. Connolly et al., *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. DISABILITY POL’Y STUD. 156, 158 (2019).

49. *W. Chester Area Sch. Dist.*, 35 IDELR ¶ 235, at \*4 (Pa. SEA 2001).

50. *Supra* note 33 and accompanying text.

51. *E.g.*, *Norton v. Orinda Union Sch. Dist.*, 168 F.3d 500 (9th Cir. 1998); *Grant v. St. James Parish Sch. Bd.*, 33 IDELR ¶ 212 (E.D. La. 2001).

52. *W. Chester Area Sch. Dist.*, 35 IDELR ¶ 235, at \*4.

53. Perhaps the court found the derivation and explanation of the test insufficiently clear. *W. Chester Area Sch. Dist. v. Bruce C.*, 194 F. Supp. 2d 417, 421 (E.D. Pa. 2002) (“in some instances the Appeals Panel’s decision is less than pellucid”).

54. *Id.* First, a careful examination of the review panel’s decision reveals negligible, if any mention, for the need prong analysis. Second, in focusing on the student’s potential, the court

More recently, in the wake of an Iowa district's successive determinations in grades four and six that a student was not eligible for special education, the parents filed for a due process hearing with a multifaceted challenge to the state's eligibility criteria as being unduly restrictive in relation to the IDEA.<sup>55</sup> Among the challenged criteria was the definition of special education in the then applicable state standards, "mean[ing] services and supports that are beyond the capacity and obligation of general education."<sup>56</sup> In a long, complicated decision, the hearing officer invalidated this definition.<sup>57</sup> Oddly, as a result of the three years of targeted and individual interventions that the district had provided in general education, plus the parents' private tutoring for two of these years, the hearing officer concluded that the second evaluation, at the end of grade six, correctly determined that the child was no longer

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arguably confused (1) the classification prong (by referring to the severe discrepancy aspect of specific learning disability) with the needs prong and (2) the overall issue of eligibility and the separable issue of free appropriate public education, or FAPE (by referring to the Third Circuit's substantive standard for FAPE).

55. *Urbandale Cmty. Sch. Dist.*, 70 IDELR ¶ 243, at \*2 (Iowa SEA 2017).

56. *Id.* at \*41. More specifically, the hearing officer provided the following excerpt from the then applicable state standards:

When making the decision regarding educational need, the team must consider what reasonably prudent general education services include, regardless of the ability of the current teacher to provide those services. For example, if a reasonably prudent general educator would differentiate for a child with ADHD, and that child's needs could be met in the general education environment, the child is not eligible, even if the child's current general educator refuses to or lacks the skills to differentiate.

*Id.* at \*11.

57. The relevant, resulting remedy was as follows: "The Iowa Department of Education shall not require . . . a definition of special education for purposes of determining whether a child needs special education . . . that excludes instruction adapted in content, methodology, or delivery . . . merely because the instruction is within the capacity of general education." *Id.* at \*48. The hearing officer relied in part on OSEP's Letter to Pawlisch, *supra* note 40. Instead, the hearing officer cryptically concluded, "[t]he proper test for distinguishing between general education and special education lies in the timing and nature of the intervention." *Urbandale Cmty. Sch. Dist.*, 70 IDELR ¶ 243, at \*44. Iowa subsequently changed its state standards to eliminate the capacity exclusion, focusing more on the availability in the general curriculum. STATE OF IOWA DEP'T OF EDUC., SPECIAL EDUCATION ELIGIBILITY AND EVALUATION STANDARDS 57–58 (July 2019), <https://educateiowa.gov/sites/files/ed/documents/SpecialEducationEligibilityandEvaluationStandardsJuly2019.pdf>.

eligible.<sup>58</sup> Consequently, the hearing officer ruled that the parents were entitled to reimbursement of their tutoring expenses and prevailing party status for attorneys' fees, but not to compensatory education or an IEP for their child.<sup>59</sup> However, the state's appeal was limited to the attorneys' fees issue,<sup>60</sup> which the court decided fully in the parents' favor.<sup>61</sup>

