



# Complaint Investigations Review: Lessons Learned

Ann M. Alexander, Ph.D.  
Attorney at Law  
Erickson, Thorpe & Swainston, Ltd.  
Reno, Nevada



## Overview

- Understand the complaint investigation process, including options for resolution
- Opportunity to talk about federal and state law through examples of compliance and noncompliance revealed in complaint investigations; focus on areas of recurring complaints
- Discussions of options for compliant practices
- NOTE: All references to “school district” include any public agency under jurisdiction of DOEED responsible to implement Part B of IDEA



## Key Differences Between Complaint Investigations and Due Process Hearings

- DP is a formal hearing with a decision by an impartial hearing officer who is not an employee of DOEED
  - CI is a decision by the DOEED
- DP allows presentation of evidence, cross-examination of witnesses, objections to evidence, record of proceeding, expert testimony, testimony under oath, “stay put” for child during pendency, appeal
  - CI generally does not include these procedural safeguards



- DP hearing officer may order specific changes to eligibility, placement, IEP provisions
  - Generally, CI may order that procedures be re-engaged to correct procedural deficiencies
  - CI may order that services in the IEP are provided (including necessary compensatory services)
  - Recently OSEP has stated it is possible for CI to order modification/amendment of IEP to include direct services the state has determined are “appropriate” BUT
  - State must “carefully consider whether ordering the provision of services not previously in the IEP is appropriate and necessary to ensure the provision of FAPE” because “the IEP team is best equipped” to make such decisions (*Letter to Deaton*, May 19, 2015)



## The Complaint Investigation Process

- IDEA Provisions, 34 CFR 300.151-153
- Complainants may include individuals, organizations; may be from another state
- AK DOEED must adopt written procedures to resolve “any complaint”
- Procedures:
  - 60 calendar time limit to carry out investigation, including
    - opportunities for complainant to submit additional information
    - opportunity for school district to respond
      - opportunity to submit a proposal to resolve
      - opportunity for school district and *complainant* to voluntarily engage in mediation (AK regulation extends mediation opportunity to any complainant, IDEA extends to parents but provides that a state may extend to individuals and organizations)



- Issue written decision containing
      - Findings of fact and conclusions
      - The reasons for the DOEED final decision
  - Extensions to 60-calendar-day timeline
    - Exceptional circumstances (DOEED determines)
    - Complainant + school district agree to extend time to engage in mediation
  - Effective implementation of DOEED final decision
    - Technical assistance activities
    - Negotiations
    - Corrective actions to achieve compliance
- Remedies for failure to provide appropriate services – DOEED must address
  - needs of child (such as compensatory services or monetary reimbursement)
  - appropriate future provision of services for all children with disabilities



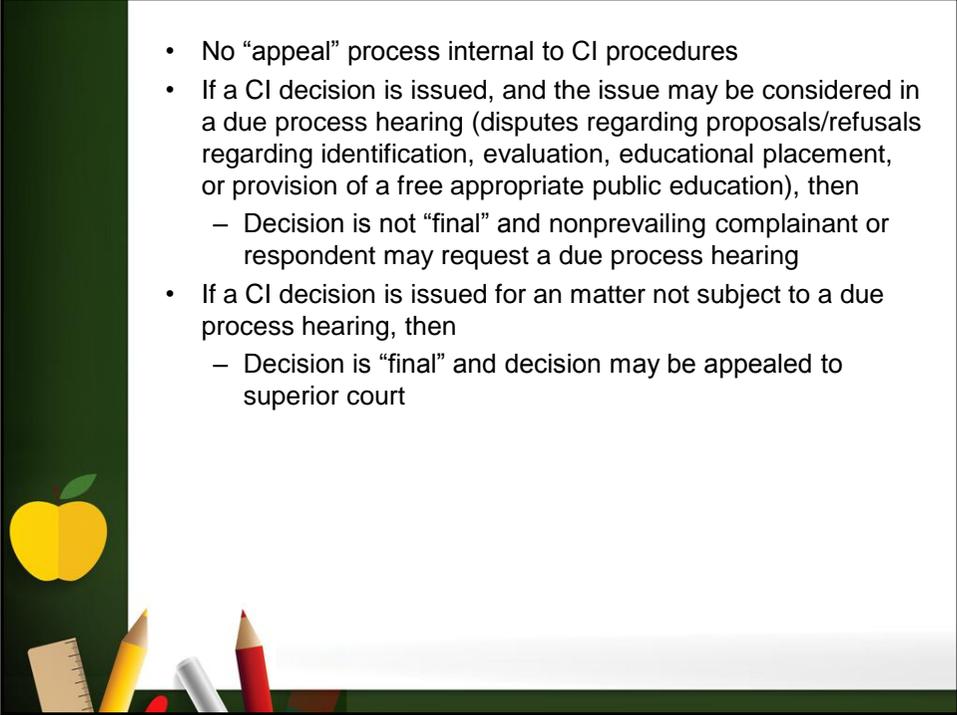
- Filing a complaint (AK regulations, 4 AAC 52.500)
  - Writing, signed, dated; student-specific, systemic, or both
  - Must be sent to DOEED and to district at the same time
  - Must include:
    - Name, address, telephone number of complainant or person filing on behalf of complainant
    - Statement alleging school district has violated AS 14.30.180 – 14.30.350, AK regulations, Chapter 52 (“this chapter”), IDEA statute or regulations
    - Statement of the facts that form basis for allegation(s)
    - Name of district or other public agency (“respondent”)
    - Date of violations
    - If alleged violations concerning a specific child:
      - Name, address, phone number of child
      - Name of school
      - Description of nature of problem + facts
      - Proposed resolution to extent known

