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IS “RESPONSE TO INTERVENTION” THE ANSWER TO THE INDIVIDUALS WITH DISABILITY EDUCATION ACT ELIGIBILITY MESS?¹

*Rebekah Gleason**

ABSTRACT

The 2004 Amendments ushered in new controversial provisions to the thirty-year-old Individuals with Disability Education Act (IDEA). In an effort to cure several issues at once, one of these provisions allows school districts to replace the much maligned discrepancy model with a process referred to as the Response to Intervention (RTI) model. RTI was intended to more accurately identify students as eligible within the category of learning disabilities under the IDEA, with a conscious focus on avoiding over-identification and misidentification. Another priority of RTI was early intervention by identifying children before the child reaches third grade. These lofty goals were certainly worthwhile, but were they realistic? And, has RTI, as it is commonly implemented, taken on more than it should? This article will examine RTI from its inception to its appropriate place in the eligibility of students within the category of learning disabilities. It will argue that RTI has its place, but is not the answer to the eligibility mess without modification. Instead, it has chipped away at some of the core rights upon which the IDEA was founded when it leaves parents out of the process, and it denies students services by delaying the eligibility process.

¹*See generally* Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83 (2009) (discussing the confusion surrounding IDEA eligibility; the present article is written in response to this article).

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INTRODUCTION

Nathan had a history of discipline problems and, despite the escalation of these problems, when he entered junior high school, he had never been referred for evaluation of a disability.² After a string of suspensions, he was finally threatened with placement in an alternative setting late in his seventh grade year.³ His father requested a manifestation determination meeting.⁴ At the meeting, it was determined that his behaviors were likely a manifestation of a disability that had yet to be determined, but should be evaluated and, for this purpose, he was placed back in his local school.⁵

Nathan's father had been asking for evaluations since the beginning of Nathan's seventh grade year.⁶ By this time in April, he sought evaluations of Nathan on his own.⁷ While the evaluations were pending, the school and his parents agreed to seek a 504 plan under the American with Disabilities Act (ADA)⁸ to temporarily provide services to assist both the school and Nathan to finish out his seventh grade year.⁹ The evaluations of Nathan were completed and shared with the school in June 2009.¹⁰ The following fall, the school initiated a functional behavioral assessment to complete the evaluation process.¹¹ In the meantime, the school system had begun to implement the RTI¹² process as a means to

²Personal anecdote from Rebekah Gleason.

³*Id.*

⁴Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(E) (2008) (explaining that if a local educational agency, the parent, and relevant members of the IEP [Individualized Education Program] team determine either: (I) "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability;" or (II) "the conduct in question was the direct result of the local educational agency's failure to implement the IEP" than the conduct shall be determined to be a manifestation of the child's disability).

⁵Personal anecdote from Rebekah Gleason.

⁶Personal anecdote from Rebekah Gleason.

⁷*Id.*

⁸Rutgers, The State University of New Jersey: New Brunswick, Office of Disability Services for Students, IDEA, ADA, IEP's, and Section 504 Plans: What Happens In College?, available at <http://disabilityservices.rutgers.edu/plans.html> (explaining that a 504 Plan is developed when a student in kindergarten through high school needs certain accommodations and modifications to a physical space or a learning environment in the school; however, the plan does not indicate a need for special education because, otherwise, the student would have been granted an IEP under the IDEA).

⁹Personal anecdote from Rebekah Gleason.

¹⁰*Id.*

¹¹*Id.*

¹²Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(B) (2004). Response to Intervention refers to one specific amendment made in the 2004 reauthorization of the IDEA, under the provision of determining a student eligible for IDEA services under the disability of specific learning disabilities. *Id.* Rather than depending on determining a child eligible due to a discrepancy between the IQ and

determine eligibility for special education of students with disabilities.¹³ A formal training and consistent implementation of this process was expected in the following year.¹⁴ At this time, however, as the program was in its infancy in this school district, each school was left to interpret the policy on its own.¹⁵

In Nathan's case, the result was that he was caught in multiple tiers¹⁶ of RTI several times; but he was never determined eligible for special education services under the IDEA because the school determined that it had to complete the RTI process before it could refer him for evaluation.¹⁷ The process was not completed that school year, and Nathan moved on to high school.¹⁸ Over the summer, each school was trained in the RTI process and new hope arose that Nathan would be determined eligible.¹⁹ Finally, in January of his ninth grade year—when he had yet to have an eligibility determination meeting—his father elicited the assistance of an attorney to file a due process request under the IDEA.²⁰ Days after the request was filed, Nathan was arrested and incarcerated, becoming another tragic statistic—a child that seems to have fallen through the cracks.²¹ Nathan was finally determined IDEA eligible as a student under the other health impaired category on October 14, 2011—almost two and a half years after his father first requested a determination of eligibility.²²

Nathan's case exemplifies a problem with the systemic reliance on RTI as a required step in the eligibility determination process—the perpetual cycles of interventions during which parents have no procedural protections. As problematic as the process seems, it has the potential to resolve some lingering issues in determining eligibility of students with learning disabilities, as well as addressing academically at-risk students who otherwise may not qualify for remedial or special education services.

achievement of a child, this option allows states to identify a child eligible if that child fails to make adequate progress after scientific, research based interventions have been provided to that child. *Id.*

¹³Personal anecdote from Rebekah Gleason.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*See* discussion *infra* Part III.B.

¹⁷Personal anecdote from Rebekah Gleason.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²Interview with Beverly Brown, Nathan's current attorney, Three Rivers Legal Services, Inc., in Jacksonville, Fla. (Oct. 12, 2011).

As several scholars have noted, the eligibility pendulum has swung to and fro, and it may well be time to try to stop it in its center.²³ It is also undisputed that the general education system in this country has suffered as compared to other nations' systems.²⁴ But, is this provision of the IDEA, a law protecting the rights of students with disabilities and their parents, the correct vehicle for complete school reform?

The original purpose of RTI was merely to correct an outdated method for determining eligibility for special education services under the category of specific learning disabilities.²⁵ In order for RTI to work for its intended purpose, however, the process must overhaul both the general and special education systems beginning with the core curriculum of the general education. Is this seemingly minor amendment to the IDEA meant to affect school reform on such a grand scale?

What has been done in both special and general education in the past is not currently working. Change is hard, but necessary, in order for the United States to compete globally, and not just within the education system. Is RTI one answer? This article demonstrates that this well-intentioned provision, if kept within its original scope, could be a step in the right direction. RTI will only be successful, however, with modification of its current form as described herein.

The language of the IDEA permits—but does not require—the use of RTI to identify students as eligible under a learning disability diagnosis.²⁶ Further, RTI is permitted as an alternative to the discrepancy model, which can no longer be imposed by states upon school districts as the sole process for determining eligibility.²⁷ This is not to say that parents must rely on RTI to have their child determined eligible; it merely says that states cannot require districts to rely solely on the discrepancy model.²⁸

²³See, e.g., Robert A. Garda, Who is Eligible Under the Individuals with Disabilities Education Improvement Act?, 35 J.L. & EDUC. 291 (2006); Wendy F. Hensel, Sharing the Short Bus: Eligibility and Identity Under the IDEA, 58 HASTINGS L.J. 1147 (2007); Weber, *supra* note 1.

²⁴*The Real Reason America's Schools Stink*, BUSINESSWEEK.COM, <http://www.businessweek.com/articles/2012-08-19/the-real-reason-americas-schools-stink> (last visited Mar. 16, 2013).

²⁵Learning Disabilities and Early Intervention Strategies: How to Reform the Special Education Referral and Identification Process: Hearing Before Subcomm. on Educ. Reform of the H. Comm. on Educ. and the Workforce, 107th Cong. 65 (2002) [hereinafter Hearings] (statement of Rep. Michael Castle, Chairman, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

²⁶See Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b) (2008).

²⁷Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(B) (2008). Prior to IDEIA, the statute was silent on the method to determine eligibility for specific learning disabilities. See 20 U.S.C. § 1414(b) (2003).

²⁸Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(A) (2008).

In reviewing the problems with determining eligibility—including the disdain of the discrepancy model as an outdated and inaccurate tool—RTI has a certain amount of curb appeal as an alternative. RTI requires high quality instruction before sending challenging students to special education, which makes teachers and districts accountable for every child in the teachers' classroom.²⁹ Furthermore, when implemented thoroughly and consistently, RTI can assist children who would otherwise fall through the cracks because he or she did not perform poorly enough to warrant special education.³⁰

But is this process effective and therefore necessary on the grand scale into which it has evolved? The answer is no. The inherent problem with RTI is that while it is funded with IDEA funds, there is no accountability under the IDEA.³¹ There is no notice requirement.³² There is no timeline requirement.³³ There is no structure for teachers or parents to fall back on when schools and school districts fail to implement the process in a meaningful way.³⁴ For teachers, RTI can become an additional burden with little benefit for their classroom.³⁵ For parents, it is an additional hurdle to overcome before getting much needed assistance for their children.³⁶

The bypass of the parent seems to defeat the purpose of the IDEA:

Almost [thirty] years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . *strengthening the role and responsibility of parents* and ensuring that *families of such children have meaningful opportunities to participate* in the education of their children at school and at home[.]³⁷

Because it is not special education, the procedural protections of the IDEA do not attach.³⁸ Thus, when a teacher recognizes through the screening devices that are part of the first tier of interventions that a

²⁹See Amy Clark, *Using Response to Intervention in the Classroom*, 36 No. 19 QUINLAN, SCH. LAW BULL. art. 2 (2009).

³⁰See *infra* Part III.D.2 and accompanying text.

³¹See *infra* notes 77, 81 and accompanying text.

³²See Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2008).

³³*Id.*

³⁴*Id.*

³⁵See discussion *infra* Part III.D.2.

³⁶*Id.*

³⁷Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(5)(B) (2008) (emphasis added).

³⁸*But see* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A)–(B) (2008) (stating that a purpose of the IDEA is to “ensure that all children with disabilities have available to them . . . public education the emphasizes special education” and to “ensure that the rights of children with disabilities and parents of such children are protected,” therefore, implying that the IDEA does not apply outside of special education).

student is not progressing adequately, there is no requirement to notify the parent of either the weakness or the plan to correct that weakness.³⁹ While best practices suggest that the parents should be notified in writing to maintain a respectful and collaborative partnership, it is not necessary.⁴⁰ In other words, a student who has been identified as struggling in reading or behavior can be cycled through the tiers of intervention over dozens of weeks before the parents are ever notified of the original concern by the teacher.⁴¹

Taking the plain meaning of the IDEA provision on its face, it seems to offer school districts the option of declaring that a child may have a learning disability by using “a process that determines if the child responds to scientific, research-based intervention *as part of the evaluation procedures*[.]”⁴² The language clearly states that this process is part of the evaluation procedures, rather than a precursor to the procedures.⁴³ While there is diagnostic value to multiple iterations of the interventions, the endless cycle that can occur merely prolongs the evaluation process from ever getting officially started, thereby delaying both the services to those children who need them, and the procedural accountability of the district. Recognizing that RTI is part of the evaluation process starts the timeline requirements.⁴⁴ This would create tension between concluding the evaluations in a timely manner—as dictated by state and federal statutes—and the time needed to work through the tiers of interventions in a meaningful manner. This tension, however, may benefit both parents and school personnel, by forcing schools to cycle through the tiers efficiently. Rather than attempting

³⁹STANLEY L. SWARTZ ET AL., RESPONSE TO INTERVENTION (RTI): IMPLEMENTATION AND LEGAL ISSUES 6 (2011) (discussing the first tier of interventions); *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2008).

⁴⁰E-mail from Heather Diamond, Multi-tier System of Supports (MTSS) Liaison for Florida’s Problem-solving/RTI Project at the U. of So. Fla. In collaboration with the Fla. Dept. of Educ. (FDOE), to Tanya H., parent, Indian River County, Fla. (Jan. 2, 2012, 1:22 PM) (on file with author) (stating that there are no set time periods of when to notify the parents. Additionally, “in the broader scope of establishing district wide expectations, I caution against modeling expectations after the more compliance driven ESE procedures”); SWARTZ ET AL., *supra* note 39, at 26.

⁴¹*See* President’s Comm. on Excellence In Special Educ., A New Era: Revitalizing Special Education for Children and Their Families 21, 22 (July 1, 2002) [hereinafter President’s Comm. on Excellence]; *Hearings, supra* note 25, at 28 (statement of Joseph F. Kovalski, Dir. Of Pupil Services, Cornwall-Lebanon Sch. Dist., Lititz, Pa). The concomitant relationship between learning disabilities and behavioral problems especially in older children is a common thread in discussing this process.

⁴²Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(B) (2008) (emphasis added).

⁴³*Id.*

⁴⁴*See* Individuals with Disabilities Education Act, 20 U.S.C. § 1414 (2008).

several interventions in a trial and error manner with no clear end, a timeline will force school personnel to carefully scrutinize each intervention. This would assist those schools, such as Mrs. W's,⁴⁵ that request different information after the collection of RTI data. A timeline would also assist those schools, such as the ones encountered by Ms. Roberts,⁴⁶ with better RTI implementation when the schools do not know when to stop the intervention cycles.

Along with procedural protections, RTI's substantive scope may need to be re-assessed. This provision was initially intended to more accurately diagnose only those students who may have a learning disability.⁴⁷ And, more specifically, the precedent programs and specialists in the area were focused on reading in the early grades of kindergarten to second grade.⁴⁸ Maintaining the focus on the initial intent is essential to both RTI's success and acceptance. While there is little evidence in either direction whether the comprehensive model of RTI is successful, the precedent programs addressing reading from kindergarten through second grade have shown that children make progress.⁴⁹ Common to these success stories was support from the administration, "buy in" from the faculty, and focus on reading at the younger grade levels.⁵⁰ As the RTI model deviates from this successful approach, it becomes diluted and less effective.

In order to illustrate how far RTI may have strayed from the original intent of the Education for All Handicapped Children Act⁵¹ (EAHCA), now known as the IDEA, it is important to examine the origin of the statute. First, this article will look at the history and background of the IDEA and the current implementation of the most recent authorization of it, the Individuals with Disabilities Education Improvement Act (IDEIA). Next, this article will discuss the complications with the current eligibility determination model. Third, it will describe the RTI provision of the IDEA by discussing its history, the potential legal issues raised, and its current implementation. Finally, the article will suggest that RTI can be useful, but only when utilized appropriately.

⁴⁵See *infra* pp. 36–37.

⁴⁶See *infra* pp. 34–36.

⁴⁷See Clark, *supra* note 29.

