

Part B

Maine Proposes New Eligibility Standard for Specific Learning Disability

The major proposed change in the state special education regulations is to the definition of what must be found to identify a specific learning disability. In particular, the proposed rule removes the measurement criteria for finding a processing disorder, and instead moves to the fore the role of the “pattern of strengths and weaknesses” prong in this eligibility determination. There are other changes as well, but these are the central alterations. Set forth below is an overview of the changes in the rule. Following that overview is a more detailed consideration the “pattern of strengths and weaknesses” component, which would likely play the key role in future SLD eligibility determinations.

A. Overview of the proposed rule.

It is undeniable that the eligibility standard for the specific learning disability coding has always been complicated. It became particularly nuanced in 2006, when the federal government kept the same core definition of that disability, but added a complex set of criteria for identifying the presence of a specific learning disability. In that same year, the federal regulators also required each state to adopt “criteria for determining whether a child has a specific learning disability.”⁶⁴

The federal definition of “specific learning disability” therefore has remained unchanged for many years, and reads as follows:

The term “specific learning disability” means a disorder in 1 or more of the basic psychological processes involved in understanding or in using

⁶⁴ See 34 C.F.R. § 300.307 (2006).

language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.⁶⁵

Yet the federal rules and laws have never defined what a “processing disorder” is, or how much of a limitation must exist in a processing skill for it to be considered a processing “disorder”.

Maine answered that question a few years after the federal rules came out in 2006. The state-promulgated rules followed the federal language, but also added in specific numerical standards for identifying the processing disorder referenced in the federal law and rules.⁶⁶ As readers all know, Maine rules (approved by the Maine Legislature) currently require an individualized determination through testing of the existence of the processing disorder, with test results showing at least a 1.5 standard deviation below the mean in one area of processing, or at least a 1 standard deviation below the mean in two or more areas of processing.⁶⁷

This numerical standard – applied with some flexibility by most school units – gave IEP teams a clear standard against which to measure for the disorder, but did not answer which tests should be used to identify processing disorders, or how much testing for such disorders should be undertaken until there could be a declaration that such a disorder either existed or did not. This uncertainty may lead to considerable variation around the state regarding when a processing disorder is identified or not. We are also told that very few states in the country are now using such measures for determining the existence of processing disorders.

65 20 U.S.C. § 1401(30)(A); *see also* 34 C.F.R. § 300.8(c)(10).

66 A challenge to whether Maine’s numerical standard for measuring processing disorders violates the federal IDEA is currently pending at the U.S. Court of Appeals in Boston, although that court could resolve the case without answering that particular issue.

67 *See* MUSER VII.2(L) (2015).

Maine has now proposed for statewide consideration an altered standard for determining whether a child has a specific learning disability. This changed standard removes the entire numerical guideline for finding a processing disorder. It then rearranges to some degree the various components of the federal rule on determining whether a specific learning disability exists. The language remains complicated, as both state and federal rules have always been in this area. But it is interesting, and if approved into law this new approach may turn out to be very useful for schools, once practitioners get used to the new criteria.

Bear in mind, nothing in the proposed rules has removed the requirement for a processing disorder as part of this eligibility category. As the language quoted above makes clear, federal law has always understood that specific learning disabilities are rooted in disorders of processing. Those disorders then manifest themselves in imperfect abilities to undertake certain stated tasks. In addition, Maine's proposed language begins with a recitation of the definition of "specific learning disability," which continues to be anchored in the existence of a processing disorder. The introductory language in the proposed rule states, as it has for many years:

Definition. 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. Specific learning disabilities does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional

disturbance, or environmental, cultural or economic disadvantage.⁶⁸ (emphasis added)

The key change in the proposed Maine rules, therefore, is not in the elimination of a processing disorder requirement, but instead the elimination of a requirement *to measure* a processing disorder through tested standards. Roughly put, the IEP team now is supposed *to infer* a processing disorder from specific data about the child's performance, and through rule outs of other possible explanations for the child's irregular performance. Let's look at the key pieces of the proposed rule in broad brush, and then turn to our more detailed consideration of the "pattern of strengths and weaknesses" prong. But first the broad brush.