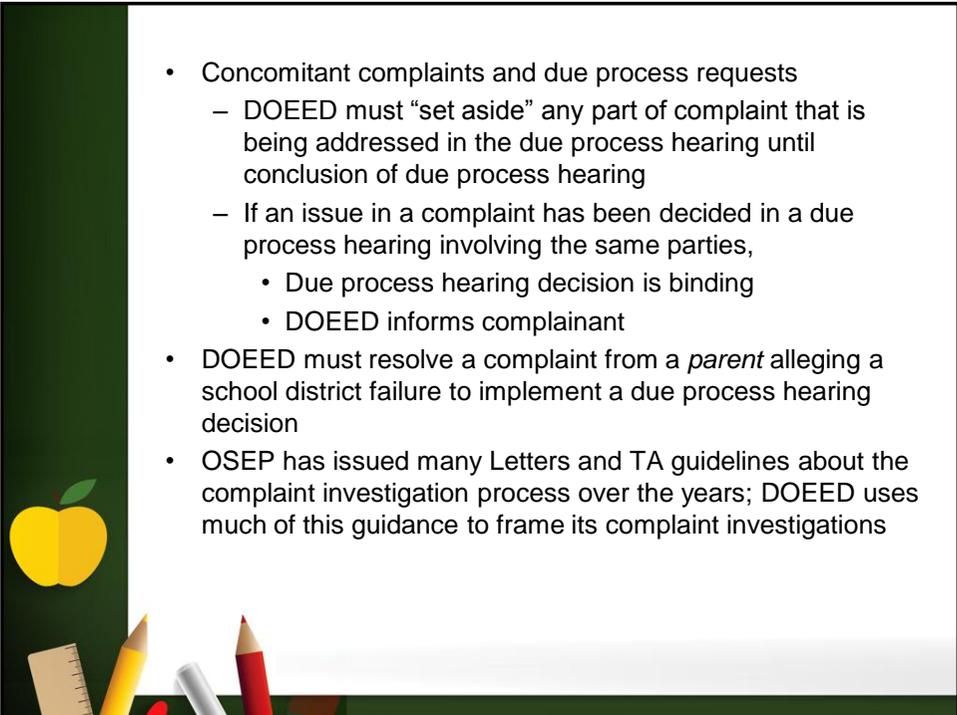
- Must allege violation that occurred not more than one year before the date that complaint is received by DOEED
- DOEED reviews, determines whether to accept as submitted or whether additional information is needed to correct “procedural deficiencies”; then
  - DOEED assists complainant to clarify allegations
  - DOEED gives complainant opportunity to submit additional information
  - Advises complainant and respondent of opportunity to resolve issues in a non-adversarial manner, including
    - Respondent may offer a proposal to resolve
    - Complainant and respondent may voluntarily agree to mediate

**(DISCUSSION)**

- 
- DOEED conducts independent investigation, which may include
    - Interviews of complainant and respondent, including employees
    - Review of relevant documentation as determined by the department
    - An on-site investigation

