

LD Eligibility and Response to Intervention:

Why This, Why Now, and Why Not?

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I. INTRODUCTION

I was asked to develop and present a thought-provoking, informative, and up-to-date presentation on the “hottest” topic in the field of special education today – RTI. Any discussion of RTI must begin with the realization that the responsibility of implementing this concept, and accepting the federal admonition to drastically reduce the numbers of students being labeled “LD,” must begin with an acceptance of the fact that RTI is actually a general education concept and responsibility, and is not supposed to fall to special educators and administrators for implementation. However, I have spent much of the past two years speaking to groups across the United States and from Florida to Alaska about RTI – and almost without exception these groups have consisted mainly of special educators. Once again, I present this topic to special educators, hoping that the message will travel to the ears it was intended for – or was it always intended that special education bear the responsibility for implementing RTI? Such existential ruminations aside, I will endeavor to provide a concise overview of the legal groundwork and mandate for the new RTI requirements and leave it to public school districts to grapple with

assigning actual responsibility for implementing this daunting challenge. Remember that I am a lawyer. I am not a special educator, administrator, reading researcher, or employee of a publishing company selling a reading curriculum or intervention. My goal is to review and present the legal issues arising from this new mandate, and to leave the implementation issues to those with responsibility and training for that task.

II. WHAT IS RESPONSE TO INTERVENTION (“RTI”) ?

Just to make certain that participants are on the same page with me, it’s important to define the term “response to intervention,” or “RTI.” The National Association of State Directors of Special Education (NASDSE) defines RTI as “the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals and applying child response data to important educational decisions.” Response to Intervention: Policy Considerations and Implementation, NASDSE, Inc., 2005. According to Helen Duffy of the American Institutes for Research®, “RTI involves a tiered approach to providing the most appropriate instruction, services and scientifically based interventions to struggling students – with increasing intensity at each tier (Cortiella, 2005). RTI is often used in conjunction with identifying students as having a specific learning disability. The RTI approach holds promise for supporting all struggling learners.... Those implementing RTI services typically employ a three-tiered approach:

1. The first level of intervention begins with evidence-based instruction, progress monitoring and support that are provided to all students. When students began to falter academically, they receive more specialized prevention or remediation within the general education setting.

2. In the second tier, students who have not been successful in tier one receives targeted interventions, and progress is monitored frequently to determine the intervention's effectiveness. If one intervention is not successful, another more intense intervention may be tried. At this stage, general education teachers typically receive support as needed from other educators in implementing interventions and monitoring student progress.
3. In the third tier, with parental consent, a comprehensive evaluation may be conducted by a team to determine eligibility for special education.

This multi-tiered approach is designed to deliver research-based instruction informed by data, including individualized instruction with remedial opportunities made available in the general education setting. The regular monitoring of the student's response to instruction is particularly important as a means to determine if a student should move from one stage of support to the next. Typically, those students at risk of not meeting end-of-year goals are identified for frequent progress monitoring and remedial instruction. If students in tier three make significant progress, they can move back to tier two and receive less intensive instructional interventions.” Meeting the Needs of Significantly Struggling Learners in High School: A Look At Approaches to Tiered Instruction, Helen Duffy, American Institutes for Research®.

According to the National Research Center on Learning Disabilities (2005), there are eight “core features” of RTI:

1. High-quality classroom instruction;
2. Research-based instruction;
3. Monitoring of classroom performance

4. Universal screening;
5. Continuous progress monitoring;
6. Research-based interventions;
7. Progress monitoring during interventions;
8. Fidelity measures.

The problem is not with the definition of RTI. Rather, the difficulty arises when a local school system seeks to select and implement a particular RTI model. RTI is not defined anywhere in the IDEIA or in NCLB. Neither does federal law or policy provide any guidance as to where to obtain reliable (i.e., legally defensible) information about the selection or implementation processes. State educational agencies are also largely silent on these issues, leaving local school districts alone to navigate this quagmire. Thus, the majority of local school districts in the United States have not implementing RTI in any large-scale way. Questions of funding, staffing, selection of a particular RTI model, and how to motivate staff remain huge stumbling blocks along the way to full implementation.

