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Abstract

The purpose of this study is to examine decisions rendered by the courts with regard to compliance or noncompliance to the statutes and regulations related to Response to Intervention (RtI). The No Child Left Behind Act of 2001 and the Individuals with Disabilities Improvement Act (IDEIA) of 2004 encourage state and local educational agencies to develop and provide a high-quality, scientifically research-based intervention system to determine the eligibility of a child for special education services. Most states have adopted a multi-tiered intervention system in an effort to collect data and address the RtI requirements of IDEIA. Whereas it is the duty of Congress to write legislation, the courts' interpretation provides the guidance needed to ensure that appropriate measures are taken in identifying students with potential learning disabilities.

Keywords

Child Find; Response to Intervention; Individuals with Disabilities Improvement Act; Multi-tiered Intervention System

Since 2001, school districts around the country have become increasingly focused on designing systematic intervention systems to help children experiencing learning problems and address any learning problems earlier before they become more entrenched. The emphasis behind these increased efforts began with the passage of the No Child Left Behind Act of 2001 (NCLB, 2002) and was later incorporated into the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004. Both federal laws strongly encouraged state education agencies (SEAs) and local education agencies (LEAs) to provide a system of high-quality, scientific research-based intervention prior to making a referral to determine if a child is eligible for special education services. In IDEIA, this system of early intervention directed at the learning problems of students is referred to as Early Intervening Services (EIS) and has been implemented in schools as a system of tiered interventions.

“early intervention services...for students...who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment” (Individuals with Disabilities Improvement Act, 2004).

Specifically, LEAs have the option of using up to 15% of their Part B funds for “early intervening services . . . for students . . . who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment. Early Intervening Services are typically

understood within the context of a multi-tiered model or framework that delineates a continuum of programs and services for students with academic difficulties.

In addition, IDEIA 2004 encourages SEAs and LEAs to incorporate this system of early intervention services into the evaluation process to determine if a child has Specific Learning Disabilities (SLD) [20 USC 1414(b)(6)], conceivably as an alternative to using the ability–achievement discrepancy criterion. This process of using data from the implementation of the early intervention services into the evaluation process for Specific Learning Disabilities is referred to in IDEIA as Response to Intervention (RtI). In the context of eligibility evaluations, special education would only be considered for those students who fail to respond to scientifically based interventions. Whereas IDEIA (2004) encourages SEAs and LEAs to incorporate RtI into the process for identifying students with SLD, the regulations leave open to SEAs and LEAs the specifics about implementation of RtI. Despite a lack of specifics, there are certain features that all models for the implementation of RtI have in common. Foremost of these common features are that struggling learners move through a series of tiered interventions of progressing intensity (National Joint Committee on Learning Disabilities [NJCLD], 2005).

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Three is the most common number of tiers. The first tier involves the general education classroom teacher providing high-quality, scientifically based instruction for all students. Screening, or benchmark testing (Vaughn, 2003), occurs at Tier 1 to identify those students who are considered to be at risk for developing academic and behavioral problems. The secondary tier involves providing students identified as being at risk in Tier 1 with small-group, high-intensity interventions. The interventions at Tier 2 are provided either in the general classroom or outside the classroom, through a “special education like” instructional model (McMaster, Fuchs, Fuchs, & Compton, 2005). Children who fail to respond sufficiently to this intervention enter another tier where either the intensity level of the interventions is increased or the child is referred for a special education evaluation. Regardless of how many tiers an RtI model contains, the terminal tier is referred for a special education evaluation. In addition to all RtI models having a series of tiered interventions, other similarities include the use of scientifically based interventions and the importance of ongoing assessment across tiers to monitor individual progress. Such assessment serves a number of purposes: to determine students at risk for school failure, measure academic growth and rate, gauge responsiveness to intervention, and make instructional decisions (NJCLD, 2005).

The premise behind EIS and RtI is that if a school provides high-quality instruction and regularly keeps track of how children are doing in the classroom, then all children in the school will succeed and achieve high standards. In addition, RtI will assist schools in identifying students who may require more intensive instructional services and/or be eligible for an exceptional student education program. However, almost immediately, concerns were raised about EIS and about RtI.

The purpose of this article is to discuss the current status of RtI as addressed in decisions rendered by courts. It is important to look at whether and to what extent the courts have addressed RtI because, although Congress writes legislation in the form of statutes, NCLB, and IDEIA, and the U.S. Department of Education writes regulations on how these statutes should be implemented, it is the courts that rule on what is in compliance or noncompliance with the statutes and regulations.

