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THE LAW ON RTI AND MTSS [a1]

The professional literature concerning response to intervention (RTI) and, more recently, multi-tiered system of support (MTSS) is extensive and is not limited to identification of students with specific learning disability (SLD). [1] However, it lacks a current comprehensive and objective compilation of the pertinent legal sources. [2] In response, this document provides an ***2** annotated synthesis of the law specific to RTI and MTSS in the P-12 school context. "Law" in this context consists of legislation, regulations, case law, [3] and--at the outermost margin--agency interpretations. [4] On the other hand, state guidelines, with the exception of policies formally adopted by state boards of education, are not within the scope of this synthesis. [5]

Part I synthesizes pertinent federal legislation, regulations, and agency interpretations for RTI and MTSS, respectively. Part II synthesizes the corresponding state statutes and regulations. Finally, Part III provides a snapshot of the case law to date, followed by brief concluding comments.

I. FEDERAL FRAMEWORK

A. RTI:

Legislation

The 2004 amendments of the Individuals with Disabilities Education Act (IDEA), [6] which went into effect on July 1, 2005, provided that for SLD ***3** 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. [7] Thus, states had a choice of permitting or prohibiting severe discrepancy and permitting or requiring RTI.

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 require [8]

The reference points for RTI appear to be "age or State-approved grade-level standards." [9]

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]." [10]

The regulations further require the district to "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. [11]

Moreover, the regulations require specific 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." [12]

***4** 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." [13]

Agency Policy Interpretations [14]

The RTI-relevant OSEP/OSERS policy interpretations [15] consist of (a) the commentary accompanying the 2006 regulations, and (b) subsequent policy letters and memoranda.

First, the commentary accompanying the 2006 regulations [16] included these agency interpretations:

> 75 For the third, research-based alternative, the Department of Education provided these examples of a state's choices: (a) "identify children based on absolute low achievement and consideration of exclusionary factors as one criterion for eligibility" or (b) "combine features of different models for identification." [17]

> 75 For State-approved grade-level standards, the Department 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. [18]

75 For the prerequisite consideration to avoid the suspected SLD being attributable to inadequate instruction in reading and math, the Department 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. [19]

75 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 ***5** to make their determination, or identify what additional data are needed to determine whether the child is a child with a disability." [20]

• For IQ-related concerns, the 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." [21]

Second, in the subsequent policy letters and memoranda, the Department has added these clarifications through its interrelated offices--OSEP and OSERS: [22]

• Although the models of RTI vary, the core characteristics are: (a) "high quality, research-based instruction" in general education, (b) continuous progress monitoring, (c) screening for academic and behavior problems, and (d) multiple tiers of progressively more intense instruction. [23]

• Whether a district's general education intervention program qualifies as RTI depends on whether it meets its oft-pronounced [24] four distinguishing criteria. [25]

• For adoption of RTI as mandatory, the recommended approaches are statewide and district-wide uniformity, respectively. [26] 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." [27]

• RTI is only one part of a comprehensive evaluation. [28]

• States may permit any combination of the three options, or methods. [29] However, having severe discrepancy as a required component is clearly ***6** questionable. [30]

• The IDEA regulatory reference to "pattern of strengths and weaknesses" (PSW)[31] refers to the permissible methods other than RTI, i.e., severe discrepancy and the third, research-based alternative.[32]

• For the duration of RTI and its interplay with the required evaluation, the Department has declined to define "an appropriate period" or "adequate progress."[33]

• 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."[34]

• 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."[35]

• 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.[36]

• 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 process;[37] "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."[38]

• 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 ***7** 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.[39]

• RTI may not be used to delay or deny an evaluation of a child suspected of having a disability.[40]

• 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. [41]

• SLD and, thus, RTI, are generally not applicable to Head Start and other preschool children with disabilities. [42]

• 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." [43]

• 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 individual states. [44]

• 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." [45]

• Students identified as eligible for special education under the IDEA may not participate in RTI paid for by Part B coordinated and early intervening 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 students [46]

***8** • 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. [47]

• 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. [48]

• 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]." [49]

• 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. [50]

• 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. [51]

• 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. [52]

B. MTSS

Legislation

The IDEA legislation, per the 2004 reauthorization, does not mentions MTSS. However, the Every Student Succeeds Act (ESSA), which is the successor to NCLB, provides various explicit authorizing (i.e., permissive but not mandatory) references to MTSS, including the following: [53]

• defining MTSS: "a comprehensive continuum of evidence-based, systemic practices to support a rapid response to students' needs, with regular observation to facilitate data-based instructional decision-making" [54]

• authorizing use of Title II LEARN comprehensive literacy grants for "[MTSS] for literacy services" [55]

***9** • identifying MTSS as one of the possible activities in the definition of "professional development" for teachers and other instructional staff [56]

Regulations

Neither the IDEA regulations [57] nor the ESSA regulations [58] expressly mention MTSS.

