

RTI AND THE LAW*

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The professional literature concerning response to intervention (RTI) is extensive and is not limited to its use for identification of students with specific learning disability (SLD). However, it lacks a comprehensive and objective compilation of the pertinent legal sources, which are exclusive to SLD identification.¹

This document provides an annotated synthesis of the law specific to RTI in the context of eligibility for special education under the Individuals with Disabilities Education Act (IDEA) and corollary state statutes and administrative codes. “Law” in this context consists of legislation, regulations, case law,² and—at the outermost margin—agency interpretations.³ On the other hand, state guidelines, with the exception of policies formally adopted by the state board of education, are not within the scope of this synthesis.⁴ For each of the successive sources of law, this document provides the key points along with the specific citations.

* For an earlier version of this document, see Perry A. Zirkel, *RTI and the Law*, 268 EDUC. L. REP. 9 (2011). Updated material is highlighted in yellow. For intervening summaries/analyses, see Perry A. Zirkel, *RTI and Other Approaches to SLD Identification under the IDEA: A Legal Update*, 40 LEARNING DISABILITY Q. 165 (2017).

¹ Instead, the pertinent literature is largely limited to skewed selections and interpretations of the law. See, e.g., the articles reviewed in Perry A. Zirkel, *Response to Intervention: A Legal Discrepancy Analysis*, 60 THE SCH. PSYCHOLOGIST 118 (2006). For relatively comprehensive coverage, see Torin D. Togut & Jennifer E. Nix, *The Helter Skelter World of IDEA Eligibility for Specific Learning Disability: The Clash of Response-to-Intervention and Child Find Requirements*, 32 J. NAT’L ASS’N ADMIN. LAW JUDICIARY 568 (2012). A more limited exception is a monograph that focuses, in pertinent part, on the IDEA regulations and state laws, with only a limited sampling of the agency interpretations and no coverage of the litigation to date. STANLEY L. SWARTZ, CATHLEEN A. GERAGHTY-JENKINSON & SHERRI FRANKLIN-GUY, *RESPONSE TO INTERVENTION (RTI): IMPLEMENTATION AND LEGAL ISSUES* (2011) (available from the Education Law Association). For a student law review article that recommends that Congress amend the IDEA to provide all its procedural protections to students in RTI programs, see Genna Steinberg, *Amending § 1415 of the IDEA: Extending Procedural Safeguards to Response-to-Intervention Students*, 46 COLUM. J.L. & SOCIAL PROBS. 393 (2013); cf. Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 33 (2011) (advocating incorporation of positive behavioral interventions and some of the procedural and discipline protections of the IDEA into the RTI model); Kate Matlen, *Michigan’s Specific Learning Disability Evaluation Criteria: A Case Study in the Failings of the IDEA*, 57 WAYNE L. REV. 1473 (2011) (advocating revision of the IDEA to require RTI uniformly). For suggested alternatives for school psychologists upon parental requests for evaluation during the RTI process, see Daniel W. Osher, *How to Reconcile Request for Special Education Evaluations with RTI*, 45 39 COMMUNIQUE 14 (Mar./Apr. 2017). For a survey on the extent of implementation, which has various limitations (e.g., 10% response rate, biased sponsorship, and vague measure), see Spectrum K12 School Solutions, *Response to Intervention (RTI): Adoption Survey 2011* (2011), <http://www.spectrumk12.com/uploads/file/RTI%20Report%202011%20v5.pdf>; see also Susan Unruh & Nancy McKellar, *Evolution, Not Revolution: School Psychologists’ Changing Practices Specific in Determining Learning Disabilities*, 50 PSYCH. IN THE SCH. 353 (2013); Rebecca Vujnovic et al., *Examining School Psychologists’ and Teachers’ Application of Approaches within a Response to Intervention Approach*, 22 EXCEPTIONALITY 129 (2014).

² “Case law” in this context refers to hearing/review officer decisions published in the Individuals with Disabilities Education Law Reporter (IDELR) in addition to court decisions available in any of the generally available legal databases.

³ The administering agency for the IDEA is the U.S. Department of Education, which successively includes the Office of Special Education and Rehabilitation Services (OSERS) and, most specifically in relation to the IDEA, the Office of Special Education Programs (OSEP). Although these agency interpretations do not have binding effect, hearing/review officers and courts often accord them persuasive weight. E.g., Perry A. Zirkel, *The Courts’ Use of OSEP Policy Interpretations in IDEA Cases*, 342 EDUC. L. REP. 671 (2017).

⁴ For an explanation of this boundary, see, e.g., Perry A. Zirkel & Lisa B. Thomas, *State Laws for RTI: An Updated Snapshot*, 42 TEACHING EXCEPTIONAL CHILD. 56 (Jan./Feb. 2010). For a follow-up study that analyzes not only the applicable state laws but also the pertinent state guidelines, see Perry A. Zirkel & Lisa B. Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60 (Sept./Oct. 2010) (hereinafter referred to as “Zirkel & Thomas II”). For a more recent, qualitative analysis of state laws that differentiated guidance documents from regulations, see Laura Boynton Hauerwas, Rachel Brown & Amy N. Scott, *Specific Learning Disability and Response to Intervention: State-Level Guidance*, 80 EXCEPTIONAL CHILD. 101 (2013).

I. IDEA Legislation

The 2004 amendments of the IDEA, which went into effect on July 1, 2005, provided that for SLD identification states may no longer require severe discrepancy and must permit school districts to use “a process that determines if the child responds to scientific, research-based intervention,” i.e., RTI.⁵

Thus, states had a choice of permitting or prohibiting severe discrepancy and permitting or requiring RTI.

⁵ 20 U.S.C. § 1414(b)(6) (2017).