Judicial Decisions

Judicial decisions often provide guidance with regard to the meaning of terms used in the regulations. For example, although the concept of a “free appropriate public education” has been a fundamental principle contained in IDEIA since its legislative conception in 1975 and initial regulations in 1997, it was the Rowley court in 1982 that defined *appropriate* as “an IEP designed to confer benefit” and “making progress from grade to grade” (*Board of Education of Hendrick Hudson School District v. Rowley*, 1982).

Due process hearings and court cases involving the issue of RtI have occurred under IDEIA regulations in three sections: (a) child find (§ 300.111), (b) evaluations (§ 300.301 and § 300.307), and (c) eligibility—in particular eligibility under the category of specific learning disability. It is important to note that as of this date, we do not have a Supreme Court hearing related to RtI, and only one case has been heard at the Federal Circuit Court of Appeals level. The vast majority of decisions have been handed down by the lower Federal District Courts and by hearing officers at the SEA level. The lack of court cases at the Federal Circuit Court of Appeals level and higher is probably because RtI became a part of IDEIA in 2004 and the regulations were not released until 2006. Therefore, RtI cases may not have had the time necessary to rise through the federal court system. Although, at present, there are no decisions made by the U.S. Supreme Court related to the concerns raised about the implementation of EIS and RtI, there have been decisions handed down by the lower courts and by hearing officers at the SEA level. Decisions at these lower judicial levels are important for two reasons. First, if you reside in the region of the country or state where the court or independent hearing officer (IHO) making the decision has jurisdiction, then what you do as an LEA must be consistent with those decisions, unless the decision is overturned by a higher court. Second, if the decision was made by a court outside your state or region of the country, it is important to understand that although the decision is not binding on educational practice within the district, IHOs and court judges consider the decisions of courts outside of their jurisdiction for guidance when ruling on a case within their jurisdiction. Therefore, it is possible that the issues presented in a case have not been heard in a court or due process hearing in your area of the country, but when it does, the hearing officer or judge will most certainly consider the reasoning behind the decisions made in cases in other jurisdictions in order to come to a reasoned decision that is based on previous case law.

J.S. et al. v. Attica Central Schools (2007) was a class action lawsuit in which the plaintiffs argued that state and federal statutes and regulations required LEAs to evaluate students who are suspected of having a disability to determine whether particular students so identified are in fact disabled. The LEA argued that it had delayed the process of identifying such students who may be eligible for special education or related services because the process was “fraught with great subjectivity” (p. 3). However, two witnesses for the plaintiffs testified that there were anywhere from 16 to 28 academic and social behaviors that occur in the classroom and/or school environment that could be used as indicators that a student may have a possible disability. The judge in the decision wrote, “While the decision-making process was difficult, it was not impossible” (p. 1). Furthermore, “the existence of state regulations directing that students ‘suspected of being disabled’ be promptly

identified based on stated criteria refutes [the district's] argument, and [the district] does not contest the relevance of such regulations" (p. 1).

In *Marshall Joint School District No. 2 v. C.D. by Brian and Traci D.* (2009), the U.S. District Court for the Western District of Wisconsin ruled that despite the fact that a third grader performed on the same level as his peers after receiving modifications in the general education classroom, this did not release the LEA from its responsibility to conduct a special education evaluation to determine that the student was eligible for IDEA services. The court went on to say that the district should have considered the student's performance without regard to his modifications.

Of those cases that went against the LEA on the issue of RtI, the El Paso Independent School District (EPISD) is probably the most precedent setting. This case involved a situation where the LEA repeatedly referred a student with ADHD for interventions in the LEA's general education classroom rather than evaluating the student's IDEA needs. At the hearing level, the state education hearing officer (SEHO) ruled that the LEA had violated child find regulations. The SEHO explained in his ruling that the Student Teacher Assessment Team (STAT) had devolved from a body meant to "provide support and intervention" to "an obstacle to parents who want to access the special education referrals" (*El Paso Independent School District v. RICHARD R.*, 2008, p. 18). Recognizing this discrepancy between federal law and EPISD's practice, the SEHO stated that the STAT process (i.e., RtI), "while a mandatory district requirement, is not a prerequisite to conducting a special education evaluation" (*El Paso Independent School District v. RICHARD R.*, 2008, p. 18). Also, once a parent makes a request for a special education evaluation, the LEA should begin the special education evaluation process while at the same time providing intervention strategies through the STAT (i.e., RtI) process. The EPISD appealed the hearing officer's decision and El Paso Independent School District was then heard in the District Court of West Texas. In affirming the hearing officer's decision, the District Court judge stated that a two-prong process should be used to determine whether an LEA is in compliance with its child find responsibilities. The first prong involves an examination of whether the LEA had reason to suspect that the student had a disability and whether there was reason to suspect that special education services might be needed to address that disability. If the first prong is answered in the affirmative, then the court should progress to the second prong. The second prong involves determining if the LEA evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability. In the El Paso case, the District Court found that there was insufficient justification to overturn the finding by the SEHO and that EPISD failed to meet its child find requirements. The El Paso school stated that it delayed in beginning the evaluation process because it needed time to implement

