Interventions vs. Evaluation: When To Move On— Modern Child-Find Questions in the RTI Era

by
Jose L. Martín, Attorney at Law
RICHARDS LINDSAY & MARTÍN, L.L.P.
13091 Pond Springs Road, Suite 300
Austin, Texas 78729
jose@rlmedlaw.com

The child-find requirement is as old as special education. We thought we understood it; when reasons arose to suspect disability and the potential need for special education services, the duty to refer and evaluate a child for special education eligibility was triggered. The meeting of response-to-intervention programs with the traditional identification requirement, however, has many scratching their heads over exactly how the requirement should be applied in the modern regular intervention era. It makes one wonder, in fact, whether we truly understand this fundamental duty under the IDEA in its modern context.

The Child-Find Duty Meets Response-to-Intervention

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

- ***What "triggers" Child-Find?***—Court cases have established, based on the provisions of IDEA and its regulations, that the child-find obligation to evaluate a student is triggered when and school district has reason to suspect that (1) the student has a disability, and (2) a resulting need for special education services. 34 C.F.R. §300.8(a); *El Paso ISD v. R. R.*, 567 F.Supp.2d 918 (W.D.Tex. 2008).

- ***How do we know if a school complied with Child-Find?***—The *El Paso ISD* case set forth a two-step analysis to review whether a school complied with its child-find responsibilities: first, a court examines whether the school had reason to suspect that the student had a disability and a consequent need for special education services (i.e., the "trigger" circumstances outlined above); second, the court addresses whether the school evaluated the child within a reasonable time after the reason to suspect a disability that needs special education services arose.

- ***IDEA 2004 and Early Intervention Services***—In 2004, the Congress acted on concerns related to the increasing number of students in special education, and the suspicion that many students might have avoided the need for placement in special education if interventions had been provided to the students at an early stage in their education, by including provisions in the IDEA emphasizing its desire that students receive early interventions when they struggle at school. Specifically, the law allows schools to use up to 15% of their allotted IDEA-B funds for early intervening services for students not currently identified as special education students, but who need additional academic and behavioral support to succeed in the general education environment. 20 U.S.C. §1413(f); 34 C.F.R. §300.226.

- ***Response to Intervention***—Moreover, a variety of experts from a number of different disciplines noted that the special education system in the U.S. represented a "wait-to-fail" dynamic, under which students must show significant educational deficits before they can receive high-quality additional educational services. Instead, they advocated for a system that emphasized interventions within the regular education environment first, and then case-by-case educational decision-making based on struggling student's response to high-quality research-based interventions. This sea change in educational thinking has come to be encapsulated in the phrase "response-to-intervention," or RtI.

  Note—The confluence of early intervention programs and RtI-oriented regular education interventions has potentially already delivered some change to the system. According to the Data Accountability Center, the number of students aged 6-21 that receive IDEA Part B services has dropped 3.9% since 2004. The number of LD students has declined by 12.4% since 2004. *See* www.ideadata.org.

New Questions, New Disputes

There is no lack of consensus on the child-find analysis set forth above. The child-find obligation imposed under the IDEA, however, is currently being applied in an context where the educational system is attempting to emphasize the provision of

regular education interventions for struggling students *prior to* deciding to refer them for an IDEA evaluation. In many situations, campuses are asked to provide documentation that they have implemented serious interventions to address a student's difficulties in the classroom before a referral will be allowed to proceed to evaluation. The advent of response-to-intervention methodology, together with an expanding range of interventions available outside of special education, have created a tension with schools' simultaneous need to ensure compliance with IDEA child-find requirements, particularly in cases where parents are approaching the school with concerns about their children's performance or straightforward requests for testing. While schools are expending resources and energies on making effective use of interventions outside of special education for struggling students, the child-find requirement is nevertheless present. And, certainly, a number of students that meet criteria for regular ed interventions are struggling due to the effects of disabilities, particularly learning disabilities

- *The New Tough Questions*—Establishing and using high-quality research-based interventions for students that are struggling to meet grade-level standards, however, creates new questions with respect to public schools' obligation 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 child-find 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 Federal Regulations on Referral

The federal regulation addressing referrals to special education in the context of potential learning disabilities envisions that interventions will be considered for a struggling child, but also respects the parents' right to request an evaluation at any time. The exact wording is the following:

> 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. 34 C.F.R. §300.309(c).

