

IOWA DEPARTMENT OF EDUCATION
(Cite as ___ D.o.E. App. Dec. ___)

In re: A.W., a child,)	
)	
A.W.'s Parents,)	Dept. Ed. Docket No. SE-431
)	(DIA No. 16DOESE004)
Complainants,)	
)	
vs.)	
)	
Urbandale Community School District,)	Decision
Heartland Area Education Agency, and)	(Redacted for Publication)
Iowa Department of Education,)	
)	
Respondents.)	
)	

Course of Proceedings

A.W.'s Parents filed a Due Process Complaint on May 16, 2016, on behalf of themselves and their daughter A.W. Jurisdiction is based upon section 1415 of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415, and Iowa Code section 256B. The Complainants allege that A.W. is an IDEA-eligible child with disabilities and assert Respondents Urbandale Community School District (the District) and Heartland Area Education Agency (the AEA) violated the IDEA by applying unduly restrictive eligibility criteria and failing to identify her as eligible under the Act and Respondent Iowa Department of Education (the Department) violated the IDEA by establishing unduly restrictive eligibility determination criteria.

Hearing on the complaint was conducted at the offices of the Heartland Area Education Agency in Johnston, Iowa on October 5, 6, and 7, 2016, before Administrative Law Judge Christie Scase.¹ A.W.'s mother was present throughout the hearing. A.W.'s father was present on the first morning of hearing. Complainants were represented by attorneys Curt Sytsma and Edie Bogaczyk. Paralegal Heather Carey was present with Complainants' counsel.

¹ A preliminary conference call was held on May 25, 2016, and the parties agreed to participate in facilitated mediation, which was held on June 10th. A Joint Motion for Adjudication of Law Points was filed on June 15, 2016. Following a conference call with counsel, an Order scheduling the submission of specific questions of law for adjudication was issued on June 16, 2016. The parties were unable to agree upon the wording of the questions to be presented. I declined to proceed with the adjudication of law points absent agreement of the parties on the questions presented and the case was scheduled for hearing on dates agreed upon by the parties.

Jason Volmer, Coordinator of Special Education for the District was present throughout the hearing as a representative for the District. Keri Steele, a Regional Director and Assistant Director of Special Education with the AEA, was present throughout the hearing as a representative for the AEA. Attorneys Miriam Van Heukelem and Rebecca Reif appeared as counsel for the District and AEA. Assistant Attorney General Meghan Gavin and attorney Thomas Mayes, a Legal Consultant with the Department, were present as counsel for the Department.

Testimony was received from A.W.'s mother; tutor Carol Hammen; Katie Greving, a parent advocate and President of Decoding Dyslexia Iowa; Mary Reynolds, a family support coordinator with the ASK Resource Center; District teachers Ms. D. and Ms. S., special education coordinator Jason Volmer, and A.W.'s Middle School Principal; and AEA employees Christina Glaub, Dorothy Landon, Terry Anselme, and Keri Steele. Complainants' Exhibits A – F, District/AEA [Resp.] Exhibits 1 – 27, and DE Exhibits 1 – 4 were offered and admitted into the record without objection.²

The evidentiary record was closed at the end of hearing on October 7, 2016. The parties submitted briefs in lieu of closing statements. The case was submitted upon filing of the Complainants' Reply Brief on December 30, 2016. The parties agreed to a continuance of the proceeding through January 31, 2017, to allow time for drafting of this decision. The continuance was later extended to March 22, 2017.

Issues presented

As dictated by 34 CFR § 300.511(d) and 281 IAC 41.511(4), the issues considered are limited to those raised in the due process complaint. They include:

- Whether the eligibility criteria and procedures utilized by the Respondents illegally restrict the scope of federal entitlement to special education under the IDEA by:
- omitting consideration of a pattern of strengths and weaknesses in performance, achievement, or both relative to intellectual development from the disability determination for students suspected of having a specific learning disability;
 - failing to give good faith consideration to clinical diagnoses of specific learning disabilities by qualified medical professionals and effectively creating a distinction between a “medical disability” and an “educational disability;”
 - failing to make an individualized determination of need by requiring a significant discrepancy from norm- or grade-based performance standards;
 - narrowing the definition of special education and specially designed instruction so that it includes only instruction and services that exceed the capacity of general education.

² The District, AEA, and Department are all Respondents in the action. District/AEA exhibits are labeled as Resp. Exhibits in the record. Department exhibits are labeled as DE Exhibits. For the sake of consistency, these designations will be used throughout this decision.

Whether the Respondents violated procedural requirements of the IDEA by allowing the eligibility determination to be made by the AEA, rather than by the properly constituted eligibility team.

Whether the Respondents violated the child find requirement of the IDEA by failing to identify A.W. as an entitled child under the IDEA.

Findings of Fact

Introduction: This case presents issues of broad public importance concerning the process used to identify children with specific learning disabilities and determine their eligibility for special education and services under the IDEA. The Complainants argue that some aspects of the eligibility standards adopted by the Iowa Department of Education and the eligibility criteria and procedures used by Iowa Area Education Agencies to conduct eligibility evaluations are unduly restrictive and inconsistent with the IDEA on their face and as applied by the Heartland AEA and the Urbandale Community School System when conducting the educational evaluations at issue in this case. The Complaint was filed on May 15, 2016, and alleges a continuing violation throughout the two-year limitation period.

Although the Complainants do not directly challenge the use of Response to Intervention (RtI), the Respondents justify their actions, in part, by attributing them to implementation of RtI in the District. A basic understanding of RtI, the state eligibility standards, and the eligibility criteria and procedures employed by the AEA, is needed to provide context for the events underlying this dispute. Because of this, this statement of facts includes a discussion of RtI, a review of state standards and guidance, and an overview of AEA-established procedures, as well as a chronological discussion of the events on which the Complainants' claims are based.

Response to Intervention (RtI) / Multi-Tiered System of Supports (MTSS): Response to Intervention is a broad term used to describe various multi-tiered decision-making models designed to ensure quality evidence-based instruction and improve student learning. Over the past two decades, RtI has gained support as a comprehensive model for school improvement. For the last several years, the DE has been moving toward statewide implementation of RtI-based systems of instruction. The Department recently opted to change the name used to refer to these systems from RtI to Multi-Tiered System of Supports (MTSS) to more accurately reflect the desired outcome.³ The terms RtI and MTSS were often used interchangeably by district and AEA representatives throughout the hearing. (*Cf.*, Tr. 228, 317-18, 491, 568)

Effective RtI models provide data to support improvement of instructional systems and individual student outcomes. (Tr. 224-28) As explained by the Department in a 2011 guidance document:

³ See "*The latest on RtI: A new name,*" Article issued by Iowa Dept. of Education (January 2014) (available at: <https://www.educateiowa.gov/article/2014/01/08/latest-rti-new-name> – last accessed 2/4/17)

Response to Intervention (RtI) is a process by which schools use data to identify the academic and behavioral supports each and every student needs to be successful in school and leave school ready for life. The process provides students with evidence-based instruction and interventions matched to their needs and monitors student progress to improve their educational outcomes. RtI also allows educators to evaluate the overall health of their system and target resources by providing the necessary data to determine which elements of the education system are performing adequately and which require further development. RtI is a decision-making framework composed of evidence-based practices in assessment and instruction. RtI is not a packaged program, set of assessments or curriculum that can be purchased.

RtI is also a framework for educating all children to high levels of proficiency. It is driven by general education, though it has been demonstrated to be effective for students served in special programs (e.g., Special Education, English Language Learners etc.) The RtI process takes place within Universal, Targeted, and Intensive levels of instruction. Each of these levels provides increasingly intensive instruction, based on student needs, to support student progress toward proficiency. The essential components that must be in place to ensure that RtI is implemented effectively are below. Critical to each and every one of these components is fidelity of implementation.

- (a) Robust Universal instruction in the Iowa Core
- (b) Universal screening
- (c) Evidence-based instructional interventions at the Targeted and Intensive levels
- (d) Progress monitoring
- (e) Data-based decision-making

RtI uses universal screening information to identify struggling students at the earliest grade levels and provide students with additional instructional time and intensity during the school day. RtI also provides more advanced curriculum and additional instructional time and intensity to those who are on-track to exceed benchmarks and need extended learning. With RtI, students are monitored often to ensure they are progressing, and when they are not, they receive additional learning opportunities.

Guidance Document – Response to Intervention, at p. 7 (Iowa Dept. Ed. Dec. 2011)
(found at: http://www.crtiec.org/rti_summit/documents/Gethmann2RtIGuidance.pdf)

This view of how RtI models support individual student learning is consistent with how the United State Department of Education, Office of Special Education Programs (OSEP) has described RtI.

A multi-tiered instructional framework, often referred to as RTI, is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention with a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. With a multi-tiered instructional framework, schools identify students at-risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, and adjust the intensity and nature of those interventions depending on a student's responsiveness. ...

OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many LEAs [local education agencies] have implemented successful RTI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation; and those children who simply need intense short-term interventions are provided those interventions.

Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 1/21/2011); see also *Questions and Answers on RTI and EIS*, 27 IDELR 196 (OSERS 1/1/2007).

Congress reauthorized and amended to the IDEA in 2004. Public Law 108-446. Corresponding amendments to the IDEA regulations were finalized in 2006. The amended statute and regulations require evaluators to consider past instruction and English language proficiency. A child shall not be determined to have a disability if the child's underachievement is due to a lack of appropriate instruction in reading or math. 20 U.S.C. § 1414(b)(5); 34 CFR §§ 300.306(b)(1)(i)-(ii), 309(b). The amendments also prohibited states from requiring LEAs to consider whether a child has a severe discrepancy between achievement and intellectual ability when determining whether the child has a specific learning disability and allowed RtI to be used as a tool for gathering data used to identify children with specific learning disabilities (SLDs). 20 U.S.C. § 1414(b)(6); 34 CFR. § 300.307(a)(1)-(2).

The amended statute and regulations permit LEAs to use not more than fifteen percent (15%) of IDEA Part B funds to develop and implement early intervention services (EIS) for students in grades K-12 who are not currently identified as needing special education services but need additional academic support to succeed in a general education environment. 20 U.S.C. § 1413(f); 34 CFR § 300.226. Federal guidance makes clear that the EIS funding provision does not restrict use of RtI to general education; it merely limits use of IDEA-funded EIS services to students who have not been identified as needing special education services.

Response to intervention (RTI) strategies are tools that enable educators to target instructional interventions to children's areas of specific need as soon as those needs become apparent. There is nothing in IDEA that

prohibits children with disabilities who are receiving special education and related services under IDEA from receiving instruction using RTI strategies unless the use of such strategies is inconsistent with their individual education programs (IEPs). Additionally, under IDEA, a public agency may use data gathered through RTI strategies in its evaluations and reevaluations of children with SLD. However, children with disabilities who are currently identified as needing special education and related services may not receive RTI services that are funded with IDEA funds used for EIS pursuant to 34 CFR § 300.226.

Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR 196 (OSERS 1/1/2007) (response to Ques. A-1); *see also Letter to Dale*, 60 IDELR 166 (OSEP 11/14/2012); *Memorandum to Chief State School Officers*, 51 IDELR 49 (OSEP 7/28/2008) (guidance regarding use of EIS funds). Correspondingly, except for the allowed EIS programs, IDEA Part B funds may be used only for special education programs; not to support non-special education instruction in the general education classroom. *Letter to Couillard*, 61 IDELR 112 (OSEP 3/7/2013).

RtI/MTSS, as it is being implemented in Iowa, is intended to be a school-wide system to enhance the educational opportunities of both general and special education students. (Tr. pp. 224-25) “Response to Intervention (RtI) is an every-education decision-making framework of evidence-based practices in instruction and assessment that addresses the needs of all students starting in general education. As an every-education process, RtI allows educators to judge the overall health of their educational system by examining data on all students (general and special education) as well as identifying students who need additional supports.” (Resp. Exh. 127a – *RtI Key Components* (Iowa Dept. of Ed. 3/1/2013) (emphasis original)) RtI/MTSS encompasses the full continuum of supports and interventions, from universal general education classroom instruction through intense individualized special education interventions. (Resp. 14)

State Rules & Standards: The Iowa Department of Education, acting through the division of special education, has the duty and power to “prescribe courses of study, and curricula for special schools, special classes and special instruction of children requiring special education, including physical and psychological examinations, and to prescribe minimum requirements for children requiring special education to be admitted to any such special schools, classes or instruction.” Iowa Code § 256B.3(5); *see also* Iowa Code § 256B.4(3) (discussing powers of local school and AEA boards and noting that “[c]hildren requiring special education may be identified in any way that the department of education determines to be reliable”). The Department has executed this authority through the formal adoption of administrative rules and through the promulgation of standards and guidance documents to supplement the rules.

The Complainants take issue with effect of the state standards defining disability, need, and special education. The Iowa Special Education Eligibility Standards were first published in July 2006. Updated Special Education Eligibility and Evaluation Standards were published in April 2015 and reissued, with minor changes, in December 2015. These standards “describe the essential elements of the process by which students

are identified and evaluated for special education” under the IDEA and state law. (DE Exh. 4, at IDOE 85) Each version of the standards was adopted using procedures outside the formal rule-making process established in the Administrative Procedure Act, Iowa Code chapter 17A. Department views the Standards as “authoritative interpretations of school laws and school rules.” AEA and school districts are directed to establish policies, procedures, and practices to conform to the Standards and “compliance with and attainment of these Standards [is] used by the Department to determine compliance with federal and state law.” (Id.)

Iowa has long followed a “non-categorical” approach to identifying and serving children eligible to receive special education and services under the IDEA. Instead of requiring evaluators to determine whether a potentially eligible student has one of the specific disabilities listed within the IDEA, the Department takes the position that “disability labels across all ages are not needed in the educational setting.” (Comp. Exh. E-4, at p. 3) A 1995 revision of the Iowa rules governing special education incorporated this concept into the following definitions:

“Children who are handicapped in obtaining an education” are those individuals with disabilities who are unable to receive education from the general education experience without the provision of special education and related services as defined in these rules. In these rules, they are referred to as an eligible individual.

“Eligible individual” means an individual with a disability who is handicapped in obtaining an education and who is entitled to receive special education and related services. ...

281 IAC 41.5 (definitions- published 6/7/1995, effective 7/12/1995)

Iowa has also been a leader in requiring use of general education interventions to address educational problems. To this end, the 1995 rules regarding identification of eligible individuals describe a “systematic problem solving process” to examine the nature and severity of an educationally related problem. The process was designed to “primarily focus on variables related to developing effective educationally related interventions,” and included: a) description of a problem “in objective, measurable terms that focus on alterable characteristic of an the individual and the environment” using data collection and describing the degree of discrepancy between demands in the educational setting and the individual’s performance; b) data collection and problem analysis; c) the design and implementation of interventions to address the defined problem; d) progress monitoring; and e) evaluation of intervention effects. 281 IAC 41.47.

The term “general education intervention” was defined by the 1995 rules to mean “attempts to resolve presenting problems or behaviors of concern in the general education environment prior to conducting a full and individual evaluation.” 281 IAC 41.5. Absent an affirmative determination that implementation of general education interventions would not be appropriate to meet a child’s needs, each local education

agency (LEA), in conjunction with the AEA, was required to use such interventions to “attempt to resolve the presenting problem or behaviors of concern in the general education environment prior to conducting a full and individual evaluation.” 281 IAC 41.48(2). While mandating use of general education interventions in most cases, rule 41.48(2) included the following provisions preserving parental rights and recognizing the limits of such interventions:

... The parent of a child receiving general education interventions may request that the agency conduct a full and individual evaluation at any time during the implementation of such interventions.

a. Each LEA shall provide general notice to parents on an annual basis about the provision of general education interventions that occur as a part of the agency’s general program and that may occur at any time throughout the year.

b. General education interventions shall include teacher consultation with special education support and instructional personnel working collaboratively to improve an individual’s educational performance. The activities shall be documented and shall include measurable and goal-directed attempts to resolve the presenting problem or behaviors of concern, communication with parents, collection of data related to the presenting problem or behaviors of concern, intervention design and implementation, and systematic progress monitoring to measure the effects of interventions.

c. If the referring problem or behaviors of concern are shown to be resistant to general education interventions or if interventions are demonstrated to be effective but require continued and substantial effort that may include the provision of special education and related services, the agency shall then conduct a full and individual evaluation.

281 IAC 41.48(2). Each Iowa AEA is charged with establishing and maintaining written identification and evaluation procedures. 281 IAC 41.47(2). The 1995 rules outlined the general framework and mandatory components for these procedures. 281 IAC 41.48 - 48.52. The rules also established specific criteria for determining the existence of a learning disability and additional requirements for team membership and the contents of evaluation reports for students suspected of having a learning disability were included in the rules, as required by federal IDEA program regulations. 282 IAC 41.56; 34 CFR §§ 300.540-300.543 (as adopted 9/29/1992).

In late 1994 and early 1995, the United States Department of Education, Office of Special Education Programs (OSEP) conducted a review of the Iowa “Renewed Service Delivery System for Special Education Programs,” the system described within the 1995 rules. The requirement for use of interventions to identify eligible individuals raised concern. However, after reviewing the provisions of rule 41.48(2), receiving clarification from the Department as to how the state intended to implement the system, and assurances that IDEA Part B funds would not be used for the development and implementation of general education interventions; OSEP concluded that described

identification system did not appear to be inconsistent with Part B of the IDEA. (DE Exh. 2)

The Department issued *Special Education Eligibility Standards* in 2006. The “Guiding Principles” of the Standards directly integrate intervention data into the evaluation process, as generally described in the 1995 rules, while preserving the state’s non-categorical approach to the identification of eligible students and the delivery of special education services. (Comp. Exh. E-4, at pp. 2-3) As explained in the introduction to these Standards:

... This is a Response to Intervention (RTI) model and is intended to be a general education, school-wide system. The model is designed with flexibility and fluidity to be applied across multiple settings and content areas.

The purpose of Iowa RTI model is to identify appropriate and effective interventions that result in improved individual performance. The decisions for determining an individual’s educational needs are based on multiple sources of data, including those data gathered through the RTI process.

Special education and related services are not seen as a separate entity in this model. Rather, special education instruction supports and interventions are provided within the context of the overall RTI system. As the RTI process determines the education needs of an individual, all of the components required of a full and individual evaluation for special education and related services will be satisfied.

(*Id.*, at p. 1) The glossary to the Standards defines “Interventions” as “direct instruction in the area of concern. Interventions are designed to meet the identified needs of an individual and are monitored on regular and frequent basis.” (*Id.* at 16)

The Standards detail process and content elements that are to be incorporated into AEA evaluation procedures. The content standards outline “three major elements to address when making an eligibility decision: Progress, Discrepancy, and Need.” (*Id.* at 6) AEAs are instructed: “The determination of an eligibility decision for special education will rely on establishing both the presence of a **disability** and a **need** for special education instructional support or related services. The presence of a disability does not require specification of a disability category at the individual level.” (*Id.*, emphasis original) Disability is defined in the Standards.

Disability: A disability is a skills deficit, a health or physical condition, a functional limitation, or a pattern of behavior that adversely affects educational performance. A disability 1) results in educational performance that is significantly and consistently different, diminished, or inappropriate when compared to expectations for peers and 2) significantly interferes with:

- 1) access to general education settings and opportunities,
- 2) developmental progress,
- 3) involvement and progress in the general education curriculum, or
- 4) interpersonal relationships or personal adjustment.

(*Id.* at 7)

In keeping with Iowa’s non-categorical approach, the Standards outline one evaluation system to be applied to all types of suspected disability, including specific learning disabilities. The elements of “progress” (the individual’s rate of progress compared to expected progress) and “discrepancy” (the magnitude of the discrepancy between the individual’s current performance and the performance of peers or other expected standards) are considered to determine whether a “disability” is present. (*Id.* at 7-12) The individual’s “needs” (i.e. specific instructional strategies, accommodations, and modifications that enable the individual’s learning performance to improve) are then examined to determine whether the educational interventions required for the student to be successful can be sustained by general education, without special education services. (*Id.* at 12-13) The Standards explain the Department’s conceptualization of the three essential elements of progress, discrepancy, and need and include a list of “required questions” regarding each of these elements to be addressed during each educational evaluation.

