

Child-Find in an RTI World

by

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The Modernization of LD Eligibility

When the President’s Commission on Excellence in Special Education reviewed the state of high-incidence disabilities, particularly learning disabilities (LDs) in 2002, it found an antiquated, dysfunctional, and unscientific model for determining LD eligibility. Most states used a discrepancy model that compared IQ scores to norm-referenced achievement scores under a simple difference procedure. The research of LD experts, however, indicated that this model was not predictive of true LDs, led to misidentification, and provided interventions too late, precisely at a time when they were likely to be least effective. Moreover, the model allowed eligibility for students that may have been “instructional casualties” – non-disabled students that simply did not receive appropriate regular education services and additional interventions when they struggled to meet grade-level standards. To the Commission, the need for reform was clear. The Commission’s report and the various commentators at congressional hearings pointed to the following possible options available to the Congress in reauthorizing the Act:

1. Move to an LD evaluation and eligibility model that focuses on assessing a student’s response to early educational interventions within a school’s general programs, rather than on IQ, achievement testing, and exclusionary clauses.
2. Focus on reading assessments in kindergarten and first grade to determine which students are likely to develop reading problems in later grades and to provide scientifically sound interventions at a time when they can better address the deficits.
3. Require school use of IDEA-B funding to provide scientifically sound educational intervention to students that are not currently eligible for special education, but who show early signs of reading or other academic deficits.

4. Limit IDEA eligibility to those students whose disabilities are such that they do not respond to early intervention and require more specialized instruction within special education.

Looking back at the recommendations of the President's Commission, we can better understand the policies underlying both key provisions of IDEA 2004, the new federal regulations implementing the new IDEA, and the emergence of response-to-intervention (RtI) programs in school systems. The regulations, in particular, point a path to significant and meaningful reform of the LD evaluation and eligibility model, with reference to RtI methodology. Reform, however, implicates change, and even beneficial change can cause confusion and conflict. The new way of thinking about struggling students, regular intervention programs, pre-referral practices, and LD evaluations poses new and significant challenges in the following areas:

- Child-find in an era of expanding regular education interventions
- Conducting appropriate and modern LD assessments
- Using data from high-quality research-based intervention programs
- Coordinating with regular education intervention programs
- Complying with revised state criteria on LD eligibility
- Re-evaluating existing LD-eligible students

The IDEA 2004 Provision on LD and RtI

Based on the guidance of the Commission's Report, the Congress moved to begin the reforms needed to the LD evaluation and eligibility systems. Under the IDEA (IDEA 2004), school districts cannot be required to use a discrepancy-based LD formulation, but may instead opt to use a response-to-intervention (RtI) model. Specifically, the new IDEA states that "a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability. . ." 20 U.S.C. §1414(b)(6)(A). In making the LD eligibility determination, schools "may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures . . ." §1414(b)(6)(B). Thus, states cannot require local educational agencies to use the discrepancy model. A school system is free to design and implement a response-to-intervention LD eligibility model. Although basic, the provision set firm parameters for USDOE in promulgating its regulations, and for the states in passing their own detailed LD criteria. It set the wheels in motion for the development of a framework within which schools could make needed changes.

The USDOE's 2006 LD Regulations

After the required period of comments and hearings, on August 16, 2006, the USDOE issued a complex regulation setting forth a general framework for states to issue their own rules on LD evaluations and eligibility. 34 C.F.R. §§300.307-311. It also issued extensive commentary to accompany the final LD regulations. *See* 71 Federal Register 46,646-46,661 (August 14, 2006). The following are the final regulations (in their full form) addressing evaluation and eligibility for students with potential learning disabilities, with relevant excerpts and editorial comments culled from the USDOE commentary section:

§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.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

- *Rules for States*—Section 300.307 sets forth the parameters that states must meet in promulgating their own detailed LD criteria. It establishes that states must have criteria for LD, and that LEAs within a state must comply with the state criteria. It also reflects the will of the Congress that no school should be forced to use the dysfunctional discrepancy model, and that schools should have the discretion to use RtI-based analysis as part of the LD evaluation process.

- *States may prohibit the discrepancy model*—As expected, the regulations take the position that IDEIA allows states to prohibit the use of a discrepancy model for LD

eligibility. The commentary plainly states that “[u]nder section 614(b)(6) of the Act, States are free to prohibit the use of a discrepancy model.”

