

# The Legal Dimension of RTI

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## About this Talk

THE TALK HAS CONCLUDED.

SCROLL BELOW FOR QUESTIONS AND ANSWERS.

The legal dimension of response to intervention (RTI) has been the subject of considerable confusion. Join Perry Zirkel, University Professor of Education and Law at Lehigh University, during our next RTI Talk as he answers your questions regarding the foundational elements of RTI-related legislation, regulations, and case law.

Read more about [Perry Zirkel, Ph.D., J.D., LL.M.](#)

## Transcript



**Tammy**

Does the law require that interventions be scientifically research based? Also is progress monitoring required to be evidence based or can it be teacher created?



**Perry A. Zirkel**

a) Yes, the IDEA specifically refers to "a process that determines if the child responds to scientific, research-based intervention." b) The IDEA does not address progress monitoring beyond the general requirement in SLD identification for the evaluation team to consider "data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents." This required consideration applies regardless of whether the district is using RTI. Otherwise, the nature of progress monitoring is a matter of state law and district policy.

The National Center on Response to Intervention's [RTI State Database](#) provides resources, which range from policy documents and briefs to trainings and tools, that were developed by states, districts, or territories, in the U.S. Visit the database and select any state to see the state's RTI Snapshot as well as the resources on RTI that the state has developed. Additional resources on states' policies include the following articles:

Zirkel, P. A., & Thomas, L. (2010a). State laws and guidelines for implementing RTI. *Teaching Exceptional Children*, 43(1), 60-73.

Zirkel, P. A., & Thomas, L. (2010b). State laws for RTI: An updated snapshot. *Teaching Exceptional*

**A** *Children*, 42(3), 56-63.

**Q** **Clara Fitzpatrick**

Are there legal requirements for schools regarding Tiers 1 and 2? What else besides adherence to IEPs are required for Tier 3?

**A** **Perry A. Zirkel**

The IDEA does not include any legal requirements for the multiple tiers—even for the number of such tiers—of RTI. Instead, any such legal requirements are in state law. For an overview of which states have such legal requirements, see, e.g., the Zirkel-Thomas article, "State Laws and Guidelines for Implementing RTI, in the Sept./Oct. 2010 issue of *Teaching Exceptional Children* or visit the National Center for Response to Intervention's [RTI State Database](#).

**Q** **Cate Borzi**

When your state has not defined RTI, is there a federal definition?

**A** **Perry A. Zirkel**

The federal definition in the IDEA legislation and regulations is limited to the following referencing language, which is understood to mean RTI: "a process that determines if the child responds to scientific, research-based intervention." The only other IDEA definitional language is in the IDEA administering agency policy interpretations (e.g., [Memorandum to State Directors of Special Education \(2011\)](#)) and the Office of Special Education and Rehabilitative Services (OSERS) [Questions and Answers on Response to Intervention and Early Intervening Services \(2007\)](#)), which identify the following core characteristics of RTI: 1) high quality, research-based instruction in general education, 2) continuous progress monitoring, 3) screening for academic and behavior problems, and 4) multiple tiers of progressively more intense instruction. Otherwise, OSEP has made clear its decision not to provide a more specific and narrow definition of RTI in light of 1) the varying models in the professional literature, and 2) the IDEA structure of "cooperative federalism" that leaves latitude for varying state and local choices.

**Q** **Leslie**

Wisconsin law says that we must use the RTI model starting in December but Child Find says we have a duty to locate and eval students who may have a disability. If a parent refers their child for evaluation, how do we handle that without denying services?

**A** **Perry A. Zirkel**

This question and several of the others have the same answer, which is—as OSEP has repeatedly warned—that when it has reason to suspect that the child is eligible under the IDEA (including the need for special education), a district has the obligation to move ahead promptly to obtain consent and, thereafter within the prescribed legal time limit, complete the evaluation regardless of RTI. If

**A** a parent requests the evaluation before or during the RTI process, the key question is whether the district has reason to suspect, based on the information it has available at that point, that the child 1) meets the criteria for SLD or another IDEA classification and, as a result, 2) needs special education. If the answer to the question is yes, the district must proceed ahead, only including RTI to the extent it fits within the reasonable period for consent and the specific period for evaluation. If the answer is no, the district must provide written notice to the parent of the lack of reasonable suspicion, along with procedural safeguards (including the parents' right to go to a due process hearing), and the district may proceed with RTI without the child find limitation.

**Q** **Jenny**  
Is it legal to have special education teachers working in small groups with students on interventions?

**A** **Perry A. Zirkel**  
Just as long as it meets whatever the general state standards and local policies are, the only RTI-related legal guidance I know of concerns the limitations on the use of IDEA funding. See OSEP's [Letter to Dale \(2012\)](#), which concerns this limitation in relation to IDEA early intervening services funds (which may be used for RTI).

