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

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Dear Dr. Zirkel:

This is in response to your electronic mail (email) communication to me dated October 3, 2010 in which you pose two questions. Your questions and the response of the Office of Special Education Programs (OSEP) are below.

1. How may a district, which has adopted RTI [response to intervention] for specific learning disability (SLD) identification, meet its "child find" obligations under the IDEA [Individuals with Disabilities Education Act] where state law does not include provisions specific to these two situations for parentally placed students in private schools: (a) the district where the private school is located has adopted RTI as its identification model for SLD and the private school personnel have suggested to the district's representatives that the student warrants evaluation under the district's child find process; and (b) the district where the child is a resident has adopted RTI as its identification model for SLD and the student's parents have requested an evaluation for SLD eligibility and there is reason to suspect that they may be correct?

OSEP's Response:

In the two situations described in your question, the district is responsible for meeting its child find obligations under IDEA even if the private school has not implemented an RTI process. See 34 CFR §§300.111 and 300.131. In the case of a child enrolled by his or her parent in a private school, the purpose of the evaluation may be for providing equitable services or making a free appropriate public education (FAPE) available, depending in part on whether the referral is received by the local educational agency (LEA) in which the private school is located, or the LEA where the parents reside (see Letter to Eig dated January 28, 2009 on the OSEP Web site: http://www2.ed.gov/policy/speced/guid/idea/index.html).

When an LEA receives a referral, the LEA must initiate the evaluation process to determine if the child is a child with a disability. 34 CFR §300.301(b). The IDEA and its implementing regulations at 34 CFR §§300.301 through 300.311 delineate the requirements that LEAs must use to conduct an initial evaluation to determine if a child qualifies as a child with a disability under Part B; these requirements do not apply to private schools. Even if an LEA uses RTI to evaluate a child suspected of having an SLD, IDEA does not require an LEA to use RTI for a parentally placed private school child within its jurisdiction. It would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 300.311 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a private school has not implemented an RTI process with a child and reported the results of that process to the LEA.

If the LEA proposes to conduct an initial evaluation to determine if the child qualifies as a child with a disability under 34 CFR §300.8, the LEA must provide notice under 34 CFR §§300.503 and 300.504 and obtain informed parental consent, consistent with 34 CFR §300.9, before conducting the evaluation. Regardless of whether an RTI model is used, an LEA must conduct the initial evaluation within 60 days of receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. 34 CFR §300.301(c). For a child suspected of having an SLD, the timeline may be extended by mutual written agreement of the parent and the group of qualified professionals responsible for making the eligibility determination. 34 CFR §300.309(c). If, however, the LEA does not suspect that the child has a disability, and denies the request for an initial evaluation, the LEA must provide written notice to parents explaining why the public agency refuses to conduct an initial evaluation and the information that was used as the basis for this decision. 34 CFR §300.503(a) and (b).

As noted in our letter to you dated December 11, 2008, OSEP indicated that "it is important to remember that the data from an RTI process can be considered as one component of a full and individual evaluation, consistent with 34 CFR §§300.304 through 300.311, using a variety of assessment tools and strategies in determining whether the child is a child with a disability under 34 CFR §300.8 and the content of the child's IEP [individualized education program]. 34 CFR §300.304(b)(1). The public agency may not use any single measure or assessment, including RTI, as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR §300.304(b)(2)." If an RTI process is not used in a private school, the group making the eligibility determination for a private school child may need to rely on other information, such as any assessment data collected by the private school that would permit a determination of how well a child responds to appropriate instruction, or identify what additional data are needed to determine whether the child has a disability, including whether a particular child has an SLD. (See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46647-46648 (August 14, 2006)).

2. Does the requirement for documentation of the child's "behavior" (in addition to the child's "academic performance") in the regulatory requirement for observation for SLD identification (§300.310(a)) mean that the RTI process, where districts have adopted it, must: (a) be based on behavior in addition to academic performance for SLD identification; and (b) extend to other classifications that are more closely connected to behavior, such as emotional disturbance?

OSEP's Response: The regulation at 34 CFR §300.307 requires that a State, within its adopted criteria for determining whether a child has an SLD, must permit the use of a process based on the child's response to scientific, research-based intervention. However, the IDEA statute and regulations do not prescribe any particular model of RTI nor define how an LEA should implement any particular process. The requirement for observation that you reference at 34 CFR §300.310(a) is not intended to describe an RTI model and is a separate requirement that must be met in the identification of a child with an SLD. Of course, observation can be part of RTI and may – or may not – include behavioral observation. If it does not include observations of a child's behavior in areas related to the child's academic difficulty, that observation could be done separately, while the child is working within an RTI model or in other learning environments during the child's school day. RTI, as stated above, is only one component of a

full and individual evaluation. Observation, in the identification of a child with an SLD, is another component of that evaluation.

The regulation at 34 CFR §300.307(a)(2) requires that States permit the use of a process based on a child's response to scientific, research-based intervention, as part of an evaluation only for children suspected of having an SLD. The IDEA statute and regulations do not preclude or prohibit an LEA from using data gathered through an RTI process or model in the identification of other disabilities. The evaluation requirements at 34 CFR §300.305 describe the review of existing evaluation data and a review of information gathered through an RTI process would be part of that data if the child being evaluated had participated in an RTI process or model. As stated above, there is no particular requirement in the IDEA statute or regulations that describe or prescribe a particular process or model of RTI; therefore, it would be inappropriate to assume either that an adopted RTI process must be based on behavior and/or that this process extends to other classifications more closely connected to behavior. If behavioral observation and data collection on behavior are part of an LEA's RTI model, then that data should be reviewed as part of any full and individual evaluation for any student that has participated in the model, regardless of the suspected disability, pursuant to 34 CFR §300.305. Additionally, and when necessary, separately, an LEA must ensure that it meets all the requirements of 34 CFR §§300.307 through 300.311 when identifying a child with an SLD.

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

If you have any questions, please do not hesitate to contact Dr. Deborah Morrow at 202-245-7456 or by email at Deborah.Morrow@ed.gov.

Sincerely,

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs