

Questions and Answers On Response to Intervention (RTI) and Early Intervening Services (EIS)

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The final regulations for the reauthorized Individuals with Disabilities Education Act (IDEA) were published in the Federal Register on August 14, 2006, and became effective on October 13, 2006. Since publication of the final regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education has received requests for clarification of some of these regulations. This is one in a series of question and answer documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Generally, the questions, and corresponding answers, presented in this Q&A document required interpretation of IDEA and the regulations and the answers are not simply a restatement of the statutory or regulatory requirements. The responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented and are not legally binding. The Q&As are not intended to be a replacement for careful study of IDEA and the regulations. The statute, regulations, and other important documents related to IDEA and the regulations are found at <http://idea.ed.gov>.

The final regulations incorporate new requirements regarding identifying children with specific learning disabilities (SLD) and early intervening services (EIS). With regard to identifying children with SLD, the regulations: (1) allow a local educational agency (LEA) to consider a child's response to scientific, research-based intervention as part of the SLD determination process; (2) allow States to use other alternative research-based procedures for determining whether a child has a SLD; (3) provide that States may not require the use of a severe discrepancy between intellectual ability and achievement to determine whether a child has a SLD; and (4) require a public agency to use the State criteria in determining whether a child has a SLD and discuss the role that response to scientific research-based interventions plays in a comprehensive evaluation process.

The regulations regarding EIS permit an LEA to use not more than 15% of its IDEA Part B funds to develop and implement EIS. The regulations also indicate how EIS funds can be expended; on whom the EIS funds can be spent; the reporting requirements for EIS; special provisions regarding disproportionality based on race and ethnicity and how that affects an LEA's use of EIS funds; and the relationship of EIS to maintenance of effort. The purpose of the questions and answers that follow is to provide additional guidance to States and LEAs in complying with the requirements regarding EIS and response to scientific research-based interventions to identify students with a SLD.

Authority: The requirements for using a process based on a child's response to scientific, research-based intervention when determining that the child is a child with a specific learning disability are found in the regulations at 34 CFR §§300.307, 300.309 and 300.311.

The requirements for early intervening services are found in the regulations at 34 CFR §§300.205(d), 300.208(a)(2), 300.226 and 300.646(b)(2).

A. General Education vs. Special Education

Question A-1: Please clarify how a child with a disability who is already receiving special education and related services also would be eligible to receive services using response to intervention (RTI) strategies.

Answer: Response to intervention (RTI) strategies are tools that enable educators to target instructional interventions to children's areas of specific need as soon as those needs become apparent. There is nothing in IDEA that prohibits children with disabilities who are receiving special education and related services under IDEA from receiving instruction using RTI strategies unless the use of such strategies is inconsistent with their individualized education programs (IEPs). Additionally, under IDEA, a public agency may use data gathered through RTI strategies in its evaluations and reevaluations of children with SLD. However, children with disabilities who are currently identified as needing special education and related services may not receive RTI services that are funded with IDEA funds used for EIS pursuant to 34 CFR §300.226. This is because EIS is "... for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment."

Question A-2: Why was RTI included in IDEA?

Answer: The reports of both the House and Senate Committees accompanying the IDEA reauthorization bills reflect the Committees' concerns with models of identification of SLD that use IQ tests, and their recognition that a growing body of scientific research supports methods, such as RTI, that more accurately distinguish between children who truly have SLD from those whose learning difficulties could be resolved with more specific, scientifically based, general education interventions. Similarly, the President's Commission on Excellence in Special Education

recommended that the identification process for SLD incorporate an RTI approach.

B. Funding

Question B-1: Is the use of funds for EIS required or permitted?

Answer: Generally, the use of funds an LEA receives under Part B of the Act for EIS is discretionary on the part of the LEA, except when an LEA has significant disproportionality based on race and ethnicity. Under 34 CFR §300.226, an LEA may not use more than 15% of the amount the LEA receives under Part B of the Act for any fiscal year, less any amount reduced by the LEA pursuant to 34 CFR §300.205, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated EIS. If a State identifies an LEA as having significant disproportionality based on race and ethnicity with respect to the identification of children with disabilities, the placement of children with disabilities in particular educational settings, or the incidence, duration, and type of disciplinary actions taken against children with disabilities, including suspensions and expulsions, the SEA must require the LEA to reserve the maximum amount of funds available to the LEA to provide EIS to children in the LEA, particularly, but not exclusively, to children in those groups that were significantly overidentified.

Question B-2: What does it mean to “reserve” funds for EIS?