⁴⁸See *infra* Parts III.A.1–3 and accompanying text.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142 (1975).

I. HISTORY AND BACKGROUND OF THE IDEA AND CURRENT
IMPLEMENTATION OF THE IDEA.

The education of students with disabilities has come a long way since the seminal cases of *Mills*⁵² and *PARC*.⁵³ This section will briefly discuss the history of educating students with disabilities, including the evolution of the IDEA, the impact of *Rowley*, the IDEA since the 1997 amendments, and the amendments of 2004. Finally, this section will address the history of the RTI provision of the 2004 amendments, including the primary purpose behind it.⁵⁴

Education is Important for All of Society

The importance of education to the well-being of our society is undeniable. What the Supreme Court conveyed so eloquently in 1954 continues to ring true today:

Today, education is perhaps the most important function of state and local governments . . . [i]t is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁵⁵

As our world becomes more dependent on technology and less dependent on manual labor, education, and literacy specifically, is increasingly imperative:

Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being

⁵²*Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).

⁵³*Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter *PARC*].

⁵⁴See generally Rebekah Gleason Hope, *IDEA & NCLB: Is There a Fix to Make Them Compatible?*, 29 *Child. Legal Rts. J.* 1 (2009) (discussing thoroughly the background of the IDEA).

⁵⁵*Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality in the Equal Protection Clause.⁵⁶

Any child who does not receive an adequate or appropriate education are ill-prepared for independent living, and as a result, are less productive members of society.⁵⁷ Children with disabilities that affect their education are at an even greater disadvantage. The importance of literacy has not diminished since 1982 as is evidenced by the precedent programs to RTI.⁵⁸ Each of the three programs used as models for this process focused their attention to the literacy levels of children in the younger grades.⁵⁹

Legislative Background on the Purpose and Importance of the IDEA

Throughout the early twentieth century, students who did not progress at an appropriate rate were considered “mentally deficient.”⁶⁰ These students were removed from the classroom because they distracted their classmates and consumed too much of their teachers’ time, not because they required special instruction.⁶¹ “Students with ‘mild’ disabilities who did not pose problems were left in the classroom, but were given no support or intervention; they often floundered and dropped out of school at the first opportunity.”⁶²

Although it would take another twenty years for an effective federal special education statute to be passed, *Brown v. Board of Education* in 1954 marked the beginning of a trend towards greater equality in educational opportunities.⁶³ In the following decades, this trend eventually produced real advances for the education of students with disabilities.⁶⁴ In 1965, the Elementary and Secondary Education Act (ESEA) provided federal funding for generally improving the education

⁵⁶*Plyler v. Doe*, 457 U.S. 202, 222 (1982).

⁵⁷*Plyler*, 457 U.S. at 222.

⁵⁸See *infra* Parts III.A.1–3 and accompanying text.

⁵⁹*Hearings*, *supra* note 25, at 27–48, 84–122 (describing programs at Hartsfield Elementary School, Tallahassee, Florida, Cornwall-Lebanon School District, Lititz, Pennsylvania and Elk Grove Unified School District, Elk Grove, California).

⁶⁰Michael A. Rebell & Robert L. Hughes, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 529 (1996).

⁶¹*Id.* at 529–30.

⁶²Sara Tarver, *How Special Education Has Changed*, in CHANGING PERSPECTIVES IN SPECIAL EDUCATION 11 (Rebecca Kneeder & Sara Tarver eds., 1977).

⁶³*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁶⁴See *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).

of the disadvantaged,⁶⁵ and it was amended the following year to provide targeted funding for children with disabilities.⁶⁶

Despite this federal legislation, states continued to exclude students with disabilities from public school programs. Two state class action suits shaped the federal legislation for the disabled that eventually emerged. In the first of two cases, Pennsylvania excluded students with mental retardation from public school and excluded them from attendance requirements.⁶⁷ The Pennsylvania Association for Retarded Citizens (PARC) brought an action against the state in federal district court, which required Pennsylvania “to provide . . . to every retarded person between the ages of six and twenty-one . . . access to a free public program of education and training appropriate to his learning capacities.”⁶⁸ The decision also included specific notice and hearing rights afforded to parents and guardians of children with mental retardation.⁶⁹

Later that same year, the District of Columbia District Court heard a similar case involving seven children that were denied education by the District of Columbia Public Schools.⁷⁰ As in *PARC*, the students in *Mills* were neither afforded an education, nor were they afforded due process procedural rights to appeal decisions of the board of education in expulsions, reassignments, or other denials of education to their children.⁷¹ The *Mills* court, like the court in *PARC*, set out a detailed structure for procedural safeguards including notice and hearing requirements.⁷² The *Mills* and *PARC* decisions became the framework for future legislation.⁷³

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), signed into law as P.L. 94-142.⁷⁴ Structured primarily on the *PARC* and *Mills* decisions, the EAHCA mandated that states receiving federal special education funding ensure their intermediate and local education agencies provide a free appropriate

⁶⁵Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

⁶⁶Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191 (1966).

⁶⁷*PARC*, 343 F. Supp. 279, 282 (E.D. Pa. 1972).

⁶⁸*Id.* at 282, 302.

⁶⁹*Id.* at 303.

⁷⁰*Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

⁷¹*Mills*, 348 F. Supp. at 868.

⁷²*Id.* at 878-83.

⁷³It should be noted that these were two of the thirty or more suits brought in the nation prior to 1975.

⁷⁴Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

public education to children with disabilities.⁷⁵ This federal spending statute required states to educate these children as much as possible with their non-disabled peers, but not to the detriment of their educational progress.⁷⁶ It also required appropriate evaluation procedures and mandated that an individualized education program (IEP) be designed for each child, to be reviewed at least annually.⁷⁷ In addition, the parents were to be afforded due process safeguards, including notice and hearing requirements.⁷⁸

In 1990, the EAHCA was amended and renamed the IDEA in part to emphasize that the person was the foremost priority.⁷⁹ While the focus on results for students with disabilities has emerged more clearly in the most recent reauthorizations, the original focus on the individual student has consistently remained the foremost priority. The Act emphasizes the *individual* child's educational needs, and how that specific child's disability affects their success in the general education curriculum.⁸⁰ When the child's disability no longer affects his or her educational achievement, and when the child's "other education needs that result from the child's disability" are ameliorated, the child no longer qualifies for special education services under the IDEA.⁸¹ However, as long as the child's disability affects his or her achievement in the general curriculum, the child continues to require an IEP and special education services.

Procedural Protections are a Cornerstone of the IDEA

Recognizing that neither Congress nor courts are composed of education experts, Congress created procedures for State and Local Education Agencies to implement appropriate programs for qualifying children with disabilities.⁸² The Supreme Court recognized the importance of the procedures as early as the 1981 *Rowley*⁸³ decision, and as recently as the 2005:

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Mitchell L. Yell, *The History of the Law and Children with Disabilities* 63 (1998).

⁸⁰ See Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c) (1990).

⁸¹ See Individuals with Disabilities Education Act, 20 U.S.C. § 1401(3)(A) (2008) (defining a "child with a disability" as a child with any one or more of the listed disabilities, and who, by reason of the disability, "needs special education and related services," which implies that if a child does not meet this definition than he or she is not eligible under the IDEA).

⁸² Individuals with Disabilities Education Act, 20 U.S.C. § 1414 (2009).

⁸³ *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

The core of the statute, however, is the cooperative process that it establishes between parents and schools . . . State educational authorities must identify and evaluate disabled children, . . . develop an IEP for each one, . . . and review every IEP at least once a year[.] Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide.⁸⁴

Despite indications to the contrary,⁸⁵ most circuits have followed the standard enunciated by the Supreme Court in *Rowley* decision.⁸⁶ If this continues to be the case, then the often cited language still applies:

When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid . . . We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirement that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.⁸⁷

⁸⁴*Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing *Board of Education v. Rowley*, 458 U.S. 176, 205–206 (1982) (“Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard”).

⁸⁵See generally Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561 (2003) (concluding that “the ‘some educational benefit’ standard no longer accurately reflects the requirements of the IDEA”).

⁸⁶*L.T. ex rel N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004) (finding that 1997 Amendments language “simply articulates the importance of teacher training,” and that it does not overrule *Rowley*); *K.C. ex rel M.C. v. Mansfield Independent Sch. Dist.*, 618 F. Supp. 2d 568, 575–76 (N.D. Tex. 2009) (agreeing with *Warwick* and stating that other courts have stated that had Congress intended to displace *Rowley* by its amendments to the IDEA it would have been much more explicit and held that “*Rowley* continues to provide the standard for deciding an action brought under the IDEA”).

⁸⁷*Bd. of Educ. v. Rowley*, 458 U.S. 176, 205–06 (1982).

In other words, the Supreme Court described the IDEA as an input-based mechanism.⁸⁸ So long as the IDEA's procedures are followed, the outcome will be adequate.⁸⁹ In fact, as long as *Rowley* rules the day, the standard upon which courts judge all IDEA claims reflects this emphasis on procedure: "[the] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"⁹⁰

Under Section 1415 of the IDEA, Congress sets forth a comprehensive and detailed explanation of the procedural safeguards afforded to parents of children with disabilities, as well as children with disabilities whose parents are unknown.⁹¹ The procedural safeguards contained in the IDEA are timelessly significant, especially in light of the effect of RtI because it falls outside the protections of IDEA.⁹² The procedures create "[a]n opportunity for any party to present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education [FAPE] to such child."⁹³ The procedures also detail notification requirements, due process complaint requirements, opportunity for mediation, as well the requirement for a resolution meeting, all in preparation for an opportunity to be heard by an independent hearing officer.⁹⁴ This is in stark contrast to the intentional lack of procedural protections for parents under the RTI process.⁹⁵

II. COMPLICATION WITH THE CURRENT ELIGIBILITY MODEL?

In order to receive services under the IDEA, a student must be determined eligible.⁹⁶ This generally requires a three part test: (1) a disability classification; (2) that disability "adversely affects educational performance;" and (3) the child "by reason thereof needs special education and related services."⁹⁷ In other words, if a student with a

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Rowley*, 458 U.S. at 205–206 (footnotes omitted).

⁹¹ Individuals with Disabilities Education Act, 20 U.S.C. § 1415 (2009).

⁹² *Id.*

⁹³ Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(6)(A) (2008).

⁹⁴ Individuals with Disabilities Education Act, 20 U.S.C. § 1415(a)–(i) (2008).

⁹⁵ *But see* Individuals with Disabilities Education Act, 20 U.S.C. § 1415(a)–(i) (2008); *See also* E-mail from Heather Diamond, *supra* note 40.

⁹⁶ Individuals with Disabilities Education Act, 20 U.S.C. § 1414 (2008).

⁹⁷ Weber, *supra* note 1, at 152–53 (citing 20 U.S.C.A. § 1401(3)(A)(i)–(ii) (West Supp. 2008); Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.8(a), (c) (2008)).

disability requires special education to ameliorate the effects of that disability on their academic performance, that student should be afforded the protections and services found under the IDEA.⁹⁸ Likewise, if the student either does not require or no longer requires such services, he or she should not be found eligible, or should no longer be determined eligible for special education.⁹⁹ While this sounds simple enough on its face, there are growing concerns that too many students are inappropriately identified either because they do not need the services to ameliorate the effects of a disability or because they are belatedly determined eligible.¹⁰⁰ Are too many children inappropriately identified? Are others identified too late or not at all? Is it a mess? Does it need fixing? As one of its benefits, the proponents of RTI tout that this process will limit the number of inappropriately identified students and students found eligible overall. The next section will discuss the mechanics of determining eligibility, the impact of eligibility determinations, and eligibility within the category of learning disability.

Mechanics of Determining Eligibility for the IDEA Services and Protections

Because RTI is placed in a subsection describing whether a student may have a specific learning disability and, therefore, qualifies as eligible under the IDEA,¹⁰¹ it is worthwhile to describe the elements of eligibility determinations historically.

The IDEA protects the rights of children with disabilities and provides them with appropriate services.¹⁰² In determining whether a child qualifies for services and procedural protections under the IDEA, it is necessary to determine whether the child is one with a disability within the meaning of that term under the IDEA.¹⁰³ Under the IDEA, the term “child with a disability” means a child with one of the enumerated disabilities, “who, by reason thereof needs special education and related services.”¹⁰⁴ In practice, courts utilize either a two or three-part test to determine whether a child qualifies as eligible under the IDEA if the child: “(1) is diagnosed with an enumerated disability that (2) adversely affects educational performance, and (3) by reason thereof needs special

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *Hearings, supra* note 25, at 2 (statement of Rep. Michael Castle, Chairman, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

¹⁰¹ Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6) (2008).

¹⁰² Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d) (2008).

¹⁰³ Individuals with Disabilities Education Act, 20 U.S.C. § 1401(3) (2008).

¹⁰⁴ *Id.*

education.”¹⁰⁵ Many courts merge the first and second part because the “adversely affects” test can be considered a part of the disability diagnosis.¹⁰⁶

The existence of a disability is generally not the factor that poses the most difficulty in the eligibility determination.¹⁰⁷ As previously mentioned, however, “adversely affects educational performance” is often included as part of the disability element, and is more amorphous and problematic.¹⁰⁸ An analysis of this element is best done by first recognizing what constitutes “educational performance,” and second, identifying what constitutes “adversely affected.”

As Professor Robert A. Garda explains, educational performance can be confined to a narrow definition of academic performance, or it could encompass non-academic areas such as social/emotional and interpersonal performance as well.¹⁰⁹ States treat educational performance differently and do not always consider non-academic areas,¹¹⁰ although both attendance and behavior are so inextricably linked to educational success that they should be considered.¹¹¹ Attendance should be considered as educational performance because it provides the opportunity to learn.¹¹² Likewise, behavioral problems—and by extension—inter-personal and social interactions should also be considered educational performance areas.¹¹³

Whether a disability actually adversely affects the child’s education is critical in the analysis of whether the child is eligible under the IDEA, which raises two issues. First, whether a child is adversely impacted if they perform well with non-special education services. Second, how adverse must the impact have to be?

¹⁰⁵Garda, *supra* note 23, at 294 (footnotes omitted).

¹⁰⁶*Id.* (citing *Babiez v. Sch. Bd.*, 135 F. 3d 1420, 1422 n.10 (11th Cir. 1998) (“the first prong includes those suffering from a long list of handicaps and other health impairments’ such as asthma, and, the second prong include those, who, by reason thereof, need special education and related services”) (citations omitted); *W. Chester Area. Sch. Dist. V. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. PA 2002) (There is a “two-part test for determining whether a student is entitled to an IEP. First, the student must have a qualifying disability, and, second, the student must need special education”); Weber, *supra* note 1, at 152.

