

This document was prepared to give the reader a greater understanding of specific elements of the proposed rule. It highlights issues raised by various task force members over the course of the last 5 years of rule and system development, along with responses from the department. This document is not intended to indicate that the department has reached a final conclusion on the rule, but rather illuminates the decision making process.

## GENERAL COMMENTS

- **Issue #1** concerned information about large-scale RtI implementation and the impacts on student achievement and special education rates.
  - **Response:** While it will take some time before state-level changes become evident, there are numerous studies of system-level implementation. Tilly (2003, *NRCLD*) reported substantial growth in early reading performance and significant reductions in special education referrals. The experiences in Minneapolis have been similarly successful [see Marston, et. al. (2003, *LD Research & Practice*), and Rechsley and Starkweather (1997)] with no increase in referral rates, and reductions in disproportionate minority representation in special education. In Pennsylvania (see Kovaleski, 1999, *Remedial and Special Education*), there were reductions in overall retention, lower special education referral and placement rates, and improved reading comprehension. In their Handbook of response to intervention: the science and practice of assessment and intervention, (Springer, 2007) editors Jimerson, Burns, and VanDerHeyden report on RtI implementation in many additional states and systems including Ohio, Illinois, St. Croix River Special Education District, Idaho, the STEEP Project, Michigan, and Florida. While there are many lessons learned, the consensus of these reports is that the positive impacts of a systematic change to RtI are great enough to warrant nationwide efforts in this area.
- **Issue#2** concerns what the commenter terms “the prescriptive nature of the rule.” The same commenter suggests that, “the proposed language is too prescriptive, eroding both local control of the LEA and the professional decision-making of the team resulting in the risk of not being able to adapt to the needs of the individual child.” They continue, “The federal law leaves local control in the hands of the LEAs and the decision-making to the team about the frequency of the data collection and the duration of the interventions.”
  - **Response:** While the commenter raises important concerns, the department must also respond to concerns raised at the first round of public hearings in the fall of 2007. We concur with many of the comments made at the initial round of public hearings, specifically that the revised rule must more clearly define various terms used in the federal regulations. Furthermore, rules for disability determination are necessarily specific and prescriptive. They hold a great deal of influence over the educational programming provided to students who require special education. Without a very specific rule prescribing the types of data to be collected and the criteria against which those data must be compared, the rule will identify neither the correct students nor an appropriate number of students. Finally, the commenter provides no evidence that any of the hypothesized negative outcomes have been realized in states and districts that have used RtI systems for SLD identification. Should the department become aware of such sequelae as part of the proposed study or through other sources, guidance can be prepared or amendments proposed for the rule to remedy those issues. Finally, it should be clear

from a review of the federal regulations that states have a critical role in determining rules for disability determination, and that IEP teams should interpret those rules, rather than creating rule on an *ad hoc* basis.

- **Issue#3** concerns the possibility of over-identification of students as having a Learning Disability because of this proposed rule.
  - **Response:** The Department will complete a multi-year study of the use of the data from response to scientific, research-based or evidence-based intervention to measure its impact on identification rate for SLD. However, without a specific criterion for insufficient progress, mathematical modeling of identification rates has not been possible as in previous rule revisions.

### **Paragraph a: Definition of SLD**

This paragraph provides a definition of a specific learning disability. Wisconsin's definition mirrors the federal definition, excluding learning issues that are caused by other factors.

- **Issue#1** concerns the use of the Wisconsin term “cognitive disability” instead of the Federal terminology “mental retardation.”
  - **Response:** The state of Wisconsin changed the terminology of “mental retardation” to “cognitive disability” during the time period of the revision of the original P.L.94-142 which became the Individuals with Disabilities Act Amendments of 1997 (IDEA). The proposed rule uses the words “cognitive disability” instead of “mental retardation.”

### **Paragraph b: Timely Evaluation**

This paragraph concerns parental consent for evaluation and when districts must request such consent. It is new with the advent of RtI because of the use of pre-referral data for making decisions about the need for referral as well as use of the same data for disability determination.

- **Issue#1** concerns the term, “...appropriate period of time.” Some comments suggested that the department should specify a period of time in which interventions in general education should be allowed to continue before a student would be referred for special education
  - **Response:** The Department believes that it is best left up to schools and parents to determine when a referral is appropriate. As mentioned in our responses in Paragraph c below, Wisconsin law provides for NO limitations on referrals for disability evaluation.

### **Paragraph c, subdivision 1: Inadequate Achievement**

This paragraph requires that students identified with learning disabilities have very low levels of academic achievement in a normative comparison with same-age peers. Under the proposed rule, LEAs will measure student achievement level after intensive intervention using an individually-administered, standardized achievement test as is currently used in the discrepancy analysis. Achievement will be compared to student age or grade for students who have been retained. The criterion is very specific: equal to or more than 1.25 standard deviations below the mean, allowing approximately 10% of all students to qualify for this part of the rule (additional parts are required in later paragraphs of the proposed rule). For situations where accurate assessment is not possible, the same exceptions to the process have been included as in previous versions of the rule. The allowance for scores more than 1.0 standard deviation and within 1 standard error of the measurement (SEM) is new in requiring scores within 1 SEM. Low achievement is required only for initial eligibility for special education, not for re-evaluation.