Congress reauthorized and amended the IDEA in 1997 (Public Law 105-17) and again in 2004 (Public Law 108-446). The federal regulations governing IDEA Part B were rewritten following the passage of each reauthorization act. *See* Final Regulations, 64 Fed. Reg. 12,406 (March 12, 1999); Final Regulations, 71 Fed. Reg. 46540 (Aug. 14, 2006). A definition of “specially-designed instruction” was inserted into the regulations for the first time in 1999, as a component of the definition of “special education.”⁴

⁴ Special Education.

(a) General,

- 1) Special Education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability,

(b) Individual special education terms defined. The terms in this definition are defined as follows:

- 3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
 - (i) To address the unique needs of the child that result from the child’s disability; and
 - (ii) To 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.

34 CFR § 300.26(b)(3) (1999). This definition was renumbered, but not amended, in the 2006 version of the regulations. 34 CFR § 300.39(b)(3) (2006).

The Iowa administrative rules governing special education were rescinded in 2007 and replaced with a version formatted to mirror the federal regulations. IAB [Iowa Admin. Bulletin] Vol. XXX, No. 8, at 713 (10/10/2007), ARC 6288B. The 2007 rules incorporate the federal definition of special education [281 IAC 41.39], maintain a non-categorical identification process [281 IAC 41.8, 41.111(4)], and again describe the systematic problem solving process [281 IAC 41.313] and require use of general education interventions to attempt to resolve problems [281 IAC 41.312]. The rules also require evaluators to consider whether a lack of appropriate instruction affects performance [281 IAC 41.306(2), 41.309(2)]. The definition of “general education intervention,” although renumbered, is otherwise unchanged from the prior version of the rules, 281 IAC 41.51(9).

In 2009, the Department again amended the special education rules, making what the agency described as technical corrections required by federal regulatory changes in 2007 and 2008, clarifying changes regarding the role of general education, child find, and eligibility determinations. The following sub-rules describing of the use of such interventions were added to the rule delineating child find obligations.

41.111(2) High-quality general education instruction; general education interventions.

a. As a component of efficient and effective, high-quality general education instruction, it shall be the responsibility of the general education program of each LEA to provide additional support and assistance to all students who may need such additional support and assistance to attain the educational standards of the LEA applicable to all children. Receipt of such additional support and assistance, when considered alone, does not create a suspicion that a child is an eligible individual under this chapter. Activities under this paragraph shall be provided by general education personnel, with occasional or incidental assistance from special education instructional and support personnel.

b. General education interventions involving activities described in rule 281-41.312 [attempts to resolve problems in the general education environment prior to conducting a full and individual evaluation] are a recognized component of an AEA’s child find policy pursuant to the policies set forth in subrule 41.407(1) and the procedures set forth in subrule 41.407(2).

41.111(5) Evaluation required when disability is suspected. At the point when a public agency suspects a child is a child with a disability under this chapter, the public agency must seek parental consent for an initial evaluation of that child, pursuant to subrule 41.300(1).

41.111(6) Rule of construction—suspicion of a disability. As a general rule, a public agency suspects a child is a child with a disability when the public agency is aware of facts and circumstances that, when considered as a whole, would cause a reasonably prudent public agency to believe that the child’s performance might be explained because the child is an eligible individual under this chapter.

281 IAC 41.111(2), (5), (6) (published under notice in IAB Vol. XXXII, No. 5, at 481 (8/26/2009), ARC 8050B; adopted without change IAB Vol. XXXII, No 13, at 1641 (12/16/2009), ARC 8387B).

During the last half of 2010, OSEP conducted a review of Iowa's compliance with the IDEA. In a February 8, 2011, letter to the Director of the Iowa Department of Education OSEP again expressed concern about aspects of the identification procedures used in Iowa.

Based on [the review to date], OSEP cannot determine if the State is ensuring that any AEA or district implementing Response to Intervention (RTI) strategies is appropriately using RTI and that use of RTI is not delaying or denying timely initial evaluations for children suspected of having a disability. OSEP is requiring that the State provide documentation of the steps it is taking to ensure that any AEA or district implementing RTI strategies is appropriately using RTI and that use of RTI is not delaying or denying timely initial evaluations for children suspected of having a disability.

(Comp. Exh. E-5, attach. 2) Six days later, on February 14, 2011, the Department issued an order revoking the 2006 Special Education Eligibility Standards. (Comp. Exh. E-5) The order stated that the Department was engaged in the process of revising the standard for identification of IDEA eligible children. An interim standard was distributed through a memorandum issued on July 22, 2011. The interim standard instructed schools and AEAs that they could not delay acting on a suspicion of a disability until a predetermined number of tiers or levels of interventions had been completed. The interim standard remained in place for four years.⁵

The Department published new Special Education Eligibility and Evaluation Standards in April of 2015. (DE Exh. 3) The Standards were issued with minor revision in December of 2015. (DE Exh. 4)⁶ The 2015 Standards are presented in a different format than the 2006 Standards. General observations are set out, followed by a list of ten specific "standards" and guidance as to the importance of each standard, how the standard is met and applied across settings, and how the Department will monitor compliance with the standard. This version of the Standards also includes a discussion of the relationship between IDEA eligibility standards and RtI.

RtI, as described in the law and the professional literature, is a proven process of using high quality, valid, and reliable data to decide whether instruction is working and to decide whether instruction needs to be

⁵ Draft standards were issued public comment in 2012. (Comp. Exh. E-6) Significant concerns about the draft were voiced by some parent advocates, including the attorney representing the Complainants in this case. (Comp. Exh. E-7)

⁶ Unless otherwise noted, references herein are to the December 2015 version of the Standards, which were in place when A.W. was last evaluated in August of 2016.

changed. RtI is a process that holds promise for all children, not just those being considered for special education services. RtI is a general education approach (with support from special education personnel when allowed by law). RtI provides support to any student who may be struggling with a skill or concept, or displaying inappropriate behaviors. RtI's goal is to provide supports in the general education setting to enable students to access and be successful in the general education setting, as well as giving public agencies information on how to improve their general education programs. However, a secondary benefit of RtI or MTSS may be to provide important and useful information for the special education eligibility and evaluation process.

It is important to note that RtI/MTSS is not a "hurdle" that must be cleared before being considered for special education. Although RtI/MTSS data may be used to make special education decisions, RtI/MTSS is not solely a special education process. Acting in that manner is neither proper nor permissible. It is not necessary for a child to participate or complete an RtI/MTSS process to be suspected of having a disability.

(DE Exh. 4, at IDOE 86)

Standard Five requires evaluations to be "fair, thorough and comply with the requirements of special education law." (*Id.* at IDOE 32) The explanation of this standard acknowledges that evaluations for children suspected of having learning disabilities must follow additional requirements as detailed in rules 41.307 to 41.311, and notes:

In determining whether a child has a specific learning disability, Iowa law forbids the consideration of whether a child has a severe discrepancy between ability and achievement. Iowa law requires "the use of a process based on the child's response to scientific, research-based intervention or the use of other alternative research-based procedures for determining whether a child has a specific learning disability."

(*Id.* at IDOE 116, *quoting* 281 IAC 41.307(1)(a)). Standard Seven makes clear that a child with low performance caused by something other than a disability is not eligible for special education. The explanation of this standard states: "If lack of opportunity to learn, or disadvantage causes a child's low performance, the child is not entitled to special education services." (*Id.* at IDOE 123)

Standards Six and Eight restate widely-accepted factors for determination of special education eligibility: "6. To be eligible for special education, a child must have a 'disability.' ... 8. A child's disability must cause a need for special education before the child is eligible for special education." (*Id.* at IDOE 88-89). The Complainants take issue not with these general statements, but with how the standards define and direct AEA's and LEA's to apply the terms "disability," "need," and "special education."

The 2015 Standards, like the 2006 Standards, broadly define “disability” as “a physical or mental condition that adversely affects educational performance.” (*Id.* at IDOE 118) And the combined elements of “progress” and “discrepancy” are used to determine whether a condition adversely affects educational performance.

Iowa law requires disability determinations to be demonstrated by progress and discrepancy. In nearly all cases, progress and discrepancy is demonstrated by intervention data. Once a team determines the child’s areas of concern (“operationally defined in meaningful and measurable terms, can be monitored, and the data used to make decisions”), the team selects an intervention, or modifies an existing intervention, and monitors progress toward a meaningful and measurable goal (see Standard Two). If the child does not make progress sufficient to reduce the child’s discrepancy with peers, and no exclusionary factors apply (see Standard Seven), the child likely has a disability. If the child makes progress and reduces the child’s discrepancy when compared to peers, that fact weighs against finding that the child has a disability. In very limited cases, progress-and-discrepancy may be determined by other sources of data, such as medical findings. In all cases, other sources of data (e.g., outside providers) may provide information to answer this question. Please remember that a particular child’s evaluation might require intervention data to answer some questions and other types of data to answer other questions. For example, a public agency suspects that a child needs special education because of a physical impairment and a learning disability. A physician statement might provide evidence that the child has a physical impairment. Intervention data, however, might provide the necessary information whether and what kind of special education the child needs because of the physical impairment, as well as whether the child has a learning disability and whether and what kind of special education the child requires because of the learning disability.

(*Id.* at IDOE 120-21)

The 2015 Standards define “special education” primarily in terms of access to the general education curriculum. “Not every adaptation is special education. The important factor is access to the general curriculum. If the adaptation is needed for access to the general curriculum and is based on a child’s particular disability-related needs, it is specially designed instruction.” (*Id.* at IDOE 127) Correspondingly, “need” for special education is defined in terms of the capacity of general education.

To need special education is to need adaptation of “content, methodology, or delivery” to access the general curriculum and to meet standards applicable to all children. A child could have a disability (condition that adversely affects educational performance) yet not need special education if that child met standards applicable to all children.

If the adaptation is part of the general curriculum's allowance for the differing needs of diverse learners, it is part of the general curriculum. The Iowa Core and the Iowa Teaching Standards recognize that learners have diverse needs, and require teaching for learner differences. For example, a classroom teacher uses flexible learning groups in third grade math and provides additional instruction and gives a supplemental worksheet to the group that is not currently making progress. That additional time and supplemental material, being part of the general curriculum and directed to a group, rather than an individual, is not specially designed instruction. Differentiated instruction in the general education environment is not special education. Similarly, general education interventions, being a part of the general curriculum, are not specially designed instruction. If the adaptation at issue is within the skill, capability, and licensure of the reasonably prudent general educator, it is generally not considered special education. The line between what is general education and what is special education will, of necessity, vary based on the needs of each child.

(*Id.* at IDOE 128) As articulated above, evaluators are instructed to consider the need of the individual student under evaluation not based on the general education services actually available to the student, but based on what general education should be able to provide. Stated another way:

When making the decision regarding educational need, teams 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.*)

AEA Special Education Procedures: State administrative rules and the 2006 *Special Education Eligibility Standards* require each AEA to develop IDEA eligibility evaluation procedures. 281 IAC 41.47(2) (6/7/1995); 281 IAC 41.122 (current); Comp. Exh. E-4, at p. 1) Historically, each Iowa AEA developed and maintained its own set of forms and procedures. Over time, in an effort coordinated by the Department, the AEA Special Education Directors developed a standardized web-based IEP form that was accepted for statewide use in 2006. Soon thereafter, the AEA Special Education Directors turned their attention to the development of a uniform procedures manual. The first statewide procedures manual, disseminated in August of 2009, was drafted through a collaborative effort involving staff from the AEAs and Department. (Comp. Exh. E-1, at Preface & Acknowledgements; E-3; & Resp. Exh. 20) The manual is periodically revised by the AEA Special Education Directors, as needed to address changes in the law or issues raised by one of the AEAs of the Department. (Resp. Exh. 20)

Two versions of the AEA *Special Education Procedures* manual were in place during the years at issue here: the first issued on March 1, 2011, and the second issued on July 1, 2015, after the revised state Standards were issued in April 2015. (Comp. Exh. E-1 & E-2)⁷ Both versions of the manual include a section detailing the process of conducting a full and individual evaluation to determine eligibility for special education services that incorporates the three essential elements identified in the 2006 and 2015 State Standards.

The full and individual initial evaluation documents, the examination of an individual's performance over time (progress), performance as compared to grade level expectations or developmental norms (discrepancy) at the point in time the evaluation is conducted, and needs in the context of the individual's unique circumstances. The evaluation also attempts to identify those circumstances under which the individual experiences the most growth or success.

(Comp. Exh. E-1, at p. 40)

Progress data is used to determine discrepancy from peers.

Educational Progress Discussion: The full and individual initial evaluation uses a child's response-to-intervention or instruction data to support the conclusion that a disability is present. Specifically, the individual's rate of progress is compared to the expected rate of progress for typically developing peers [or other performance standard]. Progress data provides objective evidence that an individual's performance over time and during targeted instruction/intervention is substantially different than the rate of progress for typical peers [or expectation].

(*Id.*, at p. 40) (bracketed words added in 2015 revision, Exh. E-2, at p. 41) Information gathered to document the student's rate of progress and the evaluation team's decision regarding the rate of progress is summarized in the Educational Evaluation Report (EER).

"In addition to evaluating progress, the disability determination focuses on the magnitude of discrepancy." (*Id.*, at p. 43)

Discrepancy Discussion: Once a standard of comparison is selected and the individual's performance is measured and compared to this standard, a decision must be made as to the magnitude of the discrepancy and if the discrepancy is large enough to warrant special education and

⁷ The general format and content of the two versions of the AEA Procedures Manual are quite similar. Many sections of the 2011 Manual were unchanged in the 2015 Manual. For ease of reference, citations herein are to the 2011 Manual, which was in effect when the first challenged evaluation took place in May of 2015. Significant revisions from the 2011 version of the referenced text within the 2015 version of the manual are noted.

related services. The discrepancy needs to be made on reliable, valid, current and relevant measures.

Discrepancy data provides objective evidence that an individual's performance is significantly different than the majority of children or youth of similar age or grade discrepant from standards (e.g. Iowa Core Content Standards, Iowa Early Learning Standards) or the essential skills and concepts of the Iowa Core Curriculum.

(*Id.* at p. 43)⁸ Although no specific “cutoff” score is mandated, evaluation teams are instructed to follow these guidelines:

- When considering benchmarks and standards (Iowa Core Content, Iowa Early Learning, Iowa Core Curriculum's essential skills and concepts) as the standard of comparison, the child's performance should be below grade level.

- When a measure is utilized that provides the opportunity to identify a percentile rank, a score near or below the 12th percentile may be considered to be significantly discrepant.
- When standard scores are available, more than one standard deviation may represent a significant discrepancy. If a measure providing standard scores is utilized the data gathered must also be used to guide instruction, not merely to establish a discrepancy.

(*Id.*, at p. 45) (guidelines not relevant here, and one guideline not included in the 2015 revision omitted)⁹ Information gathered to document the magnitude of discrepancy

⁸ Although slightly revised and reordered, the Discrepancy Discussion in the 2015 version of the manual contains the same central concepts.

Discrepancy data provides objective evidence that an individual's performance is significantly different than the majority of children or youth of similar age or grade and from standards (e.g. Iowa Core, Iowa Early Learning Standards). Once a standard of comparison is selected and the individual's performance is measured and compared to this standard, a decision must be made as to the magnitude of the discrepancy. Teams must also determine if the child's performance is unique when compared to similar peers who have had similar experiences.

(Comp. Exh. E-2, at p. 44)

⁹ The 2015 manual includes the following additional guideline addressing ratio data: For data which is equal interval and has a “true zero” (ratio data), a discrepancy ration may be calculated by dividing the bigger score (usually the standard of comparison) by the smaller score (usually the child's score). When a measure indicates that a child's performance is 2.0 discrepant or greater, it is considered significantly discrepant. Anything less than 1.5 times discrepant is not considered significant enough to suggest a disability and the range of 1.5 to 1.9 times

and the evaluation team's decision regarding whether a significant discrepancy is to be included in the EER. (*Id.*, at 46)

Instructional or educational need is the third and final required component of the IDEA eligibility determination.

Need Discussion: Instructional need is the third required component of eligibility determination, and is reflected in the team's judgment that an individual requires special education and related services in order to receive a free and appropriate education. Specifically, teams assess through multiple methods (Review, Interview, Observe, Test), the needs of the individual in the following areas.

- Instruction
- Curriculum
- Environment
- Learning Supports

(*Id.*, at 46) (the 2015 revision uses the term "educational need", rather than "instructional need," Exh. E-2, at p. 47) The listed areas of potential need are described and the team is instructed to describe what accommodations, modifications, services and supports the individual needs in each of the areas. "Based on the convergence of all data collected during the evaluation process, instructional need is a data-based description of the resources necessary to improve and maintain the student's rate of learning at an acceptable rate." (*Id.*, at 47) After instructional needs are identified, the team must decide "whether "the individual's instructional needs require services and supports that extend beyond what typical general education resources alone can provide," if so, then the individual has met the criteria for instructional need." (*Id.*, at 49)¹⁰

Upon completion of the evaluation, the IDEA eligibility is determined by answering two questions:

discrepant requires professional judgment. Times discrepant is not the ideal measure, but it gives more indication as to the magnitude of discrepancy than simply reporting the raw difference.

(Comp. Exh. E-2, at p. 44)

¹⁰ The 2015 version of the manual restated the needs test to mirror the language of the recently adopted State Standards: "The summative decision is for the evaluators to determine which of the child's identified needs in Instruction, Curriculum, Environment and Learning Supports are beyond the capacity of the general education program to provide." Consideration is to be given to several factors, including: whether the child required targeted instruction from a strategist who has specific licensure or training, such as a reading endorsement, or special education teacher; needed alternate instructional materials or curricular modifications; adjusted or expanded standards/benchmarks; environmental manipulation; and assistive technology needs. (Exh. E-2, at p. 49)

Does the individual have a disability? (A disability is a significant skills [deficit], a health or physical condition, a functional limitation, or a pattern of behavior that adversely affects the individual's rate of progress and current level of performance.)

Are specially designed instruction and related services required to meet the individual's educational needs?

When the answer to both questions is "yes" then the individual is eligible for special education and related services.

(Comp. Exh. E-1, at p. 50)¹¹

A.W. A.W. was born in 2003. She is now 13 years old. A.W. lives with her parents and siblings within the boundaries of the Urbandale Community School District and Heartland Area Education Agency. She is the second oldest of four children. A.W. first enrolled in the Urbandale District in the fall of 2013 and continues to attend the District.

Homeschool instruction: Prior to the 2013-2014 school year A.W.'s parents chose to homeschool A.W. and her older sister. A.W.'s father works full-time outside the home. A.W.'s mother provided the girls' instruction. She holds a Bachelor of Arts degree from Grand View University, where she majored in human services. She is not trained or licensed as a teacher.

A.W. received home school instruction for five years. A.W.'s mother selected teaching materials based on personal research and discussion with other homeschooling parents.

¹¹ The 2015 version of the manual makes clear that a condition or disorder must have a significant adverse effect on participation in general education to constitute an "educational disability" in this context.

An educational disability is a skills deficit, a health or physical condition, a functional limitation, or a pattern of behavior that adversely affects educational performance and which may not be primarily attributed to a lack of appropriate instruction (including poor school attendance and frequent moves from one school district to another), limited English proficiency, or other ecological factors.

An educational disability:

- 1) results in educational performance that is significantly and consistently different, diminished, or inappropriate when compared to the expectations for peers and
- 2) significantly interferes with:
 - a) access to general education settings and opportunities,
 - b) developmental progress,
 - c) involvement and progress in the general curriculum, or
 - d) interpersonal relationships or personal adjustment.

