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# Is Response to Intervention the Answer to the Eligibility Mess?

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# IS RESPONSE TO INTERVENTION THE ANSWER TO THE ELIGIBILITY MESS?<sup>1</sup>

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## ABSTRACT

The 2004 Amendments ushered in new controversial provisions to the 30 year-old Individuals with Disability Education Act (IDEA). In an effort to cure several issues at once, one of these provisions allows districts to replace the much maligned discrepancy model with a process referred to as the Response to Intervention (RtI) model. RtI was intended to more accurately identify students as eligible under the category of learning disabilities under the IDEA, with a conscious focus on avoiding over-identification and mis-identification. Another priority was early intervention. These lofty goals were certainly worthwhile, but were they realistic? And, has RtI, as it is commonly implemented, taken on more than it should? This article will examine RtI from its inception to its appropriate place in the eligibility of students within the category of learning disabilities. It will argue that RtI has its place, but is not the answer to the eligibility mess without modification. Instead, it has chipped away at some of the core rights upon which the IDEA was founded when it leaves parents out of the process, and denies students services by delaying the eligibility process.

## INTRODUCTION

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

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<sup>1</sup> Mark C. Weber, *The Eligibility Mess*, 57 Buff. L. Rev. 83 (2009).

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<sup>2</sup> 20 USC 1415 (k)(1)(E).

*Nathan's father had been asking for evaluations since the beginning of his seventh grade year. By this time in April, he sought evaluations on his own. While the evaluations were pending, the school and parents agreed to seek a 504 plan under the ADA to temporarily provide services to assist both the school and Nathan to finish out his seventh grade year. The evaluations were completed and shared with the school in June, 2009. The following fall the school initiated a functional behavioral assessment to complete the evaluation process. In the meantime, the school system had begun to implement the Response to Intervention (RtI)<sup>3</sup> process as a means to determine eligibility for special education of students with disabilities. A formal training and consistent implementation of this process was expected in the following year. As the program was in its infancy in this school district, each school was left to interpret the policy on its own.*

*In Nathan's case, the result was that he was caught in multiple tiers<sup>4</sup> of RtI several times, but never determined eligible for special education services under the IDEA because the school determined that it had to complete the RtI process before it could refer him for evaluation. The process was not completed that school year, and Nathan moved on to high school. Over the summer, each school was trained in the RtI process and new hope arose that Nathan would be determined eligible. Finally, in January of this 9<sup>th</sup> grade year, when he had yet to have an eligibility determination meeting his father elicited the assistance of an attorney to file a due process request. Days after the filing of the request, Nathan was arrested and incarcerated. Another tragic statistic, a child that seems to have fallen through the cracks.<sup>5</sup> Nathan was finally determined IDEA eligible as a student under the other health impaired category on October 14, 2011 – almost 2 ½ years after his father first requested a determination of eligibility.<sup>6</sup>*

Nathan's case exemplifies a problem with the systemic reliance on RtI as a required step in the eligibility determination process – the perpetual cycles of interventions during which parents have no procedural

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<sup>3</sup> Response to Intervention refers to one specific amendment made in the 2004 reauthorization of the Individuals with Disabilities Education Act, under the provision of determining a student eligible for IDEA services under the disability of learning disability. Rather than depending on determining a child eligible due to a discrepancy between the IQ and achievement of a child, this option allows states to identify a child eligible as a student with a learning disability if that child fails to make adequate progress after scientific, research based interventions have been provided to that child. 20 U.S.C. §1414(b)(6)(B)(2011).

<sup>4</sup> Discussed further infra section III. B.

<sup>5</sup> Personal anecdote from author's experience.

<sup>6</sup> Interview with Beverly Brown, Nathan's current attorney, Jacksonville, Florida October 14, 2011.

protections. As problematic as the process seems, it also has the potential to resolve some lingering issues in the determination of eligibility of students with learning disabilities, as well as to address academically at-risk students who otherwise may not qualify for remedial or special education services.

As several scholars have noted, the eligibility pendulum has swung to and fro, and it may well be time to try to stop it in its center.<sup>7</sup> It is also undisputed that the general education system in this country has suffered as compared to other nations' systems. But, is this provision of the Individuals with Disabilities Education Act (IDEA), a law protecting rights of students with disabilities and their parents, the correct vehicle for complete school reform?

The original purpose of RtI was merely to correct an outdated method for determining eligibility for special education services under the category of specific learning disabilities.<sup>8</sup> In order for it to work for its intended purpose, however, the process must overhaul both the general and special education systems beginning with the core curriculum of the general education. Is this seemingly minor amendment to the IDEA meant to affect school reform on such a grand scale?

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

The language of IDEA permits, but does not require the use of RtI to identify students as eligible under a learning disability diagnosis. Further, it is permitted as an alternative to the discrepancy model which can no longer be imposed by states upon districts as the sole process for determining eligibility.<sup>9</sup> This is not to say that parents must rely on RtI to have their child determined eligible; it merely says that states cannot require districts to solely rely on the discrepancy model.

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<sup>7</sup> See Robert A. Garda, *Who is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291 (2006); Wendy Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 Hastings L.J. 1147 (2007); Mark C. Weber, *The Eligibility Mess*, 57 Buff. L. Rev. 83 (2009).

<sup>8</sup> *Learning Disabilities and Early Intervention Strategies: How to Reform the Special Education Referral and Identification Process*, Hearing before the Subcommittee on Education Reform of the Committee on Education and the Workforce, House of Representatives, 107<sup>th</sup> Congr. 65 (2002)[hereinafter *Hearings*](statement of Chairman Michael Castle).

<sup>9</sup> 20 U.S.C. § 1414(b)(6)(B)(2008).(prior to IDEIA, the statute was silent on the method to determine eligibility for specific learning disabilities. See 20 U.S.C. § 1414(b)(2003).

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

But is this process effective and therefore necessary on the grand scale into which it has evolved? The answer is, no. The inherent problem with RtI is that while it is funded with IDEA funds, there is no accountability under IDEA. There is no notice requirement. There is no timeline requirement. There is no structure for teachers or parents to fall back on when schools and districts fail to implement the process in a meaningful way. For teachers it can become one more added burden with little benefit for their classroom,<sup>10</sup> and for parents it is one more hurdle to overcome before getting much needed assistance for their children.

The bypass of the parent seems to defeat the purpose of the IDEA. “Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by ... *strengthening the role and responsibility of parents* and ensuring that *families of such children have meaningful opportunities to participate* in the education of their children at school and at home[.]”<sup>11</sup> Since it is not special education, the procedural protections of IDEA do not attach. Thus, when a teacher recognizes through the screening devices that are part of the first tier of interventions that a student is not progressing adequately, there is no requirement to notify the parent of either the weakness or the plan to correct that weakness. While best practices suggest that the parents should be notified in writing<sup>12</sup> to maintain a respectful and collaborative partnership, it is not necessary.<sup>12</sup> In other words, a student who has been identified as struggling in reading or behavior<sup>13</sup> can be cycled through the tiers over

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<sup>10</sup> Mrs. W, *infra* note 345.

<sup>11</sup> 20 U.S.C. § 1400(c)(5)(B)(2008)(emphasis added).

<sup>12</sup> Email to Tanya H., dated January 4, 2012 from Heather Diamond, Multi-tier System of Supports (MTSS) Liaison for Florida’s Problem-solving/RtI Project at USF in collaboration with Florida Department of Education (FDOE)(stating that there are no set time periods of when to notify the parents. Additionally, “in the broader scope of establishing district wide expectations, I caution against modeling expectations after the more compliance driven ESE procedures.”); Swartz et al, *supra* note 99, at 26.

<sup>13</sup> The concomitant relationship between learning disabilities and behavioral problems especially in older children is a common thread in discussing this process. See, President’s Commission on Excellence, 22; Hearings, *supra* note 5, at 28 (Testimony of Mr. Kovaleski,).

dozens of weeks before the parents are ever notified of the original concern by the teacher.

Taking the plain meaning of the IDEA provision on its face, it seems to offer school districts the option of declaring a that a child may have a learning disability by using “a process that determines if the child responds to scientific, research-based intervention *as part of the evaluation procedures*[.]”<sup>14</sup> The language clearly states that this process is part of the evaluation procedures, rather than a precursor to them. While there is diagnostic value to multiple iterations of the interventions, the endless cycle that can occur also merely prolongs the evaluation process from ever getting officially started, thereby delaying services to those children who need them and procedural accountability of the district. Recognizing that RtI is part of the evaluation process starts the timeline requirements. This would create a tension between concluding the evaluations in a timely manner as dictated by the state and federal statute, and the time needed to work through the tiers of interventions in a meaningful manner. This tension, however, may benefit both the parents and the school personnel, by forcing the schools to cycle through the tiers efficiently. Rather than attempting several interventions in a trial and error manner with no clear end, a time line will force the school personnel to carefully scrutinize each intervention. This would assist those schools, such as Mrs. W’s, that request different information after the collection of RtI data. It will also assist those schools even with better RtI implementation that Ms. Roberts<sup>15</sup> has encountered that just do not know when to stop the intervention cycles.

Along with the procedural protections, RtI’s substantive scope may need to be re-assessed. This provision was initially intended to more accurately diagnose students who may have a learning disability only. And, more specifically, the precedent programs and specialists in the area were focused on reading in the early grades, Kindergarten to grade 2. Maintaining the focus on the initial intent is essential in both RtI’s success and acceptance. While there is little evidence in either direction whether the comprehensive model of RtI is successful, the precedent programs addressing reading in from Kindergarten through grade 2 have shown that children make progress. Common to these success stories was support from the administration, “buy in” from the faculty, and focus on reading at the younger grade levels. As the RtI model deviates from this successful approach it becomes diluted and less effective.

In order to illustrate how far RtI may have strayed from the original intent of the EAHCA, now known as the IDEA, it is important to examine the origin of the statute. First, this article will look at the history and

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<sup>14</sup> 20 U.S.C. § 1414(b)(6)(B)(2008)(emphasis provided).

<sup>15</sup> See *infra* section III D.2.

background of the IDEA and the current implementation of the most recent authorization of it, the IDEIA. Next, this article will discuss the complications with the current eligibility determination model. Third, it will describe the RtI provision of the IDEA by discussing its history, the potential legal issues raised, and its current implementation. Finally, the article will suggest that RtI can be useful, but only when utilized appropriately.

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

The education of students with disabilities has come a long way since the seminal cases of *Mills*<sup>16</sup> and *PARC*.<sup>17</sup> This section will briefly discuss the history of educating students with disabilities, including the evolution of the IDEA, the impact of *Rowley*, the IDEA since the 1997 amendments, and the amendments of 2004. Finally, this section will address the history of the Response to Intervention provision of the 2004 amendments, including the primary purpose behind it.<sup>18</sup>

### A. *Education is Important for All of Society*

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

Today, education is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. These days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>19</sup>

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

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<sup>16</sup> See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D. D.C. 1972).

<sup>17</sup> *Pa. Ass'n for Retarded Children v. Pa.*, 343 F. Supp. 279, (E.D. Pa. 1972)(hereinafter *PARC*).

<sup>18</sup> For a more thorough discussion on the background of the IDEA please see Rebekah Gleason, *IDEA & NCLB: Is There a Fix to Make Them Compatible?* *Children's Legal Rights Journal*, Volume 29, Number 4, Winter 2009.

<sup>19</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality in the Equal Protection Clause.<sup>20</sup>

Any child who does not receive an adequate or appropriate education are ill-prepared for independent living, and as a result, are less productive members of society. Children with disabilities that affect their education are at an even greater disadvantage. The importance of literacy has not diminished since 1982 as is evidenced by the precedent programs to RtI. Each of the three programs used as models for this process focused their attention to the literacy levels of children in the younger grades.<sup>21</sup>

#### *B. Legislative Background on the Purpose and Importance of the IDEA*

Throughout the early twentieth century, students who did not progress at an appropriate rate were considered “mentally deficient.”<sup>22</sup> These students were removed from the classroom because they distracted their classmates and consumed too much of their teachers’ time, not because they required special instruction.<sup>23</sup> Students with “mild” disabilities who did not pose problems were left in the classroom, but were given no support or intervention; they often floundered and dropped out of school at the first opportunity.<sup>24</sup>

Although it would take another twenty years for an effective federal special education statute to be passed, *Brown v. Board of Education* in 1954 marked the beginning of a trend towards greater equality in educational opportunities.<sup>25</sup> In the following decades, this trend eventually produced real advances for the education of students with disabilities.<sup>26</sup> In 1965, the Elementary and Secondary Education Act (ESEA) provided federal funding for generally improving the education of the disadvantaged,<sup>27</sup> and it was

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<sup>20</sup> *Plyler*, 457 U.S. at 222.

