

# Specific Learning Disability Guidance Document

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*The following is non-regulatory guidance designed to work in conjunction with the procedural safeguard protections for students with disabilities under the Individuals with Disabilities Education Act (IDEA). It is intended to be informal guidance representing the interpretation of the applicable statutory or regulatory requirements in the context of the specific facts presented and is not legally binding.*

*Revision to guidance is reviewed annually and is based on feedback the Office of Special Education and Early Learning (OSEEL) receives from the directors of Special Education, state shareholder groups, the Kentucky Department of Education's (KDE) interpretation of law, court cases and guidance from the Office of Special Education Programs (OSEP). The OSEEL also revises guidance based on on-site monitoring visits, desk reviews and formal written complaints.*



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## **I. Introduction**

The overarching goal of this document is to assist schools in conducting appropriate and comprehensive educational evaluations for students suspected of having a specific learning disability (SLD). Additionally, this guidance document will provide an overview of Kentucky's SLD eligibility determination requirements, clarify the evaluation components and criteria, and answer frequently asked questions from the field as they relate to students with an SLD.

The SLD eligibility determination process is a systematic approach that schools use to determine whether a student does or does not have an SLD as defined in the state regulations. SLD means a disorder that adversely affects the ability to acquire, comprehend, or apply reading, mathematical, writing, reasoning, listening, or speaking skills to the extent that specially designed instruction is required to benefit from education. The specific learning disability (SLD) may include dyslexia, dyscalculia, dysgraphia, developmental aphasia, and perceptual/motor disabilities. The term does not include deficits that are the result of other primary determinant or disabling factors such as vision, hearing, motor impairment, intellectual (mental) disability, emotional-behavioral disability, environmental or economic disadvantaged, cultural factors, limited English proficiency, or lack of relevant research-based instruction in the deficit area. [707 KAR 1:002 Section 1 \(59\)](#).

The Individuals with Disabilities Education Act (IDEA) 2004 outlines the legal underpinnings of the eligibility determination process and further specifies how districts should approach the process. Within the parameters established in the federal regulations, state and local district policies define individual school-level SLD eligibility determination practices.

The graphic on the next page illustrates the timeline regarding SLD regulations and guidance.

1975

- Congress passes the Children with Specific Learning Disabilities Act. This is the first time federal law mandates support services for students with learning disabilities.

1975

- The Education for All Handicapped Children Act (PL 94-142), mandates a free, appropriate public education for all students.

1990

- The Individuals with Disabilities Education Act (IDEA) renames and changes PL 94-142. The term 'disability' replaces 'handicap,' and the new law requires transition services for students.
- In 1993, Kentucky released the *Kentucky Procedures and Criteria for Determining Specific Learning Disabilities*.

1997

- IDEA is reauthorized. Regular education teachers are included in the Individual Education Program (IEP) process; students have more access to the general curriculum and are included in state-wide assessments; and there are incentives for universal approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs.

2004

- IDEA is reauthorized again. School personnel now have more authority in special education placement decisions and the new law is better aligned with the No Child Left Behind Act. 707 KAR 1:300 added specific language that required the provision of research-based instruction and intervention services.

2007

- Kentucky amended the Kentucky Administrative Regulations (KARs) on SLD to reflect changes in the 2004 IDEA Reauthorization, by allowing both RTI and Severe Discrepancy as methods for making an eligibility determination for SLD

2010

- Kentucky Department of Education (KDE) releases Policy Letter #2010-11-01 "Establishing Student Eligibility for IDEA Services" (2010). In 2012, KDE releases Eligibility Q and A.

2014

- KDE releases SLD Eligibility Guidance Document.

## II. Making an Eligibility Determination for SLD

Kentucky’s vision is that each and every student is empowered and equipped to pursue a successful future. In support of that vision, this document seeks to provide guidance for districts to ensure the accurate identification of and appropriate educational support for students with SLD. The [Kentucky Administrative Regulations \(KAR\) for Special Education Programs](#) outline two possible methods for making an eligibility determination for SLD. A district (Local Education Agency or LEA) must develop written procedures for SLD determinations.

### Method A: Severe Discrepancy (Validated Regression)

Method A: Severe Discrepancy is a process based on identification of a severe discrepancy between intellectual ability and achievement. As part of the eligibility determination for SLD, a district may choose to use the severe discrepancy method for determining students eligible for specially designed instruction.

A district determines a severe discrepancy using the [SLD Reference Tables](#) accessible via the Kentucky Department of Education website or a non-standard score method when standardized normative measures of ability and achievement are invalid or not available. Additional information on the non-standard score method can be found on page 11 of this document.

***Related Regulations: The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to ability level or intellectual development, that is determined by the ARC to be relevant to the identification of a specific learning disability, using appropriate assessments consistent with [707 KAR 1:300, Section 4](#); [707 KAR 1:310, Section 2\(3\)\(c\)](#)***

### Method B: Response to Intervention (RtI)

Method B: [Response to Intervention \(RtI\)](#) is a process based on the student’s response to scientific, research-based intervention/evidence-based practices as documented through progress monitoring and data analysis.

RtI is defined as “the practice of providing high-quality instruction and intervention matched to student needs and using learning rate over time and level of performance to make important educational decisions.” National Association of State Directors of Special Education (NASDSE), 2006, p. 5.

***Related Regulations: The child fails to achieve a rate of learning to make sufficient progress to meet grade-level standards aligned with [704 KAR 3:303](#) in [one or more of the eight SLD subcategory areas (reading comprehension, math calculation, etc.)] when assessed based on the child's response to scientific, research-based intervention [[707 KAR 1:310, Section 2\(3\)\(b\)](#)].***

### **III. Regulatory Required components: Making an Eligibility Determination for SLD**

Regardless of which eligibility determination method is used, Method A: Severe Discrepancy or Method B: RtI, the process must include all of the elements of a comprehensive evaluation. This requirement includes the additional considerations outlined for SLD determination in [707 KAR 1:310, Section 2](#). The Admissions and Release Committee (ARC) must consider all components of the child find and evaluation process and document discussions with the parent(s) or guardian(s) before eligibility is finalized.

#### **Referral System**

[707 KAR 1:300, Section 3](#)

A district must develop a referral system that ensures the following:

- An LEA shall have a referral system that explains how referrals from district or non-district sources will be accepted and acted upon in a timely manner.
- The referral system shall be conducted in such a manner as to prevent inappropriate over identification or disproportionate representation by race and ethnicity of children in special education by ensuring that each child has been provided appropriate instruction and intervention services prior to referral.
- The LEA shall ensure that:
  - Prior to, or as a part of the referral process, the child is provided appropriate, relevant research-based instruction and intervention services in regular education settings, with the instruction provided by qualified personnel; and,
  - Data-based documentation of repeated assessments of achievement or measures of behavior is collected and evaluated at reasonable intervals, reflecting systematic assessment of student progress during instruction, the results of which were provided to the child's parents.

#### **ARC Membership**

[707 KAR 1:310, Section 2\(1\), \(2\), and \(5\); 707 KAR 1:320, Section 3](#)

An LEA shall ensure that the ARC for each child with a disability includes:

- The parents of the child;
- Not less than one (1) regular education teacher of the child (if the child is or may be participating in the regular education environment) to provide information about the general curriculum for same-age peers;
- Not less than one (1) special education teacher of the child or a special education teacher who is knowledgeable about the child's suspected disability or, if appropriate, at least one (1) special education provider of the child;
- A representative of the LEA who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general curriculum and the availability of the resources of the LEA;
- An individual who can interpret the instructional implications of evaluation results may be a member of the team as described above (i.e. regular education

- teacher, special education teacher, teacher, representative of the LEA);
- An individual who has knowledge or special expertise regarding the child, at the discretion of the parent or the LEA;
- Related services personnel, as appropriate;
- The child, if appropriate.

The ARC shall also include:

- Other professionals, relative to the area(s) of concern, such as a school psychologist, speech pathologist, or educational specialist; and,
- At least one (1) team member other than the child's regular education teacher shall observe the child in the learning environment, including the regular classroom setting, to document the student's academic performance and behavior in the area(s) of difficulty. If the child is less than school age or is out of school, these observations shall take place in an environment appropriate for the child.

Any ARC convened to discuss a child with a suspected or documented SLD shall be collectively qualified to:

- Conduct, as appropriate, individual diagnostic assessments in the areas of speech and language, academic achievement, intellectual development, or social-emotional development;
- Interpret assessment and intervention data and apply critical analysis to that data;
- Develop appropriate educational and transitional recommendations based on the assessment data; and,
- Deliver and monitor specially designed instruction and services to meet the needs of a child with an SLD.