III. THE PROBLEM: WHY ARE SPECIAL EDUCATORS CONCERNED ABOUT RTI?

A. There Are Too Many Special Ed Students!

The enactment of the IDEA's predecessor, the Education for All Handicapped Children Act, or EACHA, was in response to Congressional recognition that more than 1 million children with disabilities living in the United States were not permitted to attend public school due to lack of accessible facilities, inadequate programs, or a failure of local boards of education to accept

responsibility for these students. Over the ensuing thirty-odd years, public schools went to great lengths to develop and implement appropriate educational programming for a wide variety of children with disabilities. Once the machinery of special education began to function, the numbers of students identified and served under the auspices of the IDEA grew quickly and exponentially.

According to the 27th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (2005), there are approximately 7 million public school students currently receiving special education and related services pursuant to the IDEA. More than one-half of these students are labeled “SLD,” or “LD.” Id. That means that nationally there are more than 3.5 million students classified as learning disabled and being served by special education. According to data compiled by the U.S. Department of Education’s National Center for Education Statistics, there are approximately 90,000 public schools (K-12) in some 14,500 school districts in this country. Id., Common Core of Data (CCD), Local Education Agency Universe Survey, 1998-99. Given these statistics, we can assume that an average of 38 LD students is enrolled in every public school, and that every school district serves an average of 240 LD students. Of course, there are individual differences among schools and school districts, but these figures emphasize that there are many student currently classified as LD and enrolled in public schools. The major of students labeled “LD” have reading problems. 71 F.R. 46647.

The goal of this presentation is to analyze the recent changes made by Congress to the Individuals with Disabilities Education Act in 2004, and the subsequent promulgation of the 2006 implementing regulations by the U.S. Department of Education, and to thoughtfully consider the legal, practical, and programmatic challenges of implementing the new LD eligibility criteria and the Response to Intervention, or RTI, process. There is no doubt that this

is the most critical issue presented by the new IDEA revisions, and one that will continue to frustrate and motivate school districts over the coming years.

B. Too Many Non-Readers or Non-Proficient Readers are “Left Behind”

In 2000, the National Reading Panel concluded that reading instruction in this country was failing many students because it was not structured, not sequential, and failed to address struggling students’ areas of need. Teaching Children to Read: An Evidence Based Assessment of the Scientific Research Literature On Reading and Its Implications for Reading Instruction, April 2000. In fact, the National Research Center on Learning Disabilities concluded that many children were “instructional casualties” of failed reading instruction. Response to Intervention in the SLD Determination Process, NRCLD. Looking at the rising tide of students being labeled “LD” and assigned to resource room settings, it soon became clear that a linkage existed between this failure to provide reading instruction that was proven to be effective and the increasing numbers of public school students who were being served by special education. One only needs to look at the numbers of students with average-to-above-average intelligence in middle school and high school that were identified and labeled “LD” in elementary school that have never learned to read beyond the elementary school level to see that the system was broken. Researchers concluded that many students were being referred for special education eligibility assessment whose needs could have been met in the regular classroom with the provision of, and implementation of, appropriate reading programs and interventions. Any special education administrator must admit that he/she sees many students in general education classes and carrying IEPs who need nothing more than minor classroom and/or testing accommodations to succeed academically.

C. There are Too Many Referrals to Special Education!

To stop this trend, Congress incorporated many of the ideas from the No Child Left Behind Act (“NCLB”) into the IDEA 2004 and its implementing regulations. A new statutory and regulatory “barrier” was put into place to prevent school districts from identifying children as “LD” without first making a sincere and comprehensive effort to provide effective, research-based instruction in reading and/or math in the regular education program.

The 2006 implementing regulations provide, in part:

SPECIAL RULE FOR ELIGIBILITY DETERMINATIONS

A child shall not be determined to be a child with a disability under this part if the determinant factor for that determination is:

- a. Lack of **appropriate** instruction in reading, including in the **essential components of reading instruction** as defined in Section 1208(3) of the Elementary and Secondary Education Act of 1965;
- b. Lack of **appropriate** instruction in math;
- c. Limited English proficiency.

See 34 C.F.R. Sec. 300.306(b) (Emphasis added).

1. What are the “essential components of reading instruction” as defined by NCLB?

- a. Phonemic awareness;
- b. Phonics;
- c. Vocabulary development;
- d. Reading fluency, including oral reading skills; and
- e. Reading comprehension.

No Child Left Behind Act, 20 U.S.C. Sec. 6368 (3).

