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The Helter Skelter World of IDEA Eligibility for Specific Learning Disability: The Clash of Response-to-Intervention and Child Find Requirements

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The Helter Skelter World of IDEA Eligibility for Specific Learning Disability: The Clash of Response-to-Intervention and Child Find Requirements

By Torin D. Togut*, Jennifer E. Nix**

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I. INTRODUCTION

Helter Skelter means a headlong and disorderly haste, a haphazard manner, without regard for order, carelessly hurried, confused, disorderly, or haphazard.¹ The term has several cultural meanings as well, ranging from cult to obscure to trivial.² It is unlikely, however, that Helter Skelter has been used to describe the uneasy feelings of educators, administrators, parents, parent advocates, attorneys for school boards and parents, professors, and

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¹ WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 889 (1996). When used as an adjective, Helter Skelter is often hyphenated as helter-skelter. *Id.*

² See, e.g., VINCENT BUGLIOSI, *HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS* (3d ed. 1974) (detailing Charles Manson's history and the Tate-LaBianca murders, as recounted by the prosecutor in Manson's trial); PAUL MCCARTNEY, *HELTER SKELTER* (EMI Studios 1968) (recorded by The Beatles) (departing from his typical ballads, McCartney wrote a heavy metal style song, ostensibly about a spiral ride in a British amusement park known as a Helter Skelter); *HELTER SKELTER* (Gainsborough Pictures 1949) (a romantic comedy film directed by Ralph Thomas following a detective who gets involved with a wealthy socialite who can't seem to stop hiccupping). See generally *HELTER SKELTER*, WIKIPEDIA, http://en.wikipedia.org/wiki/Helter_Skelter (last visited Apr. 18, 2012) (providing a listing of other Wikipedia articles to which "Helter Skelter" could refer, including an episode of the TV series *Eureka Seven*, a hip hop group named Heltah Skeltah, and a poem and story by Jonathan Swift entitled *Helter Skelter*).

other stakeholders in the educational arena who are attempting to determine whether a child with a disability³ is eligible to receive special education and related services under the category of a specific learning disability.⁴ There is a perception that educational experts and others attempting to define “specific learning disability” (SLD), have made little progress since 1975.⁵ This sentiment is shared among academia.⁶

The question, “who is a child with a specific learning disability?” is difficult to answer, as there is no consensus as to what constitutes a SLD.⁷ Learning disabilities come in all shapes and sizes. A child with attention deficit disorder, attention deficit hyperactivity disorder, or dyslexia may exhibit symptoms of a SLD.⁸

³ “Child with a disability” is a legal term. See 20 U.S.C. § 1401(3) (2006); 34 C.F.R. § 300.8(c) (2012) (defining a child with a disability as a child with: (i) mental retardation, hearing impairment and deafness, speech and language impairments, visual impairments and blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities, and (ii) who, by reason thereof, needs special education and related services).

⁴ See generally Ruth Colker, *The Learning Disability Mess*, 20 AM. U. J. GENDER SOC. POL’Y & L. 81 (2011) (discussing the lack of consistent standards for identifying learning disabilities).

⁵ *Id.* at 105; see also 121 CONG. REC. 25,531 (daily ed. July 29, 1975) (statement of Rep. Lehman) (“No one really knows what a learning disability is.”).

⁶ Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1166 (2007) (noting history of a SLD as a “‘bogus’ disability” and its lack of scientific basis); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 125 n. 193 (2009) (reporting statistics and research showing that learning disability prevalence varies greatly within states, suggesting there is a lack of uniformity and consistency in identification and evaluation methods). But see David T. Painter & Tanya A. Alvarado, *Meeting Special Education Needs: The Reauthorized Federal Special Education Law Encourages A New Way For Identifying Students with Specific Learning Disabilities*, 79 PA. BAR ASS’N Q. 17, 18 nn. 6–9 (2008).

⁷ One definition of a specific learning disability can be found in the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1401(30)(A) (2006) (“The term ‘specific learning disability’ means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, write, spell, or do mathematical calculations.”).

⁸ JEROME ROSNER, *HELPING CHILDREN OVERCOME LEARNING DIFFICULTIES* 1–3 (3d ed. 1993).

Signs of a SLD vary from one child to the next.⁹ Learning disabilities are not easily categorized, and each child that lives with a learning disability is very different from another. One adult with a lifelong learning disability reflected, “I will always think of myself as a child with a learning disability. I don’t think it has ever really changed . . . it is a part of my life forever.”¹⁰

The 2004 amendments to the Individuals with Disabilities Education Act (IDEA)¹¹ delegate to state educational agencies discretion to use one of several available tests to determine SLD eligibility for a child with a disability.¹² With these changes, Congress developed an amorphous standard that adds to the difficulty of determining what is a SLD. Unsurprisingly, because these changes to the IDEA statute give the states such discretion, several different approaches have developed among the states for identifying and determining SLDs.¹³ This Article will focus primarily on the two most common methods of identification that have been adopted by the states: (1) the “severe discrepancy” model; and (2) the Response-to-Intervention (RTI) model.¹⁴

Recent federal court decisions, state administrative decisions, and federal agency interpretations have reinforced the Helter Skelter standards for identifying, evaluating, and determining SLD

⁹ *Id.*

¹⁰ Marshall H. Raskind et al., *Teaching “Life Success” to Students With LD: Lessons Learned From a 20-Year Study*, 37 INTERVENTION IN SCH. & CLINIC, 201, 201 (Mar. 2002).

¹¹ Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1409 (2006)).

¹² The ultimate decision of which standard or model to adopt to determine SLD is left to the State educational agency. 34 C.F.R. § 300.307(b) (2012) (“A local educational agency must use the State criteria adopted under § 300.307(a) in determining whether a child has a specific learning disability as defined under § 300.8(c)(10).”). Further, a state “[m]ay permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).” 34 C.F.R. § 300.307(a)(3) (2012). This section is ambiguous as to what “alternative research-based procedures” can be used to determine whether a child has a SLD.

¹³ Colker, *supra* note 4, at 97.

¹⁴ *See id.* Some states use a combination of these two methods.

eligibility.¹⁵ This Article will closely examine and analyze these decisions and related memorandum in an attempt to predict legal trends in this area. This Article will conclude with reflections on the strengths and weaknesses of the current SLD eligibility standards and recommendations for change of the eligibility standards by Congress, federal executive educational agencies, and state and local educational agencies.

In Part II of this Article, we will review the IDEA statutory and regulatory framework for determining SLD eligibility. This discussion will describe use of the RTI model to remediate a student's reading and math deficits as well as to address behavioral challenges that jeopardize or place a student's academic success at risk. A closer analysis of the RTI model will reveal that it may not be the panacea for a student's educational woes. In fact, its use may actually decrease the chance the student is timely evaluated to determine IDEA eligibility.¹⁶ In Part III, we will examine the "Child Find" requirements of IDEA. These requirements mandate that the state and local educational agencies locate, identify, and evaluate all children with disabilities residing within their jurisdictions that currently need special education and related services.¹⁷ This requirement may, at times, clash with a local educational agency (LEA) that uses RTI prior to addressing its Child Find responsibilities and referring a child for an evaluation to determine special education eligibility. Part IV of this Article will discuss and analyze federal district court and state administrative decisions, and federal executive agency memorandum and findings on the interplay between RTI and Child Find. This part of the Article will reveal the slippery slope of continuing to use RTI to remediate a child's academic weaknesses and behavioral challenges once the Child Find requirements have been triggered for that child. Finally, in Part V of

¹⁵ See, e.g., U.S. DEP'T OF EDUC., MEMORANDUM TO STATE DIRECTORS OF SPECIAL EDUCATION, 56 IND. DISABILITIES EDUC. L. REP. 50 (OSEP 2011) [hereinafter DOE MEMORANDUM] (describing identification, evaluation, and eligibility procedures for children identified as SLD); Letter to Zirkel, 47 INDIVIDUALS DISABILITIES EDUC. L. REP. 268 (Dep't of Educ., OSEP 2007) (determining that states cannot require LEAs to use severe discrepancy test nor can they prohibit its use); Weber, *supra* note 6, at 140.

¹⁶ See *infra* Part II.

¹⁷ 20 U.S.C. § 1412(a)(3)(A) (2006); 34 C.F.R. § 300.111(a)(1)(i), (ii) (2012).

this Article, we will attempt to summarize the Helter Skelter nature of the SLD eligibility process and offer proposed solutions for special education law to adopt when there is a conflict between RTI and Child Find obligations.

II. THE 2004 IDEA AMENDMENTS' FRAMEWORK FOR DETERMINING SLD ELIGIBILITY

The Individuals with Disabilities Education Improvement Act of 2004 (commonly referred to as the IDEA) is the primary source of legal rights and obligations regarding special education students. IDEA broadly governs how state and local educational agencies must provide early intervention, special education, and related services to eligible infants, toddlers, children, and youth with disabilities. IDEA guarantees all eligible children the right to a “free and appropriate education” (FAPE), which is implemented through an “individualized education program” (IEP).¹⁸ The IEP must be tailored to meet the student’s individual educational needs.¹⁹ One of IDEA’s educational purposes is to prepare children with disabilities for further education, employment, and independent living.²⁰ In addition, IDEA provides for a funding scheme that gives state and local educational agencies federal funding for the provision of these instructional services and programming to eligible children.²¹

Since the 1975 passage of the Education for All Handicapped Children Act, which became IDEA,²² this federal legislation has met its goal of ensuring that children with disabilities are not arbitrarily excluded from public schools or discriminated against because of their disabilities. Currently, more than ten percent of all students are receiving special education services.²³ In order to be a “child with a

¹⁸ 20 U.S.C. §§ 1400–09 (2006).

¹⁹ *Id.*

²⁰ *Id.* § 1400(d)(1)(A).

²¹ *Id.* § 1400(d)(1)(C).

²² Before 1975, public schools could exclude children with disabilities. In 1975, Congress passed the Education for All Handicapped Children Act of 1975, which later became the IDEA. *See* Pub. L. 94-142 (1975) (repealed and replaced by IDEA, 20 U.S.C. § 1400 (2006)).

²³ *See* U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS (2010), available at <http://nces.ed.gov/programs/digest/d10/>.

disability” and be eligible for IDEA services, the student must have one of several enumerated disabilities.²⁴ In addition, the disability must adversely affect his educational performance and the student must be able to benefit from special education and related services.²⁵ In other words, in order for a child to be eligible for disability services under IDEA, he must (1) fit his disability into a proscribed category, (2) show that his disability creates an adverse effect on his academic achievement, and (3) demonstrate a need for special education and related services.

In 2004, Congress amended IDEA to address several concerns raised by educational agencies, parents, and other stakeholders in the special education process.²⁶ One of these concerns was the rapid expansion of students classified as SLD.²⁷ Congress’s other concern was that minority students had become vastly overrepresented in special education.²⁸ The overrepresentation was particularly noticeable in the “soft” disability categories of mental retardation, emotional disturbance, and SLD.²⁹ In order to solve these problems, the 2004 IDEA amendments eliminated the requirement that school districts must use the severe discrepancy test to determine a student’s eligibility under the category of SLD.³⁰

²⁴ 20 U.S.C. § 1401(3)(a).