Although Wisconsin does not have measureable state-approved grade-level standards that are specifically aligned to the 8 federally mandated areas of SLD, under ESEA (NCLB) all states are required to identify

proficiency levels on state approved grade-level assessments. On page 46652, IDEA Regulations state, “State-approved standards are not expressed as ‘norms’ but represent benchmarks for all children at each grade level.” Regulations continue, “The reference to ‘State-approved grade-level standards’ is intended to emphasize the alignment of the Act and the ESEA.”

Group assessments required under ESEA are administered once per year and results are not available quickly enough to be used for this part of an SLD assessment. Additionally, current documentation requirements for SLD include a comparison of student achievement to disaggregated groups tests required under ESEA. The requirement in this paragraph supplements the ESEA data by providing a national normative comparison.

- **Issue#1** concerns the use of the 1.25 standard deviation difference in achievement level. Specifically, the comment states that this requirement “erodes the local control of the LEA to use the expertise of the team to decide the variety of assessments that can give valid and reliable results. It also limits the strategies to be used and negates what the spirit of the law suggests.”
  - **Response:** The Department believes that a rule for SLD determination must balance specificity and flexibility in a way that is consistent with the general beliefs of the Task Force and of our role as the state education agency. Special education rules in Wisconsin have historically prescribed the types of data required, without specifying test instruments; this rule continues that practice. Further, the rule does not prescribe or limit in any way the assessment strategies to be used with students who may have disabilities. Instead, it requires the collection of certain types of data about student performance to contribute to the determination of whether a student has a disability. The department has added language consistent with the SLD rule of 1997 requiring the use of a wide variety of types of data for SLD determinations. We believe this adequately addresses the concern about the types of data that will be included in disability determinations.
- **Issue #2** pertains to the norm groups used for the achievement test. The comment expressed a question about whether the norm group for the achievement test should be local or nationally developed.
  - **Response:** The norm group for this element of the criteria should be generated using a statistically valid national norm group. Comments to the federal regulations clarify on page 46652 that, “The performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State approved standards.”
- **Issue#3** results from a comment suggesting that this paragraph will require administration of a standardized assessment tool that can only be administered by someone with psychometric training. The commenter suggests that this would mean that the classroom teacher would not be involved with collecting these data.
  - **Response:** The department believes this type of assessment is necessary to compare the student’s achievement test data to national norms, rather than relying solely on in-class formative assessment and anecdotal information. Instead, these types of assessment are among those being added to another paragraph of the rule. There is no requirement in the rule for a specific type of training; rather there is a requirement for certain types of data. Further, federal regulation § 300.304 “Evaluation procedures” requires that assessments be, “administered by trained and knowledgeable personnel;” and “administered in accordance with any instructions provided by the producer of the assessments.”

### **Paragraph c, subdivision 2a: Insufficient Progress during Intensive Intervention**

In addition to having low achievement, the student has made insufficient progress when provided at least two interventions. Progress monitoring data should be collected as soon as possible once a student falls behind her peers. Multiple interventions are required, and must be matched to the student’s area of need. Data elements include collecting a stable baseline of achievement level, along

with intensive progress monitoring data. Progress is insufficient if the IEP Team determines that continuing the student's rate of improvement would not result in their reaching an average achievement level in an appropriate period of time, or the resources necessary to obtain sufficient progress are not available in the general education program as structured. Whereas low achievement is required only for initial eligibility for special education, a determination of insufficient progress is required for all evaluations of SLD.

An IEP Team report for a 2nd grade student might state that, "If the student continues to progress at this rate she will not achieve at the average level of her peers until the end of 5th grade." The IEP Team would then determine whether this was acceptable. However, even if a student is making good progress, if the intensity of the services is such that they cannot be maintained in regular education programs, the Team may decide that the student has impaired learning. In this scenario, the IEP team might state, "The student has made good progress when receiving intensive remedial instruction for 85 minutes per day, in addition to the instruction she already receives with her peers." The Team would then determine whether this level of intensity was sustainable in general education settings and whether the student has impaired learning.

The first draft of the rule contained an assurance requirement, requiring districts to verify their use of appropriate data for this element of the rule. The department was unable to include assurances in this draft because doing so would place additional requirements on use of RtI that are not allowable under federal regulation.