## B. General Education Interventions

The next pair of examples shows the differing judicial views of the role of general education interventions in IDEA eligibility decisions. In a decision in 2017 that focused on the need prong, the Ninth Circuit ruled that an elementary student was eligible under the IDEA because he received various services that were beyond the norm in general education, such as (1) a one-on-one aide, (2) specially designed mental health services, and (3) extensive clinical intervention services by a district behavior specialist.<sup>62</sup> In doing so, the Ninth Circuit reversed the hearing officer's and district court's rulings of non-eligibility, which had been based on standardized test scores in the average range and notable behavioral progress. The court's reasoning was that the child continued

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58. The basis for this conclusion that "[t]hese services allowed her to gain skills and improve her reading, writing, and mathematics skills [i.e., her areas of need] so that she was achieving adequately to meet grade-level standards by [the end of grade six]." *Urbandale Cmty. Sch. Dist.*, 70 IDELR ¶ 243, at \*48. In a companion case for the ten-year-old sibling of this child, another hearing officer ruled that the child did not meet the need prong for SLD based on not only the meeting of grade level standards but also the district's careful consideration of "an array of information, including the IEE and related testing, [parents'] input, teacher input, and school assessments." *Urbandale Cmty. Sch. Dist.*, 119 LRP 25941, at \*24 (May 17, 2019).

59. *Urbandale Cmty. Sch. Dist.*, 119 LRP 25941, at \*44.

60. As the court explained, the state initially filed an appeal on the merits but subsequently voluntarily dismissed the challenge to the substance of the hearing officer's decision. *Iowa Dep't of Educ. v. A.W.*, 73 IDELR ¶ 76, at \*2. (S.D. Iowa 2018).

61. In a very brief decision, the court concluded that the parents' requested \$316,505 award was based on a reasonable hourly rate and a reasonable number of hours. Only as a matter of dicta, without further explanation, the court "agree[d] with [the hearing officer's] well-reasoned decision." *Id.*

62. *L.J. ex rel. Hudson v. Pittsburgh Unified Sch. Dist.*, 850 F.3d 996, 1005 (9th Cir. 2017).

to have occasional but dramatic behavioral problems<sup>63</sup> and, based on the combination of services, presumed academic needs.<sup>64</sup>

In contrast, another federal appellate court ruled that an elementary student who had received RTI services, other general education interventions, and a 504 plan that included occupational therapy consultations was not eligible under the IDEA.<sup>65</sup> Although she continued to fall behind academically upon repeating kindergarten, the court affirmed the hearing officer's and district court's decision that she did not qualify for an IEP. Although not addressing the need prong as squarely as the Ninth Circuit, the court deferred to the district personnel's determination: "We therefore find [the] educators' numerous assessments a better indicator of her need for special-education services than [her] doctor's prescription."<sup>66</sup>

### C. Dyslexia Laws

The next pair of decisions introduce, by way of illustration, the effects of state dyslexia laws on IDEA eligibility decisions. In a case in Texas, which has historically had a strong dyslexia law,<sup>67</sup> the district court initially ruled that the district violated the IDEA by exiting the child, a second grader, from eligibility under the classification of SLD while

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63. *Id.* at 1006–07.

64. The reasoning for the academic difficulties is largely inferential. First, the court posited what his performance could have been both without and with the various services he received in general education: "Although there was progress, it was no doubt . . . in substantial part, [attributable] to those services. Moreover, [he] has shown himself to be an intelligent child, so his academic performance could have been even more improved with the appropriate specially designed instruction." *Id.* at 1006. Second, the court used a similar two-sided rationale for his suicide attempts resulting in psychiatric hospitalizations: "It is hard to imagine how [such incidents] would not interfere with school performance. . . . [H]is classroom absences, due to psychiatric hospitalizations, hurt his academic performance." *Id.*

65. *M.G. ex rel. C.G. v. Williamson Cty. Sch.*, 720 F. App'x 280 (6th Cir. 2018).

66. *Id.* at 287. For another recent federal appellate court decision in which the court reached the same conclusion but with direct and focused attention on the need prong, see *Durbrow v. Cobb County School District*, 887 F.3d 1182 (11th Cir. 2018) (rejecting child find and eligibility claims on behalf of high school student who succeeded academically with a 504 plan for his ADHD for the two-year period prior to the sudden decline in his senior year, when the district timely evaluated him and found him subsequently eligible for special education).