II. IDEA Regulations

The 2006 IDEA regulations, which went into effect on October 13, 2006, required states to choose among these options for SLD identification:

- severe discrepancy: permit or prohibit
- RTI: permit or require
- “other alternative research-based procedures”: permit or require⁶

The reference points for RTI appear to be “age or State-approved grade-level standards.”⁷

Subject to confusion, the regulations separately included this provision as an alternative to RTI: “The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of [SLD].”⁸

The regulations further require the district “promptly” request consent for an evaluation if the child has not made “adequate progress” after an “appropriate period” of appropriate instruction delivered by qualified personnel in regular education settings.⁹

Moreover, the regulations require specified considerations as part of the evaluation, including “data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents.”¹⁰

Finally, the regulations require for students who participated in RTI and are subject to eligibility evaluation, documented parental notification of “(A) The State’s policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; (B) Strategies for increasing the child’s rate of learning; and (C) The parents’ right to request an evaluation.”¹¹

⁶ 34 C.F.R. § 300.307(a) (2018).

⁷ *Id.* § 300.309(a)(2)(i).

⁸ *Id.* § 300.309(a)(2)(ii). Confirming its alternative status to RTI, this provision is connected with the RTI option by the word “or,” and the commentary accompanying the final regulations rejected its replacement with “and,” stating: “We do not agree that ‘and’ should be used instead of ‘or’ between §300.309(a)(2)(i) and (ii), because this would subject the child to two different identification models.”

⁹ *Id.* § 300.309(c)(2).

¹⁰ *Id.* § 300.309(b)-(c).

¹¹ *Id.* § 300.311(a)(7)(ii). For an example of a state law that provides parental notice for a wider scope of students and with more detailed contents, see TEX. EDUC. CODE § 26.0081.

III. OSEP Policy Interpretations¹²

First, in the commentary accompanying the 2006 regulations,¹³ OSEP provided these interpretations:

- For the third, research-based alternative, OSEP provided these examples for a state’s choices: 1) “identify children based on absolute low achievement and consideration of exclusionary factors as one criterion for eligibility” or 2) “combine features of different models for identification.”
- For State-approved grade-level standards, OSEP pointed specifically to NCLB assessments and explained:
State-approved standards are not expressed as ‘norms’ but represent benchmarks for all children at each grade level. The performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State-approved standards. . . . The reference to ‘State-approved grade-level standard’ is intended to emphasize the alignment of the Act and the [NCLB/ESSA], as well as to cover children who have been retained in a grade, since age level expectations may not be appropriate for these children.
- For the prerequisite consideration to avoid the suspected SLD being attributable to inadequate instruction in reading and math, OSEP concluded that its original proposal for “*high quality, research-based* instruction exceeds statutory authority” [emphasis added]; instead, the relevant regulation requires that the evaluation team consider data that the child received “appropriate instruction” in regular education prior to or as part of the referral process.
- For SLD identification of parentally placed private school children, OSEP opined: “The group making the eligibility determination for a private school child for whom data on the child’s response to appropriate instruction are not available may need to rely on other information to make their determination, or identify what additional data are needed to determine whether the child is a child with a disability.”
- For IQ-related concerns, OSEP’s response was: “The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. . . . The reference to ‘intellectual development’ in [the optional, ‘pattern’] provision means that the child exhibits a pattern on strengths and weaknesses in performance relative to a standard of intellectual development such as commonly measured by IQ tests.”

¹² The RTI-relevant OSEP policy interpretations consist of (a) the commentary accompanying the 2006 regulations, and (b) subsequent policy letters and memoranda. The coverage here is limited to generally applicable agency interpretations role to RTI, thus not including those specific to particular role groups. See, e.g., Letter to Clarke, 51 IDELR ¶ 223 (OSEP (2008) (speech pathologists); Letter to Gorin, 48 IDELR ¶ 104 (OSEP 2006) (school psychologists). Similarly, it does not extend to those specific to severe discrepancy. *E.g.*, Letter to Anonymous, 51 IDELR ¶ 252 (OSEP 2008).

¹³ 71 Fed. Register 46,540 *et seq.* (Aug. 14, 2006).

OSEP Policy Interpretations (continued):

Second, in the subsequent policy letters and memoranda, OSEP has added these clarifications:

- For core characteristics of RTI, OSEP listed: 1) “high quality, research-based instruction” in general education, 2) continuous progress monitoring, 3) screening for academic and behavior problems, and 4) multiple tiers of progressively more intense instruction.¹⁴
- Whether a district’s general education intervention program qualifies as RTI depends on whether it meets its oft-pronounced¹⁵ four distinguishing criteria.¹⁶
- For adoption of RTI as mandatory, OSEP advised in favor of statewide and district-wide uniformity, respectively.¹⁷ However, where both state law and local policy permit RTI, “a school would not have to wait until RTI is fully implemented in all schools in the LEA before using RTI as part of the identification of SLD.”¹⁸
- RTI is only one part of a comprehensive evaluation.¹⁹
- States may permit any combination of the three options, or methods.²⁰ However, having severe discrepancy as a required component is clearly questionable.²¹

¹⁴ Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR ¶ 196 (OSERS 2007); *see also* Letter to Dale, 60 IDELR ¶ 166 (OSEP 2012); Memorandum to State Directors of Special Education, 56 IDELR ¶ 50 (OSEP 2011); Memorandum to Chief State School Officers, 51 IDELR ¶ 49 (OSEP 2008). Whether intended as a distinction, the most recent of these policy documents referred to the first characteristic in terms of “high quality, evidence-based instruction.” The professional literature has recognized an additional core characteristic—fidelity. In its most recent policy letter, OSEP affirmed this recognition but cautioned against viewing its interpretations as “requiring the use of a particular RTI approach with specific core components or characteristics” to comply with the SLD regulations. Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016).

¹⁵ *See id.* and accompanying text.

¹⁶ Letter to Zirkel, 62 IDELR ¶ 151 (OSEP 2013).

¹⁷ Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR ¶ 196 (OSERS 2007); *see also* Letter to Anonymous, 49 IDELR ¶ 106 (OSEP 2007).

¹⁸ Letter to Massanari, 108 LRP 2644 (OSEP 2007); Letter to Cernosia, 108 LRP 2652 (OSEP 2007); *see also* Memorandum to State Directors of Special Education, 56 IDELR ¶ 50 (OSEP 2011).

