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How to Reconcile Requests for Special Education Evaluations With RTI

By Daniel A. Osher

When a child's parents request a special education evaluation, the school generally must promptly evaluate the student. However, many schools implement response to intervention (RTI) to provide students with regular education interventions prior to evaluating the student for special education eligibility. School psychologists may find themselves in situations where parents have requested a special education evaluation, but the school has not yet provided interventions through its RTI process. These situations are fraught with legal risks, but can be navigated to simultaneously meet the student's needs, parents' concerns, and legal requirements.

The federal Office of Special Education Programs (OSEP) has repeatedly stated that special education evaluations may *not* be delayed on the grounds that RTI has not yet been attempted (OSEP, 2011, 2016). While OSEP opinions are not technically legally binding, they do express the United States Department

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of Education's interpretation of the law, and are routinely accorded weight by compliance monitoring officials, judges, and due process hearing officers. OSEP (2011, p. 1) stated:

> [I]t is critical that this identification [of special education eligibility] occur in a timely manner and that no procedures or practices result in delaying or denying this identification.... States and [local educational agencies] have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy.

Consistent with OSEP's interpretation, state due process decisions and federal Office for Civil Rights investigations have found school districts in violation of their special education and Section 504 child find obligations for delaying evaluation while RTI was pending (see e.g., *Acalanes Union High School District, 2009; Sacramento City School District,* 2012).

Thus, when parents request an evaluation, the school must take action, regardless of the status of RTI. However, when faced with a parent's request for evaluation prior to completion of RTI, school psychologists have several options, including:

- Request that the parents withdraw their request for evaluation pending evaluation,
- Conduct the evaluation, and integrate RTI into the evaluation,
- Conduct the evaluation independent of RTI, or
- Decline to evaluate the student (risky!).

Each of these options is discussed below.

ASK PARENTS TO WITHDRAW REQUEST FOR EVALUATION

While school personnel absolutely cannot *require* parents to withdraw a request for evaluation, we may *request* that they do so. Such a request must be made in a way that is respectful to the parents and compliant with the law. In particular, the parents must have been fully informed of all relevant information, and their consent to withdraw the request must be voluntary and in writing (34 C.F.R. § 300.9).

To ensure sufficiently informed consent, school psychologists should meet with the parents, discuss the parents' reasons for requesting the evaluation, and address any concerns with RTI. The psychologist should explain in detail the timelines for the RTI process, the decisions that will be made at various steps in the process, and the notification that parents will receive. Parents should be given a copy of their special education procedural rights and safeguards at this meeting, the rights should be explained to ensure understanding, and parents should have the opportunity to ask any questions about those rights. The school psychologist should emphasize that the choice belongs to the parents, and that if they wish the evaluation to proceed immediately, the school will honor that decision or formally decline to evaluate with appropriate prior written notice. If the parent agrees to withdraw the request, we strongly encourage the school to obtain the withdrawal in writing—in one recent case, a district argued that the parent had orally agreed to withdraw the request, but was unable to prove it when the parents denied ever giving consent (*Sacramento City School District*, 2012).

The advantages of delaying the evaluation with proper parent consent are that the school may be able to avoid the time and expense of evaluating the student if the planned intervention is successful, and will be able to use data from RTI in an evaluation if such evaluation is ultimately needed. In addition, the student would receive assistance in a more timely manner. The disadvantage is that, if the student ultimately qualifies for special education, postponing the evaluation could delay the provision of needed special education services.

CONDUCT THE EVALUATION AND INTEGRATE RTI

If the parent does not agree to postpone the evaluation to allow RTI to run its course, the school could still incorporate the planned processes—albeit on an abbreviated timeline—into the evaluation. Indeed, some states or school districts may *require* schools to consider the effectiveness of RTI when determining eligibility for specific learning disability (SLD; 34 C.F.R. § 300.307(a)(2)). Using RTI as part of the evaluation can provide richer detail and insight into a student's unique needs and abilities as they relate to the educational setting. In particular, it can provide data about how a student responds to various types of intervention, informing future intervention planning. The primary disadvantage of this approach is that, because evaluation timelines are short, interventions would need to begin at the very start of the assessment process to provide meaningful data by the time the evaluation is due. The evaluation team would need to employ excellent time management and organization to ensure that RTI can properly be implemented during the evaluation timeline.

CONDUCT THE EVALUATION INDEPENDENT OF RTI

If the school does not ask the parents to postpone the evaluation, or if the parent does not consent, then the school must complete the evaluation within the legal timeline. If the state's SLD eligibility criteria do not require the use of RTI, or if the student is being evaluated for a disability other than SLD, then the school can evaluate the student without giving further consideration of RTI. The advantage of this approach is that it may be faster and easier than an evaluation that integrates RTI data. However, such an evaluation may not provide as complete a portrait of the student's unique needs as could be obtained by including RTI.

DECLINE TO EVALUATE

Finally, a school may decline the parent's request to evaluate the student if they believe that the child is not at risk for having a disability. This approach carries substantial legal risks, and I recommend consulting with district administration or legal counsel before refusing a parent's request for an evaluation. School districts have a "child find" obligation to identify and evaluate all students who need special education (34 C.F.R. § 300.111(c)(1)). Accordingly, when a school has reason to suspect that a child has a qualifying disability, it is required to evaluate that student (e.g., *Dept. of Educ., State of Hawaii v. Cari Rae S.*, 2001). This is an easy standard to meet, and a parental request for evaluation often contains enough information to give rise to a suspicion that a child has a qualifying disability. If the school refuses to evaluate despite this information, it has violated the child find requirement. Additionally, if the district declines to evaluate, the parents could obtain a private evaluation which could find that the child meets eligibility requirements. The parents could use that evaluation in legal action against the district, seeking reimbursement for the cost of the private evaluation, compensatory services, and attorney fees. The greatest challenge in defending these cases is that, while parents have a detailed evaluation establishing the student's eligibility, the school district has no evaluation of its own, because it declined to conduct one.

Consistent with OSEP's interpretation, state due process decisions and federal Office for Civil Rights investigations have found school districts in violation of their special education and Section 504 child find obligations for delaying evaluation while RTI was pending.

If the school is certain that the child does not have a disability, it can choose to decline to evaluate the student even upon parent request. This has the advantage of saving the time and effort of conducting a needless evaluation. However, this approach is also likely to damage the relationship between the school and parent, and could subject the school to legal liability as discussed above. If the school takes this course of action, it must provide a detailed prior written notice to the parents, explaining, among other things, the factual basis for the school's decision (34 C.F.R. § 300.503). The school should also give the parents a copy of the notice of procedural rights and safeguards at this time.

CONCLUSION

The laws governing RTI and initial evaluation do not appear to have been carefully designed to work together. This leads to tricky situations for school districts, and especially school psychologists. However, by working with parents and analyzing the specific facts of the situations, school psychologists can manage RTI and evaluations consistent with the law and respectful of the parents' needs and wishes. ■

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