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Duty to find students within an LEA's boundaries that may be disabled and in need of special education

20 USC §1412(a)(3); 34 CFR §300.111

Also called "identification," which leads to offers of evaluation

Applies from ages 3 to 21

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Applies even if students are passing, homeless, wards of state, or in private schools

Duty triggered by *residency*, not enrollment

Applies from ages 3 to 21

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

A coordinated set of activities (notices, postings, websites, handbooks, pamphlets, and outreach efforts to homeless shelters, private schools, pediatricians, head start agencies)

Application to Wyoming Preschool Students

IDEA requires that WY ensures childfind for ages 3-21 (0-21 for AI and VI students)

But, Dept of Health runs the preschool child development programs

Application to Wyoming Preschool Students

Issues: LEA where child resides has the child-find and evaluation duty

LEA must ensure development of IEPs and provision of FAPE to eligible students (who may be at home or served in RCDCs)

Application to Wyoming Preschool Students

"While the State is not obligated to provide for universal preschool for all children under age six, Education does have responsibilities for services to children with disabilities, age three through five." Early Intervention and Education Program Phase I (WY Legislative Service Office, 2016)

Application to Wyoming Preschool Students

Under WY scheme, Health runs 14 RCDCs, Education oversees Health to ensure compliance with IDEA, per MOU

RCDCs provide evaluations, IEP services

But, LEAs retain the legal FAPE responsibility

Application to Wyoming Preschool Students

Potential dysfunctionalities in separation of Pre-K services and LEA services...?

Guidance to LEAs? Work with WDE to ensure that RCDCs that serve their resident students properly identify, evaluate, and serve the IDEA students

Main Modern Child-Find Challenge

Using RtI and reg ed intervention programs in ways that do not compromise LEAs' child-find duties under the IDEA

A little history...

How did Rtl Start?

Reaction to old "discrepancy" model for SLD evaluations and its many flaws

Simple comparison of FSIQ scores to standard scores on norm-referenced achievement tests

Sometimes a simple difference procedure analysis, at times a predicted achievement analysis

How did Rtl Start?

The old "discrepancy" model for SLD evaluations

Inherently, a wait-to-fail model Relied on problematic FSIQ scores High randomness No solid science basis to identify SLD Could misidentify Subject to easy manipulation Could identify non-LD low learners Identified "flat" achievement profiles

Possible Solutions?

 Recommendations of 2002 Report of President's Commission on Excellence in Special Education

Assess response to regular ed interventions ("RtI") as part of LD evaluations

Early reading assessments

IDEA funding for early interventions for struggling learners

Possible Solutions?

 Recommendations of 2002 Report of President's Commission on Excellence in Special Education

Many current SLD students really nondisabled "casualties" of poor regular education instruction

Current LD model is a wait-to-fail model lacking scientific validity

Possible Solutions?

 Recommendations of 2002 Report of President's Commission on Excellence in Special Education

Not enough focus on research-based approaches

"Special education should be for those who do not respond to strong and appropriate instruction and methods provided in general education."

Congress Responds—IDEA 2004

• 20 USC §1414(b)(6)

Schools do not have to use a discrepancy model for LD evals

LEAs may use an RI model "as part of the evaluation"

Congress Responds—IDEA 2004

• 20 USC §1413(f)

Early Intervening Services— LEA's can spend up to 15% of IDEA-B funds on "coordinated early intervention services"

Remember the Commission's recommendations...

USDE Responds: The 2006 Regs

LD reg received lots of commentary

A reform-oriented regulation...

Envisions the new reg ed role in RtI

§300.307—States' Roles

- 1. States must adopt SLD criteria
- 2. Cannot require discrepancy and must permit use of Rtl method
- 3. Can permit alternative process.
- 4. LEAs must follow State-imposed criteria.

§300.311—State Rtl Policies

- Schools must inform parents, as part of eligibility reports on LD, of state policies regarding the amount and nature of Rtl data that would be collected, as well as the services that were provided
- Regs thus envisioned states would address the fundamentals of RtI programs for their LEAs

§300.311—State Rtl Policies

"Part B regulations require state special education policy concerning identification of SLD through an RTI process to address the amount and nature of student performance data that would be collected and the general education services that would be provided in the RTI process." Letter to Zirkel, 50 IDELR 49 (ÖSEP 2008)

§300.311—State Rtl Policies

 How well have states done with this requirement to set forth fundamental parameters for Rtl programs implemented in their LEAs?... Mixed results across the US

§300.309—Basic SLD Identification (4-part process)

- 1. Failure to achieve
- 2. Rtl analysis or strength-andweakness assessment-based analysis
- 3. Traditional exclusionary clauses
- 4. Appropriate instruction "filter"

§300.309(a)(2)—Allows Rtl Analysis

- Rtl analysis—Does child fail to make sufficient progress to meet standards in an achievement area "when using a process based on the child's response to scientific, research-based intervention"?
- An option only, as "strength and weaknesses" assessment model still available (or could be used together)

§300.309(a)(2)—Allows Rtl Analysis

 Note—Rtl analysis a non-mandatory option in SLD evaluations

This point will be emphasized in later USDE guidance and letters...

§300.309(c)—Referral, Timeline

- 60-day evaluation timeline (can be extended by agreement with parents) triggered by:
 - (1) lack of progress despite appropriate instruction, and
 - (2) upon referral (from any source)

Note—States can set a timeline other than the federal default timeline

§300.309(c)—Referral, Timeline

 Notice that this provision leaves the childfind obligation essentially unchanged from that prior to 2006

Only concession to RtI is that parents may agree to extend the evaluation timeline

§300.309(c)—Referral, Timeline

 Thus, while IDEA 2004 changed the SLD evaluation criteria to include RtI analysis, the child-find provisions and requirements remained unchanged.

This tension will manifest in later USDE guidance (and in caselaw)....

USDE Letters on Rtl (Chronologically)

• Q & A on RTI and Early Intervening Services, 47 IDELR 196 (OSERS 2007)

Rtl addresses Congress' concerns with IQ-based LD models

"Core characteristics that underpin all RTI models" are (1) high-quality research-based instruction in general ed settings, (2) continuous progress monitoring, (3) all students are screened, and (4) "multiple tiers of instruction that are progressively more intense, based on the student's response to instruction."

USDE Letters on Rtl (Chronologically)

 Q & A on RTI and Early Intervening Services

"A growing body of scientific research supports methods, such as RTI, that more accurately distinguish between children who truly have SLD from those whose learning difficulties could be resolved with more specific, scientifically-based general education interventions."

USDE Letters on Rtl (Chronologically)

 Q & A on RTI and Early Intervening Services

May the parent request an evaluation at any time during the RTI process?

"If the LEA agrees with the parent that the child may be a child who is eligible for special education services, the LEA must evaluate the child."

Q & A on RTI and Early Intervening Services

May an LEA require that all children suspected of having an SLD first be assessed using an RTI process before an eligibility determination may be made?

"If an LEA is using RTI for all its students, it may require the [evaluation team] to review data from an RTI process in making an eligibility determination."

Q & A on RTI and Early Intervening Services

The guidance document does not answer the question of what is a "prompt" referral timeline for a child that has not made adequate progress in RTI program.

"The regulations do not specify a timeline for using RTI or define adequate progress.... A State may choose to establish a specific timeline.... We do not believe it is necessary to define the phrase promptly because the meaning will vary depending on the specific circumstances of each case."

Q & A on RTI and Early Intervening Services

"It generally would not be acceptable for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability."

Note—But is not child-find triggered upon suspicion of disability, since it is assumed that a student in RTI exhibits a need for services?... Would even a wait of weeks be acceptable in cases of such suspicion? (see Jackson v. Northwest Local SD, 55 IDELR 71 (S.D.Ohio 2010)(ADHD student 2 years in RtI despite escalating behaviors))

• Letter to Anonymous, 49 IDELR 106 (OSEP 2007)

"If the use of a process based on the child's response to scientific, research-based interventions in identifying children with SLD is required, then all children suspected of having an SLD, in all schools in the LEA, would be required to be involved in the process."

Note—Even if there is a parent request for evaluation prior to implementation of RtI? Ostensibly, USDE would have required that RTI be provided only within the timeframe for evaluation in such a situation

Letter to Brekken, 56 IDELR 80 (OSEP 2010)

"The IDEA does not require, or encourage, an LEA to use an RTI approach" prior to referral of children 3-5 years of age.

Rationale—SLD eligibility generally not applicable in that age range

LEAs cannot decline referrals from Head Start until the student participates in an RTI process, but it can decline the referral if it does not suspect disability (with PWN)

Letter to Zirkel, 56 IDELR 140 (OSEP 2011)

Same logic of *Letter to Brekken* now applied to private school referrals (i.e., cannot deny referral due to lack of participation in an RTI process).

LEA will have to rely on "other information, such as any assessment data collected by the private school that would permit a determination of how well a child responds to appropriate instruction..."

Letter to Zirkel, 56 IDELR 140 (OSEP 2011)

A point on "Behavior Rtl"—"It would be inappropriate to assume either than an adopted RTI process must be based on behavior and/or that this process extends to to other classifications more closely associated with behavior."

