UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

FEB 29 2012

Philip Ferrara
Executive Director
The Association for Neurologically Impaired Children
301 Park Lane
Austin, Texas 78704-2412

Dear Mr. Ferrara:

This is in response to your October 12, 2011 letter to Ruth Ryder and Deborah Morrow in the Office of Special Education Programs (OSEP), Office of Special Education and Rehabilitative Services, in the United States Department of Education (Department). Your letter addresses the relationship between a response to intervention (RTI) process and the evaluation provisions in Part B of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations in 34 CFR Part 300.

Background

In your letter, you state that, "Districts are stating that the RTI process must be completed before a referral for an initial evaluation can take place," and you cite from section 89.1011 of the Texas Education Code, which states:

> Referral of students for a full and individual initial evaluation for possible special education services shall be a part of the district's overall, general education referral or screening system. Prior to referral, students experiencing difficulty in the general classroom should be considered for all support services available to all students, such as tutorial; remedial; compensatory; response to scientific, research-based intervention; and other academic or behavior support services. If the student continues to experience difficulty in the general classroom after the provision of interventions, district personnel must refer the student for a full and individual initial evaluation. This referral for a full and individual initial evaluation may be initiated by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student.

You indicate also that "some districts are not providing prior written notice of refusal to evaluate when the reason is the student hasn't completed the district's RTI process…thus the initial evaluation is being denied without any documentation to indicate the same."

You ask for "clarification regarding what seems to be a conflict between the standing Texas Commissioner's regulations and OSEP's memorandum" regarding the use of an RTI process to delay or deny an initial evaluation for eligibility for special education and related services under

the IDEA. See OSEP Memorandum 11-07, A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA) (January 21, 2011).

Regulatory Requirements

Under 34 CFR §300.301, each public agency must conduct a full and individual initial evaluation, in accordance with 34 CFR §§300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under 34 CFR Part 300. Consistent with the consent requirements in 34 CFR §300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe, and must consist of procedures to determine if the child is a child with a disability under 34 CFR §300.8 and to determine the educational needs of the child.

Under 34 CFR §300.307, a State must adopt, consistent with 34 CFR §300.309, criteria for determining whether a child has a specific learning disability as defined in 34 CFR §300.8(c)(10). In addition, the criteria adopted by the State: (1) must not require the use of a severe discrepancy between intellectual ability and achievement; (2) must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability. A public agency must use the State criteria in determining whether a child has a specific learning disability. Under 34 CFR §300.309(c), the public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 and 300.303, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in §300.306(a)(1) if, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and ((b)(2) of this section; and whenever a child is referred for an evaluation.

Finally, under 34 CFR §300.300(a)(1), the public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under §300.8 must, after providing notice consistent with §§300.503 and 300.504, obtain informed consent, consistent with §300.9, from the parent of the child before conducting the evaluation. Under 34 CFR §300.503(a), written notice that meets the requirements of 34 CFR §300.503(b), must be given to the parents of a child with a disability a reasonable time before the public agency: (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education (FAPE) to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

Analysis and Conclusion

We do not believe there is a conflict between section 89.1011 of the Texas Education Code and OSEP Memorandum 11-07. It is appropriate that, as section 89.1011 states, "[p]rior to referral, students experiencing difficulty in the general classroom should be considered for all support services available to all students, such as tutorial; remedial, compensatory; response to scientific, research-based intervention; and other academic or behavior support services." Pursuant to OSEP Memorandum 11-07, the implementation of an RTI process cannot be used to delay or deny the full and individual evaluation of a child suspected of having a disability under 34 CFR §300.8, whether the disability is suspected by school personnel or the child's parent. Nothing in Texas Education Code section 89.1011 prohibits school personnel or the child's parent from referring a child suspected of having a disability for an initial evaluation prior to completion of the RTI process.

Additionally, whether or not the local educational agency (LEA) is implementing an RTI process, if a parent requests such an evaluation and the LEA does not suspect the child has a disability and therefore believes that an evaluation is not necessary, it must provide the parent with prior written notice, under 34 CFR §300.503, that it is refusing the parent's proposal of a full and individual evaluation. Under 34 CFR §300.503(b), the written notice must include, among other things, an explanation of why the LEA refuses to conduct an initial evaluation and the information that was used as the basis to make that decision.

The implementation of an RTI process is not a reason to fail to respond to a parent's request for an initial evaluation. While the IDEA and its implementing regulations do not specify a timeframe within which an LEA must respond to a parent's request for an initial evaluation, it has been the Department's longstanding policy that the LEA must respond within a reasonable period of time following the LEA's receipt of the parent's request. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71. Fed. Reg., 46540, 46637 (August 14, 2006). The LEA must either: (1) provide notice consistent with 34 CFR §§300.503 and 300.504 and obtain informed, written consent, consistent with 34 CFR §300.9, before conducting the evaluation, pursuant to 34 CFR §300.300(a)(1); or (2) provide notice under 34 CFR §300.503 that the LEA is refusing to conduct the evaluation. It would be inconsistent with the evaluation provisions in 34 CFR §§300.301 through 300.111 for an LEA to wait until the completion of RTI activities before responding to the parent's request for an initial evaluation in one of those two ways.

If a parent believes an LEA is using RTI to delay or deny an evaluation, or the LEA is not complying with the requirement in 34 CFR §300.503 to provide notice of its refusal to conduct an evaluation, the parent can initiate any of the dispute resolution mechanisms available under the IDEA, including: (1) mediation, pursuant to 34 CFR §300.506; (2) filing a State complaint pursuant to 34 CFR §§300.151-300.153; or (3) filing a due process complaint pursuant to 34 CFR §§300.507-300.509.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have additional questions, please do not hesitate to contact Dr. Marion Crayton at 202-245-6474 or by email at Marion.Crayton@ed.gov.

Sincerely,

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

cc: State Director of Special Education