1. *Inadequate achievement.*

What the proposed rules will require the team to do first, now, is find "inadequate achievement" for the child's age or to meet State-approved grade-level standards in any one of eight identified areas. Those eight areas continue to be:

- (1) Oral expression;
- (2) Listening comprehension;
- (3) Written expression;
- (4) Basic reading skill;
- (5) Reading fluency skills;
- (6) Reading comprehension;
- (7) Mathematics calculation; and
- (8) Mathematics problem solving.⁶⁹

Although this "inadequate achievement" component has existed for a decade, the proposed rule states that the inadequate achievement must be seen in "[a] convergence of evidence from multiple valid and reliable sources."⁷⁰ This language is helpful, making clear that a single piece of the data is insufficient to make this finding. Teams

68 MUSER VII.2(L) (proposed).

69 See MUSER VII.2(a)(i) (proposed).

70 See MUSER VII.2(a)(i) (proposed).

must rely on multiple measures, which in their convergence, make clear that the child’s performance in a specific area is inadequate for the child’s age or to meet State-approved grade-level standards.

2. *Pattern of strengths and weaknesses.*

From there, the proposed rules turn to the “pattern of strengths and weaknesses” prong, which has also existed since 2006. This seems to have become the central calculation in the proposed rule, and provides the information that one could understand as being indicative of the existence of a processing disorder. Readers might recall that the federal regulatory language includes this “pattern of strengths and weaknesses” prong, but also offers what we might call “RTI failure” as an apparent alternative to the pattern of strengths and weaknesses prong.⁷¹ Interestingly, the “RTI failure” consideration has been altered and moved into the “pattern of strengths and weaknesses” prong, and now serves as one possible source of data for the team to rely upon when looking for the pattern of strengths and weaknesses.⁷²

One difficulty in the drafting of these rules is that they do not appear to have made sufficient adjustment to the later language in the rule regarding “specific documentation of the eligibility determination.” The proposed language continues to list required findings that the student demonstrates either a pattern of strengths and weaknesses, or demonstrates what we are calling here RTI failure.⁷³ This is a mistake and could prompt later litigation about the changed overall definition. If measurement of RTI performance has become a possible data point for determining the presence of a pattern of strengths or weaknesses, it would seem that this language in the documentation section needs to be removed.

71 See 34 C.F.R. § 300.309(a)(2)(i).

72 See MUSER VII.2(L)(2)(a)(ii)(aa) (proposed).

73 See MUSER VII.2(L)(2)(g)(V) (proposed).

Because the “pattern of strengths and weaknesses” component seems so central now to the definition of specific learning disability, we will discuss it in more detail further along.

3. *The rule out factors*

If the team has found inadequate achievement in one or more of the 8 listed areas, and then has found a relevant pattern of strengths and weaknesses, the proposed rules then require the team to determine that the difficulties it has identified are NOT due to other factors. The language on this point is as follows:

The group determines that its findings under paragraphs (2)(a)(i) and (ii) of this section are not primarily the result of—

- (aa) A visual, hearing, or motor disability;
- (bb) Intellectual disability;
- (cc) Emotional disturbance;
- (dd) Cultural factors;
- (ee) Environmental or economic disadvantage; or
- (ff) Limited English proficiency.⁷⁴

There is also an additional rule out, if the team were to determine that the child’s poor performance were the result of the “lack of appropriate instruction in reading or math.” In making such a finding, the team must consider

- (i) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
- (ii) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents.⁷⁵

⁷⁴ See MUSER VII.2(L)(2)(a)(iii) (proposed).

⁷⁵ See MUSER VII.2(L)(2)(b) (proposed).

We see one difficulty with the listed rule outs, although the language used in the proposed rules certainly follows federal law. The rule outs themselves make clear that the difficulties a child is experiencing should not be caused by some other disability or by limited English proficiency. But what is not listed in the rule outs is the possibility that the child's poor performance and pattern of strengths and weaknesses is due to a child's *social maladjustment* – the exclusionary concept found under the disability of emotional disturbance. Even though this may be rare, one can imagine a child choosing to do poorly on data measures – perhaps because he or she just doesn't care about school and gets positive reinforcement at home for the poor performance, or perhaps because he or she cares only about drug use and hanging out with the gang. This type of child will likely not have an emotional disturbance because the child's poor performance is due to social maladjustment. But this means that the poor performance will fall outside the exclusion for emotional disturbance found in the definition of specific learning disability. Remember, social maladjustment is not an emotional disturbance.⁷⁶

We do not know how rare this might be, so we do not know how much of a problem it is. The example would not have mattered that much under the current rules, because the child would either have tested with a processing disorder or would not have – and if so, it would be hard to conclude that poor performance was due to a social maladjustment rather than the clearly identified processing disorder already identified. But under the new system, where in essence the processing disorder is inferred based on the absence of other explanations for the poor performance, the rule out factors loom larger and one becomes aware of a possible loophole in the area of social maladjustment.