- *RtI may be a component of the evaluation*—At various times in its commentary, USDOE makes clear that an RtI process cannot be the sole determinant of whether a child meets LD eligibility. “The implementation of RTI in practice, however, has included other domains. RTI is only one component of the process to identify children in need of special education and related services. Determining why a child has not responded to research-based interventions requires a comprehensive evaluation.” 71 Fed. Reg. 46,647. The commentary cites §300.304(b) as requiring that assessment of LD include a variety of assessments, rather than relying on one single criterion for determining eligibility. “The results of an RTI process may be one component of the information reviewed as part of the evaluation...” 71 Fed. Reg. 46,648. USDOE states in straightforward language that “...a child’s eligibility for special education services cannot be changed solely on the basis of data from an RTI process.” 71 Fed. Reg. 46,648.

- *The crucial role of the States and their criteria*—The commentary highlights the key role of state agencies in specifying how LD evaluation and eligibility is to be implemented in their schools. “It is up to each State to develop criteria to determine whether a child has a disability, including whether a particular child has an SLD.” 71 Fed. Reg. 46,648. The policy underpinning of the requirement on the states is the need for consistency and uniformity within a state. “The Department believes that eligibility criteria must be consistent across a State to avoid confusion among parents and school district personnel. The Department also believes that requiring LEAs to use State criteria for identifying children with disabilities is consistent with the State’s responsibility under section 612(a)(3) of the Act to locate, identify, and evaluate all eligible children with disabilities in the State.” 71 Fed. Reg. 46,649.

Note—A review of various states’ LD criteria show that they still allow reliance on the discrepancy analysis as part of the LD evaluation. This tells us that we are only at the onset of true reform in this area. States may be moving cautiously toward modernizing LD evaluations because of concerns over whether schools are ready to implement high-quality research-based interventions that can support the RtI analysis, or over concerns about whether schools are ready to make major changes in their assessment practices. That reform may take place gradually, however, is not necessarily a bad thing. Change that implicates both system and attitudinal reform may best be made in an incremental fashion.

§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
- (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.
- (b) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or

math, the group must consider, as part of the evaluation described in §§300.304 through 300.306 –

- (1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
 - (2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents.
- (c) The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 and 300.303, unless extended by mutual written agreement of the child’s parents and a group of qualified professionals, as described in §300.306(a)(1) –
- (1) If, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and
 - (2) Whenever a child is referred for an evaluation.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

- Section 300.309 is the major LD provision in the 2006 final regulations. It sets forth the fundamental elements and requirements of a current LD evaluation under the IDEA. It is also a regulation that only sets forth a broad framework within which states can develop their own LD models.

A Big Picture Overview of the LD Regulation at §300.309

At its core, §300.309 envisions a four-element system:

1. A determination that the child is not achieving adequately for their age or to meet state standards;
2. Either (A) a determination that the child is not making sufficient progress to meet age or state standards using an RtI process, or (B) a determination that the child exhibits a pattern of strengths and weaknesses relative to age, state standards, or IQ, using appropriate assessments;

3. A determination that the team’s findings on the above are not primarily the result of visual, motor, or hearing disabilities, MR, ED, or cultural, environmental , economic disadvantage, or limited English proficiency; and
4. A consideration, as part of the evaluation, of data that demonstrates that prior to evaluation, the child was provided appropriate instruction in regular settings, including data-based documentation of repeated assessments of achievement at reasonable intervals, which is shared with parents.

The regulation leaves to the states the job of establishing the nature of the data to be collected under an RtI model, as well as the amount of data needed. In addition, it appears that states will need policies on the types of general education services that can support the RtI option. States may also decide to establish a completely alternative means of determining LD, as long as it is “research-based.” The states, moreover, will likely have to add clarity and specificity to the rather amorphous “strengths and weaknesses” option, which implies a movement to more modern and sophisticated use of assessment instruments and interpretation techniques.

Key Provisions of the Regulation, with Commentary

The most extensive portion of the commentary on the LD regulations involved §300.309, which is the key regulation setting forth a framework for determining the existence of a LD. This regulation, with its length and complexity, requires close study.

- (a)(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.**

- *The threshold finding of lack of achievement*—Commenting on the first step of LD eligibility, as expressed in §300.309(a)(1)(inadequate achievement), USDOE states that “[t]he first element in identifying a child with SLD should be a child’s mastery of grade-level content appropriate for the child’s age or in relation to State-approved grade-level standards, not abilities. This emphasis is consistent with the focus in the ESEA [NCLB] on the attainment of State-approved grade-level standards for all children.” 71 Fed. Reg. 46,652. “The reference to ‘State-approved grade-level standards’ is intended to emphasize the alignment of the Act and the ESEA [NCLB], as well as to cover children who have been retained in a grade, since age level expectations may not be appropriate for these children.” Id.