### **Exclusionary Factors**

[707 KAR 1:310, Section 2\(8\)](#)

SLD eligibility determination requires that the following be ruled out as the primary cause(s) of the student's learning deficits:

- Visual Disability
- Hearing Disability
- Motor Disability
- Intellectual (Mental) Disability
- Emotional-Behavioral Disability
- Cultural Factors
- Environmental or Economic Disadvantage
- Limited English Proficiency

A child shall not be determined to be eligible if the determinant factor for that eligibility determination is:

- (a) A lack of appropriate instruction in reading, including the essential

- components of reading instruction as established in the Elementary and Secondary Education Act, 20 U.S.C. 6301;
- (b) A lack of appropriate instruction in math; or
- (c) Limited English Proficiency and the child does not otherwise meet eligibility criteria.

See [Appendix B](#)

## **ARC Discussions and Decisions**

### [707 KAR 1:310, Section 1](#)

The ARC may determine a child has an SLD if the LEA ensures the following:

- Prior to, or as part of the referral process, the child was provided appropriate instruction in regular education settings;
- The child is provided with learning experiences and instruction appropriate for the child's age or state-approved, grade-level standards aligned with [704 KAR 3:303](#); and,
- The child does not achieve adequately for the child's age or grade level standards aligned with [704 KAR 3:303](#), as indicated on multiple data sources, as appropriate, in one or more of the following areas:
  - Oral expression
  - Listening comprehension
  - Written expression
  - Basic reading skills
  - Reading fluency skills
  - Reading comprehension
  - Mathematics calculation
  - Mathematics reasoning
- The ARC shall consider a referral for an evaluation to determine if the child needs special education and related services when the child has not made adequate progress after an appropriate amount of time.
- Method A: Severe Discrepancy (Validated Regression)  
The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to ability level or intellectual development, that is determined by the ARC to be relevant to the identification of an SLD, using appropriate assessments consistent with [707 KAR 1:300, Section 4](#); or,
- Method B: Response to Intervention (RtI)  
The child fails to achieve a rate of learning to make sufficient progress to meet grade-level standards aligned with [704 KAR 3:303](#) in one or more of the eight SLD subcategory areas (reading comprehension, math calculation, etc.) when assessed based on the child's response to scientific, research-based intervention.

In making an SLD eligibility determination, an LEA shall draw upon information from a variety of sources, which may include:



- (a) Response to scientific, research-based interventions;
- (b) Vision, hearing, and communication screenings;
- (c) Parental input;
- (d) Aptitude and achievement tests;
- (e) Teacher recommendations;
- (f) Physical condition;
- (g) Social or cultural background;
- (h) Adaptive behavior; or,
- (i) Behavioral observations.

***Related Policy Letter: Triangulation of data confirms the credibility and validity of results when different methods lead to the same conclusion. For additional information see [Appendix A](#).***

An LEA shall ensure that information obtained from the above sources (a-i) as appropriate for each student, is documented and carefully considered.

The determination decision satisfies the three-prong test, as follows:

- Meets one or more of the eight specific learning disability areas;
- Adversely affects the student’s educational performance; and,
- Needs special education and related services

**SLD Eligibility Determination Form and Written Report**  
[707 KAR 1:310, Section 2 \(8\), \(9\) and \(10\)](#)

An ARC shall develop documentation of a specific learning disability. This documentation shall contain a statement of:

- Whether the child has an SLD;
- The basis for making that determination;
- The relevant behavior noted during observation;
- The relationship of that behavior to the child’s academic functioning;
- The educationally relevant medical findings, if any;
- Whether the child does not achieve commensurate with the child’s age and ability;
- Whether there are patterns of strengths and weaknesses in performance or achievement or both relative to age, state-approved grade level standards, or intellectual development in one (1) or more of the areas that require special education and related services; and,
- The determination of the ARC concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; environmental, cultural factors; economic disadvantage; or limited English proficiency on the child’s achievement level; and,
- The instructional strategies used and the student-centered data collected are based on

the child's response to scientific, research-based intervention.

Documentation for SLD eligibility shall include notification to the child's parents concerning the policies regarding:

- (a) The amount and nature of student performance data that are collected, and the general education services that are provided;
- (b) Strategies for increasing the child's rate and level of learning; and,
- (c) The parents' right to request an evaluation.

Each ARC member shall certify in writing whether the report reflects the member's conclusions. If it does not reflect the member's conclusion, the team member shall submit a separate statement presenting the member's conclusions. Documentation on the [SLD Eligibility Determination Form and Written Report](#) is an essential final element of eligibility determination because it ensures that the data indicate that there is an adverse effect on the student's educational performance such that the student is performing significantly and consistently below same age peers in academic and/or functional skills.

Further, documentation within the Written Report reveals the student's specific educational needs which impact decisions about curriculum, instruction and environment thereby informing the development of the student's IEP services and placement. (For additional information, refer to the [Guidance Document for IEP Development](#) and [Eligibility Record Review Document Specific Learning Disability \(SLD\)](#)).

#### **IV. Method A: Severe Discrepancy (Validated Regression)**

One critical component of the 2004 Reauthorization of IDEA is that State Education Agencies (SEAs) can no longer require a severe discrepancy between measured intellectual ability and educational performance as one of the criteria for determining whether a student has an SLD.

If the district chooses to use Method A: Severe Discrepancy, the ARC uses the aptitude/achievement discrepancy tables or the non-standard score method to determine initial eligibility, [Reference Tables for Identifying Students with a Specific Learning Disability](#).

For reevaluation purposes, the ARC may use the aptitude/achievement discrepancy tables, although it is not required for continuing eligibility for an SLD.

In individual situations, when standardized normative measures of ability and/or achievement are invalid or not available, a non-standard score method may be applied.

The psychologist/evaluator will need to provide a written rationale and summary of the non-standard method in the evaluation report. The summary includes:

- 1) Written rationale of why the formal evaluation procedures used with most students were invalid;
- 2) A list of the formal and informal assessment procedures used to evaluate the ability and/or achievement; and,
- 3) Scores and their interpretation from the alternative procedure.

A comprehensive evaluation is required when using Method A: Severe Discrepancy to determine the existence of an SLD.

#### **Parent Notification of Referral**

[707 KAR 1:340](#)

When a decision is made for a written referral as part of a special education comprehensive evaluation, parents must be notified and written permission obtained.

The designated school personnel must:

- Complete the referral form or process as outlined by the district procedures.
- Follow the procedural safeguards for prior written notice and consent for initial evaluation.
- Provide the parent with a copy of the procedural safeguards.
- Obtain written parental consent for evaluation in the area(s) identified by the ARC.

#### **Planning and Conducting a Comprehensive Evaluation**

[707 KAR 1:300](#)

The comprehensive evaluation must include a variety of technically-sound assessment tools, interventions and observations to gather relevant academic information about the student,

including information provided by the parent. It is not permissible to use any single measure or assessment as the sole criterion for determining whether the child has an SLD.

When all evaluation data have been collected, the ARC must follow procedural safeguards for prior written notice ([707 KAR 1:340, Section 4](#)) for an ARC to review the data and determine eligibility.

### **Determining Eligibility**

#### **[707 KAR 1:310](#)**

Within 60 school days of receipt of signed written parental consent, the ARC must meet to review all the data and make an eligibility determination using the LD tables accessible via the Kentucky Department of Education or a non-standard score method when standardized normative measures of ability and achievement are invalid or not available.

All components of required documentation for SLD Eligibility must be considered.

### **Developing the Individual Education Program (IEP)**

#### **[707 KAR 1:320](#)**

Once eligibility has been determined, the ARC shall develop a standards-based IEP for the student. The KDE's [Guidance Document for Individual Education Program \(IEP\) Development](#) provides instructions and examples for the ARC members on how to write standards-based IEPs.

## **V. Method B: Response to Intervention (RtI)**

Schools must have comprehensive, differentiated instruction for all learners; this includes interventions and evidence-based practices and strategies that provide a continuum of educational supports for students as part of the general education program. Once schools are implementing effective RtI processes, referrals most likely will occur after multiple attempts at targeted, research-based interventions/evidence-based practices have documented a student's lack of adequate progress, even with interventions. For further guidance, please visit the [Kentucky Multi-Tiered System of Supports \(KyMTSS\)](#) webpage.