**Q** **vincent salvi**  
Is there any case law that discusses liability as a result of use of an assessment for instructional purposes?

**A** **Perry A. Zirkel**  
The short answer is no, at least in terms of published case law (with a broad notion of "published").

**Q** **Sande Johnson**  
I read an article by Greg Toppo in USA Today, 3-18-13, regarding "ability grouping" of students. Apparently ability grouping was addressed by the Children's Defense Fund and the NAACP from the 1970s to 1990s because students were supposedly separated by race and class. According to the article, with NCLB in 2002, teachers have been using "dynamic grouping" to focus on students struggling in reading and math. My question involves the legality of grouping under Rtl. Multi-tiered instruction is permitted based on 300.307(a)(2). Because teachers are increasingly using learning centers to group students for instruction, is this a violation of an earlier civil rights law? I am a doctoral student, focusing on Rtl, so all literature of this nature is catching my attention at this time. I would have never considered grouping children in my classroom by race or class, so even though I'm a child of the 50s & 60s, the civil rights information was a surprise to me!

**A** **Perry A. Zirkel**  
The case law on ability grouping is limited and specific to race/national origin based on Title VI

**A** and/or the equal protection clause. See, e.g., *Simmons v. Hooks*, 843 F. Supp. 1296 (E.D. Ark. 1994). The upper tiers of RTI arguably constitute ability grouping, but whether they constitute race discrimination under the relatively narrow standards of this case law is unlikely, as partially reflected in the lack of any litigation or OCR letters of findings to date.

**Q** **Harry Kolody**

My question is with regard to these two statements for SLD eligibility taken from our administrative code for SLD eligibility: The pupil does not achieve adequately for the pupil's age or to meet the state-approved grade level standards when provided with learning experiences and instruction appropriate for the age of the pupil or the state-approved grade level standards in one or more of the following areas and then lists the SLD areas. Also: The student does not make sufficient progress to meet the age appropriate standards or the state approved grade level standards in one or more of the areas set forth in paragraph (a) when using a process based on the pupil's response to scientific, research-based intervention. Our district uses only a process of RTI for SLD eligibility. My question is what do the statements above mean? Does this mean that even though a student is making progress with interventions he may be eligible for special education services because he has not made sufficient progress to meet age appropriate standards or the state approved grade level standards in one or more of the 8 SLD areas? It would seem to mean, too, that once a student gets so far behind that he would become a student who would be eligible for SLD services.

**A** **Perry A. Zirkel**

The language that you attribute to your state administrative code mirrors the wording for SLD identification in the IDEA regulations (34 C.F.R. ? 300.309). For your district, your question about "making progress" would appear to depend on the decision rules in state law and/or local policies as to how much progress is deemed sufficient in relation to the frames or reference quoted from federal and state law.

**Q** **Caroline**

What is the most common misunderstanding by parents about RTI that is uncovered through legal suits against districts?

**A** **Perry A. Zirkel**

Thus far, as the related resources listed at the end provide in more detail, the case law to date has not been helpful in providing practical guidance as to legally defensible implementation of RTI. Probably the most common misunderstanding is not specific or even primarily that of parents?confusion between what I call GEI (general education interventions) and RTI.

**Q** **Cateyes**

Can a special education student with an IEP use and be involved in RTI? I have read yes! The school Principal says no to RTI and no to Title 1 programs/funds as the child is receiving Special Ed

**Q** services! I read they can't say "no double dipping" is that true?

**A** **Perry A. Zirkel**

In [Letter to Dale \(2012\)](#), the Office of Special Education Programs addressed this question. Here is a quick summary of the answer, but you and the principal ought to check OSEP's specific wording if the question persists: Students identified as eligible for special education under the IDEA may not participate in RTI paid for by Part B coordinated and early intervention services (CEIS) funds; however, a district may split the costs among special ed, general ed, and CEIS funds with proper documentation of the allocation for IDEA-eligible students as compared to those for the other students.

**Q** **cateyes**

When is RTI to be "running" in the schools? Can the schools have only "reading" going and not math? Now as of Fall 2012 was told elementary has no to math RTI and the intermediate blg. at PTC says they have Math RTI? Same district and side by side buildings! Is this possible. Also no parent involvement in the program and they won't talk about RTI period! ONLY hear from child "went to RTI" and see him bring home papers with like two sentences completed and the rest not done. The work never relates to any other class and seems to be busy work only. Note this is a special ed/IEP child gifted in many areas, but needs specific instruction in academics!