⁷⁶ See MUSER VII.2(E) (2015).

All that said, one could conclude that a social maladjustment should fall within the exclusions for “cultural factors” or “environmental disadvantage.” These terms are both undefined and certainly include other issues beyond social maladjustment. And yet, the term social maladjustment could be understood as being tucked within those broader concepts.

4. *Cultural and linguistic background*

The proposed rules also address what to do if the team does not have available properly normed test measures because of the child’s “cultural and linguistic background, physical disability or other contributing factors.” This could include children for whom English is a second language, but also could include others. In this situation, the team must

utilize multi-tiered problem-solving approaches such as analysis of work samples and other performance data to demonstrate the likelihood of a learning disability.⁷⁷

School evaluators will need to advise the team on how best this can be accomplished.

5. *The need for special education*

Unchanged in the proposed rule is of course the requirement that because of the child’s identified disability, he or she must require special education. Remember that Maine has defined what it means to need special education because of a disability, and the proposed rules keep the same definition that existed before:

A child must need special education. Although federal regulations do not define “needs,” the word commonly signifies something necessary, something exigent or the “lack of something essential.” A child “needs” special education and related services when, because of the disability, the child can neither progress effectively in a regular education program

⁷⁷ MUSER VII.2(L)(c) (proposed).

nor receive reasonable benefit from such a program in spite of other services available to the child.

The need is best established through evidence of a distinctly measurable and persistent gap in the child's educational or functional performance that cannot be addressed through services or accommodations available through the general education program.⁷⁸

Admittedly, this standard will be fairly easily met under the specific learning disability category because the child has already been found to have inadequate achievement in one or more of the 8 identified areas. But it is a separate determination that still must be reached for this particular disability, as well as for all others.

6. *Summary of the proposed rule*

Where does all this leave us, under the proposed rules? In sum, they seem to require the following:

- 1) a finding of inadequate academic achievement in one of 8 listed areas;
- 2) a finding of a "pattern of strengths and weaknesses" in certain defined areas;
- 3) a finding that any limitations found in 1 and 2 are not due to a number of other listed factors, including the lack of appropriate instruction in English or math; and
- 4) a finding that because of the identified difficulties the child requires special education

Because this new language places the "pattern of strengths and weaknesses" prong at the center of the proposed SLD definition, we believe special educators should consider that language in careful detail. Here is our effort to do the same.

⁷⁸ See MUSER VII.2 (2015 and proposed).

B. The pattern of strengths and weaknesses prong, in detail.

When the federal government first included the “pattern of strengths and weaknesses” language in the federal rules, we began describing this concept as a “hybrid discrepancy” model, but one that operated very differently from the old discrepancy model used prior to 2006 for identifying a specific learning disability.

Let’s begin by quoting the pattern of strengths and weaknesses language in its entirety, as found in the proposed Maine rule:

The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§300.304 and 300.305[Section V].

To determine a pattern of strength and weaknesses, the IEP Team must consider the following:

- aa) data collected when using a process based on the child’s response to scientific, research-based intervention;*
- bb) Classroom performance data;*
- cc) Achievement data based on summative assessments, State assessments or scientifically-based assessments;*
- dd) Cognitive processing data to identify contributing factors.*

We will first examine the various patterns that are of concern in this language. From there, we will look a bit at Maine’s suggested measurement tools.

1. *What pattern? What strengths and what weaknesses?*

Let’s focus first on the description of the required pattern of strengths and weaknesses, before moving to Maine’s own listing of types of data to draw upon in that decision. When looking at the

pattern language, it is evident that a choice must be made as to whether to measure the child's performance (or achievement) against his or her age, or against grade-level standards, or against intellectual development. In earlier discrepancy models prior to 2006, the discrepancy that mattered was solely a discrepancy between the child's achievement and his or her intellectual ability. In the language quoted above, the Team is to look for a "pattern of strengths and weaknesses" relative to age expectations, or to state-approved grade-level standards, or to intellectual ability.

Just as interesting, the choice of which comparisons to make is made by the IEP Team, based on the Team's determination of which would be relevant for this particular child in making the identification decision. Thus, the decision is individualized by the Team, based on unique factors for the student. A Team theoretically could identify a student even if he or she is doing uniformly well relative to state-approved grade-level standards, if the Team otherwise believes the focus should instead be on age standards or on the child's intellectual development.⁷⁹

The official commentary discusses the concept of "patterns of strengths and weaknesses" found in both the Maine and federal language, stating that these patterns "commonly refer to the examination of profiles across different tests used historically in the identification of children with" learning disabilities.⁸⁰ It may be that the term "pattern of strengths and weaknesses" indicates that students with learning disabilities should not have flat profiles, but will have strengths and weaknesses when reviewing a variety of tested areas.