The regulation addressing initial evaluations in general clarifies 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." 34 C.F.R. §300.301(b). And, the commentary to the 2006 regulations indicates that the same timelines and procedures applicable to all initial evaluations would apply to evaluations involving students with potential LDs. "Although there are additional criterial and procedures for evaluating and identifying children suspected of having SLD must follow the same procedures and timeframes required in §§300.301 through 300.306, in addition to those in §§300.307 to 300.311." 71 Fed. Reg. 46,659 (August 14, 2006).

- **School refusal of evaluation**—Of course, schools can refuse to refer the student, and then provide parents with written notice of refusal, as well as notice of procedural safeguards. *Letter to Williams*, 20 IDELR 1210 (OSEP 1993) ("Parent's request for a Part B evaluation does not automatically trigger the obligation of the LEA to conduct that evaluation. Rather, the LEA must conduct an evaluation without undue delay only if the LEA suspects that the child has a disability and is in need of special education and

related services"); see also *Letter to Anonymous*, 18 IDELR 493 (OSEP 1992). This course of action, however, creates the possibility 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).

> *Note*—As discussed below, 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.

Addressing 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 circumstance changes, however, when the parent approaches the school asking for special education testing. Because the parent has a right to request evaluation, and can take legal action against the school if it fails to act on the request, a parent referral places the school in an entirely different situation. These scenarios can easily lead to disputes, as the cases below show.

- The case of ***Student v. Austin Independent Sch. Dist.*, 110 LRP 49,317 (SEA Texas 2010)** illustrates the push-pull of the intervention vs. referral dynamic, together with how the current child-find landscape may confuse a parent concerned that their child may have a disability that is going undetected.

> **The factual sequence**—Since the age of three, the boy in question had been diagnosed with ADHD. In addition, his grandmother/guardian was concerned about his life-skills competencies. Although he passed the reading TAKS (probably in 3rd grade) on a second administration, the school was concerned enough about his reading that it involved a reading specialist and provided him with small-group reading support. Concerned about his performance, the grandmother consulted with a neurosurgeon, who contacted the school principal about the possibility of qualifying the boy as OHI ("Other Health Impaired"). In addition, the doctor provided the school with a prescription for neuropsychological testing to further substantiate the request for consideration of special education services. The school, however, failed to follow up on the request for consideration of testing or OHI eligibility.

Subsequently, the grandmother contacted the students 4th grade teacher regarding testing in September of 2009. The teacher explained that the District had a response-to-intervention process (called the IMPACT process), and referred the child to the IMPACT team, which held a meeting without the grandparent. An educational diagnostician discussed the grandmother's request for testing with the teacher, who was of the opinion that the RtI process was an "absolute" requirement prior to referral and testing. The school's reading specialist, moreover, had assessed the boy with the SIPPS and the Flynt-Cooter instruments in October 2009, and had not found indications of dyslexia, other than low fluency rate. After more intensive intervention by the reading specialist, however, his fluency rate improved.

Meanwhile, the grandmother proceeded to obtain her own independent testing of the boy. That testing found that the student had ADHD, dyslexia, LD in basic reading, dysgraphia, and LD in written expression. It also recommended §504 services, various accommodations, and OT testing. By this time the student was receiving failing grades in three subjects. After another IMPACT team meeting, the team planned to develop a §504 plan for the student. At the §504 meeting, the grandparent was presented with a consent form for 504 evaluation and services, but was confused about what that meant and whether the school was proceeding to IDEA testing. The team noted that although the boy had responded well to interventions put into place during the IMPACT process, he "still functioned below grade level and was making slow progress in comparison with his peers." At the meeting, the grandparent provided the team with a copy of the independent evaluation conducted four months earlier. The team did not inform the grandmother specifically that she had a right to request special education testing, but the diagnostician *suggested* that special education testing could be initiated while also commenting that "I have to be very strict by saying I can't . . . I can't look at your kiddo until we try some interventions . . . do a lot of interventions." Thus, the school did not provide the grandparent with a consent form for IDEA testing. It also neither initiated the referral, nor issued the guardian a notice-of-refusal form. The Hearing Officer found that subsequent to this meeting, the diagnostician reviewed the private evaluation, and wrote in an e-mail that "we are not at a point of considering a special education evaluation for [the student] just yet, *but I did want you to know that the data we have is a good indicator that [the student] would be eligible for special education if we decided to 'go there*.'" Thus, there appeared to be an acknowledgment that *if* testing proceeded, the student would likely qualify.

