

# **RTI and Special Education: Eligibility, Evaluation, and Other Issues**

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## **I. Introduction**

As the field of special education anticipates the next reauthorization of the Individuals with Disabilities Education Act (“IDEA”) and that of the No Child Left Behind Act (“NCLB”), serious questions regarding the codification of the “Response to Intervention,” or “RTI,” initiative remain unanswered. This presentation is not an effort to explain the purpose or the methodology of implementing an RTI initiative, neither of which this presenter would be qualified to deliver. Rather, the purpose of this presentation is to review the legal implications for the RTI mandate for public schools by concentrating on how the courts and the Office for Civil Rights (“OCR”) have handled legal challenges concerning the determination of eligibility for special education and the provision of educational programming for students with disabilities. In reviewing these decisions and policy statements, I hope to illustrate common themes that point the way to avoiding/surviving legal challenges to the implementation of RTI initiatives in public school districts.

## **II. RTI and the Interplay Between NCLB and IDEA**

### **A. What is “RTI?”**

The National Association of State Directors of Special Education (NASDSE) defines RTI as “the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals and applying child response data to important educational decisions.” Response to Intervention: Policy Considerations and Implementation, NASDSE, Inc., 2005. According to Helen Duffy of the American Institutes for Research®, “RTI involves a tiered approach to providing the most appropriate instruction, services and scientifically based interventions to struggling students – with increasing intensity at each tier (Cortiella,

2005). RTI is often used in conjunction with identifying students as having a specific learning disability. The RTI approach holds promise for supporting all struggling learners.... Those implementing RTI services typically employ a three-tiered approach:

1. The first level of intervention begins with evidence-based instruction, progress monitoring and support that are provided to all students. When students began to falter academically, they receive more specialized prevention or remediation within the general education setting.
2. In the second tier, students who have not been successful in tier one receives targeted interventions, and progress is monitored frequently to determine the intervention's effectiveness. If one intervention is not successful, another more intense intervention may be tried. At this stage, general education teachers typically receive support as needed from other educators in implementing interventions and monitoring student progress.
3. In the third tier, with parental consent, a comprehensive evaluation may be conducted by a team to determine eligibility for special education.

This multi-tiered approach is designed to deliver research-based instruction informed by data, including individualized instruction with remedial opportunities made available in the general education setting. The regular monitoring of the student's response to instruction is particularly important as a means to determine if a student should move from one stage of support to the next. Typically, those students at risk of not meeting end-of-year goals are identified for frequent progress monitoring and remedial instruction. If students in tier three make significant progress, they can move back to tier two and receive less intensive instructional interventions.” Meeting the Needs of Significantly Struggling Learners in High School: A Look At Approaches to Tiered Instruction, Helen Duffy, American Institutes for Research®.

The problem is not with the definition of RTI. Rather, the difficulty arises when a local school system seeks to select and implement a particular RTI model. RTI is not defined anywhere in the IDEIA or in NCLB. Neither does federal law or policy provide any guidance as to where to obtain reliable (i.e., legally defensible) information about the selection or implementation processes. State educational agencies are also largely silent on these issues, leaving local school districts alone to navigate this quagmire. Thus, the majority of local school districts in the United States have not implementing RTI in any large-scale way. Questions of funding, staffing, selection of a particular RTI model, and how to motivate staff remain huge stumbling blocks along the way to full implementation.

According to the National Research Center on Learning Disabilities (2005), there are eight “core features” of RTI:

1. High-quality classroom instruction;
2. Research-based instruction;
3. Monitoring of classroom performance
4. Universal screening;
5. Continuous progress monitoring;
6. Research-based interventions;

7. Progress monitoring during interventions;
8. Fidelity measures.

**B. What Does the IDEA Say About RTI?**

The IDEA does not mandate RTI per se for any student with disabilities. But, the NCLB's mandate for the provision of "scientifically designed instruction" and the theories behind "Response to Intervention" directly impact the IDEA via the "child find" requirements. Specifically, the IDEA forbids school districts from making students eligible for special education and related services if the actual cause of the student's academic problems is the lack of scientifically-based reading or math instruction.

**IDEA, 20 USC 1414(b)(5):**

**Special Rule for Eligibility**

"In making a determination of eligibility..., a child shall not be determined to be a child with a disability if the determinant factor for such determination is –

- (1) Lack of appropriate instruction in reading including in the essential components of reading instruction [as defined in NCLB];
- (2) Lack of instruction in math; or
- (3) Limited English proficiency."