Agency Policy Interpretations

Thus far, the U.S. Department of Education policy interpretations have been limited to the following related partial or marginal references under the IDEA (thus, from OSEP or OSERS) [59] or Section 504 (triggering the Department's Office for Civil Rights (OCR)), [60] although more such guidance is anticipated for implementation of the ESSA:

> • "For those students who may need additional academic and behavioral supports to succeed in a general education environment, schools may choose to implement a multi-tiered system of supports (MTSS), such as response to intervention (RTI) or positive behavioral interventions and supports (PBIS). MTSS is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multilevel instructional and behavioral system to maximize student achievement and reduce problem behaviors." [61]

> • "A multi-tier system of supports, often referred to as RTI, [62] means a comprehensive continuum of evidence-based, systemic practices to support a rapid response to a child's needs, with regular observation to facilitate data based instructional decision-making. OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner." [63]

> • "In OCR's experience, school districts have not generally adopted a uniform definition of what constitutes an intervention strategy, protocol, or process, and they have been described in a variety of ways, including, but not limited to: Response to Intervention (RTI); multi-tiered system of supports (MTSS); positive behavioral interventions and supports and other strategies; and referral to intervention teams .... [64] The Department ***10** supports the use of an evidence-based system of interventions to help a school district identify and address learning and behavioral challenges in its students at the earliest opportunity, improving student achievement and reducing behavioral problems whether or not they are related to a disability." [65]

> • "As a matter of practice, we strongly encourage schools to consider how the implementation of behavioral supports within the IEP could be facilitated through a school-wide multi-tiered behavioral framework .... In general, behavioral supports are most effectively organized within a multi-tiered behavioral framework that provides instruction and clear behavioral expectations for all children, targeted interventions for small groups not experiencing success, and individualized supports and services for those needing the most intensive support" (citing PBIS research and resources) .... [T]his subsection may not be required for students suspected of having a disability if a team that comprises qualified professionals and the parent determines that these general education interventions are not appropriate for a student who demonstrates a speech disorder or severe cognitive, physical or sensory disorders, or severe social/behavioral deficits that require immediate intensive intervention to prevent harm to the student or others." [66]

II. STATE LAWS

A. RTI

As of May 31, 2010, per the options in the IDEA,[67] approximately 13 states (e.g., Delaware, Florida, Illinois, New Mexico, New York, and West Virginia)[68] 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.[69] Conversely, the vast majority of states have elected to permit ***11** both RTI and severe discrepancy, thereby delegating the choice to the school district.[70] 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.[71]

Additional examination of state laws and guidelines reveals that (a) the state laws often provide general education interventions but not in coordination with the RTI provisions; (b) 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; (c) less than half of the states specify an individual intervention plan as part of their RTI provisions; and (d) only a handful of states have extended RTI for classifications beyond SLD, with Louisiana the only one to do so rather generically thus far.[72]

B. MTSS

A few state laws or related guidance documents use MTSS either interchangeably with (or instead of) RTI on a broad basis.[73] More significant, fewer state laws separately require MTSS in addition to and separable from RTI. The following Florida regulation serves as a leading example:[74]

> ***12** *General education intervention procedures for kindergarten through grade twelve (12) students suspected of having a disability who are enrolled in public schools*. It is the local school district's responsibility to develop and implement a [MTSS] which integrates a continuum of academic and behavioral interventions for students who need additional support to succeed in the general education environment. In implementing a data-based problem solving process designed to develop, implement and evaluate a coordinated continuum of evidence-based instruction and intervention practices, a school district may carry out problem solving activities that include the provision of educational and behavioral evaluations, services, and supports, including evidence-based literacy instruction and professional development for teachers and other school staff to enable them to deliver scientifically based academic and behavioral interventions and, where appropriate, instruction on the use of adaptive and instructional technology ....[75]

III. CASE LAW

A. RTI

The aforementioned[76] 2006 IDEA regulations specific to SLD identification serve as the road map for tracing the case law specific to RTI. For the prior period, a comprehensive compilation of 68 hearing/review officer and 17 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 ($n = 31$).[77]

For the period after the 2006 IDEA regulations, a series of follow-up analyses specific to SLD eligibility revealed that the trend continued with regard to the heavily district-skewed outcomes; however, as Table 1 shows, the primary decisional factor gradually shifted to the ultimate criterion for eligibility, the need for special education. More significantly, the longitudinal ***13** analysis in Table 1 shows that RTI continued to play a very limited role in the SLD eligibility case law. [78]

Table 1. SLD Eligibility Case Law Approximately After the 2016 IDEA Regulations [79]

TIME PERIOD	PRIMARY DECISIONAL FACTOR	COMMENTS
(no. of cases)		
mid 2016-late 2012	severe discrepancy	2 RTI cases [81]
(n = 26 cases) [80]		
late 2012-end 2014	need for special education	no RTI cases [83]
(n = 16 cases) [82]		
2015-late 2017	need for special ed.	4 RTI cases [85]
(n = 25 cases) [84]		
late 2017-late 2019	need for special ed.	no RTI cases [87]
(n = 14 cases) [86]		

The preceding image contains the references for footnotes [79], [80], [81], [82], [83] ***14** , [84], [85], [86], [87].