<sup>21</sup> *Hearings*, *infra* note 8, at 27 – 48, and 84 – 122. (describing programs at Hartsfield Elementary School, Tallahassee, FL; Cornwall-Lebanon School District, Lititz, Pennsylvania; Elk Grove, CA.)

<sup>22</sup> Michael A. Rebell & Robert L. Hughes, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 529 (1996).

<sup>23</sup> *Id.*

<sup>24</sup> Sara Tarver, *How Special Education Has Changed*, in CHANGING PERSPECTIVES IN SPECIAL EDUCATION 11 (Rebecca Kneeder & Sara Tarver eds., 1977).

<sup>25</sup> *Brown*, 347 U.S. 483.

<sup>26</sup> *See Mills*, 348 F. Supp. 866 (D. D.C. 1972).

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

amended the following year to provide targeted funding for children with disabilities.<sup>28</sup>

Despite this federal legislation, states continued to exclude students with disabilities from public school programs. Two state class action suits shaped the federal legislation for the disabled that eventually emerged. In the first of two cases, Pennsylvania excluded students with mental retardation from public school and excluded them from attendance requirements.<sup>29</sup> The Pennsylvania Association for Retarded Citizens (PARC) brought an action against the state in federal district court, which required Pennsylvania “to provide . . . to every retarded person between the ages of six and twenty-one . . . access to a free public program of education and training appropriate to his learning capacities.”<sup>30</sup> The decision also included specific notice and hearing rights afforded to parents and guardians of children with mental retardation.<sup>31</sup>

Later that same year, the District of Columbia District Court heard a similar case involving seven children that were denied education by the District of Columbia Public Schools.<sup>32</sup> As in *PARC*, the students in *Mills* were neither afforded an education, nor were they afforded due process procedural rights to appeal decisions of the board of education in expulsions, reassignments, or other denials of education to their children.<sup>33</sup> The *Mills* court, like the court in *PARC*, set out a detailed structure for procedural safeguards including notice and hearing requirements.<sup>34</sup> The *Mills* and *PARC* decisions became the framework for future legislation.<sup>35</sup>

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), signed into law as P.L. 94-142.<sup>36</sup> Structured primarily on the *PARC* and *Mills* decisions, the EAHCA mandated that states receiving federal special education funding ensure their intermediate and local education agencies provide a free appropriate public education to children with disabilities.<sup>37</sup> This federal spending statute required states to educate these children as much as possible with their non-disabled peers, but not to the detriment of their educational progress.<sup>38</sup> It also required appropriate evaluation procedures and mandated that an individualized education program (IEP) be designed for each child, to be reviewed at least

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<sup>28</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-750, 80 Stat. 1191, (1966).

<sup>29</sup> *PARC*, 343 F. Supp. 279, (E.D. Pa. 1972).

<sup>30</sup> *Id.* at 302.

<sup>31</sup> *Id.* at 288.

<sup>32</sup> *Mills*, 348 F. Supp. 866 (D.C. 1972).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> It should be noted that these were but two of the 30 or more suits brought in the nation prior to 1975.

<sup>36</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

annually.<sup>39</sup> In addition, the parents were to be afforded due process safeguards, including notice and hearing requirements.<sup>40</sup>

In 1990, the EAHCA was amended and renamed the Individuals with Disabilities Education Act in part to emphasize that the person was the foremost priority.<sup>41</sup> While the focus on results for students with disabilities has emerged more clearly in the most recent reauthorizations, the original focus on the individual student has consistently remained the foremost priority. The Act emphasizes the *individual* child's educational needs, and how that specific child's disability affects their success in the general education curriculum. When the child's disability no longer affects his or her educational achievement, and when the child's "other education needs that result from the child's disability" are ameliorated, the child no longer qualifies for special education services under the IDEA.<sup>42</sup> However, as long as the child's disability affects his or her achievement in the general curriculum, the child continues to require an IEP and special education services.

### *C. Procedural Protections are a cornerstone of the IDEA*

Recognizing that neither Congress nor courts are composed of education experts, Congress created procedures for State and Local Education Agencies to implement appropriate programs for qualifying children with disabilities.<sup>43</sup> The Supreme Court recognized the importance of the procedures as early as the 1981 *Rowley* decision, and as recently as the 2005:

The core of the statute, however, is the cooperative process that it establishes between parents and schools. State educational authorities must identify and evaluate disabled children, §§ 1414(a)-(c), develop an IEP for each one, § 1414(d)(2), and review every IEP at least once a year, § 1414(d)(4). Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 20 U.S.C. § 1400(a) (1990). *See also* MITCHELL L. YELL, THE HISTORY OF THE LAW AND CHILDREN WITH DISABILITIES 63(1998).

<sup>42</sup> *See* 20 U.S.C. § 1401(3) (2008) (Definition of a "child with a disability" means a child with any one or more of the listed disabilities, and who, by reason of the disability, needs special education and related services).

<sup>43</sup> 20 U.S.C. § 1414 (2009).

that the school will provide.<sup>44</sup>

Despite indications to the contrary,<sup>45</sup> most circuits have followed the standard enunciated by the Supreme Court in *Rowley* decision.<sup>46</sup> If this continues to be the case, then the often cited language still applies:

When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid . . . We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirement that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.<sup>47</sup>

In other words, the Supreme Court described the IDEA as an input-based mechanism.<sup>48</sup> So long as the IDEA's procedures are followed, the outcome will be adequate. In fact, as long as *Rowley* rules the day, the standard upon which courts judge all IDEA claims reflects this emphasis on procedure: "[T]he court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to

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<sup>44</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 2005 (citing Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist.v. *Rowley*, 458 U.S. 176, 205 - 206 (1982) (citing 20 U.S.C. § 1401). ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, ... as it did upon the measurement of the resulting IEP against a substantive standard") (citing 20 U.S.C. § 1414(d)(1)(A)).

<sup>45</sup> Johnson, Scott F., *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU Educ. & L.J. 561. (2003).

<sup>46</sup> *Warwick*, 361 F.3d 80 (finding that 1997 Amendments language "simply articulates the importance of teacher," and that it does not overrule *Rowley*); *Mansfield*, 618 F.Supp. 2d at 576 (agreeing with *Warwick* and stating that other courts have stated that had Congress intended to displace *Rowley* by its amendments to the IDEA it would have been much more explicit).

<sup>47</sup> *Rowley*, 458 U.S. at 205-06.

<sup>48</sup> *Id.*

receive educational benefits?”<sup>49</sup>

Under Section 1415 of the IDEA, Congress sets forth a comprehensive and detailed explanation of the procedural safeguards afforded to parents of children with disabilities, as well as children with disabilities whose parents are unknown.<sup>50</sup> The procedural safeguards contained in the IDEA are timelessly significant, especially in light of the effect of RtI because it falls outside the protections of IDEA.<sup>51</sup> The procedures create an opportunity for any party to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child.”<sup>52</sup> The procedures also detail notification requirements, due process complaint requirements, opportunity for mediation, as well the requirement for a resolution meeting, all in preparation for an opportunity to be heard by an independent hearing officer.<sup>53</sup> This is in stark contrast to the intentional lack of procedural protections for parents under the RtI process.<sup>54</sup>

## II. COMPLICATION WITH THE CURRENT ELIGIBILITY MODEL?

In order to receive services under the IDEA, a student must be determined eligible.<sup>55</sup> This generally requires a three part test: First, a disability classification; second, that disability “adversely affects educational performance”<sup>56</sup> and; third, “by reason thereof needs special education and related services.”<sup>57</sup> In other words, if a student with a disability requires special education to ameliorate the effects of that disability on their academic performance, that student should be afforded the protections and services found under the IDEA. Likewise, if the student either does not require, or no longer requires such services, they should not be found eligible, or should no longer be determined eligible for special education. While this sounds simple enough on its face, there are growing concerns that too many students are inappropriately identified because they either do not need the services to ameliorate the affects of a disability, or they are belatedly determined eligible.<sup>58</sup> Are too many children

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<sup>49</sup> *Id.* at 206-07.

<sup>50</sup> *Id.*

<sup>51</sup> *See generally* 20 U.S.C. § 1415 (2009).

<sup>52</sup> 20 U.S.C. § 1415(b)(6)(A) (2009).

<sup>53</sup> 20 U.S.C. § 1415(a)-(i) (2009).

<sup>54</sup> Email to Tanya Harrington, dated January 4, 2012 from Heather Diamond, *supra* note 12.

<sup>55</sup> 20 U.S.C. § 1414 (2008).

<sup>56</sup> This is not directly stated in the regulations, but implied.

<sup>57</sup> Weber, *supra* note 7, at 152.

<sup>58</sup> *Hearings, supra* note 8, at 2 (testimony of Michael Castel, chairman subcommittee).

inappropriately identified? Are others identified too late or not at all? Is it a mess? Does it need fixing? As one of its benefits, the proponents of RtI tout that this process will limit the number of inappropriately identified students – and students found eligible overall. The next section will discuss the mechanics of determining eligibility, the impact of eligibility determinations, and eligibility within the category of learning disability.

#### A. *Mechanics of Determining Eligibility for IDEA services and Protections*

Because RtI is placed in a subsection describing whether a student may have specific learning disability<sup>59</sup> and thereby qualifies as eligible under the IDEA, it is worthwhile to describe the elements of eligibility determinations historically.

The IDEA protects the rights and provides appropriate services to children with disabilities.<sup>60</sup> In determining whether a child qualifies for services and procedural protections under the IDEA, therefore, it is necessary to determine whether the child is one with a disability within the meaning of the term under the IDEA. Under the IDEA, the term “child with a disability” means a child with one of the listed enumerated disabilities, “who, by reason thereof needs special education and related services.”<sup>61</sup> In practice, courts utilize either a two or three part test to determine whether a child qualifies as eligible under the IDEA: “1) the child is diagnosed with an enumerated disability, that 2) adversely affects educational performance, and 3) by reason thereof needs special education.”<sup>62</sup> Many courts merge the first and second part because the “adversely affects” test can be considered as part of the disability diagnosis.<sup>63</sup>

The existence of a disability is not generally the factor that poses the most difficulty in the eligibility determination.<sup>64</sup> As previously mentioned, however, “adversely affects educational performance”<sup>65</sup> is often included as part of the disability element, and is more amorphous and problematic. An analysis of this element is best done by first recognizing what constitutes “educational performance,” and second, identifying what constitutes “adversely affected.”

As Professor Robert A. Garda explains, educational performance can be

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<sup>59</sup> 20 U.S.C. § 1414(b)(6)(B)(2008).

<sup>60</sup> 20 USC § 1400 (d)(2008).

<sup>61</sup> 20 UCS §1401 (3)(2008).

<sup>62</sup> Garda, *supra* note 7, at 294(citing *Babicz v. Sch. Bd.*, 135 F.3d 1420, 1422 n.10 (11<sup>th</sup> Cir. 1998) and *W. Chester Area Sch. Dist. V. Bruce C.* 194 F.Supp 2d 417, 420 (E.D. Pa. 2002)).

<sup>63</sup> Garda, *supra* note 7, at 294; Weber, *supra* note 7, at 152.

<sup>64</sup> Weber, *supra* note 7, at 152.

<sup>65</sup> 34 CFR § 300.8(c)1 – 13.

confined to a narrow definition of academic performance, or it could encompass non-academic areas such as social/emotional and inter-personal performance as well. States treat this differently, and do not always consider non-academic areas,<sup>66</sup> though both attendance and behavior are so inextricably linked to educational success that they should be considered.<sup>67</sup> Attendance should be considered as educational performance because it provides the opportunity to learning.<sup>68</sup> Likewise, behavioral problems, and by extension inter-personal and social interactions,<sup>69</sup> should also be considered educational performance areas.

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

It should be axiomatic that if a child requires services, including remedial non-special education services to perform adequately, then without those services, his/her education is adversely impacted.<sup>70</sup> Whether the child require *special education* services, and thereby is eligible, is established in the next prong. But, to deny that the child is adversely impacted educationally merely because it appears that these non-special education services assist the child in his/her educational performance, is to ignore the fact that the child requires some sort of assistance to adequately address an educational need.

Second, how adverse, does the impact have to be? Some districts contend that the "adversely affected" component requires "some significant impact on educational performance."<sup>71</sup> In rejecting that requirement, the First Circuit Court of Appeals correctly noticed that "adversely affects," as it appears in the regulatory language has no qualifier.<sup>72</sup> To the argument that such a low bar would open the floodgates of eligibility too much, it should be noted just what the purpose of this element is, and where it falls in the eligibility analysis. The purpose of the "adversely affects" language is to act as a gate keeper itself, limiting possible eligibility to those students with a disability only if it impacts educational performance.<sup>73</sup> Likewise, it limits eligibility to those students whose poor performance in school is due to a

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<sup>66</sup> *Mr. and Mrs. I v. Maine School Bd.* 480 F3d 1, 11 (2006).