Why age?—Obviously, the need to add an age reference is required in order to avoid creating an incentive to grade retention. Moreover, the Department is reemphasizing the policy, embodied in NCLB, that the ultimate goal is student attainment of state-mandated regular curriculum standards to the greatest degree possible. “Accelerated growth toward, and mastery of State-approved grade-level standards are goals of special education.” 71 Fed. Reg. 46,653.

Is failing a statewide test “failure to achieve”?—On one point the commentary is crystal clear—failing a statewide assessment is not enough, in and of itself, to qualify a student as LD. “We agree that failing a State assessment alone is not sufficient to determine whether a child has an SLD. However, failing a State assessment may be one factor in an evaluation considered by the eligibility group.” 71 Fed. Reg. 46,652. This guidance likely was intended to prevent referrals to special education based solely on a child’s failure to pass a statewide assessment, under the argument that such failure means the child is “not achieving adequately” on state grade-level standards under §300.309(a)(1).

(a)(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

- *RtI makes its entrance*—After the step of determining that the student is not achieving adequately, subsection (a)(2) of the regulation offers a choice—either (1) determine that the student has not made “sufficient progress to meet” state standards by use of an RtI process (i.e., assess a student’s level of response to high-quality scientifically sound regular interventions), or (2) proceed to the “strength-and-weaknesses” pattern assessment option (see below).

- *Fundamental unanswered questions*—How much progress is necessary in regular intervention programs for the team to determine that a child is not LD based on their response to the interventions? The language of the regulations is susceptible to contrary interpretations. One could argue that “sufficient progress to meet” state standards means that the student has actually reached age-level performance (i.e., on chronologically appropriate grade level). Or, one could argue that the point is whether the child appears to be making sufficient progress with regular interventions to be moving toward meeting standards. The fact that the language mixes terms of “progress” with terms of “meet” state standards—two unequal terms—means we will inevitably require caselaw determinations to understand the concept fully.

Note—In light of the potential for differing interpretations on the above questions, it is telling that there appear to be no reported cases at this time involving disputes over the results of pure RtI-based LD evaluations and eligibility determinations. As schools use RtI-analysis as part of LD evaluations, we can expect that some of these evaluations will lead to determinations that the child has “responded” to interventions, which, together with other evaluation components, signals that the child is not LD. These situations will lead to hearing requests alleging inappropriate evaluation and eligibility determination. That there are no reported cases on this likely dispute scenario may indicate that not many schools, at this time, are engaging in the RtI-oriented analysis of data from high-quality interventions as part of the evaluation process.

- *RtI model up to LEAs*—OSEP letters have indicated that the type of RtI program or model to be implemented is entirely up to individual LEAs. “The LEA may choose the RTI model it wishes to implement.” *Letter to Clarke*, 108 LRP 65824 (OSEP 2008). In addition, the LEA also has discretion to determine the roles and responsibilities of staff implementing and overseeing the intervention programs, including its training components, data gathering, and communications with parents.

- *Will the RtI option create new disputes?*—USDOE resisted setting forth guidelines for the RtI option, beyond confirming that it is available, per the mandate of the Act. One commentator worried that without clear guidance from the Department, schools would be faced with more and more complex failure-to-identify claims associated with disputes over implementation of RtI processes. Sticking by its guns, the commentary shifts the debate to the state agencies’ rule-making duties, stating only that “[w]e do not believe more clarity in the requirements for RTI models is necessary. States can avoid disputes over eligibility determinations by developing clear criteria, consistent with the regulatory parameters, and providing staff with the necessary guidance and support to implement the criteria.” 71 Fed. Reg. 46,653. Thus, USDOE places the burden on the states to design LD criteria that will be “conflict-resistant.” The more detailed and clear

the LD criteria, the more resistant it should be to differing interpretations and disputes. But, if USDOE felt unsure about adopting detailed RtI guidelines, would not states feel the same way about imposing their views of RtI-based evaluations on its individual school districts?

Litigation concerns—This portion of the commentary touches on an issue of concern for many observers of special education law. Reform means change, change means conflict, and conflict can lead to dispute. How will parents and child advocates view the movement toward an RtI model, particularly when it results in findings of non-eligibility for special education, and the consequent exclusion from IDEA procedural safeguards and protections in various areas? That point of contention has already led to some of the initial caselaw that will likely create a new area for judicial review.