- **Issue#1** concerns the requirement for 3 data points to establish a stable baseline. The proposal is to remove the requirement for 3 data points and instead simply require establishment of a statistically reliable baseline. The concern is that at some ages, obtaining 3 equivalent probes for some of the areas of potential SLD qualification is not a standard part of progress monitoring. The commenter cites an example of a Maze probe for reading comprehension with a middle school student, where one 3-minute probe could be considered valid and reliable.
  - **Response:** While the Department understands that different progress monitoring systems use various methods to establish a baseline, we nevertheless consider that in the 8 areas of possible SLD qualification, using 3 data points is neither burdensome nor uncommon. The commenter expressed specific concern over a 3-minute Maze probe for reading comprehension. In this scenario, the student would spend 10 minutes establishing a baseline. We think this is a reasonable expectation. It is our further belief that reliable and valid progress monitoring tools exist (or can be developed in the case of listening comprehension) for each of the 8 possible areas of SLD, and that these measures can be administered in reasonable periods of time.
- **Issue #2** addresses the requirement for weekly data points to establish individual rate of progress. The commenter suggests this may be "difficult and unreasonable." They state that, "For writing this may mean a 3-minute (or longer) passage..." Another commenter suggested requiring grade-level materials to ensure consistency of difficulty. A final comment inquired as to the rationale for weekly data points.
  - **Response:** The Department believes this is a critical area of data collection, and that while data collection and analysis may take a few minutes for each sampling period, this is an appropriate expectation, especially in the context of disability determination and in comparison to the current burden of assessment. We would also point out that the rule sets out a minimum standard, and that once RtI systems are in place, we expect IEP Teams to have access to a great deal more data than are required in this proposed rule.

With regard to the rationale for weekly data points, we refer to a variety of studies, especially, “Short-Term Estimates of Growth Using Curriculum-Based Measurement of Oral Reading Fluency: Estimating Standard Error of the Slope to Construct Confidence Intervals” (Christ, T., *School Psychology Review*, v35 n1, p128-133, 2006). Results of this study suggest that with 6 weeks of progress monitoring using two probes per week, standard error of estimates can be reduced to acceptable levels. In Implementing Response-to-Intervention in Elementary and Secondary Schools: Procedures to Assure Scientific-Based Practices (CRC Press, 2008) authors Gibbons and Burns suggest collecting a total of 8 weeks of data. In the article, “Estimates of the Standard Error of Measurement for Curriculum-Based Measures of Oral Reading Fluency,” (Christ, T. & Silberglitt, B., *School Psychology Review*, Vol. 36, #1) the authors describe acceptable levels of reliability using multiple probes within a short time period. With regard to the requirement for grade-level materials, the proposed rule is consistent with federal regulation in using age-based standards.

- **Issue #3** concerns the duration of the interventions. One commenter stated that IEP Teams will not be able to complete an evaluation in the federally mandated 60 days. Finally, another comment stated that, “The proposed language doesn’t allow for intensive student support through overlapping programs (e.g., intervention occurring with both a classroom teacher and a support teacher).”
  - **Response:** As mentioned above, the proposed rule states that, “interventions are implemented prior to referral, or as part of a referral, for specific learning disability.” The proposed rule sets forth a required minimum in light of the many intervention designs and research studies requiring substantial periods of time, thus balancing the needs of the student and the district. The department understands that federal regulations require completion of an evaluation within 60 days of consent for evaluation. Federal regulations also allow extension to this timeline only for evaluations of specific learning disabilities, and only upon mutual, written agreement. In that context, the department believes that districts should have systems in place to quickly identify and support students who are not making adequate progress. We foresee that the data collected to determine whether interventions to remedy the slow progress have been successful will be critical in determining whether a student has a learning disability. This perspective is reinforced in OSEP’s Q & A on RtI and EIS (OSEP, January 2007, see [www.idea.ed.gov](http://www.idea.ed.gov)), “...the regulations do not specify a timeline for using RTI or define ‘adequate progress.’ As required in 34 CFR §300.301(c), an initial evaluation must be conducted within 60 days of receiving consent for an evaluation (or if the State establishes a timeframe within which the evaluation must be completed, within that timeframe). Models based on RTI typically evaluate a child's response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child's achievement, including observation data. A State may choose to establish a specific timeline that would require an LEA to seek parental consent for an evaluation if a student has not made progress that the district deemed adequate” (emphasis added). Our proposed language is consistent with OSEP’s guidance, and is further supported by their explanation of the core components of RtI as follows, “While the Department does not subscribe to a particular RTI model, 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" (emphasis added). **We want to make it extraordinarily clear that, while DPI's RtI framework does not require a tiered model, such a model is permitted and districts may choose to adopt tiered models should they so choose.** As long as a district implements an RtI system that is consistent with the DPI framework (high quality instructional practice, continuous review of student progress, collaboration), it will have the data necessary for SLD determinations under this rule.

We would also point out that Wisconsin law provides for NO limitations on referrals for disability evaluation. So, even though the proposed rule requires two successive interventions implemented with appropriate integrity, a child can be referred for evaluation at any time. An IEP Team would then need to determine whether the data they have is adequate for making a disability determination. The proposed rule does not change the federal timeline for referral.

