

# Amending § 1415 of the IDEA: Extending Procedural Safeguards to Response-to-Intervention Students

GENNA STEINBERG\*

*In 2004, Congress amended the Individuals with Disabilities Education Act (IDEA) to ameliorate the over-inclusion of students diagnosed with “specific learning disabilities” (SLDs) in special education. To achieve this goal, the amendments permit the use of “response to intervention” (RTI), which is both a diagnostic tool used to identify students with SLDs, and an early-intervention pedagogical tool for general-education students at risk of academic failure. RTI addresses the problem of over-inclusion by improving the diagnostic reliability of SLDs, enhancing general-education services, and reducing referrals to special education. Although evidence indicates that RTI is serving its intended goal, there are inconsistencies associated with its implementation that arise from the denial of procedural safeguards to RTI students. These safeguards, set forth in § 1415 of the IDEA, protect the rights of children with disabilities to a “free appropriate public education.” This Note argues that the denial of these safeguards conflicts with the goals of § 1415 and standards-based education policy reform. Accordingly, Congress should amend § 1415 of the IDEA to extend all § 1415 procedural safeguards to students receiving RTI services.*

---

\* Managing Editor, COLUM. J.L. & SOC. PROBS., 2012–2013. J.D. Candidate 2013, Columbia Law School. The author would like to thank the editorial board of the *Journal* for its guidance.

## I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) is the primary source of federal education rights for children with disabilities.<sup>1</sup> It guarantees such children the right to a “free appropriate public education”<sup>2</sup> (FAPE) and protects that right through a unified set of procedural safeguards.<sup>3</sup> These safeguards, set forth in 20 U.S.C. § 1415, enable parents to effectively advocate on their children’s behalf throughout the ongoing evaluation and placement processes.<sup>4</sup> Among other protections, § 1415 ensures parents access to school records, participation in meetings, and a system through which to challenge the appropriateness of their children’s services.<sup>5</sup> Section 1415 requires the prompt and effective communication of these rights to parents,<sup>6</sup> and mandates that, in the absence of an active parent, a surrogate advocate be appointed on the child’s behalf.<sup>7</sup>

Congress enacted the IDEA in 1975 to provide educational rights to children with disabilities.<sup>8</sup> In the last decade, however, there has been substantial growth in the special-education population, particularly among students diagnosed with “specific learning disabilities” (SLDs),<sup>9</sup> as defined in the IDEA.<sup>10</sup> Attribut-

---

1. See 20 U.S.C. §§ 1400–1491 (2006).

2. 20 U.S.C. § 1412(1) (2006). “Free appropriate public education” means “special education and related services that — (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.” 20 U.S.C. § 1401(9) (2006).

3. See 20 U.S.C. § 1415 (2006).

4. *Id.*

5. §§ 1415(b)(1), (b)(5), (e)(1), (e)(2)(D).

6. § 1415(d)(1)(A).

7. § 1415(b)(2)(A).

8. See 20 U.S.C. § 1400(1)(B) (2006); Sheila K. Hyatt, *The Remedies Gap: Compensation and Implementation under the Education for All Handicapped Children Act*, 17 N.Y.U. REV. L. & SOC. CHANGE 689, 690–91 (1991); Sharla N. Fasko, *Special Education Services and Response to Intervention: What, Why, and How?*, 2 NONPARTISAN EDUC. REV., no. 9, 2006, at 1, 2 (2006), available at <http://www.nonpartisaneducation.org/Review/Esays/v2n9.pdf>.

9. “Specific learning disability” means “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(30)(A) (2006). This category of disabilities includes “such conditions as perceptual disabilities, brain injury, minimal

ing this growth to unreliable diagnostic measures, Congress amended the IDEA in 2004 to permit the use of “scientific, research-based intervention” in the general-education setting.<sup>11</sup> Unlike prior classification methods, which based SLD diagnoses on an unexpected discrepancy between aptitude and achievement levels,<sup>12</sup> research-based intervention serves not only as a diagnostic tool to identify students with SLDs, but also as a pedagogical tool for students in general education who are at risk of academic failure.<sup>13</sup>

The most widely implemented intervention method to emerge since the 2004 amendments is “response to intervention” (RTI).<sup>14</sup> Through graduated intervention levels and progress monitoring within general education, RTI seeks to properly distinguish students with learning disabilities from those who are merely underachievers in need of more intensive instruction.<sup>15</sup> RTI not only attempts to resolve the over-inclusion of students in special edu-

---

brain dysfunction, dyslexia, and developmental aphasia.” 20 U.S.C. § 1401(30)(B) (2006). This category does not include “a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” 20 U.S.C. § 1401(30)(C) (2006).

10. Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons From Special Education Legislation*, 29 *FORDHAM URB. L.J.* 759, 765 (2001); Mark C. Weber, *The IDEA Eligibility Mess*, 57 *BUFF. L. REV.* 83, 123 (2009); Melinda Baird, *LD Eligibility and Response to Intervention: Why This, Why Now and Why Not?*, *THE LAW OFFICE OF MELINDA BAIRD & MELINDA BAIRD TRAINING, LLC* 5 (2008), <http://www.ksde.org/LinkClick.aspx?fileticket=5CyW6YOKEq0%3D&tabid=3339&mid=7404>.

11. 20 U.S.C. § 1414(b)(6)(B) (2006); see also Kenneth A. Kavale et al., *Responsiveness to Intervention and the Identification of Specific Learning Disability: A Critique and Alternative Proposal*, 28 *LEARNING DISABILITY Q.* 2, 3 (2005) (noting that traditional methods of SLD classification resulted in overgeneralization of the SLD concept, which led researchers to develop the scientific, research-based intervention methods embodied in the 2004 IDEA amendments); Margaret J. McLaughlin, *Closing the Achievement Gap and Students With Disabilities: The New Meaning of a “Free Appropriate Public Education”* 17 (Nov. 13, 2006), presented at The Campaign for Educational Equity: Symposium, Fall 2006 (paper available at [http://devweb.tc.columbia.edu/manager/symposium/Files/99\\_McLaughlin\\_Edited\[1\].Closing%20the%20Achievement%20Gap%2011-29.pdf](http://devweb.tc.columbia.edu/manager/symposium/Files/99_McLaughlin_Edited[1].Closing%20the%20Achievement%20Gap%2011-29.pdf)) (“An accumulation of research and concerns among policymakers about the inaccurate and/or unnecessary identification of students led to several changes in the 2004 IDEA amendments. These include the option for local school districts to use a new procedure for identifying a learning disability that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures”).

12. Mitchell L. Yell & David W. Walker, *The Legal Basis of Response to Intervention: Analysis and Implications*, 18 *EXCEPTIONALITY* 124, 128 (2010).

13. Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 *HOW. L.J.* 303, 317 (2011).

14. See *infra* notes 83–85.

15. Fasko, *supra* note 8, at 5; Yell & Walker, *supra* note 12, at 127–28.

cation, but also supports the most recent effort by the education-policy reform movement to reconfigure the public-education system.<sup>16</sup> This reform movement advocates a unified system of general and special education, characterized by universal achievement standards applicable to most students.<sup>17</sup> Underlying this movement is the idea that the bifurcation of general and special education is unfounded, arbitrary, and contrary to the best interests of children, particularly those with high-incidence disabilities such as SLDs.<sup>18</sup>

RTI promotes the goals of this reform movement by implementing specialized instruction in general education for students historically classified with SLDs, and by holding such students to the same standards as their peers. However, § 1415 of the IDEA conflicts with these goals by denying procedural safeguards to RTI students, and in turn enforcing the traditional boundaries of educational classifications.

This Note argues that denial of § 1415 procedural safeguards to RTI students creates problematic legal inconsistencies within the IDEA itself and across special-education law. In particular, such denial is inconsistent with the goals of § 1415 and the education-policy reform movement. To ameliorate these inconsistencies, Congress should amend § 1415 to extend all procedural safeguards to students receiving RTI or other research-based intervention methods permitted under the 2004 amendments.<sup>19</sup>

---

16. Kenneth A. Kavale et al., *Response-to-Intervention: Separating the Rhetoric of Self-Congratulation From The Reality of Specific Learning Disability Identification*, 31 LEARNING DISABILITY Q. 135, 137–39 (2008). Kavale et al. quote the School Social Work Association of America and the National Association of School Psychologists, who describe RTI as “a systematic, multi-tiered approach to helping all students achieve school success,” and as “an improved process and structure for school teams in designing, implementing, and evaluating educational interventions . . .” *Id.* at 137. Kavale et al. further argue that the goal of RTI is not merely to enhance SLD identification, but rather to create more effective instruction across educational categories and to unify those categories through greater collaboration. *Id.*; see also Yell & Walker, *supra* note 12, at 124–25.

17. Douglas Fuchs et al., *The “Blurring” of Special Education in a New Continuum of General Education Placements and Services*, 76 EXCEPTIONAL CHILD. 301, 303 (2010); McLaughlin, *supra* note 11, at 31.

18. McLaughlin, *supra* note 11, at 31.

19. Professors Angela Ciolfi and James Ryan discuss one subset of § 1415 procedural safeguards — those intended to protect a student from disciplinary sanctions resulting from behavior related to the student’s disability. See Ciolfi & Ryan, *supra* note 13, at 322–24. Noting that racial minorities are overrepresented in special education, and disproportionately subject to disciplinary sanctions in general education, Professors Ciolfi and Ryan propose extending the disciplinary protections set forth in § 1415(k) to general-education

Part II of this Note examines the historical and legal circumstances that led to the development of RTI and to the passage of the 2004 IDEA amendments. It sets forth the requirements of RTI, an analysis of its implementation and effectiveness, and the policy underlying its development. Part III describes the § 1415 procedural safeguards afforded to students receiving traditional special education, and examines the problematic inconsistencies arising from the denial of those safeguards to RTI students. Finally, Part IV contends that, to resolve the incongruence in special-education law, Congress should amend § 1415 to extend all procedural safeguards to students receiving RTI or other research-based intervention methods permitted by the 2004 amendments. Denying RTI students the IDEA's procedural protections contradicts the purpose of those provisions and perpetuates an outdated bifurcation that reflects neither the current state nor emerging innovations of public education.