More concern over complicated failure-to-identify claims—One commenter stated that a parent could sue for compensatory services if, after requesting an evaluation, the LEA requires an assessment of how the child responds to high quality research-based instruction. The USDOE commentary responds that “[i]nstructional models vary in terms of the length of time required for the intervention to have the intended effect on a child’s progress.... Parents should be informed if there are concerns about their child’s progress and should be aware of the strategies being used to improve and monitor their child’s progress.” 71 Fed. Reg. 46,658. Certainly, the regulations do not discuss the length of interventions, or limits on time for interventions. See, e.g., *Salado Ind. Sch. Dist.*, 108 LRP 67655 (SEA TX 2008) (“This rule does not establish the specifics of important operative terms and phrases used therein. For example, the rule does not specify... how long a district may engage in the process prior to referral for special education assessment”).

- *Must states develop RtI policies, in addition to LD criteria?*—Apparently so. Section 300.311(a)(7) states that schools must inform parents, as part of eligibility reports on LD, of state policies regarding the amount and nature of data that would be collected, as well as the general education services that would be provided. OSEP has stated that “the Part B regulations require state special education policy concerning identification of SLD through an RTI process to address the amount and nature of student performance data that would be collected and the general education services that would be provided in the RTI process.” *Letter to Zirkel*, 50 IDELR 49 (OSEP 2008).

- *Initial caselaw*—Cases are only starting to recognize the emergence of RtI initiatives. In *Salado Ind. Sch. Dist.*, 108 LRP 67655 (SEA TX 2008), the hearing officer correctly writes that “school districts are now being encouraged to use a continuum of

educational interventions, rather than simply referring a student for special education evaluations when the student demonstrates that he might have a disability that interferes with his education. The RTI approach is meant to eventually replace the traditional application of educational and intellectual testing instruments to the problem of a student's low classroom performance." Other cases, however, show that old thinking may persist for some time. In the eligibility case of *Alvin ISD v. A.D.*, 48 IDELR 240 (5th Cir. 2007), for example, the hearing officer from which the appeal proceeded ruled that the school's provision of regular interventions in the form of an "academic and behavior contract" to a regular education student with a private ADHD diagnosis constituted a "special" program, and thus a tacit agreement that the student was in need of special education services. The hearing officer thus ordered the student placed in special education. The federal courts reversed the decision, finding that the student was not in need of special education.

Note—Certainly, RtI methodology envisions the provision of regular interventions far more intensive and structured than a simple "academic and behavior contract." The provision of these services should not be viewed as implicit agreements that special education is required, but rather as the appropriately expanding universe of interventions within regular education, for all struggling students. There are, however, some clear limits—a hearing officer saw the provision of actual special education services in a resource setting to a regular education student as a significant indicator that a student was in need of special education services, and thus IDEA-eligible in the case of *Adelanto Elem. Sch. Dist.*, 108 LRP 69424 (SEA Calif. 2008). The school unsuccessfully argued that the special education instruction was just part of its regular interventions.

- *What about RtI in areas other than LD?*—OSEP has stated that "the Part B regulations do not address the use of an RTI model for children suspected of having other disabilities." *Letter to Clarke*, 108 LRP 65284 (OSEP 2008). Of course, nothing in IDEA would prohibit a school from undertaking screening and other pre-referral activities for students struggling in the classroom for reasons other than academics, such as students with behavioral or emotional problems.

(a)(2)(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

- *Standardized assessment instruments still front and center* – The USDOE commentary makes clear that its position is that, RtI-based reforms notwithstanding, standardized testing has a place in determining LD eligibility. It states that “[n]othing in the Act or these regulations would preclude the eligibility group from considering results from standardized tests when making eligibility determinations.” 71 Fed. Reg. 46,651.

Although RtI experts generally contend that standardized testing is not necessary to implement an LD eligibility process based on RtI, the USDOE did not go so far as to exclude consideration of standardized tests. Indeed, the option other than RtI, what we can call the “strengths and weaknesses” option, is plainly built upon IQ and achievement test results. Thus, for schools and states not on the RtI bandwagon at this time, an eligibility process based on test scores is still available, although with some reforms, as seen below.

- *The reason for the assessment alternative to RtI analysis* – In the second part of §300.309’s process, schools may use an assessment-based alternative to the RtI analysis. We can ask ourselves the following question: if an RtI analysis is the preferred method for determining LD, why would the USDOE permit use of alternative assessment-based methods? First, USDOE recognized that many school systems across the U.S. are not ready for an RtI-based model because they have not yet fully installed and implemented the high-quality research-based interventions that would be needed to support an RtI-based analysis. “Research indicates that implementation of any process, across any system, is most effective when accomplished systematically, in an incremental manner, over time.” *Letter to Cernosia*, 108 LRP 2652 (OSEP 2007). Second, experts on LD broadly envision a role for assessment instruments when used and interpreted appropriately.

