Get Email Updates
Sign up to receive the RTI Action Network e-newsletter.
Email Address SIGN UP

Find Us on Facebook!

Legal Implications of Response to Intervention and Special Education Identification

By Jose L. Martín, Attorney at Law, RICHARDS LINDSAY & MARTÍN, L.L.P., Austin, Texas

PRINT | EMAIL | READ COMMENTS | ADD A COMMENT SHARE

The Response-to-Intervention (RtI) movement is enabling public education in the United States to evolve from a reactive model in which students had to seriously deteriorate before being moved on to special education programs, to one that emphasizes early and high-quality research-based interventions in regular programs that generate useful data with which to make key decisions for each struggling student. This evolution, however, has taken place against a backdrop of legal requirements for special education referrals and evaluations that remain almost unchanged from those of more than 30 years ago. The meeting of RtI innovations and the traditional child-find requirement of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) has many scratching their heads over exactly how the rules fit into the modern intervention era. Both the misconceptions that have become commonplace, as well as the legal disputes created by this juncture, make one wonder whether we truly grasp the fundamental child-find obligation of the IDEA in its present context.

Child-Find Under IDEA 2004

Child-find is the term used to describe the legal duty imposed by IDEA 2004 on public school districts to "find" children who may have a disability and be in need of special education services. Under the law, schools have an affirmative duty to identify, locate, and evaluate students who they suspect may have a disability, in order to evaluate them for potential eligibility for special education services (see IDEA 2004, 20 U.S.C. § 1412(a)(3) and 34 C.F.R. § 300.111). It is not enough for schools to wait until parents ask about or request a special education evaluation based on suspicion that their child may have a disability and struggling in school as a result. Schools must maintain a system of notices, outreach efforts, staff training, and referral processes designed to ascertain when there are reasonable grounds to suspect disability and the potential need for special education services.

Court cases, moreover, have established that the school's obligation to evaluate a student is triggered when a school district has reason to suspect both that (1) the student has a disability, and (2) a resulting need for special education services (see El Paso v. R.R., 2008). Once that "trigger" is pulled, schools must evaluate the child within a reasonable time to meet IDEA 2004's requirements and avoid exposure to child-find legal challenges and compensatory services claims (see El Paso v. R.R., 2008).

The legal framework described above has remained virtually unchanged since the inception of IDEA, enacted in 1975 as the Education for All Handicapped Children Act. But, in recent times, public education arrived at a consensus that this framework permitted a model to emerge that implemented intensive services only when children demonstrated serious educational deficits, and only by means of the special education process. Instead, the educational community began to focus on the potential benefits of intervening at an earlier stage, and within regular education, to help

ADDITIONAL ARTICLES
Identifying Learning Disabilities in the Context of Response to Intervention: A Hybrid Model
The Role of RTI in LD Identification
Making Decisions About Adequate Progress in Tier 2
Position Statement on Determination of Specific Learning Disabilities

ADDITIONAL RESOURCES
National Center for Learning Disabilities
National Research Center on Learning Disabilities
RTI Talk: Response to Intervention and IDEA - LD Identification in the RTI Instruction Model
Wrightslaw

struggling students before they reached the point of significant educational deficits.

The Push for Early Interventions and RtI

In 2004, the Congress acted on concerns about the increasing number of students in special education, and the related suspicion that many students currently classified as having a specific learning disability (SLD) might have avoided the need for special education if instructional support and interventions had been provided to them at an early stage in their education. Thus, the backdrop was set in place for a move to reform to the manner in which schools should identify students with SLD—the largest population served by special education. This reform, moreover, was to take advantage of existing and emerging research on SLD, as well as modern ideas on how to meaningfully address the needs of struggling students within regular education.

By the time IDEA was reauthorized in 2004, a variety of experts from different disciplines noted that the special education system in the United States represented a “wait-to-fail” model, rather than a system that focused first on quality interventions within the regular education environment, followed by case-by-case educational decision making based on struggling students’ response to high-quality research-based interventions. This sea change in educational thinking and modernization in SLD evaluations, combined with the work of a fairly tight knit group of people across the country over the past 30 years who have been quietly working on ways to bring evidence-based practice into schools, has come to be encapsulated in the phrase Response to Intervention, or RtI.

Sidebar: Changes in LD Identification Rate
The confluence of early intervention programs and RtI-oriented regular education intervention programs may have already made some positive changes to the system. According to the Data Accountability Center, the number of students aged 6-21 who receive IDEA Part B services has dropped 3.9% since 2004. In addition, the number of students identified as having a specific learning disability (SLD) has declined by 12.4% since 2004. See www.ideadata.org. Although the decreased numbers alone cannot confirm that RtI programs are having the intended beneficial effect on rates of special education identification, the data are a positive and hopeful sign that this is the case.