¹⁰⁷Weber, *supra* note 1, at 152.

¹⁰⁸Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.8(c) (2006); Garda, *supra* note 23, at 294; Weber, *supra* note 1, at 152.

¹⁰⁹Garda, *supra* note 23, at 295 (footnotes omitted).

¹¹⁰*Mr. I v. Maine School Board*, 480 F.3d 1, 11 (1st Cir. 2006) (explaining that “[e]ach state thus remains free to calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the statute”).

¹¹¹Garda, *supra* note 7, at 301.

¹¹²Garda, *supra* note 23, at 301.

¹¹³*Mr. I*, 480 F.3d at 12 (citations omitted).

First, it should be axiomatic that if a child requires services—including remedial non-special education services to perform adequately—then without those services, his or her education is adversely impacted.¹¹⁴ Whether the child requires *special education* services and, therefore, is eligible, is established in the next prong.¹¹⁵ But, to deny that the child is adversely impacted educationally merely because it appears that these non-special education services assist the child in his or her educational performance is to ignore the fact that the child requires some sort of assistance to adequately address an educational need.

Second, how adverse does the impact have to be? Some school districts contend that the “adversely affected” component requires “some significant impact on educational performance.”¹¹⁶ In rejecting that requirement, the First Circuit Court of Appeal correctly noticed that “adversely affects,” as it appears in the regulatory language has, no qualifier.¹¹⁷ To the argument that such a low bar would open the floodgates of eligibility, it should be noted just what the purpose of this element is, and where it falls in the eligibility analysis. The purpose of the “adversely affects” language is to act as a gatekeeper, limiting possible eligibility to those students with a disability only if it impacts educational performance.¹¹⁸ Likewise, it limits eligibility to those students whose poor performance in school is due to a disability rather than other factors.¹¹⁹

The final element of the eligibility analysis is “by reason thereof, the child needs special education and related services.”¹²⁰ Even if a child is found to have a disability that is adversely affecting his educational performance, it must still be considered whether special education is required to ameliorate the effects of the disability.¹²¹ Whether special education services are required to ameliorate the effects of a disability is further broken down into two questions: (1) What is “need”?; and (2) What is “special education”?¹²²

¹¹⁴Garda, *supra* note 23, at 303–304.

¹¹⁵*Id.* at 294.

¹¹⁶*Mr. I v. Maine School Bd.*, 480 F.3d 1, 13 (1st Cir. 2006)

¹¹⁷*Id.* (citation omitted).

¹¹⁸Garda, *supra* note 23, at 305.

¹¹⁹*Id.*

¹²⁰*Id.* at 294; Weber, *supra* note 1, at 152.

¹²¹Garda, *supra* note 23, at 293–94.

¹²²*Id.* at 306, 316.

As Professor Garda astutely points out, the IDEA provides no clarification on the “need” standard,¹²³ and many states do not define the “need” standard.¹²⁴ Does a child need special education merely because that child would benefit from it? Or, does it require something more? And, if so, what level of need warrants eligibility?¹²⁵

Most scholars agree that a certain level of “need” is required to warrant services.¹²⁶ Most scholars also agree that the level of performance of the student is based on that student’s performance with non-special education services in place.¹²⁷ Moreover, as RTI is implemented more comprehensively across the board, students will be provided remedial non-special education services and will not necessarily be evaluated for special education eligibility until he or she fails to make progress with those interventions. The RTI process may answer the question—at which level must a student fall below to “need” special education services? It is generally accepted that students who are failing need special education, and students who are performing above average in all academic and non-academic areas do not need special education.¹²⁸ The question is—at what level between failing and excelling, to acquire necessary life skills does a student display a need for special education?¹²⁹ Scholars and educators agree that students should be identified before complete failure.¹³⁰ Early intervention provides the best chance of successful treatment.¹³¹ The RTI process, with its focus on early intervention, just may help achieve this goal.¹³²

Special education is the “adaption of the content, methodology or delivery of instruction to address a child’s unique needs, and to ensure access to the general curriculum.”¹³³ Related services are “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special

¹²³*Id.* at 306 (citing Robert A. Garda, *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 Mo. L. Rev. 441, 441–43 (2004)).

¹²⁴Garda, *supra* note 23, at 306.

¹²⁵*Id.* at 307–308.

¹²⁶Garda, *supra* note 23, at 308.

¹²⁷*Id.* at 308–309.

¹²⁸*Id.* at 310–11 (footnotes omitted).

¹²⁹*Id.* at 310; *See also* Mr. I v. Maine School Board, 480 F.3d 1, 12 (1st Cir. 2006) (identifying that necessary life skills is meant to include both academic and non-academic areas).

¹³⁰*Id.* at 315 (citing H.R. Rep. No 108–77, at 84, 108, 124 (2003) (waiting for failure is bad educational policy, and educators must attempt to prevent failure; PRESIDENT’S COMM. ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 21, 7–8 (July 1, 2002)).

¹³¹*Id.* at 315 (footnotes omitted).

¹³²*See* SWARTZ ET AL., *supra* note 39, at 3.

¹³³Garda, *supra* note 23, at 317.

education, and includes the early identification and assessment of disabling conditions in children.”¹³⁴ In other words, if a child is determined eligible for special education services, the child may also qualify for related services if those services assist the child in benefitting from special education.¹³⁵ If the child requires only related services, the child may not qualify as eligible under the IDEA unless the state’s definitions of those related services fall under one of the enumerated related services in its definition of special education.¹³⁶

The more difficult question is how to define special education in terms of eligibility. The definition—as stated above—leads to a few different interpretations.¹³⁷ First, a broad interpretation of special education can lead to any adaptation of content, method, or delivery of general education as special education.¹³⁸ Second, a narrow interpretation limits the definition of special education to only significant and unique adaptations that meet the needs of the individual child rather than the generic needs of all students.¹³⁹ Third, a judicial approach presumes that all children otherwise eligible with a disability that adversely affects educational performance to a point that requires remediation through special education are eligible.¹⁴⁰ This approach is circular in that it assumes that which it is meant to scrutinize. It is also over inclusive because it does not screen those students who may benefit merely from better instruction, especially those students with learning disabilities that affect his or her reading skills.¹⁴¹ This latter group is precisely the group at which the RTI process is targeted.

Generally, there is disagreement on the level of adaptation that is needed in content, method, and delivery to constitute special education.¹⁴² But, a more legitimate and realistic approach may be to adopt a more conservative view on where general education ends, and special education begins. Professor Garda concludes, “children with enumerated disabilities should only be eligible if they need significant individualized instruction beyond that which is provided to all students.”¹⁴³ In suggesting that minor changes to delivery, content, and instruction are merely good instruction instead of “special education,”

¹³⁴Individuals with Disabilities Education Act, 20 U.S.C. § 1401(26)(A) (2008).

¹³⁵*Id.*

¹³⁶Garda, *supra* note 23, at 318.

¹³⁷*Id.* at 317.

¹³⁸*Id.* at 317–318.

¹³⁹*Id.* at 319 (footnotes omitted).

¹⁴⁰Garda, *supra* note 23, at 319.

¹⁴¹*Id.* at 319–320.

¹⁴²*Id.* at 320–330.

¹⁴³*Id.* at 331.

Professor Garda lends support to the RTI process which assumes that most intervention begins with better teaching in the general education.¹⁴⁴

Purpose of Eligibility Determinations

As discussed above, historically, children with disabilities were under-educated.¹⁴⁵ According to the Bureau of Education for the Handicapped, U.S. Office of Education, in 1975, the needs of only fifty percent of the children with disabilities from ages zero to nineteen were served.¹⁴⁶ The Senate Labor and Public Welfare Committee (Committee) noted that the long-range implications for not appropriately serving this population would ultimately cost taxpayers more than the actual services.¹⁴⁷ Providing children with proper services at a younger age will help the children become productive members of society rather than forcing the children to remain burdens on society.¹⁴⁸

Despite the overwhelming need for such legislation, the Committee voiced three specific concerns before passing the bill:

- (1) [M]isuse of appropriate identification and classification data within the educational process itself;
- (2) discriminatory treatment as the result of the identification of a handicapping condition; and
- (3) misuse of identification procedures or methods which results in erroneous classifications of a child having a handicapping condition.¹⁴⁹

Representative George Miller of California noted that a concern that some of the tests used to identify disabilities were biased and discriminatory.¹⁵⁰ There were also concerns over the amorphous nature of the learning disabilities and that it may invite inconsistent eligibility determinations.¹⁵¹ None of these concerns were unwarranted and, ultimately, the bill was passed with a cap of twelve percent of the total

¹⁴⁴*Id.* at 332.

¹⁴⁵*See supra* Part I.B and accompanying text.

¹⁴⁶S. Rep. No. 94-168, at 8 (1975).

¹⁴⁷*Id.* at 9.

¹⁴⁸*Id.*

¹⁴⁹S. Rep. No. 94-168, at 26-27 (1975).

¹⁵⁰Hensel, *supra* note 23, at 1153-54 (citing 121 Cong. Rec. 25526, 25539 (1975) (statement of Rep. Miller)).

¹⁵¹*Id.* at 1154.

population, and a cap of two percent of identification for learning disabilities.¹⁵²

Despite these concerns, however, in 1986, in a continuing effort to minimize the need for services later, early intervention¹⁵³ was expanded and the caps were lifted.¹⁵⁴ As mentioned earlier, in 1990 the name of the Act changed to the IDEA to put the focus on the individual first, and the disability second.¹⁵⁵ The IDEA expanded the disabilities it would serve including Autism, traumatic brain injury, and later Attention Deficit Hyper-Activity Disorder (ADHD).¹⁵⁶ In 1997, the Amendments narrowed the reach of the IDEA by limiting eligibility to those children whose determining factor for eligibility was neither due to lack of instruction in reading or math nor because of limited English proficiency.¹⁵⁷ Education for children with disabilities has come a long way since 1975, but students with disabilities still require the procedural protections of the IDEA to attain appropriate services.¹⁵⁸

While in some respects the IDEA has expanded its reach to include a broader range of students, the practice by school districts—confirmed by case law—has been to limit its reach by adhering to a restrictive reading of the eligibility requirements and, thereby, denying services to students who would otherwise qualify.¹⁵⁹ As noted in great detail above,¹⁶⁰ the process to determine eligibility is flawed and inconsistent, but arguably necessary for the following three reasons. First, to limit costs by limiting the number of students entitled to a free, appropriate, public, education.¹⁶¹ Second, eligibility determination requires a finding that the student has one of the enumerated disabilities, which has historically assisted in programming decisions.¹⁶² Finally, to allocate resources so that Congress is assured that the funds appropriated to states

¹⁵²*Id.* at 1154–55.

¹⁵³Early intervention in this context means services provided during early childhood and preschool. This is not to be confused with the general reference of early intervention used throughout most of the paper that uses early intervention to mean assistance to children in the early stages of their educational problems.

¹⁵⁴Mark C. Weber, *Special Education Law and Litigation Treatise*, LRP. at 11:1 (2d ed. 2005) (to be updated when 3rd edition arrives).

¹⁵⁵See Gleason Hope, *supra* note 54, at 3 (citing 20 U.S.C. § 1400(a) (1990); MITCHELL L. YELL, *THE HISTORY OF THE LAW AND CHILDREN WITH DISABILITIES* 63 (1998)).

¹⁵⁶Hensel, *supra* note 23, at 1156.

¹⁵⁷*Id.* at 1158. (citing Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105–17, § 614(b)(5), 111 Stat. 37, 82 (codified as amended at 20 U.S.C. § 1414(b)(5) (2000)).

¹⁵⁸Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(3) (2008).

¹⁵⁹Weber *supra* note 23, at 102–103.

¹⁶⁰See *supra* Part II.A and accompanying text.

¹⁶¹See Weber, *supra* note 1, at 95.

¹⁶²See *Id.* at 96.

for special education are actually being used for the education of children with disabilities, rather than for general education.¹⁶³

Each of these three justifications has been diminished a bit over the years. First, federal funding is no longer tied to the number of students receiving special education services, although some state and local funding is tied to the number of students.¹⁶⁴ Instead, federal funding is based on total student population.¹⁶⁵ Second, there has been a lack of evidence linking specific disabilities with methods of instruction, and several models of programming combine instruction for varying disabilities.¹⁶⁶ Third, the most recent amendments cloud—rather than clarify—the distinction between general and special education funding when it calls for fifteen percent of the funding to go to general education for early intervention.¹⁶⁷ According to the President’s Commission on Excellence in Special Education, early intervention can “prevent disabilities in many children and ameliorate their impact on those who develop them.”¹⁶⁸ With the use of these funds in conjunction with other specialized services already provided within the general education arena,¹⁶⁹ many children are receiving specialized services without the imposition of a special education label.¹⁷⁰ All of this combines with the ultimate goal of having all children succeed in the mainstream education arena.¹⁷¹

Yet, the laudable goal of having all children succeed is not a reality.¹⁷² Students with disabilities that require these protections and services of the IDEA are routinely denied eligibility by school districts; therefore, these students are denied the rights to appropriate education, and the students’ parents are denied explicit procedural protections to enforce those rights.¹⁷³

¹⁶³See *Id.* (citations omitted).

¹⁶⁴See Weber, *supra* note 1, at 97.

¹⁶⁵*Id.* at 94.

¹⁶⁶*Id.* at 96–97.

¹⁶⁷Individuals with Disabilities Education Act, 20 U.S.C. § 1413(f)(1)(2008); See *infra* Part III.C.E. and accompanying text for further discussion.

¹⁶⁸See President’s Comm. On Excellence, *supra* note 41, at 22.

¹⁶⁹See Weber, *supra* note 1, at 99–100.

¹⁷⁰*Id.* at 101.

¹⁷¹*Id.*

¹⁷²*Id.* at 101.

¹⁷³*Id.* at 101–102.

The Eligibility of the Learning Disability Category

No area is more controversial in eligibility determinations than learning disabilities.¹⁷⁴ As far back as 1975, there has been skepticism on the eligibility of students with specific learning disabilities.¹⁷⁵ The dissatisfaction with evaluation methods for children with learning disabilities lies at the heart of the RTI process.¹⁷⁶ The following section will address the effect RTI has in the context of education overall.