Although there is little guidance on this point, it seems very important to recognize that the pattern of strengths and weakness in

⁷⁹ See *Federal Register*, Vol. 71, No. 156, at 46653 (Aug. 14, 2006).

⁸⁰ See *Federal Register*, Vol. 71, No. 156, at 46654 (Aug. 14, 2006).

achievement (or performance) is not relative to the achievement scores themselves, but relative to age, state-approved grade-level standards, or IQ. Thus, a child does not meet this standard simply by having variable achievement results. The results must have strengths and weaknesses in relation to a comparative standard – again, age expectations, grade-level expectations, or IQ expectations – as determined by the team. A student with achievement standard scores ranging from 80 to 55 has considerable variability among those scores, but the scores do not present a strength, only weaknesses, relative to age and state-approved grade-level standards. The same would be true if his or her IQ were 100. If his or her IQ were 60, the scores present no weaknesses, only strengths relative to IQ expectations.

In other words, the achievement (or performance) results should show strengths and weaknesses relative to one of the three benchmarks – not relative to the achievement (or performance) scores themselves.

What is a “strength”? Does it mean performance above what would be expected for age, state-approved grade-level standards, or IQ? Or does it simply mean performing at the expected levels? There is no answer to this in the regulations themselves. However, it would seem reasonable that the concept of “strength” should be understood as achievement at the level of expectation – with the grade-level standard, at grade-level; with the age-level standard, at age-level; with the IQ standard, at a level comparable to the student’s general intelligence quotient.⁸¹

⁸¹ According to the federal commentary, the reference to “intellectual development” in this standard “means that the child exhibits a pattern of strengths and weaknesses in performance relative to a standard of intellectual development such as commonly measured by IQ tests.” *Federal Register*, Vol. 71, No. 156, at 46651 (Aug. 14, 2006).

In the case of intellectual development, one might actually dispute whether the focus is meant to be on strengths and weaknesses relative to the child's IQ, or relative to the mean for IQ's generally – say, 100. The language of the rule, however, would seem to indicate a focus on the child's own IQ. Thus, we would look for the pattern of strengths and weaknesses relative to that child's IQ, not to the overall mean for IQ scores. This is a debatable point, but would seem to be the best read for the law. One implication for this conclusion is that a team could find the requisite pattern of strengths and weaknesses when compared to IQ for students who are gifted and for students who have intellectual disabilities – which would not likely be the case if the benchmark comparison was with the IQ mean of 100.

Another unanswered question is how much variation should be sought in the “pattern of strengths and weaknesses” between the student's strengths – that is, those scores that are at the expected level based on the relative comparison being made – and the student's lower, or weaker achievement scores. There is no answer, and this would seem to be an area for local school units to determine, or for the state to provide guidance. One would assume that the weaker scores should be at least a standard deviation below the expected level in the comparison, and perhaps more.

In fact, one might consider looking for a 1.5 standard deviation in the child's achievement scores from the child's IQ scores when the comparison is with intellectual ability. In the area of state-approved grade level standards, one might look for at least a grade level discrepancy in the area of concern, and perhaps more when the child gets to higher grade levels. In the area of comparison to age – which would likely be used only for younger students before grade 3 – the standard might be greater than a year.

These are debatable points, but would seem to be helpful starting points for discussion.

Please note that under this pattern of strengths and weaknesses model, the regulation asks the team to give consideration to three possible types of patterns, and to decide which one of them, or combination, would be appropriate for use for a particular child – be it comparisons to age expectations, to state-approved grade-level standards, or to intellectual ability.

Now that the rules no longer include a measure for processing disorders, we wonder if each school unit should conclude that the team must always use the “intellectual development” option for measuring a pattern of strengths and weaknesses, and then add to that comparison one of the other two for grade level standards or for age levels.

The “intellectual development” option would keep a focus on the child’s performance relative to his or her cognitive abilities in the SLD determination, and will tease out when achievement or performance are shifting higher and lower in light of that intellectual capacity. Historically this has long been one way of identifying a processing disorder – comparing intellectual capability with academic achievement, and looking for relative highs and lows.