(Exh. E-2, at p. 55)

She used scripted, phonic-based literacy materials. A.W.'s mother completed and filed a Competent Private Instruction Report with the Urbandale school district for each daughter each year. (*Cf.* Comp. Exh. A, at A213-14) Each report included a list of the texts used and designated a licensed teacher who was to supervise the parent providing instruction. (Tr. pp. 84-85, 149-50, & Comp. Exh. A, at A89, A162)

A.W.'s sister had no difficulty learning to read and progressed well through grade level curricula. A.W. struggled with reading and was not able to retain and progress at the same pace as her sister. A.W.'s mother used several different reading programs with A.W. over time, in hopes of finding one in which she would excel. Eventually, A.W.'s mother began to suspect that A.W. might have a learning disability. (Tr. pp. 86-87)

Demarest evaluation: In the fall of 2012, A.W.'s parents took their concerns about A.W.'s limited academic progress to clinical neuropsychologist David Demarest, Ph.D. (Tr. p. 87) Dr. Demarest evaluated A.W. and issued a detailed report of his findings in January of 2013. (Comp. Exh. A, at A149-A157, Tr. p. 88) Following initial interviews, A.W. completed various cognitive ability, memory, and academic achievement assessments administered by Dr. Demarest in January of 2013; including: the Wechsler Intelligence Scale for Children – 4th edition (WISC-IV), the Wide Range Assessment of Memory and Learning – 2nd edition (WRAML-2), the Wechsler Individual Achievement test – 2nd edition (WIAT-II), and others. (*Id.* at A150).

A.W.'s WISC-4 cognitive function subtest scores ranged little, with results on nine of 13 subtests falling in the average range. None of the scores were above the average range. She did show notable weakness (borderline performance) on the subtest of visual-motor integration (Block Design) and weakness (low-average performance) in the area of visual-perceptual/nonverbal intelligence skills compared to her verbal intelligence. Her full scale IQ of 89 fell in the low average range, at the 23rd percentile. (*Id.* at A151) Results of various subtests of the WRAML-2 assessment of memory and learning also fell into the average, low-average, and borderline performance ranges. The lowest scores were on visual memory subtests, consistent with her nonverbal intelligence skills being significantly lower than her verbal intelligence skills. A.W.'s average subtest score over the 13 WRAML-2 subtests of memory fell at the 23rd percentile. (*Id.* at A152)

As measured by the WIAT-2, A.W.'s academic achievement fell below expected performance in nearly all subject areas tested. A.W. was 9 years and 7 months old in January of 2013. This would have typically have been the mid-point of fourth grade for a student born in May of 2003.¹² Her academic performance scores yielded age and grade equivalents uniformly below the nine-year-old and fourth grade levels – from a low of 7.0 years/1:5 grade on numerical operations to a high of 9.0 years/3:7 grade in written expression. Scores on all remaining subtests: word reading, reading comprehension, pseudoword reading, math reasoning, spelling, and listening comprehension fell within the range expected for the second grade level. Given A.W.'s

¹² Children in Iowa generally enter kindergarten at age 5. See Iowa Code § 282.3(2)(b) (“No child shall be admitted to school work the year immediately preceding the first grade unless the child is five years of age on or before the fifteenth of September of the current school year.”)

intellectual ability, Dr. Demarest concluded that while she was behind her age and grade level in all academic areas tested, “the only Learning Disorder present is a Mathematics Disorder related to her quite low (1st %ile for her age norm) numerical operations skills.” (*Id.* at A153) He found the discrepancy between A.W.’s achievement in reading and her perceived IQ was not great enough to warrant a diagnosis of developmental dyslexia or a spelling disorder. (*Id.* at A155)

Fall 2013 – A.W. enrolls in 4th Grade at []: During the summer of 2013 A.W.’s parents made a decision to enroll A.W. and her older sister in public school for the upcoming school year. They chose to enroll A.W. in fourth grade at [] Elementary in the Urbandale District. (Tr. pp. 89-92) [] Elementary is a high-achieving school, with well over 80 percent of students testing as proficient in reading in any given year. It has a somewhat exceptional demographic make-up, with a relatively affluent population base and a low percentage (4 to 7 percent) of students qualifying for free or reduced price lunch. Some buildings in the District have Title 1 funding available. These funds may be used to hire staff to support reading programs for students who are failing, or at risk of failing, to meet academic standards.¹³ Given the low percentage of socioeconomically disadvantaged students attending this elementary school, the building does not qualify for Title 1 funding. As a result, the building has fewer resources available to fund general education intervention programs than other buildings in the District. (Comp. Exh. A, at p. A80; Tr. pp. 239-40)

A.W. met her fourth grade teacher, Ms. D., on the first day of school.¹⁴ Ms. D. knew that A.W. had been homeschooled. A.W.’s mother shared the parents’ concerns about A.W.’s slow academic progress with the teacher and told her about the Demarest evaluation. (Tr. pp. 93, 401) During the first week of the school year Ms. D. conducted “pretesting” to assess A.W.’s skills. She determined that A.W. was reading within the first grade level and was also performing well behind grade level in math. Ms. D. then spoke with the building Principal to start the process of evaluation to determine whether A.W. was in need of special education. She also discussed A.W.’s situation with the Building Assistance Team – a team of teachers designated to help a classroom teacher identify appropriate interventions for students who are not performing at grade level. (Tr. pp. 401-03)

¹³ Title 1, Part A of the Elementary and Secondary Education Act provides federal financial assistance to local education agencies and schools with high numbers or percentages of children from low-income families to help ensure these children have support needed to meet state academic standards. *See* 20 U.S.C. § 6301, et seq.

¹⁴ Ms. D. completed teacher preparation in early childhood and elementary education at the University of Northern Iowa. (Tr. p. 400) She holds a standard teaching license with the following endorsements: K-6 Teacher Elementary Classroom, K-8 English/Language Arts, PK-3 Teacher, Regular Education/Special Education, and PK-3 Teacher, PK-3 Classroom. *Id.* Pursuant to agreement of the parties, judicial review is taken of Iowa Board of Educational Examiners (BoEE) license information for Ms. D. and other educators who testified at hearing. (Tr. p. 820)

In October of A.W.'s fourth grade year, intervention plans were implemented to address her math and reading skill deficits. The initial math intervention plan, dated October 1, 2013, was designed to increase fluency and accuracy with mixed addition and subtraction problems and called for A.W. to be provided "skill and strategy instruction for adding and subtracting 2 digit numbers which require regrouping."¹⁵ Baseline testing using 2nd grade mixed math computation problems resulted in a median score of 26 correct digits in two minutes, compared to an expectation of 41 correct digits in two minutes for students entering 4th grade. The goal was to increase A.W.'s performance by 1 digit every two weeks. The instruction was to be provided "10 to 15 minutes daily in an individual setting with the classroom teacher," under the supervision of Heartland AEA Special Education Consultant Ms. B., utilizing a variety of math materials including manipulatives to demonstrate regrouping.¹⁶ Although A.W.'s performance on weekly math probes varied widely, A.W. was able to achieve 35 digits correct on a two minute probe by November 26th, reducing her discrepancy from peers, and this intervention was discontinued with a notation that the problem was "resolved." (Resp. Exh. 3, at RESP. 48-50)

The initial reading intervention plan, dated October 14, 2013, was designed to increase reading fluency and support decoding of words. It called for A.W. to be provided "additional practice reading 4th grade passages aloud" and receive assistance and additional practice of words that were difficult for her to decode. Baseline testing using 4th grade level Dynamic Indicators of Basic Early Literacy (DIBELS) Next passages found A.W. read 62 correct words per minute (CWPM) with 95% accuracy, compared to fall DIBELS Next benchmark expectations of 90 CWPM with 96% accuracy. The goal was to increase A.W.'s performance by 1 correct word per minute each week. The instruction was to be provided using DIBELS Next 4th grade passages in a small group setting for 15 minutes two times per week with an associate and 15 minutes one time per week with the classroom teacher. (Resp. Exh. 3, at RESP. 51-55; Resp. Exh. 12, at RESP. 115)

First Educational Evaluation: At some point in the fall of 2013 A.W.'s mother met with AEA Consultant Ms. B. to express concern about A.W.'s progress, discuss the Demarest evaluation, and ask about obtaining a special education evaluation for A.W. (Tr. p. 93) Ms. B. reviewed the evaluation report, but did not request a copy of it. In mid-November of 2013, Ms. B. met with Karla Jones, the Regional Director of Heartland AEA Region 6, to discuss A.W.'s situation. Based upon available information, including concerns expressed by A.W.'s mother, Jones advised that A.W.'s parents should be offered a full individual evaluation to determine whether she was eligible for special education. Jones

¹⁵ The plan document indicates that A.W.'s mother attended a Building Assistance Team meeting on September 16, 2013, and would "be providing additional fact practice at home." (Resp. Exh. e, at RESP. 48)

¹⁶ Ms. B. has a Bachelor's Degree in Elementary Education and Special Education and a Master's Degree in Special Education. She holds a permanent professional teaching license, with the following endorsements: K-6 Teacher Elementary Classroom, K-8 Mildly Disabled, K-8 Learning Disabilities, K-8 Mental Disabilities Mild/Moderate, Ages 5-21 Consultant Learning Disabilities. (Comp. Exh. A, at A127; BoEE license file)

felt that more intensive interventions needed to be provided to A.W., to provide further data for the evaluators. She spoke to the building Principal and recommended “a robust intervention matched to need” – involving 20 to 30 minutes of instruction 4 to 5 days per week – be put into place for reading, math, or both, to assist the evaluation team in making decisions about whether A.W. had a disability and needed specially designed instruction. (Comp. Exh. A, at A158-59)

A “Disability Suspected” determination was documented on a form completed on November 26th. The data supporting the suspicion of disability is explained on the form as follows: “A.W. has been diagnosed with a mathematics disorder by a clinical psychologist. At this point in time, her academic skills are discrepant and unique from peers.” (Comp. Exh. A, at A70) On December 2, 2013, A.W.’s mother signed a consent form authorizing a full initial evaluation of A.W. (Comp. Exh. A, at A072-73)

District and AEA staff were concerned that A.W.’s math and reading skill-deficits might be related to substandard instruction while she was home schooled. In late November, Ms. B. scheduled a meeting at the family home to obtain information about A.W.’s home school instruction. Katie Greving, the president of De-Coding Dyslexia – a nonprofit organization formed to raise awareness of dyslexia and advocate for children with dyslexia, also attended the meeting. (Tr. p. 170) A.W.’s mother gathered homeschool materials that she used with A.W., including: lesson plans, teacher manuals and student workbooks for all subjects, and tests; and had them available for Ms. B. to review. Ms. B. asked a number of questions about each subject, reviewed many of the materials, and took extensive notes recording A.W.’s scores on tests and assignments. At the end of the meeting, A.W.’s mother offered to allow Ms. B. to take the home schooling materials with her for further review. Ms. B. declined. (Comp. Exh. A, at A160-61, Tr. pp. 94-96, 152, 172-73)

Ms. B. recalled that she asked A.W.’s parents to complete a spreadsheet she developed by identifying the math, reading, and written language curriculum they used with A.W. each year and providing information about assessments in each of these subjects. A.W.’s parents did not return the form to Ms. B. (Resp. Exh. A, at A83-88) A.W.’s mother remembered that Ms. B. brought this form to their meeting, but did not recall Ms. B. directly asking her to complete this form. At some point, A.W.’s mother did provide Ms. B. or the evaluation team with a list of the curricula that she used with A.W. each year. (Comp. Exh. A, at A89, Tr. pp. 150-52)

In December 2013 the district amended A.W.’s reading intervention plan and implemented two new math interventions. Direct instruction in decoding multisyllabic words was added to pre-existing reading intervention plan on December 10, 2013. The Principal asked AEA Consultant Ms. B. to select the curriculum to be used. (Comp. Exh. A, at A165) Reading support teacher Ms. R. was to provide one-on-one instruction using REWARDS materials for 20-30 minutes daily.¹⁷ This instruction took place

¹⁷ Ms. R. is holds a standard teaching license with endorsements to serve as a K-8 Reading and K-6 Elementary Classroom teacher. (BoEE license file)

outside the general education classroom.¹⁸ (Tr. 424) Follow-up testing of reading fluency was done on January 17, 2014. At this point, the initial reading intervention had been in place since early October and the additional individual daily reading instruction had been in place for approximately four weeks (allowing for the holiday break). A.W.'s median score on three trials was 65 CWPM, an increase of three CWPM from the fall benchmark of 62 CWPM. The target behavior remained a concern and the reading interventions continued. (Resp. Exh. 3, at RESP. 51-55; see footnote 30 discussing duration of the enhanced one-on-one reading intervention)

The first new math intervention was developed by classroom teacher Ms. D. and AEA Consultant Ms. B. It was quite similar to the initial math intervention, but targeted multiplication instead of addition and subtraction. The intervention plan, dated December 4, 2013, was designed to increase fluency and accuracy when computing basic multiplication facts. A.W. was to be provided "skill and strategy instruction for computing basic multiplication facts." Instruction was to be provided "10 minutes daily in a 1-on-1 setting [by the classroom teacher] using manipulatives and a sequence of math facts." On baseline testing using 4th grade material, A.W. scored 49 digits correct given 2 minutes for computation. The goal was to increase A.W.'s performance by 0.7 of a digit each week. The identified problems was marked "resolved" after follow-up testing performed January 17, 2014, during which A.W. had median score of 64 digits correct on five trials. (Resp. Exh. 3, at RESP. 56)

The second new math intervention plan, dated December 5, 2013, was developed by AEA Consultant Ms. B. to increase A.W.'s "ability to acquire 2nd grade math skills and concepts." It called for A.W. to be provided "skill and strategy instruction for computing basic multiplication facts" using Number Worlds Level E material.¹⁹ Baseline placement testing showed A.W. was performing below "75% criteria on 2nd grade level placement tests for number sense [25%], addition [38%], subtraction [38%], geometry & measurement [50%], and data analysis & application [50%]." Instruction for this intervention was to be provided daily for 30 minutes by the building Principal.²⁰ The

¹⁸ REWARDS is described in a Continuum of Literacy Intervention Resources guide being developed by the District as a potential Tier I, II, or III, intervention to address decoding, vocabulary, and fluency with students in grades 4-12 who read above 2.5 and have difficulty with long words. "REWARDS is an intense, short-duration intervention that uses teacher directed instruction, requires minimal teacher training, and aligns with components of scientifically based reading research." (Comp. Exh. F, Tr. pp. 375-79)

¹⁹ Although the Number Worlds curriculum focuses on concepts and is not necessarily categorized by grade level, the Level E concepts were described in the Intervention Plan and by the Principal as being 2nd grade skills and concepts. (Resp. Exh. 3, at RESP 59; Resp. Exh. 23, at RESP 172)

²⁰ The Principal tried unsuccessfully to secure additional resources to assist with this new math intervention. He was mindful of the workload on existing staff with regard to running multiple interventions and made the decision to personally provide the instruction because he had no other "extra staff" available and wanted to avoid overwhelming the classroom teacher. (Comp. Exh. A, at A81, A165) To ensure that A.W. did not miss instruction in her regular classroom and

goal was for A.W. to score at least 75% correct, given weekly math assessments from the Number Worlds Level E math materials. Program assessments from Number Worlds were to be administered by the Principal after every five lessons to monitor A.W.'s progress. AEA Consultant Ms. B. was to monitor implementation of the plan. The first five weeks of instruction were devoted to Unit 1, Number Sense. Follow-up testing was conducted on January 14, 2014. I presume the testing covered only the Level E Unit 1 concepts that A.W. had been studying. She achieved a median score of 97% on three trials. (Resp. Exh. 3, at RESP. 59)

Philbin Evaluation: The Educational Evaluation Meeting for A.W. was scheduled for January 28, 2014. (Comp. Exh. A, at A90) While district and AEA staff were implementing these interventions and collecting data, A.W.'s parents decided to pursue another independent evaluation of potential learning disabilities. A.W.'s mother believed A.W. had as much difficulty with reading concepts as with math and she was not fully satisfied with Dr. Demarest's conclusion that A.W. did not have a reading disability. They chose Dawn Philbin to conduct the evaluation. (Tr. pp. 96-98) Ms. Philbin is a master's level Speech Language Pathologist associated with The Speech Language Dyslexia Clinic and specializes in diagnosing, screening, and remediation of language-based Dyslexia. (Comp. Exh. A, at A28)

Ms. Philbin met with A.W.'s parents, gathered background information, and administered several standardized assessments on December 27, 2013. She later prepared a report of her findings. (Comp. Exh. A, at A13-28) The assessments administered included: the Comprehensive Test of Phonological Processing (CTOPP); an informal test of sound segmentation and blending in nonsense words; portions of the Woodcock Johnson Tests of Achievement III; and the Word Identification and Spelling Test (WIST). The CTOPP revealed uneven development of phonological processing skills and marked weakness in two of five composite skill categories. WIST scores showed significant deficits in overall word identification skills, spelling skills, and sound to symbol skills. Philbin interpreted the test results as evidencing a language-based learning disorder, also known as Dyslexia. (*Id.* at A17-19) A.W. did not appear to understand word structure patterns used within the English language. (*Id.* at A21) The remaining test results were also consistent with Dyslexia.

Ms. Philbin concluded that A.W. clearly exhibited Developmental Dyslexia at a moderate classification level, as well as Mixed Receptive and Expressive Language Disorder, and Expressive Language Disorder – Developmental Aphasia and Word Deafness. (*Id.* at A22-23) In Philbin's view, all areas of A.W.'s language delays would

accommodate the Principal's schedule, the instruction usually took place in the Principal's office during A.W.'s lunch recess. (Resp. Exh. 23, at 171; Tr. pp. 123-24)

The Principal is not licensed as a special education teacher. He holds a Master Educator License with the following endorsements: K-6 Teacher Elementary Classroom, K-8 German, PK-K Teacher PreKindergarten-Kindergarten Classroom, and K-8 Reading. He also holds Professional Administrator License with the endorsements to serve as a PK-12 Superintendent & AEA Administrator, PK-8 Principal, and Evaluator. (BoEE license file)

improve as her dyslexia improved. She recommended use of an Orton-Gillingham based instructional program, such as the Wilson Language Program, Barton Reading System, the original Pure Orton-Gillingham Program, or another similar program to remediate A.W.'s skill deficits.²¹ (Id at A24) Early on the morning of January 27, 2014, the day after she received it, A.W.'s mother sent copies of the Philbin report to the Principal and Ms. D. (Comp. Exh. A, at A169)

Evaluation meeting, report, and prior written notice: The Educational Evaluation meeting was held as scheduled on January 28, 2014. Prior to the meeting, Ms. B. – the AEA Consultant primarily responsible for conducting the evaluation – prepared a draft Educational Evaluation Report (EER) that was available for participants to review at the meeting. (Comp. Exh, A, at A91-96, Tr. pp. 104-05) The draft was prepared and distributed before Ms. B. received the Philbin evaluation report. Neither the Philbin evaluation nor the clinical neuropsychological evaluation completed by Dr. Demerest in the fall of 2012 is mentioned in the EER or listed among the data sources considered. Ms. B. later reported that the Philbin evaluation report was discussed during the Evaluation Team Meeting on January 28th. (Comp. Exh. A, at A85) A.W.'s mother does not recall any discussion of either of these outside evaluations. (Tr. p. 105)

The EER was prepared using the uniform AEA-developed EER form that is available through the Iowa IDEA system. The form includes a series of questions prompting entry of responses detailing concerns about the student and the student's educational progress, discrepancy, and needs. None of the questions directly ask if the team determined that the student has a disability. The report for the January 28, 2014, evaluation does not state whether the team found that A.W. has a specific learning disability.²² (Resp. Exh. 27)

The EER begins with a description of the areas of concern regarding A.W.'s academic performance, ways in which she had been instructed, and potential barriers to progress not related to disability. Comments in this section of the report highlight the fact that A.W. did not receive public school education prior to the 2013-2014 school year.