This documentation will reflect a level of performance and a rate of growth that is below same-age peers. The ARC will need to consider the results of multiple sources of documentation (triangulation of data) when analyzing an individual student's performance and rate of growth. Students should not be referred to special education simply because they need academic assistance and special education is thought to be the only avenue for extra help. However, if targeted interventions within general education have demonstrated minimal results and a team suspects that a student's learning difficulties are not due to a lack of appropriate instruction or other exclusionary factors, a referral for a special education evaluation on the basis of a suspected SLD must be considered. Once a referral is received, regardless of where the district is in the RtI process, the district must convene an ARC to review the referral.

Determining a child eligible for SLD utilizing the RtI process requires the collection of data and information from the general education environment as well as from increasing levels of interventions targeting specific skills. [Targeted Interventions](#), like RtI, are a part of [Kentucky's Multi-Tiered System of Supports \(KyMTSS\)](#), and are utilized to support student achievement and social-emotional behavioral competencies through the integration of differentiated core instruction, assessment and intervention.

While not required, districts may still choose to administer cognitive/intellectual assessments in situations where information on the cognitive abilities of the student is determined necessary by the ARC. The assessments selected by the ARC should directly measure the area(s) of identified concern(s). IDEA 2004 provides for the option to assess the relative contribution of cognitive factors in the determination of eligibility for special education services for students with a disability [[34 CFR § 300.304\(b\)\(3\)](#)]. Cognitive/Intellectual Assessments may also be useful for assessing specific types of abilities, including nonverbal areas such as spatial abilities and for helping team members better understand an individual student's strengths and weaknesses.

A full description of RtI or any multi-tiered approach to instruction goes beyond the purpose of this document. However, it is desirable to have as much consistency in the process as possible from district to district across the state when determining SLD eligibility. The implementation of a multi-tiered approach to instruction will look different from school to school. However, a set of guiding principles and the core components of such an approach will be evident regardless of the specific implementation within a given school setting.

## General Education Interventions Prior to Referral and Evaluation

When using the RtI process, the district/school team must review student progress-monitoring data at reasonable intervals to ensure that students are making progress within the general education curriculum. Student progress data are used to make recommendations for instructional interventions. A student may be referred for a comprehensive evaluation to determine whether that student has a disability at the point where unexplained underachievement (level) and insufficient growth (rate) are documented. In addition, other reasons for the lack of student progress have been investigated (such factors might include attendance, office discipline referrals, in/out of school suspensions, medical history, language barriers and/or cultural factors).

The following should be considered before initiating a referral:

- Student has been provided with research-based interventions/evidence-based practices with documented progress monitoring data for a sufficient amount of time to allow student learning to occur. The amount of time needed to document progress should be based on research; specifically, the research conducted for a given intervention.
- Student participation in interventions has been consecutive and consistent.
  - Interruptions in the child's participation of the prescribed intervention (e.g., snow days, school breaks, staff vacancies) will need to be considered.
- Student performance has been determined to be unrelated to behavior.
  - Measures have been taken to address the student's behavior and provide supports to increase the child's motivation to participate in prescribed interventions when needed.
  - Behavioral interventions should consider environmental changes and factors that may affect a student's behavior.
- Student has received appropriate instruction and intervention. In determining appropriate instruction, ensure the following:
  - Scientifically, research-based or evidence-based materials are used.
  - Personnel are qualified and have received appropriate training in the use of the instructional materials or interventions.
  - Interventions are delivered with fidelity (i.e., presented in the manner for which they were designed and researched).
- District/school RtI team has reviewed the existing data and determined whether interventions specifically designed to address student's concern(s) have been implemented with fidelity and that an ample amount of time has been provided for the specific intervention(s).
- A referral cannot be delayed just because a student has not moved through all tiers of the RtI process. Districts must not deny referrals or delay initial evaluation procedures for students suspected of having a disability because of RTI implementation. See letter from OSEP, 2011, [Appendix C](#).
- When a referral is made before the completion of an intervention cycle, interventions and progress-monitoring data collection should continue as part of the comprehensive initial evaluation process.
- District/school RtI team has analyzed unexplained underachievement (level), insufficient growth (rate), student skill level, and intensity of instructional need. Progress-monitoring data for a targeted skill should be used and documented for decisions in these areas.

The table below provides possible indicators suggesting further evaluation is needed:

<b>Indicator</b>	<b>Questions to Consider</b>
<p>Unexplained Underachievement (Level): Evidence that the student's lack of achievement cannot be explained by other factors.</p> <p><i>Level: A student's current academic or behavioral performance compared to their expected performance (either criterion or norm-referenced).</i></p>	<ul style="list-style-type: none"> <li>• Is the student meeting the state-approved, grade-level academic standards?</li> <li>• Is the student achieving LEA and classroom curricular benchmarks?</li> <li>• Are there known reasons why the student is not meeting the expected achievement?</li> </ul>
<p>Insufficient Growth (Rate): Evidence of student's lack of progress over time.</p> <p><i>Rate: A student's growth in achievement or behavior over time compared to prior levels of performance and peer growth rates.</i></p>	<ul style="list-style-type: none"> <li>• Given an equal opportunity to learn (including expanded classroom supports and interventions), is the student's learning rate significantly less than the rate of typical peers or the expected rate of growth?</li> <li>• What does it take, or what is it projected to take, for this student to learn at the expected rate?</li> <li>• Are clear benchmarks for performance level and rate of learning defined so that intervention goals can be established?</li> </ul>
<p>Student Skill Level: Evidence of gaps in student skill area(s) compared to peers.</p>	<ul style="list-style-type: none"> <li>• Is the student's performance in skill areas significantly different from peers in his or her class or school, or from state or national norms?</li> <li>• In what areas is the student's performance significantly different?</li> </ul>
<p>Intensity of Instructional Needs: Evidence of the student's instructional needs and what is required for the student to be successful.</p>	<ul style="list-style-type: none"> <li>• Are the student's learning patterns such that sustained learning requires instruction and support significantly different from the general education program, including comprehensive, expanded supplemental supports, extensive differentiation of instruction and precise measurement of progress?</li> <li>• If the instruction and support is removed, does the student regress to such an extent that the student is unable to achieve state and district standards?</li> </ul>

## **Parent Involvement throughout the RtI Process**

When designing a RtI framework, an essential component is to involve parents as partners in the process. As soon as a child exhibits difficulty meeting an academic or behavioral benchmark, parents should be advised as to what their child's educational needs are and what steps will be taken to address those needs. Parents should also be encouraged to participate in decision-making about their child's instructional programming.

### Questions to consider:

- How do we tell parents that their child has been identified for intervention?
- How are parents involved in the development, implementation and monitoring of their child's intervention and support?
- What are the different ways to communicate with parents about their student's progress in meeting the school or district benchmarks?
- How do we communicate with parents about the continuum of supports and services provided to students within a RtI framework?
- In what ways are parents provided with strategies they can implement at home to help support their student's progress?
- How are parents included in celebrating their student's growth?

## **Interpreting and Analyzing RtI Progress Monitoring Data**

Once a student has been provided interventions or evidence-based practices, the next step is to interpret and analyze the existing student data to determine how a student has responded.

- It is critical that an intervention be implemented long enough for a change in student performance to be possible. Student response to intervention should be monitored carefully and frequently throughout the intervention period so that an unproductive intervention is changed or intensified in a timely manner. For additional information on the length of time (see box on page 17).
- Districts must not deny referrals or delay initial evaluation procedures for students suspected of having a disability because of RtI implementation.
- For a student's response to intervention to be deemed "inadequate," his or her *level* of performance must be consistently and significantly below age-appropriate, grade-level expectations. Moreover, his or her *rate* of progress during intervention must also be insufficient, even after repeated attempts to change or otherwise intensify the intervention.
- Assessment data must be analyzed and interpreted. Information obtained from the data must guide instructional decision-making. Student performance data must be clearly understood by all involved.



An informed decision-making process provides a framework for consistently monitoring and evaluating the progress of students based upon data; with that being said, the framework does not provide absolutes such as time-limited interventions. Limiting the amount of time for an intervention to be successful places too much emphasis on “when” is enough, rather than placing the emphasis on “what” instructional strategies the student needs to be successful. Although a student may be receiving additional supports through Tier 2 or 3, one should not automatically assume that the instructional strategies in the core program (Tier 1) are sufficient. Students who continue to need Tier 2 support (e.g., year after year) will likely need more differentiation within the core curriculum than other students who may only need Tier 2 supports on a short-term basis (e.g., three months). The focus of an effective system of intervention should be on finding instructional strategies that work rather than focusing on what did or did not work within a specified time frame. The nature of a true intervention system must be based upon evaluating the effectiveness of the intervention(s) at set intervals to make informed decisions.