> *Editorial note*—What if the grandmother had pointed out that the IMPACT interventions had already been in place for a semester, but the student

continued to struggle? And, what accommodations could the §504 team put into place that would not have already been attempted?

When parents are confused and concerned, they are likely to seek out independent help. Here, the grandparent retained an advocate and attorney, who filed a request for due process alleging a failure to identify. In response, the District formally offered to conduct a full initial evaluation of the student. The evaluation found that the student qualified as LD in reading comprehension, and OHI because of his ADHD. At the initial ARDC meeting, the committee placed the student in special education, and provided him consultative OT services, all the accommodations in the §504 plan, and monitoring by a special education teacher in the classroom. Curiously, by this time, the student had improved in reading fluency, as tested by the reading specialist, and apparently also passed the 4th grade reading statewide assessment. Thus, he actually wound up responding significantly well to the regular ed interventions provided, including dyslexia program assistance.

Editorial Note—If the data from regular education interventions indicated that the student had improved with interventions, to the point of passing the statewide assessment on grade-level and increasing his measures of reading fluency, why did the student need special education, and thus qualify under the IDEA? In another Texas case, after a student exhibited some problems in reading, a Problem Solving Team met to consider and implement RtI programming, and the parents agreed to the planned interventions. *Joshua Ind. Sch. Dist*., 111 LRP 4652 (SEA Texas 2010). Eight months later, the parents requested an IDEA evaluation, but the school determined that the data showed that the student had made significant progress in reading. The school eventually agreed to evaluate the student, but found he was not eligible, based on his progress through the RtI program. The Hearing Officer concurred, finding that "the district demonstrated that it determined that RTI could be successful for the student and that the student's progress indicated the RTI process was successful for the student." Thus, the student's improvement (i.e., "response") by means of RtI-oriented interventions was evaluation data showing that the student was not in need of special education services. (Curiously, the parent in Joshua apparently testified that she "sought special education eligibility only to ensure that the plan of the problem solving team would be implemented).

The Hearing Officer's Decision in the *Austin ISD* case—Ultimately, says the Hearing Officer, there was a classic failure to communicate in this matter, "yet,

the school district responded to the student's changing needs by adding increased accommodations and interventions before the student began special education services." The school "applied successive interventions to this program as part of the district's RTI process beginning in September 2009."

But, the Hearing Officer finds that as of September 2009, when the child's doctor approached the school principal, the district had reason to know that the student was likely a student with a disability, and that the grandmother was requesting testing. "Petitioner's grandmother made a parental request for testing for the student and, as a result, the school district had a duty to evaluate the student that overrode the district's use of the local district RTI process—the IMPACT committee—before evaluating the student for special education. "

> *Note*—In other words, in the Hearing Officer's opinion, a parent's request for IDEA evaluation "trumps" a district's local RtI procedures and intervention sequence. Of course, the district could have chosen to reject the request for evaluation, provide the grandmother with notice of the refusal and notice of IDEA procedural safeguards.

As the student made failing grades, "the school district began applying interventions specifically focused on areas of concern in writing and reading skills, and the student began to demonstrate success with measurable increases in those skills." Thus, although the school did not begin evaluating the student until five months later, the Hearing Officer did not find the delay unreasonable, since "the student made progress in targeted areas during the period of increased intervention." But, the hearing officer also found that while the school had in fact refused the request for evaluation, it never provided the grandmother with written notice of the refusal, as required under the IDEA. "This is a procedural flaw." As far as the school staff was concerned, however, they had not really "refused" the evaluation request, they had merely explained the RtI process to the grandparent and followed it as they understood it. In any event, the Hearing Officer excuses the procedural violation, since, in her opinion, it "did not seriously infringe on her opportunity to participate and develop Petitioner's educational program…" Therefore, the Hearing Officer denied any relief. Ultimately, the fact that the District acted in a timely and increasingly proportionate fashion with its regular intervention programs saved the legal case, since the student responded well.

