

RESPONSE TO INTERVENTION (RTI) AND SPECIAL EDUCATION:

STRANGE BEDFELLOWS OR SOUL MATES?

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I. Introduction

As the field of special education anticipates the next reauthorization of the Individuals with Disabilities Education Act (“IDEA”) and that of the No Child Left Behind Act (“NCLB”), serious questions regarding the codification of the “Response to Intervention,” or “RTI,” initiative remain unanswered. This presentation is NOT an effort to explain the purpose or the methodology of implementing an RTI initiative, neither of which this presenter would be qualified to deliver. Rather, the purpose of this presentation is to review the legal implications for the RTI mandate for public schools by concentrating on how the courts and the Office for Civil Rights (“OCR”) have handled legal challenges concerning the determination of eligibility for special education and the provision of educational programming for students with disabilities. In reviewing these decisions and policy statements, I hope to illustrate common themes that point the way to avoiding/surviving legal challenges to the implementation of RTI initiatives in public school districts.

II. RTI and the Interplay Between NCLB and IDEA

A. What is “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®.

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.

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.

B. What Does the IDEA Say About RTI?

IDEA, 20 USC 1414(b)(5):

“In making a determination of eligibility..., a child shall not be determined to be a child with a disability if the determinant factor for such determination is –

- (1) Lack of appropriate instruction in reading including in the essential components of reading instruction [as defined in NCLB];
- (2) Lack of instruction in math; or
- (3) Limited English proficiency.”

IDEA, 20 USC 1414(d)(1)(A)(i)(IV):

IEPs must contain.....

“A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child....”

III. Judicial, Administrative, and Policy Decisions Affecting the Implementation of RTI¹

A. Federal Policy Statements

Letter to Gorin, 48 IDELR 104 (OSEP 2006).

School psychologists should not be overly concerned that the new Part B regulations governing SLD assessments will eliminate their role in the evaluation process. As OSEP informed the executive director of the National Association of School Psychologists, the regulations mark a shift, rather than the elimination, of the role of school psychologists in SLD testing. The association's concerns stemmed from the official comment to 34 CFR 300.307(a)(1), which stated that the reduced need for psychologists to administer IQ tests would allow small LEAs to defray the costs of repeated assessments and research-based interventions. "We do not construe the reference language as diminishing the vital role that school psychologists can play in the assessment of children suspected of having learning disabilities," Assistant Secretary John H. Hager wrote. "Rather, the referenced language was merely intended to address the specific impact of changes relating to testing on the use of school resources, especially in small districts that do not employ school psychologists." OSEP indicated that while the new regulations preclude states from requiring districts to use a severe discrepancy model for determining whether a child has an SLD, they also provide "enhanced opportunities" for psychologists to participate in the assessment process.

Letter to Zirkel, 48 IDELR 192 (OSEP 2007).

The language that a state education agency uses to identify acceptable evaluation methods for SLDs could give districts a broad range of assessment options. OSEP indicated that a state's hypothetical use of the term "and/or" when listing evaluation techniques would permit districts to use any and all methods identified, including the severe discrepancy model. Recognizing that states cannot require districts to base SLD determinations on a severe discrepancy between a student's intellectual ability and achievement, OSEP observed that states can give districts the option to rely solely on the severe discrepancy model. OSEP noted that the example presented by a professor of special education law, in which a state authorized districts "to use RTI, severe discrepancy, and/or a third research-based alternative," would expand districts' assessment options. "Under those state-adopted criteria, LEAs in that state would be permitted to use any of the three available options/models, or any combination of those options/models, as part of the comprehensive evaluation ... to determine the presence of a specific learning

¹ *Case summaries are reprinted with permission from the Individuals with Disabilities Education Law Report® (IDELR) and Special Ed Connection®, published by LRP Publications, Inc.*

disability," Acting Director Patricia J. Guard wrote. OSEP explained, however, that districts cannot deviate from the state criteria in evaluating students for SLDs.

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

In response to a letter regarding the mandatory use of RTI models in SLD evaluations, OSEP informed a concerned citizen that individual schools are not required to use an RTI model until the LEA in which they are located has fully adopted and implemented the RTI process. If the use of an RTI model is permissive rather than mandatory, however, an individual school is free to use the RTI process as part of its SLD evaluation regardless of whether other schools in the LEA have elected to do so. OSEP explained that an LEA's decision to make the 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," Acting Director Patricia J. Guard wrote. If an LEA opted to "scale up" the implementation of an RTI model, OSEP observed, it could not require schools within its borders to use RTI until that model was fully implemented. OSEP noted that if an LEA decided to permit schools to use RTI without making the use of RTI mandatory, individual schools would not have to wait for the systematic implementation of the RTI before they could use information obtained through an RTI process as part of an SLD evaluation.

Questions and Answers on RTI and Early Intervening Services, 47 IDELR 196 (OSERS 2007).