## II. HISTORICAL AND LEGAL BACKGROUND

This Part outlines the historical and legal circumstances that led to the development of RTI. Part II.A describes the over-inclusion of students in special education and attributes this over-inclusion to growth in the SLD population. Part II.B explains how this growth resulted from the traditional method of determining special-education eligibility. Part II.C discusses the role of RTI in resolving the problem of over-inclusion. Part II.D describes the implementation and effectiveness of RTI. Finally, Part II.E analyzes the broader policy goals of the education-policy reform movement and explains how RTI promotes these goals.

### A. OVER-INCLUSION OF STUDENTS IN SPECIAL EDUCATION: GROWTH OF THE SLD POPULATION

Prior to 1975, more than one million children were excluded from the public-school system under restrictive state regulations that denied access to students who required specialized instruc-

---

students receiving RTI services. Ciolfi & Ryan, *supra* note 13, at 341. Where Professors Ciolfi and Ryan focus on the racial inequalities caused by the denial of disciplinary protections to students receiving RTI, this Note addresses the policy inconsistencies resulting from the denial of all procedural protections under § 1415 to RTI students.

tion.<sup>20</sup> Congress attributed this exclusion to insufficient state financial resources,<sup>21</sup> a lack of accessible facilities, inadequate programs, and the failure of local school boards to accept responsibility for students with special needs.<sup>22</sup> In response, Congress enacted the Education for All Handicapped Children Act (EHCA) in 1975, re-titled the IDEA in 1991.<sup>23</sup> Under the EHCA, public schools successfully implemented educational programs that accommodated students who required specialized instruction.<sup>24</sup> The inclusion of previously excluded children, as well as the reclassification of students who were struggling in general education, resulted in substantial growth in the special-education population.<sup>25</sup>

The IDEA defines “special education” as “specially designed instruction, at no cost to parents, to meet the unique needs of a

---

20. Kathryn M. Coates, Comment, *The Education for All Handicapped Children Since 1975*, 69 MARQ. L. REV. 51, 57 (1985) (citing S. REP. NO. 168, at 5, reprinted in 1975 U.S.C.C.A.N. 1425, 1429) (“At the time EHA was enacted, only about half of the nation’s eight million handicapped children were receiving an education appropriate to their developmental needs.”); David P. Prasse, *Why Adopt an RTI Model*, RTI ACTION NETWORK, <http://rtinetwork.org/learn/what/whyrti> (last visited Mar. 9, 2013); Hyatt, *supra* note 8, at 689–90; Baird, *supra* note 10, at 4–5.

21. Coates, *supra* note 20, at 57–58 (citations omitted) (citing S. REP. NO. 168, at 7–8, reprinted in 1975 U.S.C.C.A.N. 1425, 1431–32) (“Although it had been held that the lack of funding could not be used as an excuse for failing to provide educational services, in many instances it became financially impossible for the states to implement the services required.”). Coates also notes that, “[a]s the constitutional right to public education on the part of handicapped children was not in issue, it is clear that the overall intent of the [EHCA] was primarily one of financial assistance.” Coates, *supra* note 20, at 58.

22. 20 U.S.C. § 1400(c)(2) (2006); Baird, *supra* note 10, at 4–5.

23. See Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1461 (2006)); Coates, *supra* note 20, at 57; Hyatt, *supra* note 8, at 690–91; Baird, *supra* note 10, at 4. Despite the Supreme Court’s holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), it was not until the passage of the Education of the Handicapped Act in 1970, and later the EHCA in 1975, that the equal educational opportunity doctrine was applied to handicapped children. Coates, *supra* note 20, at 53.

24. *Education for All Handicapped Children Act of 1982: Hearing on Proposed Regulations Implementing Part B, Pub. L. 94-142, The Education for All Handicapped Children Act Before the Subcomm. on the Handicapped*, 97th Cong. 1 (1982) (statement of Sen. Lowell P. Weicker, Jr., Chairman, S. Subcomm. on the Handicapped) (describing the EHCA as “a success story almost without parallel in history”); Hyatt, *supra* note 8, at 691; Baird, *supra* note 10, at 5.

25. Seligmann, *supra* note 10, at 765 (“Since the enactment of the IDEA, the number of children identified as having disabilities and served under the IDEA has increased, from 3.7 million in 1976–1977 to 6.1 million in 1999–2000.”); Weber, *supra* note 10, at 123; Baird, *supra* note 10, at 5.

child with a disability.”<sup>26</sup> For a student to be eligible for special-education services, the student must be classified as a “child with a disability,” meaning a child “with intellectual disabilities, hearing impairments . . . , speech or language impairments, visual impairments . . . , serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.”<sup>27</sup> Thus, a disability alone is insufficient for special-education eligibility.<sup>28</sup> It must also be established that a student’s disability has an adverse effect on his educational performance.<sup>29</sup>

The substantial growth of the special-education population has been most pronounced with respect to students diagnosed with “specific learning disabilities” (SLDs).<sup>30</sup> An SLD is “a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematic calculations.”<sup>31</sup> SLDs include “such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.”<sup>32</sup> Learning problems that are “primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of

---

26. 20 U.S.C. § 1401(29) (2006).

27. *Id.*; 20 U.S.C. § 1401(3)(A) (2006).

28. 20 U.S.C. § 1401(3) (2006).

29. *Id.*; see also Robert A. Garda, Jr., *Who is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 294 (2006).

30. Mark F. Kowal, *A Call to the Courts to Narrow the Scope of the Definition of Learning Disability Within the Americans With Disabilities in Education Act*, 6 RUTGERS J. L. & PUB. POL’Y 819, 834 (2009) (noting that increasing awareness of ADHD may be responsible for the increase in children qualifying for services under IDEA); see also Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for Special Education Eligibility*, 42 TEACHING EXCEPTIONAL CHILD. 62, 62 (2010) (noting that, although the percentage of the special education population with an SLD decreased in 2007, SLD remains an extremely common diagnosis among the special-education population).

31. 20 U.S.C. § 1401(30)(A) (2006). Other characteristics of SLDs include the following: (1) “neurologically based and intrinsic to the individual,” (2) “persist across the life span, though manifestations and intensity may vary as a function of developmental stage and environmental demands,” (3) “may occur in combination with other disabling conditions, but they are not due to other conditions, such as mental retardation, behavioral disturbance, lack of opportunities to learn, primary sensory deficits, or multilingualism.” *SLD Identification Overview*, NATIONAL RESEARCH CENTER ON LEARNING DISABILITIES, 3 (Winter 2007), [http://www.nrcld.org/resource\\_kit/tools/SLDOverview2007.pdf](http://www.nrcld.org/resource_kit/tools/SLDOverview2007.pdf).

32. 20 U.S.C. § 1401(30)(B) (2006).

emotional disturbance, or of environmental, cultural, or economic disadvantage” are excluded from this category.<sup>33</sup> Between 1976 and 2010, the number of SLD students increased by almost 200%, reaching a total of 2.3 million students.<sup>34</sup> This represents 41% of special-education students and far outweighs the proportion of students in any other disability category under the IDEA.<sup>35</sup> As discussed in Part II.B, SLD population growth, and resulting special-education expenses,<sup>36</sup> led to controversy over SLD classifications and the reliability of diagnostic methods used to identify learning disabilities.<sup>37</sup>

#### B. UNDERSTANDING THE GROWTH OF THE SLD POPULATION: THE APTITUDE-ACHIEVEMENT DISCREPANCY MODEL

The substantial SLD population growth prior to 2004 is primarily attributed to the methods that local educational agencies (LEAs) used to classify SLDs.<sup>38</sup> Although not mandated by Con-

---

33. 20 U.S.C. § 1401(30)(C) (2006); *see also* Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1154 (2007) (noting that Congress included this provision in response to concerns that the SLD category was too expansive and amorphous).

34. *See* Frank M. Gresham, *Responsiveness to Intervention: An Alternative Approach to the Identification of Learning Disabilities*, in IDENTIFICATION OF LEARNING DISABILITIES: RESEARCH TO PRACTICE 467, 468 (Renee Bradley et al., eds., 2002); (noting 797,213 students “served as LD” in 1976); *2012 Annual Disability Statistics Compendium*, REHAB. RESEARCH & TRAINING CTR. ON DISABILITY STATISTICS & DEMOGRAPHICS 108 (Nov. 2012), <http://www.disabilitycompendium.org/docs/default-source/2012-compendium/disabilitycompendium2012.pdf?sfvrsn=2> (noting 2,346,993 SLD students in 2010).

35. *See* sources cited in *supra* note 34. The other categories of disabilities under the IDEA include “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, [and] other health impairments . . . .” 20 U.S.C. § 1401(3)(A)(i) (2006).

36. H.R. REP. NO. 108-77, at 84 (2003) (concluding that “[t]he overidentification of children as disabled and placing them in special education where they do not belong hinders the academic development of these students . . . [and] takes valuable resources away from students who truly are disabled.”); Fasko, *supra* note 8, at 3; Sharon Vaughn & Lynn S. Fuchs, *Redefining Learning Disabilities as Inadequate Response to Instruction: The Promise and Potential Problems*, 18 LEARNING DISABILITIES RES. & PRAC. 137, 137 (2003) (stating that the cost per student in special education is nearly twice the cost per student in general education).

37. Fasko, *supra* note 8, at 3; *see also* Kenneth A. Kavale et al., *A Time to Define: Making the Specific Learning Disability Definition Prescribe Specific Learning Disability*, 32 LEARNING DISABILITY Q. 39, 40–41 (2009) (challenging the definition of “specific learning disability” as vague and indeterminate).

