

April 8, 2008

Perry A. Zirkel
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Department of Education and Human Services
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Dear Dr. Zirkel:

This letter is in response to your November 1, 2007 letter regarding questions you posed after completing a 50-state survey concerning legal provisions for response to intervention (RTI). You state in your letter that the survey revealed substantial confusion concerning two issues regarding RTI in Part B of the Individuals with Disabilities Education Act (IDEA). Additionally, you posed two other related questions. All four of your questions and our responses follow. I apologize for the delay in getting back to you.

1. Pattern of strengths and weakness

Question: Am I correct in interpreting the language "pattern of strengths and weaknesses..." (§300.309(a)(2)) to encompass both the options of severe discrepancy and the "other alternative research-based procedures"?

Response: The eligibility group, including the parents, required under 34 CFR §300.306 and, when applicable, under 34 CFR §300.308, can determine that a child has a specific learning disability (SLD) if the child meets the criteria in 34 CFR §300.309(a)(1), (a)(2)(i) OR (a)(2)(ii), and (a)(3). 34 CFR §300.309(a)(2)(i) specifically applies to failure of a child to make sufficient progress when using a RTI process. Therefore, 34 CFR §300.309(a)(2)(ii), which references a child exhibiting a pattern of strengths and weaknesses, would apply to all other permissible methods of identifying a child with a specific learning disability.

2. Continuous progress monitoring

Question: Is my interpretation correct that the requirement for the evaluation team to "consider" continuous progress monitoring (§300.309(b)(2)), regardless of whether the approach is RTI, means that the LEA must include continuous progress monitoring in the referral or evaluation process and give due weight to the results?

Response: The eligibility group referenced above, under 34 CFR §300.309(b)(2), must consider 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, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. The regulation does not use the term "continuous progress monitoring."

The information referred to in 34 CFR §300.309(b)(2) may be collected as a part of the evaluation process, or may be existing information from the regular instructional program of a school or LEA. It must be reviewed and weighed by the evaluation group. As we noted in the Analysis of Comments and Changes for the final IDEA Part B regulations, Federal Register, Vol. 71, No. 56, Monday, August 14, 2006, 71 *Fed. Reg.* 46540, 46657, "[a] critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected and analyzed and that parents are kept informed of the child's progress." We believe that this information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction.

3. Amount and nature of student performance data collected

Question: Must state special education law concerning SLD identification include provisions "regarding the amount and nature of student performance data that would be collected and the general education services that would be provided" (§300.311(a)(7))?

Response: The Part B regulations require state special education policy concerning identification of SLD through an RTI process to address the amount and nature of student performance data that would be collected and the general education services that would be provided in the RTI process. If a child suspected of having a SLD has participated in a process that assesses the child's response to scientific, research-based intervention, under 34 CFR §300.311(a)(7), the documentation of the determination of eligibility, as required in 34 CFR §300.306(a)(2), must contain a statement of the instructional strategies used and the student-centered data collected; and the documentation that the child's parents were notified about 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, the strategies for increasing the child's rate of learning and the parents' right to request an evaluation.

4. Scientifically based research

Question: Does the absence of the qualifier "scientific" in "other alternative research-based procedures" mean that this option need not meet all the defined, and relatively rigorous, requirements for "scientifically based research" (§300.35)?

Response: The criteria that a State adopts for determining whether a child has a SLD, under 34 CFR §300.307(a)(3), may permit the use of other alternative research-based procedures for determining whether a child has a SLD, as defined in 34 §300.8(c)(10). There is no requirement under this provision for such alternative procedures to be "scientifically-based." They must, however, be research-based.

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 Deborah Morrow of my staff at 202-245-7456.

Sincerely,

/s/

William W. Knudsen
Acting Director
Office of Special Education

Programs