LEAs adopting criteria for the identification of students with SLDs do not have to require districts to use RTI as part of the evaluation process, but that cannot preclude the use of RTI, either. OSERS observed in a Q&A that response-to-intervention techniques are a critical component of eligibility evaluations under IDEA 2004. The purpose of requiring the adoption of statewide evaluation criteria, OSERS explained, is to promote consistency across the state and avoid confusion among parents and district personnel. OSERS noted that SEAs must include a variety of assessment tools in their evaluation procedures, and cannot use a single measure or assessment to identify children with SLDs. "However, an SEA could require that data from an RTI process be used in the identification of all children with SLD," OSERS wrote. OSERS also cautioned that RTI is not intended to be a replacement for a comprehensive special education evaluation, but is instead one tool out of many that a district can employ to identify eligible students. Furthermore, OSERS indicated that districts cannot use funds reserved for early intervention services to apply RTI methods across-the-board for all students.

Letter to Zirkel, 52 IDELR 77 (OSEP 2008).

Referencing the ED's discussion accompanying the publication of the final 2006 regulations at 71 Fed. Reg. 46,689 (2006), OSEP explained that a district that uses an RTI process prior to a formal evaluation for identifying children with SLD is not obligated to pay for an IEE if the district has not yet evaluated the student. This is so even if the parent obtained the IEE out of disagreement with the district's RTI approach and the independent evaluator finds the student eligible as SLD based on a severe discrepancy analysis or other analysis. The district's evaluation must be complete before IEE funding is considered. OSEP noted that if a parent disagrees with the results of a completed evaluation that includes the results of a child's RTI process, the parent has a right to an IEE at public expense, subject to the conditions in 34 CFR 300.502(b)(2) through (b)(4). "The parent, however, would not have the right to obtain an IEE at public expense before the [district] completes its evaluation simply because the parent disagrees with the [district's] decision to use data from a child's response to intervention as part of its evaluation to determine if the child is a child with a disability and the educational needs of the child," OSEP observed. OSEP added that its answer would be the same even if the district notified the parent that the child responded successfully to RTI and that it would not proceed to a formal evaluation for SLD eligibility. And, when a parent requests reimbursement for an IEE prior to the completion of the district's evaluation, the district may deny the request for reimbursement without filing for a due process hearing. 34 CFR 300.502(b)(1).

Letter to Combs, 52 IDELR 46 (OSEP 2008).

LEAs cannot use the RTI process as a justification for not conducting an expedited evaluation of a student pursuant to 34 CFR 300.534(d)(2)(i), OSEP explained to a state school board association attorney. If a request for an evaluation of a child known to be a child with a disability is made during the time period in which the he is subjected to discipline under 34 CFR 300.530, the LEA must conduct the evaluation in an expedited manner. 34 CFR 300.534(d)(2)(i). This applies regardless of whether the district is using an RTI model to determine the student's eligibility as a student with an SLD. OSEP also observed that once consent is obtained to evaluate a child suspected of having an SLD, an LEA may have enough information from the RTI process to ensure that the evaluation can be completed in an expedited manner. However, in situations where a child has not participated in an RTI process prior to the parent's request for the expedited evaluation, the LEA must rely on other assessment tools and strategies to ensure that the evaluation can be conducted in an expedited manner.

Letter to Clarke, 51 IDELR 223 (OSEP 2008).

SEP informed the director of the American Speech-Language-Hearing Association that LEAs are not required to use speech-language pathologists when they use an RTI model to evaluate a child suspected of having a specific learning disability. Although the Part B regulations recognize speech-language pathologists as one category of individuals qualified to conduct diagnostic examinations of students, there is nothing in the IDEA that requires districts to use

them on a consistent basis. OSEP noted that the IDEA does not specifically address the role of speech-language pathologists in an RTI model. Thus, if an LEA chooses to use an RTI model, it has freedom to choose the RTI model it wishes to implement. "It would then be the responsibility of the LEA to determine the roles and responsibilities of the various staff members to be involved in that particular model, or which staff members the LEA chooses to involve," OSEP explained. OSEP observed that the shape of an RTI model can vary for many reasons. Those reasons include the nature of the child's suspected disability and the expertise of local staff.

Letter to Zirkel, 50 IDELR 49 (OSEP 2008).

Noting that the Part B regulations on RTI have resulted in "substantial confusion," OSEP attempted to clarify the procedures for SLD evaluations and eligibility determinations. OSEP first noted that the phrase "exhibits a pattern of strengths and weaknesses," as used in 34 CFR 300.309(a)(2)(ii), does not apply to a student's failure to make progress under an RTI process. This is because the provision is an alternative to 34 CFR 300.309(a)(2)(i), which specifically addresses RTI. Moreover, the monitoring provision found at 34 CFR 300.309(b)(2) does not require continuous progress monitoring. Nonetheless, OSEP observed, districts must consider data-based documentation of students' progress at reasonable intervals. "We believe that this information is necessary to ensure that a child's underachievement is not due to a lack of appropriate instruction," Acting Director William W. Knudsen wrote. OSEP confirmed that state special education laws concerning the use of RTI should address both the amount and nature of student performance data to be collected, as well as the general education services that will be provided in the RTI process. States can also permit the use of other alternative research-based procedures for determining whether a student has an SLD. While those alternative procedures must be based in research, they do not need to be "scientifically based."

Letter to Brekken, 56 IDELR 80 (OSEP 2010).