²⁵ *Id.*

²⁶ Individuals with Disabilities Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 424 (codified as amended at 20 U.S.C. §§ 1400–1409 (2006)).

²⁷ See, e.g., Angela A. Cioffi & James E. Ryan, *Race and Response to Intervention in Special Education*, 54 HOW. L.J. 303, 304 (2011); Diana Pullin, *Getting to the Core: Rewriting the No Child Left Behind Act for the 21st Century*, 39 RUTGERS L. REC. 1, 5 (2011–2012) (“There has been almost a doubling of the proportion of U.S. schoolchildren served under IDEA since data collection began in 1976.”); *id.* at 6 n. 56 (calling SLD the “most subjective of classifications” and noting that close to fifty percent of students served under the IDEA are labeled as SLD); Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons From Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 765 (2001); Weber, *supra* note 6, at 123 (citing statistics showing a 283% increase over a thirty year period and SLD as forty-five percent of all IDEA-eligible children).

²⁸ IDEA Improvement Act, § 601(c)(12) (2006).

²⁹ Cioffi & Ryan, *supra* note 27, at 304.

³⁰ 20 U.S.C. § 1414(b)(6)(A) (2006); see Weber, *supra* note 6, at 100–01 n. 102.

A. Severe Discrepancy Test: Quiet Demise or Bold Insurrection?

Congress's 2004 IDEA amendments were intended to address several concerns raised between education professionals, parents, and other stakeholders in the special education process. One of these concerns was the rapid expansion of students classified as having "specific learning disabilities."³¹ Prior to the 2004 IDEA amendments, LEAs often used a "severe discrepancy test" to determine eligibility for a SLD. This test measured and assessed whether there was a severe discrepancy between the student's achievement and her intellectual ability, which was usually measured with IQ testing.³² The "severe discrepancy test" for identifying students as SLD has been widely criticized as unsound.³³ This test came into disfavor because of long standing concerns about the inadequacies of the ability-achievement discrepancy criterion, which had been incorporated into the IDEA of 1997 for identifying students with learning disabilities.³⁴ One professor summed up the critiques of the discrepancy method as:

[T]he balance of the evidence shows that the severe discrepancy classification criteria are (a) unreliable (particularly in the sense of stability), (b) invalid (poor readers with higher IQs do not differ on relevant variables from those with IQs commensurate with reading levels), (c) easily undermined in practice by giving multiple tests, finding a score that is discrepant

³¹ See *supra* note 27 and accompanying text.

³² See Louise Spear-Swerling, *Response to Intervention and Teacher Preparation*, EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND 273, 276 (Elena L. Grigorenko ed., 2008); Weber, *supra* note 6, at 123–24.

³³ WILLIAM N. BENDER & CARA SHORES, *RESPONSE TO INTERVENTION: A PRACTICAL GUIDE FOR EVERY TEACHER 1–4* (2007); see Cioffi & Ryan, *supra* note 27, at 309 ("Some students who should have been eligible were excluded and some—many more—who should not have been found eligible were included."); Weber, *supra* note 6, at 124 (noting the unreliability of IQ testing, both in general, and its discrepancy from state to state).

³⁴ NATIONAL JOINT COMMITTEE ON LEARNING DISABILITIES, *RESPONSIVENESS TO INTERVENTION AND LEARNING DISABILITIES 1–19* (2005), available at <http://www.ldanatl.org/pdf/rti2005.pdf>.

and ignoring disconfirming evidence, and (d) harmful because the severe discrepancy delays treatment from kindergarten or first grade when the symptoms of reading disability are first manifested to 3rd or 4th grade when reading problems are more severe, intervention more complex, and the school curriculum shifts [from learning to read] to “reading to learn.”³⁵

Despite the misgivings concerning the severe discrepancy test, the IDEA Amendments of 2004 provided that states can neither require LEAs to use this test or prohibit its use.³⁶ By refusing to prohibit use of the severe discrepancy test, Congress compromised, leaving discretion to states and local educational agencies. In retrospect, this may have been a mistake. Nationally, there exists a hodgepodge of different SLD eligibility standards.³⁷ Until Congress and the Department of Education can agree on a uniform and consistent standard for determining SLD eligibility, states will continue to use the severe discrepancy test, and criticism of its continued use is likely to follow. In response to the changes to IDEA, RTI has become the primary tool used to address the educational needs of students suspected of having learning challenges.

³⁵ Daniel J. Reschly, *What if LD Changed to Reflect Research Findings?*, NAT'L RESEARCH CTR. ON LEARNING DISABILITIES (Dec. 2003), <http://www.nrcl.org/symposium2003/reschly/reschly2.html>; see Allison Uertz Nealy, *Response-to-Intervention: A Proactive Approach Addressing A Spectrum Of Need in HEALTH PROMOTION IN SCHOOLS*: FOUNDATION 105 (R.J. Walter ed., 2012) (positing that severe discrepancy has three significant flaws). Professor Nealy states that it is reactive rather than proactive because children tested at earlier ages do not demonstrate the cognitive ability-achievement discrepancy required to meet SLD eligibility as intelligence and achievement testing is generally considered inaccurate or unreliable at these grade levels. Many students do not qualify for special education because of low intellectual ability, and discrepancy is not severe enough to meet state eligibility standards. This means the student will be classified as a “slow learner” rather than having a SLD. Third, there is insufficient scientific based research to support its use in the identification students with SLDs. *But see* Weber, *supra* note 6, at 124–25 (noting existence of both defenders of the discrepancy method and those who take a middle ground on its use).

³⁶ See 20 U.S.C. § 1414(b)(6)(A) (2006); Letter to Zirkel, 47 INDIVIDUALS DISABILITIES EDUC. L. REP. 268 (Dep't of Educ., OSEP 2007).

³⁷ Colker, *supra* note 4, at 97–101.

B. The Rejuvenation of Response-to-Intervention

During the Congressional term encompassing the 1997 reauthorization of the IDEA, in a letter to the U.S. Department of Education's Office of Special Education Programs (OSEP), the National Joint Committee on Learning Disabilities expressed that there was no accurate identification method for children suspected of having specific learning disabilities.³⁸ OSEP's response to this letter spawned a movement called the "Learning Disabilities [LD] Initiative."³⁹ The goal of the LD Initiative was to improve the process for timely and efficient SLD identification, using a method other than the severe discrepancy test.⁴⁰ The LD Initiative recommended the use of RTI as an alternative to the severe discrepancy test, which was criticized for forcing students to fail before special education services were provided.⁴¹ RTI's main benefit is an implementation of scientifically based research interventions earlier in the process for students failing to respond to traditional classroom instruction.⁴² In 2001, OSEP delegated the task of investigating potential RIT models to the National Research Center on Learning Disabilities (NRCLD), who also assisted states and local entities, hoping to create a change in SLD identification by 2004.⁴³ The work of the NRCLD was considered in the reauthorization of the IDEA in 2004.⁴⁴

During the administration of President George W. Bush, RTI moved to the forefront of the debate concerning SLD eligibility, particularly because the laudatory goals of RTI meshed well with the mandates and requirements of the No Child Left Behind Act (NCLB).⁴⁵ NCLB became President Bush's flagship educational

³⁸ Renee Bradley et al., *Responsiveness to Intervention: 1997 to 2007*, 39 TEACHING EXCEPTIONAL CHILDREN 8, 8 (May/June 2007).

³⁹ *Id.*

⁴⁰ *Id.* (discussing attempts to find alternative methods for identifying SLD students).

⁴¹ *Id.*

⁴² *Id.* at 9.

⁴³ Bradley, *supra* note 38, at 9.

⁴⁴ *Id.*

⁴⁵ See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6311 (2006)).

reform.⁴⁶ Not long after it was passed, Congress reauthorized the 2004 IDEA amendments, which encourage early intervention services⁴⁷ and the use of RTI as a diagnostic tool.⁴⁸ These statutory revisions to IDEA, combined with regulations issued by the Department of Education, pushed LEAs to employ RTI, instead of the severe discrepancy test, as the primary method for diagnosing learning disabilities.

As a result of these statutory and regulatory changes, most schools have shifted toward employing RTI, rather than the severe discrepancy test, for evaluation of students suspected of having learning disabilities.⁴⁹ At first blush, these changes seem to resolve the long-standing problems that existed in using the severe discrepancy test by providing a workable solution to the problems that had developed with IDEA, as well as ostensibly providing a method to raise the educational quality of all students' education. After all, the simple concept that "all students should be given adequate instruction"⁵⁰ is the commendatory intent behind RTI.⁵¹

⁴⁶ PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 21 (2002) (recommending incorporation of RTI into IDEA). NCLB helped propel the RTI movement forward. See Cioffi & Ryan, *supra* note 27, at 312 (likening RTI's universally-applied services to NCLB's mandate that all children receive the same education and meet the same academic standards).

⁴⁷ 20 U.S.C. § 1413(f) (2006). In some situations, these early interventions are mandatory. *Id.* § 1418(d) (requiring certain procedures when ethnic or racial minorities are overrepresented in special education).

⁴⁸ *Id.* § 1414(b)(6) (authorizing school districts to "use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures"). Nothing in the federal statute or regulations makes use of RTI mandatory for SLD evaluations, though states may choose to make it so.

⁴⁹ Aiding this shift toward the use of the RTI is that IDEA now authorizes up to fifteen percent of special education funds for RTI. *Id.* § 1413(f). If a district has significant racial disparities in its special education placement, this spending is mandatory. *Id.* § 1418(d)(2)(B).

⁵⁰ Cioffi & Ryan, *supra* note 27, at 311; see also Nicholas L. Townsend, *Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229, 259 (2007) ("The RTI model tries to appropriately and immediately address the instructional needs of students who are difficult to teach.").

⁵¹ BENDER & SHORES, *supra* note 33, at 7 (tracing RTI back to the 1970s); see also Townsend, *supra* note 50, at 259 (commenting on the shift in focus from

When RTI is properly implemented, it focuses on providing every student with quality instruction; this allows teachers to distinguish between those students who actually have a disability and those students who simply received poor instruction in the past.⁵² Indeed,

RTI has great potential, in theory, to improve the education for students at risk of failure, to reduce the costs of special education by reducing the number of students who need those services, and to reduce the stigma and sometimes low expectations that attach to students found eligible for special education.⁵³

C. What is the RTI Model?

In order to understand RTI, we must have a better understanding of what it is and what it is not. In the 1980s, RTI began as a teaching strategy involving interventions to assist students who struggled academically or behaved poorly.⁵⁴ Presently, RTI does not refer to a specific set of interventions, but encompasses all programs where students are given increasingly intense and tailored instruction before they are determined eligible for special education.⁵⁵ Despite this, five primary components are seen in most RTI models: (1) universal screening; (2) continuous progress monitoring; (3) continuum of evidence-based interventions; (4) data

eligibility to providing effective instruction and the goal of reducing overall special education population).