intervention strategies. The District Court judge was not swayed by EPISD's argument citing *Bobby R.*, 200 F.3d at 347 (citing *Michael F.*, 118 F.3d at 253), stating that "one of the factors used to measure whether a local educational agency has met its IDEA responsibility to provide a FAPE is whether the accommodations accorded to the student demonstrate positive academic benefits" (*El Paso Independent School District v. RICHARD R.*, 2008, p. 22). The facts in this case showed that R.R. (the student) had failed the *Texas Assessment of Knowledge and Skills* (TAKS), a state-wide achievement test, for 3 years in a row and continued to display significant academic difficulties in reading, math, and science despite the district's implementation of intervention strategies (RtI), which the SEHO found to be "clear signals that an evaluation was necessary and appropriate" (*El Paso Independent School District v. RICHARD R.*, 2008, p. 22). The facts showed that instead of evaluating R.R., the October 2005 STAT committee recommended modifications to R.R.'s section 504 accommodations, additional tutoring, and attendance at Saturday tutoring camps. All of these interventions had been provided by EPISD over the past 3 years and had been shown to be ineffective in helping R.R. achieve passing scores on the TAKS. To summarize the decision of the District Court judge, "Faced with three years of repeated failure, the Court agrees with the SEHO's finding that '[a] special education evaluation would have clearly indicated whether RR had a disability that was affecting his educational progress'" (*El Paso Independent School District v. RICHARD R.*, 2008, p. 22). Furthermore, the Court concurred with the SEHO's ruling that EPISD's "reliance on a purported agreement to continue RR in section 504 and not send the parent's referral to the special education department reflected a mistake on [EPISD's] part" (*El Paso Independent School District v. RICHARD R.*, 2008, p. 22). Because of R.R.'s record of consecutive failure on the TAKS test, his continuing difficulties in multiple subjects, and the inability of prior accommodations to improve his scores, the District Court stated that the SEHO was correct in believing that EPISD had reason to suspect that R.R. had a disability and that special education services might be needed to address that disability. The District Court then turned to the second prong of the Court's child find inquiry to determine if the LEA had evaluated the student within a reasonable time after suspecting that the student might have a disability. The District Court in this case stated that whereas the Fifth Circuit Court had yet to rule on the issue of what is a reasonable period of time, other federal courts faced with this issue had developed standards stating that a delay of 6 months (*A.W. v. Jersey City Pub. Schs.*, 2007) to a delay of 12 months (*O.F. ex rel. N.S. v. Chester Upland Sch. Dist.*, 2002) from the time that a child's parent(s) had informed a school district that the child was experiencing difficulties or the point at which the school had reason to suspect that a child had a disability to scheduling of evaluation constituted a child find violation.

In the EPISD case, the court ruled that the 13 months that passed between R.R.'s request for evaluation and EPISD's offer of evaluation was unreasonable. Finally, in its ruling, the Court adopted the SEHO's finding that the IDEIA "gives the parent a right to seek an evaluation and overrides local district policy concerning intervening procedures. . . . In those instances where the STAT committee impedes the exercise of rights guaranteed by federal law, those practices violate the IDEA" (*El Paso Independent School District v. RICHARD R.*, 2008, p. 18).

Court Decisions: RtI Implementation Consistent With IDEIA

Whereas the decisions in the above cases indicate that the implementation of RtI may be problematic, the decisions of other cases suggest the possible benefits of RtI when implemented within those regulations related to child find. For example, in *Baltimore City Public School System* (2007), the due process hearing officer ruled that

interventions and strategies be implemented to meet the needs of students within the regular school program, as appropriate, before referring students for special education services. However, the public agency must ensure that this process does not delay or deny a student's access to special education services under IDEA (34 CFR § 300.111). (p. 4)