But first, although it was clear that students with learning disabilities were indeed the most underserved population,¹⁷⁷ these students were also the most controversial from the outset.¹⁷⁸ Congress' skepticism in diagnosing learning disabilities has not dissipated.¹⁷⁹ The most recent 2004 amendments of the IDEA focused on the current problem of over-identification of students with specific learning disabilities.¹⁸⁰ There is an argument that over-identifying students as learning disabled—when the students are not actually disabled—denies those students the access to a meaningful high quality education in the mainstream, and limits the students' future opportunities.¹⁸¹ On the other hand, under-identification leaves those students who are truly disabled “unserved and often unable to participate effectively in society.”¹⁸²

The solution to this conundrum, of course, is an accurate and reliable system of determining eligibility based on specific learning disabilities. There is no question that the discrepancy model used for identifying a student eligible by reason of a learning disability is a flawed process.¹⁸³ “The IQ-achievement discrepancy model is the approach traditionally used to identify children with learning disabilities.”¹⁸⁴ If a student's score on the IQ test is significantly higher than his or her scores on an achievement test—for example, two standard deviations or thirty

¹⁷⁴See *Hearings, supra* note 25, at 2 (statement of Rep. Michael Castle, Chairman, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

¹⁷⁵Hensel, *supra* note 23, at 1152 (footnotes omitted).

¹⁷⁶See *Hearings, supra* note 25, at 2–3 (statement of Rep. Michael Castle, Chairman, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

¹⁷⁷S. Rep. No. 94–168, at 8 (1975).

¹⁷⁸See Hensel, *supra* note 23, at 1154.

¹⁷⁹See generally *Hearings, supra* note 25 (discussing the issues related to the identification of children with specific learning disabilities).

¹⁸⁰Garda, *supra* note 23, at 292–93.

¹⁸¹*Id.*, at 293.

¹⁸²*Id.*

¹⁸³See Weber, *supra* note 1, at 124.

¹⁸⁴The IRIS Center for the National Association of State Directors of Special Education's IDEA Partnership, Office of Special Education Programs Dialogue Guides: What is the IQ-Achievement Discrepancy Model? 1 (2007).

points—the student is described as having a “discrepancy between IQ and achievement and, therefore, as having a learning disability.”¹⁸⁵

According to one psychologist, the current discrepancy model is unreliable, invalid, easily undermined in practice, and harmful:

[It is] unreliable particularly in the sense of stability. [It is] invalid because poor readers with higher IQs do not differ on relevant variables from those with IQs commensurate with their reading levels[.][It is] easily undermined in practice by giving multiple tests, finding a score that is discrepant and ignoring disconfirming evidence. [Finally, it is] harmful because the severe discrepancy delays treatment from kindergarten or first grade when the symptoms of reading disability are manifested to [third] or [fourth] grade when reading problems are more severe, intervention more complex, and the school curriculum shifts to “reading to learn.”¹⁸⁶

Therefore, the current discrepancy model makes any hope for early intervention impossible.¹⁸⁷ Congress recognized the failings of the discrepancy model and offered the RTI as an alternative.¹⁸⁸

III. RESPONSE TO INTERVENTION –FRIEND OR FOE?

RTI is one seemingly small change to the 2004 amendments to the IDEA. Specifically, Congress recognized that the discrepancy model used to determine eligibility for students with learning disabilities was an inappropriate method.¹⁸⁹ In response, Congress prohibited states from forcing school districts to use only this model and, instead, allowed for other methods including a “process that determines if the child responds to scientific, research-based interventions.”¹⁹⁰ This meant that states could allow school districts to use this process to determine eligibility under the disability of specific learning disabilities in conjunction with the discrepancy model, or by itself.¹⁹¹ For such a narrowly focused

¹⁸⁵*Id.*

¹⁸⁶Daniel J. Reschly, *What if LD Identification Changed to Reflect Research Findings?*, Paper presented at the Nat’l Research Ctr. On Learning Disabilities Responsiveness-to-Intervention Symposium, Kansas City, Mo. 1 (2003).

¹⁸⁷*Id.*

¹⁸⁸Individuals with Disabilities Education Act, 20 U.S.C. §1414(b)(6)(B) (2004).

¹⁸⁹See *Hearings, supra* note 25, at 2–3 (statement of Rep. Michael Castle, Chairman, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

¹⁹⁰Individuals with Disabilities Act, 20 USC § 1414(b)(6)(B) (2004).

¹⁹¹*Id.*; See also Hensel, *supra* note 23, at 1160.

provision, the option of using RTI has impacted education as a whole, perhaps more than it should.

RTI was based on several experimental programs in schools across the country that ran prior to the reauthorization of the IDEA in 2004, and the effects of these programs were examined in the June 2002 congressional hearings that led up to the reauthorization of the IDEA.¹⁹² This section will clarify the origin of RTI, and whether the current implementation of RTI is true to that origin. This section will do so by first explaining the origins under which the provision was first explored including the congressional hearings and the experimental programs on which it was based. Next, the section will explore possible legal problems RTI raises for school districts. Finally, the section will examine RTI's implementation to determine whether the original policy goals have been met.

Origins of the RTI

As part of the amendment process to the IDEA, the Subcommittee on Education Reform of the Committee on Education and Workforce held numerous hearings, including one on June 6, 2002.¹⁹³ The title and subject of the hearing is relevant in identifying the intended scope of the eventual amendment to the IDEA: "Learning Disabilities and the Early Intervention Strategies: How to Reform the Special Education Referral and Identification Process."¹⁹⁴ Additionally, the purpose of the hearing was to learn more about the identification process of students' various learning disabilities, and to hear about effective, evidence-based early intervention programs and how they can improve educational outcomes.¹⁹⁵ Ranking Minority Member Dale E. Kildee (Representative Kildee) noted that slightly less than half of those children with disabilities are identified as learning disabled.¹⁹⁶ A key focus of the hearings was to examine more closely what interventions and services were available to these children prior to identification in an effort to reduce the number of students misidentified without denying services to those students who truly need the services.¹⁹⁷

¹⁹²See generally *Hearings*, *supra* note 25 (discussing the issues related to the identification of children with specific learning disabilities).

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵*Id.* at 2–3 (statement of Rep. Michael Castle, Chairman, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

¹⁹⁶See *Hearings*, *supra* note 25, at 4 (statement of Rep. Dale E. Kildee, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

¹⁹⁷See *Hearings*, *supra* note 25, at 4 (statement of Rep. Dale E. Kildee, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

As previously noted, the art of diagnosing the disability category of learning disability has led a checkered past, with congressional concern of over-identification that reaches as far back as the initial EAHCA.¹⁹⁸ Between 1976 and 1996, students identified under the category of specific learning disability increased 283 percent.¹⁹⁹ In 2009, the number stood at 2,710,476, which made up forty-five percent of all children eligible under the IDEA.²⁰⁰ Therefore, it is not surprising that Congress revisited the issue of diagnosis in light of the burgeoning percentage of students found eligible by reason of a learning disability. Although Representative Kildee was careful to recognize the need of some students for special education services—and whatever interventions are put into place do not present barriers to those students—it is clear that this hearing was focused on filtering out as many students as possible before the students are determined eligible and, thereby, covered by the due process protections of the IDEA.²⁰¹ In his opening remarks, Chairman Michael Castle was the first to point out that many of the students are incorrectly identified because he or she fails to learn fundamental skills such as reading.²⁰²

The hearings began with testimony from Former Chairman William Goodling (Hon. Goodling), chief author of the 1997 reauthorization to the IDEA.²⁰³ He testified that the reauthorization “focused on children’s education instead of process and bureaucracy, giving parents greater input in determining the best education for their child, and giving teachers the tools they need to teach all children well.”²⁰⁴ He suggested a focus on student results and academic achievement in the 2004 amendments.²⁰⁵ He also maintained a focus on early intervention, families, and more precise diagnosis.²⁰⁶

¹⁹⁸Hensel, *supra* note 23, at 1157–58 (footnotes omitted).

¹⁹⁹Weber, *supra* note 1, at 123 (citing Frank M. Gresham, *Responsiveness to Intervention: An Alternative Approach to Identification of learning Disabilities*, in IDENTIFICATION OF LEARNING DISABILITIES: RESEARCH TO PRACTICE (Renee Bradley, et. al. ed., 2002), available at <http://nrcld.org/resources/ldsummit/gresham4.pdf>).

²⁰⁰*Id.* (citing U.S. Dep’t. of Educ, Data Tables for OSEP State Reported Data, https://www.ideadata.org/tables30th/ar_1-3.xls (last visited Aug. 4, 2008). The count is as of Fall 2006, and includes school children ages six through twenty-one).

²⁰¹*See Hearings*, *supra* note 25, at 4–5.

²⁰²*Id.* at 2 (statement of Rep. Michael Castle, Chairman, Subcomm. On Educ. Reform of the H. Comm. On Educ. And the Workforce).

²⁰³*Id.* at 6 (statement of Hon. William F. Goodling, Former Chairman, H. Comm. On Educ. And the Workforce).

²⁰⁴*Id.* at 61.

²⁰⁵*Id.*

²⁰⁶*Id.* at 63.

Early identification yields better chances for success in education.²⁰⁷ Throughout the hearings, early intervention was stressed as an important goal²⁰⁸ and, indeed, the experimental programs, such as the Hartsfield Elementary School program, began in the earliest grades, reaching upward incrementally.²⁰⁹ It is ironic, however, that precisely what Hon. Goodling suggests is one of the very things lost with the implementation of the RTI process. The part that is lost in the current implementation of the program is not the general early intervention of emphasizing the process in the earliest grades, but the early intervention to the individual student level.²¹⁰ This is what Hon. Goodling seemed to be cautioning against when he said that the diagnosis should be earlier and more precise.

As flawed as the traditional learning disability eligibility determination process may be, a student assessed and found eligible under the IDEA can still receive services within a prescribed timeframe.²¹¹ While attempting to catch students in early stages of failure—as currently implemented—the tiered approach keeps them in an unprotected holding pattern while various methods of intervention are attempted.²¹² Meanwhile, the parents are sometimes not even aware that there is a problem, nor that the school has started an intervention process.

This presents the question whether the school's "Child Find" requirements of the IDEA are met during this process. The "Child Find" provision requires the state to locate, identify, evaluate, and develop a practical method to provide special education services to all students residing in the state who require special education services.²¹³

Hon. Goodling's suggestion was that during the "earlier and more precise" diagnosis, early literacy programs must be strengthened to avoid both misdiagnosis and over-identification.²¹⁴ He suggested that early intervention programs should target preschoolers, employ research-based literacy programs, and encompass the parents in the screening as well as

²⁰⁷See *Hearings, supra* note 25, at 63 (statement of Hon. William F. Goodling, Former Chairman, H. Comm. On Educ. And the Workforce).

²⁰⁸See generally *Hearings, supra* note 25.

²⁰⁹See *Hearings, supra* note 25, at 87-89 (statement of G. Reid Lyon, Research Psychologist and Chief, Child Dev. and Behavioral Branch, Nat'l Inst. of Child and Health and Human Dev.).

²¹⁰See *Hearings, supra* note 25, at 63 (statement of Hon. William F. Goodling, Former Chairman, H. Comm. On Educ. And the Workforce).

²¹¹Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.301(c)(1)(i) (2006).

²¹²See *infra* Part III.B and accompanying text.

²¹³Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(3) (2008); Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.111 (2006).

²¹⁴See *Hearings, supra* note 25, at 63 (statement of Hon. William F. Goodling, Former Chairman, H. Comm. On Educ. And the Workforce).

the children.²¹⁵ Doing so would strengthen both early reading and family literacy to avoid unnecessary referrals.²¹⁶ Additionally, he encouraged increased parental involvement and responsibility, which is reflective of his mission in the 1997 reauthorization and reflected in manuals to professionals working with the RTI process.²¹⁷

Hon. Goodling's emphasis on early intervention has a pedagogical foundation based on experience.²¹⁸ Several programs had been implemented in the years leading up to the 2004 Amendments.²¹⁹ Each of these programs was successful over the first few years of implementation, as noted below, but it is important to recognize the limited scope of these programs.²²⁰ Following is a discussion on three programs that were the inspiration for RTI.

Hartsfield Elementary School, Tallahassee, Florida.

Directly prior to the implementation of its intense reading program, Hartsfield Elementary School experienced a demographic shift from predominantly white middle-class to sixty percent "free/reduced lunch" recipients and sixty percent minority.²²¹ As students began to fall behind in reading, students were typically sent to special education and Chapter I programs, which resulted in a disconnect between special education and regular education.²²² According to Ray King (Principal King), Principal of Hartsfield Elementary School, the regular education teachers—who passed the students off to special education—did not have a "sense of ownership" for these students.²²³ Principal King recognized two primary problems in the school's program.²²⁴ First, students were not prepared to enter kindergarten.²²⁵ Second, there was not a consistent reading program throughout the school.²²⁶ The reading programs ranged from various

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷SWARTZ ET. AL., *supra* note 39, at 26.

²¹⁸*See Hearings, supra* note 25, at 59–60 (statement of Hon. William F. Goodling, Former Chairman, H. Comm. On Educ. And the Workforce).

²¹⁹*Id.* at 27–48, and 84–122 (describing programs at Hartsfield Elementary School, Tallahassee, Florida; Cornwall-Lebanon School District, Lititz, Pennsylvania; Elk Grove United School District, California.).

²²⁰*See infra* Part III.A.1–3 and accompanying text.

²²¹*Hearings, supra* note 25, at 84 (written statement of Ray King, Principal of Hartsfield Elementary School).

²²²*Id.* at 85. Chapter I programs provide identified students with supplementary services designed to instruct them in the core curriculum and improve their achievement in basic and advanced skills.

²²³*Id.*

²²⁴*Id.* at 86.

²²⁵*Id.*

²²⁶*Id.*

phonetic approaches to whole language strategies with the same students.²²⁷

The problem of students entering kindergarten not prepared is complicated and not necessarily within the control of the school system.²²⁸ Factors including pre-natal and infant health history, education background of the parents, and time spent reading and conversing with children all play a part in a child's readiness to begin school.²²⁹ Hartsfield Elementary attempted to fill some of these gaps by obtaining a grant to support an infant-toddler wing of the school and double the size of early childhood programs.²³⁰

Principal King testified that the core problem for the school, however, was that the reading program was inconsistent.²³¹ First, the school moved to a block-scheduling model to facilitate common planning for the teachers, and began team teaching with resource teachers going into the regular classrooms.²³² Second, the school consulted with Dr. Joseph Torgesen—who, at the time, was the director of Florida Center for Reading Research at Florida State University—on a consistent reading curriculum.²³³ The school eventually settled on two programs: (1) Open Court for grades kindergarten to second grade; and (1) Science Research Associate's Reading Mastery (SRA) for grades three to five.²³⁴ During the 1995–1996 school year, problems arose with inconsistent implementation and, thus, in each of the following four school years various changes were made to the program.²³⁵

The school made changes in both the structure of the curriculum generally as well as the reading programs specifically.²³⁶ To accommodate and support the efforts in the reading program, the school eliminated most of the pull out services and suspended social studies, science, and some math for students in kindergarten through second grade.²³⁷ Additionally, because the reading program relied on small

²²⁷*Hearings, supra* note 25, at 88 (written statement of Ray King, Principal of Hartsfield Elementary School).