¹⁹ Letter to Zirkel, 47 IDELR ¶ 268 (OSEP 2007); Letter to Prifitera, 48 IDELR ¶ 163 (OSEP 2007); *cf.* Letter to Copenhaver, 108 LRP 16368 (OSEP 2007) (except for rare exceptions, review of existing data would be insufficient).

²⁰ Letter to Zirkel, 48 IDELR ¶ 192 (OSEP 2007).

²¹ Letter to Hugo, 62 IDELR ¶ 211 (OSEP 2013). Moreover, for severe discrepancy, OSEP recently opined that based on the regulatory requirement for a variety of measures, “it would be inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for special education and related services under the SLD category solely because the child scored above a particular cut score established by State policy.” Letter to Delisle, 62 IDELR ¶ 240 (OSEP 2013); *see also* Memorandum to State Directors of Special Education, 65 IDELR ¶ 181 (OSEP 2015) (extending *Delisle* to students with ED with high cognition).

OSEP Policy Interpretations (continued):

- The IDEA regulatory reference to “pattern of strengths and weaknesses” (PSW)²² refers to the permissible methods other than RTI, i.e., severe discrepancy and the third, research-based alternative.²³
- For the duration of RTI and its interplay with the required evaluation, OSEP declined to define “an appropriate period” or “adequate progress.”²⁴
- Early intervening services funds may be used for RTI provided that they serve “nondisabled students in need of additional academic or behavioral support and supplement, not supplant, other funds used to implement RTI.”²⁵
- For the expedited evaluation required for “deemed to know” children who are subject to disciplinary changes in placement, information from the RTI process may be used, but where the child had not participated in the RTI process, the district “would need to rely on other assessment tools and strategies to ensure that the evaluation can be conducted in an expedited manner.”²⁶
- If a district used the RTI process and, in disagreement with it, the parent obtained an independent educational evaluation (IEE), the district is not required to reimburse the parents for the IEE because reimbursement is only possible when the parents disagree with a completed evaluation.²⁷
- The IDEA does not require parental consent for RTI to the extent that it constitutes screening or the use of existing data prior to the evaluation process²⁸; “however, parental consent would be required if, during the secondary or tertiary level of an RTI framework for an individual student, a teacher were to collect academic functional assessment data to determine whether the child has, or continues to have, a disability and to determine the nature and extent of the special education and related services that the child needs.”²⁹

²² See *supra* text accompanying note 8.

²³ Letter to Zirkel, 49 IDELR ¶ 50 (OSEP 2008).

²⁴ Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR ¶ 196 (OSERS 2007). For similar, prior clarification, see *supra* note 12, at 46,658.

²⁵ Memorandum to Chief State School Officers, 51 IDELR ¶ 49 (OSEP 2008).

²⁶ Letter to Combs, 52 IDELR ¶ 46 (OSEP 2008).

²⁷ Letter to Zirkel, 52 IDELR ¶ 77 (OSEP 2008).

²⁸ Letter to Torres, 53 IDELR ¶ 333 (OSEP 2009).

²⁹ Letter to Gallo, 61 IDELR ¶ 173 (OSEP 2013).

OSEP Policy Interpretations (continued):

- If a parent requests an evaluation of a child who is in the district’s RTI process, the district must either 1) proceed to obtain consent within a reasonable period and complete the evaluation within the regulatory timeline, or 2) provide the parent with a written refusal explaining the basis for concluding that it lacks reason to suspect the child has a disability. The parent may challenge this refusal via a due process hearing.³⁰
- RTI may not be used to delay or deny an evaluation of a child suspected of having a disability.³¹
- If a private school refers a parentally placed child to the district of its location for an evaluation for suspected SLD and the district uses RTI for SLD identification, the district is not required to use RTI for the evaluation and must move forward to obtain parental consent and to complete the evaluation within 60 days thereafter.³²
- SLD and, thus, RTI, are generally not applicable to Head Start and other preschool children with disabilities.³³
- The IDEA regulations’ requirement for documentation of a child’s behavior (as well as academic performance) based on an observation is a separable part of the SLD identification process; “therefore, it would be inappropriate to assume that an adopted RTI process must be based on behavior and/or that this [RTI] process extends to other classifications more closely connected to behavior.”³⁴
- The IDEA does not address the use of an RTI model for children suspected of having disabilities other than SLD, which is a matter for states.³⁵
- A state law requiring that students experiencing classroom difficulties “should be considered for all support services available [in general education],” such as RTI, before school referral for special education does not conflict with OSEP policy regarding evaluations under RTI because it does not “prohibit[] school personnel or the child's parent from referring a child suspected of having a disability for an initial evaluation prior to completion of the RTI process.”³⁶

³⁰ *Id.*; see also Letter to Zirkel, 56 IDELR ¶ 140 (OSEP 2011).

³¹ Memorandum to State Directors of Special Education, Preschool/619 State Coordinators, Head Start Directors, 67 IDELR ¶ 272 (OSEP 2016); Memorandum to State Directors of Special Education, 56 IDELR ¶ 50 (OSEP 2011); see also Letter to Ferrara, 60 IDELR ¶ 46 (OSEP 2012); cf. Dear Colleague Letter, 68 IDELR ¶ 52 (OCR 2016) (providing parallel guidance under § 504 and the ADA).

³² Letter to Zirkel, 56 IDELR ¶ 140 (OSEP 2011); cf. Letter to Brekken, 56 IDELR ¶ 80 (OSEP 2010) (same for referral from a Head Start program).

³³ Letter to Brekken, 56 IDELR ¶ 80 (OSEP 2010)

³⁴ Letter to Zirkel, 56 IDELR ¶ 140 (OSEP 2011).

³⁵ Letter to Brekken, 56 IDELR ¶ 80 (OSEP 2010).

³⁶ Letter to Ferrara, 60 IDELR ¶ 46 (OSEP 2012).