**IDEA, 20 USC 1414(d)(1)(A)(i)(IV):**

IEPs must contain.....

"A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child...."

### **III. Judicial, Administrative, and Policy Decisions Affecting the Implementation of RTI<sup>1</sup>**

#### **A. Federal Policy Statements**

**Letter to Gorin, 48 IDELR 104 (OSEP 2006).** The executive director of the National Association of School Psychologists expressed concern that the IDEA regulations/LD eligibility provisions would result in the elimination of the role of school psychologists. The association was concerned about the official commentary to 34 C.F.R. 300.307(a)(1) which explains that the reduced need to psychologists to administer IQ testing would allow some school districts to reduce staff and defray the costs of assessments. OSEP acknowledged that the new regulations marked a shift, rather than the elimination, of the role of school psychologists in the future. "We do not construe the reference language as diminishing the vital role that school psychologists can play in the assessment of children suspected of having learning disabilities," Assistant Secretary John H. Hager wrote. "Rather, the referenced language was merely intended to address the specific impact of changes relating to testing on the use of school resources, especially in small districts that do not employ school psychologists."

**Letter to Zirkel, 48 IDELR 192 (OSEP 2007).** Responding to an inquiry from a professor in Pennsylvania, OSEP explained that state education agencies may give school districts the option of using RTI, discrepancy formulae, and/or a third research-based alternative to identify students with learning disabilities. States may not force school districts to utilize a discrepancy formula, however.

**Letter to Anonymous, 49 IDELR 106 (OSEP 2007).** Individual schools are not required to implement an RTI process until their entire school district has adopted and implemented RTI. However, individual schools may choose to implement RTI before the process is operational throughout their district and may use the data in making eligibility determinations. The USDOE recognized that full implementation of a district-wide RTI process can take time. "Research indicates that implementation of any process, across any system, is most effective when accomplished systematically, in an incremental matter, over time," Acting Director Patricia J. Guard wrote.

**Questions and Answers on RTI and Early Intervening Services, 47 IDELR 196 (OSERS 2007).** OSEP explained that RTI cannot substitute for a comprehensive special education evaluation, and that RTI data is just one facet of the information to be collected. Districts cannot use any single measure or assessment to identify students with learning disabilities. "However, an SEA could require that data from an RTI process be used in the identification of all children with SLD," OSERS wrote.

**Letter to Zirkel, 52 IDELR 77 (OSEP 2008).** School districts are not obligated to pay for independent educational evaluations (IEEs) for students who are participating in the RTI process. A district's evaluation must be completed before the parent's right to demand an IEE arises. This applies even where the parent disagrees with the implementation of RTI and obtains a private evaluator who determines that the child has a learning disability.

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<sup>1</sup> *Case summaries are reprinted with permission from the Individuals with Disabilities Education Law Report® (IDELR) and Special Ed Connection®, published by LRP Publications, Inc.*

**Letter to Combs, 52 IDELR 46 (OSEP 2008).** School districts cannot use the RTI process to delay or avoid conducting an expedited evaluation for a student who is about to be expelled. Pursuant to the IDEA, 34 C.F.R. 300.534(d)(2)(i), districts must conduct an “expedited evaluation” of a student who is suspected of having a disability and who needs special education and related services.

**Letter to Clarke, 51 IDELR 223 (OSEP 2008).** There is nothing in the IDEA requiring school districts to use speech/language pathologists as a part of an RTI model, OSEP told the director of the American Speech-Language-Hearing Association. The IDEA recognizes speech/language pathologists as one category of professionals who are qualified to evaluate students, but there is no statutory authority to require districts to obtain speech/language assessments as a part of the RTI process. The determination of what type of evaluations to conduct is subject to state law and the nature of the child’s suspected disability.

**Letter to Zirkel, 50 IDELR 49 (OSEP 2008).** OSEP tries again to explain the new Part B regulations on RTI, recognizing that the regulations have resulted in “substantial confusion.” According to OSEP, the IDEA does not require “continuous progress monitoring” as a part of RTI. The law does, however, require districts to consider data-based documentation of student progress at reasonable intervals. The LD eligibility criteria requiring a finding that a student “exhibits a pattern of strengths and weaknesses” does not apply to the RTI process, but to the process of identifying a child as having a learning disability.