OSEP informed a Head Start program director that districts have no right to require outside agencies to implement RTI before referring a child for an initial evaluation. Once a district receives a child find referral from a community based, early childhood education program, it must initiate the evaluation process in accordance with the IDEA. OSEP observed that the IDEA neither requires nor encourages districts to monitor a child's progress under RTI prior to referring the child for an evaluation, or as part of an eligibility determination. Rather, it requires states to permit districts to use RTI in the process of determining whether a student has an SLD. 34 CFR 300.307(a)(2). Moreover, the SLD classification is rarely applicable to preschool children. Thus, there is no basis in the IDEA for a district to postpone an evaluation once it receives a referral from Head Start, or from any source, just because the referring program has not used RTI to monitor the child's developmental progress. "[I]t would be inconsistent with the evaluation provisions at 34 CFR 300.301 through 34 CFR 300.311 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a

community-based early childhood program (e.g., Head Start) has not implemented an RTI process with a child and reported the results of that process to the LEA," OSEP Acting Director Alexa Posny wrote. Rather, unless it determines that there is no reason to suspect the child is eligible, the district must initiate the evaluation process by obtaining parental consent within a reasonable period of time, and conducting the evaluation within 60 days, or in accordance with the state time frame.

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

The use of RTI does not diminish a district's obligation under the IDEA to obtain parental consent and evaluate a student in a timely manner, OSEP informed state education directors. When there is reason to suspect the student may have a disability and need special education and related services as a result, the IDEA's initial evaluation provisions kick in, regardless of whether the district plans to or is currently utilizing RTI strategies with the student. OSEP noted that the IDEA implementing regulation at 34 CFR 300.301(b) allows a parent to request an initial evaluation at any time. Thus, districts cannot point to their use of RTI strategies as a basis for delaying or denying the evaluation. If the district agrees with the parent that the student may be eligible, it must obtain parental consent within a reasonable period of time and evaluate the student within 60 days or in accordance with the state deadline. OSEP noted that a district is free to deny an evaluation in response to a referral if it does not suspect a disability. However, it must notify the parent of the basis for its decision, and that basis cannot be that the district is waiting to see how the child responds to general education interventions. "It would be inconsistent with the evaluation provisions at 34 CFR 300.301 through 34 CFR 300.111 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," OSEP Director Melody Musgrove wrote.

B. Office for Civil Rights ("OCR") Letters of Finding

Stone Co. (MS) School District, 52 IDELR 51 (OCR 2008).

A Mississippi district placed a sixth-grader with ADHD on academic interventions pursuant to its response-to-intervention model in August 2007. In October, his mother asked the school to evaluate her son for Section 504 services. After gathering documentation related to the student's performance, the district did not refer him for an evaluation. The district explained that it based its decision on the fact that the student was already receiving Tier II interventions, that his grades had improved, and that he had done well on standardized tests the prior year

and on the district's screening tests. It did not believe an evaluation was necessary. The middle schooler's parent filed an OCR complaint, alleging that the district denied her son FAPE under Section 504 by failing to evaluate her son. The regulations implementing Section 504 require districts to evaluate students who need or are believed to need special education or related services. 34 CFR 104.35(a). OCR concluded that the district was not required to evaluate the student, given its reasonable belief that he did not need special education services. The information the district reviewed after receiving the parent's request indicated that the student was making academic progress, that his grades improved as a result of interventions, and that he was capable of performing well on tests. Therefore, the district's failure to evaluate the student did not run counter to Section 504. However, OCR determined that the district did violate Section 504 by neglecting to notify the parent of its decision not to evaluate the student or provide notice of her procedural safeguards. The district entered a commitment to resolve the compliance issues.

Polk Co. (FL) School District, 56 IDELR 179 (OCR 2010).

A Florida district whose written policies and actual practice required a third-grader to wade through the RTI process before it would evaluate him for special education and related services ran afoul of Section 504's procedural requirements. OCR noted that the district failed to evaluate the child before offering him a general education placement and improperly delayed his evaluation. In September 2009, the parent requested a psycho-educational evaluation and provided medical documentation diagnosing the student with ADHD. The district told the parent that the student first had to complete general education interventions, which would later be incorporated into the evaluation. This conformed with the district's written policies. Those policies indicated that completing the RTI process was a prerequisite to qualifying for special education services. In October 2009, the district found the student eligible for interventions in a general education classroom. It initiated the psycho-educational evaluation in March 2010. The parent alleged that the district's evaluation was untimely. OCR pointed out that Section 504 requires a district to evaluate a student who, because of a disability, needs or is believed to need special education or related services before making an initial placement. Moreover, once a district receives an evaluation request, it must conduct the evaluation in a timely manner. By September 2009, the district had sufficient evidence, based on parent input, the student's academic performance, and the medical documentation, that the student might need special education and related services because of his ADHD. However, "[r]ather than conducting a full evaluation of the Student, the District conducted a partial or incomplete evaluation which limited the Student's eligibility to regular education and delayed the determination of the Student's eligibility for special education," OCR wrote. Moreover, the district did not begin the student's evaluation until March 2010, almost six months after it received the parent's consent.

C. Judicial Decisions

Powers v. Woodstock Board of Education, 50 IDELR 275 (D. Conn. 2008).