> *Note*—The Hearing Officer addressed the school's procedural violation of failing to issue a notice-of refusal when it *de facto* rejected the guardian's request for testing. But, the Hearing Officer did not address the fact that

the school also did not provide the grandparent with notice of her IDEA procedural safeguards when it decided not to test. Other cases have held that the failure to provide notice of procedural safeguards is in fact a procedural violation that can seriously infringe on a parent's opportunity to participate. See *El Paso Ind. Sch. Dist. v. R.R.*, 50 IDELR 256 (W.D.Tex. 2008)(tacit refusal of evaluation request when parent instead agreed to interventions required provision of IDEA procedural safeguards notice).

More Modern Child-Find/RtI Disputes

• The 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…

- *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 2006 regulation states that referral must take place if either the student has not made adequate progress after an appropriate period of regular interventions, or whenever the child is referred for evaluation (i.e., a parent request for referral).

> *The Feds comment on the regulation*—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…? In its commentary, 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.

Case Example—The USDOE commentary does not answer the questions posed in many factual situations. In the case of ***City of Chicago Sch. Dist. 299*, 102 LRP 72479 (SEA Illinois 2009)**, a school refused to either initiate a special education referral even though a third-grader had been retained and was failing his classes. The school believed that a referral was not warranted because the student had missed a year of school and there was insufficient data regarding his academic performance. Instead, the school offered to provide regular education "school-based problem-solving." It neither provided a notice of the refusal, nor a copy of procedural safeguards. The Hearing Officer ruled that the school failed in its child-find obligations, since the student was failing, and had to be retained, despite previous attempts at regular education interventions, including small pull-out groups. "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 Hearing Officer thus awarded compensatory services.

- *What if the parent requests a special education evaluation, but subsequently agrees to try regular education interventions first?* These situations can get complicated, as they raise tricky procedural questions. Are these situations where a parent simply changes her mind about the referral, or rather, are these situations where the school has in fact refused to proceed with the evaluation? In the case of ***Scott v. District of Columbia*, 45 IDELR 160 (D.D.C. 2006**), after a parent notified the school that her third-grade son was diagnosed with ADHD, the school met with her and the parties agreed to a plan of "alternative strategies" to address attentional problems and other issues. Although the student was "on target" academically, the parent filed an action alleging a child-find violation. The court interpreted the situation as one where, despite the parent's agreement to "alternative strategies," the school still had an obligation to evaluate the student. "No provision of the IDEA supports [the school's] contention that a parent's acceptance of the use of 'alternative strategies' relieves a school district of the obligation to comply with the 'child-find' provisions of the Act."

Editorial Note—But is not information on the student's response to regular education interventions crucial to the determination of whether he is in need of special education services? That determination is required for IDEA eligibility. Do not the IDEA provisions allowing states to install RtI models, as well as the regulation implementing the federal LD eligibility model (§300.309), support the provision of regular education interventions to better identify students that need special education evaluation, particularly if parents are in agreement with such steps? Why is parental agreement to regular education interventions not interpreted, instead, as a withdrawal of their original evaluation request? What if

solid documentation supports the withdrawal of the referral and the parent's agreement to the intervention plan?

These complications arose similarly in ***El Paso Ind. Sch. Dist. v. R.R.*, 50 IDELR 256 (W.D.Tex. 2008)**(vacated on other grounds), where the parent of a struggling student approached the school about the possibility of a referral for special education evaluation. The school convened a meeting of their Student Teacher Assessment Team (STAT), a regular education committee that provided a variety of interventions, including accommodations, tutoring, and Saturday tutoring camps. The court found that the record established that the parent agreed to the STAT interventions and, thus, to forego special education testing. But, the court held that although the parent agreed to forego the evaluation, the school should have provided her with notice of IDEA procedural safeguards and written notice of its refusal to evaluate the child. "Nowhere in either the text of the IDEA or the federal regulations have exceptions been carved out to relieve local educational agencies of this responsibility when a parent agrees with the agency's refusal to evaluate. … [W]hether parents agree to the refusal or not, local educational agencies must comply with their IDEA responsibility to provide written notice upon their refusal to evaluate a child for special education services."