Answer: The Department interprets “reserve” to mean that these funds can only be spent on EIS. The statute does not authorize LEAs to use the funds they must “reserve” for EIS for any other purpose.

Question B-3: Must the maximum amount of special education funds allowed for EIS be reserved only if significant disproportionality is the result of inappropriate identification?

Answer: No. The reservation of funds must occur whether or not the significant disproportionality was the result of inappropriate identification. In addition to identification, funds also would have to be reserved if significant disproportionality was found with respect to discipline or placement in particular educational settings.

Question B-4: If a State has identified significant disproportionality in an LEA can the IDEA funds the LEA must use to address the issue be used to provide services to students who have already been found eligible for special

education and related services?

Answer: No. Section 300.226(a) states that EIS is “... for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.”

Question B-5: What is the relationship between EIS funds and maintenance of effort (MOE) funds?

Answer: LEAs that seek to reduce their local maintenance of effort in accordance with 34 CFR §300.205(d) and use some of their Part B funds for early intervening services under 34 CFR §300.226 must do so with caution because the local maintenance of effort reduction provision and the authority to use Part B funds for early intervening services are interconnected. The decisions that an LEA makes about the amount of funds it uses for one purpose affect the amount that it may use for the other. Appendix D of the Part B regulations [71 FR 46817] provides examples of how 34 CFR §300.205(d), regarding local maintenance of effort, and 34 CFR §300.226(a), regarding EIS funds, affect one another.

C. Evaluation and Eligibility Determinations

Question C-1: Must an LEA evaluate a child upon the request of the parent at any time during the RTI process? May a parent request an initial special education evaluation at any time during the RTI process?

Answer: If the LEA agrees with the parent that the child may be a child who is eligible for special education services, the LEA must evaluate the child. The Federal regulations at 34 CFR §300.301(b) allow a parent to request an evaluation at any time. If an LEA declines the parent's request for an evaluation, the LEA must issue a prior written notice as required under 34 CFR §300.503(a)(2) which states, "written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." The parent can challenge this decision by requesting a due process hearing to resolve the dispute regarding the child's need for an evaluation.

Question C-2: May an LEA require that all children suspected of having a SLD first be assessed using an RTI process before an eligibility determination may be made?

Answer: If an LEA is using RTI for all its students, it may require the group established under 34 CFR §300.306(a)(1) and 34 CFR §300.308 for the purpose of determining the eligibility (eligibility group) of students suspected of having a SLD to review data from an RTI process in making an eligibility determination. Models based on RTI typically evaluate the child's response to instruction prior to the beginning of the evaluation time period described in 34 CFR §300.301(c)(1), and generally do not require as long a time to complete an evaluation because of the amount of information already collected on the child's achievement, including observation data. If the eligibility group determines that additional data are needed and cannot be obtained within the evaluation time period described in 34 CFR §300.301(c)(1), the parent and eligibility group can agree to an extension of the timeframe. However, as explained in Question C-1, parents can request an evaluation at any time, and the public agency must either obtain consent to evaluate and begin the evaluation, or, if the public agency declines the parent's request, issue a prior written notice as required by 34 CFR §300.503(a)(2).

Question C-3: Section 300.309(a)(2)(i) states that the eligibility group may determine

that a child has a specific learning disability if “the child does not make sufficient progress to meet age or State-approved grade-level standards in one or more” identified areas. Section 300.309(a)(2)(ii) states that the group may determine that a child has a specific learning disability if “the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards, or intellectual development” that the group determines is relevant to making an eligibility determination. Please explain how these two criteria differ from one another.

Answer: Section 300.309(a)(2)(i) reflects the use of the criterion that the child has not made sufficient progress in at least one of the following areas when using response to intervention as an aspect of the SLD identification process: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, and mathematics problem solving. Alternatively, based on 34 CFR §300.309(a)(2)(ii), the group could consider variation in a child's performance, achievement, or both relative to age, State-approved grade-level standards, or intellectual development that is determined by the eligibility group to be relevant to identification of a SLD using appropriate assessments. Under this criterion, a pattern of strengths and weaknesses in performance, achievement, or both relative to age, State-approved grade-level standards or intellectual development would be part of the evidence that a child has a learning disability.

Question C-4: The regulations require an SEA to adopt criteria for determining if a child has a specific learning disability (34 CFR §300.307(a)). Does this preclude the SEA from mandating RTI as the sole criterion used to determine if a child has a specific learning disability? Must an LEA follow the State-developed criteria for determining if a child has a specific learning disability?

Answer: An SEA must include a variety of assessment tools and may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability, as required under 34 CFR §300.304(b). However, an SEA could require that data from an RTI process be used in the identification of all children with SLD.