Because an elementary school student made progress with the use of general education interventions, a Connecticut district did not err in failing to refer him for a special education evaluation. The U.S. District Court, District of Connecticut denied the parents' request for tuition reimbursement. The IDEA's child find requirement applies to students who are suspected of having a qualifying disability *and* being in need of special education as a result. 34 CFR 300.111. The student in this case did not fulfill the second requirement. Although the student had some difficulties in the classroom, the evidence showed that he responded well to interventions. The court pointed out that the student received As, Bs and Cs on his report card, and performed "on goal" on a statewide assessment without any accommodations. Moreover, the teacher had regular contact with the parent about the student's progress. "This is decidedly not a case in which a school turned a blind eye to a child in need," U.S. District Judge Mark. R. Kravitz wrote. "To the contrary, [the teacher] acted conscientiously, communicating regularly with [the mother] and utilizing special strategies to help [the student] succeed." The court acknowledged that the student was found eligible for IDEA services in sixth grade under the category of nonverbal learning disability. Given the student's response to interventions, however, the district did not err in failing to evaluate him sooner. *Editor's note: This decision was affirmed on appeal at 55 IDELR 61.*

El Paso Ind. School District v. Richard R., 50 IDELR 256 (W.D. Texas 2008), vacated in part and affirmed in part, 53 IDELR 275 (5th Cir. 2008).

Noting that a Texas district repeatedly referred a student with ADHD for interventions rather than evaluating the student's IDEA needs, a District Court concluded that the district violated its child find obligations. The court upheld a due process decision in the student's favor. The IDEA requires districts to evaluate students who are suspected of having disabilities that require special education services. Thus, when a district has reason to believe that a student has a disability, it must evaluate the student within a reasonable time. The district maintained that it fulfilled its child find obligations by providing interventions recommended by its Student Teacher Assessment Team (STAT). Those interventions included Section 504 accommodations, additional tutoring, and Saturday tutoring camps. However, the court pointed out that the interventions did not demonstrate positive academic benefits. Not only did the student continue to struggle in reading, math and science, but he failed the Texas Assessment of Knowledge and Skills test for three years in a row. "Why [the district's] STAT committee would have suggested these measures, knowing that [the student] had undertaken each of these steps in the past three years and that none had helped him achieve passing TAKS scores, simply baffles this court," U.S. District Judge Kathleen Cardone wrote. Although the district eventually offered to evaluate the student, that offer was made 13 months after the initial evaluation request as part of a proposed FAPE settlement. By failing to evaluate the student in a timely manner, the district violated its child find obligation. *Editor's note: This decision was vacated in part and affirmed in part at 53 IDELR 175.*

E.M. v. Pajaro Valley Unified School District, 53 IDELR 41 (N.D. Calif. 2009).

The fact that a student performed very well in class with the use of general education interventions supported a California district's determination that he did not have an SLD. Concluding that the student did not require special education, the District Court affirmed an administrative decision in the district's favor. As a preliminary matter, the court addressed the parents' claim that the district's psychologist failed to consider all evaluative data. The court recognized that the psychologist disregarded scores from one test that indicated a severe discrepancy between the student's ability and performance. However, the psychologist explained that the student's score on that test to be inflated. Because two other tests -- including one performed by the parents' evaluator -- yielded lower scores, the court found that the psychologist did not err in using those test results to determine the existence of a severe discrepancy. More importantly, the court observed, the student's performance showed that he did not require specialized instruction to receive an educational benefit. The court acknowledged the student's distractibility and failure to complete homework assignments, but noted that the student's performance improved when his teacher used interventions such as small group settings. "When viewed as a whole, the observational and anecdotal evidence describes a student who was distracted easily but who also responded to various forms of classroom intervention," U.S. District Judge Jeremy Fogel wrote. Finding that the student did not need specialized instruction, the court upheld the ALJ's eligibility determination.

Citrus Co. (FL) School District, 54 IDELR 40 (SEA FL 2009).

The parent of a first-grader may have wanted a district to leapfrog over its RTI process and promptly launch IDEA services, but she had to wait for the district to complete an initial evaluation. Under the IDEA, the district had 60 days to evaluate the child, and Florida law required it to continue general education interventions in the meantime. Concerned that the child was behaving poorly at home and making insufficient progress through RTI reading instruction, the parent obtained an evaluation from an outside agency. The agency provided a master treatment plan describing the student as a child with ADHD, ODD and bipolar disorder. It also provided goals and behavioral interventions. The parent filed a due process complaint, claiming that the student was eligible for special education and related services. On the same day, the parent requested and consented to an initial evaluation from the district. Under Florida law, the ALJ stated, the parent of a child receiving RTI may request an evaluation before the district completes interventions. If the district agrees to evaluate the child, it must then complete the evaluation within 60 days after receiving consent. 34 CFR 300.301(c)(1)(i). The student's eligibility could not be determined until the district completed its evaluation, the ALJ ruled. The master treatment plan the parent obtained did not constitute a comprehensive evaluation, and thus was not a sufficient basis for determining eligibility. Finally, the ALJ noted that there had been no reason to conduct an evaluation prior to the parent's request, because the student was making slow-but-steady progress in RTI Tier 3.

Delaware College Preparatory Academy, 53 IDELR 135 (SEA DE 2009).