<sup>67</sup> Garda, *supra* note 7, at 301-302.

<sup>68</sup> Garda, *supra* note 7, at 301.

<sup>69</sup> *Mr. and Mrs. I*, at 12.

<sup>70</sup> Garda, *supra* note 7, at 303 – 304.

<sup>71</sup> *Mr. and Mrs. I* at 13.

<sup>72</sup> *Mr. and Mrs. I* at 13.

<sup>73</sup> Garda, *supra* note 7, at 305.

disability rather than other factors.<sup>74</sup>

The final element of the eligibility analysis is “by reason thereof, the child needs special education and related services.”<sup>75</sup> Even if a child is found to have a disability that is adversely affecting his educational performance, the final filter that must be considered is whether special education is required to ameliorate the effects of the disability.<sup>76</sup> This inquiry into whether special education services are required to ameliorate the effects of a disability is further broken down into two questions: 1) what is need; and 2) what is special education.<sup>77</sup>

As Professor Garda astutely points out, the IDEA provides no clarification on the “need” standard,<sup>78</sup> nor do many states define the “need.”<sup>79</sup> Does a child need special education merely because that child would benefit from it? Or, does it require something more? And, if so, what level of need warrants eligibility?<sup>80</sup> Most agree that a certain level of “need” is required to warrant services.<sup>81</sup> Most also agree that the level of performance of the student is based on that student’s performance with non-special education services in place.<sup>82</sup> Moreover, as RtI is implemented more comprehensively across the board, students will be provided remedial non-special education services, and will not necessarily even be evaluated for special education eligibility until they fail to make progress with those interventions. The RtI process may answer the question at which level must a student fall below to “need” special education services. It is generally accepted the students who are failing need special education, and students who are performing above average in all academic and non-academic areas do not need special education.<sup>83</sup> The question is at what level between failing and excelling to acquire necessary life skills<sup>84</sup> does a student display a need for special education? Scholars and educators agree that students should be identified before complete failure. Early intervention provides the best chance of successful treatment.<sup>85</sup> The RtI process, with its focus on

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<sup>74</sup> *Id.*

<sup>75</sup> 20 USC §1401(3)(A)(ii); 34 CFR § 300.8(1)(a). Garda, *supra* note 7, at 306.

<sup>76</sup> *Id.*

<sup>77</sup> Garda, *supra* note 7, at 306.

<sup>78</sup> Garda, *supra* note 7, at 306. (citing Letter to Pawlich, 24 IDELR 959, 964 (OSEP 1995)).

<sup>79</sup> Garda, *supra* note 7, at 306.

<sup>80</sup> Garda, *supra* note 7, at 307 – 308.

<sup>81</sup> Garda, *supra* note 7, at 308.

<sup>82</sup> Garda, *supra* note 7, at 308- 309.

<sup>83</sup> Garda, *supra* note 7, at 313.

<sup>84</sup> Necessary life skills is meant to include both academic and non-academic areas as identified in *Mr. and Mrs. I.*

<sup>85</sup> Garda, *supra* note 7, at 313 – 314.

early intervention, just may help achieve this goal.<sup>86</sup>

Special education is the “adaption of the content, methodology or delivery of instruction to address a child’s unique needs, and to ensure access to the general curriculum.”<sup>87</sup> Related services are “transportation, and such developmental, corrective, and other supportive services . . . as many be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.”<sup>88</sup> In other words, if a child is determined eligible for special education services, they may also qualify for related services if those services assist the child in benefitting from special education. If the child requires only related services, the child may not qualify as a child eligible under IDEA unless the state’s definitions of those related services fall under one of the enumerated related services in it definition of special education.<sup>89</sup>

The harder question is to define special education in terms of eligibility. The definition as stated above leads to a few different interpretations. First, a broad interpretation of special education can lead to any adaptation of content, method, or delivery of general education is special education.<sup>90</sup> Second, a narrow interpretation limits the definition of special education to only significant and unique adaptations that meet the needs of the individual child rather than the generic needs of all students.<sup>91</sup> Third, a judicial approach presumes that all children otherwise eligible with a disability that adversely affects educational performance to a point that requires remediation through special education, are eligible.<sup>92</sup> This approach is circular in that it assumes that which it is meant to scrutinize. It is also over inclusive because it does not screen those students who may benefit merely from better instruction, especially those students with learning disabilities that affect their reading.<sup>93</sup> This latter group is precisely the group at which the RtI process is targeted.

Generally, there is disagreement on the level of adaptation that is needed in content, method, and delivery to constitute special education.<sup>94</sup> But, at the end of the day, a more legitimate and realistic approach may be to adopt a more conservative approach on where general education ends,

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<sup>86</sup> Drs. Stanley L. Swartz, Cathleen A. Geraghty-Jenkinson, Sherri Franklin-Guy, *Response to Intervention (RtI): Implementation and Legal Issues*. Education Law Association, No. 81 in the Monograph Series Dayton, Ohio. at 3(2011).

<sup>87</sup> Garda, *supra* note 7, at 317.

<sup>88</sup> 20 U.S.C. § 1401(26)(2008).

<sup>89</sup> Garda, *supra* note 7, at 318.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 320 – 330.

and special education begins. Professor Garda concludes that “children with enumerated disabilities should only be eligible if they need significant individualized instruction beyond that which is provided to all students.”<sup>95</sup> In suggesting that minor changes to delivery, content and instruction are merely good instruction instead of “special education,” Professor Garda lends support to the RtI process which assumes that most intervention begins with better teaching in the general education.

### *B. Purpose of eligibility determinations*

As discussed above, historically, children with disabilities were under educated.<sup>96</sup> According to the Bureau of Education for the Handicapped, U.S. Office of Education, in 1975 only 50% of the children with disabilities from ages 0 to 19 were served.<sup>97</sup> The Senate Labor and Public Welfare Committee noted that the long range implications for not appropriately serving this population would ultimately cost taxpayers more than the services would. Providing them proper services when they are younger will help them become productive members of society rather than forcing them to remain burdens on society.<sup>98</sup>

Despite the overwhelming need for such legislation, the Committee voiced three specific concerns before passing the bill: “1) misuse of appropriate identification and classification data within educational process itself; 2) discriminatory treatment as the result of the identification of a handicapping condition; and 3) misuse of identification procedures or methods which results in erroneous classifications of a child having a handicapping condition.”<sup>99</sup> Rep. Miller noted a concern that some of the tests used to identify disabilities were biased and discriminatory.<sup>100</sup> There were also concerns over the amorphous nature of the learning disabilities and that it may invite inconsistent eligibility determinations.<sup>101</sup> None of these concerns was unwarranted, and ultimately, the bill was passed with a cap of 12% of the total population, and 2% cap of identification for learning disabilities.<sup>102</sup>

Despite of these concerns, however, 1986 in a continuing effort to

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<sup>95</sup> *Id.* at 331.

<sup>96</sup> *See supra* Part I.B.

<sup>97</sup> S. Rep. 94-168, at 8 (1975).

<sup>98</sup> S. Rep. 94-168, at 9 (1975).

<sup>99</sup> S. Rep. 94-168, at 26-27 (1975).

<sup>100</sup> Hensel, *supra* note 7, at 1154 (citing 121 Cong. Rec. 25526, 25539 (1975) (statement of Rep. Miller)).

<sup>101</sup> Hensel, *supra* note 7, at 1154.

<sup>102</sup> *Id.* at 1155.

minimize the need for services later, early intervention<sup>103</sup> was expanded and the caps were lifted.<sup>104</sup> In 1990 the name of the Act changed to the Individuals with Disabilities Education Act to put the focus on the individual first, and the disability second.<sup>105</sup> The Act also expanded the disabilities it would serve, including autism, traumatic brain injury, and later Attention Deficit Hyper-Activity Disorder.<sup>106</sup> In 1997, the Amendments narrowed the reach of the Act by limiting eligibility to those children whose determining factor for eligibility was not due to lack of instruction in reading or math, nor because of limited English proficiency.<sup>107</sup> Education for children with disabilities has come a long way since 1975,<sup>108</sup> but students with disabilities still require the procedural protections of the IDEA to attain appropriate services.

While in some respects the Act has expanded its reach to include a broader range of the students, the practice by school districts, and confirmed by case law, has been to limit its reach by adhering to a restrictive reading of the eligibility requirements and, thereby, denying services to students who would otherwise qualify.<sup>109</sup> As noted in great detail above, the process to determine eligibility is flawed and inconsistent, but arguably necessary for three reasons. First, to limit IDEA costs by limiting the number of students entitled to a free, appropriate, public, education.<sup>110</sup> Second, eligibility determination requires a finding that the student has one of the enumerated disabilities, which historically assisted in programming decisions.<sup>111</sup> Finally, to allocate resources so that Congress is assured that the funds appropriated to states for special education, are actually being used for the education of children with disabilities, rather than the general education.<sup>112</sup>

Each of these three justifications has been diminished a bit over the years. First, federal funding is no longer tied to the number of students

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<sup>103</sup> Early intervention in this context means services provided during early childhood and preschool. This is not to be confused with the general reference of early intervention used throughout most of the paper that uses early intervention to mean assistance to children in the early stages of their educational problems.

<sup>104</sup> Mark C. Weber, *Special Education Law and Litigation Treatise*, LRP. at 11:1 (second edition)(2005)(to be updated when 3<sup>rd</sup> edition arrives).

<sup>105</sup> Yell, *supra* note 33, 20 U.C.S. §1400(a)(1990).

<sup>106</sup> Hensel, *supra* note 7, at 1156.

<sup>107</sup> Hensel, *supra* note 7, at 1158. (citing Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, §614(b)(5), 111 Stat. 37, 82 (codified as amended at 20 U.S.C. § 1414(b)(5) (2000)).

<sup>108</sup> 20 U.S.C. §1400(c)(3)(2007).

<sup>109</sup> Weber *supra* note 7, at 102.

<sup>110</sup> *Id.* at 95.

<sup>111</sup> *Id.* at 96.

<sup>112</sup> *Id.* at 92.

receiving special education services although some state and local funding is. Instead, it is based on total student population.<sup>113</sup> Second, there has been a lack of evidence linking specific disabilities with methods of instruction, and several models of programming combine instruction for varying disabilities.<sup>114</sup> Third, the most recent amendments cloud rather than clarify the distinction between general and special education funding when it calls for 15% of the funding to go to general education for early intervention.<sup>115</sup> According to the President's Commission on Excellence in Special Education, early intervention can "prevent disabilities in many children and ameliorate their impact on those who develop them."<sup>116</sup> With the use of these funds in conjunction with other specialized services already provided within the general education arena (such as services under No Child Left Behind, title I, the ADA of 1990, and section 504 of the Rehabilitation Act of 1973), many children are receiving specialized services without the imposition of a special education label.<sup>117</sup> All this with the ultimate goal of having all children succeed in the mainstream.<sup>118</sup>

The laudable goal of having all children succeed is not a reality.<sup>119</sup> Students with disabilities that require these protections and services are routinely denied eligibility by districts, thereby denying them rights to appropriate education, and denying their parents explicit procedural protections to enforce those rights.<sup>120</sup>

### C. *The Eligibility of Learning Disability Category*

No area is more controversial in eligibility determinations than learning disabilities.<sup>121</sup> As far back as 1975, there has been skepticism on the eligibility of students with specific learning disabilities.<sup>122</sup> The dissatisfaction with evaluation methods for children with learning disabilities lies at the heart of the Response to Intervention process.<sup>123</sup> The

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<sup>113</sup> *Id.* at 97.

<sup>114</sup> *Id.* at 97.

<sup>115</sup> 20 U.S.C. § 1413(f)(2007). *See also*, further discussion on the 15% funding in section III.C.2. *infra*.

<sup>116</sup> PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA; REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 23 (2002).

<sup>117</sup> Weber *supra* note 7, at 99 – 101.

<sup>118</sup> *Id.* at 101.

<sup>119</sup> *Id.* at 101.

<sup>120</sup> *Id.* at 102.

<sup>121</sup> *Hearings, supra* note 8, at 2 (testimony of Michael Castle, Chairman of subcommittee).

<sup>122</sup> Hensel, *supra* note 7, at 1153.

<sup>123</sup> *Hearings, supra* note 8, at 3 (testimony of Michael Castle, Chairman of

following section will address the effect Response to Intervention has in the context of education overall.

But first, although it was clear that the students with learning disabilities were indeed the most underserved population,<sup>124</sup> they were also the most controversial from the outset.<sup>125</sup> Congress' skepticism in diagnosing learning disabilities has not dissipated.<sup>126</sup> The most recent 2004 amendments focused on the current problem of over identification of students with specific learning disabilities.<sup>127</sup> There is an argument that over identifying students as learning disabled when they are not actually disabled denies those students the access to a meaningful high quality education in the mainstream, and limits future opportunities.<sup>128</sup> On the other hand, under identification leaves those students who are truly disabled unserved and often unable to effectively participate in society.

The solution to this conundrum, of course, is an accurate and reliable system of determining eligibility based on specific learning disabilities. And, there is no question that the discrepancy model used for identifying a student eligible by reason of a learning disability is a flawed process.<sup>129</sup> The IQ-achievement discrepancy model is the approach traditionally used to identify children with learning disabilities. If a student's score on the IQ test is significantly higher than his or her scores on an achievement test (for example one and half to two standard deviations (30 points)), the student is described as having a discrepancy between IQ and achievement and, therefore, as having a learning disability.<sup>130</sup>

According to one psychologist, the current discrepancy model is unreliable, invalid, easily undermined in practice, and harmful.<sup>131</sup> It is unreliable because it is unstable.<sup>132</sup> It is invalid because poor readers with higher IQs do not differ on relevant variables from those with IQs commensurate with their reading levels.<sup>133</sup> It is easily undermined in practice by continually testing the students with various instruments until a

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subcommittee).

<sup>124</sup> S. Rep. 94-168, at 8 (1975).

<sup>125</sup> Hensell, *supra* note 7, at 1154.

<sup>126</sup> See Hearings, *supra* note 8, generally.

<sup>127</sup> Garda *supra* note 7, at 293.

<sup>128</sup> *Id.*, at 293 – 294.

<sup>129</sup> Weber, *supra* note 7, at 124.

<sup>130</sup> *Dialogue Guides*, IRIS Center, Peabody College, Vanderbilt University, for the National Association of State Directors of Special Education's IDEA Partnership, Department of Education, Office of Special Education Programs, 2007.

<sup>131</sup> Weber, *supra* note 7, at 124 (citing *What if LD Changed to Reflect Research Findings?*, Daniel J. Reschly, (Dec. 2003), <http://www.nrclid.org/symposium2003/reschly2.html>.)

<sup>132</sup> Reschly, *supra* note 132.

<sup>133</sup> *Id.*

discrepant score is found, ignoring any disconfirming evidence.<sup>134</sup> And, finally, it is harmful because the severe discrepancy model relies on the passage time for a gap to emerge, which inherently delays treatment, and therefore makes any hope for early intervention impossible.<sup>135</sup> This results in reading problems that exist in grades later than 3<sup>rd</sup> grade which are more severe by making intervention more complex at a time when school curriculum shifts from learning to read to “reading to learn.”<sup>136</sup> Congress recognized the failings of the discrepancy model and offered the Response to Intervention as an alternative.<sup>137</sup>

### III. RESPONSE TO INTERVENTION –FRIEND OR FOE

Response to Intervention (RtI) is one seemingly small change to the 2004 amendments to the IDEA. Specifically, Congress recognized that the discrepancy model used to determine eligibility for students with learning disabilities was an inappropriate method.<sup>138</sup> In response, Congress forbade the states to force districts to use only this model, and instead allowed for other methods, including a “process that determines if the child responds to scientific, research-based interventions.”<sup>139</sup> This meant that states could allow districts to use this process to determine eligibility under the disability of specific learning disability in conjunction with the discrepancy model, or by itself. For such a narrowly focused provision the option of using RtI has impacted education as whole. Perhaps more than it should.

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

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 20 U.S.C. §1414(b)(6)(B)(2011).

<sup>138</sup> Hearings, *supra* note 8.

<sup>139</sup> 20 USC § 1414 (a)(6)(B) (2011).

*A. Origins of the Rtl*

As part of the amendment process to the IDEA, the Subcommittee on Education Reform of the Committee on Education and Workforce held hearings, including one on June 6, 2002.<sup>140</sup> The title and subject of the hearing is relevant in identifying the intended scope of the eventual amendment: “Learning Disabilities and the Early Intervention Strategies: How to Reform the Special Education Referral and Identification Process.”<sup>141</sup> Additionally, the purpose of the hearing was to learn more about the identification process of students various learning disabilities, and to hear about effective, evidence-based early intervention programs and how they can improve educational outcomes.<sup>142</sup> Ranking Minority Member Dale E. Kildee noted that slightly less than half of those children with disabilities are identified as learning disabled.<sup>143</sup> And, a key focus of the hearings was to examine more closely what interventions and services were available to these children prior to identification in an effort to reduce the number of students mis-identified without denying services to those students who truly need them.<sup>144</sup>

As previously noted, the art of diagnosing the disability category of learning disability has led a checkered past, with congressional concern of over-identification that reaches as far back as the initial EAHCA.<sup>145</sup> Between 1976 and 1996 students identified under the category of specific learning disability increased 283%.<sup>146</sup> In 2009, the number stood at 2,710,476, which made up 45% of all children eligible under IDEA.<sup>147</sup> It is not surprising, therefore, that Congress revisited the issue of diagnosis in light of the burgeoning percentage of students found eligible by reason of a

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<sup>140</sup> Hearings, *supra* note 8, generally.

<sup>141</sup> *Id.*

<sup>142</sup> Hearings, *supra* note 8, at 2 – 3 (testimony of Michael Castle, Chairman of Subcommittee on Education Reform, Committee on Education and Workforce in the 107<sup>th</sup> Congress).

<sup>143</sup> Hearings, *supra* note 8, at 4 (testimony of Dale E. Kildee (D), Ranking Minority Member of Subcommittee on Education Reform, Committee on Education and Workforce in the 107<sup>th</sup> Congress).

<sup>144</sup> *Id.*

<sup>145</sup> Hensel, *supra* note 7, at 1158.

<sup>146</sup> Weber, *supra* note 7, at 123.(citing Frank M. Gresham, *Responsiveness to Intervention: An Alternative Approach to Identification of learning Disabilities*, in *IDENTIFICATION OF LEARNING DISABILITIES: RESEARCH TO PRACTICE* (Renee Bradley, et. al. ed., 2002), available at, <http://nrclid.org/resources/ldsummit/gresham4.pdf>.

<sup>147</sup> Weber, *supra* note 7, at 123.(citing U.S. Dep’t. of Educ, Data Tables for OSEP State Reported Data, [https://www.ideadata.org/tables30th/ar\\_1-3.xls](https://www.ideadata.org/tables30th/ar_1-3.xls) (last visited Aug. 4, 2008). The count is as of Fall 2006, and includes school children ages six through twenty-one.

learning disability. Although Mr. Kildee was careful to recognize the need of some students for special education services, and whatever interventions are put into place do not present barriers to those students, it is clear that this hearing was focused on filtering out as many students as possible before they are determined eligible, and thereby covered by the due process protections of the IDEA.<sup>148</sup> In his opening remarks, Mr. Kildee was the first to point out that many of the students who are wrongly-identified, are so because they fail to learn fundamental skills like reading.<sup>149</sup>

The hearings began with testimony from Former Chairman Goodling, chief author of the 1997 reauthorization to the IDEA. He testified that the reauthorization focused on children's education instead of process and bureaucracy; giving parents greater input in determining the best education for their child; and giving teachers the necessary tools.<sup>150</sup> He suggested a focus on student results and academic achievement in the 2004 Amendments.<sup>151</sup> He also maintained a focus on early intervention, families and more precise diagnosis.<sup>152</sup>

Early identification yields better chances for success in education.<sup>153</sup> Throughout the hearings, early intervention was stressed as an important goal,<sup>154</sup> and indeed, the experimental programs, such as the Hartsfield Elementary School program, began in the earliest grades, reaching upward incrementally.<sup>155</sup> It is ironic, however, that precisely what the former Chairman of the Committee on Education and the Workforce, Mr. Goodling suggests is one of the very things lost with the implementation of the RtI process. The part that is lost in the current implementation of the program is not the general early intervention of emphasizing the process in the earliest grades, but the early intervention, to the individual student level. This is what Mr. Goodling seemed to be cautioning against when he said that the diagnosis should be earlier and more precise.

As flawed as the traditional learning disability eligibility determination process may be assessed and if found eligible, receive services within a prescribed timeframe.<sup>156</sup> While attempting to catch students in early stages of failure, as currently implemented, the tiered

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<sup>148</sup> *Hearings, supra* note 8, at 4 (testimony of Dale E. Kildee, Ranking Minority Member).

<sup>149</sup> *Id.* at 2.

<sup>150</sup> *Hearings, supra* note 8, at 61 (written testimony of Mr. William Goodling, former Chairman of Committee on education and the Workforce).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 63.

<sup>153</sup> *Id.*

<sup>154</sup> *Hearings, supra* note 8, at 13, 25, 63,79.

<sup>155</sup> *See Hearings, supra* note 8, at 87-89.

<sup>156</sup> 34 C.F.R § 300.301(c)(1)(i)(2008).

approach,<sup>157</sup> keeps them in an unprotected holding pattern while various methods of intervention are attempted. Meanwhile, the parents are sometimes not even aware that there is a problem, nor that the school has started an intervention process.

This presents the question whether the school's Child Find requirements are met during this process. The Child Find provision of the IDEA requires the State to locate, identify, evaluate, and develop a practical method to provide special education services to all students residing in the State who require special education services.<sup>158</sup>

Mr. Goodling's suggestion was that during the "earlier and more precise" diagnosis, early literacy programs must be strengthened to avoid both misdiagnosis and over-identification.<sup>159</sup> He suggested that early intervention programs should target pre-schoolers, employ research-based literacy programs and encompass the parents in the screening as well as the children.<sup>160</sup> Doing so would strengthen both early reading and family literacy to avoid unnecessary referrals.<sup>161</sup> Additionally, he encouraged increased parental involvement and responsibility, which is reflective of his mission in the 1997 reauthorization, and reflected in manuals to professionals working with the RtI process.<sup>162</sup>

Mr. Goodling's emphasis on early intervention has pedagogical foundation based on experience. Several programs had been implemented in the years leading up to the 2004 Amendments.<sup>163</sup> Each of these was successful over the first few years of implementation, but it is important to recognize the limited scope of these programs. Following is a discussion on three programs that were the inspiration for RtI.

#### 1. Hartsfield Elementary School, Tallahassee, Florida

Directly prior to the start of the implementation of their intense reading program, Hartsfield Elementary School experienced a demographic shift from predominantly white middle class to 60% free/reduced lunch recipients, and 60% minority.<sup>164</sup> As students began to fall behind, they were

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<sup>157</sup> See *infra*, section III B.

<sup>158</sup> 20 U.S.C. § 1412(a)(3)(2008); 34 C.F.R. § 300.111(2008).

<sup>159</sup> *Hearings, supra* note 8, at 63.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Stanley L. Swartz et. al., *supra* note 86, at 26. (2011).

<sup>163</sup> *Hearings, supra* note 8, at 27 – 48, and 84 – 122. (describing programs at Hartsfield Elementary School, Tallahassee, FL; Cornwall-Lebanon School District, Lititz, Pennsylvania; Elk Grove, CA.)

<sup>164</sup> *Hearings, supra* note 8, at 84 (written statement Ray King, principal of Hartsfield Elementary School.)

typically sent to special education and Chapter I programs, resulting in a disconnect between special education and regular education.<sup>165</sup> According to Mr. King, Principal of Hartsfield Elementary School, the regular education teachers, by passing the students off to special education, did not have a “sense of ownership” for these students.<sup>166</sup> Principal Ray King recognized two primary problems in the school’s program. First, students were not prepared to enter kindergarten. Second, there was not a consistent reading program throughout the school. The reading programs ranged from various phonetic approaches to whole language strategies with the same students.<sup>167</sup>

The problem of students not entering kindergarten prepared is complicated and not necessarily within the control of the school system.<sup>168</sup> Factors including pre-natal and infant health history, education background of the parents, and time spent reading and conversing with children all play a part in a child’s of readiness to begin school.<sup>169</sup> Hartsfield Elementary attempted to fill some of these gaps by obtaining a grant to support an infant-toddler wing of the school and double the size of early childhood programs.<sup>170</sup>

M. King testified that the core problem for the school, however, was that the reading program was inconsistent.<sup>171</sup> First, the school moved to a block scheduling model to facilitate common planning for the teachers, and began team teaching with resource teachers going into the regular classrooms.<sup>172</sup> Second, the school consulted with Dr. Joseph Torgesen, who, at the time, was the director of Florida Center for Reading Research at Florida State University, on a consistent reading curriculum.<sup>173</sup> They eventually settled on two programs, Open Court for grades Kindergarten to second grade, and Science Research Associate’s Reading Mastery (SRA) for grades three to five.<sup>174</sup> During the 1995 – 1996 school year, problems arose with inconsistent implementation, and thus in each of the following four school years, various changes were made to the program.<sup>175</sup>

The school made changes in both the structure of the curriculum

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<sup>165</sup> *Hearings, supra* note 8, at 85. (written statement of Ray King).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 87. (written statement of Ray King).