Modified from Pamela Radford

Response to Hintze (2008) - *Conceptual & Empirical Issues Related to Developing a Response-to-Intervention Framework*

**Note: After analysis of the intervention data has occurred and a student has been determined as not making sufficient progress on the intervention (rate and level), a referral for a special education evaluation on the basis of a suspected SLD may be considered.**

Documentation of progress monitoring should include both a visual display of the student’s response to intervention (e.g., aim line and trend line) and a quantitative index of the student’s rate of improvement determined by the student’s slope of progress. The rate of improvement is the amount of improvement divided by the time devoted to the intervention. Information on progress monitoring assessments and calculating the slope of progress can be found at [Research Institute on Progress Monitoring](#), [RTI Action Network](#) and [Vanderbilt University’s IRIS Center](#).

### **Parent Notification of Referral**

[707 KAR 1:340](#)

When a decision is made for a written referral as part of a special education comprehensive evaluation, parents must be notified and written permission obtained.

The designated school personnel must:

- Complete the referral form or process as outlined by the district procedures.
- Follow the procedural safeguards for prior written notice and consent for initial evaluation.
- Provide the parent with a copy of the procedural safeguards.
- Obtain written parental consent for evaluation in the area(s) identified by the Admissions and Release Committee (ARC).

## **Planning and Conducting a Comprehensive Evaluation**

### [707 KAR 1:300](#)

The comprehensive evaluation must include a variety of technically-sound assessment tools, interventions and observations to gather relevant academic information about the student, including information provided by the parent. It is not permissible to use any single measure or assessment as the sole criterion for determining whether the child has an SLD.

When all evaluation data have been collected, the ARC must follow procedural safeguards for prior written notice for an ARC to review the data and determine eligibility.

## **Determining Eligibility**

### [707 KAR 1:310](#)

The comprehensive evaluation must include information from multiple sources in determining SLD eligibility. Lack of progress in a RtI structure in and of itself is not sufficient to determine that a child is eligible as a child with a disability in the area of SLD. Other factors such as lack of appropriate instruction, failure to implement appropriate interventions with fidelity, attendance, behavior, medical conditions, etc., must be considered when trying to determine the reason for a child's lack of progress.

Within 60 school days of receipt of signed written parental consent for initial evaluation, the ARC must meet to review all the data and make an eligibility determination.

When making a determination of SLD, the ARC must consider all of the data and use the following to guide the eligibility decision:

- The RtI component of the evaluation must evidence underachievement (level) and insufficient growth (rate).
- Evidence of underachievement may be demonstrated through documentation of progress-monitoring data, classroom performance, observations, and norm-referenced or standardized assessments.
- If a student's rate of growth on benchmarks is within the average range when compared to the performance of peers, the student may not be a student with an SLD.
- The student requires ongoing intensive instruction and resources that are not sustainable in the general education setting alone without additional special education services. If the ongoing intensive instruction is removed, the student is once again not making progress sufficient to keep pace with similar-age peers.
- The evaluation must assure that core instructional programs and RtI interventions were implemented with fidelity.
- The evaluation must rule out exclusionary conditions such as the effects of visual, hearing, or motor disability; cognitive disability; emotional disability; cultural factors; environmental or economic disadvantage; or limited English proficiency.
- All components of required documentation for SLD Eligibility must be considered.

## **Developing the Individual Education Program (IEP)**

[707 KAR 1:320](#)

Once eligibility has been determined, the ARC shall develop an IEP for the student. The [Guidance Document for Individual Education Program \(IEP\) Development](#) provides instructions and examples for the ARC members on how to write IEPs.

## VI. Appendix A: Eligibility Policy Letter 2010 and Eligibility Q&A 2012



Steven L. Beshear  
Governor

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Commissioner of Education

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#### Policy Letter #2010-11-01

#### Establishing Student Eligibility For IDEA Services

Kentucky Department of Education  
Division of Learning Services (DLS)  
August 30, 2010

#### Rationale

Over the past two years, I have become increasingly concerned over IDEA eligibility practices that the Division of Learning Services (DLS) staff have observed in local school districts. Due to districts' failure to follow IDEA procedures in federal and state law, Kentucky's percentage of students identified as having disabilities under IDEA has significantly increased since 2000.

At the same time, critical outcomes for students with disabilities have failed to keep pace with educational outcomes for general education students. The achievement gap between students with and without disabilities is significant and continues to increase in many districts. Graduation rates for students with disabilities are lower, and dropout rates higher, as compared to non-disabled students.

Part of the failure to ensure positive outcomes for IDEA students is general education's lack of understanding in appropriately teaching students with diverse learning needs. Students who do not learn in the "typical" manner begin lagging behind their classmates at an early age. If inappropriate instruction continues and educational progress remains delayed, diverse learners are often inappropriately placed in special education.

Once in special education, students' access to the general education curriculum is frequently limited. This continues to affect the special education students' academic achievement, leading to unacceptable outcomes in graduation and dropout rates and post-school success.

KDE believes that general education requirements such as Response to Intervention (RtI) will ultimately aid school districts with teaching diverse learners. Two keys with RtI are intervening early at the first sign of difficulty and appropriately instructing students with diverse learning needs through differentiated instruction. Through the use of RtI, most diverse learners will have their needs met in general education. Special education will no longer be the "fallback position" for low-achieving students.

DLS has assumed a major role in addressing Kentucky's over-identification issues over the past two years. During that time, DLS has conducted data verification visits and initiated focused monitoring of districts with IDEA identification rates of more than 15%. Districts violating IDEA by failing to provide appropriate interventions, evaluations and eligibility determinations have been cited for IDEA violations.

Districts cited for noncompliance have one year to come into compliance with IDEA. To assist districts with correction of noncompliance, DLS and the Special Education Cooperatives (Co-ops) have been providing districts with technical assistance and training related to appropriate IDEA identification.

To further assist districts, DLS, with the help of the Co-ops, recently revised documents related to record reviews of student folders. The resulting Compliance Record Review Document sets out DLS's interpretation of IDEA. The Document is posted on the KDE web site at:  
<http://www.education.ky.gov/KDE/Instructional+Resources/Exceptional+Children/Monitoring/>

The Compliance Record Review Document contains specific guidance on proper IDEA eligibility practices. It is intended to provide technical assistance to districts as well as notice to districts regarding DLS's interpretation of IDEA requirements related to student eligibility. It will also guide DLS's efforts at determining district compliance with IDEA during on-site visits and desk audits for SY 2010-11.

This Policy Letter is to be used in conjunction with the Compliance Record Review Document. The Letter contains DLS's interpretation of its regulations in the area of Identification, Evaluation and Eligibility where the language of the regulations is unclear. It is my expectation that both the Compliance Record Review Document and this Policy Letter will assist districts in achieving IDEA compliance.



R. Larry Taylor, Director  
Division of Learning Services  
Office of Next Generation Learners

## Identification, Evaluation and Eligibility under IDEA

### Interventions

The legal requirement for Kentucky's RtI-type process for all disability categories was put into Kentucky's Child Find requirement in 2007. (707 KAR 1:300, Section 3). In spite of the law being in effect for over two years, DLS continues to find little to no evidence that the following requirements are being implemented:

- Relevant research-based instruction and intervention services are provided in regular (general) education settings prior to or as part of the referral process
- Instruction and intervention services are provided by qualified personnel
- Data-based documentation of repeated assessments of achievement or measures of behavior are collected and evaluated at reasonable intervals; and reflect systematic assessment of student progress during instruction; and
- Results are provided to the child's parents

DLS has also found a lack of understanding about interventions required by the Child Find regulation. Information provided in student folders demonstrates that accommodations are persistently substituted for the required interventions.

Interventions are defined as changes to **instruction**. Alterations in physical surroundings (preferential seating), materials (large print) or curriculum adaptations (extended time, reducing the quantity of materials to be mastered by students) are accommodations. They are not interventions. See Compliance Record Review document, Item 61, pages 38-40. <http://www.education.ky.gov/NR/rdonlyres/0F89B537-EACD-4D69-99CF-6BFF35797BC0/0/RecordReviewDocumentjuly12final.pdf>

As explained in Item 61 of the Record Review, districts not providing appropriate interventions prior to or during the referral process are in violation of 707 KAR 1:300, Section 3. Any students, including preschoolers, identified for IDEA services that have not received appropriate interventions have been illegally identified as eligible under IDEA.