During this lengthy period, only one court decision, which was unpublished and at the district court level, specifically addressed RTI in relation to SLD eligibility. [88] In this case, after providing tier 2 RTI in reading to a first grader for approximately two months, the district moved the child to tier 3 for the remaining six months of the school year. For the issue of SLD eligibility, the federal district court judge upheld the hearing officer's ruling in favor of the parents, finding RTI relevant in two key respects. First, for the classification component of eligibility, the court concluded that the hearing officer had sufficient evidence to determine that the child was not adequately achieving to meet grade-level standards with RTI. [89] Second, for the need prong for eligibility, the court upheld the hearing officer based on not only the evidence from the parents' experts but also the nature and extent of the RTI. [90]

Viewed with a wider lens than the SLD eligibility context of the IDEA, two other clusters of cases emerge concerning RTI. [91] First, a few cases used ***15** RTI as a decisional factor for eligibility for classifications other than SLD. [92] Second, a much longer but still limited line of mostly hearing or review officer decisions used RTI as a decisional factor for the overlapping but separable issue of child find under the IDEA. [93] The majority of these child find rulings were in favor of the defendant district, but (a) they were fact-specific in light of the ad hoc multi-factor nature of child find, [94] and (b) RTI served as either a

contributing or a countering factor to a child find violation depending on the child's progress. [95] Moreover, the relatively few court decisions were all unpublished and without a clear-cut pattern. [96]

Finally, extending "case law" most broadly to administrative investigatory decisions, RTI has been a decisional factor in child find rulings in the IDEA state complaint process [97] and the analogous Section 504 OCR investigatory process, [98] with parents generally being more successful in these ***16** alternative administrative forums largely due to the relatively strict procedural orientation.

B. MTSS

The decisions to date that have referred to MTSS thus far have been negligible in number and entirely at the nonjudicial level. The bare handful of hearing and review officer decisions are largely indistinguishable from the foregoing RTI case law, with the sole exception being based on a state law specific to MTSS beyond SLD identification. [99] Similarly, the sparse complaint investigator decisions are based on semantic variation rather than legal differentiation. [100] Finally, all of these cases were specific to procedural issues, such as child find, but not SLD or other eligibility.

CONCLUSIONS

This updated comprehensive synthesis of the law on RTI and MTSS is purposely objective, leaving interpretations largely to the educational and legal practitioners who tend to be partisan about the use of these approaches for SLD identification and broader applications in P-12 schools. A few overall legal trends appear to be relatively clear regardless of one's particular position on RTI and MTSS.

First, the federal framework of legislation and regulations is relatively skeletal and specific to SLD identification for RTI and negligible for MTSS, while agency guidance is gap-filling but nonbinding for RTI and both comparably limited and not clearly differentiated for MTSS. [101] Although not ***17** entirely consistent, it seems that this federal legal framework addresses RTI for SLD identification and treats MTSS as the same approach in a broader educational context.

Second, the state laws for RTI provide specific choices within the federal framework for SLD identification but with not only wide variation but also confusing inconsistency in the applicable terminology and acronyms, [102] including provisions for MTSS. [103] It appears, however, that generally MTSS is gradually replacing RTI as the prevailing term.

Third, the case law specific to RTI for the ultimate component of SLD identification--eligibility--is relatively inconsequential in amount, weight, and nuance, [104] with the longer, wider, and still limited line extending to various other classifications and, even more so, the initial identification component of child find. [105] The balance of the outcomes has been in school districts' favor, although parents have fared better via the alternate and more procedural avenue of complaint investigations. [106]

The rather clear overall conclusion is that RTI and MTSS are largely a matter of professional discretion than legal prescription. Thus, beyond and above the rather wide boundaries of the law, the focus should be on evidence-based best practice.

Footnotes

a1 *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 373 Ed.Law Rep. [1] (February 20, 2020).

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1 Much too extensive to cite comprehensively here, the RTI and MTSS literature has recently shifted to more of a focus on implementation, research, specialized applications, and MTSS. *E.g.,* Adhwaa Alahmari, *A Review and Synthesis of the Response to Intervention Literature*, 33 INT'L J. SPECIAL EDUC. 894 (2019); Stephanie Al Otaibaet et al., *Elementary Teachers' Knowledge of Response to Intervention Implementation*, 69 ANNALS DYSLEXIA 34 (2019); Gerald J. August et al., *Getting "SMART" about Implementing Multi-Tiered Systems of Support to Promote School Mental Health*, 66 J. SCH. PSYCHOL. 85 (2018); Courtenay A. Barrett et al., *Examining MTSS Implementation Across Systems for SLD Identification*, 12 SCH. PSYCH. F. 30 (2018); Jeong Hoon Choi et al, *An Analysis of Mediating Effects of School Leadership on MTSS Implementation*, 53 J. SPECIAL EDUC.15 (2019); Stephen Ciullo et al., *Implementation of Evidence-Based Literacy Practices in Middle School Response to Intervention*, 39 LEARNING DISABILITY Q. 44 (2016); John W. Eagle et al., *Implementing a Multi-Tiered System of Support*, 25 J. EDUC. & PSYCHOL. CONSULTATION 160 (2015); Douglas Fuchs & Lynn S. Fuchs, *Critique of the National Evaluation of Response to Intervention*, 83 EXCEPTIONAL CHILD. 255 (2017); Kaitlyn M. Leonard, *Implementing MTSS in Beginning Reading*, 34 LEARNING DISABILITIES RES. & PRAC. 110 (2019); Jeremy Miciak et al., *Executive Functions and Response to Intervention*, 42 LEARNING DISABILITY Q. 17 (2019); Terrence Scott et al., *An Examination of the Association between MTSS Implementation Fidelity Measures and Student Outcomes*, 63 PREVENTING SCH. FAILURE 308 (2019); Collin Shepley & Jennifer Grisham--Brown, *Multi-Tiered Systems of Support for Preschool-Aged Children*, 47 EARLY CHILDHOOD RES. Q. 296 (2019).