A new student's extreme behavior should have led a Delaware charter school to refer him for an evaluation based on its observations alone, a hearing panel concluded. Neither the parent's failure to provide copies of the child's psychiatric records nor its own use of an RTI process justified its failure to meet its child find obligations. A psychiatrist diagnosed the child with ADHD and ODD before he enrolled in the district. A few weeks into the year, the student was being removed from class and suspended almost weekly for violent temper tantrums. The student's mother alleged that the district violated the IDEA by failing to identify her son. The hearing panel agreed. Relying on *W.B. v. Matula*, 23 IDELR 411 (3d Cir. 1995), *overruled on other grounds by A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007), the panel pointed out that an LEA must identify a child once it suspects that he has a disability and must do so with a reasonable amount of time. The panel noted that as of the time of the hearing, the school had not identified the student. The panel rejected the school's argument that it could not have known the extent of the child's problems because it lacked his doctor's records. The student's behavior was sufficient by itself to trigger the school's duty as early as a few weeks into the school year, the panel concluded. At that point, it was clear that the child was likely experiencing more than simple behavior or transition issues. Finally, the panel rejected the school's explanation that it was engaging in RTI, finding no evidence of a written RTI plan or the development of new interventions. The panel awarded the child compensatory education.

Jackson v. Northwest Local School District, 55 IDELR 104 (S.D. Ohio 2010).

An Ohio district missed the signs that a third-grader with ADHD could be a child with a disability when it disciplined her without first conducting an MD review. The district provided the student with intervention services for two years. Her third-grade teachers reported their increasing concerns about the impact of the student's escalating behavior on her academic performance. The RTI team recommended that the student undergo a mental health evaluation, but it did not initiate a special education evaluation at that time. The following month, the district suspended and expelled the student for threatening behavior. When the parent filed for due process, the district argued that an MD review was not required because the student had not yet been found eligible under the IDEA. The IDEA protects students who have not been determined to be eligible under the act when the circumstances indicate that a district should have suspected that the student had a disability. When the district expelled the student, it had provided her with interventions for approximately two years yet she had made few gains. Additionally, the behavioral concerns expressed by her teacher and others warranted a referral to an outside mental health agency. Relying on the magistrate judge's opinion at 55 IDELR 71, the District Court ruled that these circumstances provided sufficient justification for the district to suspect that the student was a child with a disability. Because the district was deemed to have known of the student's disability, the court ruled that its failure to conduct an MD review violated the IDEA's procedural safeguards.

Joshua Ind. School District, 56 IDELR 88 (SEA Texas 2010).

A Texas district's successful use of RTI with a student who had a weakness in reading skills helped confirm its ultimate finding that the student did not need specialized instruction. An impartial hearing officer reasoned that the student's solid progress bolstered the district's determination that the student was not eligible as a child with an SLD. The district initially declined to evaluate the student, noting that the student made significant progress through several months of RTI. It subsequently evaluated the student and found the student had a weakness in reading fluency, but it again found the student ineligible. It explained that the student was already progressing. Shortly thereafter, the parent unilaterally enrolled the student in private school. The parent claimed the district violated the IDEA by declining to evaluate the student and by finding the student did not qualify for IDEA services. But there was insufficient evidence that the student required special education and related services to make progress, according to the IHO. The district had determined that RTI could be successful for the student and that the student's forward steps bolstered that view. The IHO noted that districts have a responsibility to ensure that a student has an opportunity to make reasonable progress, but in some cases that opportunity can be provided through RTI. Here, the student's improvement gave the district adequate reason to deny an initial evaluation and to ultimately find the student ineligible. Although the extent of the student's progress might not have measured up to the parent's expectations, the parent failed to show that the district did not meet its obligations under the IDEA.

Meridian School District 223, 56 IDELR 30 (SEA Ill. 2010).

A district that offered general education interventions to address the academic difficulties of a student with a hearing impairment instead of evaluating him for IDEA eligibility violated child find. The Illinois district had reason to suspect the impairment was impeding the second-grader's progress, an impartial hearing officer reasoned. Despite the mother's repeated requests for an IDEA or Section 504 evaluation, the district instead developed "RTI plans" that offered accommodations to assist the student with comprehending instruction, paying attention, and completing tasks. The student's grades slipped, and he came close to failing marks in multiple areas. The parent filed a due process complaint. A hearing impairment, the IHO observed, whether permanent or fluctuating, that adversely affects educational performance is a disability under the IDEA. 34 CFR 300.8(c)(1)(5). The district was aware of the impairment. Furthermore, audiological assessments indicated that the impairment was impacting the student's ability to function in class. The district knew of those assessments as well as his declining grades and his teacher's concerns about his inattentiveness. "[C]ourts have held that a district has failed its child find duty when it ignored clear signs that a student has a disability and ... might need special education," the IHO wrote. If the district had put two and two together, it would have found good reason to evaluate the student and find him eligible. The IHO rejected the district's argument that it developed an RTI plan to address the student's needs and that the student responded positively to it. The IHO observed that the IDEA permits

districts to utilize an RTI approach to identify students with an SLD who require special education and related services. 34 CFR 300.307(a). In this case, however, there was no evidence the district ever suspected an SLD.

Austin Ind. School District, 110 LRP 49317 (SEA TX 2010).