<sup>168</sup> Robert Garda, *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 Ala. L. Rev. 1071, 1086 (2005).

<sup>169</sup> *Id.*

<sup>170</sup> *Hearings, supra* note 8, at 87. (written statement Ray King).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Hearings, supra* note 8, at 87 - 89. (written statement Ray King).

<sup>175</sup> *Id.* at 88 – 89.

generally as well as the reading programs specifically. To accommodate and support the efforts in the reading program, the school eliminated most of the pull out services<sup>176</sup> and suspended social studies, science and some math for students in Kindergarten through second grade.<sup>177</sup> Additionally, since the reading program relied on small group instruction for all students, class distribution of various students became more important in order to ensure that each class had enough students in each level for a group.<sup>178</sup> All first and second graders were pre-tested on the Woodcock Johnson Psycho-Educational Revised within the first few weeks of school.<sup>179</sup> They were tested again by someone other than their own teacher at the end of the year.<sup>180</sup> In the years following, the school continued to improve and strengthen the program by focusing on clear expectations, increased instruction time, early intervention at the Kindergarten level, summer course for “at risk” four year olds, and “home reading” program for Kindergarten to third graders.<sup>181</sup>

The results were impressive. In 1995, 31.8% of the first graders were tested below the twenty-fifth percentile. In the 1999, however, only 3.7% were below the 25%.<sup>182</sup> The third grade median percentile rose from 48.9% in 1995 to 81.7% in 1999. This success was not without tremendous effort and support from the administration and cooperative teaching staff.<sup>183</sup> Teachers who were unclear on the importance of maintaining the integrity of the whole program or were not adequately able to instruct were replaced.<sup>184</sup> The inherent problem with such a program is the tax on resources, staff, and administration. Whether this program will reap long term benefit is uncertain as Principal King has moved on, and this author’s attempt to follow up on the progress of these students has yielded no response.<sup>185</sup> The support and guidance from the principal is critical in the success of the program.<sup>186</sup> The program has been successful in reading improvement, which by all accounts should improve performance overall in coming years. But, at what cost? Did the sacrifices related to other student

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<sup>176</sup> The term “pull out services” refers to services a student receives outside the general education classroom.

<sup>177</sup> *Id.* at 88-90.

<sup>178</sup> *Id.* at 89-90.

<sup>179</sup> *Id.* at 88-90..

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 91.

<sup>182</sup> *Id.* at 97.

<sup>183</sup> *Id.* at 91 – 93.

<sup>184</sup> *Id.* at 88.

<sup>185</sup> Telephone interview with Joseph Torgesen, former Director of Florida Center for Reading Research at Florida State University, (March 30, 2011). (Email requests for information to Hartsfield have gone unanswered since September, 2011.)

<sup>186</sup> *Id.*

services and subjects set these students back in other ways?

2. Cornwall-Lebanon School District, Lititz, Pennsylvania.

Joseph Kovaleski, school psychologist and Director of Pupil Services for the Cornwall-Lebanon School District in Lititz, Pennsylvania, reported that between 1990 and 1997 Pennsylvania instituted a statewide process targeting improvement in general education in order to reduce special education referrals.<sup>187</sup> The process was a building-based approach incorporating the use of instructional support teams.<sup>188</sup> It utilized curriculum based assessments as well as other procedures that assessed students' needs and provided services to students as soon as the need arose.<sup>189</sup> The process relied upon the actual rate of learning with appropriate instruction rather than the discrepancy model. 85% of the students identified for the process did not need further evaluation.<sup>190</sup> "...[J]ust having the that process in place [sic] we were able to cut off referrals for special education and the need for special education dramatically."<sup>191</sup>

He noted that in his experience, the process known as "Response to Intervention" was a better way to identify the right students for special education because it was based on their lack of progress in learning even when provided effective instruction.<sup>192</sup> Dr. Kovaleski pointed out that the program depended on fully funding early literacy programs in order to provide intervention for problems in reading before the third grade.<sup>193</sup> He proposed to fund these programs by coordinating efforts with various federal programs such as special education, remedial education, Title I, and general education.<sup>194</sup> Of course, this did not consider those students who, through no fault of their own, had not been provided adequate instruction, or had fallen behind because of their disability precluded their ability to compensate for inadequate instruction. Therefore, these students remained unidentified because they had not been provided adequate instruction.

While Dr. Kovaleski primarily addressed this issue as one related to identifying students with learning disabilities, he recognized that emotional and behavioral issues were often concomitant and should also be addressed

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<sup>187</sup> *Hearings, supra* note 8, at 27. (Testimony of Joseph Kovaleski, Director of Pupil Services, Cornwall-Lebanon School District, Lititz, PA)

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 28.

<sup>193</sup> *Id.* at 28.

<sup>194</sup> *Hearings, supra* note 5, at 28. (Testimony of Joseph Kovaleski).

early on.<sup>195</sup> He did not, however, propose how that should be done or could be done. This is an inherent problem with the RtI model; it does not always address the actual issue.<sup>196</sup>

The process is intentionally one that contemplates general education and special education connected to each other.<sup>197</sup> Generally, once students are found eligible for special education, general educators become less responsible for their progress.<sup>198</sup> According to Dr. Kovalski, Pennsylvania implemented a successful program based on early intervention using pre-referral interventions to reduce the number of children referred to special education,<sup>199</sup> and thereby keeping those children in general education where the general educators would maintain responsibility for their progress. The program utilized building-based teams that assessed the students using curriculum-based assessments as well as other procedures.<sup>200</sup> Based upon the results of those assessments, the team provided in-class support to the regular education teacher over a 50-day period to see whether “effective instructional procedures” improved the rate of progress.<sup>201</sup> If the rate of progress did not improve, the student was one who truly qualified for special education services.<sup>202</sup>

Again, the results seemed impressive. Of the students referred to the intervention program, 85% did not need further evaluation for special education because the students’ achievement improved on academic measures “when school implemented the program at a high degree of fidelity.”<sup>203</sup> The problem, as alluded to above, is that when the program is not implemented with a high degree of fidelity, the struggling student continues to struggle without services because infidelity of the program eliminates the student’s qualification as eligible. Likewise, as one area of achievement is addressed at a time in this approach, it is not necessarily addressing the root of the problem, but rather the problem that surfaces first. Another problem with this particular program is that it is not clear whether the reduction in referrals is based on adequate progress due to the program’s success or it was due to teacher’s acceptance of modest progress because they were discouraged to refer students.

On one hand, another benefit to this program is the capability of earlier identification. The discrepancy model typically cannot identify eligibility

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<sup>195</sup> *Id.*

<sup>196</sup> Roberts, *infra* note 233.

<sup>197</sup> *Hearings, supra* note 5, at 28. (Testimony of Joseph Kovalski).

<sup>198</sup> *Id.* at 101. (Written testimony of Joseph Kovalski)

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

until third grade at the earliest because it general takes that long to develop the required IQ subtest score gap between achievement and ability. These early literacy intervention programs described above can reach a struggling student before the gap develops.<sup>204</sup> These interventions do not require the level of failure that the discrepancy model requires, allowing for assistance before it is too late.<sup>205</sup>

Most students referred to this process ultimately are not referred for further testing towards eligibility into special education.<sup>206</sup> But, despite their ineligibility for the protections of the IDEA, Dr. Kovaleski suggests that IDEA funds should be available for early intervention in a “non-categorical format, as a method to determine who will ultimately need long-term special education services.”<sup>207</sup> This would answer some of the funding questions for the districts, but fail to address the procedural protections for the students and parents.

### 3. Elk Grove Unified School District, Elk Grove, California

David Gordon, Superintendent of Elk Grove, California, testified that 1991, when the district employed the discrepancy model, 16% of the student population was identified as eligible for special education services.<sup>208</sup> The district requested and received a waiver to use special education funds for Kindergarten through second grade. In these earlier grades teachers were accurately able to predict which students would be identified three years earlier.<sup>209</sup> After employing a program similar to the one described by Dr. Kovaleski, there were under 9% identified in special education.<sup>210</sup> Additionally, there had been no due process hearings in the last 11 years between 1991 and 2002.<sup>211</sup> The lack of due process hearings is an indication less conflict between parents and the school system over special education decisions.

The reduction of special education services to students in Elk Grove was not due to an increase in denial of services, but rather “through curriculum and instructional methods in a coordinated fashion that changed the service delivery systems for student interventions.”<sup>212</sup> Rather than waiting for the child to fail before identifying a need for services, this early intervention

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<sup>204</sup> *Id.*

<sup>205</sup> *Hearings, supra* note 8, at 110 (written testimony of David Gordon)

<sup>206</sup> *Id.* at 102. (written testimony of Joseph Kovaleski) *See supra* section III. C. 2.

<sup>207</sup> *Id.*

<sup>208</sup> *Hearings, supra* note 8, at 29 (Testimony of David Gordon).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 110.

approach caught the students before it was too late to catch them.<sup>213</sup> In part, this meant identifying weaknesses in reading prior to third grade. “Failing to leave the third grade with adequate reading levels assures a 74% chance that reading problems will persist through the 9<sup>th</sup> grade or higher.”<sup>214</sup> Therefore, it is essential that children are identified early and receive services prior to third grade. Adhering to the discrepancy model to identify a learning disability almost assuredly denies that possibility.

The current legislation incorporates three of Mr. Gordon’s recommendations: 1) Specific Learning Disability eligibility must prescribe specific early interventions for a period of 8 – 12 weeks at the first sign of academic failure; 2) State and Federal laws pertaining to special education eligibility must align to allow for maximum front-loading of prevention and intervention strategies prior to referral; and 3) the commingling of resources and teaching expertise at the school site must be conjoined for the benefit of all students’ need regardless of funding source origination.<sup>215</sup> This answers the funding source problem for the districts, but fails to consider the procedural protections of the students and parents. Also not addressed are the students, in grades higher than third grade that continue to struggle academically, tend to have more complicated concomitant problems than can be addressed in a single intervention, and by virtue of that complication will require multiple iterations of the intervention cycle, thereby falling victim to the exact opposite of an early intervention, but rather a delayed intervention.

### B. What is RTI?

“In determining whether a child has a specific learning disability, a local education agency *may* use a process that determines if the child *responds to* scientific, research-based *intervention* as a part of the evaluation procedures described in paragraphs (2) and (3).”<sup>216</sup> From the June 6, 2002 hearings to its placement under evaluation for children with specific learning disabilities, this provision is clearly meant to replace the often maligned discrepancy model as a *possible* method of determining whether a child has a specific learning disability. Indeed, the provision is closely aligned with the definition of specific learning disability which generally is described as

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<sup>213</sup> *Id.* at 111.

<sup>214</sup> *Id.* at 111. (citing Reid Lyon, Research psychologist and the Chief of the Child Development and Behavior Branch of the National Institute of Child Health and Human Development.)

<sup>215</sup> *Id.* at 122. (This seems to suggest that despite the source of funding, each school should provide adequate resources and qualified teachers to implement the program.)

<sup>216</sup> 20 U.S.C. § 1414(b)(6)(B)(2011)(emphasis added).

a disorder of a psychological process involved in language which affects the “ability to listen, think, speak, read, write, spell, or do mathematical calculations.”<sup>217</sup> In other words, if a child responds to some form of quality intervention in general education, the child is not affected in his/her ability to listen, think, speak, read, write, spell, or do mathematical calculations – and therefore not eligible for special education as a student with a specific learning disability.