2. What is “appropriate” reading and math instruction?

“Appropriate” instruction means instruction that is not only high-quality, but instruction that is research-based and scientifically-validated. “Appropriate” instruction does not mean having a “good teacher” or making passing grades. The new IDEIA regulations shift the burden of defining “appropriate” to the states. 71 F.R. 46646. But there are several indicators that support my contention that the word “appropriate” in the context of this section of the law means “research-based”:

- a. “Children may not be identified as having [a learning disability] if there is no documentation of appropriate instruction, consistent with the Act and the ESEA/NCLB.” 71 F.R. 46652. NCLB requires schools to provide “scientifically-based, empirically-validated” and research-based reading instruction for students in grades K-3. 20

U.S.C. Sec. 2368. It is clear that the statement in the official commentary is referring to this same high standard of instruction in the new eligibility requirements.

- b. “The Department does not support the use of identification procedures that are not based on scientific research.” Models or procedures that claim to assist in identifying a child with an SLD, but which are not based on sound scientific research, are not appropriate and should not be adopted by LEAs or SEAs. 71 F.R. 46648 (Emphasis added).

- c. A definition of “scientifically based research” has been added to the IDEA regulations. 34 C.F.R. Section 300.35. “[W]e have added the definition of scientifically based research from section 9101 (37) of the ESEA to the definitions section of these regulations. This definition is the most appropriate definition to include in these regulations, given the importance Congress placed on aligning the Act with the ESEA. The Department does not intend to dictate how extensive the research must be or who, within an LEA or State, should determine that the research is of high quality. We believe that this is a matter best left to State and local officials because determining the presence of an appropriate instructional process is part of the State-adopted criteria. 71 F.R. 456648-49.

Question: *What is “scientific, research-based intervention?”*

Answer: *The definition is found in the No Child Left Behind Act, and is as follows:*

“The term “scientifically based research” means “research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs, and includes research that:

- 1. Employs systematic, empirical methods that draw on observation or experiment,*
- 2. Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn,*
- 3. Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators,*
- 4. Is evaluated using experimental or quasi-experimental designs,*
- 5. Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication, and*
- 6. Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.”*
NCLB, 20 USC 7707(b)(37).

D. Why Do General Educators Think That RTI Is Special Education's Responsibility?

The problem in explaining Response To Intervention to general educators is that RTI is not discussed or included in the NCLB or any other broadly applicable education law. RTI is only contained in the Individuals with Disabilities Education Improvement Act ("IDEIA"). So, the perception is that RTI is a special education requirement. In reality, RTI is a general education responsibility because it must be done ***prior to*** a special education eligibility determination.

The National Research Center on Learning Disabilities states, "Ideally, identification of [learning disabilities] should include a student-centered, comprehensive evaluation and problem-solving approach that ensures students who have a learning disability are efficiently identified. Additionally, **general education must assume significant responsibility for delivery of high-quality instruction, research-based interventions, and prompt identification of individuals at risk** while collaborating with special education and related services personnel." 2004 Learning Disabilities Roundtable, National Research Center on Learning Disabilities, 2005 (Emphasis added).

IV. THE PROPOSED SOLUTION – NEW CRITERIA FOR LD ELIGIBILITY

The goal of the new LD eligibility criteria is to stem the rising tide of referrals of students having difficulty learning reading and/or math for special education testing. The reauthorized IDEIA contains strict and complex eligibility requirements for LD:

A. **LD ELIGIBILITY**

General. A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State –

- i. Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).
- ii. Must permit the use of a process based on **the child’s response to scientific, research-based intervention**; and
- iii. May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).

Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.

34 C.F.R. § 300.307 (Emphasis added).

B. RESPONSE TO INTERVENTION – IT’S A PROCESS, NOT A TEST!

The 2004 IDEIA requires states to allow local school districts to implement a system of RTI. The law states:

In determining whether a child has a specific learning disability, a school district may use a process that determines **if the child responds to scientific, research-based intervention** as a part of the evaluation procedures.

20 U.S.C. 1414(b)(6)(B).

C. DETERMINATION OF ELIGIBILITY FOR SLD

1. General. Upon completion of the administration of assessments and other evaluation measures –

1. A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

2. The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

34 C.F.R. § 300.306.

2. Additional group members. The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in § 300.8, must be made by the child's parents and a team of qualified professionals, which must include –
 - a. The child's regular teacher; or
 - b. If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
 - c. For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and
 - d. At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. 34 C.F.R. § 300.308.