**Letter to Brekken, 56 IDELR 80 (OSEP 2010).** School districts cannot require outside agencies such as Head Start to implement an RTI program prior to referring a child for an initial eligibility evaluation. There is no basis in the IDEA for a school district to delay an initial evaluation of a child who is transferring from an early childhood program just because the child has not been in an RTI program. “[I]t would be inconsistent with the evaluation provisions at 34 CFR 300.301 through 34 CFR 300.311 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a community-based early childhood program (e.g., Head Start) has not implemented an RTI process with a child and reported the results of that process to the LEA,” OSEP Acting Director Alexa Posny wrote. In such case, the district is required to initiate the evaluation process and comply with all required procedures and timelines.

**Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 2011).** The RTI process does not diminish or eliminate school districts’ obligations under the IDEA to conduct “child find” and to locate/identify/evaluate children who are suspected of having a disability. When a district has reason to suspect that a child may have a disability and is in need of special education and related services it must act in accordance with legal requirements for initiating a referral to special education. School districts cannot wait to consider the need for an initial evaluation just because a child is participating in an RTI program. “It would be inconsistent with the evaluation provisions at 34 CFR 300.301 through 34 CFR 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework,” OSEP Director Melody Musgrove wrote.

## **B. Office for Civil Rights (“OCR”) Letters of Finding**

**Stone Co. (MS) School District, 52 IDELR 51 (OCR 2008).** The parent of a sixth grade boy with ADHD alleged that a Mississippi school district violated Section 504 by failing to evaluate her son. The district based its decision not to evaluate the child on the fact that the child was participating in

RTI, his grades and behavior were improving, and he had done well on standardized testing. OCR found that the district had complied with Section 504 regulations and was not obligated to evaluate the child given its reasonable belief that he did not need special education and related services or accommodations per a 504 plan. The district's only violation was in failing to provide the parent with written notice of its decision not to evaluate the child.

**Polk Co. (FL) School District, 56 IDELR 179 (OCR 2010).** In September 2009 the parent of a third grade boy provided medical documentation that her son had been diagnosed with ADHD and requested an evaluation for special education. The school district informed the parent that it could not evaluate her son until he had completed an RTI process with interventions provided in the general education program. District policies indicated that completion of the RTI process was a prerequisite to special education eligibility. The student failed to make progress in the RTI program and, after a year, was finally evaluated and determined to be eligible for an IEP. OCR found the district in violation of Section 504 due to its delay in responding to the parent's request for an initial evaluation. According to OCR, the district had sufficient information in September 2009 to suspect that the child had a disability and needed special education and related services.

**Indian River (FL) Sch. Dist., 58 IDELR 52 (OCR 2011).** A Florida school district violated Section 504 when it waited four months to evaluate a child diagnosed with Tourette Syndrome. The boy had been evidencing behavior problems in his general education classroom prior to his diagnosis, including tapping his pencil, refusing to write, and vocal outbursts. The mother was told by administrators that the district could not consider 504 eligibility even with medical documentation until it had implemented the RTI process.

**Harrison (CO) Sch. Dist. Two, 57 IDELR 295 (OCR 2011).** A Colorado school district violated Section 504 by failing to evaluate a boy who was diagnosed with ADHD. The child's diagnosis was known to school officials, yet they refused to evaluate him for 504 eligibility despite increasing behavior and academic problems. OCR rejected the district's contention that it was implementing an RTI program as a justification for its failure to consider 504 eligibility. The child's behavior problems intensified during the implementation of RTI. Therefore, the district should have identified and evaluated the boy for possible 504 eligibility.

**Broward Co. (FL) Sch. Dist., 58 IDELR 202 (OCR 2012).** The school district violated Section 504 when it required a girl to participate in an RTI program twice prior to developing a 504 plan for her. The girl was identified as a "student with a disability" in elementary school after continuing to struggle academically despite participating in the RTI program. However, her mother refused to sign the proposed 504 plan and accommodations were never provided. After the girl matriculated to middle school her mother requested implementation of a 504 plan. The principal of the middle school informed the mother that the girl was required to participate in the school's RTI program prior to being considered for 504 eligibility. The girl's grades dropped during the provision of interventions.