67. See, e.g., Zirkel, *Update of the Law and Students with Dyslexia: Identification and Intervention*, *supra* note 30, at 608.

continuing his diagnosis of dyslexia.<sup>68</sup> However, the Fifth Circuit vacated and remanded this decision for failing to address the need prong of eligibility.<sup>69</sup> On remand, the district court concluded that the child met this second prong,<sup>70</sup> because (1) the district determined upon its exiting evaluation that, despite making progress in the general education classroom, the child continued to need dyslexia services; and (2) these services, which included frequent sessions in the Wilson Reading Program, were more than minor adaptations, thus amounting to special education.<sup>71</sup> Oddly, however, the parents did not prevail due to the lack of a cognizable injury to the child; the district apparently continued to provide the IEP under the IDEA's stay-put provision, and the court concluded that the IEP met the requisite standard for substantive appropriateness.<sup>72</sup>

In partial contrast, another Texas case concerned a student who received and completed dyslexia services in grade eight and subsequently

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68. *W.V. ex rel. William V. v. Copperas Cove Indep. Sch. Dist.*, 73 IDELR ¶ 181 (W.D. Tex. 2018). The gist of the court's ruling was as follows:

The IDEA's statutory language explicitly includes dyslexia as a disorder included as an SLD. The District diagnosed W.V. with dyslexia; therefore, the District violated the IDEA by determining in its assessment that W.V. no longer met the eligibility requirements for an SLD and thus was no longer entitled to Special Education or an IEP.

*Id.* at \*4–5.

69. *W.V. ex rel. William V. v. Copperas Cove Indep. Sch. Dist.*, 774 F. App'x 253 (5th Cir. 2019) (per curiam). The court reasoned that “[b]ecause the district court did not apply the second part of the test, it did not consider whether the accommodations being provided to the [child] constitute ‘special education.’” *Id.* at 254. In dicta, the court commented: “While the [boundary] line . . . may be murky, case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making educational progress, the child does not ‘need’ special education within the meaning of the IDEA.” *Id.*

70. *W.V. ex rel. William V. v. Copperas Cove Indep. Sch. Dist.*, 75 IDELR ¶ 124 (W.D. Tex. 2019).

71. *Id.* at \*6–7. The court observed that “[w]hat it means to need special education . . . is not clear.” *Id.* at \*6 (citing *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 215 (5th Cir. 2019)). However, after reviewing the services and other accommodations that the child was receiving, the court concluded: “Given the definition of ‘special education’ . . . in the IDEA and the manner in which the District adapted the content, methodology, and delivery of instruction to specifically address the unique needs of [the child] it cannot be said that these accommodations and modifications were minor, nor merely a ‘related service.’” *Id.* at \*7.

72. *Id.* at \*8–12. The stay-put provision of the IDEA requires the district to maintain the then-current placement of the child during the adjudicative proceedings. 20 U.S.C. § 1415(j) (2018). Because this eligibility arose upon exiting from an IEP, rather than at the entry stage, the then-current placement was the child's IEP.

advanced successfully from grade to grade in high school with various accommodations mostly available to other general education students.<sup>73</sup> However, despite extra help and support as a star athlete, he experienced significant stress from his schoolwork. In his senior year, his mother requested a special education evaluation for him, but the school denied her request based on insufficient evidence to suspect the requisite need. The parent filed for a hearing, which resulted in an adverse decision based on failure to meet the need prong. On appeal, the federal district court affirmed the ruling that he was not eligible under the IDEA based on the failure to show the need for special education, concluding that his academic achievement was satisfactory and the accommodations that he had received were “not highly individualized, but rather, were available to other students as needed.”<sup>74</sup>

#### D. Double Vision

The final pair of decisions not only reinforces the blurry boundary to determine the need for special education but also illustrates the potential reverse effect. In a recent case in Alabama, the student was a high school senior with a 504 plan for diabetes and a continuing history of behavioral problems at school.<sup>75</sup> In the middle of the year, the district conducted an evaluation that determined that he was not eligible under the IDEA because, although he qualified under the first prong based on ADD or oppositional defiant disorder that adversely affected his educational performance, he did not need special education. The hearing officer ruled against the district, concluding the eligibility team erred by requiring the need for special education as a qualifying criterion and, thus, the student was entitled to compensatory education services, including vocational assessment and services along with weekly counseling.<sup>76</sup> Upon appeal,

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73. T.W. *ex rel.* K.J. v. Leander Indep. Sch. Dist., 74 IDELR ¶ 12 (W.D. Tex. 2019).