In terms of choosing between the comparison with age and the comparison with state-approved grade level standards, it is hard to imagine a team ever choosing to the make the comparison with the child’s age, except for those students who are in the very early grades when there are no state-approved grade level standards – that is, prior to grade 3.

Certain examples may be helpful. As discussed, a child with a 100 IQ might have achievement standard scores ranging from 110 down to 80. Certainly the scores in the 110 to 100 range

are relative strengths. The score of 80 is a weakness – more than 1.5 standard deviations from the child’s IQ score of 100. The scores at roughly 100 and above will be strengths for the student and the score of 80 would meet the requirement in the area of weakness. It will be interesting to see, of course, whether this area of weakness correlates with the areas of inadequate achievement that have already been identified. In any event, these numbers show a pattern of strengths and weaknesses compared to intellectual development.

Note that this pattern might also be shown by a gifted child. Imagine a child with an IQ of 150. He or she might have some achievement standard scores ranging from 160 to 100. Certainly the achievement scores ranging from 160 to, say, 140 are strengths for this student. But an achievement score of 100 is a weakness, much lower than even 1.5 standard deviations, when compared to his or her IQ of 150. Thus this child would meet the requirement under this prong for a pattern of strengths and weaknesses. It doesn’t mean the child will be eligible. He or she must also have shown inadequate achievement – not average achievement – in one of the 8 listed areas of achievement. And the student must meet the need for special education prong. But certainly a gifted student could meet the “pattern of strengths and weaknesses” prong for eligibility.

As noted, a very important and unanswered question in all of this is how much swing must there be in any of the three comparisons to find a pattern of strengths and weaknesses. One would assume that when comparing achievement with intellectual development, the swing would be roughly 1.5 standard deviations below the student’s IQ level to find a weakness, with some scores coming in at or above his or her IQ level for the strengths. But it is more difficult to determine how much variation there should be

when the comparison is against the state approved grade level standards (one grade level below, or two?), or against the child's age (one year below, or two?).

Schools and psychometricians should give thought as to whether it would be important to require a finding in two of the three comparison areas. One would think a team would always want to make use of a strengths and weaknesses comparison with intellectual development. But perhaps in addition to a finding of strengths and weaknesses in that area, there ought also to be a finding in one of the other two. Perhaps most often that would be the strengths and weaknesses comparison with state approved grade level standards, but as stated, for the earliest grades it might be a comparison with age.

2. *What are Maine's measurement tools?*

It is also important to reflect on the data measurements set forth in the Maine proposed rule. These are:

- aa) Data collected when using a process based on the child's response to scientific, research-based intervention;
- bb) Classroom performance data;
- cc) Achievement data based on summative assessments, State assessments or scientifically-based assessments;
- dd) Cognitive processing data to identify contributing factors.

There is no "and" or "or" connecting this listing, so presumably it is up to the Team to determine which of the data to use, or to use all of them.

The key thing to recall is the importance of using multiple measures, and the more the better. As noted earlier, the language in the federal rules relating to the child's performance in scientific, researched based interventions (what we have loosely called "RTI failure") has been moved here, and when such data exists it should

always be part of the process in making comparisons for the pattern of strengths and weaknesses, if not against the child’s intellectual development, then as against his or her performance on state approved grade level standards. But as with all elements of the SLD decision, the more data measures the better. As the proposed rule states back in the section on inadequate achievement, the role of multiple measures is to look for “[a] convergence of evidence from multiple valid and reliable sources.”⁸² We strongly suggest that this remain the focus when determining the pattern of strengths and weaknesses. Look for multiple measures that converge toward your answer.

3. A “*pattern of strengths and weaknesses*” worksheet?

Included with this material is a draft of a “pattern of strengths and weaknesses worksheet. This is a draft only, and input would be appreciated. The draft assumes that the team will always want to make one comparison with intellectual development, and then will do one more – usually against state-approved grade level standards, unless the child is below grade 3, and then it will be against age.

As discussed earlier, we have also identified the distance between a strength and a weakness to be 1.5 standard deviations for the comparison with intellectual development. For the comparison with state-approved grade level standards we suggest at least a 1.5 grade level spread – although one could imagine it greater at higher grade levels. When the Team uses an age comparison with young children, we suggested at least a one year spread.

These are debatable numbers. We offer them to begin a discussion. But we think the worksheet might be of some help, given the importance of the “strengths and weaknesses” prong and the questions that must be addressed within it.

⁸² See MUSER VII.2(a)(i) (proposed).