**Cherokee Indep. Sch. Dist., 112 LRP 17582 (OCR 2012).** The Texas school district violated Section 504 and Title II of the ADA when it failed to conduct an eligibility evaluation for a seventh grade girl who had failed state testing for three consecutive years. The district refused to evaluate the girl after her mother asked for eligibility testing, suggesting that it implement RTI first. Even though the mother apparently consented to the RTI program, the district violated the law by failing to provide the parent with notice of her procedural safeguards and her right to challenge the district's actions through a due process hearing.

## **C. Judicial Decisions**

### **a. Reading Difficulties and Requests for Private Programming**

**Davidson v. Gibson County Special School District, 37 IDELR 279 (W.D. TN. 2002), affirmed (6<sup>th</sup> Cir. 2002).** The parent of a high school student with Tourette Syndrome and a learning disability alleged that her son had been denied FAPE and sought reimbursement for the costs of a Sylvan Learning Center tutoring program and a private Lindamood-Bell reading program. The court found that the parent's own expert testified that the Sylvan Learning Center program had not benefitted the student. Moreover, there was no evidence that the Lindamood-Bell methodology had produced any benefits for this student. The district had provided after-school tutoring for the student, he had made passing grades in all subjects, and his academic skills were commensurate with his intellectual abilities. The court denied the reimbursement request for both private programs.

**Robert B. v. West Chester Area School District, 44 IDELR 123 (E.D. Pa. 2003).** A Pennsylvania school district developed an appropriate IEP for a fifteen-year-old student with a learning disability and the student was making reasonable progress, held a federal court. The student's parents sought private school tuition reimbursement and alleged that their son's IEP was deficient because it did not contain a "research-based reading program." The court held that the IDEA does not require school districts to provide "research-based" programming, as mandated by the No Child Left Behind Act (NCLB). The boy's IEP contained measurable goals and provided for specially designed instruction to address his attentional deficits and other educational needs. The court noted that nothing in the IDEA mandated the provision of a particular educational methodology.

**Hood v. Encinitas Union School District, 47 IDELR 213 (9<sup>th</sup> Cir. 2007).** School districts have no obligation to provide special education and related services to students whose needs can be met in the general education classroom. In this case, a fifth-grade girl with a diagnosed learning disability was not eligible for special education because she was making adequate progress in the general education curriculum. Importantly, the court held that the Rowley standard of the "basic floor of opportunity" also applies to eligibility determinations. "Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate instruction in the general classroom -- and thus not entitled to special education services -- using the benefit standard," U.S. Circuit Judge Cornelia G. Kennedy wrote. The girl was capable of making passing grades in the general education classroom without special education and related services. Therefore, she was not eligible under the IDEA despite the fact that she had a diagnosed learning disability.

**Garcia v. Bd. Of Education of Albuquerque Public Schs, 46 IDELR 14 (D. N.M. 2006).** A New Mexico school district avoided a claim for reimbursement for a private Wilson reading program by showing that a seventeen-year-old girl's lack of motivation and poor attitude towards school was the primary cause of her academic failure. The evidence proved that the girl made progress when she attended school and failed when she became truant and disinterested in her education. There was also evidence that the girl's problems at home with her mother led to her truancy and poor attitude at school. There was no evidence that the district's reading program was inappropriate to meet the girl's educational needs.

**Powers v. Woodstock Board of Education, 50 IDELR 275 (D. Conn. 2008), affirmed, 55 IDELR 61 (2<sup>nd</sup> Cir. 2008).** The parents of an elementary school student alleged that the school district had failed to identify their son in a timely manner and sought private education services. The boy had received general education interventions and had made As, Bs, and Cs, on his report card. In addition, he performed “on goal” on statewide assessments without accommodations. The court held that the IDEA’s “child find” provisions require school districts to refer students for evaluation who are suspected of having a disability and being in need of special education and related services. Although this boy had some difficulties in learning, he was responding well to the interventions provided in the general education program. “This is decidedly not a case in which a school turned a blind eye to a child in need,” U.S. District Judge Mark. R. Kravitz wrote. “To the contrary, [the teacher] acted conscientiously, communicating regularly with [the mother] and utilizing special strategies to help [the student] succeed.” The fact that he was eventually identified in the sixth grade as having a “nonverbal learning disability” did not prove that the district erred in failing to refer him previously.