38. *See, e.g.*, Kavale et al., *supra* note 11, at 2; McLaughlin, *supra* note 11, at 19.

gress, following the IDEA's enactment, most LEAs employed the "aptitude-achievement discrepancy model" to identify students with SLDs.<sup>39</sup> This model is based on the idea that an unexpected discrepancy between a student's aptitude and achievement in a particular academic area indicates a learning disability specific to that area.<sup>40</sup> Under this model, evaluators compare a measure of a child's cognitive skills — usually an IQ score — to a measure of the child's achievement in a particular area of concern, such as reading or math.<sup>41</sup> Where the former is found to be at least two standard deviations greater than the latter, that child is deemed to have a learning disability.<sup>42</sup>

The aptitude-achievement discrepancy model has been criticized on several grounds. First, some argue that a discrepancy between aptitude and achievement is not conceptually equivalent to the presence of an SLD, as defined in the IDEA.<sup>43</sup> While discrepancy indicates underachievement, it indicates only the possibility of a disability.<sup>44</sup> Therefore, such a discrepancy should be no more than a threshold determination of an SLD diagnosis.<sup>45</sup>

Second, some criticize the discrepancy model as unreliable in its application,<sup>46</sup> in part because a child who takes a cognitive or achievement test more than once rarely attains the same score.<sup>47</sup> Third, critics note that the discrepancy between a child's aptitude

---

39. Kenneth A. Kavale, *Identifying Specific Learning Disability: Is Responsiveness to Intervention the Answer?*, 38 JOURNAL OF LEARNING DISABILITIES 553, 553 (2005); David T. Painter & Tanya A. Alvarado, *The Reauthorized Federal Special Education Law Encourages a New Way for Identifying Students with Specific Learning Disabilities*, 79 PA. B. ASS'N Q. 17, 17 (2008); Vaughn & Fuchs, *supra* note 36, at 137–38; *SLD Identification Overview*, *supra* note 31, at 5.

40. Yell & Walker, *supra* note 12, at 128.

41. Fasko, *supra* note 8, at 4.

42. Fasko, *supra* note 8, at 4.

43. See Kavale et al., *supra* note 37, at 42; Kavale, *supra* note 39, at 555–56.

44. Kavale et al., *supra* note 37, at 42; see also Kavale, *supra* note 39, at 552 (“Discrepancy alone is too disconnected from what is actually stipulated in the formal definition to meet the criteria of significance and meaningfulness necessary for a valid operational definition.”).

45. Kavale et al., *supra* note 11, at 5. The authors also note that part of the difficulty in creating an accurate operational definition of SLDs is that the formal definition under the IDEA is too vague. *Id.* at 3 (“The present SLD definition has always been too broad to be wrong and too vague to be complete.”).

46. See, e.g., S. REP. NO. 108-185, at 26 (2003) (concluding that “there is no evidence that the IQ-achievement discrepancy formula can be applied in a consistent and educationally meaningful (i.e., reliable and meaningful) manner.”).

47. Fasko, *supra* note 8, at 4.

and achievement cannot be reliably measured until a child is approximately nine years old, which makes the discrepancy model remedial, rather than preventive, in nature.<sup>48</sup> Finally, critics argue that, as a binary classification system that places students in only two educational categories, the discrepancy model ignores the fact that aptitude and achievement lie on a continuum.<sup>49</sup>

These criticisms shed light on the relationship between the aptitude-achievement discrepancy model and the dramatic SLD population growth in two significant ways. First, because the discrepancy model produces unreliable results for children under the age of nine, learning disabilities can remain undetected until that time, thereby increasing the need for remedial measures.<sup>50</sup> This in turn necessitates more special-education referrals than would have been required had preventive measures been taken.<sup>51</sup>

Second, the discrepancy model's binary system does not allow for graduated treatment of students who achieve borderline scores. This increases the risk that they will be inappropriately placed in special-education for two reasons.<sup>52</sup> First, the specialized services offered within general education are insufficient.<sup>53</sup> Therefore, students with SLDs must utilize special-education services, even though discrete general-education services would be more cost-effective, more targeted to their needs, and more

---

48. Yell & Walker, *supra* note 12, at 126.

49. See Fuchs et al., *supra* note 17, at 304. The authors present the view that education law has traditionally been a system of bifurcation and that "the cause of this bifurcation . . . is special education law, which . . . has produced a system of haves and have nots; that is, a small privileged group of students with disabilities gets an education calibrated to its learning needs, and a much larger group without disabilities — many of whom are struggling — fails to get such differentiated help." Fuchs et al., *supra* note 17, at 304. They note that "this system of service delivery is not only fundamentally unfair but hurtful to those directly affected by it." Fuchs et al., *supra* note 17, at 304; see also Seligmann, *supra* note 10, at 769 (arguing that "all children have strengths and weaknesses, and when lines are drawn, inequities become apparent.").

50. Yell & Walker, *supra* note 12, at 126–27.

51. Yell & Walker, *supra* note 12, at 126–27; Douglas Fuchs & Lynn S. Fuchs, *Introduction to Response to Intervention: What, Why and How Valid is it?*, 41 *READING RES. Q.* 93, 96 (2006) (describing discrepancy as a "wait-to-fail model" in that "children must fall dramatically behind their peers in academic achievement to qualify as LD.").

52. Kowal, *supra* note 30, at 828 ("Often schools cannot determine an educationally sound cause of a student's poor achievement, and thus will categorize students as learning disabled when in fact there are developmental issues that do not rise to the level of disability causing their poor performance. As a result, many underachieving students who possess no true 'learning disability' receive special education services.").

53. Ciolfi & Ryan, *supra* note 13, at 306.

consistent with the IDEA's guarantee of an education in the "least restrictive environment."<sup>54</sup> Second, many states' accountability systems credit school districts more for progress made by children in special education than by children in general education.<sup>55</sup> This provides school administrators with a perverse incentive to push students into special education, even where such services are inappropriate.<sup>56</sup>

Concerns about the unreliability of the aptitude-achievement discrepancy model led Congress to amend the IDEA in 2004 to allow for alternative diagnostic methods, such as RTI.<sup>57</sup>

### C. 2004 AMENDMENTS TO THE IDEA: RESPONSE TO INTERVENTION AS AN ALTERNATIVE TO THE DISCREPANCY MODEL

The 2004 amendments made three changes to the IDEA that enabled schools to implement RTI as an alternative to the discrepancy model.<sup>58</sup> First, Congress eliminated requirements that states and local educational agencies (LEAs) rely solely on the aptitude-achievement discrepancy model to diagnose and classify students with SLDs.<sup>59</sup> Second, Congress permitted states and LEAs to use "scientific, research-based intervention" methods either in place of or in addition to the discrepancy model.<sup>60</sup> Third,

---

54. Ciolfi & Ryan, *supra* note 13, at 307. To educate a student in the "least restrictive environment" means that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(A) (2006).

55. See *Accountability for Students with Disabilities: Frequently Asked Questions*, NAT'L CTR. ON EDUC. OUTCOMES, <http://www.cehd.umn.edu/NCEO/TopicAreas/Accountability/AccountFAQ.htm> (last visited Mar. 9, 2013).

56. See *id.*; Kowal, *supra* note 30, at 834.

57. See sources cited in *supra* note 10.

58. See 20 U.S.C. §§ 1413(f)(1), 1414(b)(6) (2006).

59. 20 U.S.C. § 1414(b)(6)(A) (2006) ("When determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning.")

60. 20 U.S.C. § 1414(b)(6)(B) (2006) ("In determining whether a child has a specific learning disability, a local education agency may use a process that determines if the child

Congress permitted LEAs to allocate up to 15% of their federal special-education funds each year to the development and implementation of such intervention methods.<sup>61</sup>

While the IDEA does not define the term “scientific, research-based intervention,” the No Child Left Behind Act, enacted in 2001, defines it as research that:

(i) employs systematic, empirical methods that draw on observation or experiment; (ii) involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn; (iii) relies on measurements or observational methods that provide valid data across evaluators and observers and across multiple measurements and observations; and (iv) has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.<sup>62</sup>

The most widely implemented research-based intervention method to emerge since the 2004 amendments is “response to intervention” (RTI).<sup>63</sup> RTI is a diagnostic tool used to identify students with SLDs, as well as an early-intervention pedagogical tool for general-education students who are at risk of academic failure.<sup>64</sup> The purpose of RTI is to determine whether a student requires the specialized services available only through IDEA identification, or merely needs more intensive instruction within the general-education setting.<sup>65</sup> The National Center on Response to Intervention (NCRTI), established to provide technical

---

response to scientific, research-based intervention as part of the evaluation procedure”); Yell & Walker, *supra* note 12, at 124–25.

61. § 1413(f)(1) (“A local educational agency may not use more than 15 percent of the amount such agency receives under this subchapter for any fiscal year, less any amount reduced by the agency pursuant to subsection (a)(2)(C), if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) 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.”).

62. 20 U.S.C. § 6368(6)(B) (2006).

63. See *infra* notes 83–85.

64. Ciolfi & Ryan, *supra* note 13, at 317.

65. Fasko, *supra* note 8, at 5.

assistance to states and districts in implementing RTI,<sup>66</sup> summarizes RTI as follows:

Response to intervention integrates assessment and intervention within a multi-level prevention system to maximize student achievement and to reduce behavioral problems. With RTI, schools use data to identify students at risk for poor learning outcomes, monitor student progress, provide evidence-based interventions and adjust the intensity and nature of those interventions depending on a student's responsiveness, and identify students with learning disabilities or other disabilities.<sup>67</sup>

The RTI model requires three graduated tiers of intervention before a child is referred to special education.<sup>68</sup> Tier I requires

---

66. *About the National Center on Response to Intervention (NCRTI)*, NAT'L CTR. ON RESPONSE TO INTERVENTION, <http://www.rti4success.org/aboutus> (last visited Jan. 31, 2013).

67. *Essential Components of RTI — A Closer Look at Response Intervention*, NAT'L CTR. ON RESPONSE TO INTERVENTION 2 (Apr. 2010), <http://www.cldinternational.org/Articles/rtiessentialcomponents.pdf>.

