SPECIAL EDUCATION ELIGIBILITY AND OVER IDENTIFICATION: THE BALANCE BETWEEN RTI AND CHILD FIND

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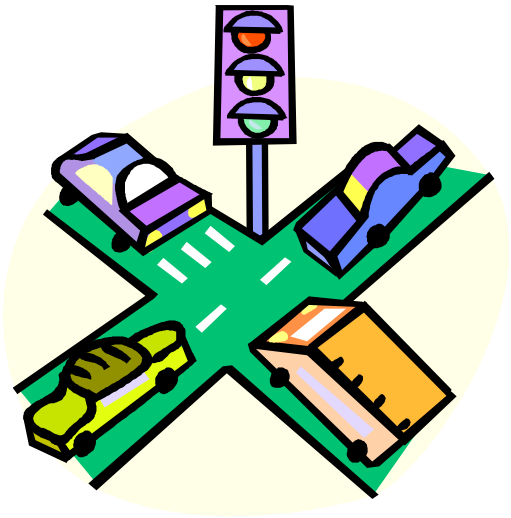
I. Introduction



Response to Intervention ("RTI") isn't really new. Best practice has always involved the use of differentiated instruction and general education interventions for struggling learners, regular assessment to determine the effectiveness of those interventions, and a review of the student's progress. Many state laws require the consideration of general education interventions prior to referring a student to special education. More recently, IDEA was amended to prohibit a student from being identified for special education if the student's difficulties are due to lack of appropriate instruction in reading or math. With the 2005 amendments of IDEA, Congress made changes to reduce the number of students identified for special education. Conversely, the amendments to the American with Disabilities Act in 2009 were intended to increase the number of students who are eligible for Section 504 services. Navigating the intersection between RTI, §504, and special education can be hazardous. Knowing whether to implement RTI or refer a student to the 504 committee or special education isn't always easy, and collecting good RTI data can be a challenge. Data driven decisions are the key to implementing RTI with fidelity and are critical to defending against a "failure to identify" complaint.

II. The Long and Winding Road to RtI (How did we get here?)

1777 – Public Education Begins – "By this means, twenty of the best geniuses will be raked from the rubbish annually, and be instructed at public expense." *Thomas Jefferson, 1777 Plan for Public Education, Commonwealth of Virginia.*

1925 – Compulsory School Attendance – "No question is raised concerning the power of the state reasonably . . . to require that all children of proper age attend some school. . ." *Pierce v. Society of Sisters,* 268 U.W. 510 (1925). [Note: Exempt from the state compulsory school at issue in this case were children who were abnormal, subnormal, or physically unable to attend school.]

1954 – Education for All, Regardless of Race – "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an

opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483 (1954).

1975 – Education for All Handicapped Children Act (P.L. 94-142) – "A State is eligible for assistance under this part . . . if the State demonstrates . . . that the State has in effect policies and procedures to ensure . . . a free appropriate public education is available to children with disabilities residing in the State between the ages of 3 and 21, inclusive." [Now the Individuals with Disabilities Education Act (IDEA)].

2002 – Higher Standards for All Children; No Child Left Behind Act

- Each State desiring to receive a grant under Title I must adopt challenging academic content standards and challenging student academic achievement standards. 20 U.S.C. §6311(b)(1) ("State plans").

- The academic standards must be the same academic standards the State applies to all schools and children in the State. 20 U.S.C. §6311(b)(1)(B).

- The academic standards must include at least mathematics, reading or language arts, and, as of the 2005-2006 school year, science. 20 U.S.C. §6311(b)(1)(C).

- The academic standards must include the same knowledge, skills, and levels of achievement expected of all students. 20 U.S.C. §6311(b)(1)(C).

- Each State plan must reflect that the State has implemented a set of high quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and, as of 2007-2008, science.

- These assessments will be the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards. 20 U.S.C. §6311(b)(3)(A).

- Each State must define what constitutes AYP of the State, and of all public elementary and secondary schools and LEAs in the State, toward enabling all students to meet the State's student academic achievement standards while working toward the goal of narrowing the achievement gaps in the State, its LEAs and public schools. 20 U.S.C. §6311(b)(2)(B).

- By the end of 2013-2014 all students are to be proficient in the state content standards.

2006 – Response to Intervention (RtI) and NCLB – RtI is a strategy for meeting the goals of NCLB. . . . RtI can help states and school districts meet those goals by identifying struggling

learners early in order to improve their educational outcomes. *Response to Intervention: NASDSE and CASE White Paper on RtI* (May 2006).

What is RtI?

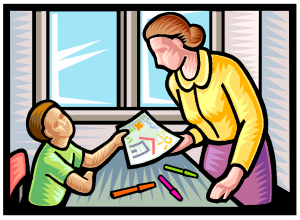
> RtI is the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals and applying child response data to important educational decisions. RtI should be used for making decisions about general, compensatory and special education, creating a well-integrated system of instruction/ intervention guided by child outcome data.

NASDSE and CASE White Paper on RtI (May 2006), pp. 2-3.

High Quality Instruction/ Intervention is Defined as:

"[I]nstruction or intervention, matched to student need that has been demonstrated through scientific research and practice to produce high learning rates for most students." *Response to Intervention Policy Considerations and Implementation, NASDSE. Inc. (2005).*

- Tier 1 – In the Classroom
- Tier 2 – In Classroom and/ or Pull-Out
- Tier 3 – Pull-Out/ Intensified



III. When do we need to provide RTI?

RTI should be provided to all students who are struggling academically, including those who are struggling due to behavior problems or social skills deficits.