74. *Id.* at \*6. The court also concluded that the ruling of non-eligibility left him without a remedy even if the district violated child find. *Id.* at \*4 (citing D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887 (5th Cir. 2012)).

75. Jefferson Cty Bd. of Educ. v. Rajeeni M., 75 IDELR ¶ 184 (N.D. Ala. 2019).

76. *Id.* at \*4. According to the excerpt in the court's opinion, it appears that the hearing officer concluded that special education need was reserved for the post-eligibility stage based on a misinterpretation of the overlap between (a) child find and eligibility and, possibly, (b) eligibility and FAPE. *Id.* at \*5.

the federal district court ruled that the hearing officer was incorrect in his eligibility analysis by failing to include the need prong.<sup>77</sup> Although remanding the case for the hearing officer to evaluate the need prong, the court's demarcation of the applicable criteria<sup>78</sup> would seem to foreclose this broad-based interpretation of special education.<sup>79</sup>

As the obverse, in another case arising in the same large Alabama school district, another hearing officer ruled that the district violated its child find obligation for an eighth grader with ADD but declined to order compensatory education or other relief.<sup>80</sup> The student's recent school history, in short, included the following:

- grade six—student had behavioral problems but did well academically
- grade seven—student continued to have behavioral problems; parent informed school's principal of the ADD diagnosis; academic difficulties arose in a few subjects, including math; math teacher provided 1:1 help
- grade eight, first semester—math teacher referred student to school problem-solving team (PST) that provided interventions, but academic problems continued
- grade eight, second semester—district conducted a special education evaluation that determined that student was eligible, leading promptly to an IEP

The child-find ruling was that the district had reason to conduct the evaluation earlier than the second half of grade eight. Upon appeal, the

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77. *Id.* at \*4.

78. The court relied on the aforementioned Eleventh Circuit decision, *supra* note 66, extracting the following non-exhaustive multi-factor test for the boundary of the need prong:

A student is . . . unlikely to need special education if, *inter alia*: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to comprehend course material.

*Jefferson Cty Bd. of Educ.*, 75 IDELR ¶ 184, at \*6 (citing *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1194–95). Both this *Jefferson County* decision and the *Durbrow* decision were at their essence child find cases, but in light of the overlapping interrelationship, ultimately addressed eligibility.

79. *Id.* at \*6–7. More specifically, the court characterized a math calculator and a behavior plan as related services, thus negating the hearing officer's apparent use of these items as amounting to special education. *Id.*

80. *M.N. ex rel. J.N. v. Jefferson Cty. Sch. Dist.*, 421 F. Supp. 3d 1288 (N.D. Ala. 2019).

court affirmed the hearing officer's child-find ruling in light of the student's known ADD diagnosis, her continuing behavioral problems, and her declining academic performance.<sup>81</sup> However, the court also affirmed the hearing officer's decision not to provide any remedy. Specifically with regard to compensatory education, the court concluded that the parent failed to prove that the informal interventions that the teachers provided, especially in math, were substantively different from special education.<sup>82</sup> As a result, the court also concluded that the parent had not attained prevailing party status and, thus, was not entitled to attorneys' fees.<sup>83</sup>

#### IV. DISCUSSION

Underlying the continuing litigation that gravitates to the need prong of IDEA eligibility are two inferable and differing views of special education. Using the approximate analogy of swimming instruction, one view is that this specialized approach is reserved for children who, after being exposed to routine recreation in pools or natural bodies of water, fall far behind their peers and in some cases below the surface of the water. For these children, the range of personalized services include 1:1 instruction in shallow water to floaties, fins, and foam noodles in deeper water. The purposes are to avoid drowning and, to the extent feasible, make progress in the mainstream.<sup>84</sup> The other view, which is overlapping but more expansive, is that this specialized approach is to achieve the potential of the child, such that children who are doing "swimmingly" in relation to their peers qualify if they are capable of markedly superior, even Olympian, performance. This second view, although having some

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81. *Id.* at 1297. The court specifically distinguished this case from *Durbrow*, *supra* notes 66 and 78, but only with regard to the academic performance factor. *Id.*

82. *Id.* at 1300-01 ("[Parent] has not cited any evidence to suggest that the interventions the math teacher provided [to student] were inappropriate or substantively different than interventions she should have provided pursuant to an IEP. . . . Additionally, [parent] did not cite any evidence to suggest that [student's] English teacher and other teachers did not provide [her] with appropriate help during the PST intervention.").