²²⁸*See* Robert A. Garda, *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1086 (2005).

²²⁹*Id.*

²³⁰*Hearings, supra* note 25, at 87 (written statement of Ray King, Principal of Hartsfield Elementary School).

²³¹*Id.* at 86.

²³²*Id.* at 87.

²³³*Id.* at 87–89.

²³⁴*Id.*

²³⁵*Id.* at 88–89 (written statement of Ray King, Principal of Hartsfield Elementary School).

²³⁶*Hearings, supra* note 25, at 88–89.

²³⁷*Id.* (stating “pull out services” as services that a student receives outside the general education classroom).

group instruction for all students, class distribution of various students became more important in order to ensure that each class had enough students in each level for a group.²³⁸ All first and second graders were pre-tested on the Woodcock Johnson Psycho-Educational Revised Tests of Cognitive Ability within the first few weeks of school.²³⁹ These students were tested again by someone other than his or her own teacher at the end of the year.²⁴⁰ In the years following, the school continued to improve and strengthen the program by focusing on clear expectations, increased instruction time, early intervention at the kindergarten level, summer courses for “at risk” four-year-olds, and “home reading” programs for kindergarten to third graders.²⁴¹

The results were impressive. In 1995, 31.8% of first graders tested below the twenty-fifth percentile.²⁴² In 1999, however, only 3.7% tested below the twenty-fifth percentile.²⁴³ The third grade median percentile rose from forty-nine in 1994 to seventy-three in 1999.²⁴⁴ This success was not without tremendous effort and support from the administration and cooperative teaching staff.²⁴⁵ Teachers who were unclear on the importance of maintaining the integrity of the whole program—or were not adequately able to instruct—were replaced.²⁴⁶ The inherent problem with such a program is the tax on resources, staff, and administration. Whether this program will reap long-term benefit is uncertain, as Principal King has moved on from the school.²⁴⁷ The support and guidance from the principal is critical in the success of the program.²⁴⁸ The program has been successful in reading improvement, which by all accounts should improve performance overall in coming years; but, at what cost? Did the sacrifices related to other student services and subjects set these students back in other ways?

²³⁸*Id.* at 89–90.

²³⁹*Id.* at 90.

²⁴⁰*Id.*

²⁴¹*Id.* at 91 (written statement of Ray King, Principal of Hartsfield Elementary School).

²⁴²*Hearings, supra* note 25, at 90.

²⁴³*Id.* at 91.

²⁴⁴*Id.*

²⁴⁵*See Id.* at 91–93.

²⁴⁶*See Id.* at 88.

²⁴⁷Telephone Interview with Joseph Torgesen, former Dir. of Fla. Ctr. for Reading Research at Fla. St. U. (Mar. 30, 2011). E-mail requests for information to Hartsfield have gone unanswered since September, 2011 and this author’s attempt to follow up on the progress of these students has yielded no response.

²⁴⁸*See Hearings, supra* note 25, at 83–95.

Cornwall-Lebanon School District, Lititz, Pennsylvania.

Joseph Kovaleski (Dr. Kovaleski), school psychologist and Director of Pupil Services for the Cornwall-Lebanon School District in Lititz, Pennsylvania, reported that between 1990 and 1997 Pennsylvania instituted a statewide process targeting improvement in general education in order to reduce special education referrals.²⁴⁹ The process was a building-based approach incorporating the use of instructional support teams.²⁵⁰ It utilized curriculum-based assessments as well as other procedures that assessed students' needs and provided services to students as soon as the need arose.²⁵¹ The process relied upon the actual rate of learning with appropriate instruction rather than the discrepancy model.²⁵² Eighty-five percent of the students identified for the process did not need further evaluation.²⁵³ Dr. Kovaleski stated that "just having that process in place we were able to cut off referrals for special education and the need for special education dramatically."²⁵⁴

Dr. Kovaleski noted that in his experience, the process known as RTI was a better way to identify the right students for special education because it was based on the his or her lack of progress in learning even when provided effective instruction.²⁵⁵ Dr. Kovaleski pointed out that the program depended on fully funding early literacy programs in order to provide intervention for problems in reading before the third grade.²⁵⁶ He proposed to fund these programs by coordinating efforts with various federal programs such as special education, remedial education, Title I, and general education.²⁵⁷ Of course, this did not consider those students who, through no fault of their own, had not been provided adequate instruction or had fallen behind because the student's disability precluded his or her ability to compensate for inadequate instruction.²⁵⁸ Therefore, these students remained unidentified because they had not been provided adequate instruction.²⁵⁹

²⁴⁹*Hearings, supra* note 25, at 27 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁵⁰*Hearings, supra* note 25, at 27 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁵¹*Id.*

²⁵²*Id.*

²⁵³*Id.*

²⁵⁴*Id.*

²⁵⁵*Id.* at 28.

²⁵⁶*Hearings, supra* note 25, at 27 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁵⁷*Id.*

²⁵⁸*Id.* at 27-28; 102-103 (written statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁵⁹*Id.*

While Dr. Kovaleski primarily addressed this issue as one related to identifying students with learning disabilities, he recognized that emotional and behavioral issues were often concomitant and should also be addressed during early intervention.²⁶⁰ He did not, however, propose how that should be done or could be done.²⁶¹ This is an inherent problem with the RTI model—it does not always address the actual issue.²⁶²

The process is intentionally one that contemplates general education and special education connected to each other.²⁶³ Generally, once students are found eligible for special education, general educators become less responsible for the student's progress.²⁶⁴ According to Dr. Kovaleski, Pennsylvania implemented a successful program based on early intervention using pre-referral interventions to reduce the number of children referred to special education and, thereby, keeping those children in general education where the general educators would maintain responsibility for the student's progress.²⁶⁵ The program utilized building-based teams that assessed the students using curriculum-based assessments as well as other procedures.²⁶⁶ Based upon the results of those assessments, the team provided in-class support to the regular education teacher over a fifty-day period to see whether "effective instructional procedures" improved the rate of progress.²⁶⁷ If the rate of progress did not improve, the student was one who truly qualified for special education services.²⁶⁸

Again, the results seemed impressive. Of the students referred to the intervention program, eighty-five percent did not need further evaluation for special education because the students' achievement improved on academic measures "when schools implemented the program at a high degree of fidelity."²⁶⁹ The problem, as alluded to above, is that when the program is not implemented with a high degree

²⁶⁰*Id.* at 28.

²⁶¹*But see Hearings, supra* note 25, at 28 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania) (addressing that a student's emotional and behavioral needs need to be identified as soon as possible, but does not propose a solution to the issue).

²⁶²Telephone Interview with Claudia Roberts, *infra* note 303.

²⁶³*See Hearings, supra* note 25, at 28 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁶⁴*Id.* at 101 (written statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁶⁵*Hearings, supra* note 25, at 28 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁶⁶*Id.*

²⁶⁷*Id.*

²⁶⁸*Id.*

²⁶⁹*Id.* at 102 (written statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

of fidelity, the struggling student continues to struggle without services because infidelity of the program eliminates the student's qualification as eligible. Likewise, as one area of achievement is addressed at a time in this approach, it is not necessarily addressing the root of the problem, but rather, the problem that surfaces first. Another problem with this particular program was that it was not clear whether the reduction in referrals was based on adequate progress due to the program's success or due to the teacher's acceptance of modest progress because they were discouraged to refer students.

On the other hand, another benefit to this program is the capability of earlier identification.²⁷⁰ The discrepancy model typically cannot identify eligibility until third grade, at the earliest, because it generally takes that long to develop the required IQ subtest score gap between achievement and ability.²⁷¹ These early literacy intervention programs described above can reach a struggling student before the gap develops.²⁷² These interventions do not require the level of failure that the discrepancy model requires and, thus, allows for assistance before it is too late.²⁷³

Most students referred to this process ultimately are not referred for further testing towards eligibility into special education.²⁷⁴ But, despite the students' ineligibility for the protections of the IDEA, Dr. Kovaleski suggests that IDEA funds should be available for early intervention in a "non-categorical format, as a method to determine who will ultimately need long-term special education services."²⁷⁵ This suggestion would answer some of the school district's funding questions, but would fail to address the procedural protections for the students and parents.

Elk Grove Unified School District, Elk Grove, California.

David Gordon, Superintendent of Elk Grove Unified School District in Elk Grove, California, testified that in 1991—when the district employed the discrepancy model—sixteen percent of the student

²⁷⁰See *Id.* at 28 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁷¹See *supra* Part.II.C. and accompanying text.

²⁷²*Hearings, supra* note 25, at 28 (statement of Joseph F. Kovaleski, Dir. of Pupil Serv., Cornwall-Lebanon Sch. Dist., Lititz, Pennsylvania).

²⁷³*Id.* at 110 (written statement of David W. Gordon, Superintendent, Elk Grove Unified Sch. Dist., Elk Grove, Cal.)

²⁷⁴See *Id.* at 102.

²⁷⁵*Hearings, supra* note 25, at 103 (written statement of David W. Gordon, Superintendent, Elk Grove Unified Sch. Dist., Elk Grove, Cal.).

population was identified as eligible for special education services.²⁷⁶ The district requested and received a waiver to use special education funds for kindergarten through second grade.²⁷⁷ In these earlier grades, teachers were accurately able to predict which students would be identified three years earlier.²⁷⁸ After employing a program similar to the one described by Dr. Kovaleski, there were less than nine percent of students identified in special education.²⁷⁹ Additionally, there had been no due process hearings in the last eleven years between 1991 and 2002.²⁸⁰ The lack of due process hearings is an indication of less conflict between parents and the school system over special education decisions.

The reduction of special education services to students in Elk Grove was not due to an increase in denial of services, but rather “through providing curriculum and instructional methods in a coordinated fashion that changed the service delivery systems for student interventions.”²⁸¹ Rather than waiting for the student to fail before identifying a need for services, this early intervention approach caught the students before it was too late to catch them.²⁸² In part, this meant identifying weaknesses in reading prior to third grade because “[f]ailing to leave the third grade with adequate reading levels assures a [seventy-four percent] chance that reading problems will persist though the [ninth] grade or higher.”²⁸³ Therefore, it is essential that children are identified early and receive services prior to third grade. Adhering to the discrepancy model to identify a learning disability almost assuredly denies that possibility.

The current legislation incorporates three of Mr. Gordon’s recommendations:

- (1) [Specific Learning Disability] eligibility must prescribe specific early interventions for a period of [eight to twelve] weeks at first signs of academic failure.
- (2) State and federal laws pertaining to special education eligibility must be aligned to allow for

²⁷⁶*Id.* at 29 (statement of David W. Gordon, Superintendent, Elk Grove Unified Sch. Dist., Elk Grove, Cal.).

²⁷⁷*Id.*

²⁷⁸*Id.*

²⁷⁹*Id.* at 29–30 (stating that the School District “began serving those kids with a very focused instructional strategy based on the kind of teamwork that Mr. Kovaleski described. All of our instructional people work together”).

²⁸⁰*Id.* at 30 (statement of David W. Gordon, Superintendent, Elk Grove Unified Sch. Dist., Elk Grove, Cal.).

²⁸¹*Hearings, supra* note 25, at 110 (written statement of David W. Gordon, Superintendent, Elk Grove Unified Sch. Dist., Elk Grove, Cal.).

²⁸²*Id.* at 111.

²⁸³*Id.* at 112 (citation omitted).

maximum front-loading of prevention and intervention strategies prior to referral. [And] (3) [t]he commingling of resources and teaching expertise at the school site must be conjoined for the benefit of all student need regardless of funding source origination.²⁸⁴

This answers the funding source problem for the school districts, but fails to consider the procedural protections of the students and parents. Also not addressed by the legislation are that the students in grades higher than third grade who continue to struggle academically tend to have more complicated concomitant problems than can be addressed in a single intervention. Furthermore, by virtue of that complication, these students will require multiple iterations of the intervention cycle, thereby falling victim to the exact opposite of an early intervention, but rather a delayed intervention.

What is RTI?

“In determining whether a child has a specific learning disability, a local education agency *may* use a process that determines if the child *responds to* scientific, research-based *intervention* as a part of the evaluation procedures described in paragraphs (2) and (3).”²⁸⁵ From the June 6, 2002 hearings to its placement under evaluation for children with specific learning disabilities, RTI is clearly meant to replace the often maligned discrepancy model as a *possible* method of determining whether a child has a specific learning disability. Indeed, the provision is closely aligned with the definition of specific learning disability that is generally described as a disorder of a psychological process involved in language which affects the “ability to listen, think, speak, read, write, spell, or do mathematical calculations.”²⁸⁶ In other words, if a child responds to some form of quality intervention in general education, the child is not affected in his or her ability to listen, think, speak, read, write, spell, or do mathematical calculations, and, therefore, not eligible for special education as a student with a specific learning disability.²⁸⁷

²⁸⁴*Hearings*, supra note 25, at 110 (written statement of David W. Gordon, Superintendent, Elk Grove Unified Sch. Dist., Elk Grove, Cal.). This seems to suggest that despite the source of funding, each school should provide adequate resources and qualified teachers to implement the program.

²⁸⁵Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(B) (2004) (emphasis added).

²⁸⁶Individuals with Disabilities Education Act, 20 U.S.C. § 1401(30) (2004).