Thus, we believe that the proposed rule for SLD is consistent with the federally identified core characteristics for RtI, such that systematic data on student achievement are regularly collected and can be used as part of a comprehensive evaluation to determine whether a student has a specific learning disability. The department believes the proposed rule has appropriate requirements for the timing of data collection, confirms in another paragraph the requirement for districts to make referrals when a student has not made adequate progress, and allows adequately for provision of support through multiple, distinct interventions. However, it should be clear that classroom-based interventions are unlikely to be intensive enough to meet the requirements under the rule. We believe it will be appropriate to include more information about intervention intensity, design and delivery in guidance.

- **Issue #4** concerns the language for insufficient progress, suggesting that the department create a specific criterion for IEP Teams.
  - **Response:** We agree that providing more information on rate of progress would be useful, and, while comments at public hearings requested more specificity in the proposed rule in general, feedback since that time has suggested putting a specific criterion in guidance. We believe it is important to give reasonable flexibility to LEAs while ensuring that students with disabilities are served as quickly as possible. At this time, the department proposes to provide guidance rather than rule on measuring rate of progress and use of these data for SLD determinations.
- **Issue #5** concerns fidelity or integrity of the intervention. A concern expressed by numerous Task Force participants pertained to how IEP Teams will measure and document their determinations in this regard.
  - **Response:** Researchers have noted the following methods for measuring treatment integrity: direct observations, behavior rating scales, self-reports, behavioral interviews with interventionists, and permanent products in intervention implementation (See Gresham, et. al.: "Treatment Integrity in Learning Disabilities Intervention Research: Do We Really Know How Treatments Are Implemented?"; *Learning Disabilities Research & Practice*, 0938-8982, Volume 15, Issue 4, 2000, Pages 198 – 205). In Implementing Response-to-Intervention in Elementary and Secondary Schools: Procedures to Assure Scientific-Based Practices (CRC Press, 2008) authors Gibbons and Burns suggest treatment integrity should be validated using a variety of approaches including direct observation. Others have suggested a

basic expectation that interventions should be implemented with at least 80% integrity to the design of the intervention (see Perepletchikova & Kazdin, *Clinical Psychology: Science & Practice*. 12(4):365-383, Winter 2005.). This has been considered particularly important, and is easily measurable, with regard to the amount of time specified in the intervention. Thus, for an intervention specifying 60 minutes per day, IEP Teams would document that the intervention was provided at least 48 minutes per day, etc.

- **Issue #6** concerns the number of interventions required before a student can be considered to have a disability. The comment states, “We believe that included in the guidance language needs to be that there are at least 3 documented evidence based attempts to adapt instruction to the specific needs of the child.” The same commenter later states that the proposed rule, “...implies you must have two different interventions which can lead students to cognitive confusion and thereby decrease the effectiveness of any intervention.”
  - **Response:** While there is no research specifically documenting the appropriate number of interventions to use prior to making a disability determination, this rule attempts to balance this element of the analysis with the amount of time given for IEP Teams to determine whether a student has a disability. And, even though requiring 3 interventions could potentially make the rule more accurate, the department believes this would require an inordinate amount of time before a student could possibly begin receiving special education. Conversely, it would not be appropriate to allow for a disability determination after only one intervention. There is no research to suggest any sort of “cognitive confusion” takes place for students who receive multiple interventions.
- **Issue #7** concerns the specificity and intensity of the required interventions. One commenter expressed concern that the interventions must be highly intensive to ensure that a student was not qualifying for special education when general education instruction could remedy the student’s challenges. Another commenter suggested that interventions should closely match the student’s achievement deficits.
  - **Response:** The department agrees that interventions should be specifically aligned with student need and implemented with sufficient intensity (time, size of group, frequency) to assure that the student’s needs cannot be met in general education. While the proposed rule language reflects this belief, department will also prepare guidance in this area. In particular, the guidance will build upon the department’s longstanding position that formative assessments have an important role in RtI systems, including being used to align intervention with student need.
- **Issue #8** suggests that the proposed rule, “...implies that there is only one appropriate model for RtI.”
  - **Response:** A close reading of the discussion to the IDEA Regulations shows that OSEP clearly intends for states to make rules with the awareness that rulemaking does not require one model. “There are many RTI models and the regulations are written to accommodate the many different models that are currently in use. The Department does not mandate or endorse any particular model. Rather, the regulations provide States with the flexibility to adopt criteria that best meet local needs. Language that is more specific or prescriptive would not be appropriate. For example, while we recognize that rate of learning is often a key variable in assessing a child’s response to intervention, it would not be appropriate for the regulations to set a standard for responsiveness or improvement in the rate of learning. As we discussed earlier, we do not believe these regulations will result in significant

increases in the number of children identified with SLD.” Page 46653 (Emphasis added).