83. *Id.* at 1301.

84. "Mainstream" in this analogy is linked primarily with the definitional criterion of access to the general curriculum, *supra* text accompanying note 33, with incidental reference to the more common use of this term in relation to LRE.

support in the traditional severe discrepancy approach for SLD identification<sup>85</sup> and the OSEP policy interpretations for students with high cognition,<sup>86</sup> is far from precise or predominant.<sup>87</sup>

The other major factor that blurs the boundary of the need prong is the changing, increasingly overlapping nature of general education both informally—via innovations such as differentiated instruction, diagnostic/prescriptive teaching, and problem-solving teams<sup>88</sup>—and legally—via Section 504 accommodations, dyslexia laws, and RTI/MTSS interventions<sup>89</sup>—while at the same time, special education is increasingly delivered in general education classrooms.<sup>90</sup> As a result, the specially designed instruction in IEPs and the generally available instruction for students without IEPs is increasingly similar. Even the hallmark factor of individualization is less and less distinctive as the adaptation in content, methodology, and delivery of instruction becomes increasingly focused on differences among children.<sup>91</sup> On balance, this change from mutually exclusive silo-like compartments to a continuum with overlap between general and special education is worth the trade-off from bright line to blurred boundaries by moving closer to “good pedagogy for all students.”<sup>92</sup>

To the extent that the IDEA remains as the entrenched model for resource allocation and legal protections for students with disabilities, the gateway of eligibility will continue to rely on the ultimately blurry and crucial criterion of the need for special education. Although the courts

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85. *Supra* note 56 and accompanying text.

86. *Supra* note 42.

87. Moreover, the lack of careful differentiation between eligibility and FAPE contributes to the confusion and lack of traction in applying this view. *Supra* notes 34, 44, 47.

88. *E.g.*, *supra* note 33.

89. *E.g.*, *supra* notes 29–30. Adding to the boundary-blurring are the various state dyslexia laws that use RTI or MTSS for the required identification or interventions. *E.g.*, GA. STAT. § 20-2-159.6 (RTI for identification); IND. CODE § 35.5-2-7 (RTI for services); TENN. CODE ANN. § 49-1-229 (RTI for delivery); WASH. REV. CODE ANN. § 28A.300.260 (MTSS for delivery).

90. *E.g.*, Allison F. Gilmour, *Has Inclusion Gone Too Far?*, EDUC. NEXT, Fall 2018, at 8, 10, <https://www.educationnext.org/has-inclusion-gone-too-far-weighing-effects-students-with-disabilities-peers-teachers/> (graphing NCES data to show that inclusion has become increasingly prevalent, particularly in the most recent decade).

91. For example, in the aforementioned first selected case, *supra* text accompanying notes 48–54, the district provided the student with an individualized, albeit more modest, Pupil Education Program after determining that he did not qualify under the IDEA or Section 504. *W. Chester Area Sch. Dist. v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002).

92. Garda, *Who Is Eligible*, *supra* note 20, at 332.

have not been receptive or at least constructive thus far,<sup>93</sup> the solution would appear to be a multi-factor test, similar to the criteria for the similarly slippery slope of the IDEA's least restrictive environment (LRE) provision.<sup>94</sup> Although imperfect and imprecise, this judicial approach would be preferable to the present entirely unprincipled and unpredictable array of eligibility analyses and outcomes. Despite the changed environment of both general and special education, the proposed factors include: (1) causally connected to the established classification(s);<sup>95</sup> (2) individualized;<sup>96</sup> (3) not both largely available in general

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93. *E.g.*, *supra* notes 51–52 and accompanying text.