**A** **Perry A. Zirkel**

For the applicable regulations and guidelines for RTI in Illinois, see: ? ILL. ADMIN. CODE tit. 23, ? 226.130 The following sections of the Illinois State Board of Education website also offers relevant information:

- [Illinois Response to Intervention](#)
- [Special Education Services](#)
- [Illinois Parents Guide: Educational Rights and Responsibilities - Chapter 5: Additional Procedures for Specific Learning Disabilities](#)
- [I-Rtl Network](#)

For enforcement in particular situations, the legal alternatives include the ISBE complaints and compliance process and the impartial hearing officer system, although effective communication with the school representatives in your district is generally the preferable first option.

**Q** **Sharon Patton-Griffin**

Can special education staff be used to provide Tier 2 and 3 interventions to general education students?

**A** **Perry A. Zirkel**

Please see the answer to Jenny's question, which is that it's largely a matter of funding rules under

**A** the IDEA (and state/local policies).

**Q** *J Mull*

Under RTI don't parents still have a right to request the district to perform a complete/ thorough evaluation of their child's skills to assist the team (including the parents) in determining the need for specialized instructional services?

**A** *Perry A. Zirkel*

Surely, but see the answer to Leslie's question about child find, because?unless state law provides otherwise (which is very rare)?the parent's request does not automatically trigger an evaluation.

**Q** *Shari*

Does federal law specify the use of Rtl with other disabilities besides SLD?

**A** *Perry A. Zirkel*

No, but a few state laws (e.g., Delaware and Louisiana) require the use of RTI for identifying one or more other of the IDEA classifications. See, e.g, Perry A. Zirkel, State Laws and Guidelines for RTI: Additional Implementation Features, 39 COMMUNIQUE 30 (May 2011).

**Q** *Shannon*

Should Rtl be standing alone in terms of special education eligibility consideration or is Rtl meant to be a component of the evaluation process, but not the sole determining factor?

**A** *Perry A. Zirkel*

This question is easy to answer legally, because OSEP has repeatedly reminded us that the IDEA requires a variety of sources and procedures for evaluation and, thus, under the current provisions of the IDEA, RTI may not alone suffice for evaluation under the IDEA.

**Q** *Sara*

Once a failure to respond to valid interventions has been demonstrated, what would be the most legally supported method of identifying a Specific Learning Disability?

**A** *Perry A. Zirkel*

If by "legally supported" you mean specified in the IDEA regulations, OSEP policy interpretations, and case law, then there is no one specific method. Instead, conformance to the various procedural and substantive requirements specified for evaluation in the IDEA and any corollary special education law in your state is all that is legally required with one limited exception. Specifically, if state law requires both RTI (presumably before evaluation) and severe discrepancy (for the evaluation), than the traditional severe discrepancy would answer your question, although there is

**A** considerable controversy as to doing severe discrepancy in a legally defensible way.

**Q** **Annette Thacker-Bartlett**

Many special education coordinators ask me "How much RTI do I need to do before I can make a referral for evaluation for special education?" While I know this is individual for each student and each circumstance, what are some recommendations I can provide to them?

**A** **Perry A. Zirkel**

As the answer to Leslie's question shows, the situation is an individual matter but the IDEA standard is the same?reasonable suspicion that the child meets the criteria for one or more classifications and has a resulting need for special education. Thus, it is left to the discretion of states (typically via guidelines), districts (typically via prevailing practice) and experienced individuals (like you presumably) to provide practical training and recommendations on the "red flags" for reasonable suspicion.

**Q** **Toni Montgomery**

Are all districts required to have a RtI plan?

**A** **Perry A. Zirkel**

If you mean a district plan for implementing RTI, approximately 5-10 states have such a requirement. If you mean an individual plan for the child in the RTI process, the minority of states have such a requirement via law. See Perry A. Zirkel, State Laws and Guidelines for RTI: Additional Implementation Features, 39 COMMUNIQUE 30 (May 2011). However, beyond law, having such an individual plan for practical purposes may end up as a local policy or practice just as a practical matter.

**Q** **Annette Thacker-Bartlett**

Should the implementation of Tier 3 strategies and interventions for a student, either for academics or behavior, automatically result in a referral for evaluation for special education?

**A** **Perry A. Zirkel**

No, it will depend on 1) whether the district has the reason to suspect eligibility at that point (see the answer to Leslie's question about child find), and 2) the requirements in state law and/or district policy as to the relationship to whatever is the final tier and the IDEA evaluation process. For example, some states merge the final tier and evaluation, whereas generally the completion of the entire RTI process precedes a formal IDEA evaluation, which starts with parental consent.