**El Paso Ind. School District v. Richard R., 50 IDELR 256 (W.D. Texas 2008), vacated in part and affirmed in part, 53 IDELR 275 (5<sup>th</sup> Cir. 2008).** The school district violated the IDEA by continuing to refer a struggling student to its STAT (Student-Teacher Assessment Team) for general education interventions rather than initiating a special education referral. The district provided additional tutoring and Saturday tutoring “camps” for three years, but the student continued to fail statewide assessments and to have serious academic difficulties. “Why [the district’s] STAT committee would have suggested these measures, knowing that [the student] had undertaken each of these steps in the past three years and that none had helped him achieve passing TAKS scores, simply baffles this court,” U.S. District Judge Kathleen Cardone wrote. The district had more than ample information to suspect that the boy had a disability and was in need of special education and related services, and should have initiated an initial evaluation. *Editor’s note: This decision was vacated in part and affirmed in part at 53 IDELR 175.*

**Draper v. Atlanta Indep. Sch. District, 49 IDELR 211 (11<sup>th</sup> Cir. 2008).** The Atlanta public school district was ordered to pay up to \$38,000 a year for a student’s private placement due to its use of an ineffective reading program. The student entered the school district as a seven-year-old who could not read and did not know the sounds of the alphabet. Four years later, he was evaluated and determined to be cognitively impaired, and was subsequently placed in a self-contained program. This self-contained program provided functional skills training that would not lead to a regular high school diploma. The student remained in the restrictive environment and was not reevaluated until he entered the ninth grade and was sixteen years old. The reevaluation revealed that this student was not cognitively impaired, but learning disabled with an IQ of 82. At this point, he was performing at a third grade level in reading and math, and a second grade level in spelling. The school district placed the teen in the general education program with special education instruction for 10.5 hours per week. His IEP also provided that the student would use the Lexia reading program, but this program was not provided until the second semester of his freshman year. The student was nineteen years old at the point he requested a due process hearing seeking private educational services to compensate him for the denial of appropriate educational services throughout his educational career. The court ordered the school district to pay for private schooling for the student, citing the district’s failure to provide the “basic floor of opportunity” required by the IDEA in failing to properly identify the student’s disability and its insistence on using a reading intervention that was inappropriate for the teen given his serious deficits.

**Fairfax County School Board v. Knight, 49 IDELR 122 (4<sup>th</sup> Cir. 2008).** The school district was not required to reimburse the parents of a teenager with dyslexia for her placement in a private Lindamood-Bell reading program. The district was using a different methodology that, although not preferred by the parents, was research-based and reasonably calculated to provide a “free appropriate public education” as required by the IDEA, held the court. The case turned on the persuasiveness of the

parties' expert witnesses. The court credited the testimony of the district's experts, who had extensive experience in the field of special education and advanced degrees in the field. The parents' experts, to contrast, had no college degrees in reading, education, or special education, but were trained to provide the Lindamood-Bell methodology.

**E.M. v. Pajaro Valley Unified School District, 53 IDELR 41 (N.D. Calif. 2009).** The fact that a student performed very well in class with the use of general education interventions supported a California district's determination that he did not have an SLD. Concluding that the student did not require special education, the District Court affirmed an administrative decision in the district's favor. As a preliminary matter, the court addressed the parents' claim that the district's psychologist failed to consider all evaluative data. The court recognized that the psychologist disregarded scores from one test that indicated a severe discrepancy between the student's ability and performance. However, the psychologist explained that the student's score on that test to be inflated. Because two other tests -- including one performed by the parents' evaluator -- yielded lower scores, the court found that the psychologist did not err in using those test results to determine the existence of a severe discrepancy. More importantly, the court observed, the student's performance showed that he did not require specialized instruction to receive an educational benefit. The court acknowledged the student's distractibility and failure to complete homework assignments, but noted that the student's performance improved when his teacher used interventions such as small group settings. "When viewed as a whole, the observational and anecdotal evidence describes a student who was distracted easily but who also responded to various forms of classroom intervention," U.S. District Judge Jeremy Fogel wrote. Finding that the student did not need specialized instruction, the court upheld the ALJ's eligibility determination.

**D.G. Cooperstown Central School District, 55 IDELR 155 (N.D.N.Y. 2010).** The parent of a child with learning disabilities in reading requested that the school district provide the Wilson Reading Program for her child. District officials agreed to implement the program and provide training for the student's special education teacher in the Wilson Reading Program. However, this training never occurred due to inclement weather. The District's IEP provided daily instruction in a reading class not to exceed fifteen students five days per week for forty minute sessions and resource room services in a "mixed setting" five days per week for forty minute sessions. Additional accommodations included preferential seating, a peer note taker, typed assignments, decreased length of academic tasks by thirty percent, and other modifications. The student made progress, but not enough to satisfy the parent. The parent also objected to the child's placement in a "mixed" resource classroom. The court noted that the district was providing a multisensory reading program, albeit not the one preferred by the parent. "While [the parent] may have preferred the district to employ the Wilson program, the district did not fail to provide [the student] a free appropriate public education by utilizing other proven methods," U.S. District Judge David N. Hurd wrote. The district offered FAPE, and the parent was not entitled to tuition reimbursement for private schooling.