68. Matthew K. Burns et al., *Ethical and Legal Issues Associated with Using Response-to-Intervention to Assess Learning Disabilities*, 46 J. SCH. PSYCHOL. 263, 265 (2008).

There are also eight core features of successful RTI implementation in the general-education setting, including (1) high quality classroom instruction, which can be assessed by comparing students' learning rates and achievement in different classrooms at the same grade level, (2) research-based instruction, to ensure that classroom practices and curriculum are valid and that students' learning difficulties are independent of the classroom experience, (3) active classroom performance by instructors and staff in designing and completing student assessments in lieu of reliance on external standardized tests, (4) universal screening of all students' academic performance and behavior, to determine which students need closer monitoring or intervention, (5) continuous progress monitoring, to identify students who are not meeting the expected standards, (6) research-based interventions that have been validated through a series of studies and are designed to increase the intensity of the student's instructional experience where progress monitoring indicates a deficit, (7) progress monitoring and data collection that provide a cumulative record of a student's responses to interventions and facilitate any necessary modifications in intervention methods, and (8) fidelity measures that ensure that the interventions are consistently implemented as intended and tracked by staff members other than the classroom teachers. Daryl Mellard, *Understanding Responsiveness to Intervention in Learning Disabilities Determination*, NAT'L RESEARCH CTR. ON LEARNING DISABILITIES (Sept. 15, 2004), <http://www.nrcl.org/about/publications/papers/mellard.pdf>; see also Amanda VanDerHeyden, *Approaches to RTI*, RTI ACTION NETWORK, <http://rtinetwork.org/learn/what/approaches-to-rti> (last visited Mar. 9, 2013) (describing four models of RTI implementation that have emerged over time: problem-solving models, functional assessment models, standard protocol models, and hybridized or blended models).

effective, evidence-based instruction and progress-monitoring in general education.<sup>69</sup> By ensuring the existence of high-quality instruction, this tier enables evaluators to determine whether a disability, rather than low-quality instruction, causes a student's underachievement.<sup>70</sup> If evaluators determine that instruction is sufficient, students exhibiting academic or behavioral difficulties receive more targeted intervention in Tier II.<sup>71</sup> In this tier, evaluators monitor students and assess their responsiveness to instruction.<sup>72</sup> Students who succeed with Tier II assistance return to the general student population.<sup>73</sup> Students who continue to experience academic or behavioral difficulties receive more intensive and specialized intervention in Tier III.<sup>74</sup> For students who are unsuccessful with Tier III assistance, schools conduct individual special-education placement evaluations in accordance with IDEA procedures.<sup>75</sup>

The use of RTI increases the diagnostic reliability of SLD classifications and the quality of general-education services, and reduces special-education referrals.<sup>76</sup> By retaining more students in general education, RTI reduces the number of students who are

---

69. Burns et al., *supra* note 68, at 265.

70. Ciolfi & Ryan, *supra* note 13, at 313.

71. Ciolfi & Ryan, *supra* note 13, at 313; Edward S. Shapiro, *Tiered Instruction and Intervention in a Response-to-Intervention Model*, RTI ACTION NETWORK, <http://rtinetwork.org/essential/tieredinstruction/tiered-instruction-and-intervention-rti-model> (last visited Mar. 9, 2013).

72. Evelyn Johnson, *How to Develop an Effective Tier 2 System*, RTI ACTION NETWORK, <http://rtinetwork.org/essential/tieredinstruction/tier2/how-to-develop-an-effective-tier-2-system> (last visited Jan. 31, 2013) (describing Tier II as "small-group instruction that relies on evidence-based interventions that specify the instructional procedures, duration, and frequency of instruction.").

73. Ciolfi & Ryan, *supra* note 13, at 313; Johnson, *supra* note 72 ("The goal of Tier 2 is to remediate academic skill deficits with the idea that in doing so, students will be successful in the Tier 1 program without support.").

74. Burns et al., *supra* note 68, at 266; Ruth A. Ervin, *Considering Tier 3 Within a Response-to-Intervention Model*, RTI ACTION NETWORK, <http://rtinetwork.org/essential/tieredinstruction/tier3/consideringtier3> (last visited Jan. 31, 2013). Various models of RTI differ in their implementation of Tier III. Ciolfi & Ryan, *supra* note 13, at 313. In some models, Tier III is special education; in others, it is the last step before special education. Ciolfi & Ryan, *supra* note 13, at 313.

75. Burns et al., *supra* note 68, at 266.

76. Hensel, *supra* note 33, at 1159; Vaughn & Fuchs, *supra* note 36, at 139–40; *see also* Burns et al., *supra* note 68, at 274 ("[U]sing RTI data primarily for LD diagnosis is almost indefensible because labeling a child with a disability due to a lack of adequate response to effective interventions is basing a diagnosis on prognosis, and a valid diagnostic paradigm should be based on data that lead to treatments with likely prognosis."); Seligmann, *supra* note 10, at 776.

faced with the stigma of a “special education” classification. Additionally, RTI is useful to classroom educators because its diagnostic method also provides teachers with information to help shape their educational plans.<sup>77</sup>

The 2004 amendments allow LEAs to allocate up to 15% of their federal special-education funds each year to the development and implementation of early-intervention services (EIS), such as RTI, in general-education settings.<sup>78</sup> While this funding may be spent on EIS for students in kindergarten through twelfth grade, there is an emphasis on students in kindergarten through third grade, who have not yet been diagnosed with disabilities, but who require additional academic and behavioral support to succeed in general education.<sup>79</sup> The IDEA requires LEAs that use IDEA funds for EIS to (1) conduct school-wide assessments of all students to identify at-risk students, (2) implement school-wide, scientifically based systems of assessment and instruction that identify those in need of specialized services, and (3) offer professional-development activities to teachers and other school staff to enable them to properly implement the scientifically based interventions.<sup>80</sup> In addition, LEAs utilizing IDEA funds for EIS must provide reports to their respective state educational agencies that describe the early-intervention services that are provided to general-education students, the number of students provided with such services, and the number of such students eventually found eligible for special education.<sup>81</sup>

---

77. Vaughn & Fuchs, *supra* note 36, at 139–40.

78. 20 U.S.C. § 1413(f)(1) (2006) (“A local educational agency may not use more than 15 percent of the amount such agency receives under this subchapter for any fiscal year, less any amount reduced by the agency pursuant to subsection (a)(2)(C), if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) 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.”).

79. *Id.*; Yell & Walker, *supra* note 12, at 129.

80. 20 U.S.C. § 1413(f) (2006); Yell & Walker, *supra* note 12, at 129–30.

81. § 1413(f)(4); Yell & Walker, *supra* note 12, at 130.

#### D. THE IMPLEMENTATION AND EFFECTIVENESS OF RTI

While the IDEA does not mandate use of RTI, its adoption has risen steadily since 2004.<sup>82</sup> Based on the most recent information provided by the National Center on Response to Intervention and states' departments of education, all fifty states allow the use of RTI, with forty states showing evidence of actual implementation in one or more schools,<sup>83</sup> twelve states mandating the use of RTI,<sup>84</sup>

---

82. See *infra* notes 83–91.

83. The following states show evidence of actual implementation in one or more of their schools: Alaska, see *No Child Left Behind*, DEP'T OF EDUC. & EARLY DEV., <http://www.eed.state.ak.us/nclb/RTI.html> (last visited Mar. 9, 2013); Arizona, see *AZ Response to Intervention (RTI)*, ARIZ. DEP'T OF ED., <https://www.azed.gov/school-effectiveness/azrti/> (last visited Mar. 9, 2013); California, see *Response to Instruction & Intervention*, CAL. DEP'T OF EDUC., <http://www.cde.ca.gov/ci/cr/ri/> (last visited Mar. 30, 2013); Colorado, see *Colorado Response to Intervention (RtI)*, COLO. DEP'T OF EDUC., <http://www.cde.state.co.us/rti/> (last updated Feb. 27, 2013); Connecticut, see *Scientific Research-Based Interventions (SRBI)*, CONN. STATE DEP'T OF EDUC., <http://www.sde.ct.gov/sde/cwp/view.asp?a=2618&q=322020> (last visited Mar. 30, 2013); Delaware, see *What Is Response to Intervention*, DEL. DEP'T OF EDUC., [http://www.doe.k12.de.us/infosuites/staff/profdev/rti\\_docs.shtml](http://www.doe.k12.de.us/infosuites/staff/profdev/rti_docs.shtml) (last updated Sept. 1, 2011); Florida, see *Florida's Multi-Tiered System of Supports*, FLORIDA-RTI.ORG, <http://www.florida-rti.org/> (last visited Mar. 9, 2013); Georgia, see *Implementation Manual*, GA. DEP'T OF EDUC., <http://www.doe.k12.ga.us/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Implementation-Manual.aspx> (last visited Mar. 30, 2013); Hawaii, see *Contracted Services for Eligible IDEA and Section 504 Students*, HAW. STATE DEP'T OF EDUC., <http://doe.k12.hi.us/csss/contractedservices/index.htm> (last visited Mar. 9, 2013); Idaho, see *Response to Intervention (RTI)*, IDAHO STATE DEP'T OF EDUC., <http://www.sde.idaho.gov/site/rti/> (last visited Mar. 9, 2013); Illinois, see *Illinois Response to Intervention (RtI)*, ILL. STATE. BD. OF EDUC., [http://www.isbe.state.il.us/rti\\_plan/](http://www.isbe.state.il.us/rti_plan/) (last updated Dec. 11, 2012); Indiana, see *Best Practice/Research-Based Prevention and Intervention Resources for School Counselors*, IND. DEP'T OF EDUC., <http://www.doe.in.gov/student-services/student-assistance/best-practiceresearch-based-prevention-and-intervention> (last updated Feb. 22, 2013); Iowa, see *RtI: Strong Results Guaranteed*, IOWA DEP'T OF EDUC., [http://educateiowa.gov/index.php?option=com\\_content&view=article&id=2808:rti-strong-results-guaranteed&catid=666:headlines](http://educateiowa.gov/index.php?option=com_content&view=article&id=2808:rti-strong-results-guaranteed&catid=666:headlines) (last visited Mar. 9, 2013); Kentucky, see *A Guide to the Kentucky System of Interventions*, KY. DEP'T OF EDUC. (June 2012), <http://education.ky.gov/educational/int/ksi/Documents/KSIRtIGuidanceDocument.pdf>; Louisiana, see *Louisiana's Response to Intervention [RTI] Implementation Plan*, LA. DEP'T OF EDUC. (2010), <http://www.louisianaschools.net/lde/uploads/17077.pdf>; Maine, see *Response to Intervention (RTI)*, ME. DEP'T OF EDUC., <http://www.maine.gov/doe/rTI/> (last updated Nov. 9, 2012); Maryland, see *Response to Intervention in Maryland (RtI)*, MD. STATE DEP'T OF EDUC., <http://www.marylandpublicschools.org/MSDE/programs/rTI/?WBCMODE=PresentationUnpublished> (last visited Mar. 9, 2013); Massachusetts, see *The Massachusetts Tiered System of Support (MTSS)*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., <http://www.doe.mass.edu/sped/mtss.html> (last updated Oct. 11, 2011); Michigan, see *What does MiBLSi Do?*, MICHIGAN'S INTEGRATED BEHAVIOR & LEARNING SUPPORT INITIATIVE, <http://miblsi.cenmi.org/Home.aspx> (last visited Mar. 9, 2013); Minnesota, see *Response to Intervention*, MINN. DEP'T OF EDUC.,