2 For an earlier version of this document, which did not extend to MTSS and which ended its coverage to late 2010, see Perry A. Zirkel, *RTI and the Law*, 268 Ed. Law Rep. 9 (2011). The other available legal analyses are also limited to RTI or particular issues within it and do not cover recent case law. *E.g.*, STANLEY L. SWARTZ, CATHLEEN A. GERAGHTY-JENKINSON & SHERRI FRANKLIN-GUY, RESPONSE TO INTERVENTION (RTI): IMPLEMENTATION AND LEGAL ISSUES (2011) (focusing on the IDEA regulations and state laws, with limited sampling agency policy interpretations and no coverage of case law); 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) (discussing the case law and agency interpretations specific to the intersection of child find and RTI); *cf.* Erin Archerd, *Response to Intervention: A Rising Tide or Leaky Boat?* 30 OHIO J. ON DISP. RESOL. 233 (2015) (recommending provision of alternate dispute resolution for RTI issues, including for students not covered under IDEA); 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); Daniel W. Osher, *How to Reconcile Request for Special Education Evaluations with RTI*, 45 COMMUNIQUÉ 14 (Mar./Apr. 2017) (suggesting alternatives for school psychologists upon parental requests for evaluation during the RTI process); Kate Matlen, Comment, *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); Genna Steinberg, Comment, *Amending § 1415 of the IDEA: Extending Procedural Safeguards to Response-to-Intervention Students,* 46 COLUM. J.L. & SOCIAL PROBS. 393 (2013) (recommending that Congress amend the IDEA to provide all its procedural protections to students in RTI programs).

3 "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 the more general legal databases.

4 The administering agency for the IDEA is the U.S. Department of Education, which successively includes the Office of Special Education and Rehabilitations 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 Ed. Law Rep. 671 (2017).

5 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); *see also* Rachel Savitz et al., *Response to Intervention: A Summary of the Guidance State Departments of*

Education Provide to Schools and School Districts, 91 CLEARINGHOUSE 243 (2018) (finding wide variation in the RTI information on state education agencies' websites).

6 20 U.S.C. §§ 1400-1419 (2017). This funding legislation, which dates back to 1975 and has been periodically amended via reauthorization, has provided for two alternative avenues of decisional dispute resolution starting at the administrative level--a due process hearing (with an option for a second, review officer level) and an investigative complaint procedure. *See e.g.*, Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes--Complaint Procedures and Impartial Hearings: An Update*, 369 Ed. Law Rep. 550 (2019). For the adjudicative avenue, the IDEA has yielded a large and generally increasing body of court decisions, including the following successive basic components: (1) identification (child find and eligibility), (2) free appropriate public education (FAPE) in the least restrictive environment (LRE), and (3) remedies. *See e.g.*, Perry A. Zirkel, National Update of Case Law 1998 to the Present under the IDEA and Section 504/ADA (2019), available in the "Case Law Updates" section of https://perryzirkel.com/publications/.

7 20 U.S.C. § 1414(b)(6). The legislation also authorizes use of up to 15% of IDEA funds for "early intervening services" (EIS) coordinated with ESEA activities for students "who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment," which inferably includes RTI. *Id.* § 1413(f).

8 34 C.F.R. § 300.307(a) (2018).

9 *Id.* § 300.309(a)(2)(i).

10 *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."

11 *Id.* § 300.309(c)(2).

12 *Id.* § 300.309(b)-(c).

13 *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.

14 The coverage here is limited to generally applicable agency interpretations for 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).

15 *Supra* note 4.

16 71 Fed. Reg. 46,540 *et seq.* (Aug. 14, 2006).

17 *Id.* at 46,648.

18 *Id.* at 46,652.

19 *Id.* at 46,655.

20 *Id.* at 46,648.

21 *Id.* at 46,651.

22 *Supra* note 4.

23 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 ¶ Ê49 (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).

24 *Supra* note 23 and accompanying text.

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

26 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).

27 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).

28 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).

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

30 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).

