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Understanding the Modern Menu of Public Education Services for Struggling Learners: RtI Programs, Section 504, and Special Education

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The emergence of high-quality research-based intervention programs under Response-to-Intervention (RtI) methodology in public schools has created a modern continuum of services for students who struggle with the regular curriculum. Prior to the advent of RtI programs, students who struggled with the regular curriculum faced either failure in regular programs or referrals to disability programs as their educational difficulties became serious enough to suspect that they might have a learning disability. The modern continuum of services retains the protections of the disability laws, the Individuals with Disabilities Education Act (IDEA) and Section 504, but also enables schools to provide quality interventions within regular education programs at a much earlier stage in the course of students' educational problems, when assistance can be both more effective and timely. The lines between the programs, however, have become a source of confusion and misconception. This article reviews those dividing lines and examines the similarities and differences between programs and services provided under local RtI policies, Section 504, and special education programs under IDEA.

RtI Programs and Learning Disabilities

On October 3, 2001, President George Bush established the President's Commission on Excellence in Special Education (PCESE) to collect information and study issues related to federal, state, and local special education programs, with the goal of recommending policies for improving the education performance of students with disabilities. The PCESE delivered its report to President Bush on July 1, 2002 (U.S. Department of Education Office of Special Education and Rehabilitative Services, 2002). When the Commission examined how public education was addressing the problem of struggling learners, including students with potential specific learning disabilities (LDs), it found an antiquated, dysfunctional, and unscientific model for determining whether a student truly had an LD (see U.S. Department of Education Office of Special Education and Rehabilitative Services, 2007, Question A-2). To evaluate for LDs, most states have used a discrepancy-based model that simply compared IQ scores to norm-

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referenced achievement scores as the main criterion for LD eligibility. The research of experts in LDs, however, has indicated that this model was not predictive of true LDs, led to misidentification, was subject to manipulation, and operated to apply helpful interventions too late, precisely at educational timeframes when they were shown to be least effective. Moreover, the discrepancy model allowed certain nondisabled students who did not receive appropriate regular education services and interventions to be misclassified as having a disability, when in fact they did not and only needed additional instructional assistance to master grade-level content. To the Commission, the need for reform was clear. Consequently, one of its main recommendations was to transition toward an evaluation and eligibility model for identifying LDs that focused on assessing a student's response to early educational interventions within a school's general programs, rather than on results of intelligence and achievement testing. The other key recommendation was to limit special education eligibility to those students whose learning deficits were such that they did not respond to early intervention and required more specialized instruction within special education.

These efforts at reform, which originated in a desire to modernize LD eligibility determinations, also resulted in the public education system refocusing its energies and resources on addressing the needs of all its struggling learners through application of high-quality, research-based interventions within regular education. Both of these facets of educational reforms came to be encapsulated in the phrase *Response-to-Intervention* or *RtI*. Under RtI methodology, schools do not wait until a child's educational deficits become so significant that a learning disability is suspected and the child is referred to the disability-based programs of Section 504 or IDEA. Instead, students struggling with the general curriculum are provided quality interventions that are research based, usually of incremental intensity, and capable of generating detailed data on students' responses. The intervention programs commonly make use of progress data to fine-tune intervention strategies and assist in educational decision making regarding each participating student.

Crucially, the decisions of whether to develop an RtI program and how to determine the right nature and type of program have been primarily left to local public school systems, although some state education agencies have taken greater leadership roles in the process. Letters from the U.S. Department of Education corroborate that the type of RtI program or model to be implemented is entirely up to individual local education agencies (U.S. Department of Education Office of Special Education Programs, 2008). In addition, local school districts also have discretion to determine the roles and responsibilities of staff implementing and overseeing the intervention programs, including its training components, data gathering, and communications with parents. Thus, schools across the United States are establishing and developing a wide variety of intervention programs under the broad rubric of RtI, guided by a principle of early quality interventions, and prodded by the incentive to increase struggling students' academic performance.

As creatures of local policy and local investment, moreover, RtI programs are entirely discretionary—no public school is legally required to establish an RtI program (unless the state has otherwise required it; see U.S. Department of Education Office of Special Education and Rehabilitative Services, 2007, Question E-1). Rather than flowing from a legislative mandate, the emergence of RtI programs in American public schools is a result of both a collective realization that too many schools were falling short with too many struggling students and a desire to meet this challenge with a more positive and proactive approach.