- 
- DOEED issues written decision, including
    - Summary of complaint
    - Summary of investigation
    - Findings of fact
    - Conclusions that address allegations including reasons for the decision
    - If violation(s), an order requiring cessation and remediation, including
      - Compensatory education
      - Monetary reimbursement
      - Corrective action, including
        - For systemic violations:
          - » Corrective action & future provision of services
  - If order is issued, DOEED requires documentation of compliance with the order

- 
- No “appeal” process internal to CI procedures
  - If a CI decision is issued, and the issue may be considered in a due process hearing (disputes regarding proposals/refusals regarding identification, evaluation, educational placement, or provision of a free appropriate public education), then
    - Decision is not “final” and nonprevailing complainant or respondent may request a due process hearing
  - If a CI decision is issued for an matter not subject to a due process hearing, then
    - Decision is “final” and decision may be appealed to superior court

- 
- Concomitant complaints and due process requests
    - DOEED must “set aside” any part of complaint that is being addressed in the due process hearing until conclusion of due process hearing
    - If an issue in a complaint has been decided in a due process hearing involving the same parties,
      - Due process hearing decision is binding
      - DOEED informs complainant
  - DOEED must resolve a complaint from a *parent* alleging a school district failure to implement a due process hearing decision
  - OSEP has issued many Letters and TA guidelines about the complaint investigation process over the years; DOEED uses much of this guidance to frame its complaint investigations

## THE RECURRING ISSUES

(School Years 2010-2015)

- Child Find
- Evaluations
- Independent Educational Evaluations
- Eligibility Decisions
- IEP Development
- IEP Contents
- Program Supervision & Special Education Aide Supervision
- IEP Implementation
- Placement Decisions
- Miscellaneous
  - Discipline
  - Due Process Resolution Sessions
  - Right to copies under AK law and FERPA



## CHILD FIND

- BASIC LEGAL OBLIGATIONS
  - 34 CFR 300.111, identify, locate, and evaluate
  - Child find duty is “triggered when the state or LEA has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability.” *Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii, 2001).
  - The IDEA does not prescribe a specific timeframe from referral for evaluation to parental consent; it is the USDOE “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. *OSEP Memo 11-07* (January 21, 2011).



- BASIC LEGAL OBLIGATIONS (continued)
  - “The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation ... to a child suspected of having a disability.” *OSEP Memo 11-07*
    - 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 and obtain informed parental consent before conducting the evaluation.
    - If 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.
      - Parent challenge via due process or complaint

- BASIC LEGAL OBLIGATIONS (continued)
  - “It would be inconsistent with the evaluation provisions for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework.” *OSEP Memo 11-07*
  - *AK Handbook, 2015, p. 9:*

“RTI programs of any sort do not replace or relieve districts of obligations under Alaska or federal law with respect to child find, screening, referral, eligibility – or any other component of special education programs. ... In short, RTI strategies cannot be required before or used to delay or deny a timely special education evaluation of a student suspected of having a disability.”

- COMPLAINT SCENARIOS
  - Parent requests evaluation; district says “not yet” based on “no RTI yet”; district does not provide written notice of refusal + procedural safeguards
  - District loses staff critical to conducting evaluations (school psychologist, speech/language therapist) and issues blanket directive to discontinue referrals
  
- OPTIONS FOR COMPLIANT PRACTICES
  - Timely respond to parent requests for evaluations with **written notice** of proposals or refusals + procedural safeguards (two weeks is probably reasonable timeline); must provided basis for proposals or refusals
  - Make certain that building-level staff understand importance of **written notice** in the refusal scenario (vs. ignoring, or denying/delaying in conversation with parent)

- OPTIONS (continued)
  - Caution regarding refusals to evaluate merely “on the basis that a child has not participated in RTI” – instead, use facts that inform district’s decision about whether the child is suspected of having a disability and suspected to need special education
    - E.g., the kindergarten student has not yet received appropriate instruction in reading, including the essential components of reading
    - E.g., district has no data to suggest the child will not respond adequately to general education instruction and interventions
  - When critical staff shortages occur, triage and make individualized, defensible decisions about how to proceed (no blanket directives to cease referrals)

## EVALUATIONS

- BASIC LEGAL OBLIGATIONS

- 4 AAC 52.115:

Not later than 90 calendar days after obtaining parental consent for an initial evaluation or reevaluation of eligibility, the district shall evaluate the referred child, develop an IEP if the child is determined to be eligible and if parental consent for services is obtained, and provide the child with special education and related services.