and seven states allowing for the sole use of RTI in place of the discrepancy model.<sup>85</sup>

Furthermore, in April 2011, Spectrum K12 School Solutions — a company that develops software to track RTI implementation<sup>86</sup>

---

<http://www.education.state.mn.us/MDE/EdExc/BestPrac/RespInterv/index.html> (last visited Mar. 9, 2013); Mississippi, see *Response to Intervention*, MISS. DEP'T OF EDUC., <http://www.mde.k12.ms.us/curriculum-and-instruction/curriculum-and-instruction-other-links/response-to-intervention-teacher-support-team> (last visited Mar. 9, 2013); Missouri, see *Three-Tiered Models of Intervention and Evidence Based Practice (RTI)*, MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., <http://dese.mo.gov/3tieredmodels/index.html> (last updated Feb. 28, 2013); Montana, see *Montana RTI*, MONT. OFFICE OF PUB. INSTRUCTION, <http://opi.mt.gov/Programs/SchoolPrograms/rTI/Index.html> (last updated Feb. 12, 2013); Nebraska, see *Welcome to RtI*, NEB. DEP'T OF EDUC., <http://www.education.ne.gov/RtI/index.html> (last visited Mar. 9, 2013); New Hampshire, see *Response to Instruction (RTI)*, N.H. DEP'T OF EDUC., <http://www.education.nh.gov/innovations/rTI/index.htm> (last visited Mar. 9, 2013); New Mexico, see *Welcome to New Mexico's Response-to-Intervention (RtI) Framework Website*, N.M. PUB. EDUC. DEP'T, <http://www.ped.state.nm.us/RtI/> (last visited Mar. 30, 2013); New York, see *What is RtI?*, N.Y. STATE RESPONSE TO INTERVENTION TECHNICAL ASSISTANCE CTR., <http://www.nysrti.org/> (last visited Mar. 9, 2013); Oklahoma, see *Oklahoma Tiered Intervention System of Support (OTISS)*, OKLA. STATE DEP'T OF EDUC., <http://www.ok.gov/sde/oklahoma-tiered-intervention-system-support-otiss> (last visited Mar. 30, 2013); Oregon, see *Oregon's Response to Intervention Initiative (Or-RTI)*, OR. DEP'T OF EDUC., <http://www.ode.state.or.us/search/page/?id=315> (last updated Feb. 12, 2013); Pennsylvania, see *Response to Instruction and Intervention (RtII)*, PENN. DEP'T OF EDUC., [http://www.pattan.net/category/Educational%20Initiatives/Response%20to%20Instruction%20and%20Intervention%20\(RtII\)](http://www.pattan.net/category/Educational%20Initiatives/Response%20to%20Instruction%20and%20Intervention%20(RtII)) (last visited Mar. 9, 2013); Rhode Island (see *Rhode Island Criteria and Guidance for the Identification of Specific Learning Disabilities*, R.I. DEP'T OF ELEMENTARY & SECONDARY EDUC., (Jan. 2010), [http://www.ride.ri.gov/OSCAS/Programs\\_Services/SLD%20Guidance%20-%20web.pdf](http://www.ride.ri.gov/OSCAS/Programs_Services/SLD%20Guidance%20-%20web.pdf)); South Carolina, see *Response to Intervention*, S.C. STATE DEP'T OF EDUC., <http://ed.sc.gov/agency/programs-services/173/ResponseToInterventionRTI.cfm> (last updated Aug. 9, 2012); Texas, see *Curriculum Programs — Response to Intervention*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/index2.aspx?id=5817> (last updated Sept. 30, 2011); Utah, see Patti Harrington et al., *Utah's 3 Tier Model of Reading Instruction*, UTAH STATE OFFICE OF EDUC. (Jan. 2007), <http://www.schools.utah.gov/sars/DOCS/resources/3-tierread.aspx>; Virginia, see *Response to Intervention (RTI)*, VA. DEP'T OF EDUC., [http://www.doe.virginia.gov/instruction/response\\_intervention/index.shtml](http://www.doe.virginia.gov/instruction/response_intervention/index.shtml) (last visited Mar. 9, 2013); Washington, see *Response to Intervention (RTI)*, WASH. OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, <http://www.k12.wa.us/RTI/default.aspx> (last visited Mar. 9, 2013); West Virginia, see *Inclusion of RTI in SPL*, W.V. SUPPORT FOR PERSONALIZED LEARNING (Apr. 2012), at <http://wvde.state.wv.us/spl/Documents/9-Inclusion-of-RTI-in-SPL.doc>; Wisconsin, see *Response to Intervention*, WIS. RTI CTR., <http://www.wisconsinrticenter.org/> (last visited Mar. 9, 2013); Wyoming, see *Response to Intervention (RtI)*, WY. DEP'T OF EDUC., <http://edu.wyoming.gov/Programs/rTI.aspx> (last visited Mar. 9, 2013).

84. Zirkel, *supra* note 30, at 62. The following states mandate the use of RTI: Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maine, New York, New Mexico, Rhode Island, West Virginia. Zirkel, *supra* note 30, at 62.

85. *The States Chart*, NAT'L CTR. ON RESPONSE TO INTERVENTION, [http://state.rti4success.org/index.php?option=com\\_chart](http://state.rti4success.org/index.php?option=com_chart) (last visited Jan. 31, 2013). States allowing for the sole use of RTI in place of the discrepancy model are Colorado, Connecticut, Delaware, Hawaii, Illinois, Rhode Island, and West Virginia. *Id.*

— and other leading education organizations surveyed school-district administrators to determine the extent to which individual school districts had implemented RTI.<sup>87</sup> 1390 school districts, approximately 10% of school districts in the United States, responded.<sup>88</sup> 94% of respondents were at some stage of RTI implementation, with 24% having reached full implementation, 44% in the process of district-wide implementation, 15% piloting RTI in a limited number of schools, 11% at the planning stage, and 5% in the preliminary-investigation stage.<sup>89</sup> In elementary schools, where RTI can have the greatest impact, 80% of respondents reported full RTI implementation in one or more academic areas.<sup>90</sup> The findings also indicate that districts with 10,000 or more students are significantly more likely than smaller districts to have fully implemented RTI.<sup>91</sup>

Although the approach has been utilized for less than a decade, evidence indicates that RTI is serving its intended goals. In a review of published field studies through 2010, Professors Charles Hughes and Douglas Dexter examined the impact of sixteen different RTI programs.<sup>92</sup> The authors found that RTI improves the academic achievement and performance of at-risk students, and reduces referrals to and placement in special education.<sup>93</sup> Evidence gathered by the Data Accountability Center

---

86. *About Us*, SPECTRUM K12 SCHOOL SOLUTIONS, [http://www.spectrumk12.com/about\\_us/about\\_us\\_overview](http://www.spectrumk12.com/about_us/about_us_overview) (last visited Jan. 31, 2013).

87. *Response to Intervention (RTI): Adoption Survey 2011*, SPECTRUM K12 SCHOOL SOLUTIONS (2011), <http://www.spectrumk12.com/uploads/file/RTI%20Report%202011%20v5.pdf> [hereinafter *Adoption Survey*].

88. *Id.* at 2; Lei Zhou & Frank Johnson, *Revenues and Expenditures for Public Elementary and Secondary School Districts: School Year 2007–2008*, U.S. DEPT OF EDUC. 4 (May 2010), <http://nces.ed.gov/pubs2010/2010323.pdf> (indicating that, based on data collected in 2008, there are 13,525 school districts in the United States).

89. *Adoption Survey*, *supra* note 87, at 3.

90. *Adoption Survey*, *supra* note 87, at 3.

91. *Adoption Survey*, *supra* note 87, at 3.

92. Charles Hughes & Douglas D. Dexter, *Field Studies of RTI Programs, Revised*, RTI ACTION NETWORK, <http://www.rtinetwork.org/learn/research/field-studies-rti-programs> (last visited Jan. 31, 2013).

93. *Id.*; see also MATTHEW BURNS & KIMBERLY GIBBONS, IMPLEMENTING RESPONSE-TO-INTERVENTION IN ELEMENTARY AND SECONDARY SCHOOLS: PROCEDURES TO ASSURE SCIENTIFIC-BASED PRACTICES 7–8 (2008); Burns et al., *supra* note 68, at 271 (“[I]mplementing RTI led to schoolwide increases in student scores on state accountability tests and a schoolwide reduction in the number of student grade retentions. Students who participate in an RTI process and found to be adequately responsive experienced improved reading skills, improved adaptive behavior, and increased time on task, task comprehension, and task completion.”); Ciolfi & Ryan, *supra* note 13, at 318.