**Q** **Jeanne Lee**

Could you explain the legal role of RTI as it pertains to the reauthorization of IDEA 2004?

**A Perry A. Zirkel**

The various pieces posted on this website, which I and/or Jose Martin prepared (see list of Related Resources below), answer this question more fully, but the short answer is that IDEA 2004 provided states with two options with regard to RTI--either mandate it (which approximately 12 states have done) or permit it (which the other states have done, thus leaving the choice to the local district).

**Q tammie**

What if a child is not responding to the District's scientifically-based program, what should be the next step?

**A Perry A. Zirkel**

If your question assumes, via the reference to "scientifically based," that the district uses RTI and that we are at the universal tier (i.e., all children), the next step would be to provide the student with what is typically called Tier 2 supports. State law and local policy would provide more specific answers, such as what is the decision rule for "not responding" and what are the number and nature of the tiers.

**Q Cyn**

Is possible to have a school say that we "have to use RTI prior to writing a 504 Plan or IEP"? Is that according to IDEA? Thank you.

**A Perry A. Zirkel**

First, the IDEA does not say anything about "a 504 Plan," which is governed by a separate pair of statutes--Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. Second, the IDEA requires an evaluation, which is prerequisite for an IEP in terms of eligibility. The key to the eligibility evaluation is whether the district has reason to suspect that the child may be eligible under the classification of specific learning disability (SLD). If the district does have that reasonable suspicion, it must promptly proceed to obtain parental consent and to complete the evaluation within the prescribed period under the IDEA or, if different, under state law. For example, the [Memorandum to State Directors of Special Education \(2011\)](#), the Office of Special Education Programs (OSEP), which administers the IDEA, made clear that RTI may not be used to delay or deny an evaluation of a child reasonably suspected of having a disability. Conversely, if the district does not have such suspicion and uses the RTI process for SLD identification, it may follow the sequence suggested in your question. For example, in [Letter to Ferrara \(2012\)](#), OSEP interpreted as permissible a Texas law that provided for use of "all support services available [in general education]" prior to referral with the understanding that districts implemented it so as not to delay the evaluation of a child reasonably suspected of qualifying for eligibility.

**Q Laurie Weideman**

What responsibility does the local school have toward students in a nearby private school



**Q** regarding RTI?

**A** **Perry A. Zirkel**

Under the IDEA, the district of location has specified obligations starting with "child find." If the child is suspected of meeting the criteria of specific learning disability (SLD) and if the district uses RTI as part of the process for identifying students with SLD, the responsibility would be to see whether the private school can and will provide RTI data. If not, which would likely be the typical case, the commentary accompanying the 2006 IDEA regulations provides the following guidance: "The group making the eligibility determination for a private school child for whom data on the child's response to appropriate instruction are not available may need to rely on other information to make their determination, or identify what additional data are needed to determine whether the child is a child with a disability." Moreover, in [Letter to Zirkel \(2011\)](#), the Office of Special Education Programs provided this additional clarification: "If a private school refers a parentally placed child to the district of its location for an evaluation for suspected SLD and the district uses RTI for SLD identification, the district is not required to use RTI for the evaluation and must move forward to obtain parental consent and to complete the evaluation within 60 days thereafter."

**Q** **Merryl Casanova**

Is it legal to have paraprofessionals and/or classroom teachers provide Tier 2 interventions that they are not certified in (such as Wilson)? Are "1 Day" trainings enough?

**A** **Perry A. Zirkel**

The answer will depend on state laws regarding certification and, if any pertinent provision, RTI. The apparent confusion here is between certification in terms of teacher licensing, which governs certain subjects and grades, and certification in terms of external programs, such as Wilson. The only possible legal connection of the latter meaning of certification would be in a due process hearing or court case. Thus, far this FAPE issue has received negligible attention, with courts generally leaving staff assignments to the discretion of school authorities just as long as the staff meets minimum state qualifications.

#### **Related Resources from RTINetwork.org:**

- [The Common Lore About RTI](#), By Perry A. Zirkel
- [The Legal Dimension of RTI: Part I. The Basic Building Blocks](#), By Perry A. Zirkel
- [The Legal Dimension of RTI: Part II. State Laws and Guidelines](#), By Perry A. Zirkel
- [The Legal Dimension of RTI: Part III. RTI Legal Checklist for SLD Identification](#), By Perry A. Zirkel
- [Legal Implications of Response to Intervention and Special Education Identification](#), By Jose L. Mart?n
- [Understanding the Modern Menu of Public Education Services for Struggling Learners: RtI Programs, Section 504, and Special Education](#), By Jose L. Mart?n