NCLB requires the components of a schoolwide program and of a targeted assistance school program include "use of effective methods and instructional strategies that are based on scientifically based research that strengthens the core academic program." NCLB 1114 (b)(1)(B) and §1115(c)(1)(C). For targeted assistance schools, the methods and strategies are required to minimize removal of the students from the general education classroom.

An expressly stated goal of the revisions to IDEA is "to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children." 20 U.S.C. § 1400(5)(F). As a result, Congress added a determinant factor prohibition:

> 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:
> a. lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in Section 1208(3) of the ESEA);
> b. lack of appropriate instruction in math; or

c. limited English proficiency; and

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

From the Judges:

Lake Park Audubon ISD #2889, 108 LRP 21639 (SEA MN 2008)

District's use Title 1 funds to address a kindergarten student's needs was determined reasonable in light of the student's young age and prior moves between districts due to placement in three different foster homes.

Montgomery County Bd. of Educ., 108 LRP 69414 (SEA AL 2008)

District did not violate child find duty or wrongfully refuse to assess a student where the student received general education interventions when she failed math, and her grade was brought up to a C. Her behaviors, which included defiant and aggressive behaviors, were not significant enough and had only been observed for a few months so there was no reason to suspect an emotional disturbance.

E.M. v. Pajaro Valley Unified Sch. Dist., 109 LRP 54340 (SEA CA. 2009)

A district did not have a reason to suspect a student had a disability and needed specialized instruction although student demonstrated some distractibility. Under State law the District could not refer a student to special education until resources in general education had been considered and, if appropriate, attempted.

Student v. Fort Osage R-I School District, 110 LRP 57773 (SEA Mo. 2010)

Referral of student to the student support team for behavioral difficulties was determined to be sufficient by the hearing officer when the student did not demonstrate a need for special education. The teachers had expressed concerns about incomplete class work, tardiness, a decline in the quality of the student's work, dress code violations, vandalism, and defiant behavior. The student had been diagnosed with ADHD and Oppositional Defiant Disorder, and the parent alleged the student had an emotional disturbance, but the court determined the district did not have reason to suspect the student was eligible for special education.

Practical Tip:

Most districts screen for reading and math deficits. Make sure your RtI procedures include steps for referring students with social skill deficits or behavior issues to the student support team.

IV. What interventions are appropriate?

That depends on the area(s) of deficit and the student's progress.

Interventions at all tiers should be based on *individual* needs of the student and should include, as appropriate, (a) academic interventions such as scientifically based curriculum to address the specific area of weakness, tutorials, computer-assisted instruction, small group instruction, state

assessment remediation, peer tutoring, parent/teacher conferences and communication and (b) behavioral interventions such as behavior contracts, social skills training, general education counseling services, parent/teacher conferences and communication, use of an assignment notebook and positive behavioral supports. In Tier 2 and above, an individual RTI Plan should be developed for each student, and should be reviewed and revised based on frequent assessment and monitoring of individual progress. Like the curriculum, Congress identified the need for teacher training to be "derived from scientifically based research".[1] Teachers are expected to use peer reviewed and evidence based strategies, to recognize different learning styles and to vary their style and method of instruction to meet the needs of all students.

It may seem superfluous to state that Tier 2 interventions should match the area of need, but this is an important thing to remember when choosing Tier 2 curriculum. Some reading intervention programs, for example, are wonderful for building phonemic skills and fluency but do little to address comprehension. Likewise, some mathematics intervention programs may build calculation skills but do little to address math reasoning.

When a district is sued for failure to timely identify a student for Section 504 or special education services, the hearing officers and courts consider whether the district provided general education interventions in the area(s) of need and whether the student made progress with those interventions.

<u>From the Judges:</u>

Stone County (MS) Sch. Dist., 52 IDELR 51 (OCR VI, Dallas 2008)

A District did not violate its child find duty to evaluate a student for special education services because his progress in Tier 2 interventions resulted in academic progress. Despite continued behavior problems, which resulted in at least one DAEP placement, the student made academic progress in all areas. OCR reviewed each intervention (which included pull-out services for reading and math, as well as behavioral interventions) and specifically discussed academic progress, including an improvement in grade, STEEP scores, and state-wide achievement tests. (The District did have to take corrective action, however, because it failed to notify the parents that it was not going to evaluate their son and failed to provide the parents with Procedural Safeguards.)

Key Quote:

> The complainant's son's grades, MCT scores, Steep scores and slight academic progression convinced the district not to perform an evaluation. This evidence was sufficient to give the district a reasonable belief that the complainant's son did not need special education services at the time of the request. . . . [I]t did continue to monitor his academic and behavioral performance throughout the school year. As a result of the monitoring the district made adjustments when needed, and the resulting interventions helped the complainant's son make some academic progress.

[1]Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46627 (August 14, 2006).