31 *Supra* text accompanying note 10.

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

33 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 16, at 46,658.

34 Memorandum to Chief State School Officers, 51 IDELR ¶ Ê49 (OSEP 2008).

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

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

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

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

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

40 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).

41 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).

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

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

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

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

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

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

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

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

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

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

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

53 The ESSA also refers more generally to "schoolwide tiered model" in two sections: 20 U.S.C. §§ 6314(b)(7)(A)(iii) and 6315(b)(2)(B)(ii) (2017).

54 *Id.* § 7801(33).

55 *Id.* § 6644(e)(4).

56 *Id.* § 7801(42).

57 34 C.F.R. §§ 300.1-300.818 (2018).

58 *Id.* §§ 200.1-200.73 and 299.1-299.13 (2018).

59 *Supra* note 4.

60 29 U.S.C. § 794 (2017); 34 C.F.R. §§ 104.1-104.39 (2018). For the role of OCR in administering and enforcing § 504 and other federal civil rights statutes, see, e.g., https://www2.ed.gov/about/offices/list/ocr/index.html

61 Dear Colleague Letter, 66 IDELR ¶ 188 (OSERS 2015) (allowing the use of dyslexia, dyscalculia, and dysgraphia in the IDEA context).

62 For this same alternative use of MTSS and RTI, see Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the IDEA, 68 IDELR ¶ 78 (OSERS 2016)-item 24; Memorandum to State Directors of Special Education, 56 IDELR ¶ 50 (OSEP 2011).

63 Memorandum to State Directors of Special Education, Preschool/619 State Coordinators, Head Start Directors, 67 IDELR ¶ 272 (OSEP 2016) (extending the message that RTI may not be used to delay or deny a special education evaluation).

64 For another OCR reference to MTSS as including PBIS, *see* Dear Colleague Letter: Restraints and Seclusion of Students with Disabilities, 69 IDELR ¶ 80 (OCR 2016).

65 Dear Colleague Letter, 68 IDELR ¶ 52 (OCR 2016) (focusing on identifying and providing FAPE under § 504 to students with ADHD). For references to MTSS in OCR letters of findings in relation to child find under § 504 (and, via double coverage, under the IDEA), see, *e.g.*, Farmington (MI) Pub. Sch., 116 LRP 31313 (OCR 2016); DeSoto (KS) Unified Sch. Dist., 110 LRP 20298 (OCR 2009).

66 Dear Colleague Letter, 68 IDELR ¶ 76 (OSEP 2016) (providing "significant guidance" for providing appropriate behavioral interventions and supports for students with disabilities both during and alternative to disciplinary removals, including short-term suspensions).

67 *Supra* text accompanying notes 5-7.

68 Zirkel & Thomas II, *supra* note 5. The only state that had not finalized its official choice by that date was Wisconsin. *Id.* Hauerwas et al., *supra* note 5, 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.

69 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 July 1, 2014 and secondary by July 1, 2015); 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 July 1, 2020. *See* http://mtss.ncdpi.wikispaces.net/

70 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).

71 Zirkel & Thomas II, *supra* note 5. For the current approval procedure in Pennsylvania, see https://cms-pattan-live.ae-admin.com/CMSPages/GetAmazonFile.aspx?path=?\pattan\media\publications\2019accessiblepdfs/using_rti4deter_sld_sd_appl_1.pdf&hash=e52be1731173d62a034da9c921336a9bdfe7414a.

72 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).

73 *E.g.*, 704 KY. ADMIN REGS. 3:095(1)-(2); *see also* North Carolina's new state board policies, especially §§ 1500-2.1 (defining MTSS as "multi-tiered framework [that] promotes school improvement through engaging, research-based academic and behavioral practices" and defining RTI as "the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make changes in instruction or goals, and applying child response data to important educational decisions") and 1503-3.1 (requiring "RTI/MTSS" for SLD identification. http://ec.ncpublicschools.gov/2020PolicyAddendum.pdf. *For state guidance, see, e.g., Pennsylvania's transition from RTI to MTSS.* https://www.pdsd.org/cms/lib/PA01000989/Centricity/Domain/774/PA-MTSSModel.pdf

74 For other state laws that provide for MTSS separately from RTI, see, e.g., S.C. CODE ANN. § 59-33-510-59-33-530; S. C. ADMIN. REGS. § 43-243.1(K); VT. STAT. ANN. tit. 16, § 2902; Vt. State Bd. of Educ. r. 2362.2.5. available at https://education.vermont.gov/documents/state-board-rules-series-2360 (mandatory MTSS generally but permissive RTI for SLD identification); *cf.* GA. COMP. R. & REGS. 160-4-7-.03(2) (broad prereferral interventions) and 160-4-7-.05 (RTI for SLD identification); WASH. REV. CODE ANN. § kE28A.320.260 (MTSS interventions requirement as part of dyslexia identification in grades k-2). For state guidance that provides for MTSS more broadly than the RTI state law provision for SLD identification, see, e.g., https://www.cde.state.co.us/mtss *(Colorado);* https://www.educateiowa.gov/pk-12/standards-and-curriculum/iowas-multi-tiered-system-supports *(Iowa)*.