3. Determining the existence of a specific learning disability.
 - a. The group described in § 300.306 may determine that a child has a specific learning disability, as defined in § 300.8(c)(10), if –
 - i. The child does not achieve adequately **for the child's age or to meet State-approved grade-level standards** in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-

level standards: oral expression; listening comprehension; written expression; basic reading skills; reading fluency skills; reading comprehension; mathematics calculation; mathematics problem solving;

- ii. The child **does not make sufficient progress to meet age or State-approved grade-level standards** in one or more of the area identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305; and

- iii. The group determines that its findings under paragraphs (i) and (ii) of this section are **not** primarily the result of –
 - A. A visual, hearing, or motor disability;
 - B. Mental retardation;
 - C. Emotional disturbance;

D. Cultural factors; Environmental or economic disadvantage; or

E. Limited English proficiency.

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

i. Data that demonstrate that prior to, or as a part of, the referral process, the child was provided **appropriate instruction in regular education settings**, delivered by **qualified personnel**; and

ii. **Data-based documentation of repeated assessments of achievement at reasonable intervals**, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

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

- i. 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
- ii. Whenever a child is referred for an evaluation.

34 C.F.R. § 300.309 (Emphasis added).

4. Observation.

- a. The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.
- b. The group described in § 300.306(a)(1), in determining whether a child has a specific learning disability must decide to:
 - i. Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or
 - ii. Have at least one member of the group described in § 300.306(a)(1) conduct an observation of the child's

academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with § 300.300(a), is obtained.

- iii. In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age.

34 C.F.R. § 300.310.

V. THE ISSUES

1. LD Eligibility Evaluations –

a. LD Evaluations Must Include a “Variety” of Assessment Tools and Strategies

- i. LD evaluations must rely on any single procedure as the sole criterion for determining eligibility. School districts choosing to use the traditional “discrepancy” formula must also ensure that the determinant factor in the eligibility determination is not a lack of “appropriate” instruction in reading and/or math. To do this, schools must collect data showing that the child has been provided with high-quality, research-based instruction, in regular education settings, delivered by qualified personnel, for an “appropriate” period of time, and “with fidelity.” 71 F.R. 46646; 34 C.F.R. §300.309.

- ii. The USDOE does not “discourage” the use of discrepancy models to determine LD eligibility. 71 F.R. 46647. However, the federal agency voices “support for models that focus on assessments that are related to instruction and promote intervention for identified children.” Id.

b. Is Discrepancy Dead?

The new IDEA regulations clearly permit the continued use of the discrepancy model for determining LD eligibility, with State authorization. 34 C.F.R. §300.307. However, the sole use of the traditional comparison of IQ and standardized achievement test scores to determine LD eligibility is not permissible. 34 C.F.R. § 309. Essentially, States may choose to modify the traditional LD discrepancy model by combining it with the collection and review of “RTI-type” data. In the Official Commentary to the 2005 IDEA regulations, the USDOE cites research attacking the efficacy of the traditional discrepancy model. (Donovan & Cross, 2002; Bradley et al, 2003) and meta-analysis (Hoskyn & Swanson, 2000; Steubing et al., 2002).

c. Can Schools Rely on RTI Data Alone to Determine LD Eligibility?

RTI is only one component of the LD eligibility process, and “a child’s eligibility for special education services cannot be changed solely on the basis of data from an RTI process.” 71 F.R. 46647-48. This process must include a “comprehensive” evaluation that includes evaluations provided by the parents; current classroom-based, local, or State assessments and classroom-based observations; and observations by teachers and related services providers.” 71 F.R. 46647-48. Also, nothing in the new IDEIA would preclude States from allowing districts to

consider scores from standardized tests as a part of an LD eligibility determination. 71 F.R. 46651.

2. What About LD Reevaluations?

There is no clear directive as to how to handle LD reevaluations of students who were identified under prior LD evaluation criteria. The only mention of this critical issue is in the Official Commentary to the 2006 IDEA regulations, “States that change their eligibility criteria for SLD may want to carefully consider the reevaluation of children found eligible for special education using prior procedures. States should consider the effect of exiting a child from special education who has received special education and related services for many years and how the removal of such supports will affect the child’s educational progress, particularly for a child who is in the final year(s) of high school. Obviously, the group should consider whether the child’s instruction and overall special education program have been appropriate as part of this process. If the special education instruction has been appropriate and the child has not been able to exit special education, this would be strong evidence that the child’s eligibility needs to be maintained.” 71 F.R. 46648.