⁵² See Ciolfi & Ryan, *supra* note 27, at 305 (noting that RTI provides services for all students at risk of failing, not just those with disabilities).

⁵³ *Id.* at 306.

⁵⁴ See Ciolfi & Ryan, *supra* note 27, at 311 (citing a National Research Council Study as instrumental in shifting special education identification to an RTI model).

⁵⁵ See BENDER & SHORES, *supra* note 33, at 7–8 (“Response to Intervention is, simply put, a process of implementing high-quality, scientifically validated instructional practices based on learner needs, monitoring student progress, and adjusting instruction based on the student’s response. When a student’s response is dramatically inferior to that of his peers, the student may be determined to have a learning disability.”).

based decision-making and problem solving; and (5) implementation fidelity.⁵⁶

Universal screening involves systematically evaluating the performance of all students, including those who are making adequate educational progress, at some risk of failure if not provided interventions and supports, and at high risk of failure if not provided specialized interventions and supports.⁵⁷ Continuous progress monitoring involves assessing a student's progress on a regular and periodic basis to identify when inadequate educational growth trends may indicate a need for increasing the level of instruction support to the student.⁵⁸ A continuum of evidence-based interventions is an integral part of RTI. Depending upon the level of instructional support required for the student, evidence-based interventions are tailored to respond to the student's learning and behavioral needs and provide a data-based method for evaluating the student's level of need.⁵⁹ When a student does not demonstrate adequate educational progress in response to a modified core curriculum, then an individualized curriculum is implemented for that student, providing more modifications or adaptations based upon the student's educational needs.⁶⁰ Finally, RTI requires that the instructional interventions and supports of the RTI model are implemented with fidelity for students.⁶¹

⁵⁶ See, e.g., Lise Fox et al., *Response to Intervention and the Pyramid Model* 1–2 (2009), available at http://www.challengingbehavior.org/do/resources/documents/rti_pyramid_web.pdf. There are advocates and professionals who include other additional components in the RTI model, including collaboration by school staff, high-quality research-based instruction, documentation of parental involvement, and documentation of special education evaluation timelines as stated in IDEA. See Mary Beth Klotz & Andrea Canter, *Response To Intervention (Rti): A Primer For Parents 2009*, NASP RESOURCES (2006), <http://www.nasponline.org/resources/factsheets/rtiprimer.aspx>; Memorandum to State Directors of Special Education, 56 INDIVIDUALS DISABILITIES EDUC. L. REP. 50 (Dep't of Educ., OSEP 2011) (describing core characteristics of RTI model).

⁵⁷ Lise Fox et al., *supra* note 56, at 1.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1–2.

⁶⁰ *Id.*

⁶¹ *Id.*

Despite RTI's implementation across the country, no single model or proscribed set of interventions has developed, either by statute or regulation, or from the educational community as a whole.⁶² Two general models have developed: the problem solving model and standard protocol model.⁶³ The problem solving model requires designing specific interventions to meet the needs of an individual student or small groups of students; data collection to continually evaluate a student's progress and determine when and whether additional supports are needed; and periodic meetings of educators to evaluate a student's progress and reset timeliness for further interventions.⁶⁴ The standard protocol model identifies specific interventions for students with similar learning problems (e.g. reading, fluency) and defines a timeline for the interventions to be implemented.⁶⁵ All of these students receive the same interventions, which must be research-based, and school personnel are trained on their implementation and on how to conduct progress monitoring.⁶⁶ Further, most LEAs use a RTI model that involves "tiers" of intervention which move from the least intense form of monitoring to more intensive methods.⁶⁷ There are usually three tiers: at the base

⁶² John J. Hoover et al., *National Implementation of Response to Intervention*, SPECIAL EDUCATION LEADERSHIP AND QUALITY TEACHER INITIATIVE 1 (2008), available at <http://www.nasdse.org/Portals/0/NationalImplementationofRTI-ResearchSummary.pdf> (finding a ninety percent rate of state training on use of RTI); Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILDREN 60, 61–73 (2010). As of May 2010, approximately thirteen states had adopted RTI as mandatory for SLD identification for specific subjects and/or grades. Perry A. Zirkel, *Legal Currency in Special Education Law: Top Ten for School Leaders*, 262 ED. LAW REP. 1 (2011).

⁶³ See Nealy, *supra* note 35, at 119–20.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Kathryn M. Smith & Richard Bales, *Education for Americans with Disabilities: Reconciling IDEA with the 2008 ADA Amendments*, 37 N. KY. L. REV. 389, 394 (2010). There are many types of RTI models with different tiers of intervention including best practice strategies. See, e.g., Douglas Fuchs & Lynn S. Fuchs, *Responsiveness-To-Intervention: A Blue Print For Practitioners, Policymakers, And Parents*, 38 TEACHING EXCEPTIONAL CHILDREN 57 (Sept./Oct. 2001), available at www.advocacyinstitute.org/resources/TEC_RtIblueprint.pdf.

level, all students are involved; at the second level, some students who are underperforming receive specialized instruction; and at the final level, a few students receive individualized instruction.⁶⁸ During the RTI process, progress data is recorded and is used to determine if the student needs further intervention.⁶⁹ The duration, frequency, and time of each stage depend upon the RTI model that is implemented. In general, for example, second tier interventions can vary but should not exceed eight weeks.⁷⁰ There is no established timeline for entry into the third tier, but at this stage students are more likely to be referred for a full psychoeducational evaluation under IDEA when there is a lack of response to more individualized research-based instruction and intervention.⁷¹

The RTI model provides a diagnosis for failing students on two prongs.⁷² First, the child must be found to be achieving less than others in his age group in one of eight specified educational categories when provided with the same teaching.⁷³ Second, the

The National Research Center on Learning Disabilities has developed a manual entitled *A Tiered Service-Delivery Model* that comprehensively sets forth the tiered levels of intervention for RTI. *A Tiered Service-Delivery Model*, NRCLD (Aug. 2006), <http://www.laofky.org/RTI/RTI%20Manual%20Section%203%20-%20Tiered%20Service%20Delivery.pdf>.

⁶⁸ See, e.g., BENDER & SHORES, *supra* note 33, at 10 (elucidating a model with three tiers where Tier One is “Core Instructional Curriculum,” which involves all students; Tier Two is “Core Instruction and Supplemental Instruction Resources,” which involves students who need additional assistance; and Tier Three is “Core Instructional and Intensive Resources,” where students receive intensive interventions and specialized resources on an individual basis).

⁶⁹ Smith & Bales, *supra* note 67, at 394 (noting that some schools follow the same tiered plan for every student, while other schools let the teacher decide the increasing interventions).

⁷⁰ Lise Fox et al., *supra* note 56, at 7.

⁷¹ *Id.*

⁷² The RTI model currently dominates SLD diagnosis. See 34 C.F.R. § 300.307, .309, .311 (2012) (setting forth requirements for using a process based on a child’s response to scientific, research-based intervention when determining that the child is a child with a specific learning disability). It is possible that something other than RTI could provide the data and documentation needed, but RTI is the most “obvious” method. Weber, *supra* note 6, at 131.

⁷³ 34 C.F.R. § 300.309 (2012); see Letter to Zirkel, 50 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 49 (Dep’t of Educ., OSEP 2008) (stating that 34 C.F.R. § 309(a)(2)(ii) applies to all other possible methods of identifying a child with a SLD).

child must fail to make sufficient progress or exhibit a specific pattern of strengths and weaknesses that are indicative of a SLD.⁷⁴ Thereafter, a child that fails to respond to interventions may be considered to have a learning disability.⁷⁵ The RTI model demonstrates whether the child has achieved satisfactorily with his age group, but the child is not assessed in reference to his individualized ability.⁷⁶ This means two things: first, it is possible that if a child is achieving with his age group, he will be unlikely to become eligible for special education services under the RTI model;⁷⁷ second, because children are measured based on how they perform within their age group as compared to individually, it is more likely that the child's response-to-intervention for a suspected SLD becomes linked to the quality of his instruction.⁷⁸ This is an issue with RTI generally, as "[t]he RTI model requires seamless integration of general and special education [programming] because interventions and identification of disabled students are administered by general education teachers, while special education [teachers are often only involved] only later in the process, if at all."⁷⁹ Thus, it is questionable whether regular education teachers are adequately trained and experienced to timely identify and refer students suspected of having a SLD for a psychoeducational evaluation under the IDEA.⁸⁰

Even assuming the RTI method aids students struggling in academic subjects,⁸¹ it remains that a number of the students who

⁷⁴ 34 C.F.R. § 300.309 (2012).

⁷⁵ Weber, *supra* note 6, at 128.

⁷⁶ 34 C.F.R. § 300.311(a)(5) (2012).

⁷⁷ *E.g.*, Weber, *supra* note 6, at 133–42 (pointing out this problem as related to students with dyslexia).

⁷⁸ *See* Townsend, *supra* note 50, at 260–65 (questioning the base level of instruction).

⁷⁹ *Id.* at 259.

⁸⁰ *See* 20 U.S.C. § 1414(b), (c) (2006); 34 C.F.R. § 300.304–306 (2012).

The RTI model is not intended to become a replacement for a comprehensive special education evaluation; it just one tool from many that a district may use to identify a child with SLD. *See* Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 196 (Dep't of Educ., OSEP 2007) [hereinafter OSEP Q&A].

⁸¹ There has been considerable controversy with the application of this three-tier model, but that is beyond the scope of this article. *See, e.g.*, Ciolfi &

struggle in the classroom do so because of a learning disability. While schools attempt multiple interventions to remediate students' academic deficiencies, these students are potentially being denied critical specialized educational instruction and services. In other words, the students are denied a FAPE under IDEA. The delay of the determination of eligibility for specialized educational instruction and related services while a child receives RTI creates a significant tension between IDEA's legal requirement of Child-Find and the educational system's desire to continue RTI and remediate a child's academic and behavioral challenges and deficits.