Support for this decision may also be found in *A.P. by Powers v. Woodstock Bd. of Education* (2008). A.P., a 14-year-old student diagnosed with a nonverbal learning disability, had attended Woodstock schools from kindergarten through April of his sixth-grade year. The court noted that IDEIA's child find requirement applies to students who are suspected of having a qualifying disability as well as being in need of special education as a result of their disability. The student, A.P., did not meet the second requirement. The court noted that although A.P. had some difficulties in the classroom, the evidence showed that he responded well to interventions. The court pointed out that A.P. received As, Bs, and Cs on his report card and performed commensurate with his grade level on a statewide assessment without any accommodations. Moreover, the teacher had regular contact with the parent about the student's progress. According to U.S. District Judge Mark R. Kravitz (*A.P. by Powers v. Woodstock Bd. of Education*, 2008),

This is decidedly not a case in which a school turned a blind eye to a child in need. To the contrary, [the teacher] acted conscientiously, communicating regularly with [the mother] and utilizing special strategies to help [the student] succeed. Given the student's response to interventions, however, the district did not

err in failing to evaluate him sooner. There is nothing in either the IDEA or in the state or federal implementing regulations to indicate that a student would qualify as a "student with a disability," when the school voluntarily modifies the regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level. (p. 4)

The U.S. District Court in *Ashli and Gordon C. ex rel. Sidney C. v. State of Hawaii, Department of Education* (2007) came to the same conclusion when it ruled that

(1) even though the student was entitled to IDEA services, her parents were not entitled to reimbursement of their expenses in unilaterally placing the student in a private school following the district's refusal to provide those services and (2) the district would not be separately ordered to provide compensatory education services to reverse the effects of that decision on the student's progress.

The following conclusions may be drawn from the decisions in the above cases. First, when RtI or pre-referral interventions are effective in helping a student who had previously displayed academic learning difficulties, and the student is no longer experiencing these problems, that student is no longer a child who is eligible for special education services. Therefore, it is not necessary to have that child evaluated to determine if he or she needs special education services. However, LEAs should also keep the following points in mind concerning the use of RtI. First and foremost, IDEIA gives the parent a right to seek an evaluation and this right overrides local district policy concerning intervening procedures. Also, LEAs, when implementing a series of interventions, should consider how many school days they will allocate to those interventions prior to making a referral for a special education evaluation. This is important because most SEAs are mandating that school districts initiate a series of pre-referral intervention strategies that will occur over a 10- to 18-week period of time, or 50 to 90 days, prior to making a referral for special education evaluation. This period of time to implement pre-referral intervention strategies would result in special education evaluations occurring after the 45 to 60 days that most states mandate for the period of time in which an evaluation must occur once a parent has made a request for an evaluation. Given the ruling in *A.W. v. Jersey City Pub. Schs.* (2007), that a delay of 6 months, or 24 weeks, does not meet the criteria for a reasonable period of time, it is recommended that LEAs complete their RtI process in less than 6 months. Finally, the courts seem to be suggesting that LEAs should be able to identify whether a student will be a responder or nonresponder prior to beginning the pre-referral interventions so that students

Table 1. Characteristics of Nonresponders

Source	Findings
Torgesen et al. (2001)	Nonresponders attained a word reading accuracy scale score of 90 or below on the <i>Woodcock Reading Mastery Test</i> (WRMT) after completion of 67.5 hours of Tier 2 reading intervention.
Torgesen (2002)	IQ scores did not differentiate between intervention responders and nonresponders.
Fletcher and Denton (2003)	Nonresponders had more severe reading difficulties prior to intervention. Nonresponders failed to activate those areas in the left hemisphere of the brain known to be involved in the development of reading skills. Nonresponders showed predominant right hemisphere activity much like that observed in children and adults with identified reading disabilities.
Burns and Senesac (2005)	Scored at or below 25th percentile on a district administered reading test.
McMaster, Fuchs, Fuchs, and Compton (2005)	Students identified as persistent nonresponders scored > 0.5 SD below average performers' levels and slopes on curriculum-based measures (i.e., on nonword fluency and Dolch word probes). Nonresponders performed below the 30th percentile on the WRMT-R Word Identification and Word Attack subtests and were reading less than 40 words correct per minute. 70% of the initial nonresponders were persistent nonresponders. Nonresponders gained less than 10 words on the WRMT-R Word Identification subtest and gained less than 5 words on the Word Attack subtest as a result of Tier 2 interventions.
Barth et al. (2008)	Results indicate that choice of cut-point, method, and measure influences who is classified as adequate and inadequate responders (nonresponders).
Case, Speece, and Molloy (2003)	Nonresponders scored less than 1 SD below class level and slope.
Good et al. (2003)	8 of 9 nonresponders had a score below 25 on the Letter Naming Fluency subtest of the DIBELS. 6 of 9 nonresponders had a standard score below 90 on the Sight Word Efficiency subtest of the <i>Test of Word Reading Efficiency</i> . 7 of 9 nonresponders had deficient skills on the Academic Competence subscale of the <i>Social Skills Rating System</i> .
Vellutino, Scanlon, Zhang, and Schatschneider (2008)	Intelligence tests did not reliably differentiate between nonresponders and responders. Language-based cognitive measures did distinguish between nonresponders and responders.
Al Otaiba and Fuchs (2006)	Nonresponders read less than 40 words per minute correctly from unfamiliar grade level text. Nonresponders were 1.5 SD lower on receptive vocabulary (PPVT) than responders. Nonresponders had lower scores on a test of rapid naming. Nonresponders had elevated scores on a test of distractibility. Nonresponders were a SD lower on verbal memory than responders. There were no differences by race, age, or socioeconomic status between responders and nonresponders.
Komatsu (2008)	Nonresponders did not reach criterion within 10 probe sessions.
Shapiro (2007)	<i>Curriculum Based Management</i> individual level data alone can be problematic in identifying responders and nonresponders.