- **Issue #9** concerns the term “probes.” Comments suggest that this requires certain commercially available curriculum-based measurement tools.
  - **Response:** The department believes that curriculum-based measurement tools are appropriate for monitoring progress, and that other tools are not reliable and valid for this purpose. The department issued guidance in February, 2007 stating that “Repeated assessments are *curriculum-based measures...*” There are many curriculum-based measurement tools available, both free and for a cost. They may be viewed on the National RtI Center’s web site at: <http://www.rti4success.org/>.
- **Issue #10** is a request to provide specificity for this paragraph in guidance rather than rule. They suggest that comments from public hearings requesting more specificity in the rule, in particular with regard to rate of progress, be dealt with by providing additional guidance rather than specifying criteria about insufficient rate of progress in the rule. They cite what they believe is a paucity of longitudinal data on changes to the RtI model for SLD identification. These assertions have been supported in recently scholarly publications by noted researchers including Matt Burns (NASP Communiqué), and Cecil Reynolds (School Psychology Quarterly). The WI commenter continues that professional decisions of the IEP Team would be paramount in a system where requirements about insufficient progress were written into guidance rather than rule. Finally, they suggest that more complex skills like reading comprehension are not amenable to progress monitoring and thus should be evaluated using less stringent criteria.
  - **Response:** The vast majority of public comments to the first proposed rule requested more specificity in the rule in general. Since then, stakeholder groups have suggested a criterion for insufficient progress be included in guidance only. With this rule, we propose guidance on insufficient progress and will wait for additional public comments on the issue.  
Earlier discussion provided citations for numerous meta-analyses of the use of RtI and the impact on identification rates and overall student achievement. Furthermore, IDEA and associated regulations *require* states to allow RtI and create rule [§ 300.307: **A State must adopt criteria for determining whether a child has a specific learning disability...**]. Therefore, we believe it is necessary to propose a rule that is appropriately detailed, and which responds to the technical issues raised in by our stakeholders as well in the research community. We believe that over 5 years of revision, with 3 stakeholder task forces, and with numerous public hearings, our final proposal will address local needs. And, with 5 years of input from numerous local and national experts, it will meet all of the technical challenges raised in the research literature. Finally, we believe that skills in the 8 areas of SLD can be adequately measured using progress monitoring and diagnostic achievement tests.
- **Issue #11** concerns the inclusion of “evidence-based interventions” as an option for working with students. The commenter inquires why this has been included when it appears neither in federal law nor regulation.
  - **Response:** This language was intended to gives flexibility to IEP teams in cases when scientific research-based interventions were unavailable for a student’s specific

need. It was crafted at a time when the general understanding of available interventions was more limited. However, since then, the department has learned that first, evidence-based interventions are those which have met a higher level of validation than research-based interventions. Intervention science has also progressed such that interventions are more widely available. ESEA (NCLB) defines scientifically based research as:

- “research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs; and
- includes research that
  - employs systematic, empirical methods that draw on observation or experiment;
  - involves rigorous data analyses that are adequate to test the stated hypothesis and justify the general conclusions drawn;
  - relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;
  - is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls;
  - ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or' at a minimum, offer the opportunity to build systematically on their findings; and
  - has been accepted by a peer reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.”

The department will clarify in guidance how these types of interventions are alike and different. We have included evidence-based interventions in our proposal because we believe they will allow IEP Teams to use these more rigorous approaches.

- **Issue #12** pertains to the use of a dual approach. (This is sometimes called dual discrepancy, though we prefer to avoid the term “discrepancy.”) For SLD identification this combines analysis of low achievement (paragraph c, subdivision 1) and insufficient progress during intervention (paragraph c, subdivision 2a). The commenter asked for the rationale for this approach.
  - **Response:** The department relied on numerous published studies and implementation projects to validate this approach. These include:
    - Speece, D.L., Case, L.P., & Molloy, D.E. (2003). Responsiveness to general education instruction as the first gate to learning disabilities identification. *Learning Disabilities Research & Practice*, 18, 147–156. The authors found that students with a rate and level of reading skill below their peers had more significant academic problems than students who had only low skill levels, as well as students with an IQ-Achievement discrepancy.
    - Fuchs, D., Fuchs, L.S., & Compton, D.L. (2004). Identifying reading disabilities by responsiveness to instruction: Specifying measures and criteria. *Learning Disability Quarterly*, 27(4), 216-228. These authors highlight the utility of this

dual approach, and state that it fares best among alternatives with regard to consistency of identification.

- In “Comparison of Dual Discrepancy Criteria to Assess Response to Intervention,” Burns and Senesac find that the dual approach is superior to other models. (Journal of School Psychology, v43 n5 p393-406 Nov 2005). Their research is consistent with prior research, including:
  - Responding to Nonresponders: An Experimental Field Trial of Identification and Intervention Methods; Kristen L. McMaster, Douglas Fuchs, Lynn S. Fuchs, Donald L. Compton; Exceptional Children, Vol. 71, 2005
  - Assessing Intervention Responsiveness: Conceptual and Technical Issues. Fuchs, Lynn S. Learning Disabilities: Research & Practice, v18 n3 p172-86 Aug 2003
- In his article “Identifying Students at Risk, Monitoring Performance, and Determining Eligibility Within Response to Intervention: Research on Educational Need and Benefit From Academic Intervention,” (*School Psychology Review*, Vol. 36, #4) Shinn expresses strong support for the dual delay approach.
- In Implementing Response-to-Intervention in Elementary and Secondary Schools: Procedures to Assure Scientific-Based Practices (CRC Press, 2008) authors Gibbons and Burns suggest that special education entitlement decisions should be made on the basis of student performance data examining both level and slope on grade-level materials.