OSEP Policy Interpretations (continued):

- Students identified as eligible for special education under the IDEA may not participate in RTI paid for by Part B coordinated and early intervention services (CEIS) funds; however, a district may split the costs among special ed, general ed, and CEIS funds with proper documentation of the allocation for IDEA-eligible students as compared to those for the other students³⁷
- For highly mobile (e.g., military-connected, migrant, foster-care, and homeless) or other children who change districts during the same school year after the previous school district started the evaluation process, the new school district may provide RTI during the process but it may not delay or extend the timeline for completion of the evaluation based on the RTI implementation.³⁸
- In a permissive state, if a district uses a severe discrepancy approach to determine SLD eligibility, it is not required to implement an RTI process to comply with the regulation requiring consideration of continuous progress monitoring data.³⁹
- A state’s threshold requirement for a specified score for psychological processing “must be interpreted and implemented in a way that does not use a single measure or assessment as the sole criterion for determining [a child’s eligibility as SLD].”⁴⁰
- The IDEA does not require, or encourage, an LEA or preschool program to use an RTI approach prior to a referral for evaluation or as part of determining whether a 3-, 4- or 5-year old is eligible for special education and related service.⁴¹
- The IDEA only mentions RTI for determining SLD eligibility and does not define RTI (or MTSS). IDEA funds may not be used to provide special education within an RTI framework before determining the child is eligible, but afterwards the IEP may include RTI strategies.⁴²
- The IDEA does not prohibit the use of the terms dyslexia, dyscalculia, or dysgraphia, and RTI or MTSS is an option for schools to be part of the process for identifying whether these students are eligible as SLD under the IDEA.⁴³

³⁷ Letter to Dale, 60 IDELR ¶ 166 (OSEP 2012); *see also* Letter to Couillard, 61 IDELR ¶ 112 (OSEP 2013).

³⁸ Letter to State Directors of Special Education, 61 IDELR ¶ 202 (OSEP 2013).

³⁹ Letter to Zirkel, 72 IDELR ¶ 131 (OSEP 2018).

⁴⁰ Letter to Breton, 115 LRP 31185 (OSEP 2015).

⁴¹ Memorandum to State Directors of Special Education, Preschool/619State Coordinators, Head Start Directors, 67 IDELR ¶ 272 (OSEP 2016).

⁴² Letter to Zirkel, 73 IDELR ¶ 241 (OSEP 2019).

⁴³ Dear Colleague Letter, 66 IDELR ¶ 188 (OSERS 2015).

IV. State Laws

As of May 31, 2010, approximately 13 states (e.g., Delaware, Florida, Illinois, New Mexico, New York, and West Virginia)⁴⁴ had adopted RTI as mandatory for SLD identification at least in part (i.e., for reading and/or for specified grades), with varying deadlines. Since then, at least four states—Connecticut, North Carolina, Tennessee, and Wisconsin—have moved from the permissive to the mandatory group in their state laws.⁴⁵ Conversely, the vast majority of states have elected to permit both RTI and severe discrepancy, thereby delegating the choice to the school district.⁴⁶ Many states have issued guidelines—as distinct from legislation or regulations—that provide operational details for implementation. For example, in some of the permissive states (e.g., Pennsylvania), the state education agency requires school districts to obtain approval for their particular plan for RTI.⁴⁷

Additional examination of state laws and guidelines reveals that 1) the state laws often provide general education interventions but not in coordination with the RTI provisions; 2) more than two thirds of the states provide for a dual model of RTI, i.e., the behavioral as well as the academic dimension, but largely via guidelines; 3) less than half of the states specify an individual intervention plan as part of their RTI provisions; and 4) only a handful of states have extended RTI for classifications beyond SLD, with Louisiana the only one to do so rather generically thus far.⁴⁸

⁴⁴ Zirkel & Thomas II, *supra* note 4. The only state that had not finalized its official choice by that date was Wisconsin. *Id.* Hauerwas et al., *supra* note 4, identified 17 states as of September 2011, which was before Wisconsin’s final regulation, but their inclusion of some states in the mandatory group—specifically, Idaho, Mississippi, and Wyoming—is questionable.

⁴⁵ CONN. AGENCIES REGS. § 10-76d-9(b)(2); KY. REV. STAT. 158.305 and KY. ADMIN. REGS. 3:095 (2012) (grades K-3 comprehensively including behavior); https://www.tn.gov/content/dam/tn/education/special-education/eligibility/se_eligibility_sld_standards.pdf (Tennessee - elementary by 7/1/14 and secondary by 7/1/15); <http://www.dpi.state.wi.us/sped/ld.html> (Wisconsin “final rule”). Additionally, North Carolina most recently finalized its state board-approved policies, with an effective date of 7/1/20. See <http://mtss.ncdpi.wikispaces.net/>

⁴⁶ Some states are ambiguously in the middle. *E.g.*, 511 IND. ADMIN. CODE § 7-41-12 (either RTI or pattern of strengths and weaknesses, but prohibiting severe discrepancy).

⁴⁷ Zirkel & Thomas II, *supra* note 4.

⁴⁸ Perry A. Zirkel, *State Laws and Guidelines for RTI: Additional Implementation Features*, 39 COMMUNIQUÉ 30 (May 2011). More specifically, for Louisiana, the assessment process for the following disability classifications at least partially require RTI: autism (“when appropriate”), developmental delay, mental disability (“should”), and orthopedic impairment (“when appropriate”); ED and OHI (partial provision). LA ADMIN. CODE tit. 28, Pt. XLIII, § 308 Incorporating Bulletin 1508). For a more general example of such “beyond” features, such as behavior, see JEFFREY SPRAGUE ET AL., *RTI AND BEHAVIOR: A GUIDE TO INTEGRATING BEHAVIORAL AND ACADEMIC SUPPORTS* (2008).

V. Case Law

A. SLD Case Law Until Mid-2006

A comprehensive compilation of approximately 90 hearing/review officer and court decisions from 1980 to mid-2006 specific to SLD identification found that districts won approximately 80% of the cases in terms of the child not being eligible, with the most frequent decisional factors being severe discrepancy ($n = 68$) or the need for special education ($n = 31$).⁴⁹

B. SLD Case Law After Mid-2006

1. The same trend continued in the 26 decisions from mid-2006 to late 2012.⁵⁰
2. This trend further continued in the 15 decisions from late 2012 to the end of 2014⁵¹ and in the 25 decisions from 2015 to early 2018.⁵²
3. The court, as compared with hearing officer, decisions to date have been few, and they have provided negligible guidance.
 - First, a few court decisions have mentioned RTI peripherally as permissive under state law while using severe discrepancy to determine SLD eligibility.⁵³

⁴⁹ PERRY A. ZIRKEL, *THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY* (2006) (available from the Council for Exceptional Children – www.ced.sped.org).