- *Researching modern use of assessment instruments* – Schools would be well-advised to research modern approaches to using assessment instruments, both cognitive and achievement, in order to help determine the presence of an LD, or make a finding that some other condition is at work. For example, the work of researchers Dawn Flanagan and Salomon Ortiz of St. Johns University on cross-battery assessment techniques is advancing our knowledge of how to use cognitive and achievement testing not only to determine eligibility, but also to help plan individualized interventions. *See, e.g., FLANAGAN, ORTIZ, ALFONSO, MASCOLO, “Essentials of Cross-Battery Assessment” (2007).*

(a)(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.

- *Application of traditional exclusionary clauses*—As in prior versions of IDEA, a determination of LD requires that the assessment team rule out that their findings are not primarily the result of another disability or a non-disability factor. The final regulations, however, offer no new ideas or guidance as to how to properly apply and document this determination. The question is particularly difficult with respect to ascertaining the effect of cultural factors, and environmental or economic disadvantage. How is the team to determine whether a student’s economic disadvantage is the “primary” cause of depressed academic achievement as opposed to only a contributing factor?

(b) **To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§300.304 through 300.306—**

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

- *Ruling out lack of appropriate instruction*—To USDOE, the key point is that “[c]hildren should not be identified as having a disability before concluding that their performance deficits are not the result of a lack of appropriate instruction.” 71 Fed. Reg. 46,656. Moreover, the determination of “whether a child has received ‘appropriate instruction’ is appropriately left to State and local officials to determine. Schools should have current, data-based evidence to indicate whether a child responds to appropriate instruction before determining that a child is a child with a disability.” Id. “What is important is that the group making the eligibility decision has the information that it needs to rule out that the child’s underachievement is a result of a lack of appropriate instruction. That could include evidence that the child was provided appropriate instruction either before, or as a part of, the referral process.” The commentary cautions, however, that “[e]vidence of appropriate instruction, including instruction delivered in

an RTI model, is not a substitute for a complete assessment of all of the areas of suspected need.” Id.

Notice, moreover, that this step is required even if the school does not opt for the RTI process. This step, rather, serves to help ensure that the “instructional casualties” that the President’s Commission referred to are not misidentified as students with disabilities.

- *Does the regulation examine the right things?* – You may notice that this provision of the regulation purports to address the appropriateness of the instruction provided to the student, but does not examine factors such as teacher credentials, experience, test scores of all the teachers’ students in comparison to those in the school in general, teacher evaluations/appraisals, etc... One would think these factors would be key to deciding whether instruction has been appropriate. Incongruously, the provision asks schools to determine whether instruction has been appropriate on the basis of student performance, even though the first LD evaluation factor requires a determination that the child is not achieving adequately. This incongruity may affect the ability of the provision to effectively screen out situations where regular instruction has truly been inappropriate.

Child-Find Complexities in RtI-Oriented Schools

- Establishing and using high-quality research-based interventions for students that are struggling to meet grade-level standards creates new questions with respect to LEAs’ obligations to identify students who may be disabled and in need of special education services, including the following:

At what point should a school suspect that students struggling with the curriculum and receiving regular education interventions are potentially LD?

How long should a student receive regular interventions without significant improvement before the school moves to initiate an IDEA evaluation?

What is the child-find obligation if a child is moving through the tiers of intervention programs with some improvement, but still with deficits in achievement?

How should schools handle parents' requests for evaluations when interventions have only begun to show promise?

How can schools avoid failure-to-identify IDEA hearing claims while attempting to make best use of regular education interventions prior to referral?

What role do campus assistance teams play in the RtI process and the decision to refer a child to special education?

It is in this area that we are likely to see the most litigation. Questions may be raised about the timeliness of implementation of high-quality interventions, the rate of the student's progress in the interventions, the timeline for interventions (particularly in tiered, lengthy intervention models), and situations where parents were encouraged to allow interventions to proceed only to lead to limited progress and delayed placement in special education.