E.M. v. Pajaro Valley Unified Sch. Dist., 109 LRP 54340 (SEA CA. 2009)

A district did not have a reason to suspect a student had a disability and needed specialized instruction although student demonstrated some distractibility. Under State law the District could not refer a student to special education until resources in general education had been considered and, if appropriate, attempted. Teacher provided student with preferential seating and reduced assignments. She also had regular conferences with the student's mother. She also tracked the interventions in the "classroom intervention log." The ALJ determined these were appropriate interventions. [Note: Student was later assessed by the District and DNQ'd as SLD based on discrepancy model.]

Student v. Austin ISD, 110 LRP 49317 (SEA TX 2010)

The provision of interventions "specifically focused on areas of concern in writing and readiness skills" was appropriate in light of the student's measurable progress in those areas. Some interventions provided included: peer tutoring, the availability of a word processor, behavioral/ organizational checklists, reduced or chunked work, provision of class notes, private discussion regarding behavior and focus, teacher monitoring and redirection for inattention and "fidgeting," pull-out reading, and accommodations for organizational skills.

Student v. Lovejoy ISD, 110 LRP 17533 (SEA TX 2010)

For a student with behavior problems and a diagnosis of ADHD, school counseling sessions, strategies to manage anger, weekly goal sheets and completion of reflection sheets were determined to be appropriate.

<u>Practical Tips:</u>
When determining developing the Tier 2 or 3 plan:

1. Identify the specific area of deficit
2. Identify the Baseline
3. Choose Curriculum and/ or other Interventions
    - Instructional
    - Behavioral
    - Social
4. Identify frequency and duration of interventions
5. Identify CBM and frequency of CBM at **Reasonable Intervals**
    - TEA Guidance is once a week
    - Curriculum Guidelines
6. Identify time for review
    - TEA Guidance is 4-8 weeks per tier
7. Specify Expected Progress Rate
    - Increase in
        - CBM score
        - WPM
        - Lexile score
        - Work completion/ time on task
        - Etc.

- Decrease in
  - Office referrals
  - Incomplete assignments/ time off task
  - Tardies
  - Non-compliance
  - Etc.

V. What Constitutes Adequate Progress?

The goal of RTI is to allow any student who is experiencing difficulty in the general education classroom to be successful through the use of general education interventions. The expected rate of achievement will be determined both based on the student's past learning rate and the rates projected by the curriculum being used.

<u>From the Judges:</u>

A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 221 (D. Conn. 2008)

Evidence of progress with general education interventions can support a District's failure to refer a disabled student to special education. Even if a student is suspected of having a disability, IDEA does not require the student be referred to special education, unless the student is also suspected of needing special education and related services. Thus, where a student was making progress, achieving passing grades and passing statewide achievement tests with general education interventions in 4th and 5th grade, the District did not violate its Child Find duty when it failed to convene an IEP team meeting and identify him as a student with a disability until the end of his 5th grade year *after* the parents obtained a private evaluation indicating that the student had a non-verbal learning disability.

Practical Tips:

Document interventions and progress. Use objective measures of progress. If a student is not making adequate progress with general education interventions, he should be referred to special education. Parents are not entitled to attend RtI team meetings. Nor do other IDEA procedural requirements apply to a pre-referral process. [Note, however, *El Paso ISD v. R.R.* below.]

Key Quote:

> Here, all evidence suggests that in the fourth grade, A.P. did not need special education services. . . . A.P. responded well to the assistance [his teacher] provided. He was performing at grade level and made progress throughout the year. . . . This is decidedly not a case in which a school turned a blind eye to a child in need. To the contrary, [his teacher] acted conscientiously, communicating regularly with Mrs. Powers and utilizing special strategies to help A.P. succeed.

The Court also noted that A.P. made both academic and behavioral progress and that during his 5th grade year he was referred to the Campus Based Student Support Team twice, and a plan to address his difficulties in general education was developed.

The Court also concluded that the procedural requirements of IDEA (such as the parents' right to attend meetings) did not become effective until after a student was referred to special education, and that a Student Support Team Meeting which was part of the pre-referral process did not violate the provisions of IDEA.

Key Quote:

> In essence, the Parents argue that merely discussing the possibility of a referral becomes a referral and that any time a child is not referred to [special education], the school has made an unlawful finding that the student does not qualify for special education. Not only would such a system be counterproductive . . . it would also prevent schools from trying alternative strategies for students who . . . are in need of extra help in order to succeed academically.

El Paso Independent Sch. Dist. v. R.R., 567 F. Supp. 2d 918 (W.D. Tx. 2008), *rev'd on other grounds*, 591 F. 3d 417 (5th Cir. 2009).

Although the Student Support Team (including the parents) met to review R.R.'s progress and agreed to modify his §504 accommodations, provide additional tutoring, and provide Saturday tutoring camps, the Court held that the District failed to meet its Child Find obligation because the student failed the TAKS test three years in a row and "displayed 'continuing difficulties in reading, math, and science. '" The Court also concluded that the Student Support Team's decision that an evaluation for special education was not needed constituted an improper use of the Student Support Team and denied the parent's right to consideration by the ARD committee of their request for an evaluation. The District was required to either evaluate R.R. or provide his parents with prior written notice of its refusal to do so, despite the fact that R.R.'s parents agreed that the evaluation was not needed. Finally, the Court held that the one year statute of limitations did not apply because the parents were not provided with notice of their procedural safeguards after they requested an evaluation be considered and the Student Support Team met.