75 FLA. ADMIN. CODE r. 6A-6.0331(1). This provision includes an exemption for specified students being considered for eligibility, such as "severe cognitive, physical or sensory disorders, or severe social/behavioral deficits that require immediate intensive intervention to prevent harm to the student or others." *Id.* For Florida's separate regulation specific to RTI for SLD identification, see id. r. 6A-6.0318(2)-(5).

76 *Supra* notes 8-16 and accompanying text.

77 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). The hearing and review officer decisions are those published in the only national database that includes a sampling of the case law at the administrative level, LRP's SpecialEdConnectionb®. This source includes decisions in the print reporter series, the Individuals with Disabilities Education Law Reports (IDELR) and those only included in the electronic database, designated with an "LRP" citation. Equating to the two prongs for eligibility, the primary decisional factors are (a) severe discrepancy, which is historically the predominant criterion for the SLD classification, and (b) the need for special education.

78 The Comments column of Table 1 shows the frequency of cases in which RTI was a decisional factor. A few other cases mentioned RTI incidentally in a purely background role of no decisional significance. *E.g., Dep't of Educ., State of Haw. v. Patrick P.*, 609 Fed.Appx. 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) (mentioning "informal RTI" as distinguished from special ed incidental to severe discrepancy determination).

79 The starting point is only approximate here, because the IDEA regulations were not effective until October 2006, and the case law typically has a time lag thereafter.

80 Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Latest Case Law*, 41 COMMUNIQUÉ 10 (Jan. 2013). Of the 26 cases, 16 were court decisions. *Id.*

81 In a very brief decision, a Texas hearing officer concluded that the child was successful via RTI and, thus, did not need special education. Joshua Indep. Sch. Dist., 56 IDELR ¶ 88 (Tex. SEA 2010). The Ninth Circuit issued the other decision, but it was marginal because (a) the outcome was inconclusive, (b) the focus was severe discrepancy being the exclusive basis, (c) the context was the post-IDEA 2004 interim between the state's former and new regulations, and (c) the analysis was largely based on Hawaii's nongeneralizable status as being both the state education agency and local education agency. *Michael P. v. Dep't of Educ., State of Haw.,* 656 F.3d 1057, 272 Ed.Law Rep. 869 (9th Cir. 2011), *further proceedings sub nom Elizabeth G. v. Dep't of Educ., State of Haw.*, 58 IDELR ¶ 68 (D. Haw. 2012); *see also* Perry A. Zirkel, *The Ninth Circuit's Recent Ruling: RTI?,* 40 COMMUNIQUÉ 26 (Dec. 2012).

82 Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Most Recent Case Law*, 43 COMMUNIQUÉ 4 (June 2015). Of the 16 cases, 10 were court decisions. *Id.*

83 The analysis excluded an RTI-related decision because the relevant issue concerned sharing RTI data, a procedural FAPE ruling separate from the ruling that upheld the district's SLD eligibility evaluation. *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842 (9th Cir 2014); *see also* Perry A. Zirkel, *A Collateral Case of RTI*, 43 COMMUNIQUÉ 4 (Dec. 2014).

84 Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for IDEA Eligibility: The Latest Case Law*, 46 COMMUNIQUÉ 14 (May 2018). Of the 25 cases, 9 were court decisions. *Id.*

85 In all of these cases, the key factor was whether the student made sufficient progress via RTI. The three hearing or review officer decisions were rather cursory in their analysis. Columbus City Sch. Dist., 116 LRP 42455 (Ohio SEA 2016) (ruled that student continued to make progress via Tier 3 interventions); Grapevine-Colleyville Indep. Sch. Dist., 115 LRP 15682 (Tex. SEA 2015) (ruling briefly that student made sufficient progress in RTI); Hardin-Jefferson Indep. Sch. Dist., 66 IDELR ¶ 147 (Tex. SEA 2015) (ruled that student was eligible as SLD upon making progress via RTI in oral expression and listening comprehension but not in spelling and reading). Based on its higher legal authority and more specific analysis, the court decision, *Greenwich Bd. of Educ. v. G.M.*, 68 IDELR ¶ 8 (D. Conn. 2016), is discussed separately herein. *Infra* notes 87-89 and accompanying text.