This evolution, however, is not taking place without incident. The RtI movement, has generated a new tension between the desire to apply early high-quality interventions to struggling students and the legal duty to comply with IDEA’s traditional child-find requirements. And, while schools are establishing RtI programs as educational initiatives, the child-find mandate of IDEA represents a legal requirement, violation of which can mean real liability for schools.

New Questions Mean New Disputes

There is no lack of consensus on the outline of IDEA’s child-find requirements, or about the positive benefits of expanded opportunities for interventions for struggling students within regular education programs. The child-find obligation imposed under IDEA, however, is currently applied in a context where public schools are simultaneously focusing on providing quality regular education interventions for struggling students prior to referring them for an IDEA evaluation. In many situations, campuses, referral teams, and classroom teachers are being asked to provide documentation that they have implemented serious interventions to address

a student's difficulties in the classroom before a referral is allowed to proceed to evaluation. The advent of RtI methodology, together with an expanding range of interventions available outside of special education, has thus created a tension with the schools' duty to comply with child-find, particularly in cases where parents approach schools with concerns about their children's performance or outright request testing.

While schools are expending resources and energies on making effective use of interventions outside of special education for struggling students, however, the child-find requirement remains ever-present and mostly unchanged. Another fact is that a number of students who meet criteria for regular education interventions may in fact be struggling in the classroom due to the effects of learning disabilities.

Given the existing dynamic, new and difficult questions have arisen about how the child-find requirement of IDEA works in the context of expanded regular education interventions and RtI methodology. These questions include the following:

- At what point should schools suspect that students who are struggling with the curriculum while receiving regular education interventions might actually have a specific learning disability?
- How long should a student receive regular interventions before a school initiates an IDEA evaluation?
- Is the child-find obligation triggered if a child moves through tiers of interventions with some improvement, but nevertheless continues to show deficits in achievement?
- How should schools handle parents' requests for evaluations when interventions have only just been initiated and/or appear 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 a referral?

It is in answering these questions that we are likely to see the complex legal disputes in this area of education. 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, and situations where parents are encouraged to allow interventions to proceed only to lead to limited response and an ultimately delayed placement in special education. Some parents may feel that participating in the RtI process ultimately led to a delay in having special education services provided to their children and may attempt to seek legal redress in the form of compensatory services.

There is a significant related question, moreover, as to whether the existing legal rules on referrals for evaluation in fact reflect and support RtI initiatives that many schools have been working diligently to put into place .

The Federal Regulation on Referral

The federal regulation addressing referrals to special education—in the all-important context of potential learning disabilities—envisions that interventions will be considered for a struggling child, but at the same time it respects the parents' ultimate right to request an evaluation at any time. The regulation in question states that schools must promptly seek parental consent to evaluate a child for special education, under regular timeframes, if the child has not made adequate progress after an appropriate period of time when provided with appropriate instruction, and whenever the child is referred for an evaluation (see IDEA 2004, 34 C.F.R. § 300.309(c)).

Another regulation addressing initial evaluations in all situations also serves to emphasize that "either a parent or a public agency may initiate a request

for an initial evaluation to determine if the child is a child with a disability" (see IDEA 2004, 34 C.F.R. § 300.301(b)). The United States Department of Education (ED) commentary accompanying the regulation indicates that the same timelines and procedures applicable to all initial evaluations would apply to evaluations involving students with potential LDs (see IDEA 2004 Consent for Initial Evaluations, 2006). The only exception to the regular timelines to complete evaluations is in situations where the school staff and parents mutually agree in writing to extend the timeline, ostensibly to allow additional time for interventions to proceed. The USED commentary also reminds us that interventions can be provided during the weeks while the evaluation is conducted, a point made in response to concerns that parents, by requesting evaluation, could "short-circuit" or opt out of the intervention process (and in the commentary, ED stated that "if 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"; IDEA 2004 Consent for Initial Evaluations, 2006). In sum, however, the referral scheme under IDEA's federal regulations respects the parent's right to request an evaluation with no specialized exception for circumstances where the school is attempting high-quality research-based interventions.

Indeed, the current legal framework makes little concession to the expanding universe of regular education interventions available in an increasing number of public schools. Although schools can, technically, refuse to refer the student, they must then provide parents with written notice of refusal and notice of IDEA procedural safeguards (since parents must be informed that they can challenge the school's refusal to evaluate the student). This course of action also creates the possibility that the school will face a failure-to-identify legal action challenging the refusal to evaluate. If the parents can prove that there are reasonable grounds to suspect disability and the need for special education services (admittedly not a high threshold), then the school will lose the case, will be ordered to evaluate the student, and will likely be liable for the parents' attorneys' fees.