Practical Tips:

If a parent asks for an evaluation or for special education services, provide the parent with a copy of the Procedural Safeguards and refer the student to special education. RtI or other general education interventions should be continued, and an ARD committee meeting should be called to consider the parent's request for an evaluation. If no evaluation is needed and the parent disagrees with the ARD committee decision, Prior Written Notice of the District's refusal to test should be provided.

Key Quotes:

> [T]he SEHO opined:

> The [STT] process, while a mandatory district requirement, is not a prerequisite to conducting a special education evaluation. Upon a parental request for a special education evaluation, the campus should begin the special education evaluation process while at the same time provid[ing] intervention strategies through the [SST c]ommittee.
>
> . . . the minutes of the STAT committee meeting, attended by RR's mother and five EPIS officials, record the committee's agreement that 'special education testing is not warranted at this time'. . . Consequently, the question before the Court is whether parental consent to forgo evaluation, given following a school district's failure to provide IDEA safeguards, relieves the district of its obligations to provide the parent with notice of its refusal to evaluate the child . . . the Court finds that it does not.

Student v. Austin ISD, 110 LRP 49317 (SEA TX 2010).

Adequate progress supported a district's delay in completing an evaluation during a five-month period following the parent's request.

Practical Tips:

While it isn't the sole factor, the result of state assessments are often used as the standard for adequate progress.

Key Quote:

> During this period, the district attempted increasing interventions and, in fact, Petitioner showed increases in the targeted areas of fluency and writing skills, with a passing grade on the [] TAKS Reading test in the commended range at the [] percentile. I do not find the school district's delay to have been unreasonable under these facts where the student made progress in targeted areas during the period of increasing intervention.

VI. When do we need to refer a Tier 1 or 2 Student to the Section 504 Committee?

When you know or suspect that the student has a disability that substantially limits a major life activity.

The ADA defines disability as follows:

1. A physical or mental impairment that substantially limits one or more major life activity of such individual;

2. A record of such an impairment; or

3. Being regarded as having such an impairment . . .

42 U.S.C. §12102(1).

> . . . [M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(2)(A).
>
> A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2)(B).

Although Congress has not defined substantial limitation, it is unlikely that a student who is successful with Tier 1 interventions would be considered substantially limited in the major life activity of learning, concentrating, reading or thinking. Therefore, the identification of a student with a disability such as ADHD or dyslexia would not, by itself, trigger a need to refer the student to the Section 504 committee.

For students who require Tier 2 interventions, however, there are additional considerations. In determining whether an impairment substantially limits a major life activity, the 2009 amendments to the ADA provide that the effect of mitigating measures (with the exception of regular eye glasses and contact lenses) should not be taken into consideration. Thus, students are disabled under Section 504 if they have a physical or mental impairment that *would* substantially limit them in a major life activity *if they were not* taking advantage of mitigating measures, even if the student is taking advantage of mitigating measures and those measures are effective.

We know that medication, low-vision devices, a wheelchair, and many other things are mitigating measures, but it is not so clear whether Tier 2 interventions will be considered mitigating measures. Students who have an impairment that impacts a major life activity other than learning (i.e., a physical impairment, an orthopedic impairment, or a medical impairment, that substantially impact the student's ability to care for himself, perform manual tasks, see, hear, eat, sleep, walk, stand, lift, bend, speak, breath, communicate[2] and work) will be eligible for Section 504 services.

Because Tier 2 interventions may be considered a mitigating measure in certain instances, if a student who is receiving Tier 2 services is identified as having an impairment, such as Attention Deficit/Hyperactivity Disorder ("ADHD") or dyslexia, the student should be referred to the Section 504 Committee for an individual determination regarding the student's eligibility for Section 504 services. (While the Section 504 referral is pending, general education interventions should be continued.) In the event a Tier 2 student is eligible for Section 504 and is successful with Tier 2 interventions, the Student's Section 504 Accommodation Plan may be identical to his/her Tier 2 Intervention Plan, but the Student should then be monitored by the Section 504 committee.

[2]Deficits in communication and speaking may also impact the major life activity of learning.

Even if a student does not have an identified disability, if a referral for Section 504 services is made by the parent or the student's teacher, the student should be referred to the Section 504 committee. The student will continue to receive RTI while the Section 504 referral is pending. If a student is evaluated for Section 504 services and does not qualify for those services, the RTI process will continue.

From the Judges:

Stone County (MS) Sch. Dist., 52 IDELR 51 (OCR VI, Dallas 2008)

OCR's opinion in *Stone County* (see above) was issued prior to the amendments to the ADA regarding mitigations measures. If this case were decided today, the result may be different if the student had a physical or mental impairment. Nevertheless, OCR found

> that the district's decision to pursue [its RtI policy] was, in effect, a denial of a Section 504 evaluation, and therefore procedural safeguards should have been provided to the complainant.

Practical Tips:

Evidence of progress is important as a defense against a Child Find claim. Even when a student is making progress, however, if a district decides not to evaluate a student after the parent has requested an evaluation, the parent should be provided with Procedural Safeguards and a PWN.