²⁸⁷*Id.*

The RTI process varies from state to state, but there are certain general core concepts that are common to most or all approaches; for example, it is generally a three-tiered approach.²⁸⁸ In the first Tier, all students participate and receive high quality, differentiated, and research-based instruction.²⁸⁹ This is core instruction that all students receive that focuses on essential skills for reading or mathematics, and behavior.²⁹⁰ All students are screened three times a year to assess progress or need for further intervention.²⁹¹ If adequate progress has not been made under the high quality instruction in the first Tier, the student participates in Tier two interventions.²⁹²

In Tier two, students participate in small group instruction in the area of instructional need, with more frequent monitoring of two to four times a month.²⁹³ It is estimated that up to fifteen percent of the student population may require Tier two intervention.²⁹⁴ If the student does not demonstrate adequate progress with Tier two interventions, the student is moved to more intensive interventions in Tier three.²⁹⁵

Tier three is more intensive than tier one or tier two.²⁹⁶ In some instances, Tier three has been considered special education while other models consider both Tier two and Tier three to be more intensive, but not special education.²⁹⁷ The intervention in this phase is individualized and intensive, with progress monitoring on a weekly basis.²⁹⁸ Tier three includes “increasing the intensity of intervention, providing more frequent intervention, spending more time in intervention session, and providing smaller and more heterogeneous groups and instruction provided by more skilled teachers.”²⁹⁹ How this is not *de facto* special education is never answered. It is estimated that about five percent of the student body may need Tier three interventions, and if these interventions do not yield adequate progress the student is referred to special education.³⁰⁰ Of course, technically, referral to special education can occur at any time during this process.³⁰¹ While referral to special

²⁸⁸SWARTZ ET. AL., *supra* note 39, at 5–6.

²⁸⁹*Id.* at 6.

²⁹⁰*Id.*

²⁹¹*Id.* at 6.

²⁹²*Id.*

²⁹³SWARTZ ET. AL., *supra* note 39, at 6–7.

²⁹⁴*Id.* at 5–6.

²⁹⁵*Id.* at 7.

²⁹⁶*Id.*

²⁹⁷*Id.* at 13 (citation omitted).

²⁹⁸*Id.* at 7.

²⁹⁹SWARTZ ET. AL., *supra* note 39, at 12 (citation omitted).

³⁰⁰*Id.* at 7.

³⁰¹*Id.* at 6.

education does occur in “emergency” situations,³⁰² parents and advocates complain that it works as a delay to services for those students who do require them.³⁰³

RTI is a front loaded program within general education.³⁰⁴ With a focus on keeping students in general education rather than placing them in special education, it is an ongoing monitoring process that starts with universal screening.³⁰⁵ In other words, theoretically, everyone is in Tier one on an ongoing basis. As previously mentioned, because this process is focused on keeping more students in general education it will invariably force general education teachers to teach the students as they come, rather than fitting the students into a particular curriculum or send them on to special education.³⁰⁶ This may require teachers to become more flexible in their methods of instruction.

As the language of the IDEA clearly states, the RTI model *may* be used as part of the evaluation process.³⁰⁷ Five states require RTI as the only method of determining whether a child has a specific learning disability, while all other states permit RTI or the discrepancy model.³⁰⁸

Potential Legal Issues Raised for Districts Under RTI.

There are several potential problems with utilizing only the RTI process to identify specific learning disabilities. First, as mentioned earlier,³⁰⁹ it can delay the provision of services to those students who require these services, which violates the “Child Find” provision of the IDEA.³¹⁰ Second, because this process technically falls outside of the procedural protections of the IDEA, parents do not enjoy procedural protections of the IDEA such as notice and participation in the development of the intervention strategy.³¹¹

³⁰²Interview with Matthew Vignieri, Sch. Psychologist Intern in Rockdale, Ga., in Jacksonville, Fla. (Feb. 2011) (stating that “if there is overwhelming evidence [of eligibility], [the school] can recommend [to] move forward right away”).

³⁰³*See, e.g.*, Clark, *supra* note 29; Interview with Heidi G., Parent in Jacksonville, Fla., in Jacksonville, Fla. (Feb. 6, 2012); Telephone Interview with Tanya H., Parent in Indian River Co., Fla., in Jacksonville, Fla.. (Jan. 5, 2012); Telephone Interview with Claudia Roberts, Educ. Advocate, (Jan. 5, 2012).

³⁰⁴Interview with Gayle Cain, RTI Coordinator for Duval County Public Schools, in Jacksonville, Fla. (Oct. 13, 2010).

³⁰⁵*Id.*

³⁰⁶*Id.*

³⁰⁷Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(B) (2004).

³⁰⁸SWARTZ ET AL., *supra* note 39, at 18. Colorado, Connecticut, Indiana, Iowa, and Rhode Island require the use of RTI.

³⁰⁹*See supra* Parts III.A–B and accompanying text.

³¹⁰Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(3) (2008).

³¹¹Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(1)(B) (2008); Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(3) (2008).

“Child Find” is implicated when the iterations of interventions delay services to those students who need them.

RTI avoids the “wait to fail” problem that is inherent with the use of the discrepancy model in identifying students with specific learning disabilities. For example, many schools screen all students although it is not required and, in doing so, the schools catch struggling students much earlier in the process.³¹² In contrast, relying on the discrepancy model requires a child to fail enough to create the qualifying gap.³¹³ Additionally, including the general education teachers more actively in the identification and intervention process may provide a better “sense of ownership” for the progress of their struggling students instead of immediately referring difficult students to special education.³¹⁴ In keeping some of these struggling students in general education there is, theoretically, a promise of better collaboration between special education and general education.³¹⁵

On the other hand, those students who are truly in need of special education services often find a delay in receiving those much-needed services in direct contradiction to the goal of early intervention.³¹⁶ Although there certainly are those students who ultimately benefit from the interventions of the RTI process who may otherwise have forgone help until they had failed or may never have received help because his or her deficits did not rise to the level of intervention for special education, there are those students whose services are unnecessarily delayed because of the long process. Even when the students reach Tier three and, therefore, may be receiving *de facto* special education services, he or she is not enjoying the procedural protections that come from eligibility under the IDEA.

The regulations further require an initial evaluation be conducted within sixty days of receiving parental consent unless the state has established its own timeframe.³¹⁷ If the school does inform the parents of the potential problem, it is possible to get their consent to commence evaluations thus keeping them participating in the process. While there is a general consensus on the three-tiered system as a whole, there is no

³¹²Telephone Interview with Claudia Roberts, *supra* note 303; SWARTZ ET AL., *supra* note 39, at 22. Pinellas County, Florida screens all students in the areas of reading, science and math three times a year.

³¹³SWARTZ ET AL., *supra* note 39, at 22.

³¹⁴*See Hearings*, *supra* note 25, at 85–87 (written statement of Ray King, Principal of Hartsfield Elementary School).

³¹⁵SWARTZ ET AL., *supra* note 39, at 22.

³¹⁶Telephone Interview with Heidi G., *supra* note 303; Telephone Interview with Tanya H., *supra* note 303.

³¹⁷Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.301(c)(1) (2006).

general consensus as to how many intervention cycles must be provided before a disability is suspected.³¹⁸ Some suggest at least two different interventions over sixteen to eighteen weeks,³¹⁹ which is much longer than the sixty-day timeframe required by the Department of Education regulations.³²⁰ This is the best-case scenario. In practice, several iterations of various interventions before an evaluation is even referred can lead to an entire year of delay for eligibility determination—and the services that would follow—for a student who is determined eligible.³²¹

Even if the parents are aware that his or her child is struggling—and they request evaluations—it is unclear where the RTI process fits into this process. Anecdotal evidence shows that even after a request for evaluations has been made, the school is convinced that it cannot complete evaluation procedures until the RTI process has run its complete course.³²² As stated above, the best practices may say that means two cycles for each tier of interventions. But, even if that is followed, that means twelve to sixteen weeks on each tier, which multiplied by three tiers adds up to almost an entire school year. Again, according to the IDEA the evaluation should be completed within sixty days of receiving parental consent.³²³ And, according to the U.S. Office of Special Education and Rehabilitative Services, the “RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation[.]”³²⁴ Despite this mandate, schools routinely delay evaluations, referrals, and ultimately, services to students who can least afford this unnecessary delay.³²⁵

In fact, one county in Florida seems to have rolled the intervention process into the eligibility determination process of all students suspected of having a disability between the referral to evaluate by a

³¹⁸SWARTZ ET AL., *supra* note 39, at 23.

³¹⁹*Id.*

³²⁰Regulations of the Offices of the Dept. of Educ., 34 C.F.R. §300.301(c)(1) (2006).

³²¹Telephone Interview with Tanya H., *supra* note 303.

³²²Interview with Vanessa Ramirez, Nathan’s initial Certified Legal Intern, in Jacksonville, Fla. (Dec. 2009) (following a meeting with the school where it denied the parents an eligibility determination meeting because the RTI process had not been completed despite the existence of a Technical Assistance Paper from the Florida Department of Education requiring schools to not delay services in the name of RTI); *See also* Telephone Interview with Heidi G., *supra* note 303; Telephone Interview with Tanya H., *supra* note 303.

³²³Individuals with Disabilities Education Act, 20 U.S.C. § 1414(a)(1)(C)(i)(I) (2008).

³²⁴Memorandum from the Office of Special Educ. Programs to the State Dir. Of Special Educ. 2 (Jan. 21, 2010) (on file with the U.S. Dept. of Educ. Office of Special Educ. And Rehab. Serv.) (on file with author) [hereinafter Memorandum from OSEP].

³²⁵*See, e.g.*, Telephone Interview with Heidi G., *supra* note 303; Telephone Interview with Tanya H., *supra* note 303; Telephone Interview with Claudia Roberts, *supra* note 303.

parent or school member and the actual trigger that implicates the sixty day timeline—the signing of the consent to evaluate by the parent.³²⁶ In so doing, it automatically delays the evaluation process and, thereby, the services to the child.

Parents and Students are Deprived of Procedural Protections That Would Otherwise Be Enjoyed Under the IDEA.

One of the allures of the RTI process for schools is that it provides funds for interventions via the above mentioned early intervention provision of the IDEA;³²⁷ but, because the process is still technically outside the special education process, the procedural requirements are not implicated. The benefit to teachers is more flexibility in providing and changing interventions as deemed necessary, rather than waiting for reluctant or non-participatory parents to consent.³²⁸

Because RTI falls outside the scope of the IDEA, federal special education funds directed to local education agencies (LEAs) would generally not be available to assist.³²⁹ However, under the early intervening services provision of the IDEA, up to fifteen percent of the IDEA funds are available for assistance with students not yet determined eligible but “who need additional academic and behavioral support to succeed in the general education environment.”³³⁰ Because schools and school districts receive funds through the IDEA to implement RTI, it stands to reason that they should also be held accountable for the procedural protections that are attached to the receipt of such funds.

Prior to the implementation of the RTI process, when a school recognized, or should have recognized, that a student was not progressing adequately, the procedural protections attached as soon as a problem was detected under the “Child Find” provision.³³¹ As previously discussed, the conventional approach for eligibility determinations under the disability category of specific learning disability often resulted in delayed determinations.³³² Despite this flaw in the method that inherently delays the eligibility determination under the IDEA, once the problem is discovered, the parents have legal recourse if the school system fails to

³²⁶Duval County Public Schools, http://www.duvalschools.org/static/parents/getinvolved/ese/learn_eligible.asp (last visited Mar. 20, 2012).

³²⁷See Individuals with Disabilities Education Act, 20 U.S.C. § 1414 (2008).

³²⁸Interview with Matthew Vignieri, *supra* note 302.

³²⁹See Individuals with Disabilities Education Act, 20 U.S.C. § 1414 (2008).

³³⁰Individuals with Disabilities Education Act, 20 U.S.C. § 1413(f)(1) (2008).

³³¹Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(3) (2008).

³³²See *supra* Part II.C and accompanying text.

follow through.³³³ RTI potentially mitigates the initial delay based on the discrepancy model's need for time for the gap to emerge. But, once the problem is discovered by the school system, the parents do not have the same legal recourse as they would if RTI was under the ambit of the IDEA.

Several procedural safeguards denied to parents under RTI illustrate the problem. First, the regulations allow a parent to seek an Independent Education Evaluation (IEE) at the public's expense "if the parent disagrees with the evaluation obtained by the public agency[.]"³³⁴ However, a parent's disagreement with complete evaluation measures within the RTI process does not allow for reimbursement of an IEE.³³⁵ Second, the IDEA requires parental consent for an initial evaluation.³³⁶ Parental consent is not required for RTI.³³⁷ Third, under the IDEA, notice is required any time the LEA proposes to initiate or change, or refuse to initiate or change the identification, evaluation, or education placement of a child.³³⁸ Finally, to further ensure parental participation, the regulations require the LEA to notify parents of meetings and to schedule the meetings at a mutually agreed upon time and place.³³⁹

Without the requirement to notify parents of the evaluations that occur within the RTI, parents do not know that these "screenings" and interventions are going to occur. But, if the parents do know, he or she does not necessarily have any input on how the screenings are conducted or what kind of interventions should be utilized. Further, because the parent's consent is not necessary to initiate the process, he or she has no input as to which measures are used; and, if the parent disagrees, he or she does not have the right to an IEE. It is true that a parent always has the right to request an evaluation, and will then have the right to initiate due process procedures if the school district fails to follow through without written explanation.³⁴⁰ It is also true that policies forbid RTI to delay the evaluation process.³⁴¹ As demonstrated in the following section, however, in practice, there is little enforcement power to hold districts accountable to efficiently implement RTI properly and timely.³⁴²

³³³Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(1)(B) (2008); Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(3) (2008).

³³⁴Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.502(b)(1) (2006).

³³⁵Perry A. Zirkel, *RTI and the Law*, 268 EDUC. LAW REP. 9, 12 (2011).

³³⁶Individuals with Disabilities Education Act, 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2008).

³³⁷Zirkel, *supra* note 335, at 12.

³³⁸Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(3) (2008).

³³⁹Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.322(a) (2006).

³⁴⁰Zirkel, *supra* note 335, at 12.

³⁴¹Memorandum from OSEP, *supra* note 324, at 2.

³⁴²*See infra* Part III.D and accompanying text.

How RTI is Currently Implemented

Congress leaves states much leeway in implementing the IDEA.³⁴³ RTI is one such area largely left to the states.³⁴⁴ In fact, Congress does not require the use of RTI by any state.³⁴⁵ Instead, states are prohibited from requiring the use of only the discrepancy model in identifying a student as learning disabled and offers RTI as an option.³⁴⁶ To further complicate a generalized explanation of how RTI works, within each state, the various LEAs do not, by all indications, implement the process according to statewide policies.³⁴⁷ While most states seem to have fully embraced this process to some degree, it is worthwhile to look at the more cautious approach that the state of Washington has taken.³⁴⁸ Additionally, anecdotal experiences may help demonstrate some of the discrepancies between the states. The next section will also demonstrate the perspective of various participants in the process, including parents, an advocate, school psychologist and teachers.

