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BILL RICHARDSON  
Governor

August 13, 2009

**MEMORANDUM**

**TO:** Superintendents  
Charter School Administrators  
Principals  
REC Directors  
Special Education Directors  
Charter School Special Education Coordinators  
STARS Coordinators

**FROM:** Veronica C. García, Ed.D. *Veronica C. Garcia*  
Secretary of Education

**RE: REQUIREMENTS FOR USING A DUAL DISCREPANCY MODEL FOR ELIGIBILITY AS SPECIFIC LEARNING DISABLED (SLD) UNDER A RESPONSE TO INTERVENTION (RtI) FRAMEWORK**

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As you recall, in 2005 the New Mexico Public Education Department (NMPED) approved a change in state rule in regards to the evaluation and eligibility determinations for students in grades K-3 who are perceived to have Specific Learning Disabilities (SLD). Accordingly, Subsection C of 6.31.2.10 NMAC provides that in identifying children with specific learning disabilities, the public agency may use the dual discrepancy model as defined and described in the New Mexico Technical Evaluation and Assessment Manual (NMTEAM) or the severe discrepancy model as defined and described in NMTEAM. The rule further provides that **effective July 1, 2009, public agencies must implement the dual discrepancy model in grades K-3 as part of the variety of information sources and measures when evaluating for SLD eligibility.** This change in state rule was necessary in order to make decisions that are founded in current research, and ensure that lack of appropriate classroom instruction and interventions in reading and math are not the primary cause of the learning difficulty as required by Subsection D (1) (g) of 6.31.2.10 NMAC and the federal Individuals with Disabilities Education Act (IDEA) 2006 at 34 CFR Sec. 300.307.

As the NMPED has received many questions regarding the dual discrepancy model, I am issuing this guidance.

### **What is a dual discrepancy?**

A *dual discrepancy* is said to exist when a student performs both below the level of grade-level peers (**low achievement**) and shows a learning rate substantially below grade-level peers (**low rate of progress**). In other words, there is a discrepancy in both measures or indicators. The use of these two indicators is a key practice that occurs as schools implement the state's Response to Intervention (RtI) framework, known as *The Three-Tier Model of Student Intervention* as described in Subsection D of 6.29.1.9 NMAC: Student Intervention System.

### **Why is the dual discrepancy model a better way to determine SLD eligibility?**

Since student achievement and rate of progress are valid measures of current performance and good predictors of later performance, they can be used to prevent the problems associated with severe discrepancy evaluation models—that is, the problem of waiting for students to fail before they receive help. It is thought that the dual discrepancy model will give educators a broader view of student performance—both achievement and learning rate—compared to the snapshot obtained from utilizing a severe discrepancy model. One advantage is that the progress monitoring process utilized in the state's RtI framework yields data directly relevant to instructional design and delivery. In this way, educators can devise an effective program to meet the specialized needs of a student with disabilities, **or** distinguish a student who truly has a learning disability from one whose learning difficulties could be resolved through differentiated instruction or other scientifically-based instructional strategies delivered in the general education classroom.

The dual discrepancy model for grades K–3 is now mandated and replaces the severe discrepancy model previously used in the early grades to singularly determine the existence of a SLD. Districts and charter schools will continue to have the option of using either the severe discrepancy model or the dual discrepancy model for students in grades 4–12, though it is expected that the dual discrepancy model may be required at grades 4–6 in the coming years.

### **How does this relate to the state's RtI framework?**

In Tiers 1 and 2 of the state's RtI framework, schools implement for all students appropriate research-based instruction and interventions based on student needs, monitor student progress, and then adjust instruction to ensure that it is effective. Districts and charter schools should now have the foundational concepts of the state's RtI framework (that is, the three-tier model of student intervention) embedded into their instructional delivery system. Thus, they need to use the data gathered from interventions in Tiers 1 and 2 to determine SLD eligibility using the dual discrepancy criterion established in the NMTEAM. Students who show reasonable response in relationship to their peers when research-based instruction and classroom interventions at Tier 1 are applied in addition to supplemental support through the Student Assistance Team (SAT) Intervention Plan at Tier 2, should not be determined to have a SLD. In that case, the student is referred back to the SAT, and the SAT interventions should be revised based on new data from the evaluation process and progress monitoring should continue, as necessary.

For valid implementation the dual discrepancy procedure requires that school staff have three important data. First, the staff must have accurate information on the student's grade-level peers' level of performance and their learning rate. Second, the criterion for judging a student's discrepancy from this normative comparison must be clearly stated. Third, the individual's level and rate of performance must be reliably and meaningfully different from the peer group norm.