Student v. Salado ISD, SEA Docket No. 168-SE-0308, 2008; 108 LRP 67655

Interventions through RtI and Section 504 accommodations were enough to support a District's failure to identify a student for special education for almost two full school years because the District provided evidence that appropriate modifications were used, the student made progress, and the RtI team developed and implemented the RtI plan in consultation with the student's parents and doctor. The student had been diagnosed with Oppositional Defiance Disorder ("ODD") and Attention Deficit Hyperactivity Disorder ("ADHD") in September, 2006, but received RtI and Section 504 services. The student received 504 accommodations and had a Behavior Intervention Plan ("BIP"). He also had RtI interventions for reading. The student made academic and behavioral progress, but was not fully developed in all TPRI areas by the end of the 2006/2007 school year. The student was identified as OHI for the ADHD in May, 2008.

Key Quotes:

> The communication and collaboration of the parties for Reading Rallye and the Section 504 accommodations exceeds what would reasonably be expected for a student presenting the difficulties that Student exhibited. The Hearing Officer cannot fault school districts 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. Moreover, it cannot be overemphasized that Student's interventions were a collaborative effort; other than missing two . . . field trips, Student suffered no educational losses or punishment due to Student's [disability].

> School District's RTI program may need additional review to make it more structured and systematic as it addresses the Federal regulatory issues of data collection, student monitoring, documentation, and professional involvement. Nonetheless, School District's concerted efforts to implement RTI for Student did not act to deprive Student of FAPE while RTI was attempted.

Documentation of interventions provided and appropriate accommodations, combined with progress may be enough to win a Child Find case if they are provided in consultation with the parents and the student makes progress. It is important to note that this student was young (TPRI age) and there was no evidence of a lack of educational opportunity or progress. Discipline removals (including ISS) did not exceed 10 days in any one school year, and the student was making academic progress. It is also important to note that the student was evaluated and placed in special education prior to the decision being issued.

VII. When do we need to refer a Tier 1 or 2 Student to Special Education?

As soon as you know or suspect that the student has a disability, and due to the disability, requires special education and related services.

IDEA defines a student with a disability as:

> A child evaluated in accordance with [IDEA] as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, . . . an orthopedic impairment, autism, traumatic brain injury, another heath impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, *by reason thereof*, needs special education and related services.

20 U.S.C. §1401(3).

A student may have a disability condition, such as a hearing impairment or vision impairment, and not require specially designed instruction, thus negating the need for special education. For example, a student with a hearing impairment who hears within normal limits with a hearing aid and is functioning well academically would not need special education.[3] The same student may, however, struggle academically, for a reason other than the student's impairment. For example, the student may struggle in math due to lack of appropriate instruction in math. Such a student would be benefit from the RtI process, but would not need to be referred to Special Education unless RtI is unsuccessful.

The implementation of Tier 2 interventions, if done properly, satisfies the requirement to ensure that a student is not referred to special education when the under-achievement is due to lack of

[3] This Student would be eligible for Section 504 services, as the hearing aid would be considered a mitigating measure without which the student's disability condition would impact the major life activity of communicating.

appropriate instruction. It also satisfies any state law requirement to consider general education support services prior to referral to special education.

Nevertheless, the provision of RtI does not relieve the District of its Child Find obligations. The District is required to have policies and procedures in place that ensure that all children with disabilities who need specialized instruction are "identified, located and evaluated." 34 C.F.R. § 300.111(a). RtI is not a substitute for a Full, Individual Evaluation (FIE) under IDEA. If a parent requests an evaluation for special education or makes a referral to special education, immediately provide the parent with a copy of the Procedural Safeguards. You must also then conduct the evaluation <u>or</u> provide the parent with Prior Written Notice of the district's refusal to complete an evaluation. Even if the parent subsequently agrees that an FIE or referral to special education is pre-mature, it is best to provide the parent with Prior Written Notice that an evaluation will not be done.

<u>From the Judges:</u>

Ashli and Gordon C. v. State of Hawaii DOE, 47 IDELR 65 (D.Hawaii 2007)

The court held the student was not eligible despite having ADHD and receiving "differentiated instruction." The holding revolves around the term "adversely affects." The court concluded that:

> If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services.

Importantly, the court ruled that "differentiated instruction" is not "specially designed instruction":

> …there is nothing in either the IDEA or in the state or federal implementing regulations to indicate that a student would qualify as a 'student with a disability' when the school voluntarily modifies the regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level.

The court approved the analysis of the IHO:

> The Hearing Officer found that Sidney received 'differentiated instruction' in the classroom such as additional time highlighting and taking tests, being moved closer to the teacher during tests, and having the teacher read the test directions to him, but that 'differentiated instruction such as this is available to all children in [Sidney's] classroom and is not an accommodation or different method of teaching, as special education or Section 504 modifications or accommodations would be.

Comment: We have four observations to make about this. First, judges and hearing officers do not want to make this call. They do not wish to draw the line of demarcation between "special education" and other forms of assistance.

Second, what the school calls it carries a lot of weight. If the principal testifies "We call that 'differentiated instruction,' your Honor. It's not the same as 'special education,'" the hearing officer or judge will take that as the starting point.

Third, school officials should not be careless, sloppy or inconsistent in how they use these ambiguous terms. These terms should have some real meaning to educators, some common distinctions.

Fourth, much of the difference seems to lie in the term "designed." Notice that "special education" is defined as "specially designed instruction." Differentiated instruction, however, is not necessarily "designed." It is done at teacher discretion.