²¹ “Orton-Gillingham is a broad, multisensory approach to teaching reading and spelling that can be modified for individual or group instruction at all reading levels. Teaching sessions are action oriented with auditory, visual, and kinesthetic elements reinforcing one another. The approach targets persons with the kinds of language processing problems (reading, spelling, and writing) associated with dyslexia.” USDE What Works Clearinghouse – WWC Intervention Report for unbranded Orton-Gillingham-based strategies, available at https://ies.ed.gov/ncee/wwc/Docs/InterventionReports/wwc_ortongill_070110.pdf (last accessed 1/29/2017)

²² More than one copy of this initial EER is included in the record. The copy found at Complainants' Exhibit A, pages A91-96, is the draft version completed prior the January 28th meeting. (Tr. pp. 104-05) The copy found at Complainants' Exhibit A, pages A170-76, is the amended version of the report completed on January 30, 2014. (Tr. pp. 105-106) Respondents' Exhibit 27 is another copy of the amended EER, which was represented to include portions of test inadvertently omitted from the copies found in Complainants' Exhibit A. (Tr. 817-18)

A.W. has been home-schooled (competent private instruction) previous to the current school year. No records of attendance are available. A.W. did not have access to targeted or intensive interventions prior to the current school year.²³

* * *

... On the list of curriculum materials provided by the parent ... it does not appear that A.W. has been exposed to the same grade level scope and sequence of skills as that of the same grade level peers in the areas of reading, math, and written expression. ...

(Resp. Exh. 27, at p. 2) The second section of the report addresses “Educational Progress” and includes description of standards and benchmarks for students of the same age or grade level; the specific interventions (i.e. targeted or intensified instruction and curriculum) provided to address areas of concern; A.W.’s rate of progress in response to the interventions; and her current performance as assessed during the evaluation period. As summarized in the EER: “[A.W.]’s rate of progress on all math interventions is well above research-based expectations. [A.W.]’s growth rate based on additional reading practice was less than expected, although additional reading fluency data exists (data collected during evaluation and recent DIBELS benchmark assessment data) indicate good growth.” (*Id.* at pp. 2-4)

The third section addresses “Educational Discrepancy” and sets out current performance data for A.W. based on a variety of testing conducted in December 2013 and January 2014, expected peer performance on the same measures, and the degree of A.W.’s discrepancy from expected performance. A.W.’s performance on various math and reading assessments ranged from near expectations for reading comprehension to 1.27 times discrepant on reading fluency based on winter DIBELS benchmark testing.²⁴ She was noted to write fluently, but with spelling and scores on correct words per minute well below expectations (12th percentile). Based on this data, she was found to be “not significantly discrepant” from expectations for her peer group. (*Id.* at pp. 5-6) This section concludes with the following summary of whether A.W.’s performance was unique from a comparable group.

Given that A.W. did not have access to the scope and sequence of core instruction with options for targeted and universal instruction as did her peers prior to enrolling in [public school], her performance was unique compared to peers when she enrolled in 4th grade at [] Elementary. When given daily access to this scope and sequence of core instruction, in addition to targeted/intensive instruction, her Response has been beyond

²³ This is the draft report language. At A.W.’s mother’s request, this sentence was revised in the final version of the EER to read: “A.W. did not have access to targeted or intensive interventions typically provided in the public school prior to the current school year.”

²⁴ While reading intervention progress monitoring data showed minimal progress in reading fluency (growth from 62 to 65 CWPM), A.W. achieved 81 CWPM on the winter benchmark oral fluency assessment and 85 CWPM on DIBELS assessments conducted as part of the evaluation.

what is typical. Given this Response to instruction, we do not consider A.W. unique when compared to peers because of her rate of growth, although targeted instructions continues to be needed to assist her with reducing the gap from peers.

(*Id.* at p. 6)

The final section of the EER form addresses “Educational Needs” with regard to instruction, curriculum, and learning supports. The team found that A.W. needed continued targeted interventions to address reading and math deficits. The evaluation process (and EER form) required the team to determine whether the identified needs “will require services and supports that exceed the capacity and obligation of the general education program and resources?” This question was answered: “Based on above data, no services and/or supports outside of general education are appropriate or needed at this time.” (*Id.* at pp. 6-7)

Prior Written Notice of the decision that A.W. was not entitled to special education was prepared and issued by AEA Consultant Ms. B. a few days after the meeting. Ms. B. asked AEA Regional Director Jones to review a draft of the notice. At Jones’ suggestion, Ms. B. included the outside evaluation report from SLP Philbin, as well as evaluation done by Dr. Demarest, in the list of data used as a basis for the decision. (Comp. Exh. A, at A177-78) The reason for the action taken was explained as follows:

Results of full and individual evaluation indicate that [A.W.] has made progress when provided additional practice and/or instruction in the areas of reading and math. Academic assessment data does not indicate a significant discrepancy, with the exception of the impact of spelling on her written expression skills. [A.W.] has not been exposed to the same grade level scope and sequence of skill as that of the same level peers in the areas of reading, math, and written expression, and with [A.W.]’s rate of progress given the type of instruction provided during the evaluation stage, she is not demonstrating a need for specially designed instruction that is provided through special education services. Health was also evaluated, and no needs were determined to require ongoing health interventions at school.

(Comp. Exh. A, at A97)

Parents reaction: Soon after the evaluation meeting, A.W.’s targeted math intervention was revised to advance her study from Level E to Level F of the Number Worlds program. The target behavior continued to be to increase A.W.’s “ability to acquire grade math skills and concepts.” The new plan, dated February 11, 2014, was for math instruction using materials in Number Worlds Level F.²⁵ Baseline placement testing

²⁵ The Principal described these as second or third grade concepts. (Resp. Exh. 23, at RESP 172)

showed A.W. was performing below “75% criteria on Level F placement tests for number sense [63%], number patterns & relationships [0%], addition & subtraction [38%], multiplication [38%], and data analysis & application [50%].” This intervention continued to be provided for 30 minutes daily by the Principal. The goal was for A.W. to score at least 75% correct, given weekly math assessments from the Number Worlds Level F math materials. AEA Consultant Ms. B. was to continue monitoring implementation of the plan. (Resp. Exh. 3, at RESP. 61)

A.W.’s parents did not agree with the outcome of the evaluation. They were particularly concerned about the minimal improvement of A.W.’s reading fluency and decided to procure tutoring for her. Initially they went back to SLP Dawn Philbin, where A.W. participated in weekly small group tutoring using the Wilson method.²⁶ (Tr. p. 115) A.W.’s mother was later introduced to Carol Hammen, an independent reading tutor using the Barton method.²⁷ Ms. Hammen had experience working with students with dyslexia, was available to provide one-on-one tutoring twice each week, and her services were less costly than Philbin’s. A.W.’s parents decided to switch tutors. (Tr. p. 116) A.W. attended her first tutoring session with Hammen on June 5, 2014. (Comp. Exh. B, at B1)

In addition to securing tutoring for A.W., A.W.’s parents prepared a memorandum outlining the reasons for their disagreement with the evaluation, which they sent to AEA Consultant Ms. B., A.W.’s elementary Principal, Ms. D., and the District Director of Special Education on March 27, 2014. (Comp. Exh. A, at A180-82) They questioned how much weight was afforded to concerns previously expressed to them by the Principal and Ms. D. and to the reports of the outside evaluators; questioned the meaning of and weight given to some of the performance data; and requested a description of the interventions that had been used with A.W. They also questioned why some of the instruction that A.W. had been receiving was not deemed to be special education, explaining their concern as follows:

[W]hen [A.W.] is removed from the general education classroom and is instructed using different materials from those her peers receive, she is being treated as though she were already receiving special education.

²⁶ Wilson Reading System® is an Orton-Gillingham based “supplemental reading and writing curriculum designed to promote reading accuracy (decoding) and spelling (encoding) skills for students with word-level deficits.” USDE What Works Clearinghouse – WWC Intervention Report for Wilson Reading System, available at https://ies.ed.gov/ncee/wwc/Docs/InterventionReports/WWC_Wilson_Reading_070207.pdf (last visited 3/17/2017)

²⁷ Barton Reading & Spelling System method is an Orton-Gillingham based “one-to-one tutoring system designed to improve the reading, writing, and spelling skills of children, teenagers, or adults who struggle due to dyslexia or another learning disability.” USDE What Works Clearinghouse – WWC Intervention Report for Wilson Reading System, available at https://ies.ed.gov/ncee/wwc/Docs/InterventionReports/wwc_barton_070110.pdf (last visited 3/17/2017)

However, this arrangement is informal and without the direction and protection of an IEP. Without the formality of an IEP, the interventions and instruction used are subject to time and teacher availability and could be discontinued at any time.

(*Id.* at A182)

The District and AEA did not provide a written response to the questions posed in this memorandum. They did schedule a meeting, which was held on April 10th or 11th, to address to A.W.'s parents' questions and discuss the option of "second opinion" review of the evaluation. (Resp. Exh. 23)²⁸ A.W.'s parents gave consent for a second opinion evaluation and provided a copy of the Demarest evaluation report for consideration by the AEA, along with the Philbin report. (Comp. Exh. A, at A114-15, A191)

Second opinion evaluation / spring 2014: Terry Anselme, an AEA Special Education Consultant not regularly serving the District, was assigned to conduct the second opinion evaluation.²⁹ Ms. Anselme focused upon A.W.'s performance and progress to gauge the effectiveness of current interventions. She reviewed progress monitoring data, reviewed the Demarest and Philbin evaluation reports, and tested A.W. using the same assessment tools employed for the initial evaluation. (Tr. pp. 698-99) Anselme also met with A.W.'s parents to gain a better understanding of her homeschooling; interviewed Ms. D. – A.W.'s 4th grade teacher; the Principal – who continued to work with A.W. 30 minutes each day for her pull-out targeted math intervention; and Ms. R., the reading specialist assigned in December to give A.W. 20-30 minutes of one-on-one daily instruction on de-coding multisyllabic words using REWARDS program materials.³⁰ (Tr. pp. 700-07, 719-721)

²⁸ The Complainants and Respondents each submitted an informal transcript of this meeting. The transcripts were prepared from different recordings. The Respondents' version, Resp. Exh. 23, is more comprehensive than the Complainants' version, Comp. Exh. A, at A180-190a. (Tr. p. 119)

²⁹ Ms. Anselme has three post-secondary degrees: a Bachelor's degree in Elementary Education, a B.A. Ed. in Science Education, and a Master's degree in Special Education. She holds a Professional Administrator License (inactive) and a Master Educator License, with endorsements for: K-6 Teacher Elementary Classroom; K-8 English/Language Arts; K-8 Reading; K-8 Mildly Disabled; K-8 Mental Disabilities Mild/Moderate; K-8 Multicategorical Resource Mild; K-8 Instructional Strategist; and Special Education Consultant, ages 5-21. (Comp. Exh. A, at A127; BoEE license file) She has been a consultant with the AEA for the past 8 years.

³⁰ It is not clear from the record precisely when the REWARDS instruction was discontinued, but it appears to have remained in place at least through A.W.'s 4th grade year. When asked about this intervention at hearing, Ms. D. could not recall whether the A.W. actually received the REWARDS instruction. However, the January 28, 2014, Educational Evaluation Report lists "instruction for 20-30 minutes daily using REWARDS materials" as one of the implemented interventions. (Tr. p. 427, Resp. Exh. 27) And three months later, during the April 2014 meeting with A.W.'s parents, the Principal referred to it as a current intervention when explaining why he was providing A.W.'s pull-out instruction in math ("... my reading teacher has

Anselme testified that she reviewed Philbin evaluation report and found it helpful, but believed some of the skill gaps identified during that evaluation could be attributed to lack of exposure to concepts. (Tr. 705-06) Anselme did some additional assessment of A.W.'s phonics skills to measure deficiencies identified in the report. (Tr. 733-34) She also discussed the outside evaluations with a school psychologist, who was involved in the evaluation process to assess A.W.'s behavior, and used information in the report to inform her evaluation. (Tr. 716-17) Anselme applied the evaluation criteria dictated by the AEA forms and focused on A.W.'s progress with educational interventions, current discrepancy and need for special education in her educational setting. She did not find the Philbin evaluation particularly on point with these inquiries. (Tr. 717, 733-34, 738-39)

Anselme was not aware that A.W. had been receiving weekly private tutoring for reading since shortly after the first evaluation was completed. (Tr. 722-23, 735-36) Based on the totality of the information she gathered, including evidence showing that A.W.'s reading, writing, and math skills progressed from the time of the initial evaluation through May of 2014, Anselme was of the opinion that A.W. performed poorly during the outside evaluations largely because there were gaps in her prior education and she lacked exposure to curriculum compared to her peers. In Anselme's opinion, ongoing deficiencies in A.W.'s performance were not the result of a disability. (Tr. 705-06, 731-32)

The second opinion evaluation was documented on an Educational Evaluation Report that Anselme drafted for an evaluation meeting held on May 22, 2014. (Resp. Exh. 27, pp. 8-15) As with the initial report, this EER was prepared by completing the Iowa IDEA form. The first section of the form includes summaries of the Demarest and Philbin evaluations, as well as the initial educational evaluation. The possible inadequacy of homeschool instruction is reiterated as an area of concern regarding prior instruction. (*Id.* at pp. 6-7)

Targeted interventions and progress on performance measures are summarized in the second section of the EER. All of the interventions A.W. received after the initial evaluation were described, except the daily one-on-one reading instruction she was getting from Ms. R. using the REWARDS program to work on phonics, decoding, and repeated reading practice. At hearing, Anselme explained that this intervention was not mentioned in the discussion because the focus of this evaluation was upon reading fluency and math. She also acknowledged, however, that the skills presented in REWARDS should carry into improved reading fluency. (Tr. p. 721-22)

A.W. participated in Iowa Assessment testing in February of 2014. Her composite scores placed her in the 27th national percentile (grade level 3.5) in mathematics and the 28th percentile (grade level 3.4) in reading. Beyond noting that A.W. was currently

to work with kids grades 1 and 2 although we do have her working with [A.W.] in the area of reading ..."). (Resp. Exh 23, at RESP 174)

working on Level F of the Number Worlds intervention, progress monitoring data from this math intervention is not discussed in the EER.³¹ A.W.'s performance on retesting showed that A.W.'s scores on CBM math assessments improved significantly between the two educational evaluations, increasing from the 25th percentile to the 65th percentile on the assessment for mixed math and from the 28th to the 90th percentile on the assessment for math application skills. Although A.W.'s reading fluency improved to 103 CWPM on spring DIBELS benchmark testing and she attained 97 CWPM on DIBELS fluency probes during the evaluation period, the progress monitoring chart for the reading intervention probes shows she only exceeded 90 CWPM on two probes prior to mid-April.³² CBM assessments showed A.W.'s writing skills were much improved since the time of the initial evaluation.

The EER found the A.W.'s performance was not significantly below that of same grade peers in the area of reading, writing, or math. The evaluator noted: "Significant discrepancy is at least 1.5 to 2.0 times discrepant and/or scores that fall below the 15th percentile. [A.W.] does not meet this criteria in reading, writing, or math." (Resp. Exh. 27, at p. 14) As to educational needs, the report found A.W. benefited from "instruction delivered in the typical manner provided in general education classrooms," including large and small group instruction, and "short periods of extra repetition to solidify the skills taught ..." Continuation of a targeted intervention in math to address remaining skill gaps was recommended. The EER concluded "no services and/or supports outside of general education are appropriate or needed at this time." (*Id.* at p. 15)

The Evaluation Team met on May 22, 2014. Anselme provided a draft of the EER to A.W.'s parents before the meeting and followed up with them by telephone to see if they had any questions about the draft. They did not. (Tr. 711) An unofficial transcript of this meeting was entered into evidence. The team focused largely on the interventions provided to A.W. and did not discuss the Demarest or Philbin evaluation. (Resp. Exh. 24, RESP. 211-58) The EER was not revised as a result of the meeting. After the meeting, the Principal issued prior written notice stating that the team considered and rejected special education services or a 504 plan for A.W. The reason for this action was explained as follows: "After completing a second opinion evaluation for [A.W.], [A.W.] does not qualify for special education services in the areas of math, reading, and writing.

³¹ Progress monitoring assessments for this intervention were to be given after every five lessons, but the progress monitoring chart has only one data point in February and one data point in March. Weekly assessments resumed in April, at about the time the A.W.'s parents met with District representatives to discuss their concerns, and continued throughout May. (Resp. Exh. 3, at RESP 62)

³² In addition to fluency and accuracy, literacy data monitored by the District includes each student's Instructional Guided Reading Level – a measure of the level of difficulty of reading material at which the student is able to learn. (Tr. pp. 775-77) Instructional level expectations for the District are shown on Respondents' Exhibit 8 (RESP 100). Testing done in the fall of 2013, showed A.W. was then reading at the instructional level expected for the fall of second grade when she entered the District. By the spring of 2014 her instructional level had risen to that expected for the fall of 4th grade. (Tr. pp. 412-13; Resp. Exh. 5, RESP 80)

The team agrees that she will continue to receive her instructional plan in the areas of reading and math through general education.” (Comp. Exh. A, at A126)

Summer 2014 math intervention: During the May 22nd evaluation team meeting, the Principal offered to meet with A.W. at least weekly through the summer to continue work on the targeted math intervention and pre-teach some of the concepts she would encounter in 5th grade. (Resp. Exh. 24, at RESP 243-45) During the months of June and July, A.W. progressed through Unit 3 of Number Worlds Level F. (Resp. Exh. 3, at RESP 62) On July 30, 2014, the Principal reported to AEA Consultant Ms. B. that he tutored A.W. for an hour a week most weeks of the summer. He also asked whether pre-teaching would be considered an intervention, noting: “I think it would be critical that we PRE-TEACH the work that will be taught in her 5th grade classroom for EDM. I would like to spend my time with her this coming year pre-teaching that information ... so when she gets in the classroom ... it will not go over her head.” (Comp. Exh. A, at A204)

5th grade interventions: A.W. returned to [] Elementary in the fall of 2014 and was assigned to Ms. S.’s fifth grade class.³³ Prior to the start of the school year, Ms. S. spoke to Ms. D. about the literacy interventions that were done the prior year. (Tr. 435, 437-38) After fall baseline testing was completed, a fifth grade reading intervention plan was developed. The plan called for a “repeated reading strategy” to be used to provide A.W. with “decoding strategies for words that she [was] unable to independently decode on practices passages during the week.” Baseline testing on the fall FAST assessment found A.W. read 119 CWPM, a discrepancy of only 8 words from expected performance. The goal was to increase A.W.’s performance to at least 154 CWPM by the spring 2015 FAST assessment.³⁴ (Resp. Exh. 21, at RESP. 150) An associate worked with A.W. three or more times each week doing repeated readings of one DIBELS the 5th grade passage each week. The classroom teacher then provided one-on-one instruction for 15 minutes two times per week to directly address errors and work on fluency. (Tr. 443-45) A.W. also received core instruction through large group and small group guided reading. (Tr. 440) In addition, A.W. continued to receive Barton system tutoring from Ms. Hammen approximately twice each week throughout the school year. (Comp. Exh. B)

The targeted math intervention from the prior year carried into fifth grade unchanged and the Principal continued to work with A.W. for approximately 30 minutes each day

³³ Ms. S. has a Bachelor’s degree in elementary education. She holds a standard teaching license with the following endorsements: K-6 Teacher Elementary Classroom, K-8 Social Studies, and K-8 History. (Tr. pp. 402-03; BoEE license file)

³⁴ The Formative Assessment System for Teacher (FAST) is a “universal screening” assessment measuring reading fluency and accuracy. DIBELS is a similar assessment. The District had established benchmarks for grade-level performance on both assessments. During the 2013-14 school year the District used DIBELS for universal progress monitoring. The following year the District began using the FAST for the same purpose. Both assessments are universal screening tools that may be used to monitor student progress and evaluate the effectiveness of literacy core instruction and facilitate the implementation of MTSS. (Tr. pp. 226-28, 442, 473)

using Level F of the Number Worlds curriculum. (Tr. 455; Resp. Exh. 3, at RESP 62-63) In mid-November 2014, A.W.'s targeted math intervention was again revised to advance her study from Level F to Level G of the curriculum. The target behavior continued to be to increase A.W.'s "ability to acquire grade math skills and concepts." Baseline placement testing showed A.W. was performing below "75% criteria on Level G placement tests for number sense [38%], number patterns & relationships [50%], division [25%], geometry and measurement [0%], and data analysis & application [25%]." As before, instruction for this intervention was provided 30 minutes daily by the building Principal. The goal was for A.W. to score at least 75% correct, given weekly math assessments from the Number Worlds Level G math materials. Performance monitoring data for this goal was recorded only four times from the date the plan was implemented through mid-February of 2015.³⁵ (Resp. Exh. 3, at RESP. 68-69)

UIHC Evaluation: In November of 2014, approximately three months into her fifth grade year, A.W. underwent an evaluation at the University of Iowa Hospitals and Clinics (UIHC), Pediatric Psychology Learning/Attention Disorders Clinic. This was an independent educational evaluation paid for by the AEA at the parents' request. (Tr. 130) Tammy Wilgenbusch, Ph.D., gathered background information including reports of the prior evaluations from the parents and administered cognitive (select subtests of the WISC-IV), neuropsychological (NEPSY-II Receptive One Word Picture Vocabulary Test), and achievement (select subtests of the WIAT-III) assessments. Dr. Wilgenbusch's evaluation report was issued on December 10, 2014. (Comp. Exh. A, at A29-A37) Results of the assessments were summarized as follows:

Intelligence: ... Overall, results of the WISC-IV indicate that A.W. generally has average verbal reasoning skills, abstract reasoning, and working memory [verbal comprehension index score 93], but significant deficits with visual-spatial reasoning [perceptual reasoning index 79]. This is similar to previous evaluation. Given the discrepancy in her skills, a full scale IQ was not obtained as it is not a valid indicator of her pattern of strengths and weaknesses with her cognitive skills.