See also, Letter to Clarke, 108 LRP 65284 (OSEP 2008) ("The [IDEA] regulations do not address the use of an RTI model for children suspected of having other disabilities.")



"It has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, LEAs may be using RTI strategies to delay or deny a timely initial evaluation for children suspected of having a disability."

States and LEAs have an obligation to ensure that child-find and evaluations are not delayed or denied "because of implementation of an RTI strategy."



OSEP "supports" State and LEA implementation of RTI strategies, but to ensure early identification and timely provision of effective assistance.

"It would be inconsistent with the evaluation procedures [of the IDEA regulations] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework"

Note—Does this statement apply to parent referrals or any referral?...

Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)

Although the regulations specifically address use of Rtl for SLD evaluations, "information obtained through RTI strategies may also be used as a component of evaluations for children suspected of having other disabilities, if appropriate."

Note—Confusing statement, given the position of *Letter to Brekken* and *Letter to Clarke*, on this very point...

Letter to Ferrara, 60 IDELR 46 (OSEP 2012)

"The implementation of an RTI process is not a reason to fail to respond to a parent's request for an initial evaluation."

Note—Thus, LEAs can't wait until completion of Rtl tiers before responding to a parent request for an initial evaluation. What about with staff referrals?...

Note—See Artichoker v. Todd Co. Sch. Dist., 60 IDELR 58 (D.S.D. 2016) for an example of a school responding to parent request for eval with Rtl services instead.

Letter to State Directors of Special Ed, 61 IDELR 202 (OSERS/OSEP 2013)

Logic of 2011 Memo to State Sp Ed Directors now applied to transfer students

Letter based on USDE info that LEAs might require that a transfer student not evaluate until RTI is implemented in the new LEA

LEA cannot delay or deny referral of transfer students solely due to lack of implementation of RtI

Letter to State Directors of Special Ed, 61 IDELR 202 (OSERS/OSEP 2013)

In such cases, Rtl could only be implemented during the evaluation timeframe

Thus, in Head Start, private school, or transfer student referral situations, the LEA might be forced to not use Rtl analysis in SLD evaluations, since it may not have time to really generate the necessary intervention response data...

 Memo to State Directors of Sp Ed, Preschool/619 State Coordinators, Head Start Directors, 67 IDELR 272 (OSEP 2016)

Logic of 2011 Memo to State Sp Ed Directors now applied to *all* preschool referrals (i.e., cannot delay or deny referrals solely due to lack of implementation of RtI).

OSEP states IDEA "does not require, or encourage" use of Rtl analysis with any preschool children (compare to tone of early Rtl-related letters...)

• OCR ADHD Resource Guide, 68 IDELR 52 (OCR 2016)—§504 Child-Find

Addresses a variety of §504 and IDEA issues related to students with ADHD

States that while early interventions can be "very effective and beneficial," if there is suspicion of disability, it would be a violation of Section 504 to delay the evaluation in order to first implement interventions

• OCR ADHD Resource Guide, 68 IDELR 52 (OCR 2016)

OCR states that districts tend to "run afoul" of their §504 child-find obligations when they:

- 1. "rigidly insist on first implementing interventions before conducting an evaluation", or
- 2. "categorically require that data from an intervention strategy be collected and incorporated as a necessary element of an evaluation."

See OCR decisions on point: Polk Co. (FL) Pub. Schs., 56 IDELR 179 (OCR 2010)(School required Rtl for struggling ADHD student); Cherokee (TX) ISD, 59 IDELR 18 (OCR 2012)(school provided Rtl after parent requested eval); Indian River County (FL) Sch. Dist., 111 LRP 70055 (OCR 2011)(4-mos. Rtl for Tourette's); Bristol-Warren (RI) Regional Sch. Dist., 56 IDELR 303 (OCR 2010)(Rtl for student with anxiety and ADHD); Harrison (CO) Sch. Dist. Two, 57 IDELR 295 (OCR 2011)(long Rtl for ADHD student with multiple suspensions); Forest Hills (OH) Local Sch. Dist. 111 LRP 70117 (OCR 2011) ("diabetes Rtl" required prior to eval!).

 Texas Part B 2017 Monitoring Visit Letter, (OSEP 2018)

TEA monitoring system for LEAs included an IDEA eligibility rate indicator

Districts subjected to additional monitoring if they exceeded 8.5% eligibility (depending on how much)

From 2004-2016, IDEA eligibility dropped from 11.6% to 8.6% statewide

"OSEP found evidence demonstrating a pattern of practices in ISDs throughout the State in which evaluations were delayed or not conducted for children suspected of having a disability because these children were receiving support for struggling learners in the general education environment."