Mr. and Mrs. N.C. v. Bedford Central School District, 47 IDELR 95 (S.D.N.Y. 2007)

The court concluded that the student did not qualify as having a serious emotional disturbance. The court analyzed the five possible indications of a SED and found that the student exhibited none of them over a long period of time and to a marked degree resulting in an adverse effect on educational performance.

The most interesting aspect of this case is the discussion of "normal circumstances." The student had been sexually abused for years by a relative. Based on this, the administrative panel ruled that the student had not experienced "normal circumstances" and therefore, his acting out was not surprising and could not be attributed to a SED. The court did not agree with that approach:

> We cannot agree with the SRO's approach to this question—the baseline for measuring the appropriateness of a child's behavior must be some conception of 'normal' circumstances. If we discount this factor for children who have suffered severe trauma because we expect such individuals will behave in inappropriate ways, we effectively discount the impact of the experience that may have led to the alleged emotional disturbance in the first place. To assess whether M.C. was behaving or feeling inappropriately under normal circumstances we must consider what would be appropriate behavior for a child who had never experienced any of the horrors experienced by M.C., and determine whether M.C.'s behavior is appropriate in relation to that child's conduct.

Nevertheless, the court agreed with the SRO that the student did not qualify. His behavior, including drug use and aggression, was more typical of social maladjustment than a SED.

Mr. I and Mrs. I v. Maine School Administrative District No. 55, 47 IDELR 121; 480 F.3d 1 (1st Cir. 2007)

The court held that the student was eligible due to Asperger syndrome despite the fact that she behaved well and received good grades. The court relied on a state regulation that defined

"educational performance" as including "academic areas (reading, math, communication, etc.), non-academic areas (daily life activities, mobility, etc.), extracurricular activities, progress in meeting goals established for the general curriculum, and performance on State-wide and local assessments."

As to "educational performance":

> The district court properly articulated this standard as 'whether [LI's] condition adversely affected her performance in any of the educational areas Maine has identified.'

As to "adversely":

> The district court correctly ruled that any negative impact, regardless of degree, qualifies as an 'adverse effect' under the relevant federal and state regulations defining the disabilities listed in 1401((3)(A)(i).

In a footnote, the court specifically expresses its disagreement with the Ashli case on this point.

As to "special education":

> While 'speech-language pathology services' comprise a category of 'related services,' directly teaching social skills and pragmatic language to LI amounts to adapting the content of the usual instruction to address her unique needs and to ensure that she meets state educational standards, viz., those defining educational performance to include 'communication' and requiring progress in 'career preparation.' The district court did not err in ruling that the services recommended for LI by her neuropsychologist and speech-language pathologist, and agreed to by the PET as part of its Rehabilitation Act plan, are 'special education.' [Citations omitted].

Comment: This court thinks that "adversely" is not a matter of degree—i.e., any adverse effect is enough. However, the requirement to "need" specially designed instruction still exists. So a more accurate way to say it might be: the student must be adversely affected by the disability to the point that the student requires specially designed instruction to receive a meaningful educational benefit.

Hood v. Encinitas Union School District, 107 LRP 18924 (9th Cir. 2007)

The court held that the student was not eligible due to SLD or OHI, because there was no need for specially designed instruction. As to a learning disability, the court held that the student failed to show that her disability could not be "corrected through regular or categorical services within the regular instructional program. The parents argued that "correctable" means that the services provided would cause the discrepancy between achievement and potential to narrow—i.e., that the learning disability would be lessened or cured. The court said that the parents' brief "offers no case law in support" of that standard. Instead, the court ruled that the proper standard was the Rowley standard of educational benefit. Since the student was receiving an educational

benefit from the services provided in the regular classroom, any learning disability that she had was "correctable." Likewise, her ADD condition did not require special education.

Comment: Several points are worth noting about this case. First, the court sought to treat students with disabilities no worse, but also no better, than any other students. Noting that "school districts must function within budgetary constraints that are often quite burdensome," the court was able to put the parents' argument in proper context: "The [parents] assert that the law guarantees a learning-disabled child of superior ability enough individual attention and services—likely financed by the school's special education budget—to elicit optimum performance from the child, when clearly no such requirement exists for children without disabilities, gifted or not."

Second, the court considered the 504 accommodations provided by the school as part of the "regular education" services that were beneficial to Anna. Thus in this case, the provision of a 504 plan was helpful to the district.

Third, it is difficult to see how Anna would have qualified as disabled under 504 if that had been an issue in the case. No one questioned her eligibility under 504 and so it was not an issue. But 504 requires evidence of a "substantial limitation" of a major life activity, and it does not appear that Anna would satisfy that standard.

Fourth, very likely the district could have provided all of the 504 accommodations without declaring Anna as "disabled" under Section 504. The accommodations were "preferential seating in the classroom, the use of a graphic organizer and AlphaSmart keyboard, one-step directions, visual support for instruction and concepts, frequent prompts and checks for understanding, and daily teacher checks for homework assignments." Anything terribly unusual there? Is there anything on that list that could not be provided as an accommodation due to individual learner differences? Couldn't this be called "differentiated instruction"?

Fifth, this case is yet another illustration of the basic notion that students are eligible for special education only if they need "specially designed instruction" to receive an educational benefit. When considering eligibility for a student who has some problems consider it this way: will services that we provide in regular education correct the problem? Will they enable the student to receive a meaningful educational benefit? If so, the student is not eligible for special education.