Language: A.W. was administered a test of verbal fluency in which [] she was asked to name as many words as she could in a certain category in one minute, and scored above average. On a picture vocabulary test that did not require[] verbal expression she scored in the lower half of the average range.

Visual-Spatial/Motor: A.W. was administered a task in which she was asked to copy geometric designs to assess visual-motor integration and organization, and scored extremely low. A.W. was also administered tests

³⁵ This intervention plan was apparently reissued on February 20, 2015, and A.W. continued to work with the Principal on Level G Number Worlds material throughout A.W.'s 5th grade year. The February 20, 2015 version of the math intervention plan, which the Complainants indicate is found within the full set of school records at AW-1376 – AW-1377, is not contained in the hearing record. The math intervention progress monitoring charts offered by the Respondents do not record testing after mid-February of 2015. (Resp. Exh. 3, at RESP 66)

in which she was asked to judge the relative orientation of arrows pointing to a target and mentally manipulate and match geometric designs to assess visual-spatial abilities without a motor component, and scored below average. A.W. completed a test in which she was asked to match emotions on children's faces and scored in the low end of the average range.

Achievement: ... In regards to reading, comprehension skills and ability to sound out nonsense words were low average while word recognition, accuracy, and fluency were below average. In regards to math skills, her math reasoning was below average [while] her math computation was low average.

(*Id.*, at A30-31) Dr. Wilgenbusch gave the following summary of her impressions:

Testing today found that in general A.W. has average verbal skills, memory, and fluid/abstract reasoning. However, she has significant difficulties with visual-spatial processing consistent with a Nonverbal Learning Disorder. In addition, she has below average word identification and accuracy when reading, consistent with previous testing, confirming a diagnosis of Dyslexia. While her math computation skills today were generally average, her math reasoning ability was below average as well, confirming a diagnosis of Dyscalculia (Math Disorder). While associated with visual-spatial skills, A.W.'s visual-motor integration (handwriting) was found to be extremely low and warrants a diagnosis of Dysgraphia. Overall, A.W. has several cognitive learning disabilities that have likely significantly impacted her academic skills. She has received excellent private tutoring and individualized instruction, but continues to struggle despite these resources. She definitely has some strengths that aid her performance in school, such as verbal comprehension and memory, but her specific word identification, reading accuracy and math problem solving skills are significantly below peers (at or below the 12th percentile rank).

(*Id.*, at A32) The evaluation report closed by "strongly recommend[ing] that an IEP be put in place for A.W. as she will continue to need additional, direct instruction in reading and math skills in addition to accommodations for her disabilities" and suggesting various instruction methods and accommodations to address A.W.'s deficits. (*Id.*, at A32-36)

5th grade assessments and progress monitoring: A.W. participated in Iowa Assessment testing in January of 2015. Her composite scores fell within the 54th national percentile (grade level 5.6) in mathematics and the 41st percentile (grade level 5.0) in reading; placing her in the "proficient" range in both math and reading. (Resp. Exh. 6, at RESP 88-89; Tr. p. 460) Fall literacy benchmark data for A.W.'s 5th grade year placed her fluency rate as 119 CWPM and her instructional guided reading level at midyear 4th grade. Her fluency rate improved to 154 CWPM on spring 2015 benchmark testing, and her instructional level increased to mid-year 5th grade. (*Id.*, at RESP 90) On both of

these measures, A.W.'s performance was approaching grade-level expectations by the spring of 5th grade. Progress monitoring data for her reading intervention shows a gradual increase in fluency through the school year. A.W. achieved 161 CWPM on May 7, 2015, follow-up testing and her reading fluency problem was considered resolved. (Resp. Exh. 3, at RESP 64-76; Exh. 21, at RESP 150-152)

6th grade interventions: In the fall of 2015, A.W. entered 6th grade – the first year of middle school. Her parents arranged for a meeting with the Principal of the District Middle School before the school year began to ensure he understood A.W.'s needs and their concerns. (Tr. 134-35) The Principal explained options for interventions at the middle school. One class period a day, "EXCEL," was available in the middle school schedule for assistance to be provided to students who needed extra help, but did not have an IEP in place. They discussed the fact that A.W. had difficulties with both reading and math and A.W.'s parents were advised that they needed to choose one subject area on which to focus an intervention. At the time of the meeting, A.W. was still receiving Barton tutoring with Carol Hammen on a regular basis, so they opted to focus in-school assistance on math. (Tr. 134-35, 800)

A.W. had no reading intervention in place at school during her 6th grade year. (Tr. 789) And, for a variety of reasons, the frequency of A.W.'s tutoring sessions with Hammen declined after mid-August 2015. No tutoring took place in September or October. The tutoring resumed twice each month in November, December, and January and was suspended after a final session on February 1, 2016. (Comp. Exh. B, at B4-5, Tr. 45)

A.W.'s 6th grade math intervention was delivered during the EXCEL period. All middle school students were scheduled for the EXCEL period every other day, opposite physical education. (Tr. 806) Based on student need, the class time could be used for a variety of activities. Most students worked on project groups, some worked on extended learning (advanced programs), and others received interventions or supplemental minutes to support special education. Intervention time for all students in both math and reading was during EXCEL. (Tr. 799-801)

As the fall term began, A.W. received additional support in math as a part of a small-group intervention during each EXCEL period. No written intervention plan was in place. (Tr. 136-37) No monitoring data, apart from regular classroom data was maintained. (Tr. 802) Nine-weeks into the school year, at the end of the fall term, the school transitioned to the current "more flexible way of doing interventions in math." (Tr. 790, 802) A.W. was not provided with an ongoing, pre-planned math intervention. She and all other students were assigned to EXCEL project groups. She and other students were pulled out of their group for interventions based on classroom performance showing a need for support on a specific learning target. (Tr. 801, 810) A.W.'s parents were not notified when the system for delivering math interventions was changed. (Tr. 137, 802) A.W. received a total of eight targeted math intervention sessions during the winter and spring terms of 6th grade.³⁶ (Tr. 790)

³⁶ Math teachers were also available for an additional 10 to 15-minute block of "advisory time" or homeroom at the lunch break to provide additional assistance to special education students

6th grade assessments and progress monitoring: A.W. participated in Iowa Assessment testing in February of 2016. Her composite mathematics score placed her in the 40th national percentile, a drop from the 54th percentile on the assessments the prior year. (Resp. Exh. 7, at RESP 99) Her composite reading score placed her in the 31st national percentile, down from the 41st percentile the prior year. She was “not proficient” in reading. (Resp. Exh. 7, at RESP 98) As a result of the drop in her performance in reading on the Iowa Assessments additional testing of A.W.’s reading skills was done by the school using a FAST screening to determine her needs going forward. In June, the Middle School Principal wrote to A.W.’s parents to tell them that the District would be putting a reading intervention back into place for 7th grade. (Tr. 139)

Due Process filing / Educational Evaluation Summer 2016: On May 16, 2016, the Due Process Complaint initiating this proceeding was filed. The Complainants, District, and AEA agreed to participate in a facilitated mediation session, held on June 10, 2016, and entered into a “Next Steps Agreement.”³⁷ One of the items they agreed upon was the completion of another full, individual educational evaluation to reexamine whether A.W. was entitled to receive special education under the IDEA. The parties agreed that this evaluation would include consideration of following factors for determining whether a child has a specific learning disability, as required in the federal regulation and state rule:

a. Lack of adequate achievement. The child does not achieve adequately for the child’s age, grade-level expectations or such grade-level standards the SEA (State Education Agency) may choose to adopt in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or grade-level expectations or such grade-level standards the SEA may choose to adopt:

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

b. Lack of adequate progress.

and those with interventions in place. (Tr. 808) EXCEL and the advisory time are the only blocks of the school day that students are not involved in regularly scheduled general education classroom activities or guided study/study hall. (Tr. 804-07)

³⁷ The mediation agreement was not offered as a hearing exhibit. A copy of the agreement is included in the case file as Exhibit A to *Complainants’ Resistance to Respondents’ Request to Halt Adjudication of Law Points*, filed on July 1, 2016. The Iowa Department of Education does not appear to have participated in the mediation and is not a party to the agreement.

(1) The child does not make sufficient progress to meet age expectations, grade-level expectations, or such state-approved grade-level standards as the state may choose to adopt in one or more of the areas identified in 41.309(1)“a” when using a process based on the child’s response to scientific, research-based intervention; or

(2) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, grade-level expectations, such state-approved grade-level standards as the state may choose to adopt, 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 rules 281–41.304(256B, 34CFR300) and 281–41.305(256B, 34CFR300).

281 IAC 41.309(1)(a), (b) (mirroring 34 CFR § 300.309(a)(1), (2)(i)-(ii)).

As detailed above, the educational evaluation process described in the 2006 and 2015 state Special Education Eligibility and Evaluation Standards and detailed in the AEA Special Education Procedures manual focuses the determination of whether a student has a disability upon the elements of progress and discrepancy; with progress being measured solely in terms of response to intervention. Neither the state standards nor the AEA manual mentions consideration of the pattern of strengths and weakness in performance or achievement as an alternate means of assessing progress. This type of specific learning disabilities evaluation is not included in the AEA procedures manual. As a result, Heartland AEA does not typically perform a “patterns of strengths and weaknesses” analysis when evaluating students. (Tr. 612-13, 744-45, 779)

AEA Special Education Consultant Christina Glaub and AEA School psychologists Dorothy Landon and Tim Blakeslee, and AEA Math Consultant Vickie Borich were selected to evaluate A.W. in the summer of 2016. The evaluation included a review of existing school records and prior evaluations; interviews with A.W., her parents, tutor Carol Hammen, and A.W.’s middle school math and language arts teachers; mathematics diagnostic assessments; a literacy intervention conducted between June 28th and August 4th; and observation of A.W. in the general education setting and during the summer intervention. (Tr. 497-500; Resp. Exh. 1)

The literacy intervention focused on automaticity, comprehension, multisyllabic word reading, and paragraph and sentence writing. It was delivered in a one-to-one setting with two three-hour long sessions per week, later revised to four 1.25 hour long sessions per week because the team believed that more frequent instruction would be more beneficial. Pre-intervention testing showed A.W. was reading 161 CWPM on 6th grade level material (slightly above the expected level of performance of 158 CWPM) and 114 CWPM on 7th grade level material (below the expected level of performance of 134). A.W.’s median performance on testing after the six-week intervention was 147 CWPM on 6th grade level text (a decrease of 14 correct words per minute) and 117 CWPM on 7th grade level text (an increase of 3 correct words per minute). Her performance on an assessment of written expression also decreased from a pre-intervention score of 57

CWS to a post-intervention score of 48 CWS. (Tr. 542-44; Resp. Exh. 1, at RESP. 8-9, 34-37) The evaluation did not include a mathematics intervention.

Upon review of A.W.'s rate of progress over time, the evaluators concluded that she was meeting current grade level expectations and had progressed as expected across grades 4 through 6 in reading and written expression. For mathematics, they also found no gap between A.W.'s performance and that of her peers on district summative assessments and progress as expected through the 6th grade math curriculum, as evidenced by scores of 70% or higher on 9 out of 10 unit tests. (Tr. 503-05; Resp. Exh. 1, at RESP. 9-10) The evaluators noted the variation in A.W.'s national ranking on the Iowa Assessments for 4th, 5th, and 6th grade, and found that although her progress slowed during sixth grade her standard scores still increased showing some progress. (Tr. 507-12, 554-56, 622-24; Resp. Exh. 1, at RESP. 3)

No cognitive function or processing assessments were administered during the 2016 evaluation. (Tr. 640, 643) Dorothy Landon holds a Ph.D. in school psychology and has worked for the AEA as a school psychologist for 10 years. Dr. Landon was the team member primarily responsible for examining reports of the outside evaluations performed by Philbin and the UIHC. (Tr. 538) She did review and consider the results of cognitive function and norm-referenced achievement test given during those evaluations. Dr. Landon did not refute the validity of the diagnoses of learning disabilities articulated in these evaluations. But she rejected the suggestion that a diagnosis of learning disability was sufficient to establish a disability for purposes of IDEA eligibility because the diagnostic criteria did not consider the student's progress in the academic domain. (Tr. 646-48)

Dr. Landon was also assigned to conduct the "pattern of strengths and weaknesses" analysis. She had not done this specific analysis before and she conducted a brief literature review and selected a 2012 article from the *Journal of Learning Disabilities* for guidance about how to classify the various data they had about A.W. as strengths or weaknesses. (Tr. 612-14; Resp. Exh. 11, at RESP. 103-14) This article examines changes to the methodology for evaluating students suspected of having specific learning disabilities that were mandated by the 2004 amendments to the IDEA and 2006 regulations; and proposes an assessment model incorporating various methods of identifying specific learning disabilities, including RtI, cognitive processing approaches, and the determination of a pattern of strengths and weaknesses. Ultimately, the evaluation team plotted all available data regarding A.W.'s performance on a spreadsheet, modeled after a pattern analysis worksheet taken from the article, to help people visualize her strengths and weaknesses. (Tr. 615-18, Resp. Exh. 1, at RESP. 26-33)

The Educational Evaluation team convened on August 9th and 16th. A draft Educational Evaluation Report was prepared by Dr. Landon and Ms. Gloub prior to the first meeting, using the uniform AEA-developed EER form as a template. The format of the EER is the same as the EERs prepared in 2014. Attachments to the EER include the pattern of strengths and weaknesses worksheet, which was created between the two meetings, and

a Specific Learning Disability (SLD) Eligibility Checklist, which was completed at the conclusion of the second meeting.³⁸ (Resp. Exh. 1, at RESP 19-22, 26-33)

The team concluded that A.W. does have a specific learning disability, as evidenced by the outside evaluations. However, as detailed in the EER and SLD checklist, the consensus of the evaluation team was that A.W.'s educational progress in all areas of concern was adequate; that her current level of performance in reading, written expression, and math was not significantly discrepant from her peers; that she did not exhibit a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved standards, or intellectual development. The response to item 6 on the checklist states: "The parents agreed that A.W. is making sufficient progress on grade-level standards, but they stated that it was only with the levels of support to make it happen (targeted intervention and outside tutoring)." (*Id.* at RESP 20)

The team concluded that, although she benefits from targeted instruction, she does not require services and supports that exceed the capacity and obligation of the general education program. Shortly after the second evaluation meeting, the District issued Prior Written Notice of the finding that A.W. is not in need of special education. (*Id.*, at RESP 18)

A.W.'s parents submitted a written statement responding to the EER. (Resp. Exh. 1, at RESP 23-25) They acknowledged A.W.'s success, but felt that she was able to succeed only due to the multiple supports (private tutoring, school interventions, and informal accommodations) she received over time. The pace of her progress was decreased during her 6th grade year and, given her disability diagnosis, her parents believe special education services and supports are needed for A.W. to maintain progress throughout middle school and high school.

State Complaint: On January 7, 2015, A.W.'s parents filed a State Complaint with the Iowa Department of Education, pursuant to the provisions of 34 CFR sections 300.151 through 300.153 and 41 IAC 41.151 through 41.153. They alleged specific claims now advanced in this proceeding and argued that the failure of the District and AEA to identify A.W. as a disabled child in need of special education as a result of her disability resulted from systematic violations of the child find requirement of Part B of the IDEA. The District and AEA filed a response to the complaint on April 7, 2015, and the Complainants filed additional supporting evidence and a brief in support of their position on in late May 2015.

On January 12, 2016, the Department contacted parties to the complaint to request specific additional information and indicated that a decision on the complaint would be forthcoming after responses were filed. The decision was not issued prior to the filing of

³⁸ The SLD Checklist was presented during August 2016 evaluation. It was created specifically for this case to ensure that the evaluators considered all factors required by state rule for evaluation of a student suspected of having a specific learning disability. (Tr. 143; Resp. Exh. 25, at RESP. 320-22)

the petition initiating this proceeding on May 16, 2016. To date, no decision regarding the complaint has been issued by the Department. It appears that the agency has concluded that the Due Process Complaint encompassed all issues raised by the State Complaint and set complaint aside, as required by 41 IAC 41.152(3).

Conclusions of Law

A detailed discussion of the IDEA requirements for evaluation procedures is set forth below, followed by review of the Iowa rules, and consideration of the specific challenges the Complainants lodge regarding the Iowa evaluation standards and the AEA and District's failure to identify A.W. as a child eligible for special education services and supports.

General principles: The overriding purpose of the Individuals with Disabilities Education Act (IDEA) is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A); *see Bd. of Education of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.E.2d 690 (1982) (examining history and purpose of the Education for All Handicapped Children Act, the first comprehensive federal statute addressing special education from which the IDEA has evolved).

In exchange for accepting federal money to assist in educating children with disabilities, state and local education agencies must agree to make a free appropriate public education (FAPE) available to all qualifying children in their jurisdiction and must ensure that children with disabilities and their parents are provided with guaranteed procedural safeguards with respect to the provision of FAPE. 20 U.S.C. §§ 1412(a)(1); 1415(a); 34 CFR § 300.101. State eligibility for IDEA funds is contingent upon maintenance of rules, regulations and policies that conform to the Act. 20 U.S.C. § 1407(a)(1). States must have in effect policies and procedures that facilitate the identification of all children with disabilities residing in the state and the provision of FAPE in a manner consistent with the substantive and procedural requirements of the IDEA. 20 U.S.C. § 1412(a)(1)-(7). States are also obligated to provide general supervision over LEAs services required to ensure FAPE are provided. 20 U.S.C. § 1412(a)(12). When identifying and providing for the education of children with disabilities within its jurisdiction, each LEA must have in effect “policies, procedures, and programs that are consistent with the State policies and procedures established under section [1412].” 20 U.S.C. § 1413(a)(1).

The procedural safeguards of the IDEA afford parents who believe the Act has been violated a right to seek relief by filing a complaint initiating due process proceedings with respect to “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(6). State hearing officers have broad discretion to order educational relief, including compensatory education benefits, to parents who prevail in an IDEA due process proceeding. *Doe ex rel. Doe v. Todd County School Dist.*, 625 F.3d

459, 465 (8th Cir. 2010); 20 U.S.C. § 1415(i)(2)(C). In addition, attorneys' fees may also be awarded to the prevailing party in some circumstances. *Id.*

Although the vast majority of IDEA due process complaints concern actions of local education agencies, including school districts and AEAs, a "state educational agency may be responsible for violation of the IDEA when the state agency in some way 'fail[s] to comply with its duty to assure that the IDEA's substantive requirements are implemented.'" *Pachl v. Seagren*, 453 F.3d 1064, 1070 (8th Cir. 2006), quoting *John T. v. Iowa Dep't of Education*, 258 F.3d 860, 864-65 (8th Cir. 2001), quoting *Gadsby v. Grasmick*, 109 F.3d 940, 952 (4th Cir. 1997). The same conclusion logically holds true with regard to the procedural requirements of the IDEA. "Systemic violation" of the State's responsibilities under the IDEA may give rise to state liability. *Pachl v. Seagren*, 453 F.3d at 1070, citing *Reinholdson v. Minnesota*, 346 F.3d 847, 851 (8th Cir. 2003); see also *D.M. v. New Jersey Dep't of Education*, 801 F.3d 205, 212-15 (3rd Cir. 2015) ("The fact that E.M. challenges the way in which the Department performs one of its obligations as a state educational agency under IDEA demonstrates that E.M.'s claim falls within the ambit of § 1415.").