The RtI process varies from state, but there are certain general core concepts that are common to most or all approaches. It is generally a 3 tiered approach.<sup>218</sup> In the first, tier all students participate and receive high quality differentiated, research-based instruction.<sup>219</sup> This is core instruction that all students receive focusing on essential skills for reading, mathematics, and behavior.<sup>220</sup> All students are screened three times a year to assess progress or need for further intervention.<sup>221</sup> If adequate progress has not been made under the high quality instruction in tier 1, the student participates in tier 2 interventions.<sup>222</sup>

In tier 2, students participate in small group instruction in the area of instructional need, with more frequent monitoring – 2 to 4 times a month.<sup>223</sup> It is estimated that up to 15% of the student population may require tier 2 intervention.<sup>224</sup> If the student does not demonstrate adequate progress with tier 2 interventions, the student moved to more intensive interventions in tier 3.<sup>225</sup>

Tier 3 is more intensive. In some instances Tier 3 has been considered special education while other models consider both Tier 2 and Tier 3 to be more intensive, but not special education.<sup>226</sup> The intervention in this phase is individualized and intensive with progress monitoring on a weekly basis.<sup>227</sup> Tier 3 includes “increasing the intensity of intervention, providing more frequent intervention, spending more time in intervention session, and providing smaller and more heterogeneous groups and instruction provided by more skilled teachers.”<sup>228</sup> How this is not *de facto* special education is

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<sup>217</sup> 20 U.S.C. § 1401(30)(2011).

<sup>218</sup> Swatz et. al., *supra* note 86, at 7.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 6.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 13.(citing Burns, M.K. & Ysseldyke, J.E.(2005) Comparison of existing responsive-to-intervention models to identify and answer implementation questions. *California School Psychologist*, 10, 9-20.)

<sup>227</sup> *Id.* at 7.

<sup>228</sup> *Id.* at 12. (citing Fuchs, D. & Fuchs, L.S. (2006) Introduction to Responsiveness-to-

never answered. It is estimated that about 5% of the student body may need tier 3 interventions, and if these interventions do not yield adequate progress, the student is referred to special education.<sup>229</sup> Of course, technically, referral to special education can occur at any time during this process.<sup>230</sup> While referral to special education does occur in “emergency” situations,<sup>231</sup> parents and advocates complain that it works as a delay to services for those students who do require them.<sup>232</sup>

Response to Intervention (RtI) is a front loaded program within general education.<sup>233</sup> With a focus on keeping students in general education rather than placing them in special education, it is an ongoing monitoring process that starts with universal screening.<sup>234</sup> In other words, theoretically, everyone is in tier 1 on an ongoing basis. As mentioned in the hearings leading up to the drafting of the 2004 IDEA, since this process is focused on keeping more students in general education, it will invariably force general education teachers to teach the students as they come, rather than fitting the students into a particular curriculum or send them on to special education.<sup>235</sup> This may require teachers to become more flexible in their methods of instruction.

As the language of the IDEA clearly states, the RtI model *may* be used as part of the evaluation process.<sup>236</sup> Five states require it as the only method of determining whether a child has a specific learning disability, while the rest allow for it or the discrepancy model.<sup>237</sup>

### C. Potential Legal Issues Raised for Districts under RtI.

There are several potential problems with utilizing only the RtI process to identify specific learning disabilities, two of which will be discussed in

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Intervention: What, Why and How Valid is it? *Reading Research Quarterly*, 41, 92-99.)

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 6.

<sup>231</sup> Interview with Matt Vignieri, school psychologist intern, Jacksonville, February, 2011.

<sup>232</sup> Amy Clark, *Using Response to Intervention in the Classroom*, 36 No. 19 *Quinlan School of Law Bulletin* art. 2 (October, 2009); Telephonic interview with Tanya H., parent, Indian River County, FL, FL January 5, 2012, Jacksonville, FL.; Telephone Interview with Claudia Roberts, Educational Advocate, January 5, 2012; Interview with Heidi G., parent, Jacksonville, FL, February 6, 2012, Jacksonville, FL.

<sup>233</sup> Roberts, *supra* note 232.

<sup>234</sup> Interview with Gayle Cain, RtI Coordinator for Duval County Public Schools, Florida. October 13, 2010, Jacksonville, FL.

<sup>235</sup> *Id.*

<sup>236</sup> 20 U.S.C. § 1414(b)(6)(B). (2011)

<sup>237</sup> Swartz et al, *supra* note 86, at 18. (Colorado, Connecticut, Indiana, Iowa, and Rhode Island require the use of RtI).

more detail. First, as mentioned earlier,<sup>238</sup> it can delay the provision of services to those students who require them, which violates the Child Find provision of IDEA.<sup>239</sup> Second, since this process technically falls outside of the procedural protections of the IDEA, parents do not enjoy procedural protections of the IDEA such as notice and participation in the development of the intervention strategy.<sup>240</sup>

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

On the one hand, RtI avoids the “wait to fail” problem that is inherent with the use of the discrepancy model in identifying students with specific learning disabilities. Although it is not required, many schools screen all students,<sup>241</sup> and in so doing, they catch struggling students much earlier in the process. In contrast, depending on the discrepancy model requires a child to fail enough to create the qualifying gap.<sup>242</sup> Additionally, including the general education teachers more actively in the identification and intervention process may provide a better “sense of ownership” for the progress of their struggling students instead of immediately referring difficult students to special education.<sup>243</sup> In keeping some of these struggling students in general education there is, theoretically, a promise of better collaboration between special education and general education.<sup>244</sup>

On the other hand, those students who are truly in need of special education services often find a delay in receiving those much needed services<sup>245</sup> – in direct contradiction to the goal of early intervention. Although there certainly are those students who ultimately benefit from the interventions of the RtI process who may otherwise have forgone help until they had failed, or may never have received help because their deficits did not rise to the level of intervention for special education, there are those students whose services are unnecessarily delayed because of the long process. Even when the students reach Tier 3 and therefore may be receiving *de facto* special education services, they are not enjoying the procedural protections that come from eligibility under the IDEA.

The regulations further require an initial evaluation be conducted within

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<sup>238</sup> *Supra* section III A.

<sup>239</sup> 20 U.S.C. § 1412(a)(3).(2008).

<sup>240</sup> 20 U.S.C. §1415(b)(3); 20 U.S.C. § 1414(d)(1)(B)(2008).

<sup>241</sup> Roberts, *supra* note 232.(Pinellas County, Florida screens all students in the areas of reading, science and math three times a year.); and Swartz et al, *supra* note 86, at 22.

<sup>242</sup> Swartz et al, *supra* note 86, at 19.

<sup>243</sup> *Hearings*, *supra* note 8, at 85 (Testimony of Ray King).

<sup>244</sup> Swartz et al, *supra* note 78, at 22.

<sup>245</sup> Tanya H, Heidi G, *supra* note 232.

60 days of receiving parental consent unless the state has established its own timeframe.<sup>246</sup> If the school does inform the parents of the potential problem, it is impossible to get their consent to commence evaluations, thus keeping them participating in the process. While there is general consensus on the three tiered system as a whole, there is no general consensus as to how many intervention cycles must be provided before a disability is suspected. Some suggest at least two different interventions over 16 to 18 weeks,<sup>247</sup> which is much longer than the 60 day timeframe required by the Department of Education in its regulations.<sup>248</sup> And, this is the best case scenario. In practice, several iterations of various interventions before an evaluation is even referred can lead to an entire year of delay for eligibility determination, and the services that would follow for a student who is determined eligible.<sup>249</sup>

Even if the parents are aware that their child is struggling and they request evaluations, it is unclear where the RtI process fits into this process. Anecdotal evidence shows that even after a request for evaluations has been made the school is convinced that it cannot complete evaluation procedures until the RtI process has run its complete course.<sup>250</sup> And, as stated above, the best practices may say that that means two cycles for each tier of interventions, but even if that is followed, that means 12 to 16 weeks on each tier which multiplied by three tiers, adds up to almost an entire school year. Again, according to the IDEA the evaluation should be completed within 60 days of receiving parental consent.<sup>251</sup> And, according to the US Office of Special Education and Rehabilitative Services, the Response to Intervention strategies cannot be used to delay or deny the provision of a full and individual evaluation.<sup>252</sup> Despite this mandate, schools routinely delay evaluations, referrals, and ultimately, services to students who can least afford this unnecessary delay.<sup>253</sup>

In fact, one county in Florida seems to have rolled the intervention process into the eligibility determination process of all students suspected of

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<sup>246</sup> 30 C.F.R. § 300.301(c)(1)(2011).

<sup>247</sup> Swartz et al, *supra* note 86, at 23.

<sup>248</sup> 34 C.F.R. §300.301(c)(1)(2008).

<sup>249</sup> Tanya H., *supra* note 232.

<sup>250</sup> Interview with Vanessa Ramirez, Nathan's initial certified legal intern, December, 2009, Jacksonville, FL(after attending a meeting with school where they denied the parents an eligibility determination meeting because the RtI process had not been completed. This, despite the existence of a Technical Assistance Paper from the Florida Department of Education requiring schools to not delay services in the name of RtI. <http://www.florida-rti.org/>). Tanya H., *supra* note 240; Heidi G., *supra* note 240.

<sup>251</sup> 20 U.S.C. § 1414(a)(1)(C)(i)(I)(2008).

<sup>252</sup> US OSERS Memorandum, January 21, 2010, Melody Musgrove, Ed. D, Director, Office of Special Education Programs, at 2.

<sup>253</sup> Roberts, Tanya H., Heidi G., *supra* note 232.

having a disability between the referral to evaluate by a parent or school member and the actual trigger that implicates the 60 day time line – the signing of the consent to evaluate by the parent.<sup>254</sup> In so doing, it automatically delays the evaluation process and thereby the services to the child.

2. Parents and students are deprived of procedural protections that would otherwise enjoy under IDEA.

One of the allures of this process for the schools is that it provides funds for interventions via the above mentioned early intervention provision of the IDEA, but since the process is still technically outside the special education process, the procedural requirements are not implicated. The benefit to the teachers is that they have more flexibility in providing and changing interventions as they see as necessary, rather than waiting for reluctant or non-participatory parents to consent.<sup>255</sup>

Since RtI falls outside the scope of the IDEA, Federal special education funds directed to local education agencies (LEAs) would generally not be available to assist. However, under the early intervening services provision of IDEA, up to 15% of IDEA funds are available for assistance with students not yet determined eligible, but “who need additional academic and behavioral support to succeed in the general education environment.”<sup>256</sup> Since schools and districts receive funds through IDEA to implement RtI, it stands to reason that they should also be held accountable for the procedural protections that are attached to the receipt of such funds.

Prior to the implementation of the RtI process, when a school recognized, or should have recognized, that a student was not progressing adequately, the procedural protections attached as soon as a problem was detected under the Child Find provision.<sup>257</sup> As previously discussed, the conventional approach for eligibility determinations under the disability category of specific learning disability often resulted in delayed determinations.<sup>258</sup> Despite this flaw in the method that inherently delays the eligibility determination, once the problem is discovered, the parents have legal recourse if the school system fails to follow through. RtI potentially does mitigate the initial delay based on the discrepancy model’s need for

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<sup>254</sup> [http://www.duvalschools.org/static/parents/getinvolved/ese/learn\\_eligible.asp](http://www.duvalschools.org/static/parents/getinvolved/ese/learn_eligible.asp). (last visited January 13, 2012.)

<sup>255</sup> Vignieri, *supra* note 231.

<sup>256</sup> 20 U.S.C. § 1413(f)(1)(2008).

<sup>257</sup> 20 U.S.C. § 1412(a)(3)(2008).

<sup>258</sup> *See supra* section II. C.

time for the gap to emerge. But, once the problem is discovered by the school system, the parents do not have the same legal recourse as they would if RtI was under the ambit of IDEA.

Several procedural safeguards denied to parents under RtI illustrate the problem. First, the regulations allow a parent to seek an independent education evaluation (IEE) at public expense if the parent disagrees with the evaluation obtained by the public agency.<sup>259</sup> A parent's disagreement with the evaluation measures within the RtI process, however, does not allow for reimbursement of an IEE.<sup>260</sup> Second, IDEA requires parental consent for an initial evaluation.<sup>261</sup> Parental consent is not required for RtI.<sup>262</sup> Third, under the IDEA notice is required any time the local education agency proposes to initiate or change, or refuse to initiate or change the identification, evaluation, or education placement of a child.<sup>263</sup> Finally, to further ensure parental participation, the regulations require the LEA to notify parents of meetings and to schedule them at a mutually agreed upon time and place.<sup>264</sup>

Without the requirement to notify parents of the evaluations that occur within the RtI process, parents do not know that these "screenings" and interventions are occurring. If they do know, they do not necessarily have any input on how they are conducted or what kind of interventions should be utilized. Further, since their consent is not necessary to initiate the process, the parents have no input on which measures are used, and if they disagree they do not have the right to an IEE. It is true that a parent always has the right to request an evaluation, and will then have the right to initiate due process procedures if the district fails to follow through without written explanation.<sup>265</sup> It is also true that policies forbid RtI to delay the evaluation process.<sup>266</sup> As demonstrated in the following section, however, in practice there is little enforcement power to hold districts accountable to efficiently implement RtI properly and timely.