- The recent case of *A. P. v. Woodstock Bd. of Educ.*, 50 IDELR 275 (D.Conn. 2008), previews the type of arguments schools may face in these disputes in future cases. Here, parents argued that the school improperly failed to refer an elementary grade student with some difficulties in the classroom. The student received assistance and special strategies in the classroom from his 4th grade teacher, who communicated closely with the parents. In addition, a Child Study Team (CST) met twice in his 5th grade year to consider the student and determined that he could be accommodated as a regular education student and developed action plans to address his difficulties. The parents alleged child-find violations, and argued the following points:

1. Use of CSTs were a per se violation of IDEA because they circumvented the IDEA's procedural requirements,
2. The school used the CSTs in order to prevent the parents from making a referral under the IDEA and thwarted their attempts to have him identified,
3. If use of CSTs are permitted by the IDEA, all IDEA procedural safeguards must apply during the pre-referral process, including parental participation and prior notice.

Both the hearing officer and the court found that use of CSTs was not in violation of IDEA. "The use of alternative programs, such as CSTs, is not inconsistent with the IDEA. For it is sensible policy for LEAs to explore options in the regular education environment before designating a child as a special education student."

Editorial Note—Indeed, the court pointed out that IDEA regulations envision the existence of pre-referral processes. Section 300.302 discusses that screening of students to determine appropriate instructional strategies “shall not be considered to be an evaluation for eligibility for special education and related services.” In a footnote, the court also cited from the USDOE commentary accompanying the regulations, where USDOE stated that nothing in IDEA prohibits states from developing and implementing policies that permit screening of children to determine if evaluations are necessary. *See Id.* at fn. 2.

Second, the court found that CSTs did not act as a “roadblock” to referral, since the parents could have requested a referral at any time and knew how to do so, since the child had been in special education at the pre-school level. Finally, the court rejected the argument that the CST meetings had to comply with all IDEA procedural safeguards. “If, as the Parents argue, any ‘meeting’ regarding a child who is having difficulties triggered the procedural protections of the IDEA, then almost any action at all on the part of the school would constitute a referral.” The court found that such a system would discourage teachers from communicating concerns about students and “prevent schools from trying alternatives for students who, while perhaps not meeting the statutory definition of a ‘child with a disability,’ are in need of extra help in order to succeed academically.”

Ultimately, the court held that the school had not failed in its child-find obligations since the student improved with regular interventions, to the point of passing the statewide assessment without accommodation. “This is decidedly not a case in which a school turned a blind eye to a child in need.” *See also, Palmyra Area Sch. Dist.*, 47 IDELR 204 (SEA PA 2007)(another example of use of CSTs as part of the pre-referral process).

Another Note—If the student was doing well and passing the state assessment, why would the parents argue IDEA eligibility? The parents’ arguments in the *Woodstock* case uncover a suspicion among some parents that the provision of regular education interventions to struggling students, some of whom may have disabilities, serves to deny them the procedural safeguards and legal protections of IDEA. Ironically, the need to protect IDEA-eligible students and their parents with the formidable procedural and legal protections of the IDEA also creates a desire to access those protections, apparently even in cases where the regular interventions are sufficient to meet the student’s needs. Certainly, for students with disabilities whose needs are met through regular interventions, there are no IEPs, IEP team meetings, SEA complaints, IDEA due process hearings, mediation, independent evaluations, etc...

A final note—The court uses a fairly straightforward analysis that sounds like RTI thinking: if a child struggles in the classroom, but improves after regular education interventions, then there is no need to refer or qualify under IDEA. Similarly in the context of LDs, if a student improves with application of RTI-oriented high-quality interventions, then the student is not LD.

- *What if the parents request a referral in the midst of school attempts to implement high-quality research-based interventions?*—The regulations answer that question. Ostensibly, one way the regulations could have dealt with this situation would have been to allow school districts a certain timeframe if they were implementing RTI programs for a struggling child, say six months, during which it would not have to undertake evaluations at parent request. This scheme would have allowed schools to implement RTI programs, and thus allow for the use of the RTI-based evaluation option in §300.309(a)(2). Instead, the regulation simply states as follows:

(c) The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 and 300.303, unless extended by mutual written agreement of the child’s parents and a group of qualified professionals, as described in §300.306(a)(1) —

(1) If, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and

(2) Whenever a child is referred for an evaluation.

Thus, USDOE clarifies that the regulations allow a parent to request an evaluation that would take place within the normal 60-day timeline for initial evaluations, RTI process or not. “[W]e will combine proposed §300.309(c) and (d), and revise the new §300.309(c) to ensure that the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which could include instruction in an RTI model, and whenever a child is referred for an evaluation. We will also add a new §300.311(a)(7)(ii) to ensure that the parents of a child suspected of having an SLD who has participated in a process that evaluates the child’s response to scientific, research-based intervention, are notified about the State’s policies regarding collection of child performance data and the general education services that will be provided; strategies to increase their child’s rate of learning; and their right to request an evaluation at any time.” 71 Fed. Reg. 46,658. Put another way, “[i]f parents request an evaluation and provide consent, the timeframe for evaluation begins and the

information required in §300.309(b) must be collected (if it does not already exist) before the end of that period.” Id.