Limitation period: Unless the state explicitly implements an alternative time limitation, a parent must request an impartial due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 CFR § 300.507(a)(2). Iowa has adopted a two-year limitations period mirroring the federal law. 281 IAC 41.507(1)(b). This due process proceeding was initiated with the filing of a complaint on May 16, 2016. Any alleged violations occurring prior to May 17, 2014 cannot form the basis for relief.

Burden of persuasion: The burden of persuasion in an IDEA due process proceeding generally falls upon the party seeking relief, whether that is the disabled child or the school district. *School Bd. of Ind. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1010 at fn. 3 (8th Cir. 2006), citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 537, 163 L.Ed.2d 387, (2005). Here, this burden rests upon the Complainants.

Review standard: The Complainants assert that the entitlement evaluation procedures implemented and applied by the AEA and District in this case violated their and their daughter's procedural and substantive rights under the IDEA. A two-part inquiry is generally applied to determine compliance with the IDEA. First, the Court must decide if the school district followed the procedures required by the IDEA. Second, the Court must determine whether the student's education was "reasonably calculated to enable the child to receive educational benefit." *K.E. v. Independent Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011). A violation of IDEA procedures does not automatically establish that the school district has denied the student a FAPE. Rather, a violation of the IDEA will be found "only if the procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Id.* at 807, quoting *Sch. Bd. of Independent Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006) (internal citation omitted).

The failure to properly identify a disabled student can itself be a violation of the IDEA *if* the failure results in the denial of a free appropriate public education to a qualifying child with a disability. *Cf. Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S.Ct. 2484, 2495, 174 L.Ed.2d 168 (2009) (“A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress’ acknowledgment of the paramount importance of properly identifying each child eligible for services.”).

Jamie S. v. Milwaukee Public Schools, 668 F.3d 481, 495 (7th Cir. 2012); *see also L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 1174 (9th Cir. 2016) (noting that a procedural error during the evaluation process is harmless if the student is substantively ineligible for IDEA benefits); *Ind. Sch. Dist. No. 413 v. H.M.J.*, 123 F.Supp.3d 1100 (D. Minn. 2015).

IDEA – Definitions: Each participating State must maintain “child find” policies and procedures to identify and evaluate “all children with disabilities residing in the State ... regardless of the severity their disabilities [] who are in need of special education and related services.” 20 U.S.C. §§ 1407(a)(1), 1412(a)(3)(A). The critical first step to ensuring that all children with disabilities are provided with a FAPE, is the identification of eligible children with disability.

The term "child with a disability" means a child—

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3).

The nearly all of the listed disorders that may constitute a disability under the IDEA are also further defined in the regulations. The definition of each disorder, except specific learning disability, provides that the child has the condition only if it “adversely affects a child’s education performance.” 34 CFR § 300.8(c). For example, an orthopedic impairment or an emotional disturbance is not a “disability” under the IDEA unless the disorder “adversely affects a child’s educational performance.” 34 CFR § 300.8(c)(4)(1), (8).

The definition of specific learning disability does not include the adverse effect on education qualifier. This likely stems from the fact that a specific learning disability is by definition a disorder that directly involves basic psychological processes directly tied to the ability to absorb, recall, and process information; the processes that enable and support learning.

Specific learning disability—(i) *General*. 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 the 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.

(ii) *Disorders not included*. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

34 CFR § 300.8(c)(10) (mirroring 20 U.S.C. § 1401(30)). This does not mean that a disorder of the processes involved in learning qualifies as an IDEA disability even if it does not actually manifest itself by affecting learning, but it does alter the focus of the inquiry. As a result, the IDEA imposes enhanced procedural requirements for identifying children with specific learning disabilities. For all other potentially qualifying disorders the first-level IDEA inquiry focuses on whether the condition adversely affects overall educational performance. When determining whether a child has a specific learning disability, the inquiry focuses on whether the condition adversely affects a specific skill, such as reading fluency and mathematics calculation; which may, but does not always, affect overall educational performance. *See Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 77-81 (1st Cir. 2016) (discussing correlation between educational performance and existence of specific learning disability and holding that district court erred in relying on student's overall academic achievements as determinative of absence of specific learning disability in reading fluency without assessing the relevance of such achievements to her reading fluency).

In all cases, a child is a “child with a disability” under the IDEA only if the child “needs special education and related services” by reason of the qualifying disorder.

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.

20 U.S.C. § 1401(29); 34 CFR § 300.39(a)(1). Several terms used in the statutory definition of “special education” are further defined by the IDEA regulations.

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To 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.

34 CFR § 300.39(b)(3).

IDEA Evaluation Requirements: The child find regulations require the public agency responsible for providing FAPE to pursue an initial IDEA eligibility evaluation when a child is “suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade ...” 34 CFR § 300.111(c)(1). The public agency must obtain informed parental consent before initiating the evaluation. 34 CFR § 300.300(a). If consent is granted, “a full and individual initial evaluation” must be conducted, in accordance with sections 300.305 and 300.306 of the regulations. 34 CFR § 300.301(a).

The public agency must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining – (i) Whether the child is a child with a disability under § 300.8; and (ii) The content of the child’s IEP, ...” 34 CFR § 300.304(b)(1). No single measure or assessment may serve as the sole criterion for determining whether a child has a disability. 34 CFR § 300.304(b)(2). The child must be assessed in all areas related to the suspected disability and the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.” 34 CFR § 300.304(b)(4), (6).

As a part of an initial eligibility evaluation, the IEP Team and other qualified professionals must review existing evaluation data – including information provided by the child’s parents; current classroom-based, local, or State assessment; and classroom based observation. 34 CFR § 300.305(a). The public agency may administer such assessments or other evaluation measures as needed to produce needed data. 34 CFR § 300.305(c). Upon completion of assessment or other evaluation measures, the compiled data provides the basis for determination of eligibility.

(a) *General.* Upon completion of the administration of assessments and other evaluation measures—

(1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in §300.8, in accordance with paragraph (c) of this section and the educational needs of the child; and

(2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

(b) *Special rule for eligibility determination.* A child must not be determined to be a child with a disability under this part—

(1) If the determinant factor for that determination is—

(i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

(ii) Lack of appropriate instruction in math; or

(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria under §300.8(a).

(c) *Procedures for determining eligibility and educational need.*

(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under §300.8, and the educational needs of the child, each public agency must—

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with §§300.320 through 300.324.

34 CFR § 300.306. The procedural requirements of sections 300.04 through 300.306 of the regulations apply to all evaluations, regardless of the nature of the suspected disability.

The additional procedures referenced above for identifying children with specific learning disabilities are found in sections 300.307 through 300.311 of the regulations.

§ 300.307 Specific learning disabilities.

(a) *General.* A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State—

(1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10);

(2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and

(3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).

(b) *Consistency with State criteria.* A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

34 CFR § 300.307 (implementing 20 U.S.C. § 1414(b)(6)).³⁹ Additional members, including a regular education teacher and “[a]t least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher” must be a part of the evaluation team. 34 CFR § 300.308.

§300.309 Determining the existence of a specific learning disability.

(a) The group described in §300.306 may determine that a child has a specific learning disability, as defined in §300.8(c)(10), if—

(1) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

(2)(i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or

(ii) 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; and

³⁹ For many years prior to amendment of the IDEA in 2004, the federal regulations allowed evaluators to find a child had a specific learning disability if – (1) the child did not “achieve commensurate with his or her age and ability” and (2) the evaluation team found a “severe discrepancy between achievement and intellectual ability” in one or more of the identified areas of skill. 34 CFR § 300.541 (3/12/1999). As amended in 2004, the IDEA provides that LEA “shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability ...” and LEAs may use a process that determines if a child responds to scientific, research-based intervention” as part of the evaluation for specific learning disabilities. 20 U.S.C. § 1414(b)(6). *See Michael P. ex. rel. Courtney G. v. Hawaii Dep’t. of Educ.*, 656 F.3d 1057, 1060-61 (9th Cir. 2011) (discussing elimination of the requirement of a severe discrepancy between intellectual ability and achievement). As detailed below, Iowa has opted to preclude use of a severe discrepancy between intellectual ability and achievement for determining whether a child is an eligible individual on the basis of a specific learning disability. 281 IAC 41.307(1)(b).

- (3) The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of—
- (i) A visual, hearing, or motor disability;
 - (ii) Mental retardation;
 - (iii) Emotional disturbance;
 - (iv) Cultural factors;
 - (v) Environmental or economic disadvantage; or
 - (vi) Limited English proficiency.

34 CFR § 300.309(a). Information from observation of the child in the child's regular learning environment must be provided to the evaluation team. 34 CFR § 300.310.

§ 300.311 Specific documentation for the eligibility determination.

(a) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in § 300.306(a)(2), must contain a statement of—

- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination, including an assurance that the determination has been made in accordance with §300.306(c)(1);
- (3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;
- (4) The educationally relevant medical findings, if any;
- (5) Whether—
 - (i) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with §300.309(a)(1); and
 - (ii)(A) The child does not make sufficient progress to meet age or State-approved grade-level standards consistent with §300.309(a)(2)(i); or
 - (B) 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 consistent with §300.309(a)(2)(ii);
- (6) The determination of the group concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and
- (7) If the child has participated in a process that assesses the child's response to scientific, research-based intervention—
 - (i) The instructional strategies used and the student-centered data collected; and
 - (ii) The documentation that the child's parents were notified about—

- (A) The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;
- (B) Strategies for increasing the child's rate of learning; and
- (C) The parents' right to request an evaluation.

(b) Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.

34 CFR § 300.311.

Iowa Rules: The current version of the state administrative rules governing special education has been in place since July of 2013. The rules largely mirror the format and content of the federal regulations, with additional provisions addressing procedures unique to Iowa.

The state has opted to require schools and AEA to use RtI/MtSS or an alternative research-based procedure and prohibit the use of a severe discrepancy in comparison to intellectual disability when evaluating a child suspected of have a specific learning disability.

41.307(1) *General.* The state adopts, consistent with rule 281—41.309 ... criteria for determining whether a child is an eligible individual on the basis of a specific learning disability as defined in subrule 41.50(10). In addition, the criteria adopted by the state:

- a. Requires the use of a process based on the child's response to scientific, research-based intervention or the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in subrule 41.50(10); and
- b. Prohibits the use of a severe discrepancy between intellectual ability and achievement for determining whether a child is an eligible individual on the basis of a specific learning disability.

281 IAC 41.307(1); *see also* 281 IAC 41.307(2) (“A public agency must use the state criteria adopted pursuant to subrule 41.307(1) in determining whether a child is an eligible individual on the basis of a specific learning disability.”); 281 IAC 41.312 (requiring the LEA to attempt to resolve the presenting problem or behaviors of concern through use of interventions in the general education environment prior to conducting a full and individual evaluation, subject to parental request for an evaluation).

The state rule includes the pattern of strengths and weaknesses analysis as a matter that may be considered by the evaluation team, as mandated by section 300.309(a) of the regulations. 281 IAC 309(1)(b)(2). However, the state rules make clear that this analysis is not determinative of IDEA eligibility.

41.309(4) *Rule of construction.* Subparagraph 41.309(1)“b”(2) shall not be construed to require a child with a pattern of strengths and weaknesses in performance, achievement, or both, to be identified as an eligible individual, absent a determination that the child has a disability and needs special education and related services.

281 IAC 41.309(4); *see also* 281 IAC 30.306(3)(c) (“All determinations of eligibility must be based on the individual’s disability (progress and discrepancy) and need for special education.”). Rule 41.311 includes the specific documentation requirements for an eligibility determination involving a child suspected of having a specific learning disability, as mandated by section 300.311 of the regulations. 281 IAC 41.311. But, in keeping with Iowa’s non-categorical approach to identifying and serving students in need of special education, the general rule regarding specific learning disability evaluations states that nothing in rules 41.407 to 41.311 (the rules providing additional procedures for identifying children with specific learning disabilities) “shall be construed as requiring children evaluated under these rules to be classified as having a specific learning disability, as long as the child is regarded as a child with a disability or an eligible individual under this chapter.” 281 IAC 41.307(3); *see also* 281 IAC 41.8 (defining “child with a disability” as a person under the age of 21 “who has a disability in obtaining an education.”).

As discussed in the findings of fact, the Iowa Department of Education has developed detailed guidance regarding implementation of the IDEA, in the form of the 2006 Special Education Eligibility Standards and the 2015 Special Education Eligibility and Evaluation Standards which supplement and provide interpretive guidance for the state rules. Both versions of the standards have been published and widely distributed to education stakeholders. Neither version of the standards has been enacted through the rule-making procedure established by the Iowa Administrative Procedures act.

The Complainants advance a multi-faceted challenge to the criteria and processes used by the District and AEA in evaluating A.W.’s eligibility for special education and services and to elements of the state standards underlying these evaluation procedures. These challenges cannot be resolved without a clear understanding of the authority and discretion afforded the state under the IDEA and the limits of that authority.

Role of the SEA - The IDEA establishes minimum educational standards and procedural safeguards which all participating states and public education agencies must meet. The terms of the IDEA require states that accept federal funds under the act to maintain rules, regulations and policies that conform to the act and to provide general supervision of public agencies to ensure eligible students are identified and provided with a FAPE. 20 U.S.C. §§ 1407(a)(1)-(7), 1412(a)(12). By necessity, states must provide the framework and processes for implementing the IDEA. In doing so, states are free to provide for procedural protections or educational benefits greater than mandated by federal law, but they are not free to adopt procedural or substantive requirements that are inconsistent with the terms of the IDEA or diminish the scope of entitlement under the federal law.

We find no indication in either the statutory language or the legislative history of the Act that Congress intended to create either a substantive or procedural ceiling regarding the rights of the disabled child. Thus, under our reading of the Act, states are free to elaborate procedural and substantive protections for the disabled child that are more stringent than those contained in the Act. ...

We believe that under the “cooperative federalism” approach the proper construction of § 1415 is that state substantive law supplements the federal Act in prescribing the determinations to be made at the due process hearing. It seems plain that the Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations. Congress provided for federal executive oversight through states' annual plans to assure basic compliance with the federal minimum standards but the states supply the machinery necessary to effectuate the guarantees provided by the federal Act on a daily basis.

Town of Burlington v. Dept. of Educ., 736 F.2d 773, 788-89 (1st Cir. 1984), *aff'd sub nom. Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *see also Oberschachsiek v. Iowa Dept. of Social Services*, 298 N.W.2d 302, 305 (Iowa 1980) (“States are not free to narrow the federal standards that define the categories of people eligible for aid [under the AFDC]”), quoting *Quern v. Mandley*, 436 U.S. 725, 740, 98 S.Ct. 2068, 56 L.Ed.2d 658 (1978). “Under the concept of ‘cooperative federalism,’ it is generally understood that state laws may add to, not take away from, the districts’ obligations, (or conversely, the students’ rights) under [section 504 of the Rehabilitation Act and the IDEA].” P. Zirkel, *Update of the Law and Students with Dyslexia: Identification and Intervention*, 318 Ed. Law. Rep. 603, 607 (2015).

This case concerns the evaluation of a student suspected of having specific learning disabilities, a subject over which the states are explicitly instructed to adopt criteria. Under section 300.307(a) of the federal regulations, each participating state “must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10).” Federal and state law both require schools and AEAs to use the state-adopted criteria for determining whether a child has a specific learning disability. 34 CFR § 300.307(b); Iowa Code § 256B.4(3). “[E]ligibility criteria must be consistent across a State to avoid confusion among parents and school district personnel.” *Q & A on Response to Intervention (RTI) and Early Intervening Services (EIS)*, 47 IDELR 196 (OSERS 1/1/2007).⁴⁰

⁴⁰ Although policy guidance letters and memoranda issued by OSEP are not legally binding, courts generally “give substantial deference to an agency’s interpretation of the statutes and regulations it must administer.” *Yankton Sch. Dist. v. Schramm*, 900 F.Supp. 1182, 1190 n. 3 (D. S.D. 1995), *aff'd as mod.*, 93 F.3d 1369 (8th Cir. 1996), *citing Bd. of Regents of Univ. of Minnesota*, 53 F.3d 940, 943 (8th Cir. 1995); *see also Honig v. Doe*, 484 U.S.305, 325 n. 8, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988).

States are afforded flexibility in establishing specific learning disability eligibility criteria, so long as the criteria are consistent with the requirements of the federal law. In doing so, states may legitimately “define or adopt common definitions of certain ambiguous modifiers to guide evaluators in making determinations of eligibility.” *Letter to Kotler*, 65 IDELR 21 (OSEP 11/12/2014) (recognizing state discretion to determine the precise level of impairment that qualifies as significant and severe). But, the state may not employ definitions of unambiguous terms to narrow the scope of eligibility.

States may establish reasonable criteria for determining whether students need special education and related services, so long as individual determinations are made for each student and the full range of the student’s special education needs is considered. However, the State’s criteria may not (1) serve to diminish adherence to Part B’s evaluation procedures; or (2) operate to exclude any students who, in the absence of the State’s criteria, would be eligible for services under Part B.

Letter to Pawlisch, 24 IDELR 959 (OSEP 3/6/1996); *see also Letter to Delisle*, 62 IDELR 240 (OSEP 12/20/2013).

The Complainants note that the Iowa State Standards were not adopted through formal rule-making. Although this observation was not identified as a ground for relief in the Complaint and does not provide a basis for relief in this proceeding, I am compelled to briefly address the Department’s defense of the method it used to develop the Iowa Special Education Eligibility and Evaluation Standards. The Department argues that the standards are a procedurally valid exercise of the authority given to the Director of the Department to “[i]nterpret the school laws and rules relating to the school laws.” Iowa Code § 256.9(16). I disagree. Section 256.9(16) authorizes the Director to interpret school laws and rules, through a variety of means, including rule-making and issuance of declaratory orders or contested case decisions, and to be granted a degree of deference for those interpretations upon judicial review. *See Iowa Ass’n of Sch. Boards v. Iowa Dep’t of Educ.*, 739 N.W.2d 303, 307 (Iowa 2007). However, neither section 256.9(16), nor any other authority cited by the Department, empowers the agency to bypass the requirements of Iowa Administrative Procedure Act (IAPA). This Act establishes rule-making procedures which must be followed before an agency rule can be given the force and effect of law. Iowa Code § 17A.4.

Code section 17A.2(11) defines “rule” to include “each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency.” Declaratory orders and decisions in contested cases are excluded from the definition a rule. Iowa Code § 17A.2(11)(b), (d). A statement concerning internal management of an agency is also excluded from the definition and rule-making procedures, to the extent that the statement “does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.” Iowa Code § 17A.2(11)(a). Agency statements that interpret or prescribe law or policy of general applicability, such as the state eligibility standard – whether in the form of memoranda, directives, or manuals – are rules under

the IAPA. When issued without adoption through the rule-making process, these policies do not have the force and effect of law. They are at most nonbinding guidance. *See Anderson v. Iowa Dept. of Human Services*, 368 N.W.2d 104, 108 (Iowa 1985).

Challenged eligibility criteria - The parties agree that the IDEA establishes a two-factor eligibility test. To be entitled to services under the IDEA (1) a student must have a qualifying “disability” and (2) the student must, by reason of this disability, need special education and related services. The Complainants take issue with the three aspects of the criteria – the definitions of “disability,” “need,” and “special education” – used by the AEA in this case, and by AEAs in Iowa generally, to determine eligibility.