A hearing officer concluded that a Texas district did not violate the IDEA's child find provision. After visiting a neurosurgeon, the student's grandparent requested an evaluation in September. The neurosurgeon contacted the principal to discuss getting the student qualified for services under the category of OHI. In accordance with district policy, students received RTI services before being referred for special education eligibility testing. The RTI team met but did not invite the grandmother to the meeting. Meanwhile, an independent evaluator diagnosed the student with ADHD, an LD, and dyslexia, and recommended him for Section 504 services. As a result of the RTI meeting and a subsequent 504 meeting, the district provided the student with most of the accommodations recommended by the private evaluator. The grandmother complained, however, that the district failed to evaluate the student for special education in a timely manner. Under the IDEA, districts have an affirmative duty to identify, locate and evaluate students they suspect may have a disability. When considering if the district complied with its child find obligation, the IHO reviewed what the district knew and when, and whether the district evaluated the student within a reasonable time after having noticed behavior indicating a disability. Based on notes of the first RTI meeting, the IHO concluded that the district had reason to know that the student was likely a student with a disability at the end of September. The district argued that the grandmother made an ambiguous request for "testing" that, when coupled with the neurosurgeon's request, could have qualified the student to be served either by special education or general education. The district also pointed out that it provided the student with services through the RTI process. "I find these arguments do not overcome the fact that the [student's] grandmother made a parental request for testing for the student," the IHO wrote. As a result of this request, the district had a duty to evaluate the student that overrode the district's general policy requiring the use of RTI before evaluating a student. Nonetheless, the IHO ruled that the district's five-month delay in testing the student was harmless because the student made progress during the period he received RTI services.

Mrs. H. v. Montgomery Co. Board of Education, 56 IDELR 73 (M.D. Ala. 2011).

A high school student may have had heart and urinary conditions, but that was not enough to establish her eligibility under the IDEA as a student with an OHI. The District Court found insufficient evidence that the student's poor grades were the result of her medical conditions rather than her deteriorating attitude, disinterest in school, and participation in outside activities. The parent requested an eligibility determination, asserting that her daughter's health issues were causing her to arrive late to school and miss entire days. The eligibility team found the student ineligible. An IHO agreed, and the parent challenged the decision in court. The District Court

observed that in order to be eligible as a student with an OHI, the student's impairment must adversely affect her educational performance. The court observed that factors unrelated to the student's medical conditions were causing her to miss school. The court pointed out that many of her absences, tardies and early dismissals were unexcused. Her mother could not explain tardies that occurred in the middle of and at the end of the school day other than stating that her daughter "might be a little late because she can walk a little slow." The court pointed to the IHO's observation that the student played on her high school volleyball team as further indication that her health conditions were no impediment to her participation in school.

IV. How Do the Courts View Reading Failure and RTI?

A. Eligibility

M.B. v. South Orange/Maplewood Bd. Of Education, 55 IDELR 18 (D.N.J. 2010).

A district's seemingly exclusive reliance on a numerical formula to exit a child with an SLD from special education may end up requiring it to fund the child's private schooling. Pointing to language in the district's "statement of eligibility," a District Court determined that an ALJ erred by finding that the district based its eligibility decision on a variety of information. The district used a software program, Estimator-NJ 3.0, which applied a numerical formula to identify severe discrepancy. The program established that the 13-year-old no longer had one. The district issued a "statement of eligibility" reading in part: "based on [the student's] most recent evaluation, her scores were run through the estimator and she no longer meets the criteria." The parents placed her in private school and challenged the district's determination. An ALJ ruled for the district, and the parents appealed. The court pointed out that the IDEA prohibits districts from relying on any one test, formula or procedure for establishing eligibility. 34 CFR 300.304(b)(2). It noted that the district's eligibility statement referred only to the Estimator-NJ results as the reason for its decision. While the district asserted that it also considered evaluations and performance, that data indicated that the student was still struggling in reading and math, even with the special education supports she was receiving, such as in-class assistance and resource room time. Thus, even if it relied on other assessments, the data militated in favor of eligibility, the court ruled. "While the Court does not conclude ... that the computer program is not a tool at the disposal of a school district, the law is clear that determining whether a child is disabled under the IDEA must be based on more than a formula-driven numerical assessment," U.S. District Judge Stanley R. Chesler wrote in an unpublished decision.

Bolick v. Council Rock School District, 54 IDELR 326 (Pa Cmnwlth 2010).

A Pennsylvania district did not violate the IDEA by declining to consider an independent evaluation obtained by the father of a high schooler who thought the student had a learning disability in reading. Affirming an IHO's decision, a state court held in an unpublished opinion that the district was entitled to overlook the evaluation because it failed to meet the district criteria for identifying a SLD. At the time the parent told the district that he suspected a disability, the student was taking advanced general education classes and earning average grades, despite having earned A's before high school. The district's evaluator concluded that the student did not have a learning disability. An independent evaluator reached a different conclusion. Finding the IEE inappropriate, the district determined that the student was ineligible. After an unsuccessful due process complaint, the parent sued in state court, challenging the district's failure to rely on the IEE. The court noted that under the IDEA implementing regulation at 34 CFR 300.502(c), a public agency must consider an evaluation a parent obtains at private expense in any decision with respect to the provision of FAPE to the child if the evaluation meets agency criteria. The court pointed to statements by the district's evaluator that the tests were merely screening instruments to determine whether a student needs further testing for a learning disability. In order to identify an SLD under district evaluation criteria, it was necessary to assess the student's cognitive ability and reading achievement, which the evaluator did not do. For that reason, the district was justified in declining to consider the IEE when establishing the student's eligibility.

Hood v. Encinitas Union School District, 47 IDELR 213 (9th Cir. 2007).