D. RTI and Disproportionality

Racial disproportionality is another potential negative effect of the implementation of RTI. There is a considerable body of research that students of color are disproportionately identified in the special education categories of intellectual disability and emotional

Ryan, *supra* note 27, at 314–18 (discussing both the questions that still remain about RTI as well as its use as both a diagnostic and a treatment); Townsend, *supra* note 50, at 260–65 (questioning the burden RTI puts on “already taxed public school teachers, who have neither the training nor incentives to properly achieve its idealistic goals” and the way RTI leaves “high-achieving students with reading and writing difficulties unprotected”); Weber, *supra* note 6, at 133–42 (noting issues with “bright” children who could benefit from special education but will not receive it under RTI, implementing RTI on a large scale, affording parents and children their procedural protections, and the interaction of disciplinary problems with delays in identification of a child with a disability). Moreover, the research on RTI has focused on early elementary students and reading ability, leaving very little known about the effectiveness of RTI for other subjects or for older students. See *Response-to-Intervention—The Promise and the Peril*, COUNCIL FOR EXCEPTIONAL CHILDREN, <http://www.cec.sped.org/AM/Template.cfm?Section=Home&CONTENTID=8427&TEMPLATE=/CM/ContentDisplay.cfm&CAT=none> (last visited Mar. 30, 2012); see also *Research Spotlight on Response to Intervention*, NAT'L EDUC. ASS'N, <http://www.nea.org/tools/13038.htm> (last visited Mar. 30, 2012) (detailing recent studies on RTI effectiveness). There is also criticism that although the RTI model can identify at-risk students, it may not be able to identify a specific disability as it may be prone to systematic errors in identifying students with SLD. See *RESPONSIVENESS TO INTERVENTION AND LEARNING DISABILITIES*, *supra* note 34, at 11–13.

behavioral disorder.⁸² In response to the disproportionate percentages of minority students in these categories, it is posited that RTI and Early Intervening Services (EIS) have “the potential to reduce racial disparity in special education identification, particularly for children with learning disabilities, and to provide needed support to struggling students without labeling them.”⁸³ On the other hand, “RTI has the potential to cause delays in identification, increase disproportionality in other disability categories, and exacerbate already pronounced disparities in student discipline rates.”⁸⁴ Of particular concern is that if identification of minority students as needing special education and related services is delayed as a result of RTI, then these students are at an even higher risk than their peers of being disciplined, suspended, expelled, and a higher risk of increasing disproportionality in discipline referrals.⁸⁵ Under IDEA, students with disabilities who are served in special education have more procedural rights and protections from long-term suspensions (exceeding ten school days) and expulsions than non-disabled students.⁸⁶ Thus, there is a potential trade-off between employing

⁸² See generally Sarah E. Redfield & Theresa Kraft, *What Color is Special Education*, 41 J.L. & EDUC. 129, 171–74 (2012) (applying Supreme Court jurisprudence to racial data); Torin D. Togut, *The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 AM. U. J. GENDER SOC. POL’Y & L. 163, 164–65 (2011) (discussing racial disparities); Rebecca Vallas, *The Disproportionality Problem, The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL’Y & L. 181, 184–85 (2009) (proposing several reforms for a broken system). For an extensive analysis and study of overidentification of black students in special education, see RACIAL INEQUITY IN SPECIAL EDUCATION xv, xx (Daniel J. Losen & Gary Orfield eds., 2002).

⁸³ Ciolfi & Ryan, *supra* note 27, at 318.

⁸⁴ *Id.*

⁸⁵ *Id.* at 322. There are a number of widely accepted studies that demonstrate black students, especially black males, are disciplined, suspended, and expelled from school at a disproportionate rate than white students. See Togut, *supra* note 82, at 165 n. 11, 175–78 (showing rates of suspension for black students between two to three times higher than for white students across all grade levels).

⁸⁶ 20 U.S.C. § 1415(k) (2006); 34 C.F.R. § 300.530–.537 (2012); Ciolfi & Ryan, *supra* note 27, at 324 (providing data showing that students of color, particularly black males, are disciplined at higher rates and receive harsher discipline than white students exhibiting the same or similar behaviors). An analysis and examination of the disciplinary procedures for students with

RTI, which may decrease the unnecessary labeling of minority students, but may also reduce the number of minority students with disabilities protected against long-term suspensions and expulsions.⁸⁷ In fact, a student who needs a referral for an evaluation for a behavioral disorder may not be timely referred because RTI is designed to address challenging classroom behaviors.⁸⁸ RTI does have the potential to reduce referrals caused by behavior related to schoolwork avoidance and academic failure.⁸⁹ These trade-offs should be considered when implementing RTI, especially in schools and school systems with a racially disproportionate rate of school discipline.

III. IDEA'S CHILD FIND REQUIREMENTS

IDEA mandates State and local educational agencies identify, locate, and evaluate all children with disabilities, including those who are home-schooled, homeless, wards of the state, or in private schools.⁹⁰ This affirmative duty is commonly known as "Child Find."

disabilities would be lengthy and not particularly helpful in the context of this Article. Suffice it to say that the procedural safeguards and protections for students with disabilities under IDEA can be used to prevent or mitigate harsher disciplinary sanctions that may be typically imposed against non-disabled students by public school disciplinary panels and tribunals.

⁸⁷ Ciolfi & Ryan, *supra* note 27, at 328–29.

⁸⁸ *Id.*

⁸⁹ *Id.* at 332.

⁹⁰ 20 U.S.C. § 1412(a)(3) (2006); 34 C.F.R. § 300.111(a) (2012) ("All children with disabilities residing in the State, . . . regardless of the severity of their disability[ies], and who are in need of special education and related services, are identified, located, and evaluated; and [a] practical method is developed and implemented to determine which children [with disabilities] are currently receiving needed special education and related services."). The Child Find duty exists for children who are suspected of being children with disabilities under 34 C.F.R. § 300.8 and in need of special education, even though they are advancing grade to grade. 34 C.F.R. § 300.111(c)(1). Furthermore, a school district may have a continuing obligation to evaluate students for suspected disabilities after prior determinations have been made that the students are ineligible for special education. *Id.* § 300.111(c)(2); *see* Kruvant v. District of Columbia, 99 F. App'x 232 (D.C. Cir. 2004). When a child is suspected of being a child with a disability, the LEA has an obligation to ensure that the "child is assessed in all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(B) (2006); 34 C.F.R. §§ 300,

A. Child Find Jurisprudence

Generally, courts find Child Find obligations triggering an evaluation of a student when the LEA has reason to suspect that: (1) the student has a disability and (2) there is a resulting need for special education services.⁹¹ When this obligation has been triggered, LEAs and schools must evaluate the student within a “reasonable time.”⁹² Courts look to the specific facts and circumstances in each instance to determine the LEA’s Child Find duty.

In the Ninth Circuit Court of Appeals, the Child Find obligation is triggered when there is reason to suspect a disability and special education services that may be needed to address the child’s disability, supported by “ample” evidence in the record that the school district was on notice of the student’s disability.⁹³ The District Court for the District of Columbia also required ample evidence, but distinguished the facts used by the Ninth Circuit, concluding there was a lack of “ample” evidence to support the school district being on notice of the child’s learning disability.⁹⁴ The district court held that a parent’s request for the school to provide in-school help for her child, rather than a request for a

304(c)(4). For an exhaustive analysis of Child Find obligations under IDEA and Section 504, see MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 10:1–:12 (3d ed. 2008).

⁹¹ See, e.g., *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008).

⁹² *Id.*

⁹³ E.g., *W.H. ex rel. B.H. v. Clovis Unified Sch. Dist.*, No. CVF 08-0374 LJO DLB, 2009 WL 1605356, at *14 (E.D. Cal. June 8, 2009) (citing Dep’t of Educ., *State v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001)).

⁹⁴ *Reid v. District of Columbia*, 310 F. Supp. 2d 137, 146–47 (D.D.C. 2004), *rev’d on other grounds*, 401 F.3d 516 (D.C. Cir. 2005). Other circuits likewise disagree on how much knowledge is necessary to create a duty under Child Find. Compare *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F.Supp. 2d 1307, 1311 (D. Utah 2002) (finding material issue of fact regarding whether District violated Child Find provisions), with *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 225–29 (D. Conn. 2008) (finding no Child Find violation because meetings with school officials alone do not constitute sufficient notice and knowledge to trigger obligation to identify and evaluate child). Child Find obligations, nonetheless, are child specific and require the application of trained professional educational judgment. See *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 496 (7th Cir. 2012).

psychoeducational evaluation of her child, was insufficient to trigger the Child Find obligations of the IDEA.⁹⁵

The Third Circuit Court of Appeals has taken a slightly different approach in defining the contours of the Child Find requirements. In *W.B. v. Matula*,⁹⁶ the circuit noted that the Child Find requirements do not establish a deadline for when children who are suspected of having a disability must be identified and evaluated.⁹⁷ This circuit infers from Child Find that this requirement must be met within a “reasonable time” after school officials are on notice of behavior that may indicate a disability.⁹⁸ In addition, the Third Circuit opined that the failure to imply a reasonable time obligation on school districts would eviscerate the duty and thwart the legislative intent that children be identified, evaluated, and provided a FAPE.⁹⁹

⁹⁵ *Reid*, 310 F. Supp. 2d at 147.

⁹⁶ 67 F.3d 484 (3d Cir. 1995), *overruled, in part, on other grounds by*, *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 799 (3d Cir. 2007) (en banc).

⁹⁷ *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995).

⁹⁸ *Id.* The courts have not drawn a bright line as to what constitutes a “reasonable time” to identify and evaluate a student suspected of having a disability. *D.G. ex rel. B.G. v. Flour Bluff Indep. Sch. Dist.*, 832 F. Supp. 2d 755, 764 (S.D. Tex. 2011). Some courts have ruled that a few months is unreasonable while others have ruled that a year or longer is reasonable depending upon the circumstances. *See, e.g., New Paltz Cent. Sch. Dist. v. St. Pierre ex rel. M.S.*, 307 F. Supp. 2d 394, 401 (N.D.N.Y. 2004) (finding delay of approximately ten months from time parent informed the school district of child’s educational problems until time of evaluation was violation of Child Find); *O.F. ex rel. N.S. v. Chester Upland Sch. Dist.*, 246 F. Supp. 2d 409, 417–18 (E.D. Pa. 2002) (finding delay of nearly one year from time of observation that child was experiencing emotional problems until evaluation constituted Child Find violation); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 952 (W.D. Tex. 2008) (finding thirteen month period between request for evaluation and school district’s offer to evaluate unreasonable).

⁹⁹ *W.B. v. Matula*, 67 F.3d at 501 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (holding that school official who fails to carry out Child Find duty within a reasonable time understands that he is violating that duty); *see also C.G. v. Five Town Cmty. Sch. Dist.*, No. 05-237-P-S, 2007 WL 494994, at *25 (D. Me. Feb. 12, 2007) (adopting Child Find duty standard articulated in *W.B. v. Matula* and *Cari Rae S.*); *St. Pierre*, 307 F. Supp. 2d at 400 n. 13 (applying Child Find not only to children with disabilities but also to children suspected of having disabilities and in need of special education services); *Anders v. Indian River Sch. Dist.*, No. CS05-02707, 2007 WL 1574452, at *13 (Del. Fam. Ct. Jan. 19, 2007)

The District Court in the Eastern District of Virginia, in *School Board of City of Norfolk v. Brown*,¹⁰⁰ expanded Child Find, holding that a school district's failure to comply with Child Find constituted a procedural violation of IDEA.¹⁰¹ In so holding, the district court adopted the reasoning from *W.B. v. Matula* and *Cari Rae S.* that Child Find obligations are triggered when the school district has reason to suspect that the child may have a disability and that special education services may be necessary to address that disability.¹⁰² To establish a procedural violation of Child Find, the parent "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate."¹⁰³

B. Child Find Issues: Parental Consent & RTI

The IDEA implementing regulations require LEAs to promptly request parental consent to evaluate the child for special education and related services under the statutory timeframe.¹⁰⁴ A State educational agency may choose to establish a specific timeline requiring LEAs to seek parental consent for an evaluation if the student has not made progress that a LEA believes is adequate.¹⁰⁵ OSEP has not defined a time limitation to seek parental consent for

(following *W.B. v. Matula* and remanding to due process educational panel for determination whether District timely identified child with a disability for services).