86 *R.Z.C. v. N. Shore Sch. Dist.*, 755 Fed. Appx. 658, 363 Ed.Law Rep. 705 (9th Cir. 2018); *Burnett v. San Mateo-Foster City Sch. Dist.*, 739 Fed.Appx. 870, 359 Ed.Law Rep. 69 (9th Cir. 2018); *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 365 Ed.Law Rep. 769 (5th Cir. 2019); *Jefferson Cnty. Bd. of Educ. v. Rajeeni M.*, 75 IDELR ¶ 184 (N.D. Ala. 2019); *William V. v. Copperas Cove Indep. Sch. Dist.*, 75 IDELR ¶ 124 (N.D. Tex. 2019); *D.H.H. v. Kirbyville Indep. Sch. Dist.*, 2019 WL 5390125, *adopted*, 75 IDELR ¶ 4 (E.D. Tex. 2019); *R.F. v. S. Lehigh Sch. Dist.*, 74 IDELR ¶ 292 (E.D. Pa. 2019); *T.W. v. Leander Indep. Sch. Dist.*, 74 IDELR ¶ 12 (W.D. Tex. 2019); *Lubbock-Cooper Indep. Sch. Dist. v. Sherri D.,* 74 IDELR ¶ 17 (N.D. Tex. 2019*); G.D. v. W. Chester Area Sch. Dist.*, 70 IDELR ¶ 180 (E.D. Pa. 2017); Maplewood Sch. Dist., 119 LRP 42897 (Ohio SEA Sept. 27, 2019); Jefferson Cnty. Bd. of Educ., 119 LRP 28530 (Ala. SEA July 1, 2019); Ann Arundel Cnty. Pub. Sch., 119 LRP 12164 (Md. SEA Dec. 14, 2018); Lenoir Cnty.-Kinston Bd. of Educ., 117 LRP 22709 (N.C. SEA May 11, 2017). Thus, 10 of these 14 decisions were at the judicial level.

87 For case law during this period in which RTI was peripherally mentioned rather than being a decisional factor in determining SLD eligibility, see, *e.g., Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209, 365 Ed.Law Rep. 769 (5th Cir. 2019).

88 *Greenwich Bd. of Educ. v. G.M.*, 68 IDELR ¶ 8 (D. Conn. 2016).

89 The court pointed to not only the data from the district but also the opinion of the parents' two experts. *Id.* at *16-17.

90 For RTI part of this reasoning, the court concluded that the child "required at least some specialized intervention through [RTI], and that such specialized instruction needed to be increased after only a few months of [RTI]." *Id.* at *17.

91 Although the focus of this Article is on student issues, RTI has also emerged in an occasional case concerning a school employee. *E.g., Molloy v. Acero Charter Sch.*, 75 IDELR ¶ 91 (N.D. Ill. 2019) (rejecting various claims of terminated reading specialist who had expressed her view that her school was implementing RTI/MTSS in violation of state's mandatory law); *Schellbach v. Colonial Intermediate Unit*, 2017 WL 4542372 (Pa. Commw. Ct. Oct. 12, 2017) (rejecting whistleblower claim of terminated school psychologist who claimed that employer's exclusive use of severe discrepancy for SLD eligibility violated IDEA).

92 *E.g.,* Citrus Cnty. Sch. Dist., 54 IDELR ¶ 40 (Fla. SEA 2009) (intellectual disabilities or other health impairment); *cf. M.G. v. Williamson Cnty. Sch.*, 720 Fed.Appx. 280, 353 Ed.Law Rep. 673 (6th Cir. 2018); *K.W. v. Tuscaloosa Cnty. Sch. Sys.*, 73 IDELR ¶ 157 (N.D. Ala. 2018) (indirectly for other health impairment).

93 Child find is the ongoing obligation under the IDEA to conduct a special education evaluation within a reasonable period of time upon reasonably suspecting that the child may be eligible. The evaluation serves as the overlap between child find and eligibility, with the result in some cases being a ruling that the district violated child find but an ultimate determination that the child was not eligible. For an overview, including the relevant IDEA provisions and illustrative court decisions, see Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 Ed. Law Rep. 30 (2018).

94 *E.g.,* Perry A. Zirkel, *The "Red Flags" of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015) (showing, via a systematic analysis of the case law, the wide variance in not only the scope but also direction of the factors in the determination of the reasonable suspicion trigger for child find).

95 *E.g.,* Perry A. Zirkel, *Response to Intervention and Child Find: A Problematic Intersection?*, 84 EXCEPTIONALITY 368 (2018) (analyzing 19 hearing/review officer and 5 court decisions for the period 2008-2018). "Progress" here is a broad rubric that includes the period and tier, not just the performance data, for the child. However, in most of the cases to date, the adjudicator's analysis has been cursory and global rather than carefully nuanced. *Id.* at 380. For more recent decisions, which generally continue the same trend, see, e.g., Richmond Cnty. Pub. Sch., 118 LRP 4626 (Ga. SEA 2018) (ruling in favor of district); Special Sch. Dist. of St. Louis Cnty., 73 IDELR ¶ 271 (Mo. SEA 2019) (rulings for parents).

96 *Compare M.G. v. Williamson Cnty. Sch.,* 720 Fed.Appx. 280, 353 Ed.Law Rep. 673 (6th Cir. 2018); *K.W. v. Tuscaloosa Cnty. Sch. Sys.*, 73 IDELR ¶ 157 (N.D. Ala. 2018); *J.C. v. Sch. Bd. of St. Johns Cnty.*, 2017 WL 9935003 (M.D. Fla. Aug. 1, 2017); *Demarcus v. Bd. of Educ.*, 63 IDELR ¶ 13 (N.D. Ill. 2014) (rulings in favor of districts), *with Avaras v. Clarkstown Cent. Sch. Dist.*, 73 IDELR ¶ 50 (S.D.N.Y. 2018); *Greenwich Bd. of Educ. v. G.M.,* 68 IDELR ¶ 8 (D. Conn. 2016); *Artichoker v. Todd Cnty. Sch. Dist.*, 69 IDELR ¶ 58 (D.S.D. 2016) (rulings for parents).