#### *D. How RtI is implemented currently*

Congress leaves to the states much leeway in implementing the IDEA.<sup>267</sup> RtI is one such area largely left to the states.<sup>268</sup> In fact, Congress does not require the use of RtI by any State. Instead, it prohibits states from

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<sup>259</sup> 34 C.F.R. § 300.502(b)(1)).

<sup>260</sup> Perry A. Zirkel, *RtI and the Law*, 268 Ed. Law Rep. 9, at 12 (2011).

<sup>261</sup> 20 U.S.C. § 1414(a)(1)(D)(i)(I).

<sup>262</sup> Zirkel, *supra* note 260, at 12.

<sup>263</sup> 20 U.S.C. § 1415(b)(3).

<sup>264</sup> 34 C.F.R. § 300.322(a).

<sup>265</sup> Zirkel, *supra* note 260, at 12.

<sup>266</sup> OSEP letter, *infra* note 284.

<sup>267</sup> 20 U.S.C. § 1414(b)(6)(B)(2008).

<sup>268</sup> *Id.*

requiring the use of the discrepancy model in identifying a student as learning disabled and offers RtI as an option.<sup>269</sup> To further complicate a generalized explanation of how RtI works, within each state, the various local education agencies do not, by all indications, implement the process according to the statewide policies.<sup>270</sup> While most states seem to have fully embraced this process to some degree, it is worthwhile to look at the more cautious approach that the state of Washington has taken. Additionally, anecdotal experiences may help demonstrate some of the discrepancies between the states. It will also demonstrate the perspective of various participants in the process, including parents, an advocate, school psychologist and teachers.

1. Washington State has taken a cautious approach.

For the past few years, The Washington Office of Superintendent of Public Instruction (OSPI) has contracted with Evaluation Research Services (ERS) of Austin Texas<sup>271</sup> to implement a theory-driven, multi-method, stakeholder-oriented evaluation to “assess the effectiveness of implementing RtI and the impact of RtI implementation on the referral of students in special education programs.”<sup>272</sup> Eleven districts were identified to: “1) implement RtI as part of their general education curriculum for all students; 2) use a multi-tiered service delivery system to address student needs in reading, written language, and mathematics; 3) use an assessment system to conduct universal screening, progress monitoring, and to measure outcomes; 4) assure that parents are well-informed of student progress and their right to make a referral for special education evaluation; and 5) participate in an annual evaluation of the program.”<sup>273</sup> OSPI anticipated a significantly greater proportion of students to meet state and federal performance standards as well as a reduction in inappropriate special education referrals.<sup>274</sup> The initially identified eleven districts implemented RtI, and eleven control districts that paralleled the participating districts were tracked as well over a three year period as of this writing.<sup>275</sup>

Among the purposes of this project were to provide OSPI and the

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<sup>269</sup> *Id.*

<sup>270</sup> Roberts, *supra* note 232.(describing vast differences in implementation between districts, and within the same district, between schools).

<sup>271</sup> Washington, Response to Intervention Report of Activities and Findings, 2009 – 2010 School Year, ERS (Evaluation Research Services, Austin, Texas)(June, 2011)(herein after “Washington Report”).

<sup>272</sup> *Id.* at 4.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

federal Office of Special Education Projects with information on the efficacy of the RtI program.<sup>276</sup> In so doing, they asked three questions: “(1) To what extent have student achievement outcomes changed; how do these changes compare to changes in comparison districts?;” “(2) To what extent have rates of special education referral changed; how do these changes compare to changes in comparison districts?;” and “(3) ... to what extent are differences in the implementation of School-wide Activities associated with achievement trends?”<sup>277</sup>

The first question addressed the extent to which achievement outcomes changed. Despite the small sample size of 11 districts with their 11 comparison districts, the report recognized a relatively consistent pattern of findings, especially in the elementary grades.<sup>278</sup> In the elementary grades, while the comparison group of schools was, on average, higher in the pretests, the schools participating in RtI scored higher or as high than the matched comparisons in the second and third years.<sup>279</sup> Middle schools seem to have struggled in implementation, and results, are therefore inconsistent and inconclusive.<sup>280</sup> Site visits even to the earlier implementing schools in Washington demonstrated uncertainty around what represents best practices in these higher grades, which corroborates with the experience in at least one school district in Georgia.<sup>281</sup> Finally, in 10<sup>th</sup> grade, the comparison group tended to fare better than the RtI group.<sup>282</sup>

Question 2, whether or to what extent have rates of special education referral changed, directly addresses a core purpose for this process – reducing the over-identification and misidentification of students in special education. Interestingly, overall in both the participating and non-participating districts the referrals declined.<sup>283</sup> “There were no apparent patterns related to participation.”<sup>284</sup> Given the limited number and years available at this time, it may be too early to draw conclusions.

Finally, the study examined the extent to which implementation changed from 2008 – 2010, and the effect those implementation trends had

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 12, 29, and 32.

<sup>278</sup> *Id.* at 13.

<sup>279</sup> *Id.*, 19. (It should be noted that in 2010 the tests were changed across the board, so that there was a decrease in scores in both the participating and comparison districts, but the participating districts continued to demonstrate higher scores than the comparison districts.)

<sup>280</sup> *Id.* at 25.

<sup>281</sup> *Id.* at 25. *See also*, Vignieri, *supra* note 231.

<sup>282</sup> *Id.* at 26 – 27.

<sup>283</sup> *Id.* at 29 – 30.

<sup>284</sup> *Id.* at 29.

on achievement.<sup>285</sup> The preliminary findings suggested that the quality implementation related to improvement on test scores.<sup>286</sup> It also suggested that quality of implementation can be indicated using relatively simple methodologies.<sup>287</sup> As was the case for determining the actual impact on special education referrals, it may be too early to tell the actual impact of implementation on achievement, though early indicators do suggest a positive correlation, especially in the lower grades.<sup>288</sup> It should be noted, however, that given the various limitations on size of the sample set, variability in implementation, and lack of control for change in communities, these results are meant to be merely descriptive rather than statistically significant.<sup>289</sup> Having said that, however, up to this point, little other data seems to have been collected on the effectiveness of RtI, and it will certainly worth following the Washington research in this area.<sup>290</sup>

## 2. Anecdotal experiences with RtI.

The Washington State research indicates that more comprehensive implementation in the elementary school may correlate to better results. This is consistent with experiences in Georgia, Florida and Oregon.<sup>291</sup> Both a teacher in Oregon and a school psychologist from Georgia have reported positive results in working within an elementary school with administrative support and buy in from the staff.<sup>292</sup> Likewise, in Florida, an educational advocate has noticed that one district with whom she works has implemented RtI more thoroughly and comprehensively than other districts in the same geographic area.<sup>293</sup> She noticed that the district that has been implementing RtI longer and more comprehensively has yielded better results – more useful data in diagnosing the actual problem which also

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<sup>285</sup> *Id.* at 45.

<sup>286</sup> *Id.* at 45.

<sup>287</sup> *Id.* at 45.

<sup>288</sup> *Id.* at 46.

<sup>289</sup> *Id.* at 28.

<sup>290</sup> Sometime in 2012, the National Center for Education Evaluation will be publishing a more thorough and comprehensive look into the answer of all three of these questions across several states. Regional Educational Laboratory at Educational Development Center, Inc., *Issues and Answers, Features of state response to intervention initiatives in Northeast and Islands Region states*, no. 83, 2009, at 11. As of this writing, this more comprehensive look is not available, so the best evidence at the moment is the limited look Washington State has provided.

<sup>291</sup> Vignieri, *supra* note 231; Roberts, Clark, *supra* note 232.

<sup>292</sup> Vignieri, *supra* note 231; Clark, *supra* note 232.

<sup>293</sup> Roberts, *supra* note 232 (comparing Pinellas County, Florida with Hillsborough County, Florida).

allows for better programming.<sup>294</sup> Similarly, in the elementary school in Oregon, the school has provided support and has embraced the process as a school-wide commitment.<sup>295</sup> For instance, three times a year the “DIBLES army” spends a day evaluating the entire school to screen for reading.<sup>296</sup> The data collected from this evaluation is used to create reading groups, including ones that implemented more intense interventions.<sup>297</sup>

However, the overwhelming consensus on RtI in relation to students with disabilities who actually require special education, is that that entry into special education is generally delayed,<sup>298</sup> and the inclusion of the parents in the process is inconsistent.<sup>299</sup>

One parent in Indian River County, FL provides a unique perspective on the failings of this process with her experience with one of her younger children. Her older children had already been identified as eligible for services for disabilities that included dyslexia prior to the implementation of RtI.<sup>300</sup> So, when her 7 year old experienced problems, she immediately requested a comprehensive evaluation, but was told that she “can’t request evaluations until RtI is completed.”<sup>301</sup> This occurred despite the memos sent to each school district by the Florida Department of Education as well as the United States Department of Education saying that RtI cannot be used to delay or deny eligibility under IDEA.<sup>302</sup> She attempted to work with them for a year through the RtI process.<sup>303</sup> As a parent who regularly participated in the process with her children, she was particularly frustrated when the school gave her notice of the RtI meetings on the day of the meeting rather than giving her notice of the meeting “early enough to ensure that [she

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<sup>294</sup> *Id.*

<sup>295</sup> Clark, *supra* note 232, at 3.

<sup>296</sup> *Id.*(Describing the screening process in the school. The DIBLES is a reading screener that can be administered by trained staff to an entire class at once. The DIBLES Army even wear t-shirts identifying themselves as such.)

<sup>297</sup> *Id.*

<sup>298</sup> Clark, Roberts, Tanya H., Heidi G., *supra* note 232; *See also*, Duval County Public Schools exception student/student services eligibility website page found at [http://www.duvaschools.org/static/parents/getinvolved/ese/learn\\_eligible.asp](http://www.duvaschools.org/static/parents/getinvolved/ese/learn_eligible.asp). (last visited 1/13/2012).

<sup>299</sup> Roberts, Tanya H., Heidi G., *supra* note 232.

<sup>300</sup> Tanya H., *supra* note 232.

<sup>301</sup> *Id.*

<sup>302</sup> Tanya H., *supra* note 232; US DOE memo dated January 21, 2010 from Melody Musgrove, Ed.D, Director of Special Education Programs, “A Response to Intervention (RTI) Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disability Education Act (IDEA).”(on file with author); Florida Department of Education memo dated August 12, 2010 from Bambi Lockman, Chief of the Bureau of Exceptional Education and Student Services, “Clarification of Consent and Evaluation Requirements When Determining Eligibility for Special Education.”(on file with author).

<sup>303</sup> Tanya H., *supra* note 232.

would] have an opportunity to attend.”<sup>304</sup> When she asked for clarification on notice requirements to parents, she received an email stating that at the state level they “caution against modeling expectations after the more compliance driven ESE<sup>305</sup> procedures.”<sup>306</sup> Over the next year she continued to attempt to work with the school while her child deteriorated to point that he became suicidal.<sup>307</sup> Relying on Response to Intervention did not work for her son, who truly required special education services.

Likewise, a mother of a second grader in Duval County became increasingly frustrated while her daughter cycled through endless interventions of RtI over a two year period. The gap between her daughter’s progress and that of her classmates grow significantly from Kindergarten through January of her second grade year before the school finally began the evaluation process.<sup>308</sup> In Kindergarten her daughter’s reading was commensurate with her peers. In first grade, her reading scores clearly demonstrated that she was struggling. Yet, it took another year and a half and a consultation with an attorney versed in special education to cajole the school into initiating the evaluation process.<sup>309</sup> This is yet another example of an informed, active parent, who was able to procure testing only after consulting with a lawyer and specifically demanding that an evaluation be completed.<sup>310</sup>

This parent’s experience is not surprising given the information that is given to parents on the public school district’s web page on eligibility.<sup>311</sup> The Duval County website describes the process of eligibility from inquiry to evaluation.<sup>312</sup> The process begins with someone identifying that a “child is experiencing significant problems with learning and/or behavior.”<sup>313</sup> Buried in the middle of the 5<sup>th</sup> bullet under this explanation is the notice that a parent can request evaluations in writing.<sup>314</sup> But, it does not explain that consent to evaluate must be signed by the parent before the evaluation can begin, and that unless the consent is in the letter requesting the evaluation, the consent form is in the possession of the school. The following steps

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<sup>304</sup> Tanya H., *supra* note 232. *See also*, 34 C.F.R § 300.322(a)(1).

<sup>305</sup> In Florida, ESE (exceptional student education) is special education.

<sup>306</sup> Email dated January 4, 2012 from Heather Diamond, *supra* note 12.

<sup>307</sup> Tanya H., *supra* note 232.

<sup>308</sup> Heidi G., *supra* note 232.

<sup>309</sup> Heidi G., *supra* note 232(School records on file with author).