**W.R. v. Union Beach Bd. Of Education, 56 IDELR 62 (3<sup>rd</sup> Cir. 2011).** The school district's promise that it would use "techniques from the Wilson Reading Program and other multisensory programs" was sufficient to appease the concerns of the parents of a fifth grade student with dyslexia. Even though the parents disagreed with the district's choice of methodology delivery, they had no legal right to compel the district to purchase and implement a different reading program.

**b. RTI Programs and Processes – Judicial Decisions**

**Citrus Co. (FL) School District, 54 IDELR 40 (SEA FL 2009).** A parent who filed her complaint for due process hearing on the same day she gave informed consent for an initial evaluation for special education “jumped the gun.” At the time, the first grade child was participating in the district’s RTI program. The child’s mother had obtained a private evaluation from an outside agency diagnosing the child with ADHD, ODD, and Bipolar Disorder and recommending a variety of academic and behavioral interventions. The court noted that Florida law provided 60 days for the district to complete an eligibility evaluation and required it to continue the RTI interventions pending completion of the evaluation. The district had not violated the IDEA by failing to evaluate the child earlier, due to his slow-but-steady progress in Tier 3 of the RTI process.

**Delaware College Preparatory Academy, 53 IDELR 135 (SEA DE 2009).** A charter school violated the “child find” obligations of the IDEA when it failed to refer a student for an initial evaluation. The student had to be removed from class and was suspended for violent outbursts on an almost weekly basis from the time of his enrollment. The court rejected the school’s defense that it was conducting RTI. The school produced no evidence of any written RTI plan or the implementation of interventions for the student in the general education classroom. The student had been diagnosed with ADHD and ODD before he enrolled in the charter school. The mental health diagnoses, together with the student’s extreme behaviors in the classroom, were sufficient to alert the school to the need to refer the student for a special education evaluation.

**Jackson v. Northwest Local School District, 55 IDELR 104 (S.D. Ohio 2010).** A third grade girl diagnosed with ADHD was provided with RTI-type interventions in the general education classroom for two years but continued to experience escalating academic and behavior problems. The district did not initiate a special education evaluation, instead expelling the girl for threatening behavior. The court ruled that the evidence clearly supported the need for a referral for an initial eligibility evaluation. The school district violated the child’s rights under the IDEA by failing to trigger an evaluation.

**Mrs. H. v. Montgomery Co. Board of Education, 56 IDELR 73 (M.D. Ala. 2011).** The parent of a high school girl diagnosed with heart and urinary conditions could not prove that her daughter’s habitual truancy and tardiness was caused by a disability under the IDEA. The court found that the girl’s poor attitude, lack of motivation, and her interest in outside activities (she was on the school’s volleyball team) contributed to her refusal to attend school and her academic failure. The mother testified that her daughter’s tardiness were excusable, stating that her daughter “might be a little late because she can walk a little slow.” The court upheld the district’s eligibility determination finding that the girl was not a “student with a disability” under the IDEA. In order to be eligible as Other Health Impaired, the student must have an impairment that adversely affects her educational performance. Here, the court found that factors other than the girl’s health conditions were responsible for her poor performance at school.

**M.B. v. South Orange/Maplewood Bd. Of Education, 55 IDELR 18 (D.N.J. 2010).** The school district’s reliance on a computer program’s estimate of a student’s discrepancy violated the IDEA. The district used the Estimator-NJ 3.0, a software program that applied a numerical formula to identify severe discrepancies by analyzing test scores and comparing the result to the state formula for determining LD eligibility. The student’s scores failed to support her continuing eligibility as “LD,” so the district de-certified her and discontinued special education and related services. The proof showed that the girl was struggling in reading and math despite the provision of special education and related services, and would probably fail without continued supports. The court found fault with the district’s use of the software program, equating its use to relying on a single assessment tool to determine eligibility. “While the

Court does not conclude ... that the computer program is not a tool at the disposal of a school district, the law is clear that determining whether a child is disabled under the IDEA must be based on more than a formula-driven numerical assessment," U.S. District Judge Stanley R. Chesler wrote in an unpublished decision.