3. Relevance of IQ/Achievement Test Scores?

Many school psychologists and educators remain confused as to whether they can continue to base LD eligibility determinations, either in whole or in part, on a child’s IQ scores. The Official Commentary to the 2006 IDEA regulations clarify that, while such testing can be a part of an overall LD eligibility process, it is not appropriate to rely solely on a child’s IQ score in making LD eligibility determinations. According to the USDOE, “The first element in

identifying a child with SLD should be a child's mastery of grade-level content appropriate for the child's age or in relation to State-approved grade-level standards, not abilities." 71 F.R. 46652.

4. Relevance of Classroom Grades of a Student/Classmates?

USDOE rejects the use of a student's classroom grades, or a comparison of the student's grades to other students in the same classroom, in an LD eligibility determination, stating, "The performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State-approved standards. Furthermore, using grade-based normative data...is generally not appropriate for children who have not been permitted to progress to the next academic grade or are otherwise older than their peers." 71 F.R. 46652.

5. Discrepancy vs. RTI – What's an LEA to do?

The USDOE and most States currently authorize local school districts to use "either" a modified LD discrepancy evaluation or an RTI process that includes a review of some standardized test scores and other data.¹ However, "the Department does not support the use of identification procedures that are not based on scientific research. Models or procedures that claim to assist in identifying a child with an SLD, but which are not based on sound scientific research, are not appropriate and should not be adopted by LEAs or SEAs." 71 F.R. 46648. The bottom line – whether you are using "discrepancy," or "RTI," you must collect data proving that

¹ It is important to note that the USDOE permits the use of assessments of "intellectual development," while not requiring –nor prohibiting – assessment of "cognitive ability." I take this to mean that States may choose to require formal assessments of IQ, or may permit districts to conduct screening or short-form assessments of cognitive ability as additional information in an RTI-type process.

the student has received “appropriate” reading and/or math instruction, and you must include either a formal or informal assessment of the student’s intellectual functioning.

6. When are States required to have RTI models in place?

The Official Commentary to the 2006 IDEA regulations (effective on October 13, 2006) assumes that States would have already had time to implement RTI procedures, based on the 2004 IDEA statute (which became effective on July 1, 2005). 71 F.R. 46654.

7. What is “appropriate” reading and/or math instruction?

It is clear that the intent of the IDEA’s new LD eligibility requirements is to prevent the identification of students whose lack of academic achievement may be attributable to a failure of the school district to provide high quality, research-based instruction in reading and/or math. However, it must be said that the USDOE revised its original proposal to incorporate this requirement into the 2006 implementing regulations by substituting “appropriate instruction” for the term “high quality, research-based instruction.” The following statement in the Official Commentary to the 2006 IDEA regulations seems to “pass the buck” from the federal government to State and local education authorities for decisions about which programs are “appropriate.” **“Whether a child has received ‘appropriate instruction’ is appropriately left to State and local officials to determine.** Schools should have current, data-based evidence to indicate whether a child responds to appropriate instruction before determining that a child is a child with a disability. Children should not be identified as having a disability before concluding that their performance deficits are not the result of a lack of appropriate instruction.” 71 F.R.

46656 (Emphasis added). However, in a subsequent statement the intent of the law is clear. **“Programs that claim to be research-based, but which are not based on sound scientific research, should not be considered research-based instruction by a State or LEA.”** *Id.* While agreeing that there is nothing in the IDEA expressly requiring the provision of “high quality, research-based instruction,” USDOE warns that “[p]rograms that claim to be research-based, but which are not based on sound scientific research, should not be considered research-based instruction by a State or LEA.” 71 F.R. 46656. One thing is certain --- “appropriate” instruction does not mean just “good teaching.” In fact, the USDOE says that “good teaching” must include “the ability to determine when a child is learning and then to tailor instruction to meet the child’s individual needs. Effective teachers use data to make informed decisions about the effectiveness of a particular instructional strategy or program. A critical hallmark of appropriate instruction is that data documenting a child’s progress are systemically collected and analyzed and that parents are kept informed of the child’s progress. Assessments of a child’s progress are not bureaucratic, but an essential component of good instruction.” 71 F.R. 46657. Going even further, USDOE says, “Children should not be identified as having SLD if there is no evidence of appropriate instruction.” *Id.*