Services Under RtI Programs

Because there is no overarching legal framework for regulating RtI programs, and because the policy priority is to allow local school systems to establish RtI programs that are a proper fit to their local educational approaches, the programs run the gamut in terms of their structure and implementation. According to the National Association of State Directors of Special Education (2005), however, most RtI systems tend to adhere to the following core set of assumptions:

- The educational system can effectively teach all children.
- Early intervention is critical to preventing educational deficits from becoming impossible to address.
- The implementation of a multi-tier service delivery model is necessary.
- A problem-solving model should be used to make decisions between intervention tiers or types.
- Research-based interventions should be implemented to the extent possible.
- Progress monitoring must be undertaken to inform instruction.
- Data should drive decision making.

Reflecting the above core tenets, many RtI programs are tier based, with lighter interventions provided in initial tiers and more intensive interventions applied if the student is unsuccessful in the beginning tiers. Some programs focus on interventions provided in regular classes by regular classroom teachers as part of instruction, while others call for “pull-out” services provided by specially trained instructors in small-group settings. Some RtI programs focus almost exclusively on reading interventions, since reading competency is so closely linked to classroom performance in general, while others provide interventions in a variety of content areas. In most programs, progress is closely monitored and data gathering is a key component of the intervention system. The data, over time, are used to adjust the interventions to better meet individual needs of students, as well as to make decisions on whether referrals to Section 504 or special education may be needed or whether other approaches should be attempted. In many RtI programs, moreover, designated school teams oversee the intervention process, data gathering, and decision making.

For many struggling learners, the addition of quality interventions is all that is needed to correct the problem and place the student back on track to grade-level mastery. For some students, however, either because of a lack of response to interventions or additional information provided by parents, a suspicion can arise that their educational deficits are in fact due to a

disability. When schools have reason to suspect that a student's difficulties are due to disability, a discussion with parents should be initiated to discuss options under the disability programs (see U.S. Department of Education Office for Civil Rights, 2011, Question 31: "School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services"). The two available options are discussed below in turn.

Section 504—Nondiscrimination in the Education Context

Section 504 of the Rehabilitation Act of 1973 is a civil rights law passed by the Congress in 1973 to protect persons with disabilities from discrimination based on disability in agencies that receive federal funds. When federal regulations were promulgated to implement Section 504 in the late 1970s, provisions were included to address protections for students with disabilities in elementary and secondary public schools, all of which are recipients of federal funding (see 34 C.F.R. Part 104, Subpart D, which addresses the applicability of Section 504 to elementary and secondary public schools). As was the case with IDEA in the same decade, the Section 504 regulations included requirements for identification of potentially eligible students, evaluation, procedural safeguards, and development of individualized plans for students determined to be eligible because their impairments rose to the level of substantially limiting their ability to function in the school setting.

The evolution of this legal framework meant that even students whose disabilities were not severe enough to warrant IDEA services could nevertheless be identified, evaluated, and provided an individualized plan of accommodations and services to ensure that their educational needs were met as adequately as those of nondisabled students. Thus, a requirement to provide a free appropriate public education (FAPE) arose under Section 504 in the nondiscrimination context pursuant to the regulations promulgated to implement the law.

In other words, what developed over time was a system whereby students with disabilities that substantially limited their ability to function in the school setting would receive individualized plans under Section 504, while students with more severe disabilities requiring the provision of specially designed instruction through special education programs would receive those services under IDEA, with a more detailed and intricate set of procedures and requirements.

Who Is Eligible Under Section 504 and for What Purpose?

Under Section 504, there is no list of "approved" disabling conditions. A student with a disability entitled to receive a FAPE under Section 504 is simply one who "has a physical or mental impairment which substantially limits one or more major life activities" (see § 504 regulation at 34 C.F.R. §

104.3(j)(1)). The definition of *impairment* under Section 504 is a wide open one—any physical or mental impairment can qualify a student, as long as it substantially limits one or more of their major life activities in a way that requires the provision of accommodations or services in the school setting so that a student’s needs can be met as adequately as those of his or her peers.