- *AK Handbook, 2015, p. 13:*

For clarity, the district has up to 90 days to determine eligibility and provide an IEP. If a district determines eligibility earlier, for example in 35 days, the district would then have 30 days from the eligibility determination to develop and to provide an IEP. If the district determines eligibility after 60 days, for example in 70 days, the district may not exceed the 90 days to provide IEP services.



- COMPLAINT SCENARIOS

- Staff shortages extend timelines beyond 90 calendar days
  - Cut-off dates for referrals established in, e.g., March, because “any later and there is not enough time for the evaluations and meetings”

- OPTIONS FOR COMPLIANT PRACTICES

- IDEA in an LD section (34 CFR 300.309(c)) allows timelines for initial evaluations and reevaluations to be “extended by mutual written agreement of the child’s parents and the group of qualified professionals” ... “whenever a child is referred for an evaluation.”
  - A “target” cut-off date may be set, but cannot be used to delay or deny timely evaluation; staff must be told what to do in the event a student is suspected of having a disability after the target referral deadline
  - Remember that general education interventions may run concurrently with the evaluation



## INDEPENDENT EDUCATIONAL EVALUATIONS

- BASIC LEGAL OBLIGATIONS
  - If a parent requests an IEE, the school district must **without unnecessary delay**, either request a due process hearing to show that its evaluation is appropriate, **or** ensure that the IEE is provided at public expense.
- 34 CFR 300.502(b)
  - Cannot require parent to explain why he/she objects to agency evaluation
  - Parent entitled to only one IEE each time the agency conducts an evaluation with which parent disagrees
  - If IEE at public expense, criteria under which obtained including the location of the evaluation and the qualifications of the examiner must be the same as those used when school district initiates an evaluation (to extent consistent with IEE)
  - Must “consider” IEE even if not at public expense



- BASIC LEGAL OBLIGATIONS (continued)
  - *OSEP Letter to Baus* (February 23, 2015) 65 IDELR 81
    - If a parent disagrees with an evaluation because a specific area of the child's needs wasn't assessed, the parent has a right to request an IEE at public expense to fill the gap in the district's evaluation.
- COMPLAINT SCENARIOS
  - District did not respond to IEE request
  - District did not consider parent's evaluator's opinions
- OPTIONS FOR COMPLIANT PRACTICES
  - Respond promptly to IEE requests
  - Develop “agency criteria”
  - Caution regarding refusing the “fill the gap” requests
  - Be certain to document the team's consideration of all data and opinions brought forward from parent



## ELIGIBILITY DECISIONS

- BASIC LEGAL OBLIGATIONS
    - Full and individual, comprehensive evaluations in all areas related to the suspected disability (34 CFR 300.301, 304)
    - *OSEP MEMO 13-08, Q&A, 2013, Question B-6*
- An SEA should determine not only whether the public agency has followed the required Part B procedures to reach its determination, but also whether the public agency has reached a determination consistent with Part B requirements in light of the individual child's abilities and needs. ... The SEA may find that the public agency has complied with Part B requirements **if the public agency has followed required procedures, applied required standards, and reached a determination that is reasonably supported by the child-specific data** and is consistent with Part B.

SEA can order public agency, on a case-by-case basis, to reconsider the eligibility determination.

## ELIGIBILITY DECISIONS

- COMPLAINT SCENARIOS
  - Complainants disagree with eligibility decision
- OPTIONS FOR COMPLIANT PRACTICES
  - Follow all required procedures (team membership, assessments, timelines)
  - Ensure that the student-specific data supports the decisions made by the team
  - Comprehensive information in ESER is critical

## IEP DEVELOPMENT

- BASIC LEGAL OBLIGATIONS
  - IEPs must be reviewed periodically, but not less than annually. 34 CFR 300.324(b)(1)
  - IEPs must be revised to address any lack of expected progress, results of any reevaluations, information about the child provided to or by the parents, the child's anticipated needs, or other matters. 34 CFR 300.324(b)(1)
- COMPLAINT SCENARIOS
  - Changes to IEP are made, but IEP is not revised
  - IEP decisions are made without a meeting, and without an agreement between the parent and the public agency to change **without convening a meeting** (teachers acting without authority of school district). 34 CFR 300.324(a)(4)
  - Complainants allege that parents were not members of IEP teams (or not "equal" members)



