

Administrative Rules Committee

Hearings

June 14, 2011

My name is Brenda Oas and I work in the Department of Public Instruction's Special Education Office and have been working on these rules since June 2011.

The purpose of *Chapter 67-23-06 Response to Intervention* is to comply with the most recent reauthorization of the Individuals with Disabilities Education Act which reads:

A state must adopt...criteria for determining whether a child has a specific learning disability. In addition the criteria adopted by the state:

- (1) must not require the use of severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability and
- (2) must permit the use of a process based on a child's response to scientific research-based intervention

School districts have a choice whether to use response to intervention, or not. A significant number of ND schools are using RTI at the elementary level. Some have chosen to scale up by grades: implementing in K-1 the first year, then adding second grade in the next year and so on. My point is that implementation does not happen quickly.

In some states, the practice for administrative rules is to restate language from the federal requirements. We chose to only add those rules that were necessary to address issues that were vague in the federal requirements or where we needed clarification of some part of the process. These rules do not provide a total picture. We will be developing implementation guidelines for schools that will include both the federal requirements and ND rules,

So, in this case the state is required to do rules, but districts have discretion to use the Response to Intervention process, or to continue to use the longstanding practice that has been in IDEA for many years.

We began the rules development process in mid-2010 and requested suggestions from the IDEA Advisory Panel on participants for a Work Group to develop rules, guidelines and training. We had representatives from eleven of the thirty-three special education units assisted with the rules development process. From June 1 through Dec. 12, 2011 we worked intensely on the rules.

Beginning in Nov. 2011 we started a field test of the procedures in seven of the eleven special education units. That field test has continued through the end of the school year in May 2012. We have a lot of information that will serve as the basis for guidelines and training should these rules be approved.

We held hearings in 4 locations, Minot, Bismarck, Grand Forks and Fargo, during February and March 2012. Following the hearings, we reviewed the input with our IDEA Advisory Panel and the members offered changes. The hearing input and Advisory Committee review resulted in minor changes to the rules draft prior to submitting the rules document that is before you. I've also provided you with a document that addresses the Department of Public Instruction's Consideration of the comments from the hearings process. In a number of the comments received, the actual concerns raised were not about our rules, but were concerns regarding the federal policy.

**Agency Consideration of Oral and Written Comments
To Proposed N.D. Administrative Rule 67-23-06
Response to Intervention**

- I. Comment:** Someone noted that the authority cited for the rules was N.D.C.C. § 15.1-32-09 and this statute is the authority for the Superintendent of Public Instruction to promulgate rules for the education of students with disabilities. The question is whether this is appropriate in that RTI (Response to Intervention) is also used in the general education arena.

Response: The observation is correct that the authority cited applies only to special education programs. However, there are two reasons this is appropriate authority for the proposed rules.

First, the proposed rules only set requirements for schools that are using RTI to make a determination whether a child has a specific learning disability. Identification of students with SLD (Specific Learning Disability) is a function of the special education unit at the Department of Public Instruction as well as the special education units throughout the state. Schools that are using RTI only in the general education arena and not for identification of SLD, are not required to comply with these rules.

Second, RTI is a valuable tool in the child find obligation of each school. Child find is a component of IDEA (Individuals with Disabilities Education Act) and as such, is implemented by the special education units throughout the state.

- II. Comment:** Another noted that they did not understand how much evidence was necessary to meet the preponderance of the evidence standard applied in proposed rule 67-23-06-06. Another commenter also made a comment about the use of the phrase “preponderance of evidence” noting “these identified requirements are already embedded within IDEA-B federal regulation language and in my opinion are not relevant here!” It is not exactly clear whether the comment is about the use of the phrase “preponderance of the evidence” or about the other language set out in proposed rule 67-23-06-06.

Response: The language in proposed rule 67-23-06-06 is to address questions that arose during development of the proposed rules as to the point at which an evaluation would be required if an RTI process were being conducted. The preponderance of the evidence standard is a level of evidence between substantial evidence and clear and convincing evidence. Using preponderance of the evidence as the standard means if the greater weight, or more than 50% of the evidence, shows that the student is not responding to interventions, an evaluation is required. It is a standard that is well recognized in the legal community and has a clear meaning should a question arise whether an evaluation was required.

- III. Comment:** Several people raised questions about meanings of terms, definitions, or procedures used in the rules that are already defined or described in 34 CFR Part 300, the Individuals with Disabilities Education Act of 2004. Examples included the definitions of eligibility, evaluation, local education agency, specific learning disability, scientifically-based research.