Although the most relevant major life activity in the educational context is, of course, learning, disabilities can affect other major life activities (breathing, walking, thinking, concentrating, eating, all bodily functions and systems, performing manual tasks, etc.) in ways that have an impact on a student’s ability to function. In the school setting, students must function behaviorally, socially, and physically, in addition to academically. A disability can substantially limit a student’s ability to function in any one of those key domains, to the point of eligibility under Section 504. Amendments to the Americans with Disabilities Act effective in 2009, moreover, have served to expand student eligibility under Section 504 (see ADA Restoration Act of 2008). Generally, therefore, the child-find and eligibility processes under Section 504 are meant to identify kids with physical or mental impairments that substantially limit their major life activities in ways that have an impact on their functioning in the school setting to the point of needing an individualized and systematic plan of accommodations and services.

The ultimate purpose of Section 504 services is to provide children with disabilities an equal opportunity to receive an education despite the impact of their disabilities. Thus, the services required under Section 504 are those designed to provide a Section 504-type FAPE—meeting the individual educational needs of disabled students as adequately as the needs of nondisabled students are met (see 34 C.F.R. § 104.33(b)(1)(i), and see U.S. Department of Education Office for Civil Rights, 2011). The law provides no guarantee of achievement or of performance, but rather the law ensures provision of accommodations and services that will enable the student to have an equal educational opportunity, and which will be developed in accordance with certain procedural steps and safeguards. The existence of a legal framework, consisting of a federal statute and an admittedly modest set of federal regulations, affords some degree of consistency in Section 504 implementation from school system to school system. Although there may be variance among schools in the degree to which the process is implemented, the foundation requirements of Section 504 are likely to be known to most school districts.

Range of Services Under Section 504

The language of the regulations states that a FAPE is accomplished by means of “the provision of regular or special education and related aids and services” (see 34 C.F.R. § 104.33(b)(1)). However, the vast majority of children receiving services under Section 504 are served in regular classrooms. In fact, the Section 504 regulation addressing educational settings states that schools must place students with disabilities in regular classes “unless it is demonstrated that the education of the person in the regular environment with the use of supplementary aids and services cannot

be achieved satisfactorily...” (see 34 C.F.R. § 104.34(a)). After an evaluation process, the services are developed by a committee of knowledgeable persons and usually set out in individualized Section 504 plans, which must be reviewed periodically. Although there is no firm requirement for written § 504 plans, this is the common practice in public schools (see 34 C.F.R. § 104.35, which outlines requirements for the evaluation process, committee decision making, and re-evaluations/reviews). In describing the range of services available under Section 504 in public elementary and secondary schools, the U.S. Department of Education Office for Civil Rights (2011, Question 4) has stated that the law “requires recipients to provide to students with disabilities appropriate educational services designed to meet the individual needs of such students to the same extent as the needs of students without disabilities are met. An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.”

The nature of services, moreover, differs depending on whether the students are in elementary and secondary public schools or in colleges and universities that receive federal funds. As noted in Question 14 of the U.S. Department of Education Office of Civil Rights (2011) FAQ, “At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden.” Thus, the range of services available in postsecondary programs is less than that provided in public schools, although reasonable accommodations would be required in order to afford students with disabilities an equal opportunity to participate in a college or university program that receives federal funds.

Although the Section 504 regulations refer to the provision of “special education,” the existence of IDEA—as discussed below—means that if a student has a disability and a need for special education services, it will be provided to him or her under IDEA. Indeed, a federal court echoed this proposition nearly 20 years ago by stating that it believed that the only students likely to be entitled to special education under Section 504 are the same students also entitled to special education under IDEA (see *Lyons v. Smith*, 1993). Thus, Section 504 services for eligible students typically include classroom accommodations, instructional delivery modifications, supplementary aids and services (such as behavior intervention plans or health plans), related services (such as counseling and possibly occupational or physical therapy), organizational aids (assignment notebooks or planning aids), or offers of tutoring or other intervention programs available to all struggling students. This listing is not exhaustive, moreover, as a Section 504-eligible student would be entitled to any accommodation or service that is necessary in order to have his or her educational needs met as adequately as those of their peers.

But, the service or accommodation must be truly necessary for the school to be legally required to provide it. Programs under Section 504 are not

expected or required to maximize a student's potential or provide the optimal learning experience (see *J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000)). The law intends only to ensure that eligible students with disabilities receive the level of accommodations and services required for them to have an equal opportunity to receive a public education.

In sum, Section 504 provides a basic mechanism and process under which students with disabilities that substantially limit their major life activities can receive accommodation and services under a structured, legally mandated framework with established procedures and safeguards, in addition to readily available regular interventions. Some students' disabilities, however, are severe enough to warrant eligibility and require special education services under the federally funded program passed to assist the states in providing exactly such services.