We conclude that the dual approach is consistent with research, is supported by published implementation projects, and meets all requirements from federal regulation.

### **Proposals for Guidance**

- The Department will provide guidance on intervention design and delivery, and alignment of interventions with student needs.
- The Department will provide guidance on information about the similarities and differences between evidence-based and scientific, research-based interventions.
- The Department will provide guidance on intensive intervention, including that needed by IEP Teams to determine whether there was a reasonable expectation that the student would make good progress during the intervention.
  - “Intervention” could be defined as, “the systematic use of a technique, program, or practice designed to improve learning or performance in specific areas of student need with progress monitoring.”
  - “Intensive interventions” could be defined as, “those interventions used with individuals or small groups of students, focusing on single or small numbers of discrete skills, with substantial numbers of instructional minutes in addition to those provided to all students, and with frequent progress monitoring.”
  - “Appropriate instruction in general education settings” could be defined as, “instruction that is responsive to individual differences, culturally relevant, frequently monitored for effectiveness, and uses rigorous content.”
- The Department will clarify that two interventions means two distinct interventions, carefully crafted to meet individual student learning needs, with the second intervention modified in such a way as to address the school’s hypothesis about why the first intervention was unsuccessful at more quickly remediating the student’s needs.
- The Department will provide guidance as to handling breaks in the school year.

- The Department will provide additional guidance on indicators of appropriate instruction, consistent with that provided for the current ER-2 Additional Documentation for Learning Disabilities. Such guidance will consider WKCE Proficiency, Screening Data, and considerations of exclusions for inadequate time for appropriate instruction.
- The Department will provide guidance similar to the following on how IEP Teams can determine whether progress during intervention was adequate:
  - If the IEP Team does not have sufficient data or the data collected from intensive interventions using one of these methods are not considered by the team to be appropriate for the purpose of documenting an impairment, the team may defer to the next option on the list.
  - 1. Rate of improvement of no intervention was at least 150% that of same-grade student average; or
  - 2. Using norms for rate of improvement from publisher or researcher, rate of progress in no intervention was in average range; or
  - 3. The trend line on no intervention predicts achievement in the average range of achievement for same-grade students within 16 school weeks for K-5 and within 32 school weeks for 6-12; or
  - 4. The student's progress is less than the 10<sup>th</sup> percentile as compared to peers in the same school; or
  - 5. The IEP Team determines the student is not making sufficient progress.

**Paragraph c, subdivision 2b: IQ-Achievement Discrepancy Analysis Allowed for 5 years**

This paragraph allows districts to continue the use of significant discrepancy between IQ and achievement as one element of identification until five years after the rule is effective.

- **Issue#1** commenter's raised concerns regarding when this rule will effectively eliminate the significant discrepancy language from the SLD Rule, also known as the sunset clause.
  - Response: The Office of Special education programs (OSEP) addresses this issue in "Questions and Answers On Response to Intervention (RTI) and Early Intervening Services (EIS)": "If the State or LEA requires the use of a process based on the child's response to scientific, research-based intervention, in identifying children with SLD, then all children suspected of having a SLD, in all schools in the LEA, would be required to be involved in the process. However, research indicates that implementation of any process, across any system, is most effective when accomplished systematically in an incremental manner over time. If the LEA chose to "scale up" the implementation of the RTI model gradually over time, as would be reasonable, the LEA could not use RTI for purposes of identifying children with SLD until RTI was fully implemented in the LEA. Therefore, it is unwise for a State to require the use of a process based on the child's response to scientific, research-based intervention before it has successfully scaled up implementation."

**Note: Analysis of Information Processing**

In 1997, this part of state rule required an analysis of information processing. As mentioned previously, some believe that because the definition of SLD centers on "disordered psychological processing," an assessment of information processing should continue to be a part of the evaluation requirements. They also feel that research supports LEAs being permitted to use evidence of a cognitive processing deficit as one component of identification. They cite relationships between working memory deficits and delayed learning, long-term retrieval and basic reading skills, and phonological processing and basic reading skills.

Regulations permit states to require “analysis of a pattern of strengths and weaknesses in achievement...” that is consistent with analysis of information processing. Regulations require that the pattern must be determined to be relevant to the identification of a specific learning disability.

- **Issue#1** concerns whether States are required to allow alternative, research-based procedures such as a pattern of strengths and weaknesses or, as current rule requires, an analysis of information processing. In particular, one commenter expressed the belief that federal regulation §300.309 (a)(2)(ii) requires states to allow IEP Teams to determine whether to use alternative, research-based procedures. Another commenter proposes use of “significant variance between different processing areas” as one component of identification.