8. What is “data-based documentation” of the provision of appropriate instruction?

The term “data-based documentation” refers to “an objective and systematic process of documenting a child’s progress.” 71 F.R. 46657. This includes routine assessment of student progress. *Id.*

9. How long is “long enough” to collect RTI data before a child can be determined to be LD?

No one knows for certain. USDOE refuses to set a specific timeframe and cautions, “Instructional models vary in terms of the length of time required for the intervention to have the intended effect on a child’s progress. It would not be appropriate for the Department to establish timelines ... because doing so would make it difficult for LEAs to implement models specific to their local school districts.” 71 F.R. 46658.

10. Section 504, anyone? OHI? Language Impaired?

One of my concerns is that some educators and/parents will attempt to gain IDEA eligibility, or a Section 504 plan, by trying to assign a label to a minor, or secondary, “disability.” I am seeing this in my own practice when an eligibility team responds to a lack of “appropriate” instruction in reading and/or math by seeking to label the child “language impaired” or “other health impaired” rather than to adhere to the new regulatory requirements and the obvious intent of the law.

11. Does RTI apply to all categories of disability?

Yes. But, in reality, it will directly affect the LD category more than any other category of disability. For example, the eligibility determination for a child diagnosed with moderate-to-severe autism will likely not be affected by whether or not the child has been provided with “appropriate” reading and/or math instruction. Remember that the issue is whether or not the “determinant factor” in the eligibility decision is a lack of high quality, research-based reading and/or math instruction.

12. How do we get general education's cooperation?

Gaining the understanding and cooperation of general education is one of the biggest challenges towards successful implementation of an RTI process in any school district. Compounding this is the pervasive perception that RTI is “special education” due to its (unfortunate) placement in the reauthorized IDEIA. However, I believe that there are at least three (3) persuasive points to be made to the good folks in general education:

- a. Meeting AYP requirements.
- b. Avoiding the dreaded “Students with Disabilities” AYP Subgroup
- c. Reducing/Eliminating the Special Ed Discipline Dilemma

13. Who is going to pay for this?

Your school district – one way or another.

14. Who is going to staff this?

See answer to No. 10 above.

15. Can parents demand an evaluation? What about private evaluations?

Parents have a right to request an LD evaluation “at any time.” 71 F.R. 46658. The regulations are silent as to how a school district must handle a parental demand for an LD

evaluation that comes prior to the completion of the RTI process.² Most States say that school districts must immediately begin an LD evaluation upon receipt of a parent request for the same. This presents unique problems for local school districts caught between a parent demand for an LD evaluation and State LD eligibility requirements that may take several months to complete.

16. What are some examples of “appropriate” instruction in reading/math?

Neither the USDOE, the IDEIA, nor the NCLB provide lists or reference sources for “appropriate,” or research-based, instruction. Rather, the NCLB (and IDEIA incorporates this by reference) provides a list of six criteria for evaluating whether an instructional program or intervention is “scientifically, research-based intervention:”

Question: *What is “scientific, research-based intervention?”*

Answer: *The definition is found in the No Child Left Behind Act, and is as follows:*

“The term “scientifically based research” means “research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs, and includes research that:

- 1. Employs systematic, empirical methods that draw on observation or experiment,*
- 2. Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn,*

² The Official Commentary to the 2006 IDEA regulations seems to ignore this conflict, stating, “Models based on RTI typically evaluate the child’s response to instruction prior to the onset of the 60-day [evaluation] 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.” 71 F.R. 46658.

3. *Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators,*
4. *Is evaluated using experimental or quasi-experimental designs,*
5. *Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication, and*
6. *Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.” NCLB, 20 USC 7707(b)(37).*

17. Can RTI be waived for private school students who enroll in public school?

No. USDOE says, “The [LD] requirements for special education eligibility or the expectations for the quality of teachers or instructional programs are not affected, and do not differ, by the location or venue of a child’s instruction.” 71 F.R. 46656. “For children who attend private schools or charter schools or who are home-schooled, it may be necessary to obtain information from parents and teachers about the curricula used and the child’s progress with various teaching strategies. The eligibility group also may need to use information from current classroom-based assessments or classroom observations. On the basis of available information, the eligibility group may identify other information that is needed to determine whether the child’s low achievement is due to a disability, and not primarily the result of lack of appropriate instruction.” Id.