> *Editorial Note*—Of course, the District's contention would be that it never *refused* the evaluation. Together with the parent, the District developed a plan of regular interventions to attempt, and the parent withdrew any constructive request for evaluation. Should the school be liable for delays in the ultimate identification of a special education child occasioned by a good-faith agreement between parent and school to attempt regular education interventions prior to initiating testing? Certainly, there will be situations where the regular interventions serve to correct the child's problems and no evaluation will be necessary. But, inevitably, there will be situations where the student does not respond to interventions as well as hoped, and ultimately, a special education evaluation finds them eligible for special education services. In the latter situations, is there always the spectre of legal liability for the school?... The following cases attempt to answer the question.

• *More cases where schools' implementation of RtI is found to run afoul of child-find*—Another case example involves use of RtI procedure in a non-SLD context. In ***Meridian Sch. Dist. 223*, 56 IDELR 30 (SEA Illinois 2010)**, a school district insisted on providing interventions to a child with a known hearing impairment, rather than evaluating him for special education. Despite the mother's repeated requests for IDEA evaluation, the district instead developed "RTI Plans," although the student's grades deteriorated and

were close to failing. Moreover, his teachers expressed concerns about his inattentiveness in class. The hearing officer rejected the school's RtI-based argument. "The district argues that it developed a RtI plan to address the student's needs and that the student responded positively to the RtI plan. A district may use the RtI process to determine how a student who is suspected of having a specific learning disability responds to scientific, research-based interventions as part of the evaluation procedure…. Interestingly, there is no evidence showing that the district ever suspected that [ ] has a specific learning disability." And, the hearing officer found that the student was in fact not making progress, based on his grades and other assessments, and that no RtI data was collected to assess the student's response to intervention for months while interventions were being provided.

> In ***Upper Arlington City Sch. Dist.*, 111 LRP 66445 (SEA Ohio 2011)**, a multiple-student SEA complaint led to findings that students suspected of having learning disabilities were required, by written policy, to participate in lengthy interventions prior to evaluation, forcing some parents to seek out private evaluations and advocacy assistance in an effort to convince the school to proceed to IDEA evaluations. "A review of the evidence demonstrated that these students with suspected learning disabilities were not referred for evaluation until the parents repeatedly requested evaluations and brought in data from private evaluators to support that the students were in need of evaluations to determine whether the students were eligible for special education services under the IDEA. The district staff's implementation of the written policies subjected some of the students to an intervention process that lasted from two to four years while the students continued to have academic difficulties in areas such as reading, writing, mathematics, spelling and language." Moreover, the State found that students were not referred even when intervention data indicated they were not making adequate progress after interventions were put into place.

• *What if 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 case where the school attempts interventions in regular education, only to later qualify the child after an evaluation is ***S. v. Wissahickon Sch. Dist.*, 50 IDELR 216 (E.D.Pa. 2008)**. There, a Pennsylvania school provided interventions to a student with ADHD who performed well from third through sixth grade, but then started failing to complete work and attend school regularly. When the parents requested an evaluation, the report indicated he had ADHD and a math disorder, and an IEP was developed. The parents, however, claimed that the school was late in identifying the student for an evaluation. The court noted that several teachers saw no problems with inattention or impulsivity, but rather felt that frequent absences and failure to complete homework were the cause of his declining performance after the sixth grade. And, as the student began to struggle, the school responded with specialized progress reports, an "agenda book" to organize assignments, and frequent conferences with the parents. The court agreed with the hearing officer that there was no child-find violation. "Richard was an average student who made meaningful educational progress, but exhibited low motivation and a disinterest in academic work." In light of his performance, the reasons for the subsequent decline in his performance, and the interventions attempted by the school, there was no failure in the child-find process.

> *Editorial Note*—This case shows how different decision-makers can reach different conclusions with the same child-find scenario. An appeals panel that reviewed the hearing officer's findings that there was no child-find violation felt that the fact that the student had been diagnosed at an early age, together with the later decline in school performance should have led the school to evaluate him soon after he began experiencing problems. The key here appears to be that the student's problems seemed directly traceable to non-disability factors, such as attendance and attitude toward schoolwork. In many cases, however, the reasons for declining performance are mixed and much less clear.