Washington State Has Taken a Cautious Approach

For the past few years, the Washington Office of Superintendent of Public Instruction (OSPI) has contracted with Evaluation Research Services (ERS) of Austin, Texas,³⁴⁹ to implement “a theory-driven, multi-method, stakeholder-oriented evaluation to . . . ‘assess the effectiveness of implementing RTI and the impact of RTI implementation on the referral of students in special education programs[.]’”³⁵⁰ Seven districts were identified to:

- 1) [I]mplement RTI as part of their general education curriculum for all students; 2) use a multi-tiered service delivery system to address student needs in reading, written language, and mathematics; 3) use an assessment system to conduct universal screening, progress monitoring, and to measure outcomes; 4) assure that parents are well-informed of student

³⁴³Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(B) (2008).

³⁴⁴*See Id.*

³⁴⁵*See Id.*

³⁴⁶Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(6)(A) (2008).

³⁴⁷*See* Telephone Interview with Claudia Roberts, *supra* note 303 (describing vast differences in implementation between districts, and within the same district, between schools in the state of Florida).

³⁴⁸*See infra* Part III.D.1 and accompanying text.

³⁴⁹Washington Response to Intervention, Report of Activities and Findings 2009–2010 School Year 4 (Evaluation Research Services, 2011) [hereinafter Washington Report].

³⁵⁰Washington Response to Intervention, Report of Activities and Findings 2009–2010 School Year 4 (Evaluation Research Services, 2011) [hereinafter Washington Report].

progress and their right to make a referral for special education evaluation; and 5) participate in an annual evaluation of the program.³⁵¹

OSPI anticipated a significantly greater proportion of students to meet state and federal performance standards as well as a reduction in inappropriate special education referrals.³⁵² As of 2012, the initial two districts identified implemented RTI, and seven control districts that paralleled the participating districts were also tracked over a three-year period.³⁵³

Among the purposes of this project were to provide OSPI and the federal Office of Special Education Projects with information on the efficacy of the RTI program.³⁵⁴ In so doing, ERS asked three questions:

[1] To what extent have student achievement outcomes changed; how do these changes compare to changes in comparison districts? [2] To what extent have rates of special education referral changed; how do these changes compare to changes in comparison districts? [and 3] [T]o what extent are differences in the implementation of *School-wide Activities* associated with achievement trends?³⁵⁵

The first question addressed the extent to which achievement outcomes changed.³⁵⁶ Despite the small sample size of the districts and the parallel districts, the report recognized a relatively consistent pattern of findings, especially in the elementary grades.³⁵⁷ In the elementary grades, while the comparison group of schools was, on average, higher in the pretests, the schools participating in RTI scored higher or as high as the matched comparisons in the second and third years.³⁵⁸ Middle schools seem to have struggled in implementation and, therefore, results are therefore inconsistent and inconclusive.³⁵⁹ Site visits—even to the earlier implementing schools in Washington—demonstrated uncertainty around what represents best practices in these higher grades, which

³⁵¹*Id.* at 4.

³⁵²*Id.*

³⁵³*Id.* at 4–5.

³⁵⁴*Id.* at 5.

³⁵⁵*Id.* at 7.

³⁵⁶Washington Report, *supra* note 349, at 7.

³⁵⁷*Id.* at 13.

³⁵⁸*Id.* at 19. It should be noted that in 2010 the tests were changed across the board, so that there was a decrease in scores in both the participating and comparison districts, but the participating districts continued to demonstrate higher scores than the comparison districts.

³⁵⁹Washington Report, *supra* note 349, at 25.

corroborates with the experience in at least one school district in Georgia.³⁶⁰ Finally, in tenth grade, the comparison group tended to fare better than the RTI group.³⁶¹

Question two—whether or to what extent have rates of special education referral changed—directly addresses a core purpose for this process, which is reducing the over-identification and misidentification of students in special education. Interestingly, in both the participating and non-participating districts the referrals declined and “[t]here were no apparent patterns related to participation.”³⁶² Given the limited number and years available at this time, it may be too early to draw conclusions.

Finally, the study examined the extent to which implementation changed from 2008 to 2010, and the effect those implementation trends had on achievement.³⁶³ The preliminary findings suggested that the quality of implementation related to improvement on test scores.³⁶⁴ It also suggested that quality of implementation could be indicated using relatively simple methodologies.³⁶⁵ As was the case for determining the actual impact on special education referrals, it may be too early to tell the actual impact of implementation on achievement even though early indicators do suggest a positive correlation, especially in the lower grades.³⁶⁶ It should be noted, however, that given the various limitations on size of the sample set, variability in implementation, and lack of control for change in communities, these results are meant to be merely descriptive rather than statistically significant.³⁶⁷ Having said that, however, up to this point, little other data seems to have been collected on the effectiveness of RTI and, thus, it will certainly be worth following the Washington research in this area.³⁶⁸

³⁶⁰*Id.* at 25; *See also* Interview with Matthew Vignieri, *supra* note 302.

³⁶¹Washington Report, *supra* note 349, at 26–27.

³⁶²*Id.* at 29–30.

³⁶³*Id.* at 45.

³⁶⁴*Id.*

³⁶⁵*Id.*

³⁶⁶*Id.* at 46.

³⁶⁷Washington Report, *supra* note 349, at 28.

³⁶⁸Sometime in 2012, the National Center for Education Evaluation will be publishing a more thorough and comprehensive look into the answer of all three of these questions across several states. Regional Educational Lab. at Educational Dev.Ctr, Inc., *Issues and Answers: Features of State Response to Intervention Initiatives in Northeast and Islands Region States*, no. 83 (2009), at 11. As of this writing, this more comprehensive look is not available, so the best evidence at the moment is the limited look Washington State has provided.

Anecdotal experiences with RTI.

The Washington State research indicates that more comprehensive implementation in the elementary school may correlate to better results.³⁶⁹ This is consistent with experiences in Georgia, Florida, and Oregon.³⁷⁰ Both a teacher in Oregon and a school psychologist from Georgia have reported positive results in working within an elementary school with administrative support and buy in from the staff.³⁷¹ Likewise, in Florida, an educational advocate has noticed that one school district with whom she works has implemented RTI more thoroughly and comprehensively than other districts in the same geographic area.³⁷² She noticed that the school district that has been implementing RTI longer and more comprehensively has yielded better results—more useful data in diagnosing the actual problem, which also allows for better programming.³⁷³ Similarly, in the elementary school in Oregon, the school has provided support and has embraced the process as a school-wide commitment.³⁷⁴ For instance, three times a year the “DIBLES Army” is comprised of DIBLES reading screeners that can be administered by trained staff, who spend one day evaluating an entire class to screen for reading.³⁷⁵ The data collected from this evaluation is used to create reading groups, including ones that implemented more intense interventions.³⁷⁶

However, the overwhelming consensus on RTI in relation to students with disabilities who actually require special education is that entry into special education is generally delayed,³⁷⁷ and the inclusion of the parents in the process is inconsistent.³⁷⁸

³⁶⁹ See *supra* Part III.D.1 and accompanying text.

³⁷⁰ Clark, *supra* note 29; Telephone with Claudia Roberts, *supra* note 303; Interview with Matthew Vignieri, *supra* note 302.

³⁷¹ Clark, *supra* note 29; Interview with Matthew Vignieri, *supra* note 302.

³⁷² Telephone Interview with Claudia Roberts, *supra* note 303 (comparing Pinellas County, Florida with Hillsborough County, Florida).

³⁷³ *Id.*

³⁷⁴ Clark, *supra* note 29.

³⁷⁵ *Id.* (describing the screening process in the school where the screeners refer to themselves as the “DIBLES Army,” and even wear t-shirts identifying themselves as such.)

³⁷⁶ *Id.*

³⁷⁷ See, e.g., Clark, *supra* note 29; Telephone Interview with Heidi G., *supra* note 303; Telephone Interview with Tanya H., *supra* note 303; Telephone Interview with Claudia Roberts, *supra* note 303; See also DUVAL COUNTY PUBLIC SCHOOLS, http://www.duvalschools.org/static/parents/getinvolved/ese/learn_eligible.asp (last visited Mar. 20, 2013).

³⁷⁸ Telephone Interview with Heidi G., *supra* note 303; Telephone Interview with Tanya H., *supra* note 303; Telephone Interview with Claudia Roberts, *supra* note 303.

One parent in Indian River County, Florida, provides a unique perspective on the failings of this process with her experience with one of her younger children.³⁷⁹ Her older children had already been identified as eligible for services for disabilities that included dyslexia prior to the implementation of RTI.³⁸⁰ So, when her seven-year-old experienced problems, she immediately requested a comprehensive evaluation, but was told that she “can’t request evaluations until RTI is completed.”³⁸¹ This occurred despite the memorandums sent to each school district by the Florida Department of Education, as well as the United States Department of Education, saying that RTI cannot be used to delay or deny eligibility under IDEA.³⁸² She attempted to work with her seven-year-old’s school for a year through the RTI process.³⁸³ As a parent who regularly participated in the process with her children, she was particularly frustrated when the school gave her notice of the RTI meetings on the day of the meeting rather than giving her notice of the meeting “early enough to ensure that [she would] have an opportunity to attend.”³⁸⁴ When she asked for clarification on notice requirements to parents, she received an e-mail stating that at the state level the schools “caution against modeling expectations after the more compliance driven exceptional student education (ESE) procedures.”³⁸⁵ Over the next year she continued to attempt to work with the school while her child’s achievement deteriorated to a point where he became suicidal.³⁸⁶ Relying on RTI did not work for her son, who truly required special education services.

Likewise, a mother of a second grade student in Duval County, Florida, became increasingly frustrated while her daughter cycled through endless interventions of RTI over a two-year period. The gap between her daughter’s progress and that of her daughter’s classmates grew significantly from kindergarten through January of her second grade year before the school finally began the evaluation process.³⁸⁷ In kindergarten, her daughter’s reading was commensurate with her

³⁷⁹Telephone Interview with Tanya H., *supra* note 303.

³⁸⁰*Id.*

³⁸¹*Id.*

³⁸²*Id.*; Memorandum from OSEP, *supra* note 324, at 2; Memorandum from Fla. Dept. of Educ., to ESE Dir. and Student Srv. Dir. (Aug. 12, 2010) (on file with author) [hereinafter Memorandum from Fla. Dept. of Educ.].

³⁸³Telephone Interview with Tanya H., *supra* note 303.

³⁸⁴*Id.*; *See also* Regulations of the Offices of the Dept. of Educ., 34 C.F.R. § 300.322(a)(1) (2006).

³⁸⁵*See* E-mail from Heather Diamond, *supra* note 40.

³⁸⁶Telephone Interview with Tanya H., *supra* note 303.

³⁸⁷Telephone Interview with Heidi G., *supra* note 303.

peers.³⁸⁸ In first grade, her daughter's reading scores clearly demonstrated that she was struggling.³⁸⁹ Yet, it took another year-and-a-half—and a consultation with an attorney versed in special education—to cajole the school into initiating the evaluation process.³⁹⁰ This is yet another example of an informed, active parent, who was able to procure testing only after consulting with a lawyer and specifically demanding that an evaluation be completed.³⁹¹

This parent's experience is not surprising given the information that is given to parents on the Duval County public school district's web page on eligibility.³⁹² The Duval County website describes the process of eligibility from inquiry to evaluation.³⁹³ The process begins with someone identifying that a "child is experiencing significant problems with learning and/or behavior."³⁹⁴ Buried in the middle of the fifth bullet under this explanation is the notice that a parent can request evaluations in writing.³⁹⁵ But, it does not explain that consent to evaluate must be signed by the parent before the evaluation can begin, and that unless the consent is in the letter requesting the evaluation, the consent form is in the possession of the school.³⁹⁶ The following steps include collecting information and developing interventions.³⁹⁷ The intervention timelines are described as variable according each student.³⁹⁸ If the interventions are not successful, nine options are provided to the parent as possible next steps.³⁹⁹ The first option is to allow more time for interventions, but the eighth option is to refer the student for an individual evaluation.⁴⁰⁰ At that point, the website explains that a parent's written consent is required to complete the evaluations.⁴⁰¹ The term "response to intervention" is

³⁸⁸*Id.*

³⁸⁹*Id.*

³⁹⁰*Id.* School records are on file with the author.

³⁹¹*Id.*

³⁹²Duval County Public Schools, http://www.duvalschools.org/static/parents/getinvolved/ese/learn_eligible.asp (last visited Mar. 20, 2013).

³⁹³*Id.*

³⁹⁴*Id.*

³⁹⁵*Id.*

³⁹⁶*Id.*

³⁹⁷*Id.*

³⁹⁸Duval County Public Schools, http://www.duvalschools.org/static/parents/getinvolved/ese/learn_eligible.asp (last visited Mar. 20, 2013).

³⁹⁹*Id.*

⁴⁰⁰*Id.*

⁴⁰¹Duval County Public Schools, http://www.duvalschools.org/static/parents/getinvolved/ese/learn_eligible.asp (last visited Mar. 20, 2013).

never used, but the description of the process is hard to identify as anything but RTI. While the information on the site may not technically be wrong, it is at the very least, misleading. It is no wonder, then, that it took the mother over two school years to finally get the evaluation process started.

It is not all bad news. Claudia Roberts, an educational advocate from the west coast of Florida has seen varying levels of success with RTI.⁴⁰² Overall, she has had good experiences, especially with Pinellas County, Florida, which has implemented RTI seriously for several years, as it was chosen as the pilot district for Florida.⁴⁰³ Reading is a passion in this district, and this seemed like a good opportunity to improve literacy.⁴⁰⁴ One of the primary reasons Roberts applauds the process is because of the data collection and monitoring.⁴⁰⁵ Graphing the information collected gives useful information that is helpful for diagnosing the child's actual problem while allowing for better programming.⁴⁰⁶ In fact, she bemoans the fact that this data collection and monitoring does not continue once a student is determined eligible for ESE services.⁴⁰⁷ Contributing to the success of the program is the systematic approach that the school district takes in assessing math, science, and reading three times a year.⁴⁰⁸ The results of the assessments are sent directly to the parents, thereby involving them from the first step.⁴⁰⁹ If the results are below a certain number, the student is referred for progress monitoring and interventions.⁴¹⁰

Roberts has found, however, that RTI is not perfect.⁴¹¹ For instance, while RTI works well for a student with one disability, it is not effective for students with multiple issues.⁴¹² Likewise, it is not meant to identify and target students with low incident disabilities, but rather is intended for students who may have a learning disability, attention deficit disorder (ADD), and emotional or behavioral disorders.⁴¹³ She has found that it is difficult to monitor progress in disorders such as depression or anxiety, and it does not seem to address organizational problems.⁴¹⁴

⁴⁰²Telephone Interview with Claudia Roberts, *supra* note 303.