Disability: Complainants argue that the Respondents have illegally restricted the scope of federal entitlement under the IDEA by defining ‘disability’ so that it does not include patterns of strengths and weaknesses relative to intellectual development; thereby diminishing the deference afforded clinical evaluations and ignoring the authority of the eligibility team to determine disability based on such patterns. (Complainants’ Brief at pp. 46-58)

Good faith consideration of outside evaluations: Speech Language Pathologist Dawn Philbin evaluated A.W. in December of 2013 and administered standardized assessments of A.W.’s phonological awareness and processing skills and achievement on reading tasks. UIHC Psychologist Tammy Wigenbusch, Ph.D. evaluated A.W. in November of 2014 and administered standardized intelligence, language, and achievement assessments. Both of these professionals concluded that the relative strengths and weaknesses in A.W.’s cognitive skills and intellectual development supported one or more specific learning disability diagnoses. The Complaints argue that the AEA evaluators and District representatives on the evaluation team drew a false distinction between “medical dyslexia” and “educational dyslexia” and failed to give good faith consideration to the evaluations secured by the parents.

Several provisions of the IDEA require public agencies conducting eligibility evaluations and evaluation teams to gather, review, and consider information provided by parents, including the results of independent evaluations. For example, the public agency conducting an evaluation must use “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent,” that may assist in determining eligibility and the content of the child’s IEP, if found eligible. 20 U.S.C. § 1414(b)(2)(A); 34 CFR § 300.304(b)(1). And evaluation teams must review existing evaluation data, including “[e]valuations and information provided by the parents of the child ...” when determining whether additional assessments are needed and must “draw upon” information from a variety of sources, including aptitude and achievement tests and parent input in rendering its decision. 20 U.S.C. § 1414(c)(A); 34 CFR §§ 300.305(a)(1), 300.306(c)(1). “As a matter of law, a local education agency must give good faith consideration to independent evaluations and other information provided by the parents.” *Stacey M. v. Tripoli Community School Dist.*, 110 LRP 61787, at 4 (Iowa SEA 2009).

Without doubt, all information provided to the evaluation team should be carefully reviewed and considered. This is particularly true of clinical evaluations, which can provide valuable information about a child's diagnoses, limitations, and abilities. In all cases, outside evaluations must be considered in conjunction with all other evaluation data presented to the team. A determination that a student is eligible for special education cannot be based on "any single measure or assessment as the sole criterion for determining whether a child is [eligible]." 34 CFR § 300.304(b)(3).

While a clinical diagnosis cannot fully resolve the question of whether the child has a qualifying disability under the IDEA, clinical findings hold particular relevance in the context of specific learning disabilities. The defining characteristic of a learning disability is "a disorder of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations ..." 34 CFR ¶ 300.8(c)(10)(i). Clinical evaluations are well-suited to identifying disorders of psychological processing, but seldom comprehensively identify how these disorders manifest themselves in the classroom. With specific learning disabilities, as with other disorders, disability determination under the IDEA turns not on "whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does*." *Marshall Joint School Dist. No. 2 v. C.D.*, 616 F.3d 632, 637 (7th Cir. 2010) (emphasis original).

The Complainants contend, not that the diagnoses in the Demarest, Philbin, and Wigenbusch evaluations were determinative as to the existence of a disability under the IDEA, but that the evaluations were not afforded good faith consideration by the evaluators or the team. The record clearly shows that virtually no thought was given to then-existing outside evaluations during the first Educational Evaluation. AEA Special Education Consultant Ms. B., the drafter of the EER, did not receive the Philbin evaluation until the day prior to the team meeting. Ms. B. was aware of, but did not have or request a copy of, the prior evaluation by Dr. Demarest. Neither of the evaluations was included on the list of data sources considered within the EER. However, no relief can be granted for this violation because the initial Educational Evaluation was completed in January of 2014 and falls outside of the limitation period for this proceeding.

Considerably more attention was given to the outside evaluations by special education consultant Terry Anselme during the second opinion evaluation in the spring of 2014. Anselme reviewed the Philbin evaluation report, conducted comparative phonetical skill assessments, discussed the report with a school psychologist involved in the educational evaluation, and discussed both the Demarest and the Philbin evaluations in the EER – characterizing the data in these reports as supporting a finding that A.W. has supporting diagnosis of mathematics disorder and language based dyslexia. Ultimately, Anselme concluded that evidence of A.W.'s progress and current performance discrepancy did not support a disability finding. The rationale for this outcome was discussed during the May 22nd team meeting and the consensus of the team accepted that finding despite the Complainants' disagreement. These events lead me to conclude that the outside evaluations were given good faith consideration during the second opinion evaluation.

Pattern of strengths and weaknesses: Complainants believe the evaluators in this case should have more directly examined the reports of the outside evaluations for patterns of strengths and weaknesses in performance or achievement or both, relative to intellectual development; and that such a review necessarily results in a finding that A.W. has specific learning disabilities.

The federal regulations allow the group evaluating a child for IDEA eligibility to find that the child has a specific learning disability if: (1) the child does not achieve adequately for the child's age or does not meet grade-level standards in one or more of the listed skills – which include written expression, reading fluency, reading comprehension, math calculation, and others; *and* (2) (i) the child does not make sufficient progress to meet age or grade-level standards under a process using RtI, *or* (ii) 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;” *and* (3) the group finds the findings under (1) and (2) are not the result of one or more of six listed exclusionary factors. 34 CFR § 300.309(a).⁴¹

The first step of all specific learning disability determinations is consideration of achievement. The evaluation team cannot determine that a child has a specific learning disability unless the team finds the child does not achieve adequately. Subsection 300.309(a)(1) requires this finding in all cases. A second step finding based either on RtI data or a pattern of strengths and weaknesses analysis is also required. The two methods described in 300.309(a)(2) are alternative means for resolving the second step of the specific learning disability determination. *See Greenwich Bd. of Educ. v. G.M.*, 2016 WL 3512120, at *18 (D. Conn. 6/22/2016); *Q & A on Response to Intervention (RTI) and Early Intervening Services (EIS)*, 47 IDELR 196 (OSERS 1/1/2007). Finally, the team must rule out the exclusionary factors listed in 300.309(a)(3). The evaluation team may determine a child has a specific learning disability “if § 300.309(a)(1) and § 300.309(a)(2)(i) or § 300.309(a)(2)(ii) and § 300.309(a)(3) are met.” *Letter to Prifitera*, 48 IDELR 163 (OSEP 3/1/2007).

While the Iowa rules allow evaluation teams to consider patterns of strength and weaknesses, Iowa the rules “[r]equire[] the use of a process based on the child's response to scientific, research-based intervention or the use of other alternative research-based procedures for determining whether a child has a specific learning disability.” 281 IAC 41.307(1). Both versions of the Iowa eligibility standards and AEA procedure manuals require disability determinations to be based on discrepancy of the child's achievement from peers or grade-level standards and the child's progress when

⁴¹ In comments to this regulation, the United States Department of Education indicated that “[p]atterns of strengths and weaknesses commonly refer to the examination of profiles across different tests used historically in the identification of children with [Specific Learning Disabilities].” 71 Fed. Reg. 46540, 46654 (8/14/2006)

provided with general education instruction and interventions. The standards and manuals do not explicitly mention the patterns of strengths and weakness method of identification or discuss how to evaluate data using this method. As a result, in practice, evaluation teams and AEA evaluators lack guidance on and typically do not use this approach. The merits of the Complainants' patterns of strengths and weaknesses argument hinges upon whether one of the alternative methods of identification found in 300.309(a)(2) may be used to the exclusion of the other.

I do not read 34 CFR § 300.309(a) as requiring teams to use a patterns of strengths and weaknesses analysis. The regulation and corresponding state rule present alternative, independent methods of finding a student has a specific learning disability. The *Greenwich Bd. of Educ. v. G.M.* case supports this reading of the regulation. 2016 WL 3512120, at *18. The case also notes, but does not answer, the question presented here: whether a state regulatory requirement that evaluation teams use intervention data to make a disability determination conforms to the IDEA. Comments to the regulations directly address this point, stating: “§ 300.309(1)(2)(ii) permits, *but does not require*, consideration of a pattern of strengths or weaknesses, or both, relative to intellectual development, if the evaluation group considers that information relevant to an identification of [specific learning disabilities].” 71 Fed. Reg. at 46651.⁴² Neither party has cited contrary authority supporting the proposition that a “patterns of strengths and weaknesses” methodology must be used in all cases. Therefore, I must conclude that use of this alternative methodology is not mandated by the IDEA.

Progress, Discrepancy and Need: The Complainants assert that the Respondents have illegally restricted the scope of federal entitlement by redefining the need for special education so as to require a significant discrepancy from norm- or grade-based standards. Discrepancy is an element of entitlement under the Iowa eligibility standards. But as articulated in the standards and implemented by AEA procedures, the discrepancy element goes primarily to the first prong of the eligibility test (whether the child has a disability); not to the second prong of the test (whether, as a result of the disability, the child needs special education. Consideration of the child's performance in relationship to the performance of peers when determining whether the child has a specific learning disability is allowed by the terms of the IDEA.

Historically, the federal regulations allowed the group determining eligibility to find a child had a specific learning disability if the child did not achieve commensurate with his or her ability and the team found a severe discrepancy between achievement and intellectual ability. (*See* fn. 39, above) This is no longer the case. The IDEA and federal regulations now forbid states from requiring use of a severe discrepancy between intellectual ability and achievement for determining a child has a specific learning disability. By implication, the regulations allow a state to preclude consideration of

⁴² The comment cites to several articles raising “[c]oncerns about the absence of evidence for relations of cognitive discrepancy and SLD for identification” as justification for making consideration of intellectual development or cognitive processing optional, rather than mandatory. 71 Fed. Reg. at 46650-51.

discrepancy between intellectual ability and achievement, which Iowa has done through rule 41.307(1)(b). *See* 71 Fed. Reg. 46540, 46646 (in response to comments, U.S. Department of Education observes that “[u]nder section 614(b)(6) of the Act, States are free to prohibit the use of a discrepancy model”).

As detailed in the finding of fact, the 2006 and 2015 Iowa standards require the elements of “progress” (the individual’s rate of progress compared to expected progress) and “discrepancy” (the magnitude of the discrepancy between the individual’s current performance and the performance of peers or other expected standards) to both be considered in determining whether a “disability” is present.⁴³ Under the terms of the current federal regulations, review of performance in relationship to age- or grade-based standards is a required part of the first step in the process of identifying students with specific learning disabilities. The steps required by 300.309(a) are detailed above. In order for the evaluation team to identify a student as having a specific learning disability the team must find the child does not achieve adequately for the child’s age or to meet grade-level standards in one or more of the listed skills *and*, when an RTI identification model is used, the child does not make sufficient progress to meet age or state-approved grade-level standards under a process using RTI. The appropriate points of comparison at both the first and the second step of the identification process are age and state approved grade-level standards; not as the Complainants argue, the child’s potential.⁴⁴

The requirement of a severe or significant discrepancy in achievement despite exposure to ongoing general education interventions is far more problematic. States must maintain child find policies and procedures to identify and evaluate all children with disabilities who are in need of special education, “regardless of the severity of their disabilities.” 20 U.S.C. § 1412(a)(3)(A); 34 CFR § 300.111(a)(1)(i). Even so, generally a disorder must “adversely affect educational performance” in order to constitute a disability under the IDEA. Although the adverse effect requirement is not included in the definition of specific learning disability, rule 300.309(a) requires the eligibility determination team to find that the child does not “achieve adequately” in one or more skill areas. When the RTI identification method is used, the team must also find that the child “does not make adequate progress” in response to interventions. Performance is clearly a relevant factor.

The Iowa rules mirror the disability definitions the federal regulations and do not define “adversely affect educational performance,” “achieve adequately,” or “adequate progress.” The 2006 Iowa Special Education Eligibility Standards, defined disability as a condition or other limitation resulting in educational performance “significantly and consistently different, diminished, or inappropriate when compared to expectations for

⁴³ A short-hand version of this formulation was inserted into the Iowa rules in 2007 through the adoption of subrule 41.306(3)(c), which provides: “All determinations of eligibility must be based on the individual’s disability (progress and discrepancy) and need for special education.”

⁴⁴ The Complainants’ argument to the contrary relies upon an OSEP interpretation of the IDEA prior to the 2004 amendment (*Letter to Lillie/Felton*, 23 IDELR 714 (4/5/1995)) and a line of pre-2004 cases from the Third Circuit, which are non-binding in this jurisdiction. (Complainants’ Brief at pp. 65-66).

peers” that “significantly interferes” with access to general education or involvement and progress in the general education curriculum. (Comp. Exh. E-4, at p. 7)

The 2015 Iowa Standards do not direct evaluators to require a significant or severe discrepancy in performance or otherwise quantify the degree of discrepancy required. Rather, standard six instructs the team to focus the determination of whether a child has a disability based on consideration of intervention goals and progress toward reducing discrepancy.

In nearly all cases, progress and discrepancy is demonstrated by intervention data. Once a team determines the child’s areas of concern (“operationally defined in meaningful and measurable terms, can be monitored, and the data used to make decisions”), the team selects an intervention, or modifies an existing intervention, and monitors progress toward a meaningful and measurable goal (see Standard Two). If the child does not make progress sufficient to reduce the child’s discrepancy with peers, and no exclusionary factors apply (see Standard Seven), the child likely has a disability. If the child makes progress and reduces the child’s discrepancy when compared to peers, that fact weighs against finding that the child has a disability.

DE Exh. 3, at IDOE 48; DE Exh. 4, at IDOE 120. And standard eight, which addresses the need for special education, warns evaluators that the eligibility determination should not be based on the severity of a child’s disability.

State and federal law requires that all children with disabilities, “regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.” 34 C.F.R. § 300.111(a)(1)(i). It is impermissible to say a child is ineligible because their impairment is minor. For example, a child with a relatively minor impairment who, because of that impairment, fails to meet standards applicable to all children is eligible under the IDEA. In contrast, a child with a relatively minor impairment who meets standards applicable to all children without the need for special education and related services is not eligible. Even children with relatively major impairments are not eligible if those children meet standards applicable to all children without the need for special education and related services.

DE Exh. 3, at IDOE 57; DE Exh. 4, at IDOE 129. While cautioning against a focus on the severity of a child’s disability, standard eight allows for consideration of the magnitude of a child’s performance discrepancy in determining need for special education.

Whether a child is discrepant is answered when determining whether a child has a disability. The magnitude of the discrepancy is important when determining whether the child needs special education and the nature and extent of that need. In all instances, the magnitude of the discrepancy must be determined based on standards applicable to all

children in the public agency. If the measure selected does not equate to those standards, the measure does not directly address the issue of need.

Id.

The 2011 and 2015 versions of the AEA Special Education Procedures manual both instruct that “[i]n addition to evaluating progress, the disability determination focuses on the magnitude of discrepancy.” Comp. Exh. E-1 at 43; Comp. Exh. E-2, at p. 44. Only individuals with performance significantly discrepant from peers (i.e. below grade level; score below 12th percentile; at least one standard deviation in standard score; at least 2.0 times discrepant or 1.5 times discrepant with professional judgment) are considered disabled. *Id.* Exh. E-1 at 45; E-2 at 46. The Educational Evaluation Report form utilized by the AEA has the significant discrepancy standard built into the disability determination. All three of A.W.’s educational evaluations applied the significant discrepancy standard, as directed by the AEA manual and EER form, and determined that her performance in the areas of concern (reading skills, written expression skills, and mathematics) was not significantly discrepant from peers. As a result, A.W. could not be classified as “disabled” under the AEA procedures, even if the team accepted that she had a specific learning disability based on the diagnoses found in the parentally obtained evaluations, as they did during the August 2016 evaluation.

The 2006 Iowa Eligibility Standards and the 2011 AEA Procedure manuals each require a disorder or condition to result in performance that is “significantly discrepant” from peers and instruct that the determination of the significance of performance discrepancy is typically determined by an objective mathematical calculation. I conclude that basing determination of the whether a child has a specific learning disability on the magnitude of the discrepancy in the child’s performance from that of peers functionally imposes a severity test on the disability and is inconsistent with the terms of the IDEA. This error has been eliminated from the 2015 State Standards, but remains in the updated version of the AEA Procedures manual.

Special Education: The Complainants’ final challenge to the eligibility criteria relates to the definition of “special education” to mean services and supports that are beyond the capacity and obligation of general education. This definition, clearly articulated by the Department in the State Standards, appears to derive from the view that special education services and general education services are distinct and do overlap; all RtI/MTSS interventions are necessarily part of general education; and, therefore, interventions made available to general education students through RtI/MTSS cannot be special education. This view is not supported by the terms of the IDEA or implementing regulations, U.S. Department of Education guidance, or the general definition of RtI/MTSS.

The IDEA, federal regulations, and state rules define special education in terms of what it is, not where or by who it is delivered. Special Education “means specially designed instruction ... to meet the unique needs of a child with a disability.” 20 U.S.C. § 1401(29); 34 CFR § 300.39(a)(1); 281 IAC 41.39(1). The location of instruction is unimportant under this definition. Special education includes “[i]nstruction conducted

in the classroom, in the home, in hospitals and institutions, and in other settings.” *Id.* The delivery of specially designed instruction in a regular education classroom does not change the nature of the instruction.

The federal regulations and state rules supplement this definition by defining “specially designed instruction.”

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To 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.

34 CFR § 300.39(b)(3); 281 IAC 41.39(3)(c). This definition of specially designed instruction was added to the regulation in 1999. 64 Fed. Reg. 12,406, 12425 (3/12/1999) (publication of final regulation). The Department asserts that the addition of the second prong of the definition – referencing access to the general curriculum – represented a change in law. Having fully considered the agency's argument, I disagree. The regulatory definition appears intended to codify existing judicial interpretations of the definition of special education, rather than to change it.⁴⁵ The statutory definition of “special education” has remained essentially unchanged since passage of the Education for All Handicapped Children Act (EHA) of 1975. The EHA, from which the IDEA has evolved, defined special education to mean “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.” 20 U.S.C. 1401(16) (1975).

Although the concept of “mainstreaming” – including students with special education in the regular education classroom – gained more prominence following the 1997 amendments to the IDEA, this concept of providing these students with access to general curriculum was present in the EHA. “EHA was intended to provide a ‘basic floor of opportunity’ by opening the door of public education to disabled children, with the hope of integrating them in regular classrooms as much as possible.” *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1372 (8th Cir. 1996); citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192, 102 S.Ct. 3034, 3043–44; 73 L.Ed.3d 690 (1982); *Light v. Parkway C–2 School District*, 41 F.3d 1223, 1227 (8th Cir.1994); *cert. denied*, 515 U.S. 1132, 115 S.Ct. 2557, 132 L.Ed.2d 811 (1995). While the 1997 amendments to the IDEA shifted “emphasis of the [IDEA] Part B program toward greater participation of children with

⁴⁵ As evidenced by comments explaining the scope of the 1999 amendments to the regulations, some of the changes were “needed to incorporate longstanding interpretations of the Act that have been addressed in nonregulatory guidance in the past, or to ensure a more meaningful implementation of the Act and its regulations for children with disabilities, parents and public agencies.” 62 Fed. Reg. 55,026, 55,033 (10/22/1997).

disabilities in the general curriculum,” the amendments did not alter the underlying definition of special education. *See* 62 Fed. Reg. at 55,033 (U.S. Department comments explaining the reason for inclusion of definition of special education in the regulations).

The Respondents correctly assert that not every adaptation, alteration, or modification of the content, methodology, or delivery of instruction constitutes special education. Related services (such as transportation) and supplementary aides and services (such as large-print books or special seating) may be included in a special education program, but are not “instruction” and thus fall outside the definition of special education. Differential instruction in the general education classroom to address different learning styles or skill sets of nondisabled students and remedial programs that provide nondisabled students with leveled, repeated, or slower paced instruction are routinely classified as general education programs. *See* 71 Fed. Reg. 46540, 46577 (response to comment regarding 2006 federal regulations, finding it unnecessary to change the definition of special education to distinguish special education from remedial programming, flexible grouping, and alternative educational programming). But the fact that some adaptations of the content, methodology, or delivery of instruction are done outside of special education does not support the view that special education excludes all adaptations of the content, methodology, or delivery of instruction that are within the capacity of general education.

Instruction becomes special education when it is designed or selected to meet the disability-related needs of an individual student and is necessary for that student to maintain or improve educational performance. The fact that the instruction may be delivered without removal from general education or by someone other than a special education teacher does not take it outside the definition of special education.