Without deciding whether a fifth-grader had an SLD as her parents claimed, the 9th Circuit determined that a California district was not liable for the expenses the parents incurred when they placed the child in a private school for students with learning disabilities. The court affirmed a decision that the student was not eligible for special education services under the IDEA. The 9th Circuit explained that the district had no obligation to provide special education or related services when the child's educational needs could be met in a general classroom. The court acknowledged that *Rowley* addressed the concept of FAPE with regard to students who were already deemed IDEA-eligible. Nonetheless, the court observed that *Rowley's* "basic floor of opportunity" standard can also apply to eligibility determinations. "Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate instruction in the general classroom -- and thus not entitled to special education services -- using the benefit standard," U.S. Circuit Judge Cornelia G. Kennedy wrote. Although the student's parents maintained that the severe discrepancy between the student's abilities and achievement made her eligible for special education under the category of SLD, the court pointed out that the student consistently received average or above-average grades. The student's progress, the court noted, showed that the discrepancy could be corrected in the general classroom. The 9th Circuit determined that the student did not need special education services to obtain a meaningful educational benefit.

B. Reading Failure

W.R. v. Union Beach Bd. Of Education, 56 IDELR 62 (3rd Cir. 2011).

The parents of a fifth-grader with dyslexia failed to show that a New Jersey District denied their son FAPE by hindering their participation in developing his IEP. The 3d U.S. Circuit Court of Appeals pointed to evidence that the parents attended the student's IEP meetings and engaged in numerous discussions with the district regarding the substance of his IEPs. A District Court rejected the parents' claim that they were deprived of meaningful participation because the district did not respond to their repeated requests for information about the reading methodology it would use. The parents challenged that conclusion in the 3d Circuit. Affirming the District Court, the 3d Circuit reasoned that there was substantial evidence that the parents were actively engaged in developing the child's program. Although the parents pointed to their attorney's letters asking the district what reading methodology it was using, those same letters helped show that the district, the parents, and their lawyers had numerous meetings and correspondence regarding the content of the IEP. Moreover, the parents communicated extensively with the district about the details of the child's reading program. "Indeed, the facts ... evince a considerable back-and-forth between the District and the parents regarding the best method for teaching [the student]," the 3d Circuit wrote. Finally, the district specifically informed the parents that, as stated in the student's IEPs, it would use "techniques from the Wilson Reading Program and other multisensory programs." Although the parents disagreed with the choice of methodology, they had no right to compel the district to use a different one.

D.G. Cooperstown Central School District, 55 IDELR 155 (N.D.N.Y. 2010).

The parent of a student with deficits in reading and written expression failed to establish that a district denied her son FAPE by not offering a particular multisensory reading program that she preferred. The evidence indicated that the district's own reading programs were research-based and utilized a multisensory approach that would have addressed the student's dyslexia. According to the parent, the district told her that school personnel would be trained in her preferred methodology. Ultimately, the training did not occur. The parent placed the student in private school and sued for tuition reimbursement. She alleged that the district denied the student FAPE by, in part, failing to offer an appropriate reading program. The court noted that a district offers FAPE if it develops an IEP designed to confer meaningful benefit. There is no requirement that it offer every service a parent desires, even if that service would maximize the student's benefit. The court pointed out that the district did have multisensory reading programs in place, just not the one the parent recommended. "While [the parent] may have preferred the district to employ the Wilson program, the district did not fail to provide [the student] a free appropriate public education by utilizing other proven methods," U.S. District Judge David N. Hurd wrote. The court also determined that the IEPs contained the student's present levels of performance and measurable and appropriate goals. Finally, placement in an integrated classroom along with

small-group instruction in a resource room was appropriate. Had the student attended the district, his program would have conferred educational benefits. Because the district offered the child FAPE, the parent was not entitled to reimbursement.

Draper v. Atlanta Indep. Sch. District, 49 IDELR 211 (11th Cir. 2008).

A Georgia district that used an ineffective reading program for three years despite a student's failure to make progress had to pay a hefty price for its decision. The 11th Circuit affirmed an award of compensatory education reported at 47 IDELR 260 that required the district to pay up to \$38,000 a year for the student's private placement. Contrary to the district's argument, the 11th Circuit observed, the U.S. District Court, Northern District of Georgia did not abuse its discretion in awarding private placement as a remedy. The 11th Circuit pointed out that nothing in the IDEA precludes an award of compensatory education in the form of private placement. "If the District Court could not prospectively award [the student] a placement in a private school, [the student] would be worse off with an award of prospective education than he would be with a retroactive award of reimbursement for the same violations of the [IDEA]," U.S. Circuit Judge William H. Pryor Jr. wrote. The 11th Circuit also rejected the district's claim that the relief awarded was disproportionate to the district's IDEA violations. Not only did the district fail to identify the student's specific learning disability for five years, the court observed, but it transferred him from a self-contained class to a regular education program without considering his severe reading deficiencies. Furthermore, the district continued using an ineffective reading program for three years despite the student's clear lack of progress. "The District Court did not fault the [district] because it failed to be perfect," Judge Pryor wrote. "The District Court found that [the district] failed to provide [the student] with the 'basic floor of opportunity.'" Given the district's prolonged failure to provide the student FAPE, the 11th Circuit explained, the private placement awarded by the district was an appropriate remedy.