Against this backdrop, one would think schools would be treading quite cautiously in addressing referral questions, particularly when faced with parents' requests for evaluation. The emerging court cases, however, demonstrate otherwise. Unfortunately, some persistent and inaccurate notions may be at work in how schools observe child-find under IDEA in the modern RtI era.

Common RtI/Child-Find Misconceptions

The advent of RtI, together with the modernization of the SLD evaluation process, has given rise to some common notions and confusion spots that can lead schools awry in complying with child-find while also implementing RtI programs. Some of these misconceptions include the following:

- RtI interventions are a mandatory prerequisite to LD evaluation
- Intervention programs must be implemented for the entire period of instruction
- In tiered intervention models, all tiers must be completed prior to referral
- Data from RtI intervention programs is a mandatory part of an LD evaluation

The most entrenched misconception involves the need for RtI data as part of SLD evaluations. Although individual states may, if they wish, make the use of RtI data mandatory, the federal statute or regulations do not. Rather, the 2006 regulation allows for part of the evaluation to include a determination of whether a child responded to high-quality research-based interventions, but it does not require it (see IDEA 2004, 34 C.F.R. § 300.309(a)(2)(i); see also Memorandum to State Directors of Special Education, 2011; Alexandria Comm. Sch. Corp., 2010; and Meridian Sch. Dist., 2010. Indeed, from a practical standpoint, the regulation could not

have possibly required such a determination, since many schools would have been unprepared to fully implement such intervention programs at that time. This is why the regulation also contains an option for an assessment-based determination based on patterns of strengths and weaknesses in assessment scores instead of the RtI determination option (see IDEA 2004, 34 C.F.R. §300.309(a)(2)(ii)).

In addition, the component of the SLD evaluation under which the team must rule out that the performance difficulties are not caused by lack of appropriate instruction does not require high-quality research-based instruction or interventions—plain, appropriate, regular instruction in regular classes with periodic progress assessments (e.g., classroom quizzes and tests) can meet this requirement. In fact, the ED commentary states that the regulation requires 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 [emphasis added] include instruction in an RTI model….” (IDEA 2004 Consent for Initial Evaluations, 2006). Thus, although provision of high-quality research-based interventions would certainly meet—and, indeed, would exceed—the requirement for “appropriate” instruction, it is not required.

Consequently, ED stated in a 2011 letter that “it has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, local educational agencies (LEAs) may be using Response to Intervention strategies to delay or deny a timely initial evaluation for children suspected of having a disability” (Memorandum to State Directors of Special Education, 2011). The memo states that while ED supports RtI initiatives and programs, “the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation,… to a child suspected of having a disability….” The memo also reiterates, as discussed above, that IDEA and its regulations currently “allow” the use of RtI data as part of the criteria for determining if a child has a specific LD, as opposed to mandating such an evaluation procedure. The memo therefore concludes that “it would be inconsistent with the evaluation provisions [of the IDEA regulations] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that the child has not participated in an RTI framework” (see also City of Chicago Sch. Dist. 299, 2009, in which the Hearing Officer holds that “because RTI is a general education tool, districts cannot use it to delay disability identification in the face of parents' requests for immediate formal testing for eligibility”). The position of ED is that while schools have the discretion to reject parental requests for referral, the fact that a student has not participated in an RtI program cannot be the basis for the denial, as such participation is not required by law as a prerequisite to an evaluation request.

In light of ED’s pronouncement, the wisest course of action for schools may be to avoid unilateral decisions on regular education interventions, including decisions on timelines for interventions, choice of available interventions, schedules for progress monitoring, and, most importantly, the point at which to initiate an IDEA evaluation. Schools appear to stand in the best position to defend their actions if they are undertaken in collaboration with parents who are informed they are free to request an IDEA evaluation at any time. The difficult cases for schools, on the other hand, are likely to be those where school staff unilaterally decide on interventions, discourage or reject parental requests for evaluation in order to implement interventions, or insist that a time certain for interventions must be exhausted as a prerequisite to referral in all cases.

Parental Requests for IDEA Evaluation

Certainly, a school addressing the difficulties of a student who is struggling academically is free to consider, explore, and apply its range of intervention

options prior to deciding on a referral for special education evaluation. The circumstances change, however, when the parent approaches the school asking for special education testing. Because the parent not only has a right to request evaluation, but can initiate legal action against a school that fails to act on their request, a parent referral places the school in a unique situation. As recent case law indicates, these scenarios can easily lead to disputes. The cases that illustrate the present tension between RtI and child-find seem to break down into distinct types.