**Daniel P. v. Downingtown Area Sch. Dist., 57 IDELR 224 (E.D. Pa. 2011).** The school district did not violate the "child find" requirements of the IDEA when it waited until the end of second grade to identify a student with academic difficulties. The boy struggled academically throughout the first grade and second grade, but was found ineligible due to his progress in the RTI program. The district reevaluated the child and found him in need of special education and related services near the end of second grade when his academic performance continued to decline and he began to develop anxiety. The court rejected the parents' claims for private school funding, finding that the district properly waited to identify the child so long as he was making progress in the RTI program.

**Michael P. v. Dep't. of Education, State of Hawaii, 57 IDELR 123 (9<sup>th</sup> Cir. 2011).** The State of Hawaii is prohibited from requiring the use of the discrepancy formula for determining LD eligibility. The IDEA permits states to adopt a discrepancy formula, but prohibits states from barring a local district's decision to implement an RTI program. States may not pass legislation effectively barring the use of RTI. In this case, the court reversed a district's court's ruling that an elementary student was ineligible for special education and related services based on the discrepancy formula.

**M.M. v. Lafayette Sch. Dist., 58 IDELR 132 (N.D. Cal. 2012).** The parents of an eleven-year-old boy with reading difficulties alleged that the school district violated the IDEA by failing to disclose RTI data to them and to consider RTI data in the determination of their son's eligibility status. The student was identified in kindergarten as being in need of interventions. He was provided Tier 1 and Tier 2 services during kindergarten and first grade. The child was subsequently referred for an initial evaluation and was determined to meet the eligibility criteria for an IEP. His parents filed a lawsuit seeking compensatory education and private services, alleging that the district's failure to disclose RTI data and to use that data as the basis for IEP development violated the IDEA. The court held that the IDEA does not require school districts to use RTI data in eligibility determinations. This school district was using a discrepancy formula to determine LD eligibility, which was permissible under federal and State law. Therefore, the IDEA does not obligate the district to share the RTI data with parents unless it has chosen to use the RTI model for eligibility determinations. The court further held that the IDEA does not incorporate NCLB standards.

**c. RTI Programs and Processes – Due Process Hearings**

**Joshua Ind. School District, 56 IDELR 88 (SEA Texas 2010).** A student's progress in RTI programs justified the school district's determination that the child was not eligible for special education and related services under the IDEA as a student with a learning disability. The IHO found that the district was not obligated to evaluate the student for IDEA eligibility as long as she was making reasonable progress in the RTI program.

**Meridian School District 223, 56 IDELR 30 (SEA Ill. 2010).** An Illinois school district failed to evaluate a student with a hearing impairment despite his mother's repeated requests for an IDEA or Section 504 evaluation. Instead, the district provided RTI interventions providing accommodations and assistance with comprehension, attentional issues, and task completion. When the student's grades

declined his parent initiated a due process hearing. The IHO faulted the district for failing to react appropriately in the face of audiological assessment indicating that the hearing impairment was adversely affecting the student's academic performance. "[C]ourts have held that a district has failed its child find duty when it ignored clear signs that a student has a disability and ... might need special education," the IHO wrote. "If the district had put two and two together, it would have found good reason to evaluate the student and find him eligible." The IHO noted that the IDEA permits an RTI program for students whose academic decline is due to a lack of scientifically-based instruction in reading and/or math. However, in this case the student's problems were due to his hearing impairment and should have been apparent to the district.

**Austin Ind. School District, 110 LRP 49317 (SEA TX 2010).** A Texas school district violated the IDEA when it failed to respond to a grandmother's request for "testing" by initiating an IDEA eligibility evaluation for a student with ADHD and dyslexia. Instead, the district provided RTI interventions for the student in accordance with district policy requiring RTI services as a prerequisite to IDEA evaluation. The district asserted that, even if it did not respond to the guardian's request for testing, it had provided appropriate services and interventions to the student through the RTI process. "I find these arguments do not overcome the fact that the [student's] grandmother made a parental request for testing for the student," the IHO wrote. The RTI process did not negate the grandmother's right to request an evaluation. Despite this, the IHO held that the district's violation was harmless because the student did make progress in the RTI program.