⁵⁰ Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Latest Case Law*, 41 COMMUNIQUÉ 10 (Jan. 2013). For an interim snapshot at the midpoint of this period, see Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for Special Education Eligibility*, 42 TEACHING EXCEPTIONAL CHILD. 62 (May/June 2010).

⁵¹ Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Most Recent Case Law*, 43 COMMUNIQUÉ 4 (June 2015).

⁵² Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Latest Case Law*, 46 COMMUNIQUÉ 14 (May 2018).

⁵³ *E.g.*, Dep't of Educ., State of Haw. v. Patrick P., 609 F. App'x 509 (9th Cir. 2015) (briefly mentioning that student was in tier 1 but determining ineligibility based on not meeting combination of severe discrepancy and inadequate achievement); V.M. v. Sparta Twp. Bd. of Educ., 63 IDELR ¶ 184 (D.N.J. 2014); J.G. v. Oakland Unified Sch. Dist., 2014 WL 12576617 (N.D. Cal. Sept. 19, 2014) (“informal RTI” as distinguished from special ed incidental to severe discrepancy determination); M.B. v. S. Orange-Maplewood Bd. of Educ., 55 IDELR ¶ 18 (D.N.J. 2010); *cf.* Demarcus L. v. Bd. of Educ., 63 IDELR ¶ 13 (N.D. Ill. 2014) (briefly mentioning RTI in rejecting child find claim); Daniel P. v. Downingtown Area Sch. Dist., 57 IDELR ¶ 224 (E.D. Pa. 2011) (rejecting the parents’ unsuccessful “child find” argument that their expert’s opinion that “true” RTI would have been effective for the child). For confusion between RTI and the separable IDEA concepts of peer-reviewed research (PRR) and scientific, research-based (SRB), see, e.g., James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 831 (N.D. Ill. 2009) (deferring to hearing officer’s finding that parent’s experts’ “predictions were ‘not backed up by scientifically researched data ... [or] based on the student’s response to intervention’”). For an explanation of these terms, see, e.g., Perry A. Zirkel, *A Legal Roadmap of SRB, PRR and Related Terms under the IDEA*, 40 FOCUS ON EXCEPTIONAL CHILD. 1 (Jan. 2008).

Case Law (continued):

- Second, the two that came the closest until recently are a pair of Ninth Circuit Court of Appeals decisions, with one being of questionable generalizability⁵⁴ and the other being largely peripheral.⁵⁵
 - Most recently, a limited cluster of unpublished federal court decisions primarily concerned child find and, in any event, split between parent-favorable and district-favorable rulings.⁵⁶
5. The relatively rare other cases decided thus far at least in part based on RTI have been at the hearing officer level, and—as the Appendix shows—they reflect confusion and deference rather than the strict potential standards⁵⁷ for reviewing district determinations of non-eligibility for SLD.⁵⁸ Rather than focusing on the quality, including fidelity, of implementation of RTI, most of the cases have focused instead on child find,⁵⁹ which is overlapping but separable issue from eligibility, or identification.

⁵⁴ Michael P. v. Dep't of Educ., State of Haw., 656 F.3d 1057 (9th Cir. 2011), *further proceedings sub nom Elizabeth G. v. Dep't of Educ., State of Haw.*, 58 IDELR ¶ 68 (D. Haw. 2012) (invalidating determination that child was not eligible under the IDEA where Hawaii, which is both the LEA and the SEA, relied solely on severe discrepancy in the post-IDEA 2004 interim between its old and new regulations – the lower court subsequently remanded to hearing officer). For a summary of this decision, see, e.g., Perry A. Zirkel, *The Ninth Circuit's Recent Ruling: RTI?* 40 COMMUNIQUE 26 (Dec. 2012).

⁵⁵ M.M. v. Lafayette Sch. Dist., 767 F.3d 842 (9th Cir 2014) (ruling that the district's SLD evaluation was appropriate via use of RTI data to corroborate severe discrepancy, but that it violated the IDEA's procedural requirements by failing to have the IEP team document and carefully consider the RTI data and to provide the data to the parents). E.g., Perry A. Zirkel, *A Collateral Case of RTI*, 43 COMMUNIQUE 4 (Dec. 2014).

⁵⁶ Compare Avaras v. Clarkstown Cent. Sch. Dist., 73 IDELR ¶ 50 (S.D.N.Y. 2018) (child find); Greenwich Bd. of Educ. v. G.M., 68 IDELR ¶ 8 (D. Conn. 2016) (child and eligibility); Artichoker v. Todd Cty. Sch. Dist., 69 IDELR ¶ 58 (D.S.D. 2016) (child find) (rulings for parents), with M.G. v. Williamson Cty. Sch., 720 F. App'x 280 (6th Cir. 2018) (child find and eligibility); K.W. v. Tuscaloosa Cty. Sch. Sys., 73 IDELR ¶ 157 (N.D. Ala. 2018) (child find and eligibility); Demarcus v. Bd. of Educ., 63 IDELR ¶ 13 (N.D. Ill. 2014) (child find) (rulings in favor of districts).

⁵⁷ These standards, posed here as potential questions upon cross examination, include the following examples:

- Is the instruction provided universally in general education, at least in the eight enumerated areas (e.g., reading comprehension, written expression, and math problem solving) supported by “scientific-based research,” as defined in the IDEA?
- Similarly, in general education universally from K to 12, do all the teachers, at each of the tiers, provide continuous progress monitoring?
- How do your policies and procedures define the duration of each tier and, most importantly, the specific discrepancy from State-approved grade level standards for each of the eight enumerated areas for movement to the next tier?