An LEA must comply with the criteria adopted by their SEA regarding this requirement. The requirements at 34 CFR §300.307(a) require that a State adopt criteria for determining whether a child has a specific learning disability. The *Analysis of Comments and Changes* accompanying the final Part B regulations, page 46649, clarifies, “... the Department believes that eligibility criteria must be consistent across a State to avoid

confusion among parents and school district personnel. The Department also believes that requiring LEAs to use State criteria for identifying children with disabilities is consistent with the State's responsibility under section 612(a)(3) of the Act to locate, identify, and evaluate all eligible children with disabilities in the State.”

Question C-5: When implementing an evaluation process based on a child’s response to scientific, research-based intervention, the regulations require that a “public agency must promptly request parental consent to evaluate a child (34 CFR §300.309(c))” if the “child has not made adequate progress after an appropriate period of time (34 CFR §300.309(c)(1)).” Please define “promptly” and “adequate” in this context.

Answer: The Federal regulations under 34 CFR §300.309(c) require that if a child has not made adequate progress after an appropriate period of time, a referral for an evaluation must be made. However, the regulations do not specify a timeline for using RTI or define “adequate progress.” As required in 34 CFR §300.301(c), an initial evaluation must be conducted within 60 days of receiving consent for an evaluation (or if the State establishes a timeframe within which the evaluation must be completed, within that timeframe). Models based on RTI typically evaluate a child's response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child's achievement, including observation data. A State may choose to establish a specific timeline that would require an LEA to seek parental consent for an evaluation if a student has not made progress that the district deemed adequate.

We do not believe it is necessary to define the phrase “promptly” because the meaning will vary depending on the specific circumstances in each case. There may be legitimate reasons for varying timeframes for seeking parental consent to conduct an evaluation. However, the child find requirements in 34 CFR §300.111 and section 612(a)(3)(A) of the Act require that all children with disabilities in the State who are in need of special education and related services be identified, located, and evaluated. Therefore, it generally would not be acceptable for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability. If it is determined through the monitoring efforts of the Department or a State that there is a pattern or practice within a particular State or LEA of not conducting evaluations and making eligibility determinations in a timely manner, this could raise questions as to whether the State or LEA is in compliance with the Act.

Question C-6: May an eligibility determination be made using only information that was collected through an RTI process?

Answer: Section 300.304 (b) states that in conducting an evaluation, a public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining eligibility and not use any single measure or assessment 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.

The Department provided additional clarification regarding this issue in the *Analysis of Comments and Changes* section of the regulations, page 46648. This section states, “an RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required under 34 CFR §§300.304 and 300.305. As required in 34 CFR §300.304(b), consistent with section 614(b)(2) of the Act, an evaluation must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services.”

D. 3-5 Year Olds

Question D-1: Why don't early intervening services apply to 3-5 year olds?

Answer: Section 300.226(a) tracks the statutory language in section 613(f)(1) of the Act, which states that early intervening services are for children in kindergarten through grade 12, with a particular emphasis on children in kindergarten through grade 3. Thus, LEAs may not use Part B funds to provide EIS to non-disabled preschool children.

E. Service Delivery Models

Question E-1: Is the use of RTI required or just permitted?

Answer: Section 300.307(a)(2)-(3) requires that a State's criteria for identification of specific learning disabilities:

- Must permit the use of a process based on the child's response to scientific, research-based intervention; and
- May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability.

Section 300.307(b) states that a public agency must use the State's criteria in identifying children with specific learning disabilities. Thus, the State's criteria must permit the use of RTI and may require its use, in addition to other assessment tools and strategies, for determining whether the child has a specific learning disability.

Question E-2: Does each LEA have to select either RTI or a discrepancy model to determine if a child is a child with a specific learning disability?

Answer: No. The State agency must adopt criteria regarding the determination of SLD eligibility.

An SEA must include a variety of assessment tools and may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability, as required under 34 CFR §300.304(b). An LEA must comply with the criteria adopted by its SEA. Section 300.307(a) requires a State to adopt criteria for determining whether a child has a specific learning disability.

The *Analysis of Comments and Changes* section accompanying the Federal regulations, page 46649, clarifies, "... the Department believes that eligibility criteria must be consistent across a State to avoid confusion among parents and school district personnel. The Department also believes that requiring LEAs to use State criteria for identifying children with disabilities is consistent with the State's responsibility under section 612(a)(3) of the Act to locate, identify, and evaluate all eligible children with disabilities in the State. We believe this provides the Department with the authority to require a public agency to use its State's criteria in determining whether a child has an SLD, consistent with §§300.307 through 300.311."