⁴⁰³*Id.*

⁴⁰⁴*Id.*

⁴⁰⁵*Id.*

⁴⁰⁶*Id.*

⁴⁰⁷*Id.*

⁴⁰⁸Telephone Interview with Claudia Roberts, *supra* note 303.

⁴⁰⁹*Id.*

⁴¹⁰*Id.*

⁴¹¹*See Id.*

⁴¹²*Id.*

⁴¹³*Id.*

⁴¹⁴Telephone Interview with Claudia Roberts, *supra* note 303.

As seen in the prior examples, delays in evaluation are still an issue.⁴¹⁵ As a matter of course, once she finds that student may qualify as eligible for services, Roberts immediately requests, in writing, an evaluation of the student so that it can be done concurrently with the RTI interventions.⁴¹⁶ She also finds that the schools are told that RTI must be performed, and do not understand that both RTI and evaluations can occur at the same time.⁴¹⁷ Complicating the delay is that no one seems to know when to stop the intervention cycles.⁴¹⁸ She has met success with RTI because she knows the process and knows how to work with the process.⁴¹⁹ Parents with far less experience with RTI are not likely to know how to work with the process. Therefore, until parents are clearly informed of his or her right to request evaluations while the interventions are occurring, these delays will continue.

Roberts works with several counties in Florida.⁴²⁰ While Pinellas County has met with success and Ms. Roberts has seen students benefit from the progress monitoring and data collection, not all counties in which she has worked have implemented the process as successfully.⁴²¹ A few of the counties do not, or will not implement RTI at all, or only when it is completely necessary.⁴²² Another county is less consistent within itself, but has seen some schools embrace RTI and use it to find students who would otherwise fall through the cracks.⁴²³

Matthew Vignieri, a school psychologist intern in Rockdale, Georgia, has a unique perspective on RTI. As a recent college graduate, he was not trained with the discrepancy model to identify students with a learning disability.⁴²⁴ He admits that in order for RTI to work well, all parts need to be moving together, which includes proper teacher training and support from the administration.⁴²⁵ He also noted that it works better in elementary schools than it does in middle schools, which seems to support some of the findings in the Washington State research.⁴²⁶ But,

⁴¹⁵See, e.g., Clark, *supra* note 29; Telephone Interview with Heidi G., *supra* note 303; Telephone Interview with Tanya H., *supra* note 303; Telephone Interview with Claudia Roberts, *supra* note 303.

⁴¹⁶Telephone Interview with Claudia Roberts, *supra* note 303.

⁴¹⁷Telephone Interview with Tanya H., *supra* note 303; Telephone Interview with Claudia Roberts, *supra* note 303.

⁴¹⁸Telephone Interview with Claudia Roberts, *supra* note 303.

⁴¹⁹*Id.*

⁴²⁰*Id.*

⁴²¹*Id.*

⁴²²*Id.*

⁴²³*Id.* (referencing one school in particular in Miami-Dade Cnty., Fla., that is not all completely on board).

⁴²⁴Interview with Matthew Vignieri, *supra* note 302.

⁴²⁵*Id.*

⁴²⁶*Id.*; See also *supra* Part III.D.1 and accompanying text.

like Roberts, Vignieri applauds the diagnostic application of the process.⁴²⁷

It is also interesting to compare two different reactions from teacher reports. Amy Clark, an elementary school teacher in Oregon, acknowledged the possible delay for services for those students who may need them, but at the same time applauds the “DIBLES Army” and supporting staff that have been hired by the school to serve the students who qualify after the screening.⁴²⁸ She specifically recognizes that it is a resource and commitment intense program, but contrary to how the Duval County program is run in one school, the teachers in her school are freed from coming up with the interventions themselves.⁴²⁹ Instead, trained employees service the students, “tak[ing] the pressure off the individual teacher to come up with various interventions[.]”⁴³⁰ The screening takes five minutes from the class three times a year, and the interventions themselves are woven into the school schedule, which again, does not detract from the other class time.⁴³¹ Finally, the program at Clark’s school focuses on literacy alone.⁴³²

This is in stark contrast to the process experienced by Mrs. W. in Duval County, Florida. In her school, each teacher is given “a group” and told to work with them on a daily basis.⁴³³ Mrs. W.’s group is based on benchmark math scores, and she is expected to gather her own materials and “meet with them [her RTI group].”⁴³⁴ There is little guidance beyond this. A common thread of frustration through her team is the lack of guidance and confidence in the administration’s understanding of the process.⁴³⁵ For instance, when a student is going through the identification process for ESE and RTI data is requested, it does not seem to ever be what the team requires and it takes several more meetings for the documentation to be sufficient, which further delays the process.⁴³⁶ With no “DIBLES Army” to rely on, Mrs. W. and her team are left to fend for themselves, and see RTI as an added burden rather than a useful tool. It is important to also recognize that in Duval County, Florida, it is not limited to one area, but rather an array of different

⁴²⁷Interview with Matthew Vignieri, *supra* note 302.

⁴²⁸Clark, *supra* note 29.

⁴²⁹*Id.*

⁴³⁰*Id.*

⁴³¹*Id.*

⁴³²*Id.*

⁴³³Interview with Lisa W., Third grade teacher in Duval Cnty, Fla., in Jacksonville, Fla. (Feb. 2, 2012).

⁴³⁴*Id.*

⁴³⁵*Id.*

⁴³⁶*Id.*

subject matters. It is equally important to know that during the evaluation process, the school should be adhering to the sixty-day timeline.

Some common themes can be taken from each of these situations. The professionals who are well versed in the process reported overall success with the use of RTI if it is implemented thoroughly and has the support of the administration and the staff. Conversely, in programs that did not implement the process with fidelity, all parties were left frustrated. This runs completely counter to one of the purposes of the process—early intervention. Finally, if parents or advocates know the system well enough, it can be used successfully as part of the evaluation process rather than a hindrance to the process.

IV. SOLUTION – BALANCE BETWEEN EFFECTIVE RTI AND OVERUSE TO THE DETRIMENT OF STUDENTS AND THEIR RIGHTS

There is a recurring theme in the hearings that after a child turns nine years old, it is too late to claim “early intervention.”⁴³⁷ Early intervention depends on identifying and addressing learning or emotional problems before they become too difficult to overcome. For instance, it is imperative to address reading problems before third grade because at third grade, there is a shift from learning to read to reading to learn.⁴³⁸ From that point on, the job of closing the gap in reading becomes exponentially more difficult. This could be why the programs discussed earlier all focused on grades kindergarten through second grade.⁴³⁹ What was learned from these programs is that when it is implemented thoroughly and in the early grades, RTI appears to be a viable solution for identifying students with learning disabilities before he or she fails enough to have qualified under the discrepancy model.⁴⁴⁰ But, in practice and especially in older grades, RTI can significantly delay the process for students who truly need the services.⁴⁴¹

Anecdotally, school districts report that most special education referrals occur during elementary school and, therefore, there is less overall need for eligibility reform in the middle and high school

⁴³⁷See generally *Hearings*, *supra* note 25 (discussing the need of intervention prior to the third grade).

⁴³⁸See *Hearings*, *supra* note 25, at 110 (written statement of David W. Gordon, Superintendent, Elk Grove Unified Sch. Dist., Elk Grove, Cal.).

⁴³⁹See *supra* Part II.B. and accompanying text.

⁴⁴⁰SWARTZ ET AL., *supra* note 39, at 3; Washington Report, *supra* note 271.

⁴⁴¹See, e.g., Clark, *supra* note 29; Telephone Interview with Heidi G., *supra* note 303; Telephone Interview with Tanya H., *supra* note 303; Interview with Vanessa Ramirez, *supra* note 322; Telephone Interview with Claudia Roberts, *supra* note 303.

grades.⁴⁴² So, there is no reason to force the RTI process on older grades—especially middle school where it is less necessary, and less likely to work effectively.⁴⁴³

With this delay, and perhaps one reason for the delay, parents are not afforded procedural protections as are afforded under the IDEA.⁴⁴⁴ With no requirement that parents be kept informed of the process as it pertains to their children, schools and districts include parents inconsistently.⁴⁴⁵ In the schools' defense, the process was intended to allow the teachers flexibility in interventions and including the parents in that process certainly slows that process down. On the other hand, if the parents are unaware of the academic problems facing their child, they have no opportunity to share their insight, nor participate in the programming for their own child.

Part of this issue could be resolved by using the RTI process as part of the comprehensive evaluation process rather than a precursor to the process.⁴⁴⁶ In doing so, however, the school opens itself up to the dictates of the IDEA and the procedural protections it affords to the parents.⁴⁴⁷ It is important to remember that when the RTI process is utilized as part of a comprehensive evaluation, there is a timeframe in which the evaluation must be completed, and RTI cannot delay this process.⁴⁴⁸ While there are several state and federal memorandums that support this, the current practice does not reflect a thorough understanding of the requirements.⁴⁴⁹ To demand a better understanding of the requirements by the school districts is naïve. Each school district receives the same information from the U.S. Office of Special Education Programs.⁴⁵⁰ As reflected in Florida, however, each school district has a different level of “buy in” to the RTI process as well as the IDEA and, therefore, willingness to follow

⁴⁴²Response to Intervention Research for an Academic Article, SurveyMonkey.com (on file with author).

⁴⁴³Interview with Matthew Vignieri, *supra* note 302; *See Hearings*, *supra* note 25, at 77–92 (written statement of G. Reid Lyon, Research Psychologist and Chief, Child Dev. and Behavioral Branch, Nat'l Inst. of Child and Health and Human Dev.).

⁴⁴⁴*See* E-mail from Heather Diamond, *supra* note 40; *See also* Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b) (2008).

⁴⁴⁵*See supra* Part III.D.2 and accompanying text.

⁴⁴⁶SWARTZ ET AL., *supra* note 39, at 26; Telephone Interview with Claudia Roberts, *supra* note 303.

⁴⁴⁷Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b) (2008).

⁴⁴⁸Regulations of the Offices of the Dept. of Educ., 34 C.F.R. §300.301(c)(1) (2006).

⁴⁴⁹*See, e.g.*, Memorandum from OSEP, *supra* note 324; Memorandum from Fla. Dept. of Educ., *supra* note 383; Telephone Interview with Tanya H., *supra* note 303.

⁴⁵⁰*See* U.S. DEPT. OF EDUC., <http://www2.ed.gov/about/offices/list/osers/osep/index.html> (last visited on Mar. 20, 2013) (explaining that the U.S. Office of Special Education Programs provides assistance to states and local districts throughout the country).

the letter and spirit of the process.⁴⁵¹ Additionally, while there are policies in place to guide the school districts, so far there is little indication that there are teeth to back it up. Part of the reason that there are “no teeth” behind RTI requirements and policies is that RTI is not required, but must be allowed by any willing district.⁴⁵² In other words, districts do not lose anything by not complying with the request to not delay eligibility determinations with the RTI process. While the threat of litigation does not necessarily motivate all districts into compliance under the IDEA, it gives parents a voice when they otherwise would have none.

In an effort to improve communication with the parents, providing a liaison between the parents and school personnel may foster more meaningful and productive communication between the parties. If the RTI process is included under the protections of the IDEA, an adversarial relationship between the parents and the school may ensue. Communicating through a third party such as a trained RTI liaison in a systematic and meaningful way could diffuse situations as they arise.

As previously discussed, one strength of RTI is that it diagnoses the specific area of weakness and targets the root of the problem rather than a problem in general.⁴⁵³ Of course, the problem is that it can only address one discrete weakness at a time and, therefore, any other issues that may exist are not addressed until one has been resolved. This delays help in “all areas of suspected disability.”⁴⁵⁴ For example, in Nathan’s case, the school began interventions to address his problem with homework completion, when homework was merely one byproduct of a much larger problem that was never addressed.⁴⁵⁵ When Nathan started completing his homework the intervention was considered a success, and he was determined ineligible for special education.⁴⁵⁶ Meanwhile, he continued to fail academically, and was continually kicked out of class.⁴⁵⁷ The solution is, again, to include RTI as part of the evaluation process for the areas for which it was specifically intended—primarily reading—but at the very least, only for a learning disability.

⁴⁵¹Memorandum from Fla. Dept. of Educ., *supra* note 383.

⁴⁵²Office of the Superintendent of Schools of Brevard Cnty. Sch. Sys., Response to Intervention (2009).

⁴⁵³Telephone Interview with Claudia Roberts, *supra* note 303.

⁴⁵⁴Individuals with Disabilities Education Act, 20 U.S.C. § 1414(b)(3)(B) (2008).

⁴⁵⁵Personal anecdote from Rebekah Gleason.

⁴⁵⁶*Id.* It should be noted that there is no actual evidence on the success of the intervention because contrary to policy, there was no data collected to show his improvement in the area.

⁴⁵⁷*Id.*

CONCLUSION

Resistance to change is a natural response. RTI is relatively new and is a drastic change. It may take a whole generation of teachers and administrators to completely buy into the process and embrace the changes. For instance, Vignieri, who had never experienced anything other than this process, was quick to support its promise while acknowledging its challenges.⁴⁵⁸ In contrast, a cluster of experienced third grade teachers from Duval County Public Schools from a “good” school expressed frustration over the process.⁴⁵⁹ These teachers found that it merely detracted from the program that they already have in place.⁴⁶⁰ It is worth noting that the support Vignieri received in Rockland County, Georgia, appears to have been far superior to that of the third grade cluster in Duval County, and can be another variable affecting the process. But, it is clear that the approach each group is taking to the same task is from two different perspectives—one is open to the process as a possible successful endeavor, while the other is skeptical from the start, and may unwittingly be sabotaging the process.

With the reauthorization of both the No Child Left Behind Act⁴⁶¹ and the IDEA on the horizon, educational reform initiatives have become important. RTI is one such initiative that was intended to address a long time eligibility problem. In addressing one problem, however, it has opened a Pandora’s Box of different problems, including avoiding accountability. Instead, because it is funded by the IDEA, RTI should play by the rules of the IDEA. It should be part of the procedures for identification, forcing accountability on the process. Additionally, limiting the scope of the process to its origins of identifying students with learning disabilities in the early grades.

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⁴⁵⁸Interview with Matthew Vignieri, *supra* note 302.

⁴⁵⁹Interview with Lisa W., *supra* note 433.

⁴⁶⁰*Id.*

⁴⁶¹No Child Left Behind Act, Pub. L. 107–110 (2002).