¹⁰⁰ *Sch. Bd. of City of Norfolk v. Brown*, 769 F. Supp. 2d 928 (E.D. Va. 2010).

¹⁰¹ *Id.* at 942–44 (citing *Forest Grove Sch. Dist v. T.A.*, 557 U.S. 230, 244–45 (2009)).

¹⁰² *Id.* at 942. A LEA may be on notice of a child's disability where: (1) the parent has expressed a concern in writing to supervisory or administrative personnel, or a teacher of the child that the child is in need of special education and related services; or (2) the parents has requested an evaluation of the child under 20 U.S.C. § 1414(a)(1)(B); or (3) the teacher of the child or other LEA personnel has expressed specific concerns about a pattern of behavior exhibited by the child directly to the director of special education or other supervisory personnel of the LEA. 20 U.S.C. § 1415(k)(5)(B) (2006); 34 C.F.R. § 300.534 (2012).

¹⁰³ *Sch. Bd. of City of Norfolk*, 769 F. Supp. 2d at 943 (quoting *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007)).

¹⁰⁴ 34 C.F.R. § 300.309(c) (2012).

¹⁰⁵ DOE MEMORANDUM, *supra* note 15, at 3.

an evaluation, but several months may be inappropriate if the student is suspected of having a disability.¹⁰⁶ In addition, a parent may initiate a request for an initial evaluation to determine if a child has a disability, which the school must either honor or give written notice of its intention not to conduct an evaluation.¹⁰⁷ The parent, on the other hand, has an absolute right to request an evaluation regardless of whether the LEA or school is attempting to implement RTI.¹⁰⁸ The only question remaining is whether the school must under any circumstance acquiesce to the parent's request to evaluate the child.¹⁰⁹

The Child Find obligations impose a legal duty upon educators to timely locate, identify, and evaluate a child suspected of having a disability, even while the child is being served under the RTI model.¹¹⁰ Despite this requirement, there is evidence that when parents approach educators and administrators with questions about their child's performance in the classroom, educators prefer to continue using RTI rather than making a timely referral of the child for a psychoeducational evaluation. Paradoxically, "[i]n many situations, campuses, referral teams, and classroom teachers are being asked to provide documentation that they have implemented serious interventions to address a student's difficulties in the classroom before a referral is allowed to proceed to evaluation."¹¹¹

¹⁰⁶ *Id.*

¹⁰⁷ 34 C.F.R. § 300.301(b) (2012).

¹⁰⁸ *Id.*

¹⁰⁹ See Stone County (MS) School District, 52 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 51 (Dep't of Educ., OCR 2008) (concluding that District was not required to refer student for evaluation under Section 504 because student responded favorably to RTI and his grades and test scores improved); *cf. id.* (concluding that District violated Section 504 for failing to notify parent of decision not to evaluate student or provide notice of procedural rights); 20 U.S.C. § 1415(c)(1) (2006); 34 C.F.R. § 300.503(a) (2012) (requiring prior written notice under IDEA when LEA refuses to evaluate student).

¹¹⁰ See *infra* Part IV for a more extensive analysis and discussion of case law involving Child Find obligations and RTI; see also Jose L. Martin, *Legal Implications of Response to Intervention and Special Education Identification*, RTI ACTION NETWORK (Oct. 18, 2011), <http://www.rtinetwork.org/learn/ld/legal-implications-of-response-to-intervention-and-special-education-identification>.

¹¹¹ Martin, *supra* note 110. Further, the data collected during the RTI process puts schools in an awkward situation, as the school now has a data-based record of a student with a disability. See Smith & Bales, *supra* note 67, at 413. At

Nonetheless, LEAs and schools may not use “RTI to delay or deny a timely initial evaluation to determine if a child is a child with a disability and, . . . [provide] special education and related services [for the child] pursuant to an individualized education program.”¹¹²

IV. ANALYSIS OF FEDERAL, STATE, AND ADMINISTRATIVE DECISIONS ON RTI AND CHILD FIND REQUIREMENTS UNDER IDEA

As explored by this Article, there are a number of factors that influence and exert pressure on administrators and educators to comply with Child Find obligations, such as implementation of RTI and a state’s SLD eligibility standards. These and other factors are critical components for timely identification of students with learning disabilities. It is not surprising that judges have issued decisions regarding the implementation of RTI and Child Find obligations that are fact specific to the circumstances of the case. Judges are less likely to broadly create new obligations under Child Find, preferring to narrowly limit rulings to the specific facts of the case. As a result, court and administrative decisions regarding the ostensible tension between RTI implementation and Child Find obligations will vary significantly from one jurisdiction to another, and there is no recognizable pattern or discernible trend at this point.¹¹³ There may be small threads of consistency, however, that provide guidance as to how courts might decide similar cases in the future. We will examine a number of federal court, state court and administrative decisions, memorandum, and rulings that may help practitioners make sense of this Helter Skelter area of the law.

this point, the school is obligated to administer a special education evaluation on that child, even if the RTI process is not complete.

¹¹² DOE MEMORANDUM, *supra* note 15, at 1. The Child Find duty is not absolute. The Connecticut District Court ruled that a parent cannot prevail on a claim for alleged violation of Child Find simply because the District instituted a regular pre-referral process for special education eligibility. *A.P. v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 227–29 (D. Conn. 2008).

¹¹³ See Martin, *supra* note 110.

A. Federal Decisions

In *Michael P. v. Department of Education*,¹¹⁴ the Ninth Circuit Court of Appeals considered an appeal by Courtney G., a minor with dyslexia, from the district court's order affirming the Administrative Hearings Officer's decision that the Hawaii Department of Education (HDOE) lawfully found Courtney ineligible for specific learning disability services under the IDEA.¹¹⁵ At the end of Courtney's fourth-grade year, an evaluation team met to determine if she was eligible to receive special education and related services for a SLD.¹¹⁶ After Courtney was evaluated, the HDOE determined that she was not eligible for special education because she did not exhibit "a severe discrepancy" between her IQ test and her achievement on standardized tests.¹¹⁷ Courtney, through her mother, contested her eligibility determination and requested that the RTI model be used instead.¹¹⁸ HDOE's special education regulations did not permit the use of RTI to determine SLD and only recognized the severe discrepancy model.¹¹⁹ The Ninth Circuit held that "[t]he plain and unambiguous language of § 300.307(a) prohibits states from requiring exclusive reliance on the 'severe discrepancy model' and also requires states to allow use of the 'response to intervention model.'"¹²⁰ Because the HDOE did not amend its regulations to conform to the 2004 IDEA amendments, it procedurally violated IDEA by requiring the use of the severe discrepancy model to determine SLDs.¹²¹ Accordingly, the Court

¹¹⁴ 656 F.3d 1057 (9th Cir. 2011).

¹¹⁵ *Id.* at 1059–60.

¹¹⁶ *Id.* at 1063; see 34 C.F.R. §§ 300.307–311 (2012).

¹¹⁷ *Michael P.*, 656 F.3d at 1063.

¹¹⁸ *Id.* at 1062.

¹¹⁹ *Id.* at 1067; see HAW. CODE R. § 8-56-26 (LexisNexis 2012) (repealed Nov. 23, 2009).

¹²⁰ *Michael P.*, 656 F.3d at 1067; see also Letter to Zirkel, 47 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 268 (Dep't of Educ., OSEP 2007) (agreeing that state educational agency can neither require LEA to use severe discrepancy test or prohibit its use to determine SLD eligibility). Conversely, RTI cannot be used as the sole procedure to determine SLD eligibility. *Id.*

¹²¹ *Michael P.*, 656 F.3d at 1069. As recognized by the court, Hawaii's DOE amended its regulations after Courtney's case was decided at the district court level. *Id.* at 1067. The new regulations do not require a severe discrepancy

remanded the case to determine, by a preponderance of the evidence, whether Courtney is eligible for special education services under Hawaii's current SLD classification.¹²² The Court also remanded for determination of whether Courtney's mother is entitled to reimbursement of Courtney's private school tuition and related expenses.¹²³

In *Ms. H. v. Montgomery County Board of Education*,¹²⁴ T.H., a student in the Montgomery Public Schools, first experienced behavioral problems in first grade and was later diagnosed with Attention Deficit Disorder (ADD) in the second grade.¹²⁵ At this time, T.H.'s parent requested that T.H. be placed on a Section 504 Plan due to her ADD.¹²⁶ T.H. developed more significant health problems in middle school that caused her to miss school, but she still passed all of her classes.¹²⁷ In high school, T.H. continued to struggle academically despite receiving Section 504 accommodations for her health problems.¹²⁸ Her grades were poor during her sophomore year of high school, and she failed a number of subjects on her high school graduation exam.¹²⁹ T.H.'s parent brought a due process complaint against the District's Board of Education, raising a

between intellectual ability and academic achievement, and permit use of the RTI model. See HAW. CODE R. § 8-60-41(a)(1)-(2) (LexisNexis 2012).

¹²² *Michael P.*, 656 F.3d at 1069; see also Letter to Zirkel, 50 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 49 (Dep't of Educ., OSEP 2008) (noting no requirement under 34 C.F.R. § 307(a)(3) for alternative procedures to RTI to be "scientifically based"—only required to be researched based). This is a subtle yet significant distinction for academics and practitioners to ponder, interpret, and apply.

¹²³ *Michael P.*, 656 F.3d at 1069–70. During Courtney's sixth grade year, the mother withdrew her from public school and enrolled her in a private school. *Id.* at 1064. To recover costs of private tuition and related expenses, the court held Courtney must first prove that she qualified for SLD eligibility under the amended regulations of the HDOE. *Id.* at 1069–70. This may be a small consolation to Courtney, who did not receive specialized instruction and services for her dyslexia during fourth and fifth grades.

¹²⁴ 784 F. Supp. 2d 1247 (M.D. Ala. 2011).

¹²⁵ *Id.* at 1252.

¹²⁶ *Id.* A Section 504 plan is developed in accordance with the regulations implementing Section 504 in 34 C.F.R. §§ 104.30–104.37 (2012).

¹²⁷ *Id.* at 1253.