- Response: Language allowing analysis of a pattern of strengths and weaknesses was included in the first draft of the rule because it was erroneously thought to be required. However, more recent commentary by OSEP [Letter to Zirkel (3/6/07)] specifically clarifies that “...State criteria *must permit* the use of a process based on the child’s response to scientific, research-based intervention, and *may permit* the use of other alternative research-based procedures.” In addition, a close examination of discussion on page 46649 of the comments to the federal regulations offers support for our position, “There is nothing in the Act that would require a State to use one model of identification to identify a child with an SLD. *We do not believe the regulations should include such a requirement*, because section 614(b)(6) of the Act indicates that some flexibility in the selection of models of identification by LEAs can be appropriate, if permitted by the State” (emphasis added).

DPI staff subsequently searched for “other alternative, research-based procedures” that provide a benefit to the student and the evaluation team considering the information that is already required for SLD evaluation regardless of the model of assessment used. We were unable to identify other research-based procedures that did not simply add to the assessment burden without providing useful information to the IEP Team. There are numerous reasons for this conclusion.

First, the regulations require data collection specific to the area of concern, including documentation of appropriate instruction and of analysis of student rate of progress. Since data collection for progress monitoring provides information that is specific to the skills we are attempting to teach and in which a child may have a disability, it is not necessary to collect data on skills that correlate to academic skills. Fletcher, et al. summarize the issue well, “...measures of processing have no demonstrable relationship with outcomes and are not well delineated for all forms of LD” (Fletcher, et. al., *Alternative Approaches to the Definition and Identification of Learning Disabilities: Some Questions and Answers*. *Annals of Dyslexia*, 12/1/04). They also state that unevenness in processing is a meaningful indicator of some types of LD, but that the absence of strengths and weaknesses does not mean that the student does not have LD. The department believes that screening and progress monitoring can be considered assessments of information processing skill in the area of potential disability, and are intended to identify strengths and weaknesses in achievement. So, while data on a child’s working memory may correlate with achievement, it will not provide information that benefits disability determination or possible programming decisions nearly as much as collecting data on a student’s academic skills while receiving intensive intervention. This is an appropriate place to limit the burden of assessment.

In summary, collecting data about Information Processing or Patterns of Strengths and Weaknesses does not provide any additional useful data for IEP Teams. Instead,

it unnecessarily adds to the assessment burden without providing an added benefit over the data already required under federal regulation.

While the Department does not believe it is necessary to require data on information processing or a pattern of strengths and weaknesses for SLD evaluation, we nevertheless believe a wide variety of information sources can be relevant to IEP Team decision making. Our proposal does not prohibit IEP Teams from gathering and considering any information they believe is necessary to adequately evaluate student learning. Consistent with this belief, we have included language from the 1997 rule which states, “The IEP team shall base its decision of whether a child has a specific learning disability on formal and informal assessment data on...academic achievement and learning behavior from sources such as standardized tests, error analysis, criterion referenced measures, curriculum–based assessments, student work samples, interviews, observations, and an analysis of the child’s response to previous interventions, classroom expectations, and curriculum...”

### **Proposals for Guidance**

- Guidance will be provided to assist IEP Teams in using a Pattern of Strengths and Weaknesses in achievement to inform SLD decisions.

### **Paragraph d: Exclusions**

Parts of this paragraph are commonly referred to as the “Exclusionary Clause.” It requires analysis of other reasons for underachievement. It also sets forth requirements for data collection and includes a requirement specific to Wisconsin that before being identified as disabled in writing, students shall have received appropriate instruction in writing. This is consistent with the requirement for reading and math.

- **Issue#1** asks if the rule will include “a definition of appropriate instruction?” A commenter shared that there are additional aspects of "appropriate instruction" beyond the "essential components," stating...effective instruction includes adapting to the individual needs of students rather than a one size fits all approach...”
- **Response:** There are several significant research studies that demonstrate, with modifications of instruction to accommodate the learning needs of individual students, student learning was enhanced and they did not require special education. This component of data is currently documented on a form that must be completed for all students who are referred for an SLD evaluation, the ER-2: Additional Documentation Required When a Child is Evaluated for Specific Learning Disabilities. This form requires the following: appropriate instruction, repeated assessment, regular communication with parents regarding the child’s progress, educationally medically relevant findings, the child’s achievement relative to his age (or to meeting state approved grade level standards) and progress relative to his age. The guidance on completing the Appropriate Instruction component of the form offers more details, “...’appropriate instruction’ includes consideration of both child specific information and whole grade performance data. Child specific data regarding ‘appropriate instruction’ may include: (1) Verification that core (universal) instruction was provided regularly;(2) Data indicating that the student attended school regularly to receive instruction;(3) Verification that core instruction was delivered according to its design and methodology by qualified personnel.(4) Data indicating that differentiated instruction in the core curriculum was provided” Discussion in the federal regulations (pg. 46656) states that “... consider evidence that the child was provided appropriate instruction and clarify that this means

evidence that lack of appropriate instruction was the source of underachievement.” When considering reading, federal regulations reference the ESEA, which states that the essential components of reading instruction mean explicit and systematic instruction in phonemic awareness, phonics, reading fluency, vocabulary development, and reading comprehension strategies (pg. 46646). We will provide guidance around the issue of appropriate instruction.