<sup>310</sup> *Id.*

<sup>311</sup> Duval County Public Schools exception student/student services eligibility [http://www.duvaschools.org/static/parents/getinvolved/ese/learn\\_eligible.asp](http://www.duvaschools.org/static/parents/getinvolved/ese/learn_eligible.asp). (last visited 1/13/2012).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

include collecting information, then developing interventions.<sup>315</sup> The intervention timelines are described as variable according each student.<sup>316</sup> If the interventions are not successful, nine options are provided to the parent as possible next steps. The first option is to allow more time for interventions, but the eighth option is to refer the student for an individual evaluation.<sup>317</sup> At that point the website explains that a parent's written consent is required to complete the evaluations.<sup>318</sup> The term "response to intervention" is never used, but the description of the process is hard to identify as anything but RtI. While the information on the site may not technically be wrong, it is at the very least, misleading. It is no wonder, then, that it took Ms. G over two school years to finally get the evaluation process started.

It is not all bad news. Claudia Roberts, an educational advocate from the west coast of Florida has seen varying levels of success with RtI.<sup>319</sup> Overall, she has had good experiences, especially with Pinellas County, which has implemented RtI seriously for several years, as it was chosen as the pilot district for Florida.<sup>320</sup> Reading is a passion in this district and this seemed like a good opportunity to improve literacy.<sup>321</sup> One of the primary reasons Ms. Roberts applauds the process is because of the data collection and monitoring.<sup>322</sup> Graphing the information collected gives useful information that is helpful for diagnosing the child's actual problem while allowing for better programming.<sup>323</sup> In fact, she bemoans the fact that this data collection and monitoring does not continue once a student is determined eligible for ESE services.<sup>324</sup> Contributing to the success of the program is the systematic approach the district takes in assessing math, science, and reading three times a year.<sup>325</sup> The results of the assessments are sent directly to the parents, thereby involving them from the first step.<sup>326</sup> If the results are below a certain number a student is referred for progress monitoring and interventions.<sup>327</sup>

Ms. Roberts has found, however, that RtI is not perfect. For instance,

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> Roberts, *supra* note 232.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

while it works well for a student with one disability, it is not effective for students with multiple issues.<sup>328</sup> Likewise, it is not meant to identify and target students with low incident disabilities, but rather is intended for students who may have a learning disability, attention deficit disorder, and emotional or behavioral disorders.<sup>329</sup> She has found that is difficult to monitor progress in disorders such as depression/anxiety, and does not seem to address organizational problems.<sup>330</sup>

As seen in the prior examples, delays in evaluation are still an issue.<sup>331</sup> As a matter of course, once she finds that student may qualify as eligible for services Ms. Roberts immediately requests, in writing, evaluations, so that they can be done concurrently with the RtI interventions.<sup>332</sup> She finds, just as Ms. H did, that the schools are told that they must perform RtI, and do not understand that both RtI and evaluations can occur at the same time.<sup>333</sup> Complicating the delay is that no one seems to know when to stop the intervention cycles.<sup>334</sup> She has met with success with RtI because she knows the process, and how to work with it. Parents with far less experience with RtI are not likely to know how to work with it. Therefore, until parents are clearly informed of their right to request evaluations while the interventions are occurring, these delays will continue.

Ms. Roberts works with several counties in Florida. While Pinellas County has met with success and Ms. Roberts has seen students benefit from the progress monitoring and data collection, not all counties which she has worked have implemented the process as successfully. A few of them do not, or will not implement it at all, or only when it is completely necessary.<sup>335</sup> Another county is less consistent within itself, but has seen some schools embrace it and use it to find students who would otherwise fall through the cracks.<sup>336</sup>

Mr. Matthew Vignieri, a school psychologist intern in Rockdale, GA has a unique perspective on RtI. As a recent college graduate, he was not trained with the discrepancy model to identify students with a learning disability.<sup>337</sup> He admits that in order for RtI to work well, all parts need to be moving together, which includes proper teacher training and support

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<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Tanya H, and Roberts, *supra* note 232.

<sup>334</sup> Roberts, *supra* note 232.

<sup>335</sup> Roberts, *supra* note 232.

<sup>336</sup> *Id.* (referencing one school in particular in a county that is not all completely on board)

<sup>337</sup> Vignieri, *supra* note 231.

from the administration.<sup>338</sup> He also noted that it works better in elementary schools than it does in middle schools, which seems to support some the findings in the Washington State research.<sup>339</sup> But, like Ms. Roberts, Mr. Vignieri applauds the diagnostic application of the process.<sup>340</sup>

It is interesting to compare the two different reactions from teacher reports. Amy Clark, an elementary school teacher in Oregon, acknowledged the possible delay for services for those students who may need them, but at the same time applauds the “DIBLES Army” and supporting staff that have been hired by the school to serve the students who qualify after the screening.<sup>341</sup> She specifically recognizes that it is a resource and commitment intense program,<sup>342</sup> but contrary to the how the Duval County program is run in one school, the teachers in her school are freed from coming up with the interventions themselves. Instead, trained employees service the students, “tak[ing] the pressure off the individual teacher to come up with various interventions.”<sup>343</sup> The screening takes 5 minutes from the class three times a year, and the interventions themselves are woven into the school schedule, which again, does not detract from the other class time.<sup>344</sup> Finally, the program at Ms. Clark’s school focuses on literacy alone.

This is in stark contrast to the process experienced by Ms. W in Duval County. In her school, each teacher is given “a group” and told to work with them on a daily basis.<sup>345</sup> Mrs. W’s group is based on bench mark math scores, and she is expected to gather her own materials and “meet with them [her RtI group].”<sup>346</sup> There is little guidance beyond this. A common thread of frustration through her team is the lack of guidance and confidence in the administration’s understanding of the process.<sup>347</sup> For instance, when a student is going through the identification process for ESE and the RtI data is requested, it does not seem to ever be what the team requires and it takes several more meetings for the documentation to be sufficient – delaying the process more.<sup>348</sup> With no “DIBLES Army” to rely on, Mrs. W and her team are left to fend for themselves, and see RtI as an added burden, rather than a useful tool. It is important to also recognize that in Duval County, it is not

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<sup>338</sup> *Id.*

<sup>339</sup> *Id.*; *see also*, Washington Report, *supra* note 271.

<sup>340</sup> Vignieri, *supra* note 231.

<sup>341</sup> *Id.*, at 3.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> Interview with Lisa W., 3<sup>rd</sup> grade teacher in Duval County, FL, (February 2, 2012).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

limited to one area, but rather an array of different subject matters. It is equally remember to know that during the evaluation process, the school should be adhering to the 60 day timeline.

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

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

There is a recurring theme in the hearings that after nine years old, it is too late to claim “early intervention.”<sup>349</sup> Early intervention depends on identifying and addressing learning or emotional problems before they become too difficult to overcome. For instance, it is imperative to address reading problems before third grade because at third grade, there is a shift from learning to read to reading to learn.<sup>350</sup> From that point on, the job of closing the gap in reading becomes exponentially more difficult. This could be why the programs discussed earlier all focused on grades Kindergarten through second grade. What was learned from these programs is that when it is implemented thoroughly and in the early grades, RtI appears to be a viable solution for identifying students with learning disabilities before they fail enough to have qualified under the discrepancy model.<sup>351</sup> But, in practice and especially in older grades, RtI can significantly delay the process for students who truly need the services.<sup>352</sup>

Anecdotally, districts report that most of their special education referrals occur during elementary school, and therefore there is a less overall need for eligibility reform in the middle and high school grades.<sup>353</sup> So, there is no reason to force the RtI process on older grades – especially middle school where it is less necessary, and less likely to work effectively.<sup>354</sup>

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<sup>349</sup> Hearings, *supra* note 8, at 13, 25, 63, 79.

<sup>350</sup> Hearings, *supra* note 8 at 33- 34 (testimony of Dale E Kildee)(some sources say 4<sup>th</sup> grade).

<sup>351</sup> Washington Report, *supra* note 271. Swartz et al., *supra* note 86, at 3.

<sup>352</sup> Ramirez, *supra* note 250; Tanya H., Heidi G., Clark, Roberts, *supra* note 232.

<sup>353</sup> Anonymous account from MonkeySurvey (on file with author).

<sup>354</sup> Vignieri, *supra* note 232. Hearings, *supra* note 8, at 77 (testimony of Ried Lyon).

With this delay, and perhaps one reason for the delay, is that parents are not afforded procedural protections as they are under the IDEA.<sup>355</sup> With no requirement that parents be kept informed of the process as it pertains to their children, schools and districts include parents inconsistently. In the schools' defense, the process was intended to allow the teachers flexibility in interventions, and including the parents in that process certainly slows that process down. On the other hand, if the parents are unaware of the academic problems facing their child, they have no opportunity to share their insight, nor participate in the programming for their own child.

Part of this could be resolved by using the RtI process as part of the comprehensive evaluation process rather than a precursor to it.<sup>356</sup> In so doing, however, the school opens itself up to the dictates of the IDEA and procedural protections it affords to the parents.<sup>357</sup> It is important to remember that when the RtI process is utilized as part of a comprehensive evaluation, there is a timeframe in which the evaluation must be completed, and RtI cannot delay this process. While there are several state and federal memos that support this, the current practice does not reflect a thorough understanding of this.<sup>358</sup> To demand a better understanding of the requirements onto the school districts is naïve. Each school district receives the same information from the US OSEP. As reflected in Florida, however, each school district has a different level of "buy in" to the RtI process as well as the IDEA, and therefore willingness to follow the letter and spirit of the process. Additionally, while there are policies in place to guide the districts, so far there is little indication that there are teeth to back it up. Part of the reason that there are no teeth behind RtI requirements and policies is that RtI is not required, but must be allowed by any willing district.<sup>359</sup> In other words, districts don't lose anything by not complying with the request to not delay eligibility determinations with the RtI process. While the threat of litigation does not necessarily motivate all districts into compliance under the IDEA, it gives parents a voice when they otherwise would have

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<sup>355</sup> Email from Heather Diamond, *supra* note 12.

<sup>356</sup> Swartz et al, *supra* note 86, at 26. Roberts, *supra* note 232.

<sup>357</sup> 20 U.S.C. § 1414(b)(2008).

<sup>358</sup> Memorandum from United States Department of Education Office of Special Education and Rehabilitative Services on "A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA), by Melody Musgrove, Ed.D, Director, Office of Special Education Programs, (January 21, 2010)(on file with author); Memorandum from the Florida Department of Education on "Clarification of Consent and Evaluation Requirements When Determining Eligibility for Special Education," by Bambi Lockman, Chief, Bureau of Exceptional Education and Student Services, (August 12, 2010)(on file with author); Tanya H., *supra* note 240.

<sup>359</sup> 20 U.S.C. § 1414(b)(6)(B)(2008).

none.

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

As previously discussed, a strength of RtI is that it diagnoses the specific area of weakness and targets the root of the problem, rather than a problem in general.<sup>360</sup> Of course, the problem in that is that it can only address one discrete weakness at a time, and therefore any other issues that may exist are not addressed until one has been resolved. This delays help in “all areas of suspected disability.”<sup>361</sup> For example, in Nathan’s case, the school began interventions to address his problem with homework completion, when homework was merely one byproduct of a much larger problem that was never addressed. When Nathan started completing his homework,<sup>362</sup> the intervention was considered a success, and he was determined ineligible for special education. Meanwhile, he continued to fail academically, and was continually kicked out of class. The solution is, again, to include RtI as part of the evaluation process for the areas for which it was specifically intended – primarily reading, but at the very least, only for a learning disability.

## CONCLUSION

Resistance to change is a natural response. RtI is relatively new and is a drastic change. It may take a whole generation of teachers and administrators to completely buy into the process and embrace it. For instance, Mr. Vignieri, who had never experienced anything other than this process, was quick to support its promise while acknowledging its challenges. In contrast, a cluster of experienced 3<sup>rd</sup> grade teachers from Duval County Public Schools from a “good” school expressed frustration over the process. They found that it merely detracted from the program that they already have in place. It is worth noting that the support Mr. Vignieri received in Rockland County appears to have been far superior to that of the

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<sup>360</sup> Roberts, *supra* note 232.

<sup>361</sup> 20 U.S.C. § 1414(b)(3)(B)(2008).

<sup>362</sup> It should be noted that there is no actual evidence on the success of the intervention because contrary to policy, there was no data collected to show his improvement in the area.

3<sup>rd</sup> grade cluster in Duval County, and be an another variable affecting the process. But, it is clear that the approach each group is taking to the same task is from two different perspectives – one is open to the process as a possible successful endeavor, while the other is skeptical from the start, and may unwittingly be sabotaging it.

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

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