A district found in violation of the intervention requirement by DLS will be required to implement a Corrective Action Plan (CAP) to remedy the systemic violation, as well as the individual student violation. The CAP will consist of:

- Establishing a district-wide process to ensure compliance with federal and state requirements for determining eligibility; and,
- Re-determining the individual student's eligibility using the new, compliant process

If the student is found ineligible for IDEA services after going through the district's new eligibility process, including documentation of research-based interventions, the student must no longer receive IDEA services. The district *may* also be required to repay IDEA funds that were obtained in violation of IDEA.

The individual student remedy will undoubtedly cause hardship for the local district. Parents and school staff will not understand the reason the student, once "eligible" under IDEA, is no longer able to receive services. District administrators will be equally unhappy as they look for money to repay IDEA funds to KDE. To avoid students from being illegally identified in the first place, districts must immediately begin implementing a process which ensures IDEA compliance for determining eligibility.

KDE is in the process of reorganizing its agency structure. As part of the reorganization, emphasis has been placed on diverse learners and differentiating instruction for all students. This change will further enhance technical assistance and resources currently available to districts from KDE.

Information related to research-based instruction and interventions may be found at the *What Works Clearinghouse* at <http://ies.ed.gov/ncee/wwc/reports/default.aspx> ??

## Evaluation

### ❖ *Triangulation of data*

IDEA eligibility must be established through multiple sources of information. Just as a stool cannot stand on one leg, IDEA eligibility cannot stand on one piece of evidence. This means information regarding student eligibility must be triangulated.

The purpose of triangulation is to increase the credibility and validity of results. In the case of IDEA eligibility, triangulation means there are multiple data sources that substantiate the existence of a disability. Data triangulation includes triangulation of time, space and persons. An Admissions and Release Committee (ARC) can be confident of an eligibility determination, if different methods of evaluation that take place in varied settings, by multiple evaluators and at different times, lead to the same result.

DLS has observed the following inappropriate evaluation practices in which triangulation was not utilized while reviewing student folders for eligibility:

- One piece of evidence, such as a doctor's statement, is used to determine eligibility for OHI
- Only an IQ score or an adaptive behavior score is used to determine eligibility for MMD. This occurs when either the IQ score or the adaptive behavior score is not two standard deviations below the mean and the ARC relies upon only the lower score to establish eligibility, even though both scores are required to be two standard deviations below the mean
- On reevaluation of a student with a Mild Mental Disability, a new adaptive behavior score that is higher than the original score is completely disregarded by the ARC, in order for the student to continue to receive special education services

Districts with IDEA identification rates of more than 15% must begin an immediate shift in thinking about IDEA eligibility. **Rather than looking for any piece of information to support IDEA eligibility, ARCs must begin requiring proof that the student is IDEA-eligible.** This means districts must review their evaluation practices and require their ARCs to triangulate data.

### ❖ *Observations*

The requirement for observations as part of the Child Find and evaluation processes is found in two sections of Kentucky's IDEA regulations:

- 707 KAR 1:300, Section 4(14)(b) and (c), *Evaluation and Reevaluation Procedures*
- 707 KAR 1:310, Section 1(3), *Determination of Eligibility* (Behavioral Observations)

In addition to the regulatory requirements, observations also play a key role in answering the question of whether the disability has an *adverse effect* on the student's educational progress.

During its review of student folders, DLS noted the critical evaluation piece of observations was missing from numerous student eligibility determinations. Many districts do not routinely require student observations as part of the eligibility process. Even if listed in the evaluation plan or cited in a psycho-educational assessment, there is often little to no evidence showing the observations occurred, or that the observation information was carefully considered by the ARC.

In omitting observations as part of evaluation planning, ARCs are misinterpreting the two sections of Kentucky's IDEA regulations cited above. DLS's analyses of the observation requirements are set out in a. and b. below, for the two separate observation regulations.

**a. Review of existing observation data, "Child Find, Evaluation and Reevaluation"- 707 KAR 1:300, Section 4(14)(b) and (c)**

Section 4(14) of the Kentucky regulation states:

(14) As part of an initial evaluation, if appropriate, or as part of any reevaluation, the ARC and other qualified professionals, if necessary, shall review existing evaluation data on the child including: ...

(b) Current classroom-based, local, or state assessments and classroom-based observations; and,

(c) Observations by teachers and related services providers

Immediately following this regulation is Section 4(15), which refers to the referral phase of the Child Find process. It states:

(15) "On the basis of the review" (of existing data) "and input from the parents, the ARC shall identify what additional data, if any, are needed to determine:

(a) Whether the child has a particular category of disability and the educational needs of the child, or in the case of a reevaluation of the child, whether the child continues to have a disability, and the educational needs;

(b) The present levels of academic achievement and related developmental needs of the child; ..."

707 KAR 1:300 Section 4(15)(a) and (b)

By reading the two sections together, DLS interprets the regulations as requiring ARCs to review current classroom-based assessments and observations, and observations by teachers and related services providers, as part of the referral process. As a result of the review of existing data, ARCs during evaluation planning will determine additional data needed to determine if the student qualifies for services under IDEA, then, if eligible, the IEP services required by the student.

DLS's position is bolstered by its review of federal law. 707 KAR 1:300, Section 4(14) is based on the federal requirement found at 34 C.F.R. §300.305(a), *Additional requirements for evaluations and reevaluations*. In its comments to the federal regulations, the Office of Special Education Programs (OSEP) explained its regulation as follows:



Observation data will generally be a part of the existing data reviewed for any child suspected of having a disability. Section 300.305(a)(1) requires the eligibility group to review existing evaluation data, including classroom-based observations and observations by teachers and related services providers. (Emphasis added.)

OSEP's comments affirm DLS's belief that observations are a required part of student evaluation under IDEA.

DLS has contacted OSEP for additional guidance in defining "existing evaluation data. OSEP has advised DLS that existing evaluation data may take many forms. It may also include informal as well as formal observations. OSEP provided the following examples as sources of classroom-based observations that the ARC may use in its review of existing data:

- Disciplinary information
- Office referrals
- Anecdotal information based on a teacher's observations presented at a Teacher Assistance Team may be reduced to writing

Examples of observation data from teachers or related services providers referenced in (c) of 707 KAR 1:300, Section 4(14) include data from AIMSweb and DIBELS.

In rare circumstances, current observation data may not be available. A medically fragile child living in a hospital, a three-year old student moving to Kentucky from another state or a student who has been home-schooled probably will not have existing evaluation data.

Absent unusual circumstances which are documented by the ARC, **DLS is requiring observations set out in the Child Find process [707 KAR 1:300, Section 4 (14)] to be part of the evaluation information used to determine IDEA eligibility.**

**b. Behavioral Observations, "Determination of Eligibility"- 707 KAR 1:310, Section 1(3)**

The second observation requirement found in Kentucky's special education law is at 707 KAR 1:310, Section 1(3), *Determination of Eligibility*. The regulation states:

(3) In making eligibility determinations, an LEA shall draw upon information from a variety of sources, **which may include:**

- (a) Response to scientific, research-based interventions;
- (b) Vision, hearing, and communication screenings;
- (c) Parental input;
- (d) Aptitude and achievement tests;
- (e) Teacher recommendations;
- (f) Physical condition;
- (g) Social or cultural background;
- (h) Adaptive behavior; or
- (i) Behavioral observations.**

(Emphasis added.)

Clearly, every source of information listed above will not be needed to determine eligibility for every student. For example:

- “Aptitude and achievement tests” are not a part of evaluation information used to determine eligibility for a First Steps toddler entering preschool, since 3-year old children have not participated in formal standardized testing
- Information on “physical condition” may not be needed for students with intellectual disabilities
- “Adaptive behavior” information is not necessary for a student suspected only of having a speech/language impairment

However, omitting this same information when determining eligibility for the following disability categories would be inappropriate and would violate Kentucky’s IDEA regulations:

- “Aptitude and achievement tests” are required to determine student eligibility for a Specific Learning Disability
- “Physical condition” information is necessary for students suspected as Other Health Impaired (OHI) or as having an Orthopedic Impairment (OI)
- “Adaptive behavior” information is required when ARCs are considering if a student has a Mild Mental Disability or a Functional Mental Disability

Districts have incorrectly interpreted the regulatory language at 707 KAR 1:310, Section 1(3)(i) as making behavioral observations a permissible part of the evaluation process. By not requiring behavioral observations in evaluation planning, ARCs are omitting essential sources of data needed in making accurate eligibility decisions under IDEA.

