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Response to Intervention: The Legal Dimension

Response to intervention (RTI) is a legal response mechanism in special education; yet, its primary context for implementation is in general education. More specifically, the 2004 amendments and the 2006 regulations of the Individuals with Disabilities Education Act (IDEA) introduced RTI as an alternative to severe discrepancy for identifying students under the specific learning disability (SLD) classification. Approximately 12 states adopted RTI as the required method for SLD identification for at least certain grade levels (typically elementary) and subjects (typically reading). The remaining states delegated the choice to the local district, permitting them either to continue the use of severe discrepancy or to use RTI.

For the increasing number of states and districts that are adopting RTI for SLD identification, the change process presents interrelated problems of interpretation and implementation. First, policymakers, professors, and practitioners frequently confuse the predecessor developments of general education interventions—e.g., student assistance or instructional support teams—with RTI. Second, although the literature of RTI extends to various purposes, including applications for cross-cultural understanding and for other disability classifications, the law of RTI is—with very limited exceptions in a few state regulations—limited exclusively to SLD identification. Third, and perhaps most importantly, the implementation of RTI for this legal purpose—because it is entirely or at least largely before the evaluation step for IDEA eligibility—is within general education, thus posing major issues of attitudes, resources, and coordination vis-à-vis special education.

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Due to the prevailing problems of interpretation and implementation, RTI appears to be a ripe area for litigation. The following case and the accompanying question-and-answer discussion illustrate the contours of the legal developments to date.

The Case

Stew Dendt is a student in a school district in Texas, which is one of the states that leave the choice of RTI or severe discrepancy for SLD identification to the local education agency. In the early grades, Stew had difficulty mastering basic instructional skills, prompting promotion concerns. In October 2008, school representatives met with his parents, resulting in an agreement to use RTI with Stew. During the second semester, although continuous progress monitoring data revealed that Stew was having success in the second tier of reading instruction, his parents formally requested evaluation for special education eligibility. They wanted the written guarantee of an IEP for Stew's continuity and protection in receiving individualized instruction and attention. In response, the district initially declined to conduct the evaluation, pointing to Stew's significant progress via RTI, and provided the parents with the IDEA procedural safeguards notice. However, at the end of the 2008–2009 school year, when the parents renewed their request, the district performed the special education evaluation within the applicable 60-day time limit. The evaluation report concluded that Stew had a weakness in reading fluency, but that he did not qualify under the classification of SLD because—in light of his progress in RTI—he did not need special education. Dissatisfied with the team's conclusion, Stew's parents requested an independent educational evaluation at public expense. The district agreed, and the eventual report of the independent evaluator did not find SLD eligibility but recommended a §504 plan. Apparently upset with the results, Stew's parents refused to attend both a multidisciplinary team meeting to discuss the report and a separate group meeting to determine possible eligibility under §504. Instead, they unilaterally placed Stew in a private school and filed for a due process hearing.

What do you think was the hearing officer's decision in this case?

In *Joshua Independent School District* (2010), the hearing officer rendered a relatively brief and deferential decision. Emphasizing that the burden of

persuasion under the IDEA is on the parents, the hearing officer concluded that although "there were problems with the student's educational progress which did not meet the parents' expectations … the parents did not prove that the district failed to meet its legal responsibilities."

Is this hearing officer's decision representative of the RTI case law to date?

In two significant respects, yes. First, all of the reported decisions specific to RTI have been only at the hearing officer level. The only court-level cases reported either have concerned more general education interventions, such as school-based, problem-solving teams without RTI, or peripheral mention of RTI. For example, in ruling against tuition reimbursement premised on the parents' two successive claims of delayed SLD identification and an inappropriate IEP, the court in *Daniel P. v. Downingtown Area School District* (E.D. Pa. 2011) briefly mentioned that the parents' expert had testified that the district's instructional support team was not a true RTI process; however, she admitted that Pennsylvania did not require RTI for SLD identification.

The other reported due process decisions concerning RTI have not been particularly clear or strict in their scrutiny to date. This lack of penetrating analysis appears to be attributable to attorneys' and adjudicators' less than complete awareness of the distinctive criteria and procedures of RTI, which will presumably change as state laws, local policies, and the professional literature become better developed and well known.

Is legal guidance available as to the various operational issues of RTI, such as the duration, frequency, and intensity of interventions at each tier and the criteria for continuous progress monitoring and special education referral?

Yes. The U.S. Office of Special Education Programs (OSEP) has issued various interpretations, such as repeated warnings against using RTI to delay or deny an evaluation of a child reasonably suspected of being eligible under the IDEA. Other OSEP guidance includes the following:

- For RTI in relation to special education evaluation: "RTI is only one part of a comprehensive evaluation."
- For SLD identification of parentally placed private school children: "If a private school refers a parentally placed child to the district of its location for an evaluation for suspected SLD and the district uses RTI for SLD identification, the district is not required to use RTI for the evaluation and must move forward to obtain parental consent and to complete the evaluation within 60 days thereafter."
- For duration of RTI: The meaning of the IDEA regulatory provisions of "an appropriate period" or "adequate progress" is left to state law, local policy, and IDEA case adjudications.
- For the IDEA regulatory requirement for documentation of a child's behavior: This requirement is based on an observation that is a separable part of the SLD identification process; "therefore, it would be inappropriate to assume that an adopted RTI process must be based on behavior and/or that this [RTI] process extends to other classifications more closely connected to behavior."
- For RTI funding: School districts may use their IDEA allotment for "early intervening services" provided that they serve "nondisabled students in need of additional academic or behavioral support and supplement, not supplant, other funds used to implement RTI."

In addition to the warning against using RTI to delay or deny its "child find" obligation, has OSEP provided guidance that specifically pertains to the factual contours of our case scenario?

Yes. Confirming the district's response to the parents' referral, OSEP has opined: "If a parent requests an evaluation of a child who is in the district's RTI process, the district must either 1) proceed to obtain consent within a reasonable period and complete the evaluation within the regulatory timeline, or 2) provide the parent with a written refusal explaining the basis for concluding that it lacks reason to suspect the child has a disability. The parent may challenge this refusal via a due process hearing."

Providing another option with regard to the other parental request in the illustrative case, OSEP has clarified: "If a district used the RTI process and, in disagreement with it, the parent obtained an independent educational evaluation (IEE), the district is not required to reimburse the parents for the IEE because reimbursement is only possible when the parents disagree with a completed evaluation."

Conclusion

RTI is a hot topic within special education and, based on its meaning, inevitably in general education. Although subject to notable confusion, this prophylactic practice is, as a matter of law, not particularly problematic; both its boundaries and, at least to date, its litigation are relatively limited.

The elementary principal is a key player in relation to RTI for at least two overlapping reasons. First, RTI is more common at the elementary than the secondary grades. Second, both its adoption and its potential are easier to attain at the elementary level; the culture of the organization and the window of opportunity fit well with the nature and goals of the RTI process.

Regardless of the school level, the principal's leadership in terms of implementing change, using resources, and facilitating coordination between general and special education will determine the successfulness of RTI not only in terms of legal defensibility but—more importantly—in improving the learning outcomes of all children. P

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