R.B. v. Napa Valley USD, 48 IDELR 60 (9th Cir. 2007)

The Circuit Court held that the student was not eligible because she did not meet the criteria for a SED. The student was a severely disturbed child who "excelled in her classes, scored high marks on achievement tests, and frequently made the honor roll," but who was also involved in intimidating and physically aggressive behavior toward staff and students. The school district evaluated R.B. and concluded she did not qualify for special educational services, but that she was a "qualified handicapped individual" under Section 504. The district developed a behavioral intervention plan for her. After there was an escalation of behavioral incidents during R.B.'s fifth grade year, R.B.'s mother met with a psychologist who recommended that R.B. be placed in a private residential treatment facility. The mother advised the district that she was

placing R.B. in the private program and demanded reimbursement. The district conducted another evaluation of R.B. and again concluded that R.B. was not eligible for special education services under IDEA.

The parent appealed the IEP team's conclusion at a due process hearing where the hearing officer agreed with the school district that R.B. was not entitled to special education services. Both the district court and the Circuit Court agreed. Key Quotes:

> Once the District implemented the support plan, R.B.'s behavior improved. In other words, while R.B. engaged in inappropriate behavior over several years of school, that behavior was 'to a marked degree' only during one trimester of one grade. We accord particular deference to the [hearing officer's] thorough and careful finding that R.B.'s behavior was not 'pervasive and ongoing,' and conclude that R.B. cannot establish IDEA eligibility on the basis of inappropriate behavior during her fifth-grade year.
>
> R.B.'s inappropriate behavior further does not amount to a 'severe emotional disturbance' because it did not adversely affect her educational performance....
>
> Appellants cite the District's development of Rehabilitation Act Section 504 plans and behavioral support plans as further evidence that R.B.'s behavioral problems adversely affected her educational performance. The Rehabilitation Act is, however, a separate statutory scheme with different qualifying criteria, and R.B.'s satisfaction of those criteria do not automatically make her eligible under the IDEA. Furthermore, California school districts commonly turn to behavioral support plans as alternative remedies for students who do not satisfy the IDEA's criteria for a 'severe emotional disturbance.'

Comment: This case focuses very specifically on the criteria in IDEA for a serious emotional disturbance. Such cases are rare. This one, being a Circuit Court decision, is insightful and helpful. Members of ARDCs should remember that eligibility for special education under IDEA requires that the student fit the criteria set out in IDEA—not merely a diagnosis under the DSM-IV-TR.

Alvin ISD v. A.D., 48 IDELR 240 (5th Cir. 2007)

The court concluded that the student was not eligible due to OHI. The student's ADHD did not result in a need for specially designed instruction. The court observed that "adversely affects educational performance" is a necessary component of the OHI designation, but that it is not sufficient to make the child eligible—there still must be a need for special education services:

> Therefore, the fact that A.D.s ADHD adversely affects his educational performance does not necessarily mean that he is eligible for special education services under the IDEA.

The student did not need those services, and thus was not eligible:

> AISD argues that the district court properly determined that the testimony of A.D.'s teachers, who observed his educational progress first-hand, is more reliable than much of the testimony from A.D.'s physicians, who based their opinions on faulty information culled from isolated visits, select documents provided by A.D.'s mother, and statements from A.D.'s mother about what she believed was happening in school. Finally, AISD argues that much of A.D's behavioral problems are derived from non-ADHD related occurrences, such as alcohol abuse and the tragic death of A.D's brother. Thus, AISD asserts, any educational need is not by reason on A.D's ADHD, as required by the statute. We agree with the district's argument and find that the district court's factual findings were not clearly erroneous.

Comment: 5th Circuit decisions are always important to us, and this one is no exception. It is also very timely as school districts struggle to reduce the number of students in special education by providing better services to the "at risk" population. This case supports the notion that kids who need special help do not always require "special education." A.D. had a number of problems, one of which was an impairment that could have potentially qualified him for special education. But due to the active involvement of the SST, the boy continued to progress in the general curriculum, passing from grade to grade without "special education" services. The evaluation done by the school effectively pointed out the other possible causes of his difficulty, and the input from the teachers with firsthand knowledge clinched the deal. Note well that the court did not dispute the fact that the student had a disability that adversely affected his education. That is not enough to make the student eligible. Note also that the school provided logical, non-disability related reasons why the student was having some difficulty.

Jackson v. Northwest Local School Dist., 110 LRP 49983 (S.D. OH 2010)

Practical Tips:

Establish specific procedures for your RtI team to make referrals to Special Education when a student in

The District had reason to suspect a student was a student with a disability because the student was no longer responding to interventions and had behavioral issues that were severe enough for the student intervention team to recommend that the parent take the student to an outside mental health agency. The student was diagnosed with ADHD in 1st grade and was provided with interventions, including school counseling, 1:1 instruction in the classroom, pull-out small group instruction, and modifications. The student responded well to the interventions in 1st and 2nd grade, but in 3rd grade, the student had increased academic and behavioral difficulties. The Court found that, because the interventions were no longer resulting in adequate progress and the team had determined counseling may be needed, the district should have referred the student to special education. Not only was this a Child Find violation, but the student intervention team's knowledge was sufficient to entitle the student to protections in disciplinary matters; the district had reason to know the student had a disability and was therefore required to conduct a manifestation determination before expelling the student.