DLS recently contacted OSEP for guidance, to assist districts in understanding the observation requirement. According to OSEP, the “behavior” observations requirement is meant to be construed broadly.

Behavior observations mean more than requiring a functional behavioral assessment for students with problematic behaviors. Behavior observations also include:

- Observing student responses to teaching, learning and instruction
- Looking at and diagnosing what works during instruction to the student
- Determining what triggers negative behaviors, as well as positive responses to instruction

Even though every source of information listed in 707 KAR 1:310, Section 1(3) is not required for every student, OSEP’s guidance makes it clear that observations are a necessary source of information and must be included in eligibility determinations. Information gleaned from observations must be considered with other data about the student. The data must then be triangulated and a decision reached regarding eligibility.

In developing the evaluation plan, the ARC must consider the information needed to support the existence of the disability for the individual student. If a student is inattentive and OHI is suspected as a disability, behavioral observations must be done. Likewise, a student with complex behavioral issues will have multiple behavioral observations. A student having difficulty with written expression must be observed, to note her responses to the teacher’s instructions.

As noted earlier, data triangulation requires the observations be across time and settings, and by multiple evaluators.

Behavioral observations may also be part of the data used to establish the crucial "adverse effect" requirement in Kentucky special education law. By using observations to compare a student's performance to peers, the ARC has additional information that allows it to determine whether the student's educational performance is significantly and consistently below the level of similar-aged peers as required by the regulations.

**DLS's position is that behavior observations are required as part of the evaluation for every category of suspected disability.**

#### Additional Observation Considerations

##### ❖ *Function of Observations*

ARCs must understand the function of observations and tailor observations to the purpose for which they are being used. For example:

- If a child is experiencing difficulties in academics, the observations must be done in academic classes
- If a child is experiencing difficulties in less-structured environments, the observations must be done in less-structured settings, such as transitions between classes, the lunch room and physical education class

Observations must be done by staff trained to do the observations. Depending on the student suspected disability, observations may be more valuable if done on different days and different times of day. As noted above in the *Triangulation of Data* discussion, spacing the time between observations ensures the observations are not affected by factors unrelated to the disability, such as:

- Illness
- Lack of sleep
- Temporary family problems
- Daily interactions with other students or teachers
- Hunger

DLS has observed records in student folders that show a lack of understanding of the reason for observations. The following practices are not acceptable:

- A school psychologist's observation of the student during psycho-educational testing is accepted by the ARC as one of the required observations.
- A student suspected of a specific learning disability in math is observed during language arts only.
- Several observations are conducted by the same person close in time on the same day, resulting in diminished quality and less information for the ARC.
- Observations of a preschool child occur at screening or during testing, rather than settings where the child's behavior of concern happens.

### ❖ *Number of Observations Required*

The Kentucky regulations require observations. This means a minimum of two observations must be done; however, many situations require more than the minimum of two. The number of observations conducted is based upon the needs of the child. Additional observations may also be required when the results of two observations are inconsistent.

Other individual factors affecting the number of observations required include:

- A student with challenging behavior or with behaviors shown inconsistently throughout the day may require additional observations across settings
- Students with complex behaviors may need multiple observations (for example, students suspected of having an autism spectrum disorder).
- Students taking medication may need to be observed at different times of the day

### ❖ *Observations for Students Suspected of a Specific Learning Disability*

DLS's position is that a minimum of two observations are required during the evaluation process. If the student is suspected of having a Specific Learning Disability, one of the two observations must comply with 707 KAR 1:310, Section 2(8), *Additional Procedures for Evaluating Children with Specific Learning Disabilities*.

#### Observations – Summary

Appropriate observations are designed to obtain information about the student's suspected disability that may not be available through other means. Observations serve an important purpose in triangulating data, as they document the effects of a suspected disability and provide important information about student performance, behavior and "adverse effect."

Item 67 of the Compliance Record Review Document reflects DLS's policy in this area. Beginning in SY 2010-11, for districts to comply with Item 67, ARCs must consider current classroom-based, local or state assessments and classroom-based observations; and observations by teachers and related services providers, as part of the initial evaluation process.

In most cases, the ARC will have access to existing student data, including observations. However, as explained above, in rare cases, there may be no existing data. If there was no existing data for the ARC to consider, the district may mark "Not Applicable" (NA) on the Record Review Document for Item 67, only if the ARC documents its reasons for omitting the information from the Evaluation Plan.

#### Conclusion

Policy Letter #2010-11-01 marks the first in a series of IDEA policy statements by the Division of Learning Services. The next letter - *Reevaluation of Students with Disabilities* - will be issued shortly. Additional letters will follow so that KDE and the Co-ops may provide general supervision and technical assistance to local school districts in their efforts to comply with IDEA requirements.

## VII. Appendix B: Policy Letter #2010-11-01, Eligibility Question and Answer

April 3, 2012

**Note: Questions below are *verbatim*. They have not been changed by the Division of Learning Services.**

### Referrals and Response to Intervention (RtI)

**Question 1:** Is there guidance on the number of absences prior to/during the intervention process in determining a lack of appropriate instruction when documenting /accepting referrals?

**Answer:** KDE believes this is an individual student decision. A first grader who misses five days of critical reading instruction may fall behind in reading due to lack of appropriate instruction in reading, whereas a seventh grade student missing five days of school may not be affected to the same extent.

Even though determining the effect of missed days by a student is an individual decision, KDE believes that 10 cumulative days of absences during the school year is the threshold at which ARCs must consider whether the student's absences have resulted in a lack of appropriate instruction.

KDE does not want ARCs focused only upon the number of school absences when determining a lack of appropriate instruction. The ARC also needs to consider absences from the classroom. For example:

- A student who spends more time in the principal's office than in math class due to her behavior may not have received appropriate math instruction, even though she has no absences from school.
- A middle school or high school student who is usually tardy and consistently misses the same content class may not have received appropriate instruction in the class, even though he has zero absences.

**Question 2:** Part of the Procedural Safeguards states that no additional testing can happen with their child without their knowledge and written consent. Is there any conflict with this and the additional testing required for Tier 2 and 3 of RTI?

**Answer:** During the instructional intervention and progress-monitoring process, parent consent is not required. This is because the instruction and interventions are focusing on improving instruction, not on determining an IDEA disability. The federal IDEA regulations, found at [34 CFR § 300.302](#), exempt screening of a student to determine appropriate instructional strategies.

If the child is referred for special education evaluations, parent permission is required as part of the usual procedural safeguards.

RtI should not be confused with the evaluation for special education services. RtI results may be used along with other assessment data to determine eligibility but should be occurring whether or not the student is being referred for special education services. Therefore, for any student receiving RtI, the answer is the same - no parental permission is required.

Even though permission is not required for RtI to occur, parents are to be involved in the RtI process.

**Question 3, Part 1:** We have a student who was exited from special education last year. Teachers are now considering referring her for special education. Does the district need to provide RTI prior to making the referral?

**Answer:** Yes, since the ARC determined the student was no longer eligible for special education last year, the RtI-like process in Kentucky regulations must be provided. The Child Find provisions in [707 KAR 1:300, Section 3](#), apply to a student being referred for special education services, even if she was previously in special education. Since the teachers are considering referring the student, it is preferable to do the interventions prior to referral. Otherwise, the 60 school day timeline for evaluation may interfere with the appropriate use of interventions. Conversely, if the parent is making the referral, the referral process must not be delayed to provide interventions, unless the parent agrees the interventions may be provided first, prior to evaluation.

**Question 3, Part 2:** What if the student was withdrawn from special education instead of being released by the ARC?

**Answer:** A different result occurs when the student is withdrawn from special education rather than being exited. In *Letter to Goldman* (OSEP 2009), OSEP states that a child who has an IEP and withdraws from public school to private or home school, continues to be a student covered by IDEA until one of the following occurs:

- The student exceeds the State's age limit for IDEA services
- The student graduates with a regular diploma
- The student is determined through evaluation to no longer be a child with a disability, or,
- The student moves to another State

Thus, when a student withdraws from public school, the Child Find process, including RtI, referral, evaluation and identification, is not utilized since the student remains covered by IDEA.