The fact that a child receives educational benefit in a general education setting does not automatically negate his need for a special education program. (*Letter to Pawlisch*, (OSEP 1996) 24 IDELR 959.) If modifications are considered ‘specially designed instruction’ because they constitute individualized instruction planned for a particular student, they may constitute special education, where educational performance would be negatively affected in their absence. (*Ibid.*) These determinations must be made on a case-by-case basis. (*Ibid.*) Just because the specialized instruction [of] a student with a disability requires is already part of the general curriculum, considered best practices, or offered to all students with or without disabilities does not mean that such instruction does not constitute special education or that a qualified student does not need an IEP which incorporates specialized instruction. (*Letter to Chambers* (OSEP 2012) 59 IDELR 170.)

San Francisco Unified School Dist., 115 LRP 39392 (Calif. SEA 7/20/2015) (finding student received special education when he was provided with weekly specialized academic instruction in math, reading and language arts by credentialed special education teachers); *see also L.J. v. Pittsburg Unified School Dist.*, 2017 WL 824697, *7 (9th Cir. 2017), amending 835 F.3d 1168 (9th Cir. 2016) (finding student needed special

education because interventions he was receiving, which included one-on-one direction and specially designed mental health services and behavior plans, were not part of general education instruction); *Yankton School Dist. v. Schramm*, 93 F.3d at 1375-76 (holding that student with cerebral palsy was entitled to continued services the IDEA where she needed specially designed instruction and services, including to shortened writing assignments, mobility assistance, multiple sets of books, and physical therapy).

The IDEA was amended in 2006 to allow RtI/MTSS provided in the general education setting to be used as a method of gathering data to evaluate the potential special education eligibility of a student suspected of having a disability and to allow IDEA funds to be used to provide early intervening services to nondisabled students. Neither of these changes supports the conclusion that RtI/MTSS interventions are confined to general education. Multi-tiered RtI/MTSS models involve universal class-wide interventions, targeted group interventions, and intense individual educational interventions. General education interventions are used as a tool to assess the effectiveness of universal instruction, to assist educators in identifying the reason some students are not keeping pace with age- or grade-level performance expectations, and to address the needs of students who are lagging behind expected performance. Without doubt, many universal and group interventions, and potentially some individual interventions, are not special education. But the inverse is also true; many targeted and individual interventions are special education when delivered to a student who is eligible for special education.

It is important to keep in mind the fact that RtI/MTSS is not a set of interventions or curricula, but a systematic school-system wide process for educating all students – from the highly gifted to the severely disabled. (See Resp. Exh. 14, depicting the full continuum of RtI supports). RtI/MTSS uses evidence-based instruction, universal screening, instructional interventions, and progress monitoring to ensure that all students receive instruction and supports necessary to meet their needs. Data regarding a student's response to interventions may be used to assess the delivery of special education or to assess student progress and the needs of a student not identified as being eligible for special education. "There is nothing in the IDEA that prohibits children with disabilities who are receiving special education services and related services under the IDEA from receiving instruction using RTI strategies unless use of such strategies is inconsistent with their individual education programs (IEPs)." *Q & A on Response to Intervention (RTI) and Early Intervening Services (EIS)*, 47 IDELR 196 (OSERS).

By definition, targeted and intensive interventions are selected to meet the individual needs of a student. Targeted and/or intensive interventions can be delivered as a part of EIS or during a special education evaluation before a student has been determined disabled. But such interventions cannot legitimately be used to delay or avoid IDEA eligibility evaluations. See *Letter to Zirkel*, 62 IDELR 151 (OSEP 9/10/2013) (discussing RtI and observing that "no intervention process ... may be used to delay or deny the provision of a full and individual evaluation that meets the requirements of 34 CFR § 300.304 – 300.311 to a child suspected of having a disability"); *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP /21/2011) (same).

RtI/MTSS is neither general education nor special education; it is a framework and process for the management of an education system and delivery of appropriate instruction to all students. The RtI/MTSS process should not control evaluation outcomes. Rather, data from RtI should inform the evaluation process. The fact that an intervention has been used in the general education context during the evaluation process does not mean the intervention cannot become special education. If during an evaluation based on RtI data a student is found to be disabled and able to progress through the general education curricula only when provided with one or more specific interventions that meet needs resulting from the student's disability, then the child is eligible for special education; even if continuation of the interventions is within theoretical or actual capacity of general education.

The proper test for distinguishing between general education and special education lies in the timing and nature of the intervention. General education includes universal instruction, differentiated and remedial group instruction, and all educational interventions implemented while schools are attempting to resolve "presenting problems or behaviors of concern in the general education environment prior to conducting a full and individual evaluation" of IDEA eligibility. 281 IAC 41.51(8). Special education includes instruction adapted in content, methodology, or delivery to meet the unique needs resulting from a child's disability so that the child can access the general curriculum and meet the educational standards that apply to all children in the jurisdiction. Many IDEA eligible students receive their education, including special education and related services, exclusively in the regular education classroom.

The fact that some of those services may also be considered "best teaching practices" or "part of the district's general education program" does not preclude those services from meeting the definition of "special education" or "related services" and being included in the child's IEP. The LEA must provide a child with a disability specially designed instruction that addresses the unique needs of the child that result from the child's disability, and ensures access 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.

OSEP recognizes that classrooms across the country are changing as the field of special education responds to innovative practices and increasingly flexible methods of teaching. While the needs of many learners can be met using such methods, they do not replace the need of a child with a disability for unique, individualized instruction that responds to his or her disability and enables the child to meet the educational standards within the jurisdiction of the public agency that apply to all children.

Letter to Chambers, 59 IDELR 170 (OSEP 2012); *see also District of Columbia Public Schools*, 113 LRP 18070 (D.C. SEA 3/28/2013) ("There is no requirement that special education be delivered by a special education teacher in all instances.").

The Iowa rules incorporate the federal definitions of special education and specially designed instruction. The 2006 Iowa Standards instructed evaluation teams determine need for special education and related services by considering what instructional strategies, accommodations, and modifications will enable a student's improved learning performance and "what ongoing, substantial, additional services are needed that cannot be provided by general education." Comp. Ex. E-4, at p. 13. The 2015 Iowa Standards are more bright-line view that all instructional adaptations "within the skill, capability, and licensure of the reasonably prudent general educator" are "generally not considered special education." DE Ex. 3, at IDOE 56; DE Ex. 4, at IDOE 128. The AEA Procedure manuals each incorporate then-current state standard regarding the capacity of general education to meet a student's instructional needs. These provisions functionally limit the definition of special education to instruction that exceeds the capacity of general education and thereby, restrict the scope of entitlement under the IDEA.

Role of AEA in the eligibility determination – The Complainants assert that the Respondents violated the IDEA by allowing the eligibility determination to be made by the AEA, rather than a properly constituted eligibility team including the parents.⁴⁶ Their argument is premised on the fact that AEA evaluators compiled information and completed Education Evaluation Report forms prior to each of the evaluation team meetings. Although I understand that the presentation of completed EER forms concluding that their daughter was not entitled to special education may have led A.W.'s parents to believe that a final decision had already been made; I cannot conclude that the process used by the District and AEA violated the IDEA.

The IDEA places the duty to conduct a full and individual evaluation of a child suspected of being eligible for special education on the public agency serving the child. 20 U.S.C. § 1414(a)(1); 34 CFR § 300.301(a). Under Iowa law, the task of conducting evaluations falls upon AEAs. After obtaining parental consent, the public agency must gather relevant functional, developmental, and academic information about the child, including information provided by the parent; assure that appropriate additional assessments are properly administered, if necessary; and, when the evaluation is for a suspected specific learning disability, ensure that observations are conducted in the child's learning environment. 34 CFR §§ 300.304(b); 300.310. An evaluation team composed of IEP team members and other qualified professionals must then review existing data, identify any additional data needed, and render a decision regarding eligibility. All relevant information is to be documents and carefully considered. 34 CFR §§ 300.305; 300.306.

In practice, the AEA typically assigns a consultant to lead the evaluation process, gather relevant data, and prepare a draft EER for distribution to parents and other team

⁴⁶ Complaint, at paragraph 10(a). This issue was restated in the Complaints' Brief as an argument that the Respondent's violated the IDEA by "using the Educational Evaluation Report to answer questions properly reserved for the eligibility team." The AEA and District noted that the issue argued by the Complainants on brief was not stated in the same terms in the Complaint, but presented a responsive argument. The Department also presented a responsive argument. The analysis herein is limited to the issue raised within the Complaint.

members. The EER is distributed prior to or during an evaluation team meeting and the team, with direction from the evaluator, discusses the data and conclusions documented on the EER. The terms of the IDEA do not prohibit public agencies from drafting documents for team review. In Iowa this is the most frequent procedure for developing IEPs and EERs and is acceptable, as long as parents know that the drafts are subject to review and revision and are provided with an opportunity to participate in the decision-making process. *See Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 656 (8th Cir. 1999) (recognizing that preparation of draft IEP in parents' absence not prohibited by IDEA regulations). As with the development of IEPs, the eligibility evaluation is a consensus process. Parents are entitled to have input and participate in the evaluation process, not to control the outcome.

Based on hearing testimony and A.W.'s parents' written response to the evaluation completed in January of 2014, it appears that they thought the EER prepared prior to the team meeting was in final form. One can argue whether this belief was subjectively reasonable, but given that this evaluation was completed outside of the two-year limitation period for this action, this is a moot question. Moreover, the parents' subjective belief that the outcome of the draft EER was final does not provide a basis for relief.

[The p]arents argue that they did not understand that in giving their agreement they were participating in the development of her IEP. This misunderstanding is unfortunate, however, [the] parents have not shown that it was caused by any wrongdoing on the part of the School District. When, as in this case, a school district provides parents with proper notice explaining the purpose of the IEP meeting, the meeting is conducted in a language that the parents can understand, *see* 34 C.F.R. § 300.345(e), the parents are of normal intelligence, and they do not ask questions or otherwise express their confusion about the proceedings, the school district's failure to apprehend and rectify that confusion does not constitute a violation of the IDEA's procedural requirements.

Id., 198 F.3d at 657.

The record of parental involvement is clearer with regard to the second opinion evaluation completed in May of 2015. AEA Consultant Terry Anselme compiled information for the evaluation, interviewed A.W. and others, and compiled a draft EER prior to the May 22nd meeting. Ms. Anselme provided the EER to A.W.'s parents and called them prior to the meeting to see if they had any questions about the report. Anselme participated in the evaluation meeting with LEA representatives, the parents, and their advocate. A.W.'s parents had full opportunity to ask questions and discuss the evaluation. Although I understand that they disagree with the conclusion that A.W. was not entitled to special education, I cannot conclude that the AEA usurped the authority of the evaluation team to determine whether A.W. was disabled and in need of special education.

A.W. was denied FAPE – A.W. is described throughout the records as a well behaved student who consistently puts forth good effort in school. She is curious, attentive, and hard working. These traits and her efforts have undoubtedly enhanced her educational progress. A.W.'s parents are attentive, engaged, and thoughtful advocates on her behalf. Their support also contributed to her success.

A.W. enrolled in 4th grade in the District in the fall of 2013, after receiving home school instruction for years. Preliminary testing done at the beginning of the school year showed her reading skills were with the 1st grade level and her mathematics skills were well below grade level. Her teacher discussed A.W.'s situation and needs with the building RtI assistance team. Intervention plans to assist A.W. in reading and math were developed and implemented in October. An initial individual educational evaluation was initiated in late November. The frequency and intensity of A.W.'s interventions increase during the evaluation period. The evaluation was completed in January with a finding that she was not entitled to IDEA services. This finding was based largely on a belief that A.W.'s skill deficits might result from a lack of exposure to appropriate grade-level instruction during prior years.

Despite the finding that A.W. was not eligible for special education, the general and enhanced interventions remained in place throughout the school year. From December of 2013 through May of 2014, the District provided A.W. with universal instruction in her regular classroom; 10 minutes of daily individual math skill instruction from her classroom teacher; 20 to 30 minutes of daily targeted individual instruction on basic math concepts from the building Principal during the lunch recess; additional reading practice in a small group classroom setting 15 minutes twice weekly with an associate and 15 minutes once weekly with the classroom teacher; and 20 to 30 minutes of targeted individual daily reading instruction from a reading support teacher using REWARDS materials. A.W.'s parents also arranged for her to receive weekly private small group reading instruction from Dawn Philbin using the Wilson method, which began in late January or early February and continued through May. By the time of the second option educational evaluation, which was conducted in May of 2014, A.W.'s reading, writing, and mathematics skills were significantly improved.

Despite the extraordinary amount of targeted and individualized instruction that A.W. received throughout the second half of the school year, her reading fluency and mathematics skills remained below grade-level performance standards. The AEA evaluator and evaluation team concluded that A.W.'s current performance discrepancies were "not significant" and that her needs could be met through continuation of the classroom reading interventions and the targeted individual math skill intervention.⁴⁷ Both of these interventions were deemed to be within the capacity of general education and A.W. was again found to be ineligible for services under the IDEA.

⁴⁷ The evaluator was unaware of the private tutoring A.W. was receiving for reading and did not consider it in preparing the EER. This tutoring was not discussed during the evaluation team meeting. The record is unclear as to whether any members of the team, other than A.W.'s parents and their advocate, knew about this tutoring. I find resolution of the question of whether this tutoring masked a need for special education unnecessary to the outcome of this proceeding.

The evaluator and evaluation team erred by requiring a significant performance discrepancy to establish a disability and by finding that A.W.'s ongoing needs could be met without special education. Despite ongoing high quality education in reading and math, A.W.'s reading and math skills were lagging below grade level expectations. She had not yet mastered basic 2nd and 3rd grade math concepts and needed ongoing individual instruction in this area. The Principal believed gaps in A.W.'s math skills were significant enough that he volunteered to continue her individual math intervention on a weekly basis through the summer. This intervention was, in all respects by label, specialized instruction to meet A.W.'s needs. If proper evaluation standards had been applied, I believe A.W. would have been determined to have a specific learning disability and to need special education services as a result of that disability.

The second opinion educational evaluation concluded with an EER and team meeting on May 22, 2014, and is within the limitation period for this action. I conclude that the District and AEA erred on both prongs of the eligibility determination by finding that A.W. was not a child with a disability and finding that she did not need special education to progress through the general education curriculum and to continue closing the gap between her performance and grade-based standards for reading fluency skills and mathematics calculation and problem solving.

A procedural error during the IDEA evaluation process may be deemed harmless if a student is not eligible for IDEA benefits. But an evaluation error that results in the failure to afford IDEA benefits to an eligible student is seldom, if ever, harmless. Special education law places a premium on parental participation and procedural safeguards. If a student is determined eligible under the IDEA, then an IEP must be created for the student. Parents must be given notice and have a right to participate in making decisions regarding special education services and placement. Parents must also be given notice prior to a change in placement, have a right to challenge the change through a due process proceeding, and may invoke stay put to maintain current placement while the proceeding is pending. None of these protections exist if a student is erroneously found ineligible. See *Yankton School Dist. v. Schramm*, 93 F.3d at 1373; *Ind. Sch. Dist. No. 413 v. H.M.J.*, 123 F.Supp. 3d at 1111; *San Francisco Unified School Dist.*, 115 LRP 39392.

This case exemplifies the harm that flows from the denial of IDEA protections to an eligible student and why RtI/MTSS interventions are not a reasonable substitute for special education services. Interventions can be limited based on availability, rather than need. Interventions can be changed or cancelled without parental notice. And parents have no ability to formally challenge changes to interventions. The failure of the second opinion evaluation to find A.W. eligible for special education services in May of 2014, at the end of her 4th grade year, denied her and her parents substantive and procedural rights under the IDEA and resulted in a denial of FAPE for which they are entitled to relief. However, the relief to be granted is limited by subsequent events.

The District continued to provide math and reading interventions to A.W. throughout her 5th grade year and she made significant progress in closing her performance discrepancy. A math intervention, albeit in a much reduced form, continued through the first term of her 6th grade year. A.W. also continued to receive weekly private reading tutoring from June of 2014 through August of August of 2015. Annual assessments in the spring of 2016 year show some limited progress in reading and writing skills (based on standard scores) and some regression in her performance in these areas in relation to peers (based on percentile ranking).

A third educational evaluation was completed in August of 2016. Although this evaluation included a finding that A.W. has a specific learning disability, she was again found ineligible due to the lack of a need for special education. A.W.'s parents disagreed with the eligibility decision, but agreed that A.W. was now making sufficient progress on grade-level standards. Agreement on this point precluded a finding that A.W. had an IDEA eligible disability. A student who is achieving adequately to meet grade-level standards cannot be determined to have a specific learning disability under the IDEA. 34 CFR § 300.309(a)(1). Therefore, I must conclude that the outcome of this evaluation was correct. As of August 16, 2016, the date of the final evaluation team meeting, A.W. was no longer an eligible student under the IDEA.

Remedy – The Complainants seek and are entitled to declaratory relief with regard to two elements of the State Standards and AEA Procedures. Determination of whether a child has a disability under the IDEA cannot be made contingent upon existence of a significant or severe discrepancy between the child's performance and age or grade-based standards. And the definition of special education used to determine whether a child needs special education as a result of a disability cannot exclude instruction adapted in content, methodology, or delivery to meet the needs of the child; merely because the instruction is within the capacity of general education.

Fortunately, even though A.W. was not identified as being eligible for special education under the IDEA, she did receive universal instruction, targeted classroom interventions, and individual interventions from the District, as well as private tutoring provided by her parents. These services allowed her to gain skills and improve her reading, writing, and mathematics skills so that she was achieving adequately to meet grade-level standards by August of 2016. Because of this, she is not now entitled to be declared eligible under the IDEA and an order for compensatory education is not appropriate.

The Complainants are entitled to reimbursement of the cost of the private tutoring they procured for A.W. between May 22, 2014 and August 16, 2016. The Complainants are the prevailing parties and are entitled to an award of attorney fees under section 1415 of the IDEA.

The declaratory relief granted herein applies to policies contained in both the State Standards and procedure used by the AEA and District to evaluate A.W. But primary responsibility for developing these policies rests with the Iowa Department of Education and the Department is ultimately responsible for prescribing the "minimum requirements for children requiring special education" and the "criteria for determining

whether a child has a specific learning disability.” Iowa Code §§ 256B.3(5); 256B.4(3); 34 CFR § 300.307(a). AEA and school districts must adopt policies and procedures that comply with state-adopted policy and apply state-adopted criteria in determining whether a child has a specific learning disability. 34 CFR § 300.307(b). Further, as detailed in the conclusions of law, the child-specific error in this case was largely attributable to application of policies dictated by the challenged State Standards. For all of these reasons, equity demands that the Department be held responsible for the reimbursement of tutoring costs and payment of attorney fees.

Order of Relief

On the basis of the foregoing findings of fact and conclusions of law and consistent with the principles governing relief under the IDEA, the Complainants are entitled to the following declaratory relief and reimbursement:

1. The Iowa Department of Education shall not require and the AEA and District shall not employ criteria that make a finding of disability under the IDEA contingent upon existence of a significant or severe discrepancy between the child’s performance and age or grade-based standards.
2. The Iowa Department of Education shall not require and the AEA and District shall not employ a definition of special education for purposes of determining whether a child needs special education as a result of a disability that excludes instruction adapted in content, methodology, or delivery to meet the needs of the child; merely because the instruction is within the capacity of general education.
3. The Complainants are entitled to reimbursement of the out-of-pocket expense they incurred to procure a Barton reading tutor for A.W. during the period between May 22, 2014 and August 16, 2016, payable by the State Department of Education.
4. The Complainants are the prevailing party and are entitled to an appropriate award of attorney fees, pursuant to 20 U.S.C. § 1415, payable by the State Department of Education.

Issued on March 22nd, 2017.



Christie J. Scase
Administrative Law Judge
Iowa Department of Inspections and Appeals

Copies via email to:

ATTORNEYS FOR COMPLAINANTS

Curt L. Sytsma

Edie Bogaczyk

ATTORNEYS FOR URBANDALE CSD & HEARTLAND AEA

Miriam D. Van Heukelem

Rebecca E. Reif

ATTORNEYS FOR IOWA DEPARTMENT OF EDUCATION

Meghan Gavin, Assistant Attorney General

Thomas Mayes