⁵⁸ In contrast, the case law specific to PSW is negligible. E.g., E.P. v. Howard Cty. Pub. Sch. Sys., 70 IDELR ¶ 176 (2017) (ruling that the district's evaluation was appropriate in upholding hearing officer's decision to deny an IEE at public expense, only indirectly supporting the district's use of PSW to determine that the child was not eligible as SLD).

⁵⁹ For an analysis of the pertinent hearing/review officer and court decisions, which are generally infrequent and district-favorable, see Perry A. Zirkel, *Response to Intervention and Child Find: A Problematic Intersection?* 84 EXCEPTIONAL CHILD 368 (2018). For the increasingly more balanced judicial rulings, see *supra* note 55.

C. Other related case law

An interesting court case decided recently concerned a school psychologist who resigned but then filed suit claiming constructive discharge, i.e., that the district indirectly forced her to resign, thus amounting to termination.⁶⁰

- Her employer, an intermediate unit in Pennsylvania, had given her the choice to resign or face dismissal proceedings in the wake of three unsatisfactory evaluations from her supervisor. The evaluations focused on her failure to meet mandated timelines for evaluations.
- She claimed that the intermediate unit violated the state whistleblower law by taking this action in retaliation for the concerns that she had expressed to her supervisor about the intermediate's unit lack of compliance with IDEA requirements for evaluations.
- One of her complaints about the alleged noncompliance was that the district ordered her to use a severe discrepancy (SD) approach for evaluation of students for SLD, whereas she chose to use a "base rate" methodology.
- Finding no legal basis for her complaints, the court summarily rejected her whistleblower claim, observing in relevant part that the IDEA provides that states must permit RTI and that Pennsylvania, by allowing local education agencies, including intermediate units, to choose between RTI and SD.

⁶⁰ Schellbach v. Colonial Intermediate Unit, 2017 WL 4542372 (Pa. Commw. Ct. Oct. 12, 2017).

Appendix: RTI Case Law to Date¹

		Case 1 ² Cal. IHO 2007	Case 2 ³ Del. IHO 2009	Case 3 ⁴ Fla. IHO 2009	Case 4 ⁵ Ill. IHO 2010	Case 5 ⁶ Tex. IHO 2010	Case 6 ⁷ Ga. IHO 2012	Case 7 ⁸ Tex. IHO 2015	Case 8 ⁹ Iowa IHO 2017	Case 9 ¹⁰ Mo. IHO 2019
State Law:		permissive for SLD	mandatory for SLD (and ID)	mandatory for SLD	mandatory for SLD ¹¹	permissive for SLD	mandatory for SLD ¹²	permissive for SLD	mandatory for SLD	permissive for SLD
Purpose:	SLD identification (ID)	SLD	ED or OHI ¹³ (child find) ¹⁴	ID or OHI ¹⁵	hearing impairment (child find)	SLD	SLD	SLD (child find)	SLD	ED (child find)
Features:	• universal SRBI ¹⁶							(yes) ¹⁷		
	• multiple tiers			(yes) ¹⁸			yes	yes ¹⁹	(yes)	
	• CPM ²⁰		lack of written plan ²¹	(yes) ²²	(written plan) ²³		(yes)	yes ²⁴	(incl. written plan)	
	• decision points ²⁵	high scores ²⁶					(yes)			
Outcome:	• prevailing party	school ²⁷	parent ²⁸	school ²⁹	parent ³⁰	district ³¹	district ³²	parent ³³	parent but ... ³⁴	parent ³⁵

Endnotes for the Table

¹ The case coverage in this chart is limited to court decisions available in the Westlaw database and those hearing/review officer decisions (designated by the acronym “SEA” due to the supervisory responsibility of the state education agency) published in the Individuals with Disabilities Law Reports (IDELR). Thus far, these cases are limited to the hearing/review officer level. With a limited exception, the court decisions to date have only addressed RTI indirectly or peripherally. See *supra* notes 49–51. The coverage does not extend to the several SEA decisions in the less widely accessible LRP electronic database, Special Ed Connection[®], which includes many concerning alleged child find violations. *E.g.*, Special Sch. Dist. of St. Louis Cty., 73 IDELR ¶ 271 (Mo. SEA 2019); Albuquerque Pub. Sch., 73 IDELR ¶ 227 (N.M. SEA 2018) (child find violations for unsuccessful RTI delay in RTI in the wake of parental request for an eligibility evaluation); Palm Beach Cty. Sch. Bd., 118 LRP 14832 (Fla. SEA 2017); In re Student with a Disability, 116 LRP 1930 (N.Y. SEA 2015) (no evidence of compliance with RTI requirements but DSM-V inapplicable and no need for special ed); Robstown Indep. Sch. Dist., 115 LRP 46175 (Tex. SEA 2015) (confusion between RTI and PSW, with discrediting of severe discrepancy and no need for special ed); see also District of Columbia Pub. Sch., 118 LRP 664 (D.C. SEA 2017); In re Student with a Disability, 115 LRP 58001 (Ark. SEA 2015); Rutherford Cty. Bd. of Educ., 115 LRP 57720 (Tenn. SEA 2015); In re Student with a Disability, 115 LRP 50229 (N.Y. SEA 2015); Highlands Cty. Sch. Bd., 115 LRP 27365 (Fla. SEA 2015); Pasadena Unified Sch. Dist., 114 LRP 49752 (Cal. SEA 2014); Propel Charter Sch., 114 LRP 41595 (Pa. SEA 2014); Austin Indep. Sch. Dist., 110 LRP 49317 (Tex. SEA 2010); Salado Indep. Sch. Dist., 108 LRP 67655 (Tex. SEA 2008); *cf.* District of Columbia Pub. Sch., 114 LRP 39103 (D.C. SEA 2014) (concluding the child was not eligible as SLD based in part on parent’s refusal of RTI services and district’s expert testimony that DSM-V requires 6 mos. of RTI to diagnose SLD). It also does not extend to Office for Civil Rights (OCR) letters of findings in response to parental complaints. *E.g.*, Tracy (CA) Unified Sch. Dist., 115 LRP 17619 (OCR 2016) (blanket policy requiring 6-8 weeks of SST interventions violated child find obligation for this individual child, warranting compensatory education); Anderson Cty. (SC) Sch. Dist. No. 2, 66 IDELR ¶ 24 (OCR 2015) (finding a child find violation for student in RTI that did not effectively address his ADHD); Sch. Dist. of Newberry Cty. (SC), 64 IDELR ¶ 286 (OCR 2014) (finding a child find violation based on delaying evaluations based on RTI regardless of reasonable suspicion); Broward Cty. (FL) Sch. Dist., 59 IDELR ¶ 143 (OCR 2012) (finding a violation for not promptly providing written response and procedural safeguards notice upon parental request for special education evaluation for child in RTI process); Cherokee (TX) Indep. Sch. Dist., 59 IDELR ¶ 18 (OCR 2012) (finding a violation for not providing procedural safeguards notice upon initiating RTI in response to parent request for an evaluation and her assent instead to RTI); Harrison (CO) Sch. Dist., 57 IDELR ¶ 295 (OCR 2011) (finding a child find violation for not taking timely action upon notification of ADHD as to the diagnosis and un-medicated symptoms upon parental notice during the RTI process); Polk Cty. (FL) Pub. Sch., 56 IDELR ¶ 179 (OCR 2010) (finding a violation for not promptly providing a full psychoeducational evaluation upon reason to suspect eligibility during the RTI process); Stone Cty. (MS) Sch. Dist., 52 IDELR ¶ 51 (OCR 2008) (finding no child find violation for not evaluating child with ADHD at tier 2 of the RTI process where he was doing relatively well). Finally, it does not extend to decisions via the state complaint resolution process, which has similarly been more successful for parents, particularly for child find claims. *E.g.*, Albuquerque Pub. Sch., 72 IDELR ¶ 227 (N.M. SEA 2018); In re Student with a Disability, 117 LRP 40387 (N.M. SEA 2017); S.W. City Sch., 117 LRP 37378 (Ohio SEA 2017); Plain Local Sch. Dist., 116 LRP 11833 (Ohio SEA 2016); Buckeye Valley Local Sch., 116 LRP 11800 (Ohio SEA 2015); Columbus City Sch. Dist., 116 LRP 1355 (Ohio SEA 2015); Alaska Gateway Sch. Dist., 66 IDELR ¶ 57

