

## RTI for Students with SLD: The Legal Dimension

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Response to intervention (RTI)<sup>1</sup> is a multi-stage process starting with scientifically based validated instruction, proceeding to more intensive or different instruction for those who do not respond, and culminating in evaluation for the need for special education for those who still do not respond. In addition to multiple tiers, another hallmark of RTI is continuous progress monitoring. More specifically, two leading sources define RTI as follows:

- the practice of (1) providing high quality instruction/intervention matched to student needs and (2) using learning rate over time and level of performance to (3) make important educational decisions<sup>2</sup>
- systematic (1) application of scientific, research-based interventions in general education; (2) measurement of a student's response to these interventions, and (3) use of the [resulting] data to inform instruction”<sup>3</sup>

However, RTI is an overall approach rather than a single model. The sources of variation include the number of tiers, the role of treatment fidelity (or standard protocol v. problem solving), and the addition of other components, such as intensive parental

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<sup>1</sup> The terminology varies, including “inadequate response to intervention,” and the acronym sometimes appears as “RTI.” For a discussion of the semantics, see Theodore Christ et al., *Conceptual Confusion with Response-to-Intervention Vernacular: Clarifying Meaningful Differences*, 34 COMMUNIQUÉ 1 (Nov. 2005).

<sup>2</sup> GEORGE BATSCHE ET AL. RESPONSE TO INTERVENTION: POLICY CONSIDERATIONS AND IMPLEMENTATION (2005) (available from [www.nasdse.org](http://www.nasdse.org)).

<sup>3</sup> National Joint Committee on Learning Disabilities, Responsiveness to Intervention and Learning Disabilities (June 2005) (available at <http://www.ldonline.org/njcdl>).

involvement.<sup>4</sup>

For the IDEA classification of specific learning disability (SLD), the focus of the scientifically-based intervention and the ultimate team determination would be the SLD eligibility areas, such as reading and math. Within the context of the multiple IDEA criteria for SLD, the proponents of RTI assert that it provides for more effective identification of SLD students than the long-time criterion of a severe discrepancy between ability and achievement.

Effective July 1, 2005, the latest version of the IDEA expressly permits RTI and no longer requires severe discrepancy to be used as part of the eligibility process for the special education classification of SLD. The proposed regulations move further in the direction of RTI and away from severe discrepancy, but the timing<sup>5</sup> and contents<sup>6</sup> of their final form are currently uncertain. In any event, the implications for state laws, local policies, and the public schools' personnel, parents, and students are bound to be significant for several reasons.

First, SLD is by far the leading classification under the IDEA. For each of the past several years, it has accounted for half of all the special education students.

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<sup>4</sup> See *supra* notes 1-2. For other useful overviews, see, e.g., Douglas Fuchs et al., *Responsiveness to Intervention: Definitions, Evidence, and Implications for the Learning Disabilities Construct*, 18 LEARNING DISABILITIES RESEARCH & PRAC. 157 (2003); Douglas Fuchs & Lynn Fuchs, *Responsiveness-to-Intervention: A Blueprint for Practitioners, Policymakers and Parents*, 38 TEACHING EXCEPTIONAL CHILDREN 57 (Sept.-Oct. 2005); Lynn Fuchs & Sharon Vaughn, *Redefining Learning Disabilities as Inadequate Response to Intervention*, 18 LEARNING DISABILITIES RESEARCH & PRAC. 137 (2003); Sharon Vaughn et al., *Response to Instruction as a Means of Identifying Students with Reading/Learning Disabilities*, 69 EXCEPTIONAL CHILDREN 391 (2003).

<sup>5</sup> The legislation called for issuance of the final regulations by December 2005, but the expected date has changed several times since then. The Department of Education's latest informal estimate was the end of summer 2006, but it is only tentative, subject to further delays.

<sup>6</sup> See, e.g., Perry Zirkel, *SLD Eligibility: What the Proposed Regulations Would Require*, 34 COMMUNIQUE 8 (Nov. 2005).

Second, RTI directly affects not only special, but also regular, education. This multi-stage process entirely takes place in general education, and obviously at the first stage is the modus operandi for the basic skills instruction for all general education students.

Third, according to a brand-new monograph, which comprehensively and compactly synthesizes all of the primary sources of law concerning SLD eligibility, severe discrepancy has been the primary factor in the considerable body of case law to date. More specifically, school districts have won approximately 80% of all the published hearing/review officer and court decisions where the parents sought and the district denied SLD eligibility for the child, and severe discrepancy has been the primary decisional factor in two thirds of these cases.<sup>7</sup>

Within the next year or so, each state and, in turn, each district will have to make a decision as to whether they will be adopting the RTI approach. The consequences will be notable not only in terms of teacher training, instructional materials, and overall coordination between general and special education, but also with regard to future eligibility case law. Challenges accompany change, particularly in a legalized area such as special education. Illustrative issues include the following:

- 1) Will RTI lead a higher or lower proportion of SLD students, and will this proportion represent over- or under-identification, including but not limited to minority students?
- 2) Will parents prevail on “child-find” FAPE claims based on lack of scientific, research-based instruction during the pre-referral process, and what will

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<sup>7</sup> PERRY A. ZIRKEL, THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY (2006) (available from [www.cec.sped.org](http://www.cec.sped.org) - tel. 800/224-6830).

hearing/review officers and courts establish as the operational meaning and applicable standards for such instruction?

- 3) How will the district's requisite period for RTI fit with the IDEA's prescribed period for evaluation, when the parent preemptorily requests, with written permission for, a special education eligibility evaluation?
- 4) What will be the defensible subsequent elements of the RTI process for SLD eligibility,<sup>8</sup> including the specific meaning of the need for special education<sup>9</sup>?
- 5) What will be the appropriate specially designed instruction—"based on peer-reviewed research to the extent practicable"<sup>10</sup>—for the children who qualify as SLD based on an RTI approach?
- 6) What will be the effects of the "whip-sawing" when parents move their residence from a district that adopts an RTI approach one that does not or vice versa?

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<sup>8</sup> See, e.g., Daniel J. Reschly, *Learning Disabilities Identification: Primary Intervention, Secondary Intervention, and Then What?* 38 J. LEARNING DISABILITIES 510 (2005).

<sup>9</sup> Zirkel, *supra* note 7, at 71-72.

<sup>10</sup> 20 U.S.C.A. § 1414(d)(A)(i)(IV) (2005).