Response: In all cases the definitions or terms used in the federal IDEA statute (20 U.S.C. 1411) are used, or the IDEA definitions reference ESEA (20 U.S.C. 7801) as the source of the terms. The federal definitions of the terms will be included in state guidelines, a frequently asked questions documents, and in training materials that will be developed to support school personnel in using the practices. 67-23-06-01 (1) was amended specifically to include the reference to ESEA (20 U.S.C. 7801, Section 9101 (37)) as the source of the definition of evidence-based practices.

- IV. **Comment:** A commenter suggested that item 3 under 67-23-06-01 be amended to include the phrase “and/or Standard Protocol” after “Progress Monitoring” to indicate that either processes may be used to monitor implementation of interventions.

Response: The option to use more than one approach would be an asset as implementation moves to middle and high schools. The suggestion was adopted.

- V. **Comment:** Four individuals raised concerns about the meaning of parental notification as specified in 67-23-06-04. Analyzing the content of the concerns raised, it is clear there is confusion between parental notification and the requirement for formal parental notice under IDEA which proscribes specific timelines for making parents aware of due process procedures. The parental notification intended here is to address the relative newness and unfamiliarity of the response to intervention process for most parents and may be accomplished through providing information about the district’s or school’s response to intervention procedures in a parent newsletter, a description on the district’s or school’s website, or some similar process the school or district uses to share information at the beginning of the school year. A corollary example to this parental notification is the required Family Education Rights and Privacy Act (FERPA) notification that is provided at the beginning of each school year to address confidentiality of educational information. Schools have options in how they will inform parents of the FERPA protections (e.g., a statement in the student handbook that is sent to parents each year, a statement on the school or district website, a statement in the school newsletter that goes to all parents), and the notification in 67-23-06-04 offers these same options. It should be noted that schools or districts that do not adopt a response to intervention approach would not need to provide this notification to parents. Ongoing communication with parents might be used as the means to “update parents on the progress of their child” as stated in item 2 of 67-23-06-04, but these updates could be visits with the classroom teacher during parent-teacher conferences or some other practice specific to an individual school. In many situations, this practice is in place already. Many school personnel have commented that parents whose children are participating in interventions that are part of response to intervention procedures at their child’s school are very interested in how their child is progressing and want to stay informed.

Response: No change to language in the rule. Subsequent to adoption of the rule, a guidance document, a frequently asked questions document, and training sessions will be provided to special education personnel across the state. Written guidance will be provided to all schools regarding the notification to be provided to parents in those schools implementing response to intervention and that also want to use response to intervention data

in their identification of children as learning disabled. If the schools choose to implement response to intervention, but are continuing to use the discrepancy model for learning disabilities identification, this rules would not apply.

- VI. Comment:** Six people made statements about, or asked questions regarding 67-23-01-06, “When evaluation is required.” The comments ranged from concerns regarding the word “must” in “must conduct an evaluation,” regarding the meaning of preponderance of evidence, and requests for clarification of the meaning of the section. Although not explicitly stated, some commenters appear to have not noted that the word “or” appears after item number 1 giving the local education agency two options that may be applicable to when evaluation is required.

It should be noted also that item 2 reflects current policy in 34CFR 300.309 that a child is suspected of having a learning disability in instances in which the child is not achieving adequately for his or her age or has failed to meet state approved grade level standards and that this non-achievement is not the result of lack of appropriate instruction, another disability, economic disadvantage or limited English proficiency. In some cases, for example, economic disadvantage might be the suspected cause of the child’s sub-average performance and interventions may be provided to address this concern at what is considered Tier 2 in a response to intervention process. If after a reasonable time period, the child continues to not respond to the interventions provided, and school personnel and the parents determine that economic disadvantage does not appear to be the cause of the lack of responsiveness to interventions, school personnel may determine that a learning disability is suspected and an evaluation process consistent with 34 CFR 300.307-311 would be initiated. In the Federal Register Vol. 71, No. 156, the Analysis of Comments and Changes section regarding 34 CFR 300.307-311 discusses the comments received in response to the Notice of Proposed Rule Making. The Comments, Discussion and Changes for these sections of the regulations address this section in detail.

Response: No change to the language in the rule is needed. The August 14, 2006 regulations and comments sections will be reviewed for helpful language and explanations in the development of implementation guidelines, a frequently asked questions document, and training materials. Training will be provided statewide to special education personnel and interested others subsequent to the approval of the rules.