(Alaska SEA 2015); Medford Sch. Dist. 549C, 115 LRP 24916 (Or. SEA 2015); New Mexico Pub. Educ. Dep't, 115 LRP 50600 (N.M. SEA 2015); Ohio Virtual Acad., 115 LRP 13943 (Ohio SEA 2015); Am. Montessori Acad., 115 LRP 56523 (Mich. SEA 2014); Salem Keizer Sch. Dist., 114 LRP 44887 (Or. SEA 2014).

The only published secondary sources to date specific to RTI case law are neither comprehensive nor central. David W. Walker & David Daves, *Response to Intervention and the Courts: Litigation-Based Guidance*, 21 J. DISABILITY POL'Y STUD. 40 (2010); Mitchell L. Yell & David W. Walker, *The Legal Basis of Response to Intervention: Analysis and Implications*, 18 EXCEPTIONALITY 124 (2010); Mitchell Yell, Antonis Katsiyannis & James Collins, *Compton Unified School District v. Starvenia Addison: Child Find Activities and Response to Intervention*, 21 J. DISABILITY POL'Y STUD. 67 (2010). First, none of these three articles provides a careful analysis of the framework of relevant regulations and OSEP policy letters. Second and much more significantly, their case selection reflects fatal confusion. The first two, which are strikingly similar in their case coverage, erroneously equated RTI with prereferral interventions generally regardless of the IDEA disability classification and without concordance with the established core characteristics of RTI, thus mischaracterizing their entire sample of purported RTI cases. The third also fails to cite a case specific to RTI, instead relying on one child find case that stands out from the plethora of others only for an entirely different reason, which was the district's attempted statutory defense. For the confusion that includes but extends beyond these articles, see generally Perry A. Zirkel, *RTI Confusion the Case Law and Legal Commentary*, 34 LEARNING DISABILITY Q. 242 (2011). As explained in a follow-up article, the major problem is confusing RTI with its predecessor—general education interventions. Perry A. Zirkel, *The Legal Dimension of RTI: Confusion Confirmed*, 35 LEARNING DISABILITY Q. 72 (2012). For the latest example, see Daniel P. v. Downingtown Area Sch. Dist., 57 IDELR ¶ 224 (E.D. Pa. 2011) (confusion between RTI and Pennsylvania's general education interventions process called Instructional Support Teams).

² High Tech Middle Media Arts Sch., 47 IDELR ¶ 114 (Cal. SEA 2007) (decided on 2/8/07).

³ Delaware Coll. Preparatory Acad., 53 IDELR ¶ 135 (Del. SEA 2009) (decided on 7/30/09). For a complaint resolution process, rather than hearing officer, decision that similarly found a child find violation based, in part, on the lack of RTI for a student ultimately classified as OHI, see Family Foundations Acad. Charter Sch., 54 IDELR ¶ 207 (Del. SEA 2010).

⁴ Citrus Cty. Sch. Dist., 54 IDELR ¶ 40 (Fla. SEA 2009) (decided 11/24/09).

⁵ Meridian Sch. Dist. No. 223, 56 IDELR ¶ 30 (Ill. SEA 2010).

⁶ Joshua Indep. Sch. Dist., 56 IDELR ¶ 88 (Tex. SEA 2010). For a similar subsequent hearing officer decision, see Grapevine-Colleyville Indep. Sch. Dist., 115 LRP 15682 (Tex. SEA 2015).

⁷ Cobb Cty. Sch. Dist., 58 IDELR ¶ 180 (Ga. SEA 2012).

⁸ Hardin-Jefferson Indep. Sch. Dist., 66 IDELR ¶ 147 (Tex. SEA 2015).

⁹ Urbandale Cmty. Sch. Dist., 70 IDELR ¶ 243 (Iowa SEA 2017). The Iowa Department of Education first filed an appeal but subsequently dropped it. The subsequent federal court ruling was limited to attorneys' fees, with the court ordering the department to pay \$315k for the parents' two attorneys. Iowa Dep't of Educ. v. A.W., 73 IDELR ¶ 76 (S.D. Iowa 2018).