A hybrid scenario is illustrated 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-arose 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.

Steps to Minimize Child-Find Disputes in RtI-Capable Districts

• 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 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 reviewed above, may lie in involving parents as partners in the decisions regarding regular education interventions and the timing of a special education evaluation. This effort could 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 an IDEA evaluation is discussed, provide prior written notice and notice of IDEA rights and procedural safeguards,
6. If a decision is made to pursue regular education interventions, progress data must be shared with parents frequently,
7. Follow-up communication regarding progress or lack thereof,
8. Follow-up meetings to review progress and renew consensus on current course of action,
9. 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.

Notices to parents—If the school is in a situation where the parent initially seemed to request a special education evaluation, but then agreed to attempt regular education interventions after being provided information on these interventions, it may be wise to provide the parents with a notice of the decision to forego interventions by agreement, and notice of IDEA procedural safeguards. These notices can help ensure that parents are fully "on board" with the educational decision being made, and can be useful should there be a later dispute.

RtI Misconceptions Collide with Recent USDOE Guidance

• *Avoiding common misconceptions* – The advent of RtI-oriented intervention programs, together with the modernization of the LD evaluation process has given rise misunderstandings that can lead districts awry in complying with child-find. 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

Collecting RtI data is the only means of showing that the finding of LD is not due to lack of appropriate instruction

The most entrenched misconception involves the issue of RtI data as part of LD evaluations. 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. 34 C.F.R. §300.309(a)(2)(i); see also OSEP's *Memorandum to State Directors of Special Education* (OSEP, January 21, 2011). Indeed, from a practical standpoint, the regulation could not have required such a determination, since many schools would have been unequipped to provide those interventions. This is why the regulation also allows for the option of an assessment-based determination focusing on patterns of strengths and weaknesses in assessment scores. 34 C.F.R. §300.309(a)(2)(ii).

USDOE has already commented, moreover, that the portion of the LD regulation requiring the evaluation team to rule out that the LD finding is not due to lack of appropriate instruction (§300.309(b)) does not necessarily require the provision of high-quality research-based interventions such as would be found in RtI-oriented programs. In the commentary accompanying the regulation, it stated that in order to address concerns that the provision requiring a finding of provision of appropriate instruction did not delay evaluations, 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* include instruction in an RTI model…" 71 Fed. Reg. 46,658 (August 14, 2006)(emphasis added).

Note—Indeed, observers of the 2005-2006 IDEA rule-making process may have noted that the *proposed* IDEA regulation would have required the provision of high-quality research based instruction prior to identification as SLD. *See* proposed regulation §300.309(b)(1) at 70 Fed. Reg. 35,864 (June 21, 2005 NPRM). Commenters, however, pointed out that such a requirement would exceed the statutory authority vested in USDOE by the IDEA, since it would have required regular education programs to provide high-level instructional interventions (without additional funding to do so). USDOE considered those criticisms of the proposed regulation and wrote that "we agree that the requirement for high-quality research-based instruction exceeds statutory authority… Therefore, we will change the regulations to require that the eligibility group consider evidence that the child was provided appropriate instruction and clarify that this means evidence that lack of appropriate instruction was the source of underachievement." 71 Fed. Reg. 46,656 (August 14, 2006). In addition, the regulators also clarified that "we have also revised §300.309(b)(1) to refer to appropriate instruction rather than high-quality research-based instruction…" *Id*. Thus, the provision only serves to rule out that the LD finding not be due to poor or absent instruction in reading or math. "All children should be provided with appropriate instruction provided by qualified personnel." 71 Fed. Reg. 46,655.

- *Recent OSEP positions on topic*—In a recent memorandum, OSEP indicates 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*, 56 IDELR 50 (OSEP—January 21, 2011)**. The memo states that while OSEP 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, pursuant to 34 CFR §§300.304-311, to a child suspected of having a disability under 34 CFR §300.8." Also, the memo reiterates that the IDEA and its regulations currently only "*allow*" the use of RtI data, as part of the criteria for determining if a child has a specific LD. Thus, the memo concludes that "it would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 300.111 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."