IDEA—Educational Benefit for Students with More Severe Disabilities

Because IDEA served to provide the states with monetary assistance to create special education programs for students with even the most severe forms of disabilities, Congress designed IDEA as a law of intricate procedures and safeguarding mechanisms (see its precursor, the Education for All Handicapped Children Act of 1975). States that sought the vast monies of the federal government to help develop and maintain effective special education programs had to deal with the complicated structure of policies, procedures, requirements, and regulations that came along with the funding.

As stated by Congress, the purpose of IDEA is to assure that all children with disabilities (as defined by the IDEA regulations) have available to them a FAPE by means of special education and related services individually designed to meet their unique educational needs. The multifaceted individualized education program (IEP)—the cornerstone of IDEA—represents the statute's case-by-case approach to planning all disabled children's educations. Indeed, the collaborative and data-driven process by which an IEP team comprising educators and the parent evaluates a child's disability and develops an individualized plan to meet the needs implicated by such disability is the primary aspect of IDEA.

In its foundational 1982 opinion in the famous *Rowley* case, the Supreme Court more specifically addressed what the Congress meant by its phrase *free appropriate public education*. The Court held that the phrase meant that every disabled child, no matter how disabled, was entitled to receive an "educational benefit" from his public school program. Of course, the Court recognized that *educational benefit* meant something different for each disabled child; but under IDEA, every child deserves to benefit from their education in accordance with their disabilities and educational needs.

Consequently, unlike under Section 504, IDEA's educational standard is not measured by comparison with the performance or needs of nondisabled students. IDEA's purpose imposes an external, objective standard: to

provide all eligible children with an IEP that meets the procedural requirements of the law, and which educationally benefits each child in accordance with their needs and abilities. The law goes beyond Section 504's focus on access and nondiscrimination, and requires educational services designed to achieve a qualitative standard of appropriateness. Moreover, IDEA is armed with an intricate and detailed set of federal regulations, federal and state monitoring processes, and extensive procedural safeguards that help assure states and districts are complying with its many requirements. Thus, there is a high degree of consistency in process and implementation of special education programs from school system to school system.

Eligibility Under IDEA

Eligibility for services under IDEA is contingent on evaluation data demonstrating that the student (1) meets criteria for one of 13 eligibility categories, and (2) needs special education services as a result (see 34 C.F.R. § 300.8(a); as shown in 34 C.F.R. § 300.8(c), the 13 disability eligibility categories under IDEA are autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability (formerly mental retardation), multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment). It is not sufficient to merely show that the disability substantially limits a major life activity, as with Section 504. Evaluation results must demonstrate that the student needs special education services that are provided under the school district's IDEA program. Eligibility is established by an IEP team comprising education professionals and the parent, based on evaluations that follow set procedures and meet various requirements (see 34 C.F.R. §§ 300.304–300.311). Parents must consent both to the evaluation to determine eligibility and to the actual placement in special education, should the student be determined actually eligible (see 34 C.F.R. § 300.300).

Placements and Services Under IDEA

Because they apply to different populations, serve different purposes, and operate under different FAPE standards, programs for students with disabilities under IDEA and Section 504 may be quite dissimilar. While the overwhelming majority of children receiving services under Section 504 are educated in regular classrooms, IDEA requires a specific continuum of settings collectively capable of meeting the needs of even profoundly disabled students. Despite its requirement to provide services in the least restrictive environment, the educational needs of some IDEA-eligible students are such that they must be served in specialized classrooms for students with disabilities. And, special education students can be served in a myriad of different combinations of settings. Thus, IDEA provides for additional specialized procedures and safeguards to handle potentially delicate and difficult placement decisions. In addition, a wide variety of related services necessary in order for students to benefit from their IEPs is available under IDEA through its combination of federal- and state-level

funding.

Most important, however, IDEA provides for special education services, defined as “specially designed instruction” and commonly provided by teachers with specific training and credentials in educating students with disabilities (see 34 C.F.R. § 300.39(a)(1)). In turn, “specially designed instruction” is defined as “adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction” (see 34 C.F.R. § 300.39(b)(3)). The program could, therefore, be based on highly modified content, depending on the unique needs of the student in question. The special education system, therefore, not only provides for highly specialized instruction, but also includes its own set (continuum) of placements and instructional settings designed to be able to meet the diverse needs of students, including those with even the most profound of disabilities. In light of the diversity of students it strives to serve, the special education system is one of significant breadth and depth.