RtI opt-out by parents—Can a parent then basically opt out of the use of an RTI process by simply requesting an evaluation at an early stage of the process and refusing to agree to an extension of the 60-day timeline...? USDOE argues that this concern should not be overstated. “Models based on RTI typically evaluate the child’s response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child’s achievement, including observation data. RTI models provide the data the group must consider on the child’s progress when provided with appropriate instruction by qualified professionals as part of the evaluation.” 71 Fed. Reg. 46,658. If not, then the team will have to do with whatever RtI data can be gleaned within the 60-day timeline, keeping in mind that it will also need time to undertake the other components of the comprehensive evaluation and complete a written report. Thus, this provision will most significantly impact schools that implement lengthy interventions as part of an RtI model.

Refusal of evaluation—Of course, schools could refuse to refer the student, and then provide parents with written notice of refusal and notice of procedural safeguards. This course of action, however, places schools at risk of a failure-to-identify hearing request. If the parents prove that there are reasonable grounds to suspect disability and need for special education services, then the school loses the case and will be ordered to evaluate the student (and be potentially liable for the parents’ attorneys’ fees). The low-risk option would appear to be for schools to indicate their commitment to continuing the interventions, while at the same time making clear to parents that they will respect their decision to refer the child for evaluation if that is what they want.

- *What if the regular interventions fail and the child winds up in special education after all?*—A Texas hearing officer ruled that it could not “fault the School District for attempting an RTI program and find that Student was denied a FAPE as a result of the delay in referring Student for special education.” *Salado Ind. Sch. Dist.*, 108 LRP 67655 (SEA TX 2008). The hearing officer found that all stakeholders had worked collaboratively in providing pre-IDEA interventions. “The Hearing Officer cannot fault [the] school district for not timely referring a student for special education where the school district attempted an RTI program which eventually resulted in the student’s referral for special education.”

Editorial Note—The case above, however, shows that there can be litigation even where all stakeholders, including the parent, collaboratively agreed to attempt regular education interventions prior to a special education referral. Note, therefore, how the hearing officer took care to point out that the provision of interventions was accomplished collaboratively with the parents. In all likelihood, cases will emerge where the decision-making is not made on a consensus basis, thus giving the parents more room to argue that use of RtI programs served to delay eventual special education services, and that they have an arguable claim for compensatory services.

- Another example of an RtI-era failure-to-identify case is *Lake Park Audubon Ind. Sch. Dist. #2889*, 50 IDELR 117 (SEA MINN 1008), where a school district attempted intervention plans for a kindergarten student with academic and behavior problems. When she exhibited problems learning letter names, letter sounds, numbers, and counting, while also displaying impulsive and hyperactive behavior, the school developed an “Academic Improvement Plan.” The school noted that she was in a foster home and perhaps needed some time to adjust to school. The student then transferred to the District in question, where additional interventions were put into place. Although the student showed some improvement, she was nevertheless retained in kindergarten due to her overall skill levels and the interruption in her academic learning due to life transitions, including two foster homes in different parts of the state within six months. After the retention, the student was again referred to a “teacher assistance team” for pre-referral interventions. When that round of interventions did not show much success, the school evaluated her for special education and she met criteria for LD. The parents alleged that there was a failure to timely identify and evaluate the child. The hearing officer disagreed, finding that state law required schools to attempt, if possible, two types of regular education interventions prior to referral. Moreover, the hearing officer pointed to the child’s complicated home situation, stating that “given the Student’s age and multiple home placements, it is reasonable for the District to have attempted other strategies prior to initiating a special education evaluation.”

Editorial Note—The decision above does not discuss what method was used to determine that the student was LD. And, there is no indication that the school worked with the foster parents to reach agreement on pursuing the pre-referral interventions. From the written opinion, it appears that school staff made decisions on types of interventions and renewing rounds of interventions.