(DAC) corroborates these findings.<sup>94</sup> DAC, which operates in conjunction with the Office of Special Education within the federal Department of Education, publishes the most current data available about children with disabilities covered by the IDEA.<sup>95</sup> Data reported by DAC indicates that, between 2004 and 2011, the number of students ages six through twenty-one receiving special education under the IDEA in the fifty states, the District of Columbia, and Puerto Rico decreased by 4.11%.<sup>96</sup> DAC reports also indicate that, between 2004 and 2011, the number of students ages six through twenty-one diagnosed with SLDs in the fifty states, the District of Columbia, and Puerto Rico decreased by 15.6%.<sup>97</sup>

Despite these statistics, commentators warn that such empirical studies should be viewed cautiously, noting that referral rates can be easily manipulated.<sup>98</sup> For example, a school district can simply direct its teachers to make fewer referrals.<sup>99</sup> Nevertheless, commentators agree that it is reasonable to expect that fewer students will be referred to special education in districts that implement RTI, a conclusion supported by this data.<sup>100</sup>

#### E. THE POLICY UNDERLYING RTI: STANDARDS-BASED REFORM AND THE UNIFICATION OF GENERAL AND SPECIAL EDUCATION

Although the principle purpose of the 2004 amendments was to address the over-inclusion of students in special education, RTI represents a broader effort of the standards-based education-policy reform movement to reconfigure the public education sys-

---

94. See sources cited *infra* note 96.

95. See *Welcome to the Data Accountability Center (DAC)*, DATA ACCOUNTABILITY CTR., <https://www.ideadata.org/default.asp> (last visited Mar. 30, 2013).

96. See 2004 Spreadsheet, DATA ACCOUNTABILITY CTR., <http://www.ideadata.org/PartBChildCount.asp> (follow “2004 (csv) — Revised” hyperlink) (last modified Jan. 21, 2011); Table B1-3: Number of Students Ages 6 Through 21 Served Under IDEA, Part B, By Disability and State: Fall 2011, DATA ACCOUNTABILITY CTR., <https://www.ideadata.org/PartBData.asp> (follow “Child Count 2011” hyperlink; then follow “Table B1-3” hyperlink) (last modified Aug. 14, 2012). This data includes students attending schools operated by the Bureau of Indian Education.

97. See sources cited in *supra* note 96.

98. See Ciolfi & Ryan, *supra* note 13, at 318.

99. Ciolfi & Ryan, *supra* note 13, at 318.

100. See Ciolfi & Ryan, *supra* note 13, at 318; see sources cited in *supra* notes 93, 96.

tem.<sup>101</sup> This reform movement advocates a unified system of general and special education, characterized by universal achievement standards applicable to most students, including those with high-incidence disabilities such as SLDs.<sup>102</sup> This movement reflects a shifting view of “free appropriate public education” (FAPE), as defined in the IDEA and addressed in the 1982 Supreme Court case, *Board of Education of Hendrick Hudson Central School District v. Rowley*.<sup>103</sup>

In *Rowley*, the Court determined that the IDEA’s goal was not equal instruction, but rather equal *access* to education.<sup>104</sup> Thus, FAPE’s only substantive guarantee was instruction reasonably calculated to confer “some educational benefit.”<sup>105</sup> Under the *Rowley* standard, a student receives a FAPE if the student’s school complies with the prescribed procedural standards in crafting an individualized education plan (IEP), regardless of the student’s achievement or the substantive content of the IEP.<sup>106</sup>

---

101. Kavale et al., *supra* note 16, at 137–39; Yell & Walker, *supra* note 12, at 124–25; *see generally* Fuchs et al., *supra* note 17.

102. Fuchs et al., *supra* note 17, at 303; McLaughlin, *supra* note 11, at 11; Prasse, *supra* note 20 (“[W]hile RTI began as a response to addressing student outcomes for special education students, it quickly emerged as a general-education initiative, as obtaining successful outcomes for students requires an integrated education system that does not operate as two distinct entities.”).

103. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982).

104. *Id.* at 200; Coates, *supra* note 20, at 72.

105. *Rowley*, 458 U.S. at 200.

106. *Id.* (emphasis added). To describe the standard for regulating the content of special education, the Court stated,

Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

*Id.* at 203–04; *see also* Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 416 (2011) (“The IDEA, as interpreted by *Rowley*, views special education law through a strongly proceduralist lens: *Rowley* dictates that the process by which the IEP is created is of far more importance than the substantive content of the resulting IEP.”).

Since *Rowley*, education policy in the United States has shifted toward standards-based reform.<sup>107</sup> This reform is characterized by universal achievement standards, statewide assessments that determine whether students (including most students with disabilities) are meeting those standards, and accountability systems that penalize schools whose students fail to meet those standards.<sup>108</sup> Standards-based reform began with the 1994 reauthorization of Title I of the Elementary and Secondary Education Act (ESEA),<sup>109</sup> and gained strength with the 2001 reauthorization of the ESEA, re-titled the No Child Left Behind Act (NCLB).<sup>110</sup> NCLB's stated goal is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."<sup>111</sup> The regulations specify that all students, including

---

107. Michael Dannenberg, *A Derivative Right to Education: How Standards-Based Education Reform Redefines the Individuals with Disabilities Education Act*, 15 YALE L. & POL'Y REV. 629, 636 (1997); Fuchs et al., *supra* note 17, at 303 ("[S]tandards-driven general education reform . . . has dominated education policy in this country for more than a decade."); McLaughlin, *supra* note 11, at 2.

108. Fuchs et al., *supra* note 17, at 303; McLaughlin, *supra* note 11, at 4.

109. McLaughlin, *supra* note 11, at 4. The 1994 reauthorization of Title I of the ESEA is known as the Improving America's Schools Act (IASA). McLaughlin, *supra* note 11, at 4. Professor McLaughlin explains, "The ISA required that in order for states to receive Title I funds, they were to develop challenging content and performance standards in reading and math and adopt yearly assessments to determine how well all students were meeting the states' performance standards. However, unlike previous mandates that allowed states to use a variety of assessments and required no real accountability for results, the IASA required states to develop and implement one state-wide assessment and accountability system that covered all students and schools. The Act additionally stipulated that *all* students should participate in the state assessments, and that the results for all students must be publicly reported. In defining 'all' the IASA specifically referred to students with disabilities . . ." McLaughlin, *supra* note 11, at 4.

110. McLaughlin, *supra* note 11, at 4.

111. 20 U.S.C. § 6301 (2006) (emphasis added). This section goes on to state,

This purpose can be accomplished by — (1) ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement; (2) meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance; (3) closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers; (4) holding schools, lo-

most students with disabilities, are to be held to the same standards, and that alternate methods of assessment are intended only for students with the most severe cognitive disabilities.<sup>112</sup>

Driving this shift toward standards-based instruction is the idea that categorical separation of special education from general education is arbitrary and contrary to children's best interests.<sup>113</sup> Thus, proponents of standards-based reform advocate "blurring" general and special education into one unified system.<sup>114</sup> They argue, first, that most special-education students are not "qualitatively different learners with unique or idiosyncratic needs that require vastly different or highly specialized curriculum and instructions."<sup>115</sup> Rather, these students differ only in the degree of

---

cal educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education; (5) distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest; (6) improving and strengthening accountability, teaching, and learning by using State assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged; (7) providing greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance; (8) providing children an enriched and accelerated educational program, including the use of schoolwide programs or additional services that increase the amount and quality of instructional time; (9) promoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies and challenging academic content; (10) significantly elevating the quality of instruction by providing staff in participating schools with substantial opportunities for professional development; (11) coordinating services under all parts of this subchapter with each other, with other educational services, and, to the extent feasible, with other agencies providing services to youth, children, and families; and (12) affording parents substantial and meaningful opportunities to participate in the education of their children.

*Id.*

112. McLaughlin, *supra* note 11, at 6–7.

113. McLaughlin, *supra* note 11, at 31; *see also* Dannenberg, *supra* note 107, at 636 (“The theory behind standards-based school reform is that students will work harder and achieve more when challenged with rigorous content and heightened expectations.”).

114. *See* Fuchs et al., *supra* note 17, at 305–06; McLaughlin, *supra* note 11, at 33–34; Seligmann, *supra* note 10, at 766 (stating that educators challenge the group-oriented approach to general education, support the “transformation of all classrooms into places where individualized teaching is the norm,” and “call for the merger of special and regular education through inclusion of all children within the regular classroom as the way to accomplish this.”).

115. McLaughlin, *supra* note 11, at 21; *see also* Dannenberg, *supra* note 107, at 637 (“Advances in cognitive science and educational research show that all children, even those with a history of the lowest academic achievement, are capable of learning to the

their underachievement and the severity of their behavioral problems.<sup>116</sup> Therefore, “[w]here districts or schools draw the line between a student who becomes eligible for special education and one who does not is often highly subjective and frequently lacks instructional validity.”<sup>117</sup> Second, supporters of blurring argue that, in part because special-education students are not qualitatively different from other students, special-education instruction is not qualitatively different from high-quality general education instruction.<sup>118</sup> Third, supporters argue that the “special education” label harms children by damaging their self-esteem and promoting a self-fulfilling prophecy, and that blurring would avoid this stigmatization.<sup>119</sup> This argument is especially salient for high-incidence disabilities such as SLDs, which many describe as “socially constructed phenomena with no basis in behavior or biology or with no meaningful implications for practice.”<sup>120</sup>

RTI promotes the goals of standards-based reform and the unification of general and special education in several ways.<sup>121</sup> First, by implementing specialized instructional tiers in general education, RTI removes the traditional boundary between general and special education and, in place of a bifurcated system, creates a continuum of educational services. Second, by including children historically classified with SLDs in general education settings, and by holding them to higher standards, RTI acknowledges that many students classified as learning-disabled are not qualitatively different from their peers. Rather, many of them are merely underachievers who can attain greater achievement levels if provided with early-intervention services. Third, although RTI is primarily a general-education responsibility, it is funded by the IDEA. This funding mechanism reflects the need

---

same high standards as their ‘honors’ track peers. Research indicates that low academic achievement associated with disabled children often exists independent of intellectual ability and can be reversed with proper training.”); Fuchs et al., *supra* note 17, at 303–04.