OSEP concluded that the SEA's 8.5% monitoring indicator resulted in the decline in the States overall eligibility rate

OSEP found that RtI practices and perceptions played a major part the reduction in eligibility

Data "revealed a general understanding among teachers and parents in Texas that completing all tiers of RTI was required prior to a referral for special education, particularly for children with SLD..."

"Teachers could not always define what level of progress would be sufficient for a child to stop receiving interventions provided through an elevated tier of RTI."

Note—It's fair to point out that neither the IDEA regulations nor USDE guidance address those issues either...

Staff "expressed a lack of clarity as to which children enter tiers two or three, how long children are served in each tier, and when children move from one tier to the next within an RTI framework."

"The lack of clarity in LEA and school-level implementation contributed to the delay or denial" of valid child-find.

"With regard to teacher referrals, interviews that OSEP conducted with school and ISD staff revealed that although the staff referral will be considered, the school may deny the initial evaluation if the child has not completed all tiers of the RTI process, even if there is reason to suspect disability."

Question—Does lack of good response in an early Rtl tier mean there is suspicion of SLD? If so, why have more intensive tiers?...

"Staff in many schools and ISDs appeared to view special education under the IDEA as a 'last resort,' which should be avoided whenever possible...."

Questions—If a student responds, but only in the highest tier of Rtl services, is there a suspicion of SLD and need for sp ed? What if the Rtl services look a lot like "specially designed instruction"?

State must engage in a corrective action plan that includes:

Plan for individual reconsiderations of child-find

SEA guidance on Rtl, §504, and IDEA

SEA monitoring of students in Rtl or §504

 In some States, lack of clear guidance on RtI implementation fundamentals (nature of intervention tiers, criteria for tier-to-tier movement, criteria for "response," criteria for inadequate response, child-find point, role of parents)

This leads to inconsistency, confusion, misconceptions

 Overly rigid approaches to Rtl implementation

Insistence on Rtl participation in most cases
Viewing Rtl as a "prerequisite" to referral
Failure to inform parents properly
Failure to consider parental input
Overly-lengthy intervention cycles

Rtl implementation and quality problems

Lack of clarity at LEA and campus level
Misperceptions on Rtl vs. IDEA child-find
Problems with interventions' research bases
Poor fidelity of implementation
Failure of Rtl process safeguards

Rtl implementation and quality problems

Fidelity and quality issues are particularly problematic, as students may appear to need more intensive interventions when they really might not need them

Rtl data problems

Progress data-gathering problems

Failure to properly examine data in individual cases

Lack of use of Rtl data in IDEA SLD evaluations (prevalent in Texas)

Failure to share progress data with parents (see *C.M. v. Lafayette BOE*, 64 IDELR 31 (9th Cir. 2014)(failure to share Rtl data denied parents' participation rights)

Why the changed "mood" toward Rtl?

While RtI is a positive innovation, it appears that USDE has not always approved of the way it has been implemented in practice in the field

In the tension between Rtl implementation and child-find compliance, USDE has focused on child-find duties (the legal mandate)

Suggested Rtl/Child-Find Protocol

- 1. Provide parents all intervention policies/process info
- Meet with parents to discuss options (can be part of Rtl committee)
- Make clear parents' right to request IDEA evaluation
- 4. Reach consensus on course of action
- 5. Share progress monitoring data with parents
- Follow-up on progress or lack thereof without delay
- Have review meetings that include parents
- 8. Document steps taken and consensus decision-making

 More involved and effective State-level guidance on RtI implementation

Nature of interventions
Sound data-gathering practices
Standards for assessing response
Criteria for moving from tier to tier
Criteria for exiting Rtl

Increased flexibility in RtI implementation

Ranges of timeframes in each tier?

Viewing tier timeframes as guidelines?

Factoring parental input in RtI decisions

Factoring classroom performance

 Focus on child-find compliance in Rtl programs, rather that on stringent implementation of Rtl program

While Rtl implementation is a matter of practice, child-find is a legal requirement

Sp Ed staff must work with Rtl programs with an eye to observing child-find, not reducing or delaying referrals

Data analysis on Rtl program results

What percentage of Rtl students respond well, cease interventions, and continue to perform well without additional interventions?

What percentage of students do not respond well and wind up getting referred for evaluation?

What percentage of non-responding students eventually qualify under IDEA as SLD?

How carefully is Rtl data used as part of SLD evaluations?

Sp ed departments must have eyes on both the district's Rtl and §504 programs

They are a major source of IDEA child-find "targets"

And, they can be a source of child-find liability, if timely referral decisions are not made

Districts should avoid over-compartmentalization of sp ed, §504, and RtI programs, as they must work in a coordinated fashion

Sp ed depts must be open to referrals from these programs