¹⁰ Special Sch. Dist. of St. Louis Cty., 73 IDELR ¶ 271 (Mo. SEA 2019).

¹¹ However, all of the facts in this case were before the deadline for RTI implementation.

¹² The decision does not mention the state regulations nor show whether they were applicable at the time. Moreover, the RTI process had three tiers in this case, but Georgia's guidelines call for a four-tiered model.

¹³ Delaware's regulations require RTI for identification of not only children with SLD but also those with MR; however, they contain no such provision for identifying students in other disability classifications.

¹⁴ Presenting diagnoses of ADHD and ODD, the parent stipulated that the child did not have SLD. The hearing panel relied on evidence of severe and sustained behavioral problems to decide that the school's failure to provide procedural safeguards, including notice and evaluation, violated the IDEA.

¹⁵ The child had diagnoses of ADHD, bipolar disorder, and ODD; evidenced behavioral problems at home; was in remedial first grade after repeating kindergarten; and had been participating in RTI since kindergarten, most recently making slow by steady progress in reading (and w/o behavior problems) in Tier 3. The hearing officer recited the eligibility provisions in Florida law for MR and OHI, concluding that the district has 60 school days to complete its evaluation of the child.

¹⁶ SRBI = scientific, research-based interventions.

¹⁷ Although basing the child find violation on the private evaluation, private tutor information, and continuing parental requests for testing, the hearing officer based the eligibility violation on the student's continuing difficulties upon receiving the "scientific, research-based interventions of the district's RTI program. With regard to the RTI factor, the hearing officer commented, by way of dicta, that "[a]lthough well-intentioned the school district's continued use of RTI . . . only delayed an evaluation for special education under the school district's Child Find duty where, as here, the . . . the school district had reason to suspect Student demonstrated characteristics of dyslexia and exhibited deficits in reading and spelling."

¹⁸ See *supra* endnote 14.

¹⁹ In this Texas case, the three-tiered RTI system intersected with the district's implementation of the state dyslexia law and its identification of the student under Section 504.

²⁰ CPM = continuous progress monitoring.

²¹ The hearing panel rejected the school's RTI defense, reasoning as follows:

RTI requires a written plan for a child with meetings to discuss the interventions and the child's progress with respect to the interventions. Once a child fails to respond to one tier of interventions, additional meetings are held and new interventions are created [The school] had no record of such a plan for [the child].

Delaware's regulations for RTI have no such requirement.

²² The child had a PMP (progress monitoring plan) for at least Tiers 1 and 2; the record did not include one for Tier 3, although the progress data were in evidence.

²³ The district team developed a written plan for the individual child, although the hearing officer found its implementation to have been "questionable." However, beyond this possibly related feature, there was no mention of continuous progress monitoring.

²⁴ However, for the part based on the Developmental Reading Assessment, the hearing officer found "Student's 'running records' are somewhat difficult to decipher or understand."

²⁵ Based on the professional literature, this phrase refers to the duration of and movement from each tier, including operationalization of the regulatory references to "[in]adequate progress" and "appropriate period." See *supra* note 9 and accompanying text.

²⁶ Pointing to the commentary accompanying the 2006 IDEA regulations that identified the frame of reference as "State-approved grade-level standards, not abilities," the hearing officer concluded:

In the instant case, there is no underachievement by Student, no failure to meet grade level standards, and no evidence of any research-based interventions attempted with Student. Because Student was getting As and Bs in all her classes and scored very high on the slate [sic] standardized testing, there would have been no reason for the school to have maintained records of such interventions to determine if the student had SLD using the RTI method.

However, her opinion reflected confusion in at least two respects: 1) she accepted as an alternative, without providing any legal foundation, the premise that the IDEA, California law, or district policy required RTI; and 2) she concluded that "reading fluency . . . is not sufficient to show that the Student has an SLD in the area of reading."

²⁷ After correctly concluding that California permits both the severe discrepancy and RTI approaches, the hearing officer ruled that the child no longer qualified as SLD under either one.

²⁸ While declining to determine the child was eligible, the hearing panel ordered the district to provide a prompt comprehensive evaluation, IEE reimbursement, and approximately one semester of compensatory education services.

²⁹ The hearing officer concluded that prior to the parent's request for an evaluation and an IEE during Tier 3, the district "had no reason to request consent to perform an IEE because [the child] is making progress in RTI, Tier 3, instruction."

³⁰ The outcome was not based on RTI, at least with regard to the regulatory requirement for SLD identification. The hearing officer did not definitively address RTI in relation to SLD, merely citing the relevant state regulation and subsequently observing that the district had no reason to suspect SLD until the IEE, which was after the filing for the hearing.

³¹ The basis of this short decision was the hearing officer's rather cryptic conclusion, without detailed fact-finding or RTI examination, that "the RTI process was successful for the student."

³² In this child find, or delayed evaluation, claim for a child subsequently evaluated as eligible after a three-tiered RTI process, the hearing officer concluded that "when [the child]'s progress began to slow, [the child's] teachers initiated the RTI process and advanced [the child] appropriately [and] when [the child] failed to respond to the interventions, [the child]'s teacher referred [the child] for an evaluation [which was] conducted in a timely fashion."

³³ The relief included not only reimbursement for private evaluation and tutoring under the rubric of compensatory education but also system-wide parental information updating and dyslexia evaluation training.

³⁴ The IHO provided declaratory relief that the although the state standards unduly restricted IDEA eligibility (via requiring a severe performance discrepancy with peers and excluding from special education interventions within the capacity of general education). Concluding that the child was eligible upon the first evaluation but not upon the second and final evaluation, the IHO only ordered reimbursement for tutoring expenses during the intervening period but not—in light of the considerable RTI services—compensatory education. She also concluded that the parent had prevailed for purposes of attorneys' fees. The state voluntarily dismissed its appeal of the merits, and the court ruled that the parents were entitled to the \$317k attorneys' fees that they requested.

³⁵ The IHO ordered 8 months of compensatory education.