In one variety of case, the parent approaches the school with concerns about the child's performance, some suspicions of disability, and questions about initiating an evaluation. The school responds by providing interventions, but takes no action on the requested evaluation, and provides neither prior written notice under IDEA explaining its refusal to evaluate, nor notice of IDEA procedural safeguards (see Student v. Austin ISD, 2010). The parents, getting no straight answers on their request for evaluation, subsequently initiate legal action claiming a child-find violation. This type of case is characterized by school staff laboring under misconceptions about RtI programs and child-find, confusion in communications with parents, and by a lack of collaborative decision making.

In another type of case, the parent requests an evaluation of their struggling child but, after conferring with the school, agrees to the interventions proposed by the school instead. Likewise, in these scenarios, the school provides neither prior written notice, nor notice of IDEA rights. Later, however, the parent files a legal action alleging a child-find violation (see Scott v. District of Columbia, 2006, and El Paso Ind. Sch. Dist. v. R.R., 2008 [which was vacated on other grounds]). These scenarios are marked by school staff lobbying parents to accept provision of interventions in lieu of a referral and a lack of compliance with procedural requirements (usually because the school does not see itself as having refused an evaluation outright). But, the courts tend to take the position that if a parent asks for an evaluation but does not get it, the school has de facto refused the evaluation request, even if it never actually said the word "no." Schools tend to lose this type of case.

In yet another form of RtI/child-find dispute, the school provides interventions over a period of time with the parents' agreement, although it subsequently conducts an evaluation once the student's response to interventions appears to slow (see S. v. Wissahickon Sch. Dist., 2008; Lake Park Audubon Ind. Sch. Dist. #2889, 2008); and Dowington Area Sch. Dist., 2007). The parents, feeling that the school has tarried too long in deciding to evaluate, request a due process hearing to seek compensatory services. The results in these cases tend to hinge on whether the students were positively responding to initial interventions, and whether the school acted in a timely fashion to evaluate the child when intervention response began to lag. At times, the cases also turn on whether state law required the school to provide a certain amount of intervention prior to referral (see Lake Park Audubon Ind. Sch. Dist. #2889, 2008, in which state law required schools to attempt two types of interventions prior to referral, and Montgomery County Bd. of Educ., 2008, which involved a consent decree on overidentification of African-American students that required provision of interventions prior to referral). If the student was progressing with interventions, if the school acted quickly to evaluate the student once progress slowed, or if a state law requires interventions prior to referral, the school tends to prevail in the dispute.

Lastly, in another type of scenario, the parents and the school collaboratively agree on proceeding with interventions rather than pursue an evaluation. The decision making is by consensus, collaborative, and with parents receiving full information of all options, including their right to request an evaluation (see Salado Ind. Sch. Dist., 2008, in which all stakeholders, including parents, participated in decision to attempt interventions, and see Joshua Ind. Sch. Dist., 2010, in which parents

agreed to interventions, which were sufficient to address student's difficulties). For various reasons, litigation nevertheless erupts, but schools tend to fare well in these scenarios.

The dispute scenarios outlined above demonstrate the difficulties both schools and parents face in making decisions in regard to a struggling student who may also have a disability. Ultimately, the key question is how schools can both make effective use of available high-quality research-based interventions while at the same time avoiding potentially complicated child-find legal claims. Schools risk child-find litigation and potentially poor results when they make unilateral decisions, act under misconceptions, and apply overly rigid intervention timelines, especially in the face of parent inquiries about evaluation. But, schools must also guide parents in exploring the range of high-quality research-based interventions available outside of special education, so that RtI programs have a chance to work their benefits. The tension between the two priorities, therefore, is one that must be addressed with a carefully balanced approach.

Active Steps for Schools to Avoid RtI-Based Child-Find Disputes

From an IDEA liability standpoint, the main challenge for schools attempting to implement interventions for struggling students prior to referral for a special education evaluation is avoiding disputes with parents. Again, the tightrope schools walk is one where they make effective use of regular education interventions while also respecting parent rights and child-find obligations under IDEA. The dispute scenarios discussed above tell us that the key to this balancing effort lies in actively involving parents as partners in the decisions regarding interventions and the timing of a special education evaluation. This effort could include the following operational steps:

Providing parents with detailed information on the range of regular education interventions available (pamphlets, research support, rates of success, etc…)

1. Meeting with parents to discuss intervention options, agreed timelines, and available courses of action
2. Making clear to parents their right to request an IDEA evaluation and providing written notice of IDEA procedural safeguards
3. Reaching a consensus on a course of action in a collaborative manner
4. If the consensus decision is to pursue regular education interventions, sharing progress data frequently with parents
5. Initiating follow-up communication regarding progress or lack thereof
6. Convening follow-up meetings to review progress and renew consensus on current course of action
7. Documenting the steps above.