¹²⁸ *Id.*

¹²⁹ *Ms. H.*, 784 F. Supp. 2d at 1254.

number of claims, including whether T.H. qualified for special education as SLD.¹³⁰ The hearing officer concluded that T.H. did not have a SLD or other health impairment and did not qualify for special education and related services.¹³¹ The parent filed an appeal and argued, among other things, that the hearing officer failed to determine whether her child had a SLD.¹³² T.H.'s parent unsuccessfully argued on appeal that her daughter had a SLD.¹³³ The district court, although somewhat concerned with the reasoning of the hearing officer, ruled that the hearing officer considered more than just the severe discrepancy test in denying T.H. eligibility for a SLD.¹³⁴ The district court noted that the Hearing Officer considered a number of factors for denying eligibility—namely, T.H.'s poor attendance and attitude problems, and that her low grades were caused by these factors, instead of a learning disability.¹³⁵ Interestingly, T.H.'s parent argued that her daughter received a number of research-based interventions (or RTI) as part of the Section 504 Plan and that she was not making sufficient progress to meet State approved grade-level standards based on the RTI model.¹³⁶ The court rejected the parent's argument and deferred to the hearing officer's findings because this was a fact-specific inquiry.¹³⁷ The district court concluded that whether T.H. had a SLD was a close question, one that favors the District based on the entirety of the record and the hearing officer's determination that T.H. did not have a learning disability.¹³⁸

¹³⁰ *Id.* at 1255–56. The parent complained that the school district failed to comply with Child Find, but the district court held that this issue was not timely raised. *Id.* at 1258; see 34 C.F.R. 300.508–300.507 (2012) (providing due process complaint and procedures).

¹³¹ *Ms. H*, 784 F. Supp. 2d at 1256.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1255.

¹³⁵ *Id.*

¹³⁶ *Ms. H*, 784 F. Supp. 2d at 1254.

¹³⁷ *Id.* (noting insufficiency of T.H.'s argument because of lack of explanation of which research-based intervention occurred and what process was used). Given the constellation of factors for determining SLD eligibility, virtually every such decision will be fact-specific.

¹³⁸ *Id.*

M.M. & E.M. v. Lafayette School District,¹³⁹ a case that closely examines the RTI model, held that a District's assessments that used the RTI model were appropriate.¹⁴⁰ C.M. enrolled in Lafayette Elementary School at the beginning of his kindergarten year.¹⁴¹ The school district began providing C.M. with RTI under Tier 1 and Tier 2, as well as additional instructional support from a reading specialist.¹⁴² In first grade, C.M. continued to receive Tier 1 support.¹⁴³ In 2007, C.M.'s first-grade year, the District conducted a psychoeducational assessment to determine his eligibility for special education.¹⁴⁴ C.M.'s parents claimed that this assessment was improper and inadequate.¹⁴⁵ More specifically, they claimed, in part, that the assessment failed to properly diagnose C.M. with an "auditory processing disorder" rather than a phonological processing disorder.¹⁴⁶ After reviewing the administrative record, the district court found that the 2007 Assessment was adequate.¹⁴⁷ The court found that IDEA allows school districts to determine eligibility for a SLD by using either the RTI model or the severe discrepancy model.¹⁴⁸ The court also found the IDEA only requires disclosure of RTI data if the RTI model is used to make an eligibility determination.¹⁴⁹ The District did not have a duty to disclose RTI data because a severe discrepancy model, not the RTI model, determined C.M.'s eligibility for a SLD.¹⁵⁰ The court further

¹³⁹ Nos. CV 09-4624, 10-04223 SI, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012).

¹⁴⁰ *Id.* at *22.

¹⁴¹ *Id.* at *1.

¹⁴² *Id.* at *14.

¹⁴³ *Id.*

¹⁴⁴ *M.M.*, 2012 WL 398773, at *14.

¹⁴⁵ *Id.* For an extensive review of the procedural history of this action, see *M.M.*, 2012 WL 398773, at *2.

¹⁴⁶ *Id.* at *15. The district court found that these two disorders are simply a distinction with no meaningful consequence, as C.M.'s core problem was reading. *Id.* at *16. Thus, the court agreed with the ALJ's finding that labeling of the diagnosis was irrelevant. *Id.*

¹⁴⁷ *Id.* at *17.

¹⁴⁸ *Id.* at *16; see also 20 U.S.C. § 1414(b)(6) (2006).

¹⁴⁹ *M.M.*, 2012 WL398773, at *19; see also 34 C.F.R. § 300.311(a)(7)(i)–(ii) (2012).

¹⁵⁰ *M.M.*, 2012 WL398773, at *17.

considered whether the district violated IDEA for failing to consider RTI in the development of the IEP.¹⁵¹ The court ruled that there is no statutory or regulatory authority in IDEA that the IEP committee must consider RTI data.¹⁵² As noted by the court, IDEA does not require the disclosure of RTI data if it is not used in the eligibility determination for a SLD.¹⁵³

A more exemplary federal court decision involving the clash between RTI and Child Find obligations is *Daniel P. v. Downingtown Area School District*.¹⁵⁴ In *Daniel P.*, Daniel enrolled in the District for kindergarten, during which he received informal remedial interventions.¹⁵⁵ In first grade, Daniel was diagnosed with ADD and received additional reading intervention through an Instructional Support Team (IST).¹⁵⁶ Daniel's parents subsequently requested a multi-disciplinary evaluation under IDEA.¹⁵⁷ After the evaluation was completed, the District determined Daniel had a SLD in reading, based on a severe discrepancy between his cognitive ability and reading comprehension.¹⁵⁸ The school district did not, however, determine Daniel's eligibility for special education under the IDEA.¹⁵⁹ Daniel continued to manifest academic difficulties and continued to receive interventions through an IST.¹⁶⁰ At the beginning of third grade, Daniel's parents secured an independent educational evaluation that showed a delay in his reading, math, and writing skills.¹⁶¹ The District reevaluated Daniel and concluded that he had a SLD and was eligible for special education under IDEA

¹⁵¹ *Id.* at *21–22.

¹⁵² *Id.* at *22; see 20 U.S.C. § 1404(b)(6) (2006); 34 C.F.R. § 300.309 (2012).

¹⁵³ *M.M.*, 2012 WL398773, at *19.

¹⁵⁴ No. 07-4363, 2011 WL 4572024 (E.D. Pa. Oct. 3, 2011).

¹⁵⁵ *Id.* at *1.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* A multi-disciplinary evaluation is commonly referred to as a psychoeducational evaluation and must be conducted in accordance with the procedures set forth in 34 C.F.R. §§ 300.300–.305 (2012).

¹⁵⁸ *Daniel P.*, 2011 WL 4572024, at *1.

¹⁵⁹ *Id.* (relying on continued classroom support instead of an IEP).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

because of his deficits in reading, math, and writing.¹⁶² Before an IEP meeting could be held,¹⁶³ Daniel's parents withdrew him from public school, providing no notice nor gaining approval from the District, and enrolled him in a private school that provides educational programming for students with disabilities.¹⁶⁴ Daniel's parents attended the scheduled IEP meeting and requested a due process hearing, seeking tuition reimbursement for enrolling Daniel in private school and compensatory education from the failure of the District to provide him with special education prior to his third grade year.¹⁶⁵ A due process hearing was held, and the hearing officer found that the district failed to identify Daniel as eligible for special education under IDEA, and that the parents were entitled to compensatory education and tuition reimbursement.¹⁶⁶ The District appealed this decision to the Pennsylvania Special Appeals Panel, which reversed the hearing officer's decision, and the parents then filed an appeal to the district court for judicial review.¹⁶⁷ One of the salient issues on appeal was whether the District timely identified Daniel as eligible for special education.¹⁶⁸ The hearing officer found

¹⁶² *Id.*

¹⁶³ The substantive provisions and procedures for developing an IEP are found at 34 C.F.R. §§ 300.320–300.325 (2012).

¹⁶⁴ *Daniel P.*, 2011 WL 4572024, at *2.

¹⁶⁵ *Id.* See also 34 C.F.R. § 300.507(a). Under IDEA, a parent may seek equitable remedies, including but not limited to, compensatory education and reimbursement of private school tuition. See 34 C.F.R. § 300.516(c)(3) (2012) (allowing the court to grant appropriate relief). The word “appropriate” has varying interpretations by the courts. See, e.g., *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993) (granting appropriate relief under IDEA of reimbursement for private school tuition even when the private school did not meet state educational standards); *Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 369–70 (1985) (granting appropriate relief of prospective injunction requiring school officials to develop, at public expense, IEP placing child in private school); *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 325 (4th Cir. 2009) (providing factors to consider when fashioning appropriate relief); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1285 (11th Cir. 2008) (stating that district court is not barred from ordering private school placement as remedy).

¹⁶⁶ *Daniel P.*, 2011 WL 4572024, at *2. The district court ruled Daniel's parents did not comply with the notice requirements of the statute for requesting tuition reimbursement at 20 U.S.C. § 1412(a)(10)(C)(iii) (2006). *Id.* at *9.

¹⁶⁷ *Daniel P.*, 2011 WL 4572024, at *2.

¹⁶⁸ *Id.* at *3–4.

the District should have known of Daniel's need for special education even if he was making adequate progress when supported by the IST.¹⁶⁹ The Appeals Panel disagreed and found that the District properly relied upon the RTI assessment in third grade to identify him as a child requiring special education services.¹⁷⁰ Daniel's parents offered no evidence to rebut the district's contention that Daniel made progress under the RTI model.¹⁷¹ The district court concluded that there was no basis for the District to have acted sooner in determining that Daniel was eligible for special education services.¹⁷² To the contrary, there was evidence Daniel made progress through first and second grades.¹⁷³ Daniel began to exhibit academic difficulties at the end of the second grade and early in the third grade.¹⁷⁴ The district court held that based on the deference to the Appeals Panel decision and other evidence, the District timely identified Daniel as needing special education in third grade.¹⁷⁵

In *Jackson v. Northwest Local School District*,¹⁷⁶ a first grade student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and provided with specific interventions (not specifically called RTI).¹⁷⁷ By the third grade, the student's behaviors escalated and affected his educational performance.¹⁷⁸ Instead of evaluating the student for a suspected disability and eligibility for special education, the District suspended him.¹⁷⁹ The parent, who was dissatisfied with the District's actions, requested a due process hearing.¹⁸⁰ After hearing testimony and receiving evidence, the hearing officer rejected the parent's argument that the District should have identified the student as a child with a disability.¹⁸¹ The State

¹⁶⁹ *Id.* at *4.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Daniel P.*, 2011 WL 4572024, at *5.

¹⁷³ *Id.* at *4.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *5.

¹⁷⁶ No. 1:09-cv-300, 2010 WL 3452333 (S.D. Ohio Aug. 3, 2010).

¹⁷⁷ *Id.* at *1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Jackson*, 2010 WL 3452333, at *2.

Level Review Officer, however, reversed the hearing officer's decision.¹⁸² On appeal, the district court affirmed and ruled the school district should have suspected the student had a disability, as the evidence showed the student made little progress in nearly two years.¹⁸³ The District's intervention team also recommended the student be referred to an outside mental health agency for an evaluation.¹⁸⁴ Therefore, the District unduly delayed performing an evaluation after it should have suspected the student had a disability and might be eligible for special education.

Currently, the paucity of federal court decisions fails to give practitioners in the field of special education much insight as to how the federal courts will attempt to reconcile the LEA's Child Find obligations with RTI implementation. The *Michael P.* and *Ms. H.* decisions do not establish how the eligibility criteria for SLD will be applied on a state-by-state basis except that a state cannot prohibit the use of the RTI model to make this eligibility determination. Further, the *M.M.*, *Daniel P.*, and *Jackson* decisions are limited to the facts regarding state SLD eligibility standards and Child Find obligations under IDEA. Helpfully, there is a growing body of state administrative decisions that may shed further light on this subject.