As is the case with Section 504, however, maximizing the potential of eligible students is not the goal of IDEA. As stated in *Lunceford v. District of Columbia Bd. of Educ.* (1984), IDEA “does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each disabled child.” And, as stated in *Weixel v. Board of Educ. of the City of New York* (2000), there is “no requirement that services be sufficient to maximize each child’s potential commensurate with the opportunity provided other children”; instead, IDEA guarantees an appropriate’ education, “not one that provides everything that might be thought desirable by loving parents.” In summary, the law does not promise an optimal education or the ideal educational services. For a school to be legally required to provide a specific service or aid, it must be necessary in order for the student to benefit from his or her educational program, not merely beneficial or potentially helpful.

A Summary of the Continuum of Services

The history of disability programs started with the civil rights protections of Section 504, translated by its regulations into a nondiscrimination FAPE standard and a basic set of procedures and safeguards in the 1970s. By the end of that decade, the precursor of IDEA was passed to provide funding to the states to assist them in their efforts to educate students with more severe disabilities and complex educational needs. This law of intricate procedures, far more detailed and complicated than Section 504 and its regulations, went beyond mere equality of educational opportunity to promise a beneficial education to all eligible students. It did so by creating a multifaceted placement and specialized service system designed to meet the highly diverse needs of even the most severely impaired students. The advent of locally developed RtI programs came much later, as public schools realized that they needed to invest in interventions to assist all students who struggle with the regular curriculum early in the course of their educational difficulties, with high-quality and research-based intervention methods provided outside of a model of legal norms.

An astute observer can see that the services themselves are not terribly different across the continuum. High-quality, research-based interventions individualized based on progress data are, indeed, not much different than specially designed instruction provided under IDEA. Accommodations and services that are provided under a Section 504 program can certainly be duplicated in a special education program and vice-versa. The key distinctions lie in the laws' different eligibility criteria and processes, and in the differences in the procedural rights and safeguards they provide. Services provided under Section 504 tend to be less intensive and detailed, as they are meant for students with less severe disabilities and serve to provide only an equal opportunity to receive an education. Services provided under IDEA tend to be more intensive, are set out in highly detailed IEPs, and must be reasonably designed to confer a beneficial education—a higher standard than under Section 504. RTI programs, however, are not provided under a legal model or mandate, but rather at the discretion of local educational agencies that are trying to add interventions at the “front end” of students' educations, before their deficits become severe and entrenched.

Step by step, the modern continuum of services for struggling learners has evolved to its present shape. Hopefully, the emergence of this tripartite service structure will help ensure that no struggling learner is without access to help in obtaining a quality public education.

References

- ADA Restoration Act of 2008, 42 U.S.C. § 12101, et seq.
- Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982).
- Education for All Handicapped Children Act of 1975, Pub. L. 94-142.
- Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400 et seq.
- J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000).
- Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984).
- Lyons v. Smith*, 829 F. Supp. 414, 20 IDELR 164, at fn. 11 (D.D.C. 1993).
- National Association of State Directors of Special Education. (2005). *Response to intervention: Policy considerations and implementation*. Alexandria, VA: Author.
- Rehabilitation Act of 1973, 29 U.S.C. § 794a.
- U.S. Department of Education Office for Civil Rights. (2011, March). *Frequently asked questions about Section 504 and the education of children with disabilities*. Retrieved from <http://www2.ed.gov/about/offices/list/ocr/504faq.html>
- U. S. Department of Education Office of Special Education and Rehabilitative Services. (2002). *President's Commission on Excellence in Special Education report: A new era revitalizing special education for children and their families*. Retrieved from <http://www2.ed.gov/inits/commissionsboards/whspecialeducation/reports/index.html>
- U.S. Department of Education Office of Special Education and Rehabilitative Services. (2007, January). *Q&A on response to intervention (RTI) and early intervening services (EIS)*. Retrieved from http://www.tn.gov/education/speced/doc/82108FAQsOSEP_RT1.pdf
- U.S. Department of Education Office of Special Education Programs. (2008). *The LEA may choose the RTI model it wishes to implement [Letter to Clarke, 108 LRP 65824]*. Retrieved from <http://www2.ed.gov/policy/speced/guid/idea/letters/2008-2/clarke052808personnel2q2008.pdf>
- Weixel v. Board of Educ. of the City of New York*, 33 IDELR 31 (S.D.N.Y. 2000).

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