Question E-3: What services can be defined as early intervening services? For example, are physical therapy, occupational therapy, and assistive technology considered early intervening services?

Answer: State and local officials are in the best position to make decisions regarding the provision of early intervening services, including the specific personnel to provide the services and the instructional materials and approaches to be used. Nothing in the Act or regulations prevents States and LEAs from including related services personnel in the development and delivery of educational and behavioral evaluations, services, and supports for teachers and other school staff to enable them to deliver coordinated, early intervening services.

F. General

Question F-1: Please define “significant disproportionality” in the context of EIS.

Answer: Each State has the discretion to define the term “significant disproportionality,” in the context of EIS, for the LEAs and for the State in general. In identifying significant disproportionality, a State may determine how much disproportionality is significant. However, the State’s definition of “significant” must be based only on a numerical analysis, and may not consider factors such as the extent to which an LEA’s policies and procedures comply with the IDEA or the compliance history of an LEA. Establishing a national standard for significant disproportionality is not appropriate because there are multiple factors at the State level to consider in making such determinations. For example, States need to consider the population size, the size of individual LEAs, and composition of the State’s population. States are in the best position to evaluate those factors. The Department has provided guidance to States on methods for assessing disproportionality. This guidance is found at: <http://www.ideadata.org/docs/Disproportionality%20Technical%20Assistance%20Guide.pdf>.

Question F-2: Will early intervening services data be reported in State Performance Plans (SPP) or Annual Performance Reports (APRs)?

Answer: No. Section 300.226 directs LEAs to report EIS data to their SEA. It is not a part of the information that an SEA must report to the Department in its SPP or APRs.

Question F-3: For discipline purposes, would a student’s participation in an RTI process be considered a “basis of knowledge” under 34 CFR §300.534(b)?

Answer: Generally, no. Participation in an RTI process, in and of itself, would not appear to meet the “basis of knowledge” standards in 34 CFR §300.534. The standards for whether a public agency has a “basis of knowledge” are laid out in the Federal regulations at 34 CFR §300.534.

Question F-4: When an RTI model is implemented, can an incremental process be used to train individual schools so that over time the entire LEA is implementing the model or must all the schools in the entire LEA be trained simultaneously?

Answer: If the State or LEA requires the use of a process based on the child's response to scientific, research-based intervention, in identifying children with SLD, then all children suspected of having a SLD, in all schools in the LEA, would be required to be involved in the process. However, research indicates that implementation of any process, across any system, is most effective when accomplished systematically in an incremental manner over time. If the LEA chose to “scale up” the implementation of the RTI model gradually over time, as would be reasonable, the LEA could not use RTI for purposes of identifying children with SLD until RTI was fully implemented in the LEA. Therefore, it is unwise for a State to require the use of a process based on the child's response to scientific, research-based intervention before it has successfully scaled up implementation.

Question F-5: How might EIS funds be used to support a process determining whether a child has a specific learning disability and to address the needs of students who need additional academic and behavioral support to succeed in a general education environment?

Answer: If EIS funds are used to support a process to determine whether a child has a specific learning disability there are three interacting identification/instructional dynamics that need to be considered: (1) identification of learning disabilities; (2) early intervening services; and (3) response to intervention (RTI). While the Department does not subscribe to a particular RTI model, the core characteristics that underpin all RTI models are: (1) students receive high quality research-based instruction in their general education setting; (2) continuous monitoring of student performance; (3) all students are screened for academic and behavioral problems; and (4) multiple levels (tiers) of instruction that are progressively more intense, based on the student's response to instruction.

For example, an RTI model with a three-tier continuum of school-wide support might include the following tiers and levels of support: (1) Tier one (Primary Intervention), for all students using high quality scientific research-based instruction in their general education setting. It would not be appropriate to use EIS funds for these activities since these students do not need additional academic and behavioral support to succeed in a general education environment. (2) Tier two (Secondary Intervention), for specialized small group instruction of students determined to be at risk for academic and behavioral problems. It would be appropriate to use EIS funds to support these activities. (3) Tier three (Tertiary Intervention) for specialized individualized instructional/behavioral support for students with intensive needs. EIS funds could not be used if these students were currently receiving special education or related services.

Question F-6: Should services supported with EIS funds be scientifically based?

Answer: The No Child Left Behind Act and IDEA call on educational practitioners to use scientifically based research to guide their decisions about which interventions to implement. IDEA states that in implementing coordinated early intervening services an LEA may carry out activities that include--

- (1) Professional development (which may be provided by entities other than LEAs) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and
- (2) Educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.