VIII. If A Parent Requests an Evaluation, Should You Wait Until You Have RtI Data?

No.

An effective RtI process *may* provide appropriate interventions that allow for adequate progress and thus support a decision of the district not to complete an FIE for special education consideration, but a parent can request an FIE at any time. 34 C.F.R. § 300.301(b). If a referral for Section 504 or special education eligibility consideration is made at any time during the RtI process, the District should proceed with its normal Section 504 or special education referral process, while continuing any RtI interventions. This requires a two-track process in which the RtI Team continues to document, assess, graph, monitor and review the students' response to general education interventions, and the Section 504 committee or an ARD committee considers the referral.

Since the RTI data may provide valuable information as part of an initial evaluation for a specific learning disability, even after an evaluation is requested, it may be appropriate to gather RTI data concurrently with completing formal assessment, but the timeline for completing an initial evaluation and considering eligibility is not extended by the RTI process.

<u>From the Judges:</u>

D.A. v. Houston Indep. Sch. Dist., 110 LRP 23150 (S.D. TX 2009)

Although general education support services are required prior to referral of a student to special education (19 TAC §89.1011), it wasn't appropriate for a district to delay a requested evaluation until interventions were provided. D.A. had been considered at risk since pre-K. In 1st grade, the Intervention Assistance Team ("IAT") determined that the student should not be referred for assessment because the general education teacher had not "sufficiently documented his problems." They gave the teacher an ABC form to document the student's behavior. Two months later, the IAT team again decided not to evaluate the student because the teacher "had not provided sufficient documentation, on the proper forms" and requested the teacher complete the proper forms.

Practical Tips:

One way to address the lack of adequate RtI documentation is to provide interventions and gather data related to the interventions as part of the FIE. Due to the time limit for completing an FIE, this would need to be done over a 4-6 week period.

Key Quotes:

> As of October, 2007, all of D.A.'s teachers, from pre-K to first grade, had expressed concern about his developmental delays and behavior problems. His mother had expressed her concern to the Crespo administration on numerous occasions, and his speech therapist had both called and written to the school to recommend that he be evaluated. The IAT, however, failed to consider this evidence in October, either because it had not collected accurate information

> about his academic progress, such as his failing first grade report card, or because it refused to allow [the teacher] to present her observations because they were not documented on proper forms. . . . [T]he lack of communication within HISD and between HISD and L.A., led to an unnecessary delay in D.A.'s special education referral.

The Court also found that the District should have given the parent Prior Written Notice of its refusal to assess the Student.

Student v. Austin ISD, 110 LRP 49317 (SEA TX 2010).

The diagnostician in the recent *Austin ISD* case told the parent, "I can't look at your kiddo until we try some interventions . . . do a lot of interventions." Although the Hearing Officer concluded that the district had met its child find duty, she specifically held that because the parent had requested an assessment, "the school district had a duty to evaluate the student that overrode the district's use of the local district RTI process."

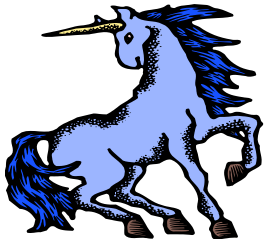
Letter to Copenhaver, 108 LRP 16368 (OSEP 2007)

Parent consent is not required prior to beginning RtI as part of an FIE. The review of RtI data would be part of a Review of Existing Evaluation Data for which no consent is required. The sixty day timeline does not begin to run until the district determines that additional evaluation data is needed and obtains parent consent for the additional evaluation. However, the RtI process must not "operate to impede the child's right to the timely provision of special education and related services." RtI data would be sufficient to determine whether a child is a child with a disability only in "limited circumstances" because RtI does not meet the requirements of an FIE. [Note: If after reviewing RtI data, the ARD committee determines there is not an educational need for special education and related services, no FIE would be required. In that situation, the district must give the parent notice that no additional evaluation data is needed, and the parent can request an FIE.]

Letter to Combs, 109 LRP 15035 (OSEP 2008)

RtI cannot be used as the single measure to determine eligibility. Even if the District has a policy of using RtI as part of the eligibility determination, the District must expedite the completion of an initial evaluation when the student has been subjected to a disciplinary change of placement.

RtI Myths



Myth: Special education services are better than interventions offered in RtI.

Myth: A student who does not respond to RtI strategies must require special education.

Myth: RtI is just for determining if a student qualifies for special education as an individual with an SLD.

Myth: Special education teachers should deliver interventions.

Myth: We need parent consent to screen a student for RtI.

Myth: If a parent agrees to RtI, we don't need to give the parent Procedural Safeguards.

Sources for More Information About RTI

1. *A Campus Guide to Response to Intervention*, 2nd Ed., Walsh, Anderson, Brown, Gallegos and Green (including flow charts, step by step discussion of RTI program development, checklists, forms for data entry, and forms for communication with parents).
2. *Response to Intervention Guidance, 2008-2009* available on the TEA website.
3. *Q&A on Response to Intervention and Early Intervening Services, January 2007,* Office of Special Education and Rehabilitative Services website.
4. *ESC 10 Scientifically Based Research,* Educational Service Center, Region 10 website.

The information in this handout was created by Walsh, Anderson, Brown, Gallegos & Green, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.