116. McLaughlin, *supra* note 11, at 21; *see also* Fuchs et al., *supra* note 17, at 303.

117. McLaughlin, *supra* note 11, at 21.

118. Fuchs et al., *supra* note 17 at 307.

119. Fuchs et al., *supra* note 17 at 307.

120. Fuchs et al., *supra* note 17 at 307.

121. *See, e.g.*, Fuchs et al., *supra* note 17, at 304 (stating that some view RTI as an explicit method for meeting the goals of NCLB).

for the two education systems to work together to deliver high-quality instruction to struggling students.<sup>122</sup>

However, as discussed in Part III, while RTI promotes these policy goals, the denial of procedural safeguards to RTI students conflicts with the goals of § 1415 and the education-policy reform movement.

### III. INCONSISTENCIES BETWEEN THE EDUCATION-POLICY REFORM MOVEMENT AND THE IDEA FRAMEWORK

As described in Part II.E, RTI advances the goals of the standards-based education reform movement, which advocates the unification of general and special education and the implementation of universal achievement standards. This Part outlines the inconsistencies between that movement and the denial of procedural safeguards to RTI students. Part III.A describes the procedural safeguards, set forth in § 1415 of the IDEA, afforded to students receiving traditional forms of special education. Part III.B discusses the interaction between RTI and § 1415. Finally, Part III.C explains how the denial of the § 1415 safeguards to RTI students conflicts with the goals of § 1415 and the education-policy reform movement.

#### A. SECTION 1415 OF THE IDEA: PROCEDURAL SAFEGUARDS AFFORDED TO STUDENTS RECEIVING TRADITIONAL FORMS OF SPECIAL EDUCATION

Students classified as “children with disabilities” under the IDEA are eligible for special-education services, and thus guaranteed the right to a “free appropriate public education.”<sup>123</sup> Under § 1415 of the IDEA, this right is protected through a unified set of procedural safeguards.<sup>124</sup> Because RTI students do not qualify as

---

122. 20 U.S.C. § 1413(f)(1) (2006); Fuchs et al., *supra* note 17, at 308 (“General education needs special education money to make RTI work.”).

123. 20 U.S.C. § 1412(1)(a) (2006).

124. *See* 20 U.S.C. § 1415 (2006). Section 1415(a) requires any state or local educational agency (LEA) receiving IDEA funds to “establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.” § 1415(a).

“children with disabilities,” they are not entitled to these safeguards.<sup>125</sup>

The purpose of § 1415’s safeguards is to protect the unique vulnerabilities of children with disabilities, in part by allowing their parents to advocate for them throughout the ongoing evaluation and placement processes.<sup>126</sup> Section 1415 requires that parents be provided with a copy of the procedural protections available to their children at least once a year, and at any time upon the parents’ request.<sup>127</sup> Where “the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the state,” this section requires “the assignment of an individual to act as a surrogate for the parents.”<sup>128</sup> The surrogate may not be an employee of any agency involved in the education or care of the child.<sup>129</sup>

In determining the needs of a child with a disability, § 1415 entitles parents to “examine all records relating to such child[,] . . . participate in meetings with respect to the identification, evaluation, and educational placement of the child . . . , and . . . obtain an independent educational evaluation of the child.”<sup>130</sup> Parents are also entitled to “written prior notice . . . whenever the [LEA] proposes to initiate or change[,] or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a [FAPE],”<sup>131</sup> and “pro-

---

125. *Id.* (emphasis added) (“Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that *children with disabilities* and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies); 20 U.S.C. § 1412(6)(A) (2006) (providing that procedural protections are afforded only to children with disabilities and their parents).

126. *See* § 1415(a); 20 U.S.C. § 1415(6)(a) (2006); *see also* Coates, *supra* note 20, at 61.

127. 20 U.S.C. § 1415(d)(1)(A) (2006).

128. 20 U.S.C. § 1415(b)(2)(A) (2006). The state must “make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.” 20 U.S.C. § 1415 (b)(2)(B) (2006).

129. § 1415(b)(2)(A). This section further specifies that, “[i]n the case of (i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child’s care provided that the surrogate meets the requirements of this paragraph; and (ii) an unaccompanied homeless youth as defined in section 11434a(6) of Title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.” *Id.*

130. 20 U.S.C. § 1415(b)(1) (2006).

131. 20 U.S.C. § 1415(b)(3) (2006).

cedures designed to ensure that such notice is in the parents' native language."<sup>132</sup> The notice to parents must include:

(A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter; (D) sources for parents to contact and obtain the assistance in understanding the provisions of this subchapter; (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal.<sup>133</sup>

Where disputes arise with respect to the provision of appropriate services, § 1415 requires the state or LEA to provide a state-funded opportunity for the parties to resolve the dispute through mediation.<sup>134</sup> Where mediation is unsuccessful, § 1415 requires an impartial due-process hearing, with judicial review in either state or federal court.<sup>135</sup> The state or LEA must ensure that the mediation or hearing process is (i) voluntary, (ii) "not used to deny or delay a parent's right to a due process hearing," and (iii) "conducted by a qualified and impartial mediator."<sup>136</sup> Where a resolution is reached through mediation, the parties

---

132. 20 U.S.C. § 1415(b)(4) (2006).

133. 20 U.S.C. § 1415(c)(1) (2006).

134. 20 U.S.C. §§ 1415(b)(5), (e)(1), (e)(2)(D) (2006). However, for parents and schools that choose not to utilize the mediation process, the state or LEA may establish procedures to offer "an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with (i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or (ii) an appropriate alternative dispute resolution entity, to encourage the use, and explain the benefits, of the mediation process to the parents." 20 U.S.C. § 1415(e)(2)(B) (2006).

135. 20 U.S.C. § 1415(f) (2006); Hyatt, *supra* note 8, at 691, 699; Perry A. Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 27 (2007).

136. 20 U.S.C. § 1415(e)(2)(A) (2006). The State must "maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services." 20 U.S.C. § 1415(e)(2)(C) (2006).

must record that resolution in a written agreement, which is enforceable in court.<sup>137</sup>

Where a hearing is necessary to reach a resolution, § 1415 permits “any party to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE].”<sup>138</sup> The complainant or his attorney must provide a due-process complaint notice to the opposing party, which must include a description and proposed resolution of the problem.<sup>139</sup> Within fifteen days of receiving notice of a complaint, the LEA must meet with the parents and relevant members of the IEP team to work toward a resolution.<sup>140</sup> If, within thirty days of receiving notice of a complaint, the LEA fails to resolve the issue to the satisfaction of the parents, the parties must proceed with a due-process hearing. Where the parent prevails, the court has discretion to award the parent reasonable attorney’s fees.<sup>141</sup>

In addition, § 1415 protects students directly in two significant ways. First, § 1415 includes a “stay-put” provision, which provides that “during the pendency of any proceedings conducted pursuant to [§ 1415], . . . the child shall remain in the then-current educational placement . . . , or, if applying for initial admission to a public school, shall . . . be placed in the public school program until all such proceedings have been completed.”<sup>142</sup> Second, § 1415 includes safeguards designed to protect students against disciplinary sanctions when the behavior at issue results from the student’s disability. Section 1415(k) provides that, when determining the appropriate disciplinary procedures for a child with a disability who violates a code of student conduct, “school personnel may consider any unique circumstances on a case-by-

---

137. 20 U.S.C. § 1415(e)(2)(F) (2006).

138. 20 U.S.C. § 1415(b)(6)(A) (2006). The complaint may “set[] forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State as a explicit time limitation for presenting such a complaint under this subchapter, in such time as the State allows . . . .” 20 U.S.C. § 1415(b)(6)(B) (2006).

139. 20 U.S.C. § 1415(b)(7) (2006). § 1415 also requires the State educational agency to “develop a model form to assist parents in filing a complaint and due process complaint notice. 20 U.S.C. § 1415(b)(8) (2006).

140. 20 U.S.C. § 1415(f)(1)(B)(i) (2006).

141. 20 U.S.C. § 1415(i)(3)(B)(i) (2006).

142. 20 U.S.C. § 1415(j) (2006).

case basis.”<sup>143</sup> This section also provides that, when a child with a disability violates a code of student conduct and the behavior that gave rise to the violation is determined to be a manifestation of the child’s disability, school personnel may not suspend the child or remove the child to an “interim alternative education setting” for more than ten days.<sup>144</sup> Finally, this section provides that when a child with a disability is removed from his or her current placement, the child must “continue to receive educational services . . . so as to enable the child to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the child’s IEP,” and must “receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.”<sup>145</sup>

This unified set of safeguards protects the educational rights of students with disabilities. However, as will be described in Part III.B, these safeguards apply only to students who qualify for special education under the IDEA, despite the emergence of specialized RTI instruction within general education.

## B. THE INTERACTION BETWEEN RTI AND § 1415 OF THE IDEA

Section 1415 safeguards were enacted with the 1997 reauthorization of the IDEA.<sup>146</sup> These safeguards protect the educational rights of students in need of specialized educational services.<sup>147</sup> With the development and adoption of RTI, schools have extended specialized instruction beyond special education and into general education.<sup>148</sup> However, while RTI students receive specia-

---

143. 20 U.S.C. § 1415(k)(1)(A) (2006).

