Policy Letter #2010-11-01
Eligibility Question and Answer

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 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).