- **Issue#2** concerns the requirement to document the essential components of reading instruction.
  - **Response:** This part of the proposal is taken directly from federal regulation §300.306 Determination of eligibility. IEP Teams evaluating students for SLD are currently required to document that students have received the “essential components of reading instruction. The comments quote from ESEA, that this means “explicit and systematic instruction in—
    - (A) Phonemic awareness;
    - (B) Phonics;
    - (C) Vocabulary development;
    - (D) Reading fluency, including oral reading skills; and
    - (E) Reading comprehension strategies.

**Note: Paragraph d, subdivision 3, Additional Staff Necessary for SLD Determination**

This subdivision requires that the IEP Team includes at least one person who can provide the team with accurate analysis of progress monitoring data, as well as one person who has worked directly with the student implementing an intervention. These requirements are unique to Wisconsin, and, the department believes, are critical to ensuring the consistency and technical adequacy of the evaluation process. These are in addition to other requirements about IEP Team membership including special and general educators, parents, and supervisory staff.

- **Issue#1** concerns the inclusion of another participant on the IEP Team. The commenter proposes eliminating this requirement. As mentioned above, federal regulations specify certain IEP Team participants including parents, teachers, and LEA Representatives. The comment continues, “The federal reference to ‘one person qualified to conduct individual diagnostic examinations of children’ focuses on the needs of the student rather than the needs of the test.” The commenter cites discussions to the regulations, “the diversity of comments received and, given the lack of consensus about which individuals should be included in the group that makes eligibility determinations for children suspected of having an SLD.” Finally, they state, “The term ‘psychometrically valid’ is a confusing term and will lead to a focus on the test rather than on the student.”
  - **Response:** The Department would first clarify that this Paragraph provides for a participant who can fulfill an important role on a collaborative IEP team; it does not require any specific job title, certification, or degree. We believe that inclusion of this role is critical to ensuring the consistency and technical adequacy of the process of data analysis. It also clarifies the regulations by delineating the specific skills necessary for a determination under the rule. Furthermore, the analysis of rate of progress is not as simple as reading a cut score off a chart of achievement and intelligence scores. It requires the creation and analysis of individual and group trend lines, determination of standard error of measurements, and understanding of “goodness of fit” of trend lines with data. We believe that a “psychometrically valid and reliable methodology” has a clear definition in the assessment literature. The regulations define some specific roles or job titles that may conduct individual

diagnostic evaluations of children, including school psychologist, speech-language pathologist, or remedial reading teacher. Current state law (115.178) requires a team member, “who can interpret the instructional implications of evaluation results...” The department believes the proposed requirements add individuals with necessary skills to the IEP Team, and that the discussion in the regulations supports this clarification.

### **Proposals for Guidance**

Guidance will be provided on appropriate methodologies for analysis of progress monitoring data, including the elements discussed above.

### **Paragraph e: Observation, Documentation, and Transfer**

This Section requires observation of the child in the classroom, completion of a report from any dissenting IEP Team members, and works in concert with Section 9 to uphold the rights of transfer students. This section intends to insure that student behavior and learning are observed during instruction in the area of potential disability.

### **Paragraph f: Exclusions, Documentation, and Re-Evaluation**

This Section addresses various regulations, most of which provide documentation that other issues are not the source of the underachievement. These include student behavior, medical challenges, and other disabilities. Number 7 requires notifying parents of the interventions used, the data collected, and their right to request an evaluation. Number 8 clarifies that once a student qualifies for special education, she shall not be removed from special education without evaluation of the continuing need for special education regardless of the identification method used for initial qualification. Number 8 ensures that the rights of transfer students are upheld.

- **Issue#1** concerns the requirement for districts to notify parents about instructional strategies, data collection, and student response. Federal regulations [page 46787, § 300.311(a)(7)(ii)(a)] suggest that states have, “...policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided” for students participating in an RtI process. A Task Force member requested clarification about the location of such Policies.
  - **Response:** The Department has historically included federally required policies and procedures in our guidance documents and through inclusion of specific questions in our model forms for special education. The department will provide guidance in this area.

### **Paragraph g: Required Data**

This paragraph specifies the types of data that must be gathered for and considered by the IEP Team. It continues a requirement that has been in place since 1997.

### **Paragraph h: Re-evaluation**

This paragraph confirms that re-evaluation criteria do not require meeting initial evaluation criteria. Instead, IEP Teams determine whether a child with an SLD continues to need special education.

**For more information about the rulemaking process, refer to the [WI Legislative Council Administrative Rules Procedures Manual](#).**