**Note: Due to an amendment to IDEA in 2008, parents who have revoked consent for special education and related services may later request that their child be re-enrolled in special education. However, OSEP guidance states the district must treat the request for re-enrollment as a request for an initial evaluation, not a reevaluation. See *IDEA Part B Supplemental Regulations, OSEP Non-Regulatory Guidance, April 2009*.**

**Question 4:** How would an LEA use an RtI process in identifying a child with a suspected disability who had been placed in a private school by his or her parents?

**Answer:** OSEP has addressed this issue in *Letter to Zirkel*, (OSEP 2011). OSEP states that 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. OSEP believes for a district to reject a referral and delay an initial evaluation on the grounds the private school did not implement RtI would be inconsistent with IDEA's evaluation requirements.

#### **Follow-up Questions to Question 4**

**Question 4a:** Are we to not require RtI/ KSI for all parent referrals of private school students, even for the eligibility determination phase of the referral?

**Answer:** The OSEP letter says no, not if in doing so, you would delay the parent's right to a timely initial evaluation. However, you are not prohibited from implementing RtI while you're evaluating the private school student. What the OSEP letter is saying is that the district cannot delay a private school referral by requiring RtI.

Some Directors of Special Education require RtI for private school students. Directors that require RtI have a well-established RtI process that is able to both require RtI for the private school student and not delay the 60 school day timeline.

**Question 4b:** Are we to not require RtI/ KSI for private school, parent referrals only for the suspected disability of SLD (as noted in the letter) or all disability classifications?

**Answer:** The OSEP letter says SLD. However, OSEP's frame of reference was SLD only, since the federal IDEA does not require RtI for all disabilities like Kentucky's law does. If asked about Kentucky's law, OSEP would most likely state that, if doing RtI for a private school student for any suspected disability would delay the parent's right to a referral, the district may decide not to require RtI.

It is preferable to do RtI if the district is able to do the interventions and instruction in a timely fashion, since RtI will provide data allowing the ARC to determine if a lack of appropriate instruction in reading/math is the reason for the student's poor performance. This is especially true if the private school is home school.

**Question 4c:** Are we to not require RtI/ KSI for **all parent referrals** (private or public) for evaluation as to require one and not the other seems a bit discriminatory to me?

**Answer:** No, the OSEP letter applies only to private schools.

The reason for the private/public school distinction is that OSEP fears requiring private schools to do RtI would delay the parent's right to have their child timely evaluated. This is not a problem in a local school district, since districts already have RtI in place

**Question 4d:** Are we to not require intervention data (RtI/KSI) for any parent referral before determination of eligibility for all disability classifications per Policy Letter #2010-11-01 dated

August 30, 2010?

**Answer:** No. The OSEP letter only discusses students in private schools.

Districts must have a way to determine if the student's performance is related to lack of instruction in reading or math. Interventions are one of the best ways of determining if the student's lack of progress is due to lack of instruction. ARCs are required to rule out lack of instruction in reading or math before determining if a student is eligible under IDEA.

**Question 4e:** We have some students currently in the RtI/ KSI process within our private schools where we have met in an ARC and assisted with providing interventions and data collection tools to private school staff and parents for those who are in home school. Do we now call an ARC and get consent to evaluate and tell them the KSI data is not needed?

**Answer:** No, so long as requiring the RtI did not deny the parent's right to a timely evaluation (or to contest the ARC's decision not to do an evaluation).

KSI data is needed in determining whether the student has received appropriate instruction. A district cannot delay the evaluation to obtain the KSI data. However, if the district has told the parent that it cannot begin the referral until RtI is finished and the ARC suspects a disability, then yes, convene an ARC, begin the evaluation but keep doing the interventions you have started.

**Question 4f:** If a home school student (private school) parent requests an evaluation and they are unable to provide any information on what type of instruction/curriculum etc. has been provided, are we to still proceed with evaluation and eligibility determination without any data of instruction?

**Answer:** No. If the ARC does not suspect a disability, the district does not have to evaluate the student. The district must give the parent his/ her right to request a hearing on the evaluation decision, if the ARC decides not to evaluate.

If the private school is a home school, it should be relatively easy to provide RtI during the 60 school day timeline.

### Evaluation

#### Observations

**Question 5:** The policy letter states "more than one observation by multiple evaluators." Does this mean that special education teacher cannot do both observations?

**Answer:** The Division of Learning Services (DLS) has stressed that establishing student eligibility for IDEA services must be done through careful consideration of multiple sources of information.

When different methods of evaluation take place...



- in varied settings,
- by multiple evaluators, and
- at different times

...that lead to the same result, an ARC can be confident in its eligibility determination.

The question above presumes only two observations are necessary. Two observations are the minimum number of observations required by regulation. Depending on the nature and severity of the child's disability, more than the minimum number of observations may be necessary for the ARC to have appropriate and sufficient information on which to base its eligibility decisions.

The intent of the policy letter was not to suggest that a special education teacher can do only one observation, but rather to stress that, through the use of multiple evaluators in varied settings at different times, the ARC will have both the quantity and quality of information it needs to make defensible eligibility decisions.

If it appears that only two observations are necessary to provide the ARC with the information it needs, then the ARC must plan for how it will ensure triangulation of the data in terms of time, space and persons.

**Question 6:** Can you clarify why a three-year old who moves to Kentucky may not need observations?

**Answer:** This illustrates the two types of observation data required by IDEA:

- Observations that are part of the existing evaluation data reviewed by the ARC under 707 KAR 300, Section 4(14)(b) and (c); and,
- Observations performed during formal evaluation that are a data source in determining eligibility

Observations that are existing data include information such as *RtI monitoring data, classroom assessments and work samples, teacher anecdotal notes/observations, and discipline referrals.*

In rare circumstances, current observation data may not be available since occasionally an ARC will not have access to existing data. A three-year-old student who recently moved to Kentucky from another state is an example of a situation in which existing data may not be available to the ARC.

**Question 7:** If behavior observations are included that are existing data (that is, three years old) can they be considered as the two observations, or do they need to be current?

**Answer:** The two observations must be current.

Part of the reason for reevaluation is to look at current information to decide if the student remains eligible for IDEA services. If the ARC is only looking at observations that are three

years old, this would not give the ARC accurate information on whether the student is currently eligible.

**Question 8:** How far back does the reviewer need to go to look for the observations (start with initial, even if several years or last evaluation – thinking of older students).

**Answer:** Allowing the ARC to reference previous behavior observations means the ARC is permitted to go back and compare older observations with current ones, perhaps to gauge progress. However, using the “old” observations does not replace the need for current observations.

**Question 9:** Does an evaluation planning form need to be completed to conduct behavior observations?

**Answer:** If there are no current observations, the ARC would decide that additional information is needed for the reevaluation process. The evaluation planning form would be completed for observations and any other missing data. And yes, parent consent is required.

**Question 10:** Does the school psychologist’s report have to contain local/state assessment data? Could it be on the referral? Could it be contained in conference summary?

**Answer:** Local and state assessment data should be included in the data reviewed to determine eligibility. This data does not have to be in the psychologist’s report, but documentation from the ARC must show that local/state assessment data was discussed and analyzed as part of the eligibility determination decision.

**Question 11, Part 1:** When a student is identified as having a developmental delay in communication or motor skills only, should the student be on the caseload of the speech/language therapist or occupational therapist or on the special education teacher’s caseload?

**Answer:** If the disability is Speech/Language Impairment, the “teacher” is the speech/language therapist.

If the only disability is “motor skills,” no specially designed instruction is provided, and the only person working with the child is the occupational therapist, the child is not IDEA-eligible since the child does not meet the criteria of “child with a disability” under 707 KAR 1:002, Section 1(9).

**Question 11, Part 2:** Can the student be served by a special education teacher such as being included in a reading group or receive instruction to address written expression?

**Answer:** The SDI must be related to the student’s disability. Unless there are additional facts not presented, the answer is no.

## Independent Educational Evaluations

**Question 12:** The KARs-Independent Evaluation- states that parents are entitled to one evaluation per year at their request. If they make that request, but RtI does not support the evaluation how should the district respond?

**Answer:** The regulation providing parents with the right to request an Independent Educational Evaluation (IEE) applies only when parents disagree with an evaluation the school district has conducted. Typically school districts do not formally evaluate students every year. As a result, the risk of having parents request an IEE every year is minimal.

RtI would not be a factor in supporting or disproving the need for an IEE. RtI is found in Kentucky's Child Find regulation (707 KAR 1:300, Section 3(3)) and occurs prior to or during referral for special education. It would not be a part of a special education student's current program, unless the student is suspected of having a second, separate disability.