- OPTIONS FOR COMPLIANT PRACTICES
  - Train staff so they know that **IEPs cannot be changed without revising the IEP**
  - This requirement pertains to any IEP content, regardless of whether the district was required to include the content or not
  - This requirement pertains to parent requests for changes; just because the parent requested the change doesn't mean she won't complain about the change later
  - This requirement pertains to changes in amount of service to be provided (e.g., when district lengthens a school day for preschoolers with disabilities by ½ hour)
  - If the school district permits revisions to an IEP, after the annual IEP team meeting, without convening a meeting, make certain the procedures are detailed and that staff understand how to implement district procedures



- OPTIONS (continued)
  - This is also true for “attendance not necessary” options for a member whose “area of the curriculum or related services is not being modified or discussed”  
34 CFR 300.321(e)(1)
  - And also true for member “excused” in whole or in part, when meeting does involve discussion of the member’s area of the curriculum or related services  
34 CFR 300.321(e)(2)
    - Parent, in writing, and the public agency must consent to excusal
    - Member must submit in writing to the parent and the IEP team, prior to the meeting, input into the development of the IEP
  - Document input from parents and the IEP team’s consideration of that input (establishes “participation”)

## IEP CONTENTS

- BASIC LEGAL OBLIGATIONS
  - Content requirements at 34 CFR 300.320 & 300.324
  - *OSEP MEMO 13-08, Q&A, 2013, Question B-8*  
An SEA may need to determine not only whether the public agency has followed the required Part B procedures to reach its determination, but also whether the public agency has properly addressed the individual child’s abilities and needs. ... The SEA may find that the public agency has complied with Part B requirements **if the evidence clearly demonstrates that the agency has followed required procedures, applied required standards, and reached a determination that is reasonably supported by the child-specific data.**
  - The SEA can order an IEP Team to reconvene to develop a program that ensures the provision of FAPE for that child or order compensatory services.

- COMPLAINT SCENARIOS
  - Complainants allege that IEP provisions (e.g., goals & services) do not address the student's needs
    - Most often, related to social/emotional/behavioral needs
    - Sometimes communication needs
    - Sometimes reading skill development needs
  - Special section on supervision services



- OPTIONS FOR COMPLIANT PRACTICES
  - ESER should include information from all sources, including parent's evaluators
  - Ensure PLAAFPs address information included in ESER related to students needs
  - Follow all required procedures for IEP development (meeting notices, team membership, content requirements, PWN of proposed IEP implementation)
  - Ensure that the student-specific data supports the decisions made by the IEP team
  - If the district refuses to include content requested by parent, or refuses to change the IEP, must provide written notice of the refusal



## PROGRAM SUPERVISION SPECIAL EDUCATION AIDE SUPERVISION

- BASIC LEGAL OBLIGATIONS
  - Each **special education program** provided through assistance of **certificated regular education teacher** must be reviewed **on-site** by the **certificated special education teacher** responsible for the child's program. 4 AAC 52.252 (a)
  - Each **related services program** provided to a child through the assistance of a **certificated regular or special education teacher** must be reviewed **on-site** by the **certificated or licensed related services provider** responsible for the child's program. 4 AAC 52.252(b)
  - Each **special education aide** employed by the district to assist in providing **special education** to a child must be supervised **on-site** by the **certificated special education teacher** responsible for the child's program. 4 AAC 52.250(c)

- BASIC LEGAL OBLIGATIONS (continued)
  - Each **special education aide** employed by the district to assist in providing **related services** to a child must be supervised **on-site** by the **certificated or licensed related services provider** responsible for the child's program. 4 AAC 52.250(d)
  - EACH SCENARIO REQUIRES, as applicable:
    - The child's **IEP team** shall make an **individualized determination** of the **frequency of on-site** supervision for each special education program or for each related service
    - A district **must provide** for **on-site** supervision **at least once every month** unless the IEP team, **after consideration of all the evidence**, determines that less frequent **on-site** supervision for that program is sufficient to provide FAPE
    - District **may not** provide **on-site** supervision less frequently than **once every three months**

- COMPLAINT SCENARIOS

- Complainants allege that every provision for supervision is exactly the same: “3x/yr” or “quarterly” or ...
- No evidence that IEP teams understand they must BEGIN with assumption that on-site supervision will be provided monthly (they begin with assumption that supervision will be provided less frequently, then augment as necessary)
- No record of any “evidence” that was “considered” by the team when deciding that on-site supervision less than monthly was sufficient to provide a FAPE; no teachers can describe how they began the discussion with “monthly” and only after “consideration of the evidence” moved to less frequent
- Interviewees believe that required supervision can be accomplished through other means (telephone, skype, email)
- Interviewees believe that supervision cannot be accomplished if the child is absent