94. 20 U.S.C. § 1412(a)(5) (2018). For the variations of the applicable multi-factor test for LRE in most jurisdictions, see, for example, *K.B. ex rel. L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004); *Sacramento Unified Sch. Dist. v. Rachel H. ex rel. Holland*, 14 F.3d 1398 (9th Cir. 1994); *Oberti ex rel. Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993); *Greer ex rel. Greer v. Rome City Sch. Dist.*, 967 F.2d 470 (11th Cir. 1992); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1068 (6th Cir. 1983). *But cf.* *C.D. ex rel. M.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621 (1st Cir. 2019) (deferential balancing test).

95. As reinforced by specified eligibility exclusions, 20 U.S.C. § 1414(b)(5) (2018), this causal connection may be seen as the bridge between the first and second prongs, *supra* note 6; however, on an overlapping basis, it also serves here as the initial criterion in light of the needs-based definition of special education, *supra* text accompanying notes 32–33. *E.g.*, *Durbrow v. Cobb Cty. Sch. Dist.* 887 F.3d 1182, 1194 (11th Cir. 2019) (“But even if we assume that [this child’s] ADHD constituted a qualifying [classification] . . . he did not, on account of ADHD, require special education”); *cf.* *T.B. v. Prince George’s Cty. Bd. of Educ.*, 897 F.3d 566, 578 (4th Cir. 2019) (“In this case, . . . the record is devoid of any credible evidence that an unaddressed disability caused [the student’s] educational difficulties and replete with credible evidence that [the student] himself was the cause [due to lack of effort]”); *Hoover City Bd. of Educ. v. Leventry*, 75 IDELR ¶ 32 (N.D. Ala. 2019) (“the Board did not adequately explore whether K.M. ‘needs special education’ because the school representatives on the eligibility team did not fully understand K.M.’s impairment and therefore did not have a basis for exploring whether she needs specialized delivery of instruction”); *M.P. v. Aransas Pass Indep. Sch. Dist.*, 67 IDELR ¶ 58 (S.D. Tex. 2016) (finding student capable of success without preponderant evidence of causal connection between the qualifying classification and his educational difficulties).

96. Even though this factor is, alone, insufficient in light of modern educational practices, *supra* note 90 and accompanying text, it is the “I” in IDEA, as reinforced by the legislation’s “unique” focus of need, *supra* text accompanying notes 32–33, and it is the only consensus criterion in the special education literature, *supra* note 19.

education and evidently effective for this child<sup>97</sup>; and (4) designed or implemented by certified special education personnel.<sup>98</sup> The proposed factors avoid the well-meaning but ultimately indefensible restrictions on relatively poor performance<sup>99</sup> or general education capacity.<sup>100</sup> Conversely, while sharing the warning against careless “reverse engineering” of the substantive FAPE standard,<sup>101</sup> this proposal disagrees with the facile scholarly solution of nonrestrictive eligibility.<sup>102</sup> Yet, the

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97. This criterion is awkwardly stated in the negative, because the obverse formulation does not clearly make sure that the two parts are in combination. The first part of this criterion borrows from various scholarly and judicial sources, *e.g.*, *supra* note 22 and text accompanying notes 62 and 73, although alone subject to question in relation to OSEP’s FAPE-based interpretations, *supra* note 44 and accompanying text. However, the second part provides a significant addition that, thus far, the scholars and the courts have not sufficiently recognized with regard to interventions that are available either informally or, via RTI/MTSS, state dyslexia laws, or Section 504, formally. *E.g.*, *supra* notes 62–66 and accompanying text. Rather than a “but for” analysis for adverse effect, *e.g.*, Letter to Pawlisch, *supra* note 40, at \*4–5, this part of factor number three views generally available adaptations that work for the child as part of regular education and, thus, alone not sufficient to qualify as “special,” *cf.* Garda, *Untangling Eligibility*, *supra* note 20, at 490 (“a child’s disability [i.e., classification] may often be appropriately served by something other than ‘special education’”). Thus, the second part of this factor would combine with the court’s reliance on the first part and factor number two, *supra* text accompanying note 74, to cement non-eligibility. Yet, if the combination of factors yields a determination of eligibility, such interventions are not excluded from IEPs. *Supra* note 44 and accompanying text.