Fairfax County School Board v. Knight, 49 IDELR 122 (4th Cir. 2008).

The parents of a ninth-grader with dyslexia and other LDs might have believed that their daughter required a Lindamood-Bell program to obtain a meaningful educational benefit, but that did not entitle them to reimbursement for their daughter's private placements. The 4th Circuit affirmed a decision that the district's program, which used a different methodology, was reasonably calculated to provide FAPE. The case turned in large part on the testimony offered by both parties' experts. According to the parents' experts, who had extensive practical experience in reading difficulties, the IEPs developed for the student's eighth-grade and tenth-grade years would provide only a trivial educational benefit. However, the 4th Circuit pointed out that the parents' experts did not have degrees in reading, education, or special education. The district's experts, in contrast, had extensive experience in special education as well as post-baccalaureate degrees in the field. The 4th Circuit agreed with the District Court that the district's experts were more credible. "While not opining upon the relative merits of educational theories and methodologies, ... the District Court found that the educational approach proposed in the eighth- and tenth-grade IEPs was appropriate and would provide an

appropriate curriculum for [the student]," the 4th Circuit wrote in an unpublished decision. Finding no fault with the District Court's reasoning, the 4th Circuit upheld the judgment in the district's favor.

Garcia v. Bd. Of Education of Albuquerque Public Schs, 46 IDELR 14 (D. N.M. 2006).

A 17-year-old's poor attitude toward her education, problems at home, and failure to attend school and a reading program were the cause of her lack of academic success, a federal District Court decided. Although her parent claimed the student succeeded academically when she was enrolled in a Wilson reading program, testimony showed that the student succeeded because she changed her attitude toward school and attended classes, even when she did not find them interesting. Although the parent claimed that the district trained teachers in the Wilson program only on a voluntary basis and selectively chose schools that had predominantly non-minority students to offer the program, she did not provide any evidence to support her claims. The court rejected her claims of race discrimination in violation of Title VI, on both a disparate impact and an intentional discrimination basis. And, the court found no basis to support her claims of violations of the IDEA, Rehabilitation Act and ADA. It found that the reason for the student's success for a limited time while she was enrolled in the Wilson program was due to her "change in heart about the importance of school." Until that time, her failure to succeed in school was caused by her lack of motivation, truancy and problems at home, not the district's reading methodology.

Robert B. v. West Chester Area School District, 44 IDELR 123 (E.D. Pa. 2003).

In refusing to order the district to reimburse parents of a 15-year-old with SLD for their private school tuition costs, a federal District Court determined the district had properly evaluated the student and offered him FAPE. The court found the district's reevaluation of the student, which consisted of available information and additional assessments pertinent to the student's potential performance, was appropriate and consistent with the terms of the prior settlement agreement with the parents. Further, the court found the content of the student's IEP was reasonably calculated to confer educational benefit. It contained specific information about mastered goals, included specifically-designed instruction aimed at addressing the student's inattention issue and easing the transition to public school. Although it did not include a "research-based reading program" as requested by the parents, the IDEA does not require that any particular methodology be prescribed. And, although the student's regular education teacher was not present at the IEP meeting as required by the IDEA, the court found the student had not been denied any service as a result. Therefore, the parents' request for tuition reimbursement was denied.

Davidson v. Gibson County Special School District, 37 IDELR 279 (W.D. TN. 2002).

Although the district determined that its personnel could provide the tutoring the student needed, he continued with his private program. The parent sought reimbursement for the cost of that program, as well as additional private tutoring the student received in the Lindamood-Bell methodology. Denying the claim, the court noted that the parent's own expert testified that the private program did not provide the services the student needed. Turning to the Lindamood-Bell instruction, the court pointed out the student did not show any improvement in his test scores following his completion of the program. It added that nothing in the record established the Lindamood-Bell methodology was needed or was effective in implementing his IEP. While the ALJ found the district failed to document the student's progress on his IEP goal sheets, the procedural error did not result in any harm or cause a denial of FAPE. He achieved passing grades in all subjects, and was able to maintain academic skills that were commensurate, or above, his intellectual abilities.

V. How Do The Courts View RTI and Behavior?

Jackson v. Northwest Local School District, 55 IDELR 104 (S.D. Ohio 2010).

An Ohio district missed the signs that a third-grader with ADHD could be a child with a disability when it disciplined her without first conducting an MD review. The district provided the student with intervention services for two years. Her third-grade teachers reported their increasing concerns about the impact of the student's escalating behavior on her academic performance. The RTI team recommended that the student undergo a mental health evaluation, but it did not initiate a special education evaluation at that time. The following month, the district suspended and expelled the student for threatening behavior. When the parent filed for due process, the district argued that an MD review was not required because the student had not yet been found eligible under the IDEA. The IDEA protects students who have not been determined to be eligible under the act when the circumstances indicate that a district should have suspected that the student had a disability. When the district expelled the student, it had provided her with interventions for approximately two years yet she had made few gains. Additionally, the behavioral concerns expressed by her teacher and others warranted a referral to an outside mental health agency. Relying on the magistrate judge's opinion at 55 IDELR 71, the District Court ruled that these circumstances provided sufficient justification for the district to suspect that the student was a child with a disability. Because the district was deemed to have known of the student's disability, the court ruled that its failure to conduct an MD review violated the IDEA's procedural safeguards.