## Adverse Effect

**Question 13:** A student with ADHD has normal, to slightly below normal aptitude and achievement scores but consistently failing grades over time. Adverse effect is shown in areas of time on task (alertness). Does he qualify for OHI?

**Answer:** A child with a disability is defined in Kentucky regulations as:

- a child evaluated in accordance with Kentucky special education regulations,
- who meets one of the 14 Kentucky IDEA eligibility categories,
- where the disability has an adverse effect on the child's educational performance, and
- as a result, the child requires special education and related services.

It appears the student could benefit from appropriate general education instruction, accommodations or extra teacher help. However, unless the student requires specially designed instruction as a result of his disability, he is not be eligible for IDEA services.

**Question 14:** What about students with OI or EBD? Does a student have to show an adverse effect in an academic area to qualify for services?

**Answer:** No.

## Reevaluation

**Question 15:** To determine continued OHI eligibility, does the ARC need a medical diagnosis every three years?

**Answer:** OSEP has said in a policy letter that, during the reevaluation process, eligibility must be re-determined. In other words, the student must still meet the IDEA eligibility criteria during the reevaluation phase. Although OSEP states eligibility may be able to be determined

with existing data, using an existing three-year old medical diagnosis as the basis for OHI eligibility is not appropriate.

OHI is based on a medical condition. Medical conditions are more likely to change than an intellectual disability or a learning disability. Especially if the student has an ADHD diagnosis, the district needs to make sure the student has not "outgrown" the diagnosis, or that the effect of the medical condition upon the child's educational performance is no longer as severe as in the past.

Unless the district's policies and procedures require otherwise, a medical diagnosis is not required by Kentucky's regulations to qualify a student as having an Other Health Impairment. Other instruments, such as the Connors Rating Scale or BASC, coupled with student observations, may be sufficient to establish continuing eligibility.

In the past, KDE has cited a school district for relying on a three-year old medical diagnosis for ADHD during the reevaluation process. To be safe, the district should obtain documentation of a current medical condition.

**Question 16:** When a student ages out of Developmental Delay and does not qualify for services under a different disability category, is there any transitional period to end services?

**Answer:** No, since Developmental Delay is limited by age, there would be no way to continue serving the child under IDEA.

If the child has educational issues that do not rise to the level of needing IDEA services, the team could refer the child for Section 504 services and determine if the child is eligible for a 504 Plan.

**Question 17:** When a reevaluation is completed and the student no longer qualifies for IDEA services, can the student be transitioned out of special education over a period of time?

**Answer:** No. The provision for a transition period is no longer in Kentucky's IDEA regulations. A 504 Plan is a possibility, if the student has a significant disability that affects a major life activity.

### Transfer Students

**Question 18:** A student moves from one district to another. His IEP and eligibility form label him as OHI (ADHD). Other than being stated in an integrated report (no doctor's name or mention of questionnaire), there is no evidence that he has been diagnosed with ADHD. Do we need a doctor's note stating this or do we take the former district's word to continue the OHI label? If this label can continue, what about when it comes time for reevaluation? Do we need that medical documentation then or since he has the label in the past, can it continue?

**Answer:** Once the student moves into the receiving district, it is that district's responsibility to ensure the student's due process folder is in compliance with federal and state regulations.

Documentation must be present to determine if the student has a chronic or acute health problem that adversely affects the child's educational performance to be eligible under the category of Other Health Impairment (OHI). It is the ARC's responsibility to determine if enough evidence and documentation is provided to determine eligibility or if more data is needed such as a doctor's note or medical report.

**Question 19:** If a student transfers to a school in another state and is then evaluated, does this qualify as a reevaluation or an initial evaluation?

**Answer:** Because of differing state-specific criteria, this would qualify as an initial evaluation. OSEP Q&A - *Larry Ringer, associate division director, Monitoring and State Improvement Planning Division* (August 31, 2006).

**VIII. Appendix C: Letter from OSEP, 2011**

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

January 21, 2011

Contact Persons:	
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OSEP 11- 07

**MEMORANDUM**

TO: State Directors of Special Education

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

SUBJECT: A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)

The provisions related to child find in section 612(a)(3) of the Individuals with Disabilities Education Act (IDEA), require that a State have in effect policies and procedures to ensure that the State identifies, locates and evaluates all children with disabilities residing in the State, including children with disabilities who are homeless or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services. It is critical that this identification occur in a timely manner and that no procedures or practices result in delaying or denying this identification. It has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, local educational agencies (LEAs) may be using Response to Intervention (RTI) strategies to delay or deny a timely initial evaluation for children suspected of having a disability. States and LEAs 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.

A multi-tiered instructional framework, often referred to as RTI, is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. With a multi-tiered instructional framework, schools identify students at-risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, and adjust the intensity and nature of those interventions depending on a student's responsiveness.

While the Department of Education does not subscribe to a particular RTI framework, 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. OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many LEAs have implemented successful RTI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation; and those children who simply need intense short-term interventions are provided those interventions.

The regulations implementing the 2004 Amendments to the IDEA include a provision mandating that States allow, as part of their criteria for determining whether a child has a specific learning disability (SLD), the use of a process based on the child's response to scientific, research-based intervention<sup>1</sup>. See 34 CFR §300.307(a)(2). OSEP continues to receive questions regarding the relationship of RTI to the evaluation provisions of the regulations. In particular, OSEP has heard that some LEAs may be using RTI to delay or deny a timely initial evaluation to determine if a child is a child with a disability and, therefore, eligible for special education and related services pursuant to an individualized education program.

Under 34 CFR §300.307, a State must adopt, consistent with 34 CFR §300.309, criteria for determining whether a child has a specific learning disability as defined in 34 CFR §300.8(c)(10). In addition, the criteria adopted by the State: (1) must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD; (2) must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) may permit the use of other alternative research-based procedures for determining whether a child has an SLD. Although the regulations specifically address using the process based on the child's response to scientific, research-based interventions (i.e., RTI) for determining if a child has an SLD, information obtained through RTI strategies may also be used as a component of evaluations for children suspected of having other disabilities, if appropriate.

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<sup>1</sup> The Department has provided guidance regarding the use of RTI in the identification of specific learning disabilities in its letters to: Zirkel - 3-6-07, 8-15-07, 4-8-08, and 12-11-08; Clarke - 5-28-08; and Copenhaver - 10-19-07. Guidance related to the use of RTI for children ages 3 through 5 was provided in the letter to Brekken - 6-2-10. These letters can be found at <http://www2.ed.gov/policy/spced/guid/idea/index.html>.

The regulations at 34 CFR §300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§300.304-300.311, to a child suspected of having a disability under 34 CFR §300.8. If the LEA agrees with a parent who refers their child for evaluation that the child may be a child who is eligible for special education and related services, the LEA must evaluate the child. The LEA must provide the parent with notice under 34 CFR §§300.503 and 300.504 and obtain informed parental consent, consistent with 34 CFR §300.9, before conducting the evaluation. Although the IDEA and its implementing regulations do not prescribe a specific timeframe from referral for evaluation to parental consent, it has been the Department's longstanding policy that the LEA must seek parental consent within a reasonable period of time after the referral for evaluation, if the LEA agrees that an initial evaluation is needed. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, 71 Fed. Reg., 46540, 46637 (August 14, 2006). 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).

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). The parent can challenge this decision by requesting a due process hearing under 34 CFR §300.507 or filing a State complaint under 34 CFR §300.153 to resolve the dispute regarding the child's need for an evaluation. It would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 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.

We hope this information is helpful in clarifying the relationship between RTI and evaluations pursuant to the IDEA. Please examine the procedures and practices in your State to ensure that any LEA implementing RTI strategies is appropriately using RTI, and that the use of RTI is not delaying or denying timely initial evaluations to children suspected of having a disability. If you have further questions, please do not hesitate to contact me or Ruth Ryder at 202-245-7513.

References:

Questions and Answers on RTI and Coordinated Early Intervening Services (CEIS), January 2007

Letter to Brekken, 6-2-2010

Letter to Clarke, 4-28-08

Letter to Copenhagen, 10-19-07

Letters to Zirkel, 3-6-07, 8-15-07, 4-8-08 and 12-11-08

cc: Chief State School Officers  
Regional Resource Centers  
Parent Training Centers  
Protection and Advocacy Agencies  
Section 619 Coordina