B. State Administrative Decisions

In *Meriden School District*,¹⁸⁵ a second grade student, who was receiving low grades in both language arts and conduct and effort, was targeted with RTI, hoping to address the student's poor academic and behavioral progress.¹⁸⁶ Over several months, the District did not collect any data to monitor how the student responded to RTI.¹⁸⁷ The parent requested an evaluation under IDEA and Section 504, to which the District did not acquiesce, failing to evaluate the student.¹⁸⁸ Subsequently, the parent filed a due process

¹⁸² *Id.* at *3.

¹⁸³ *Id.* at *10.

¹⁸⁴ *Id.*

¹⁸⁵ 56 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 30 (Ill. State Educ. Ass'n 2010).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

complaint per IDEA, challenging the District's failure to comply with the Child Find obligations.¹⁸⁹ The hearing officer ruled that the District violated Child Find, rejecting the District's argument that it never suspected the student had a SLD.¹⁹⁰ The hearing officer also found that the RTI process did not address the student's needs and that he did not respond positively to RTI, because the student had a hearing impairment that adversely affected his educational performance—he should have been timely identified, evaluated, and provided a FAPE.¹⁹¹

In another analysis of RTI and Child Find obligations, the parent in *Citrus County (FL.) School District*,¹⁹² sought to leapfrog over the District's evaluation procedures to determine the eligibility of her child for special education.¹⁹³ The parent expressed concern that her child was not making adequate progress with RTI, and secured an independent educational evaluation, which revealed that the child had ADHD, Oppositional Defiant Disorder, and Bipolar Disorder.¹⁹⁴ Subsequently, the parent requested a due process hearing and claimed a violation of Child Find.¹⁹⁵ The Administrative Law Judge (ALJ) ruled that the parent of a child receiving RTI may request an evaluation before the District completes its RTI interventions.¹⁹⁶ Before a parent attempts to leapfrog over the evaluation procedures, however, the District must be allowed to complete its interventions if the child is making slow and steady

¹⁸⁹ *Id.*

¹⁹⁰ *Meriden*, 56 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 30 (Ill. State Educ. Ass'n 2010).

¹⁹¹ *Id.* The hearing officer's decision rejects the notion that by implementing RTI, LEAs may inoculate themselves against IDEA or Section 504 liability. If RTI is implemented, LEAs must demonstrate that it is benefitting the student academically and behaviorally. It is prudent for school districts to implement RTI, and if appropriate, simultaneously evaluate students suspected of having disabilities.

¹⁹² 54 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 40 (Fla. State Educ. Ass'n 2009).

¹⁹³ *Id.*

¹⁹⁴ *Id.* See 34 C.F.R. § 300.502 (2012) (providing procedures for parents to obtain independent educational evaluation (IEE)).

¹⁹⁵ *Citrus County*, 54 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 40 (Fla. State Educ. Ass'n 2009).

¹⁹⁶ *Id.*

progress.¹⁹⁷ The ALJ found that even though the child had multiple disabilities, the IEE did not constitute a comprehensive evaluation sufficient to determine special education eligibility.¹⁹⁸

Finally, there are two State educational decisions that involve a confusing and esoteric analysis of what constitutes a “severe discrepancy” under state standards.¹⁹⁹ In *South Orange-Maplewood (NJ) Board of Education*,²⁰⁰ J.B. entered first grade and was evaluated by the child study team.²⁰¹ The team diagnosed J.B. with a SLD and determined him eligible to receive special education and related services under the state’s severe discrepancy test.²⁰² Three years later, the child study team re-evaluated J.B. and determined that he was no longer eligible because he did not show a one and a half percent (or twenty-two point) discrepancy under New Jersey’s severe discrepancy regression analysis test.²⁰³ The team made this decision based upon the Estimator 3.0 program, which requires a ninety-five percent chance that a severe discrepancy exists when comparing achievement scores on the identified areas and student’s intellectual ability.²⁰⁴ The team also considered J.B.’s standardized test scores, and his improvement in mathematics, social studies, science, reading comprehension, and listening comprehension skills.²⁰⁵ J.B.’s parent

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* See 34 C.F.R. § 300.502(b)(1) (allowing parent to request IEE at public expense if parent disagrees with district evaluation subject to the provisions of §§ 300.502(b)(2)-(4)). If parent obtains an IEE at her own expense it must be considered if it meets district criteria. See § 300.502(c); see also Letter to Zirkel, 52 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 77 (Dep’t of Educ., OSEP 2008) (disallowing reimbursement for IEE where district had not completed evaluation and parent disagreed with district’s decision to use RTI data as part of evaluation to determine child’s eligibility for special education).

¹⁹⁹ These cases demonstrate that the severe discrepancy test is fatally flawed in its application and that it causes substantial delays in the identification of children with SLDs.

²⁰⁰ 53 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 135 (N.J. State Educ. Ass’n 2009).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *South Orange-Maplewood*, 53 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 135 (N.J. State Educ. Ass’n 2009).

subsequently, requested a due process hearing to challenge this decision.²⁰⁶ The hearing officer rejected the parent's argument that the team relied solely upon the Estimator 3.0 program and that J.B. was dyslexic.²⁰⁷

The ALJ in *High Tech Middle Media Arts School & Desert Mountain SELPA*²⁰⁸ found the child did not qualify as a child with a SLD under both the severe discrepancy test and RTI model.²⁰⁹ The ALJ noted that there were competing theories by the parties' experts whether the student had a severe discrepancy and sided with the school system's experts that the student did not have a severe discrepancy.²¹⁰ The ALJ found the student received A's and B's in middle school classes and had a grade point average of 3.74.²¹¹ The student scored on the high end of California's STAR test in English-Language Arts, in the middle level in Mathematics, and in the high range on California's Achievement Tests.²¹² The ALJ reasoned, in the alternative, that even if the student did not qualify for SLD eligibility under the severe discrepancy test, he still could not qualify for such eligibility under the RTI model because he was not underachieving in a single academic area or failing to meet any grade level standards.²¹³ Because of his high performance, no RTI was even attempted on the student.²¹⁴ The ALJ found that the student did

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ 47 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 114 (Cal. State Educ. Ass'n 2007).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *High Tech Middle Media Arts School*, 47 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 114 (Cal. State Educ. Ass'n 2007). California law permits the use of both the severe discrepancy test and RTI model in determining SLD eligibility. A recent district court decision provides a lengthy analysis of the application of California's severe discrepancy test to SLD identification. *See* E.M. v. Pajaro Valley Unified Sch. Dist., No. C-06-4694, 2012 WL 909514, at *15-27 (N.D. Cal. Mar. 16, 2012) (describing why student did not meet this standard and qualify as SLD).

²¹⁴ *High Tech Middle Media Arts School*, 47 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 114 (Cal. State Educ. Ass'n 2007).

not need special education and related services, ruling in favor of High Tech.²¹⁵

*C. U.S. Department of Education, Office of Special Education Programs*²¹⁶

As part of its responsibilities, OSEP issues guidelines and memorandum, including such topics as RTI implementation, Child Find, and SLD eligibility.²¹⁷ LEAs have separate, yet blended, obligations under the 2004 IDEA amendments, RTI, Child Find, and state SLD standards.²¹⁸ These obligations raise significant, shifting legal responsibilities for LEAs, which create a host of questions: How long can a district employ RTI before it must conduct a formal evaluation under Child Find? Can RTI data be used as a measure of SLD eligibility? Can parents secure a psychoeducational evaluation of their child during the RTI process, or must they wait for RTI to conclude?²¹⁹ These are a few of the daunting and challenging questions that are often raised by LEAs and parents when faced with the Helter Skelter world of SLD eligibility.

²¹⁵ *Id.*

²¹⁶ Among other things, OSEP is responsible for monitoring and enforcing state and local educational agencies' compliance with IDEA and its implementing regulations. 20 U.S.C. § 1416 (2006). *See generally Welcome to OSEP*, DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/osep/index.html> (last visited May 23, 2012) (describing functions and responsibilities of OSEP).

²¹⁷ *Welcome to OSEP*, *supra* note 216.

²¹⁸ *Id.*

²¹⁹ This question cannot be answered without closer review of state regulations regarding RTI and special education referral. In Georgia, for example, educational regulations require that “[p]rior to referring a student for consideration for eligibility for special education and related services, a student must have received scientific, research or evidence based interventions selected to correct or reduce the academic, social or behavioral problem(s) the student is having.” However, “[e]xceptions may be made in circumstances where immediate evaluation and/or placement is required due to a significant disability.” GA. COMP. R. & REGS. 160-4-7-.03-2 (2012). This regulation could be misinterpreted by LEAs to delay referral of *any* child even when the parent has requested an evaluation, there is evidence that the child has a disability and is in need of special education and related services, and they are advancing grade to grade. *Cf.* 34 C.F.R. § 300.111(c)(1) (2012).

In a seminal memorandum on the interplay of RTI and Child Find, OSEP stated that the use of RTI does not diminish a LEA's obligation under IDEA to obtain parental consent and evaluate a student in a timely manner.²²⁰ When there is a reason to suspect that a student has a disability and is in need of special education and related services, IDEA evaluation procedures are triggered regardless of whether the LEA is utilizing RTI with that student.²²¹ OSEP emphasized that it would be inconsistent with the evaluation provisions elucidated in 34 C.F.R. § 300.301 through § 300.11 for a LEA to reject a referral and delay the provision of an initial evaluation on the basis that a student has not participated in the RTI process.²²² OSEP cautioned that the LEA is free to deny an evaluation in response to a referral if it does not suspect a disability, but it must then notify the parent of this decision and cannot be simply waiting to see how the student responds to RTI.²²³

OSEP has also issued responses to requests for guidance on the role of RTI in public and private schools, attempting to provide answers to educators, administrators, professionals, attorneys, and other stakeholders in the area of special education. For example, in *Letter to Zirkel*,²²⁴ OSEP allowed use of RTI data as a component of a comprehensive individual evaluation, consistent with 34 C.F.R. §§

²²⁰ DOE MEMORANDUM, *supra* note 15, at 1–2.

²²¹ *Id.* Cf. Letter to Combs, 52 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 46 (Dep't of Educ., OSEP 2008) (requiring expedited evaluation under 34 C.F.R. § 300.530 for child facing disciplinary procedures, regardless of ongoing RTI process).

²²² DOE MEMORANDUM, *supra* note 15, at 3.

²²³ *Id.* See also 34 C.F.R. § 300.301(b) (2012). Previously, OSEP stated that a SEA may establish a specific timetable requiring a LEA to secure parental consent for a student if the student has not made progress. See OSEP Q&A, *supra* note 80, at 84. OSEP's implication was that the LEA has discretion to determine adequate progress as circumstances may vary from child to child. The IDEA defines no timetable for an evaluation, but waiting several months before evaluating may be inappropriate if the student is suspected of having a disability and might benefit from special education and related services. *Id.* OSEP warned against requiring a RTI process before the LEA had successfully implemented that process over time; cf. Letter to Anonymous, 49 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 106 (OSEP 2007) (allowing use of RTI to aid identification of students with SLD, even when RTI is not fully implemented in all district schools).