Parents who 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 should be informed that there are no guarantees that regular education interventions will work.

Schools that invest resources and time on RtI-oriented intervention programs should also use RtI's data-based approach to study the effectiveness of the program on school-wide and district-wide bases. The important question to answer with the data is the degree to which the interventions are proving effective in reducing the need for special education referrals by improving student performance on the whole. In other

words, what schools need to know is whether their RtI program is yielding positive results in the form of student improvement, to the point that the need for IDEA referrals is reduced. If the data show that a substantial number of students who, in the past, would have been evaluated do in fact improve significantly with interventions and thus do not need referral, then the program is being successful. If, on the other hand, most of the students who would have been referred in the past simply get referred at a later time —after a potentially lengthy intervention period—then the program might appear to simply be slowing down or delaying the eventual referral and evaluation process. Certainly, the RtI movement did not intend to replace the discrepancy-based wait-to-fail SLD model with yet another version of a wait-to-fail model that requires failure in potentially lengthy RtI programs prior to referral to IDEA

.

Referral Decisions Versus Eligibility Decisions

With all of the discussion about preventing unnecessary referrals to special education, we should not forget that IDEA eligibility requires two separate findings (see IDEA 2004 34 C.F.R. §300.8(a)(1)): (1) meeting of state and federal criteria for at least one IDEA disability eligibility category, and (2) a resulting need for special education (i.e., specially designed instruction). A complexity is presented, however, when a school is capable of successfully providing high-quality and beneficial individualized instruction to a student with disabilities as part of its regular education program.

This scenario raises a concrete legislative question: Does the 35-year-old definition of “specially designed instruction” require modernization as a broader and deeper range of instructional intervention options becomes available within regular education? This question will likely be fodder for upcoming legislative discussion when IDEA is again reauthorized in a timeframe fully within the RtI era. As a broader range of struggling students’ needs can be met outside of the special education system, IDEA might evolve to reflect this reality by updating its definition of special education services. Perhaps this debate will also lead to reform in child-find and referral rules, in recognition of schools’ local intellectual and resources investments in high-quality intervention programs. For now, however, it is clear we are in a time where reform is taking place and effecting change on a system-wide basis, which inevitably leads to some degree of tension and confusion. The benefits of moving forward, however, are simply too significant to turn away.

References

Alexandria Comm. Sch. Corp., 110 LRP 68,623 (SEA Indiana 2010).

City of Chicago Sch. Dist. 299, 102 LRP 72479 (SEA Illinois 2009).

Dowington Area Sch. Dist., 107 LRP 63155 (SEA Pennsylvania 2007)

Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142.

El Paso Ind. Sch. Dist. v. R.R., 567 F. Supp.2d 918, 50 IDELR 256 (W.D.Tex. 2008)

Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400 et seq.

Individuals with Disabilities Education Improvement Act of 2004 Consent for Initial Evaluations, 71 Fed. Reg. 46,658 and 46,659 (August 14, 2006)

Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 34 C.F.R. § 300.111.

Joshua Ind. Sch. Dist., 111 LRP 4,652 (SEA Texas 2010).

Lake Park Audubon Ind. Sch. Dist. #2889, 50 IDELR 117 (SEA Minnesota 2008).

Memorandum to State Directors of Special Education, 56 IDELR 50 (U.S. Department

of Education, Office of Special Education Programs, January 21, 2011).Meridian Sch. Dist. 223, 56 IDELR 30 (SEA Illinois 2010).

Montgomery County Bd. of Educ., 51 IDELR 259 (SEA Alabama 2008).

S. v. Wissahickon Sch. Dist., 50 IDELR 216 (E.D.Pa. 2008).

Salado Ind. Sch. Dist., 108 LRP 67,655 (SEA Texas 2008).

Scott v. District of Columbia, 45 IDELR 160 (D.D.C. 2006)

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

Presented by:

The RTI Action Network is made possible by the generous support of the Cisco Foundation.

Founding Partners:
AFT, IRA, NAESP, NASDSE, NASP, NASSP, and NEA

Privacy Policy | Copyright | Feedback | RSS | Sitemap

The National Center for Learning Disabilities, Inc., is a not-for-profit, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. All contributions are tax-deductible to the extent permitted by law.

Meets all 20 of the Standards for Charity Accountability.