97 *E.g.*, Albuquerque Pub. Sch., 72 IDELR ¶ 227 (N.M. SEA 2018); Switzerland of Ohio Local Sch., 71 IDELR ¶ 180 (Ohio SEA 2017); Alaska Gateway Sch. Dist., 66 IDELR ¶ 57 (Alaska SEA 2015).

98 *E.g.,* Anderson Cnty. (SC) Sch. Dist., 66 IDELR ¶ 24 (OCR 2015); Sch. Dist. of Newberry Cnty. (SC), 64 IDELR ¶ 286 (OCR 2014); *cf.* Marion Cty (FL) Sch. Dist., 118 LRP 23944 (OCR 2018) (failure to implement RTI services).

99 *E.g.*, Pocono Mountain Sch. Dist., 117 LRP 43654 (Pa. SEA 2017) (granting district's request to override parents' lack of consent to evaluate child after notable lack of progress via MTSS in permissive RTI state); Columbus City Sch., 116 LRP 42455 (Ohio SEA 2016) (ruling in favor of district for both the child find and eligibility claim under Ohio's SLD identification law, which similarly permits RTI); St. John's Cnty. Sch. Bd., 115 LRP 27173 (Fla. SEA 2014) (ruling in favor of the district for the child find claim without clearly distinguishing between Florida's separable RTI and MTSS regulations). But see Highlands Cnty. Sch. Bd., 115 LRP 27365 (Fla. SEA 2015) (ruling in favor of the parents for the child find claim under Florida's MTSS regulation).

100 *E.g.,* In re Student with a Disability, 120 LRP 478 (Ind. SEA 2019) (finding that district's lack of parental notice for MTSS plan did not violate state regulations for comprehensive and coordinated early intervening services (CCEIS) because student was not participating in CCEIS); Colo. Charter Sch. Inst., 120 LRP 166 (Colo. SEA 2019); Mesa Cnty. Sch. Dist. 51, 119 LRP 37621 (Colo. SEA 2019) (finding no child find violation, with RTI/MTSS factor countered by parents' withdrawal of the child); Bedford Cty. Sch. Dist., 119 LRP 6598 (Ohio SEA 2019) (finding no child find violation, concluding that district complied with federal and state regulations in use of MTSS, noted as being "formerly referred to as ... RTI"). For the even more sparse OCR investigation case law arising from MTSS, see, e.g., Bay Cnty. (FL) Sch. Dist., 71 IDELR ¶ 94 (OCR 2017) (possible child find violation).

101 Thus far, the rather extensive agency policy interpretations concerning RTI have had a relatively minor impact on the case law. The most frequently cited OSEP guidance has been the basic child find reminder (*supra* note 63 and accompanying text), with most of the

cases being state complaint investigation decisions. *E.g., Artichoker v. Todd Cnty. Sch. Dist.*, 69 IDELR ¶ 58 (D.S.D. 2016); Colo. Charter Sch. Inst., 120 LRP 166 (Colo. SEA 2019); Albuquerque Pub. Sch., 72 IDELR ¶ 227 (N.M. SEA 2018); Alaska Gateway Sch. Dist., 66 IDELR ¶ 57 (Alaska SEA 2015). For other relatively limited uses of the agency guidance, see, *e.g.,* Urbandale Cmty. Sch. Dist., 70 IDELR ¶ 243 (Iowa SEA 2017) (citing various OSEP policy interpretations); *Greenwich Bd. of Educ. v. G.M.*, 68 IDELR ¶ 8 (D. Conn. 2016) (citing Letter to Zirkel, *supra* note 28 and accompanying text); Mesa Cnty. Sch. Dist. 51, 119 LRP 37621 (Colo. SEA 2019) (citing Memorandum, *supra* note 62 and accompanying text).

102 *E.g.,* 704 KY. ADMIN REGS. 3:095 ("Each local district shall implement a comprehensive response-to-intervention system for [K-3] that includes: (1) Multi-tiered systems of support ...."). The accompanying state education agency guidelines add to this variation. *E.g.*, Connecticut's Framework for RTI (2008), https://portal.ct.gov/SDE/SRBI/SRBI——Scientific-Research-Based-Interventions/Related-Resources; Oklahoma Special Education Handbook (2017), https://sde.ok.gov/documents/2013-11-18/special-education-handbook (Scientific Research-Based Interventions (SRBI).

103 *Supra* notes 73-75 and accompanying text.

104 *Supra* notes 80-90 and accompanying text.

105 *Supra* notes 91-96 and accompanying text.

106 *Supra* notes 94-98 and accompanying text.

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