



How RtI Interacts with Legal Issues

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1. **IDEA 2004 Legislation (effective 7/1/05):**¹

- severe discrepancy: not mandatory

“[W]hen determining whether a child has a [SLD] as defined under this Act, the local education agency shall not be required to take into consideration whether the child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning.”

- RTI: permitted

“In determining whether a child has a [SLD], a local education agency may use a process which determines if a child responds to scientific, research-based intervention.”

- [“early intervening services”]: permitted]

2. **IDEA Regulations (effective 10/12/06):**²

A. Criteria

- state choice:
 - 1) severe discrepancy – may prohibit or permit
 - 2) RTI – must permit
 - 3) other research-based alternatives – may permit
- additional (i.e., eighth) area : “reading fluency skills”
- new frame of reference: “the child’s age or to meet State-approved grade-level standards” (rather than “intellectual ability” except for the next item)
- severe discrepancy: “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 [SLD].”

¹ For a sample of the resulting legal debate within the special education field, see, e.g., Perry Zirkel, *Response to Intercontention: A Legal Discrepancy Analysis*, 60 SCH. PSYCHOLOGIST 118 (2006).

² For a more detailed analysis, see Perry Zirkel, *A Users’ Guide to the New Regulations* (<http://www.nrcl.org>).

- required considerations: these two forms of information to assure that the child’s underachievement was not due to lack of appropriate instruction in reading or math:
 - 1) “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
 - 2) “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.”
- requirements specific to RTI:
 - 1) inclusion in the evaluation report:
 - “The instructional strategies used and the student-centered data collected”
 - 2) prior written notice to the parents about:
 - “(A) The State’s policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;
 - (B) Strategies for increasing the child’s rate of learning; and
 - (C) The parents’ right to request an evaluation.”

B. Procedures

- eligibility team: unchanged
- required observation: slight changes
- prompt parental consent:
 - 1) when the child has not made adequate progress “after an appropriate period of time”
 - 2) when the district refers the child for an eligibility evaluation
- written evaluation report: documentation of the required elements (see “Criteria”)

3. State Legislation or Regulations:

- mandate RTI?—and also prohibit severe discrepancy³?
- permit RTI, severe discrepancy, and the third alternative?

³ See, e.g., Letter to Zirkel, 47 IDELR ¶__ (2007).

4. **Local Issues (for RTI implementation):**

- legal⁴: e.g., contents of post-RTI evaluation process, challenge typically only upon denial —replacement for severe discrepancy?⁵ need for special education?
- organizational: e.g., coordination between special and regular education⁶
- budgetary: e.g., early intervention services, NCLB funds, state/local funds
- operational: e.g., no. and length of tiers, benchmark and gap (new “severe discrepancy”?), protocol or flexible
- other: e.g., transition (especially secondary grades), training, materials, space, enumerated areas within and beyond reading, student mobility, inter-district whipsawing, and remainder in terms of services
- sobering re-consideration: e.g., “Perhaps the greatest challenge to successful RTI implementation, and the factor that could most likely lead to its downfall, is the fidelity with which we implement the model, decision rules, quality core curricula, and subsequent interventions”⁷

⁴ See, e.g., Zirkel’s “What’s the Law Say” column in May/June column of TEACHING EXCEPTIONAL CHILDREN.

⁵ For the first published case, which shows the initial confusion and transition, see High Tech Middle Media Arts Sch., 47 IDELR ¶ 114 (Cal. SEA 2007).

⁶ See, e.g., Perry Zirkel, *The Pluses and Perils of RTI*, 4 SCHOOL ADMINISTRATOR 53 (Apr. 2007).

⁷ Mathew K. Burns, *RTI Will Fail, Unless ...*, 35 COMMUNIQUÉ 38 (Feb. 2007); see also Tom Fagan, *Learning Disability: Where’s the Satisfaction?* 35 COMMUNIQUÉ 6 (Feb. 2007) (“Will we embrace the opportunity to demonstrate the importance of the intervention aspects of RTI? Or will RTI for the practitioner be renamed ‘Resistance to Innovation’?”). Alternatively, for advocacy of a combined approach, see the September 2006 and November 2006 special issues of PSYCHOLOGY IN THE SCHOOLS.