98. This criterion provides eligibility-related recognition for the otherwise ignored and centrally differentiated role of certified special education teachers. *E.g.*, 34 C.F.R. § 300.156(c) (2020). It also provides due recognition of the mandated membership of the child’s special education teacher in the group that determines the child’s eligibility, which includes the IEP team. *Id.* §§ 300.305(a), 300.306(a)(1), 300.321(a)(3).

99. Garda, *Who Is Eligible*, *supra* note 20. This broad standard conflicts not only with the IDEA regulations, *supra* note 34 and accompanying text, but also its administering agency’s interpretations, *supra* note 42. Similarly, Garda’s concomitant standard of “significant” adaptations runs counter to OSEP’s view. Letter to Pawlisch, *supra* note 40. Moreover, significant is relative to what is generally available, thus being subsumed within and better addressed via factor number three. *Supra* text accompanying note 95.

100. *Supra* notes 55–57 and accompanying text; *see also* FLA. ADMIN. CODE r. 6A-6.03018(5)(d)(3) (defining special education need for SLD eligibility as requiring “interventions that significantly differ in intensity and duration from what can be provided solely through general education resources to make or maintain sufficient progress); N.C. ADMIN CODE 1503-2.5(d)(11) (similarly requiring within the context of RTI for SLD identification a determination whether the child “needs resources beyond what can reasonably be provided in general education”).

101. Garda, *Untangling Eligibility Requirements*, *supra* note 20, at 509; *see also* Weber, *supra* note 20, at 119–20.

102. *Supra* note 22.

proposed factors are neither exhaustive nor absolute, instead inviting scholarly and judicial refinement.<sup>103</sup> Finally, school personnel rather than outside experts are generally, but not at all absolutely, entitled to deference for these need factors based on the controlling criteria of educational expertise and familiarity with the child in the primarily relevant setting.<sup>104</sup>

The only final caveats are: (a) no single criterion will suffice to establish the need prong; (b) the results, as it is for the LRE multi-factor formulations, are not entirely predictable or precise<sup>105</sup>; and (c) in the absence of such a structured approach, the applicable case law may come full circle to the ironic conclusion of eligibility as a pyrrhic victory.<sup>106</sup>

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103. A multi-factor approach would seem to be appropriate for this purpose, with the factors carefully selected and formulated for effective and general use. Although the Eleventh Circuit in *Durbrow* did not pose its reasoning as a multi-factor test, at least one other court has interpreted it as doing so. *Supra* note 78 and accompanying text; *see also* *K.W. v. Tuscaloosa Sch. Sys.*, 73 IDELR ¶ 157 (N.D. Ala. 2018); *D.J.D. v. Madison Cty. Bd. of Educ.*, 72 IDELR ¶ 273 (N.D. Ala. 2018). Re-stated in the negative for the purposes of comparison, the first *Durbrow* factor arguably has the same overly restrictive problem, *supra* note 99 and accompanying text, and does not clarify the role of effective general education interventions, *supra* note 97; the second *Durbrow* factor is more a source than a criterion for evidence; the third factor is more specific to the reasonable suspicion component of child find than the need prong of eligibility; and the final factor, which seems to be as particularly problematic in the negative (as, in effect, low potential, is better addressed as my proposed factors numbers one and two).

104. *E.g.*, *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632, 639–41 (7th Cir. 2010) (contrasting the expertise of outside medical expert and school’s special education teacher). These twin criteria are the key, with the school personnel’s testimony on judicial review—analogue to substantive FAPE—expected to be cogent. *Cf.* *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017) (“A reviewing court may fairly expect [school] authorities to offer a cogent and responsive explanation”).

105. Yet, since the cited case law, *supra* note 94, the number of court decisions specific to LRE, as compared with the corresponding judicial rulings specific to FAPE, has dwindled to a largely settled state. *See* Zirkel, *National Update*, *supra* note 2.

106. *Supra* notes 80–83 and accompanying text. The parents in this case did win an IEP, which largely amounts to broad and often thin procedural protection, *e.g.*, 20 U.S.C. § 1415(f)(3)(E)(ii) (2018), but without any retrospective remedy or fee-shifting. In light of the anticlimactic effect of *Andrew F.*, *e.g.*, Perry A. Zirkel, *The Aftermath of Andrew F.: An Outcomes Analysis Two Years Later*, 363 EDUC. L. REP. 1 (2019), the cost-benefit of this litigation victory would appear to be questionable.