Related USDOE Letters—In *Letter to Zirkel*, 56 IDELR 140 (OSEP 2011), the question involved how child-find operated with private school students in districts implementing RtI programs. There, OSEP wrote that "the district is responsible for meeting its child find obligations under IDEA even if the private school has not implemented an RTI process." Using quite similar language to

that in the memo to state directors, OSEP stated 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 a private school has not implemented an RTI process with a child and reported the results of that process to the LEA." Similarly, in *Letter to Brekken*, 56 IDELR 80 (OSEP 2010), OSEP stated that public schools also could not reject or delay IDEA referrals from outside agencies, such as early childhood intervention agencies or Head Start, on the grounds that they had not tried RtI programs. "Once an LEA receives a referral from a Head Start program, the LEA must initiate the evaluation process to determine if the child is a child with a disability." Using language similar to the recent memorandum, OSEP stated that it would be inconsistent with the IDEA's evaluation provisions to reject or delay a referral from an outside agency on the basis that the child had not participated in an RtI program prior to referral.

An older OSEP letter took a similar position to that in the memo and letters reviewed above, with respect to the question of whether a school could delay an expedited evaluation in order to pursue the RtI process for a student being subjected to disciplinary measures. *Letter to Combs*, 52 IDELR 46 (OSEP 2008). Under 34 C.F.R. §300.534(d)(2)(i), if a parent makes a request for an IDEA evaluation during the time period within which the child is being subjected to disciplinary sanctions, the evaluation must be conducted in an "expedited manner." OSEP wrote that "following the request for evaluation, and once parental consent has been obtained, a local educational agency (LEA) may not refuse to conduct the evaluation of a child during the time period in which disciplinary measures are used because the RTI process is ongoing." As in the 2011 memo, OSEP emphasized that current law and regulations *allow* for use of RtI data as part of an LD evaluation, but do not necessarily require it. Indeed, OSEP acknowledged that this may mean that the student would not have received RTI-oriented interventions, or that such interventions would not be completed. "In those instances, the LEA would need to rely on other assessment tools and strategies to ensure that the evaluation can be conducted in an expedited manner."

- *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.

- *Quality of RtI programs*—Because there are no established guidelines for RtI programs in the IDEA or its regulations, the nature and structure of programs vary widely from district to district across the U.S. Some programs are sophisticated, well-structured, competently staffed, high-quality, fully research-based, and supported by the appropriate level of training and funding support. Other programs are loosely structured, not really research-based, and lacking in appropriate staff training and funding commitment. Programs run the entire spectrum of quality. Schools must keep the relative quality of their intervention programs in mind when proposing them to parents concerned about their children's classroom performance.

- *Analyzing district-wide data on effectiveness of RtI programs*—Districts that invest resources and time on RtI-oriented intervention programs should also study the effectiveness of the interventions 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. In other words, what districts need to know is whether their RtI program is actually yielding positive results in the form of significant student response and improvement, to the point that the need for IDEA referrals is reduced. If the data shows that a substantial number of students who, in the past, would have been referred to special education in fact improve significantly with the interventions and thus do not need referral, then the program is being successful. If, on the other hand, most of the students that would have been referred in the past simply get referred at a later time—after a potentially-lengthy intervention period—then the program could appear to simply be slowing down or delaying the eventual referral and evaluation process. Certainly, the RtI movement, particularly with respect to the LD population, did not intend to replace a the discrepancy-based "wait-to-fail" LD model with yet another version of a "wait-to-fail" model—one that requires failure in potentially lengthy RtI programs prior to referral to IDEA.

- *The requirement of need for special education*—It's easy to forget that IDEA eligibility requires two separate findings: (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). 34 C.F.R. §300.8(a)(1). A difficulty 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 host of related eligibility questions: Does the student not require "specially-designed instruction"? Or instead, does this mean that the student no

longer needs to have such instruction by accessing federal or state IDEA funding? Can Congress require schools to provide access to specially-designed instruction *only* by means of its federally-funded mechanism, even when a local means exists to provide such instruction outside of special education? Or, rather, does the IDEA pact between a state and the federal government imply an agreement that the state will meet the needs of students with disabilities only under the IDEA model? These questions are likely to be fodder for legislative discussion as IDEA is reauthorized in the RtI era.