who are nonresponders are not delayed in receiving an evaluation and eventually special education services. Therefore, it is important to make sure that the staff within a district knows the characteristics of students who have a high risk of having a disability so that they may be referred for a special education evaluation concurrent with the implementation of RtI.

Curriculum Based Management

A review of selected research articles that have studied characteristics that differentiate responders from those who do not respond to interventions are shown in Table 1 along with their findings. It is important to note that all of the studies shown in Table 1 were done in the area of reading. The authors were unable to locate any studies examining

the characteristics of nonresponders in the areas of mathematics and social behavior.

In addition to what the characteristics are of those who do not respond to interventions, the question may also be asked about how a school district might go about identifying nonresponders. According to Fuchs and Deshler (2007), recent implementations of RtI approaches in classroom settings have primarily measured RtI using three methods: (a) final status, represented by both “normalization and “final benchmark” methods; (b) slope-discrepancy methods; and (c) dual-discrepancy methods. In the final status methods, a student’s postintervention test scores are compared to a criterion that may represent a norm-referenced score or a criterion-referenced benchmark. When using criterion-referenced tests, the school district must set a cut-score. The cut-score often represents the degree or level of mastery that students should attain to not be considered at risk for academic failure. This raises the question of where a district should set the cut-point to differentiate students into responder and nonresponder groups. Swets (1992) stated that it is not always obvious where the cut-point should be placed to achieve optimal decision making because the location of the cut-point will significantly affect the types of instructional services that individual students will receive and the incidence of nonresponse in the sample. Thus, the location of the cut-point or decision threshold is open to debate. To date, cut-points of 0.5, 1.0, and 1.5 standard deviations below the mean (e.g., class, district, state, nation, norm-referenced sample; Fuchs, 2003) have been employed to determine response to instruction, along with methods based on criterion-referenced benchmarks and median splits. The use of these different cut-points results in different percentages of students being identified as nonresponders. In slope/discrepancy models, a student’s learning rate (i.e., slope) is compared to the average rate of learning for a reference group, such as same grade peers from their class (Marsten, 1989). Students with slower rates of learning than the reference group (Fuchs, Fuchs, & Compton, 2004) or students whose performance is in the bottom half of the distribution (i.e., median split) are those designated as nonresponders (Vellutino et al., 1996). In the dual discrepancy method (Fuchs & Fuchs, 1998; Speece & Case, 2001), a students’ rate of growth (i.e., slope), as well as level of achievement (i.e., final status), is compared to the referent group (Fuchs, 2003; Fuchs & Fuchs, 1998; Fuchs et al., 2002; Speece & Case, 2001). In this method, those students whose achievement levels relative to a benchmark or intercept and learning rates are below those of the reference group are considered nonresponders (Fuchs, 2003; Fuchs & Fuchs, 1998). Burns and Senesac (2005) compared four definitions of dual discrepancy (i.e., student growth below the 25th, 33rd, and 50th percentiles and 1 standard deviation below the mean). Results suggest that, again, where one sets the cut-point

plays a critical role in differentiating response, resulting in varying estimates of the incidence of nonresponse to intervention. In conclusion, results from the above studies on characteristics of nonresponders and what method should be used to determine who is a nonresponder suggest that additional research is needed in this area.

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