²²⁴ Letter to Zirkel, 56 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 140 (OSEP 2011).

300.304-300.311.²²⁵ OSEP further stated that 34 C.F.R. § 300.307(a)(2) requires states to permit the use of RTI data as a part of a psychoeducational evaluation, but only for a child that is suspected of having a SLD.²²⁶ *Letter to Zirkel* indicates that RTI data should be consulted as part of a full educational evaluation for any student that has participated in the RTI model. In the same response, OSEP addressed whether private schools must utilize the RTI model. In this instance, OSEP determined that, if a private school is under a LEA's jurisdiction, it is not required to implement RTI.²²⁷ A private school may not, however, deny or delay a referral for an evaluation because it does not use RTI.²²⁸ To comply with the LEA's Child Find duty, a private school must ensure that if the child is suspected of having a disability and may be eligible for special education and related services, it makes a referral for an evaluation and conducts an initial evaluation, with parental consent, within sixty days.²²⁹

*D. Department of Education, Office for Civil Rights*²³⁰

OCR has issued findings for several complaints dealing with RTI's use in evaluations.²³¹ In *Polk County (FL) Public Schools*,²³²

²²⁵ *Id.*

²²⁶ *Id.* See also *Letter to Clarke*, 51 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 223 (OSEP 2008) (allowing district to determine role of speech and language pathologist involved in RTI model and implementation because of unique qualifications to assess and evaluate a potential SLD child).

²²⁷ *Letter to Zirkel*, 56 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 140 (OSEP 2011).

²²⁸ *Id.*

²²⁹ *Id.* See 34 C.F.R. § 300.301(c)(1)–(2) (2012).

²³⁰ OCR monitors recipients of Federal financial aid for compliance with several federal laws, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-4 (2006), Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1683 (2006), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006), and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134 (2006). OCR has procedures in place to deal with complaints based on violations of these laws. See 34 C.F.R. §§ 104.61, 106.71 (2012). For more about OCR, see *Office of Civil Rights: Overview of the Agency*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/index.html> (last visited May 24, 2012).

²³¹ OCR does not have jurisdiction to enforce IDEA.

the parents requested a psychoeducational evaluation of their child in September 2009, providing documentation of his ADHD to the district.²³³ The District informed the parents that the student had to complete the RTI process before he could be evaluated.²³⁴ The District eventually evaluated the student in March 2010, but the parents claimed it was untimely.²³⁵ OCR determined that Section 504 requires a District to evaluate any student, who, because of a disability, needs or is believed to need special education or related services before making an initial placement.²³⁶ The District's policies only required an evaluation when the district suspected the student had a disability that would result in Section 504 eligibility.²³⁷ In this case, the District had sufficient evidence that the student *may* need special education or related services because of his ADHD and should have conducted an evaluation within a reasonable period of time after it had reason to suspect that the student might qualify for special education and related services under Section 504.²³⁸ Further, OCR stated that Section 504 Child Find obligations may be triggered when there have been general education interventions, such as RTI, implemented for the student, but there is evidence that RTI is inappropriate to address the student's immediate needs and the nature and severity of his areas of educational concern.²³⁹ For these reasons, OCR found the District violated Section 504.²⁴⁰

²³² Polk County (FL) Public Schools, 56 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 179 (OCR 2010).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* See also 34 C.F.R. § 104.35(a)–(b).

²³⁷ Polk County (FL) Public Schools, *supra* note 232. This is a critical distinction; neither IDEA nor Section 504 requires that an evaluation must result in the student's eligibility for special education and related services. Rather, an evaluation is triggered when there is reason or suspicion to believe that the student has a disability, and who, because of the disability, *might* be eligible under IDEA or Section 504.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

In *Harrison School District Two*,²⁴¹ the District knew a student was diagnosed with ADHD when he enrolled in 2008.²⁴² The student exhibited challenging behaviors that continued to deteriorate over time; and, despite the student's diagnosis and behaviors, the district chose to implement RTI rather than evaluate the student.²⁴³ The implementation of RTI, however, did not ameliorate the student's worsening behaviors, and the parent requested an evaluation in the fall of 2010, which the District denied.²⁴⁴ OCR found the District violated Section 504 and its implementing regulations because the district unduly delayed evaluating the student to determine his eligibility for special education for nearly eighteen months after learning of the student's diagnosis of ADHD.²⁴⁵ OCR further found that the RTI process does not justify delaying or denying an evaluation of a student who is believed to have a disability and may need special education or related services.²⁴⁶ OCR noted that RTI may have been justified to identify promising instructional strategies, but it did not warrant delay in evaluation where there's a need.²⁴⁷

In *Stone County (MS) School District*,²⁴⁸ a sixth grade student with ADHD started RTI in August 2007.²⁴⁹ In October 2007, the parent requested an evaluation of her child under Section 504.²⁵⁰ At that time, the District did not refer the child for an evaluation because it believed that an evaluation was unnecessary.²⁵¹ The parent then filed a complaint with OCR claiming that an evaluation was necessary.²⁵² After the investigation was complete, OCR concluded

²⁴¹ *Harrison (CO) School District Two*, 57 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 295 (OCR 2011).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Harrison (CO) School District Two*, *supra* note 241.

²⁴⁷ *Id.*

²⁴⁸ *Stone County (MS) School District*, 52 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 51 (OCR 2008).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

that the District was not required to conduct an evaluation as the District did not have a reasonable belief that the child needed special education or related services.²⁵³ Furthermore, the student's grades improved after implementation of RTI, and he performed adequately on tests.²⁵⁴ In closing this investigation, OCR found the District violated Section 504 for failing to notify the parent of its decision not to evaluate her child and failing to provide notice of procedural safeguards.²⁵⁵

V. CONCLUSION

The 2004 IDEA amendments, in part, reflect a compromise. States are permitted to adopt SLD eligibility standards that incorporate the severe discrepancy test, an RTI model, or both, and are prohibited from completely excluding use of either the severe discrepancy test or RTI. Although there is considerable research that discredits the severe discrepancy test for fostering a system where students must "wait to fail"²⁵⁶ before they are identified and evaluated for special education and related services, some states continue to use this test as the primary assessment to determine SLD disability. Thus, the 2004 IDEA amendments reflect an apparent cognitive dissonance by Congress that continues to allow states to use the severe discrepancy test to identify students with a SLD, regardless of its limited validity in this circumstance.

We have the following recommendations for Congress and the U.S. Department of Education to help fix the Helter Skelter through the future reauthorization of IDEA. First, they should set a timeline for elimination of the severe discrepancy test to determine SLD eligibility. The continued reliance on this test by many states reinforces the idea that political compromises often result in misguided and unwarranted educational policies. Some states use the

²⁵³ Stone County (MS) School District, *supra* note 248.

²⁵⁴ *Id.*

²⁵⁵ *Id.* This OCR ruling does not explain what would constitute a reasonable belief that a child with a disability might need special education and related services.

²⁵⁶ Nicole Strangeman et al., *Response-to-Instruction and Universal Design for Learning: How They Might Intersect in the General Education Classroom?*, LD ONLINE (2006), <http://www.ldonline.org/article/13002>.

severe discrepancy test; some states use the RTI model; and some states use both the discrepancy test and RTI model. This makes no sense. No sound educational policy justifies why a student in Boise, Idaho, does not have the same SLD eligibility criteria as a student in Macon, Georgia. While there may be state and local differences in how the SLD eligibility criteria are applied, we agree that the same eligibility criteria should apply. If we continue to allow states to use whichever criteria they prefer, the Helter Skelter method of identifying students with learning problems and determining their IDEA eligibility for SLDs will surely continue indefinitely. Although the RTI model still has significant flaws in the SLD identification and eligibility process, these flaws are much fewer compared to the inherent and incurable weaknesses of the severe discrepancy test. Recent research and studies on the RTI model demonstrate that it is more promising than the severe discrepancy test in timely identifying children with learning difficulties.²⁵⁷ Therefore, we believe that the RTI model should eventually supersede the severe discrepancy test as the primary vehicle for SLD identification and eligibility.

Second, RTI needs to be further researched and studied, especially to determine how effective it is in identifying children suspected of having a SLD. Currently, there is little research on the efficacy of RTI for middle and high school students generally, and none regarding its use for SLD eligibility. Although the RTI model has noticeable weaknesses in the identification of children with SLD, there is a growing body of scientific, peer-reviewed studies, and research that shows this model can be improved and used more effectively in the identification purpose. Congress and the U.S. Department of Education should continue to foster grants and studies that will (hopefully) justify reliance on RTI as the primary method for identifying children with SLD.

Finally, the circuit and district courts have adopted varying standards for Child Find obligations. Congress is unlikely to change the IDEA Child Find obligations in a way that would create a more uniform standard. This may be unnecessary, however, if states adopt broad and detailed policies and procedures for identification of children suspected of having a SLD. OSEP and OCR should be more

²⁵⁷ See *supra* note 35 and accompanying text.

proactive in this arena, developing and implementing memorandum, policies, and specific other guidance to help states identify when Child Find obligations begin and when RTI can continue or should end. The RTI model and Child Find obligations can co-exist provided that states vigorously monitor and enforce their own policies, regulations, and procedures. This will promote uniformity among school districts regarding when and how RTI is implemented for a student with potential learning difficulties. School districts can even avoid unwanted litigation and expense for Child Find violations by understanding that RTI and Child Find obligations are not mutually exclusive. They can be implemented simultaneously when appropriate, as long as it is ensured that there is no unreasonable delay in the identification of a student for special education and related services under IDEA. For those students that may not qualify for SLD eligibility under the IDEA, LEAs should continue to ensure that students are timely referred for evaluation and eligibility under Section 504.

There are a number of salient predictors of success for students with learning disabilities as they become adults and move into the world of employment, communities, post-secondary education, and other life endeavors.²⁵⁸ To ensure that students with learning disabilities are successful while they attend school, we must be vigilant in timely identification of these students for remedial teaching support and interventions such as RTI and special education and related services. Timing is critical. Significant lags in the identification and eligibility process will cause these students educational, emotional, and other intangible harm.²⁵⁹ To achieve this goal, we must move from the current Helter Skelter world of SLD eligibility into a world of predictability and stability.

²⁵⁸ See Roberta J. Goldberg et al., *Predictors of Success in Individuals with Learning Disabilities: A Qualitative Analysis of a 20-Year Longitudinal Study*, 18 LEARNING DISABILITIES RES. & PRAC. 222, 222 (2003) (finding predictors of self-awareness, proactivity, perseverance, goal setting, presence and use of effective social support systems, emotional stability and emotional copy strategies).

²⁵⁹ See Myres S. McDougal et al., *Human Rights and World Public Order: Human Rights in Comprehensive Context*, 72 NW. U. L. REV. 227, 233 (1978) (listing ways that world illiteracy leads to deprivation of enlightenment).