**What does this mean for the school's Student Assistance Team (SAT) and for educational diagnosticians?**

The educational diagnostician can expect the file of a student who is referred for a multidisciplinary evaluation will contain evidence of

- the SAT child study process conducted by the school's SAT;
- scientific-based evidence supporting the instructional practices and Tier 2 curricular choices for interventions;
- active responsibility by general education to document sustained efforts to implement appropriate instructional strategies and interventions (such as, differentiated instruction) delivered by qualified personnel from Tiers 1 and 2 (SAT);
- repeated assessments at reasonable intervals using valid and reliable instruments with data showing the student's level of achievement over time;
- high fidelity of implementing interventions and instructional strategies; and,
- progress monitoring data gathered from curriculum-based measures showing that the student demonstrates a substantial pattern of flat scores or not showing minimum acceptable rates of progress in comparison to peers when classroom interventions were applied. That is, the interventions did not normalize the student's performance over time.

The file must also contain a signed written consent from the student's parents consenting to an initial evaluation. The consent must include a copy of the district's or charter school's Prior Written Notice to the parents as required by the IDEA.

This information is necessary in order for the diagnostician to plan appropriate evaluation procedures and incorporate relevant data. These evidential requirements may not fully apply to situations where an evaluation is requested due to a crisis, obvious disability, or parental request. In those cases, the SAT will have used professional judgment rooted in existing file information and data to make an appropriate referral.

**Notes:**

- Using data from progress monitoring from Tiers 1 and 2 does not replace the need for a comprehensive evaluation at this level.
- As part of the comprehensive evaluation, the educational diagnostician may determine a pattern of strengths and weaknesses by evaluating specific area of cognitive function, level of academic achievement, or both, and comparing those results against each other or in contrast to other measures of student performance.
- Evaluation procedures must be conducted in compliance with the IDEA at 34 CFR Secs. 300.301–300.305.
- The timeline from consent to initial evaluation must be within 60 days in accordance with 34 CFR Sec. 300.301(c) (1).

**What does this mean for the group that determines SLD eligibility?**

1. The eligibility determination group must be composed of individuals in compliance with the IDEA at 34 CFR Sec. 300.306.
2. The eligibility determination group must comply with procedural requirements of the IDEA at 34 CFR Secs. 300.308–300.311.
3. The group must determine that the student fails to achieve adequately when provided appropriate instruction by highly qualified teachers. In determining whether a student was provided appropriate instruction, schools should consider primary language, limited English proficiency, environmental and cultural factors, as well as whether a student has had frequent moves and/or absences that may have limited the his or her access to the curriculum.
4. The determination of SLD must be made through the use of professional judgment by the eligibility determination group which includes the parent(s). This requires the group to use the student file information cited above and diagnostic and/or clinical data, as well as other sources of information and data to support the eligibility determination. The eligibility determination cannot be solely based on progress monitoring data from interventions at Tiers 1 and 2.

**What does this mean for school principals and/or assistant principals?**

School administrators will need to ensure that the school's SAT is fully established as required by state rule at Subsection D of 6.29.1.9 NMAC, and functioning as set forth in the state's technical assistance manual *The Student Assistance Team and the Three-Tier Model of Student Intervention: A Guidance and Resource Manual for New Mexico's Response to Intervention (RtI) Framework* (release date late September 2009). Principals must provide training for the school's SAT and other relevant staff on the SAT process, as well as the state's RtI framework. Principals should also provide ongoing support and professional development in the certain aspects of the RtI framework, such as research-based instruction, differentiated instruction, classroom and behavioral management, classroom-based assessment, progress monitoring through short-cycle assessments, and data-based decision making. Principals need to ensure that Tier 1 and Tier 2 (SAT) interventions are implemented with fidelity, and that classroom instruction is delivered by highly qualified teachers, is research-based, and is differentiated, as necessary. Teachers must be evaluated accordingly using the state-level competencies, and in a timely manner while being providing support through the Professional Development Plan (PDP) or Professional Growth Plan (PGP).

**Where do schools report this information?**

**As part of the State's General Supervisory responsibility under the IDEA, initial evaluations for perceived learning disabilities in grades K–3 must be submitted every reporting period through the Student Teacher Accountability Reporting System (STARS). The information must be reported in the *Assessment Domain, Assessment Fact Template 0310*.**

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I trust that this guidance concerning the dual discrepancy model will be helpful in making the necessary changes to the evaluation process for students in grades K–3 with perceived SLD. Please feel free to distribute it to relevant staff and others. If you need further assistance, please

contact the NMPED's Special Education Bureau at (505) 827-1457 or the Education Administrator assigned to your district.

Important information regarding the state's RtI framework is located at the NMPED's website at [www.ped.state.nm.us](http://www.ped.state.nm.us). Look for the RtI link under "Most Requested" on the homepage. An updated guidance manual entitled *The Student Assistance Team and the Three-Tier Model of Student Intervention: A Guidance and Resource Manual for New Mexico's Response to Intervention (RtI) Framework* will be posted on the website's RtI link in late September 2009. In the meantime, please refer to *Understanding and Implementing the Response to Intervention Framework (RtI) in New Mexico: A Quick Guide* at this link:

<http://www.ped.state.nm.us/RtI/dl09/Understanding%20Response%20to%20Inter.pdf>

VCG/dk/lj/jre/pb

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