



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

DEC 11 2008

Perry A. Zirkel
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Dear Mr. Zirkel:

This is in response to your letter to Ms. Patricia Guard, Deputy Director of the Office of Special Education Programs (OSEP) at the U.S. Department of Education, dated September 1, 2008. The questions you pose and OSEP's responses are provided below.

1. If a school district, pursuant to a mandatory or permissive state law under §300.307(a), adopted RTI [response to intervention] as its official approach as the process prior to a formal evaluation for identifying children with SLD [specific learning disability] and early during the process a parent - in disagreement with the RTI approach - obtained an IEE [independent educational evaluation] that determined the student was eligible as SLD based on severe discrepancy analysis, is the district obligated to pay for the IEE (assuming the district filed for a due process hearing)? Your commentary accompanying the 2006 regulations - specifically, 71 Fed. Reg. 46,689 (Aug. 14, 2006) - only partially covers this issue.

OSEP's Response: In the hypothetical you pose, regardless of the method used in the IEE (severe discrepancy analysis or other), or whether the school district has adopted RTI, the parent is not entitled to be reimbursed for the IEE because the district has not completed an evaluation. The commentary you reference at 71 Fed. Reg. 46689 (Aug. 14, 2006) appears to directly address the scenario you describe above, in which the parent requests an IEE early in the RTI process because the parent disagrees with the RTI approach. The commentary states that "If a parent disagrees with the results of a completed evaluation that includes a review of the results of a child's response to intervention process, the parent has a right to an IEE at public expense, subject to the conditions in §300.502(b)(2) through (b)(4). The parent, however, would not have the right to obtain an IEE at public expense before the public agency completes its evaluation simply because the parent disagrees with the public agency'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." (Emphasis added)

With respect to your parenthetical indicating that "the district filed for a due process hearing," we note that when a parent requests reimbursement for an IEE prior to the completion of the district's evaluation, the school district may deny the request for reimbursement without filing for a due process hearing. See 34 CFR §300.502(b)(1). If, after the completion of the school

district's evaluation, the parent requests an IEE at public expense, and the school district objects, the school district could file a due process complaint to show that its evaluation is appropriate or to demonstrate that the IEE obtained by the parent did not meet agency criteria. 34 CFR §300.502(b)(2)(i).

2. Would your answer be the same if the parent obtained the discrepancy-based IEE upon receiving notice from the district that the child had responded successfully in the RTI process and, thus, had no reason to proceed to a formal evaluation for SLD eligibility?

OSEP's Response: Yes. Under 34 CFR §300.502(b)(1), a parent has the right to an IEE at public expense, subject to 34 CFR §300.502(b) through (e), if the parent disagrees with an evaluation obtained by the public agency. In the scenario described in your second question above, the school district did not complete an evaluation and therefore, the parent would not be entitled to an IEE at public expense. However, pursuant to 34 CFR §300.301(b), a parent may request an evaluation by the school district to determine if the child is a child with a disability. If the district provides written notice, consistent with 34 CFR §300.503, that it declines to conduct an evaluation, the parent has all of the available dispute resolution options afforded by the Individuals with Disabilities Education Act (IDEA) in order to pursue an evaluation by the school district, including mediation (34 CFR §300.506), filing a due process complaint (34 CFR §300.507), or filing a State complaint (34 CFR §300.153).

3. In any event, would the district be in compliance with its obligation under §300.502(c)(1) to "consider" the results either by rejecting them outright as not meeting the district's "agency criteria" or by giving them negligible weight in light of the child's RTI results?

OSEP's Response: In the scenario described in your third question, above, assuming that this question follows from the other two questions, the school district declined, based on the outcome of the RTI process, to evaluate the child. Accordingly, at this point, the child has not been evaluated or determined to be a child with a disability, and therefore, the school district would be under no obligation to consider the results of the IEE. As noted above, if the parent disagrees with the district's decision not to conduct an evaluation, the parent may request an evaluation and if the school district declines to conduct an evaluation, the parent may use all of the available dispute resolution options to obtain an evaluation. Pursuant to 34 CFR §300.502(c)(1), the results of an IEE must be considered by the public agency, if it meets agency criteria, in any decision made with respect to provision of FAPE to the child. "Agency criteria" refers to "criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner...." 34 CFR §300.502(e)

It is important to remember that the data from an RTI process can be considered as one component of a full and individual evaluation, consistent with 34 CFR §§300.304-300.311, using a variety of assessment tools and strategies in determining whether the child is a child with a disability under 34 CFR §300.8 and the content of the child's IEP. 34 CFR §300.304(b)(1). The public agency may not use any single measure or assessment, including RTI, as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR §300.304(b)(2)

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have further questions, please do not hesitate to contact Dr. Deborah Morrow at 202-245-7456.

Sincerely,

A handwritten signature in black ink, appearing to read "William W. Knudsen". The signature is fluid and cursive, with the first name being the most prominent.

William W. Knudsen
Acting Director
Office of Special Education
Programs