- Similarly in the case of *Dowington Area Sch. Dist.*, 107 LRP 63155 (SEA PA 2007), a student experiences academic difficulties, is provided a variety of regular education interventions, continues to experience difficulty, is ultimately evaluated, qualifies as LD, and the parents allege a failure to timely identify. The variant here is that the

student was evaluated twice for special education, but after the first evaluation was determined to not be in need of special education, as his “Instructional Support Team” interventions were deemed sufficient to meet his needs. The student was provided academic supports, reading intervention, and DIBELS (Dynamic Indicators of Basic Early Literacy Skills) progress monitoring. Although the student showed initial “steady progress in all areas and a continued response to remediation,” the progress eventually slowed and the student began to experience anxiety about school, leading the parents to place him in a private school setting. The hearing officer rejected the failure-to-timely-identify claim, finding that since the student was responding to regular education interventions, the District did not fail in its child-find obligations. Then, when the student’s progress slowed, the IST recommended re-evaluation, and he was evaluated and placed accordingly.

Editorial Note—This case is an example of a student that initially responds well to interventions, but the progress slows and difficulties continue. Continuous progress monitoring and quick action when difficulties re-rose saved the school in this case. The lesson for schools is to not fall asleep when high-quality interventions appear to be working, as the progress may slow and new decisions may have to be made.

- *Avoiding failure-to-identify claims and liability*—A significant challenge for schools attempting to implement interventions for struggling students prior to referral for a special education evaluation will be avoiding failure-to-identify or failure-to-timely-identify claims. The tightrope schools must walk is between making effective use of regular education interventions while also respecting parent rights and child-find obligations under the IDEA. The key, as exemplified in the *Salado* case above, may lie in involving parents as partners in the decision-making process regarding regular education interventions and the timing of a special education evaluation. This effort would include the following steps:

1. Providing parents with information on the range of regular education interventions available,
2. Meeting with parents to discuss intervention options, agreed timelines, and courses of action,
3. Making clear to parents their right to request an IDEA evaluation,
4. Reaching a consensus on a course of action,
5. If a decision is made to pursue regular education interventions, progress data must be shared with parents frequently,
6. Follow-up communication regarding progress or lack thereof,
7. Follow-up meetings to review progress and renew consensus on current course of action,

8. Documentation of the steps above.

Parents that are partners in the intervention decision-making process will be less likely to raise legal challenges, and evidence of consensual action will be important should the matter lead to litigation. The issue is of importance, because there will be situations where even after application of high-quality interventions, the student does not make sufficient progress, an IDEA evaluation takes place, and the student is placed in special education. Thus, parents must be informed that there are no guarantees that regular education interventions will work.

Practical Note—States and schools are starting to develop informational brochures that help describe the continuum of available interventions for struggling students and the process by which the services are accessed, data is generated, and progress is reviewed. *See, e.g.*, Parent’s Guide to Early Intervening and Response to Intervention: Arizona’s K-8 Plan, A Primer for Parents (November 2006, Arizona DOE); A Family Guide to Response to Intervention (RtI) (2008, New Jersey Parent Information Center).

Another Practical Note—It may be wise for schools to document meetings with parents, parents’ positions, consensual decision-making, agreements to pursue interventions for a given time, etc... If conflicts arise later, the documentation may prove crucial to proving the factual chronology and the school’s attempts to make decisions in collaboration with parents.

Avoiding unilateral decision-making—The safest course of action for schools may be to avoid unilateral decisions on regular education interventions, including decisions on timelines for interventions, types of interventions (from those available at the school), schedules for progress monitoring, and most importantly, the point at which to initiate an IDEA evaluation. Certainly, the school stands in the best position to defend its actions if they are undertaken in agreement with the parents, and the parents are informed that they are free to request an IDEA evaluation at any time. The difficult cases for schools, on the other hand, are likely to be ones where school staff unilaterally decide on interventions, discourage a parental referral for evaluation, or indicate that a time certain for interventions must be exhausted prior to referral in all cases.

- *Fidelity of implementation*—Another problem that is likely to trip up school districts as they adapt to RtI methodology is failure to follow their own procedures and guidelines as they pursue the intervention process for a particular student. In the case of *Crete-Monee Community Unity Sch. Dist. #201-U*, 108 LRP 42831 (SEA ILL 2008), parents of a child who had gone through a pre-referral process claimed that the school failed in

its child-find obligations. The hearing officer noted that “the district has moved to a response to intervention (‘RTI’) model, which [was] described as a data-driven problem solving model in which at risk students are brought to the attention of a building’s RTI team.” The team then designs an intervention plan and reconvenes if the student’s difficulties persist. But, the hearing officer also found that there were questions as to whether the school had actually followed this procedure, as the student was not referred for interventions although the student’s grades were declining. Ultimately, the hearing officer ruled that the child was not IDEA-eligible, but the lesson for schools is that intervention procedures must be followed faithfully or hearing officers may rule that failure to follow pre-referral procedures properly resulted in a failure to timely evaluate the student.