- OPTIONS FOR COMPLIANT PRACTICES

- Ensure staff completely understand legal requirements
- Develop guidelines for staff to use in IEP discussions, i.e., how to consider and document the basis for any decision to provide less than monthly on-site supervision, including for example:
  - Student-specific data regarding the nature and severity of the student’s disabilities
  - Student’s specific goals for special education and/or related services
  - Amount and nature of the direct service to be provided, by whom, in what settings
  - Staff training/experience
  - Availability of supplementary methods for providing technical assistance (telephone calls, skype, email TA)
- Develop contingency plans for when travel is interrupted (an IEP implementation problem)

## IEP IMPLEMENTATION

- BASIC LEGAL OBLIGATIONS
  - FAPE must be provided to students with disabilities.  
34 CFR 300.101(a)
  - FAPE includes special education and related services provided in conformity with the IEP. 34 CFR 300.17
  - Special education and related services must be provided to the child in conformity with the IEP. 4 AAC 52.240
  - The IEP must be accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation. 34 CFR 300.323(d)(1)
  - Each teacher and provider must be informed of his or her specific responsibilities related to IEP implementation, and the specific accommodations, modifications, and supports that must be provided in accordance with the IEP.  
34 CFR 300.323(d)(2)



- COMPLAINT SCENARIOS
  - Most common complaint, e.g.,
    - failure to provide services to address goals
    - failure to provide related services
    - failure to provide supplementary aids/services; accommodations and modifications
    - teachers do not know what is in the IEP
  - Complainants allege that their preferred methods are not implemented
    - Nothing in IDEA requires that IEP teams describe specific methodology – but if they do, they will be held to its implementation
    - E.g., if “tele-practice” is listed as the methodology to be used to provide speech therapy in a student’s IEP, then ceasing “tele-practice” would require an IEP revision



- OPTIONS FOR COMPLIANT PRACTICES
  - Take progress reporting very seriously
  - Develop/implement good systems for collecting the progress data that will be reported (in the ways the IEP states the goals will be measured) (evidence of implementation)
  - Develop/document systems for ensuring that those with IEP implementation responsibilities have access to IEPs
  - Develop/document systems for ensuring that those with IEP implementation responsibilities know exactly what those responsibilities are
  - **REMEMBER**, failure to implement an IEP is disability-based discrimination under Section 504 and money damages are available for discrimination under Section 504



## PLACEMENT DECISIONS

- BASIC LEGAL OBLIGATIONS
  - Least restrictive environment principles  
34 CFR 300.114 -117
  - The placement decision must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options
  - A case-by-case analysis is required to determine whether a change in location substantially alters a student's educational program and therefore constitutes a change of placement. *OSEP Letter to Fisher* (July 6, 1996)
    - Whether services can be implemented in new location
    - Whether student will be educated with nondisabled peers to the same extent as set forth in IEP
    - Whether student will have same opportunities to participate in nonacademic and extracurricular activities



- COMPLAINT SCENARIOS
  - Allegation that moving a specialized program (e.g., autism) from one school to another is a placement decision requiring parent participation
  - Allegation that ceasing use of a particular placement option (Head Start) is a placement decision requiring parent participation
- OPTIONS FOR COMPLIANT PRACTICES
  - Cannot assume that a change in location is never a change in placement
  - Must do the case-by-case analysis
  - If an individual student's IEP requires revision, convene and make revisions



## MISCELLANEOUS

- DISCIPLINE
  - Ensure that schools accurately record disciplinary removals, even for partial days
  - Ensure that schools understand that having the parent come “pick up” a misbehaving student is a disciplinary removal
- DUE PROCESS RESOLUTION SESSIONS
  - Remember that the school district + parent determine relevant members of IEP team to attend resolution session
- COPIES OF EDUCATION RECORDS
  - AK law gives parents right to copy of record (FERPA only does so in limited circumstances)
  - Neither AK nor FERPA give right to copy of record to representative of the parent, no matter how inconvenient





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

JAN 21 2017

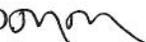
Contact Persons:

Name: Ruth Ryder  
Telephone: 202-245-7513  
Name: Deborah Morrow  
Telephone: 202-245-7456

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,

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-2600  
www.ed.gov

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

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.

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-

---

<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/speced/guid/idea/index.html>.

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 Copenhaver, 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 Coordinators