18. In the meantime, how should eligibility teams handle referrals of students who are suspected of having an LD?

The federal law and regulations are silent on the question of what to do right now about referrals made by general education teachers and parents that are based on a suspected LD. I do not know of a single public school district in the United States that has fully implemented either the modified discrepancy or the RTI process. Therefore, we are confronted with the reality that all of our LD determinations are currently subject to scrutiny, whether made on the basis of a mathematical discrepancy between IQ and achievement, or on a review of a student's response to the provision of research-based instruction in general education settings. If districts choose to make students eligible as LD without the proper documentation required by the IDEA regulations, it may temporarily provide a "fix" because likely the parents and regular classroom teachers will be satisfied. However, at some point in the future the States will be forced by federal oversight authorities to monitor local school districts' files and cite each case where an LD determination was made without the requisite documentation of the provision of "appropriate" instruction. In the past, the "corrective action" for this type of offense would be for the district to re-pay all monies generated by the student for the provision of special education and related services. – a scenario which does not bode well for any district.

VI. THE GOAL – to drastically reduce the numbers of LD students served by special education.

"The purpose of special education is not to identify and serve children with disabilities.....it is to identify and serve children with disabilities whose needs cannot be met in general education classrooms." Melinda Baird, 2008.

VII. WHAT IS THE LITIGATION SAYING ABOUT RTI?

- A. Pikes Peak (CO) BOCES, 106 LRP 42562 (SEA CO 2006). This due process hearing portends what I predict will be a commonplace event. Here, the parents of a struggling reader objected to the District's refusal to either declare the child either eligible, or ineligible, for special education and related services based on its implementation of an RTI model for LD eligibility. The final result was that the parties agreed that the child would receive a 504 plan but would not be declared LD for IDEA purposes. (Ouch!)
- B. Upper Darby (PA) School District, 106 LRP 60495 (SEA PA 2006). A fascinating case where a district's decision to classify a student as "ED" was upheld, but the parents' claim that their son was "LD" was rejected by the hearing officer. The judge pointed out that the district had adopted an RTI process for LD eligibility, and on this basis found that the private psychological evaluation (based on a traditional discrepancy model) was insufficient to meet the RTI requirements. However, the judge also found that the district's evaluation was deficit because it had failed to review the student's response to instruction as a part of its overall eligibility determination.
- C. High Tech. Middle Media Arts School, 47 IDELR 114 (SEA CA 2007). Student was not "LD," based on either the traditional "discrepancy" or the RTI eligibility requirements.

VIII. WHAT IS THE USDOE SAYING ABOUT RTI?

- A. OSERS Q & A on RTI, 47 IDELR 196 (OSERS 2007). RTI is not meant to replace the need for a comprehensive special education evaluation.

- B. Letter to Anonymous, 49 IDELR 106 (OSEP 2007). Interesting OSEP response explaining that an LEA's decision to make use of an RTI model mandatory will not necessarily require an immediate change in evaluation procedures. "Research indicates that implementation of any process, across any system, is most effective when accomplished systematically, in an incremental matter, over time."
- C. Letter to Prifitera, 48 IDELR 163 (OSEP 2007). This almost incomprehensible response to a publisher of assessments dances around the central question - what exactly *is* required to complete a compliant LD eligibility evaluation?
- D. Letter to Massanari, 108 LRP 2644 (OSEP 2007). "Nothing in the final Part B regulations would prohibit an LEA, if consistent with the State criteria, from using multiple methods of identifying a child with an SLD, as part of a full and individual evaluation, or reevaluation, across schools or across levels (e.g., elementary school, middle school, or high school).
- E. Letter to Zirkel, March 6, 2007 (OSEP). This letter seems to say that SEAs/LEAs may use EITHER the discrepancy model or RTI. Note: But it is clear that the use of the "traditional" discrepancy model, without the collection of student progress data and proof of "appropriate" instruction," is not permitted.
- F. Letter to Cernosia, 108 LRP 2652 (OSEP 2007). LEAs cannot "require" the implementation of RTI until the process has been fully implemented in all schools in the district. However, if RTI is "permissible" in the State/LEA, then individual schools may choose to implement RTI even if other schools in the same district were still using the discrepancy model.