144. 20 U.S.C. § 1415(k)(1)(B) (2006). As an exception to this rule, school personnel may remove a student to an interim alternative educational setting” for up to 45 school days “without regard to whether the behavior is determined to be a manifestation of the child’s disability, in cases where a child (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function . . . ; (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function . . . ; or (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function . . . .” 20 U.S.C. § 1415(k)(1)(G) (2006).

145. 20 U.S.C. § 1415(k)(1)(D) (2006).

146. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat 37.

147. See 20 U.S.C. § 1415(a) (2006).

148. See sources cited in *supra* notes 82–91.

lized services, they are not entitled to § 1415 protections because, under the IDEA, they are not considered “children with disabilities.”

The one exception, set forth in § 1415(k)(5), is the extension of certain protections against disciplinary sanctions to children not eligible for special education who have “engaged in behavior that violates a code of student conduct.”<sup>149</sup> Parents of these children “may assert any of the protections provided for [in the IDEA] if the local educational agency had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.”<sup>150</sup> A local educational agency will be deemed to have such knowledge where:

- (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (ii) the parent of the child has requested an evaluation of the child . . . ; or (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.<sup>151</sup>

Thus, general-education students may be protected against disciplinary sanctions if, prior to violating a code of student conduct, teachers or other school personnel have expressed concern about their need for special education, or parents have relayed such concern to appropriate personnel.<sup>152</sup> Because of the likelihood that the parents or teachers of RTI students have expressed such concern, those students might be entitled to disciplinary protections.<sup>153</sup>

Beyond the possibility of receiving disciplinary protections, however, RTI students are denied the procedural safeguards afforded to students in special education. As will be discussed in

---

149. 20 U.S.C. § 1415(k)(5)(A) (2006).

150. *Id.*

151. 20 U.S.C. § 1415(k)(5)(B) (2006).

152. *See id.*

153. *Id.*

Part III.C, denying such safeguards to RTI students creates problematic inconsistencies with the goals of § 1415, standards-based reform and the unification of general and special education.

### C. INCONSISTENCIES ARISING FROM THE DENIAL OF PROCEDURAL PROTECTIONS TO RTI STUDENTS

As discussed in Part II.E, RTI promotes the efforts of the education-policy reform movement to reconfigure the public education system.<sup>154</sup> However, while RTI furthers the goals of standards-based reform and the unification of general and special education, the denial of § 1415 safeguards to RTI students conflicts with these goals and with the goals of § 1415.

First, the denial of § 1415 safeguards to RTI students misinterprets the goals of § 1415 and the implications of RTI classification. The purpose of § 1415 is to protect, through specified procedures, the right of children with disabilities to a free appropriate public education.<sup>155</sup> These children require protection because of the historical practice of denying them equal education,<sup>156</sup> and the unique vulnerabilities presented by their need for specialized services.<sup>157</sup> RTI reduces the number of children diagnosed with disabilities by re-operationalizing the SLD definition — i.e., by changing the method by which SLDs are diagnosed, but retaining the formal SLD definition in the IDEA.<sup>158</sup> However, while RTI changes students' classifications, it does not remove their vulnerabilities. The need for protection stems not from classification as a special-education student, but from the underlying problems that necessitate specialized services, and the risks of receiving

---

154. Kavale et al., *supra* note 16, at 137–39; Yell & Walker, *supra* note 12, at 124–25; See generally Fuchs et al., *supra* note 17.

155. See 20 U.S.C. § 1415 (2006).

156. Coates, *supra* note 20, at 57; Baird, *supra* note 10, at 4–5.

157. See Joan N. Alschuler, *Education for the Handicapped*, 7 J.L. & EDUC. 523, 533–34 (1978) (noting the self-fulfilling prophecies that can result from misclassification); Coates, *supra* note 20, at 61 (noting the “discriminatory treatment which characteristically results from the identification of a handicapping condition and the danger of inadequate or inappropriate programs which could result from an erroneous classification”).

158. Kavale et al., *supra* note 37, at 39 (stating that “operational” definitions are those that “translate the concepts described in the formal definitional statement into tangible actions”); Kavale, *supra* note 39, at 553 (“Because the . . . reauthorization of the [IDEA] does not include any modification of the SLD definition, there is technically no ‘redefining.’ Instead, RTI is best viewed as a new operational definition that will supplant the long-standing ‘discrepancy’ criterion as the operational definition of an SLD.”).

inadequate or inappropriate services.<sup>159</sup> Because § 1415's goal is to protect students requiring specialized services, it is inconsistent to deny protection to RTI students.

Second, the denial of § 1415 safeguards to RTI students reinforces the traditional boundary between general and special education, and thus contradicts the goals of the education-policy reform movement — namely, standards-based instruction and the unification of educational categories. As discussed in Part II.E, an important goal of education policy reform is to recognize that many students historically classified with SLDs are not qualitatively different from their peers, and therefore should be held to the same achievement standards.<sup>160</sup> In this regard, the denial of protection to such students may seem in accordance with equalizing the treatment afforded to RTI and general education students. However, to argue that RTI students should be denied protection to further the goals of standards-based reform misinterprets the purpose of the policy reform movement. This movement does not propose that children who would have traditionally been diagnosed with SLDs are, in fact, the same as their general education peers. Rather, the movement's aim is to treat such students as general-education students for two specific purposes — classification and achievement standards. Classifying RTI students as general-education students and holding such students to the same achievement standards furthers three important goals: higher achievement levels, more efficient use of IDEA funds, and a reduction in the number of students who must deal with the stigma of special education. However, treating RTI students as general-education students for purposes of their entitlement to § 1415 safeguards is contrary to both the best interests of such students and the goals of standards-based education policy reform, because it ignores the vulnerabilities that arise from the need for specialized educational services, and it enforces the traditional boundary between general and special education.

While all students, including those in mainstream general education, could arguably benefit in some way from the § 1415 protections, it is neither necessary nor practical to extend these protections to students who lack the unique risks associated with

---

159. See sources cited in *supra* note 156.

160. McLaughlin, *supra* note 11; see also Fuchs et al., *supra* note 17, at 303–04.

the need for specialized instruction. Therefore, there must be a line of demarcation to establish which students will receive § 1415 protection. It might seem prudent to draw this line at the formal boundary between general and special education because students in special education possess the most severe learning and behavioral problems. Indeed, while RTI serves to reduce the bifurcation of educational classifications by creating a continuum of instructional services, it does not actually remove the distinction between general and special education. Rather, RTI merely blurs this distinction by including specialized instruction in general education,<sup>161</sup> thereby shifting the boundary line to allow for fewer special-education referrals.<sup>162</sup> While it may seem consistent to align entitlement of § 1415's protections with the new boundary line, to do so would ignore the purposes of RTI, education policy reform, and § 1415. RTI seeks to include more students in general education, not because such students are free from learning or behavioral problems,<sup>163</sup> but because their problems can be addressed more effectively and efficiently through intervention methods in general education.<sup>164</sup> As discussed above, because the need for § 1415 protection arises from the problems that necessitate specialized services, RTI students retain this need despite their re-classification as general-education students.

#### IV. THE NEED TO EXTEND PROCEDURAL SAFEGUARDS TO RTI STUDENTS

To resolve the inconsistencies between the denial of § 1415 safeguards to RTI students and the goals of § 1415 and education policy reform, Congress should amend § 1415 to extend all procedural safeguards to general-education students receiving RTI services or other scientific, research-based early-intervention services. This amendment would entitle RTI students and their parents to all protections set forth in Part III.A. Thus, the amendment would guarantee such parents an opportunity to ex-

---

161. Fuchs et al., *supra* note 17, at 306.

162. Hensel, *supra* note 33, at 1159; *see* sources cited in *supra* note 96.

163. McLaughlin, *supra* note 11, at 21.

164. *See* Prasse, *supra* note 20 (explaining that the purpose of RTI is to allocate special-education resources based on the actual needs of students, rather than on arbitrary scores that have little to do with developing effective interventions).

amine all records, participate in all meetings, and obtain independent assessments with respect to the evaluation and educational placement of their children.<sup>165</sup> Where the parents of an RTI student are unknown or unavailable, the amendment would require the assignment of a surrogate parent, who may not be an employee of any agency involved in the education or care of the child.<sup>166</sup>

The amendment would also entitle parents to prior written notice whenever the school or LEA proposes a change, or refuses to initiate a change, in the tier of intervention provided to their children.<sup>167</sup> As with special-education students, this notice would include a description of the action proposed or refused by the school or LEA and an explanation for the proposal or refusal.<sup>168</sup> It would also include a description of other options that were considered by the school or LEA and an explanation for their rejection.<sup>169</sup> Finally, this notice would inform parents of their protection under § 1415 and would provide them with sources for obtaining assistance in understanding the provisions of that section.<sup>170</sup>

Where disputes arise with respect to the provision of appropriate services, such as the recommended tier of intervention, the amendment would allow parents to present a complaint outlining the basis of their concern.<sup>171</sup> It would require that parents be provided with a model form to assist them in filing the complaint, and that the LEA meet with parents and respond to the complaint within thirty days of receipt.<sup>172</sup> The amendment would also entitle parents to state-funded mediation, the resolution of which would be enforceable in court, and to a hearing, where necessary.<sup>173</sup> Finally, this amendment would require that parents be provided with a copy of the procedural protections available to

---

165. See 20 U.S.C. § 1415(b)(1) (2006).

166. See 20 U.S.C. § 1415(b)(2)(A) (2006).

167. See 20 U.S.C. § 1415(b)(3) (2006).

168. 20 U.S.C. § 1415(c)(1) (2006).

169. See *id.*

170. See *id.*

171. See 20 U.S.C. §§ 1415(b)(6)(A)–(B) (2006).

172. See 20 U.S.C. §§ 1415(b)(6)(A), (b)(8), (f)(1)(B)(i) (2006).

173. See 20 U.S.C. §§ 1415(b)(5), (e)(1), (e)(2)(D), (f) (2006).

their children at least once a year, and at any time upon their request.<sup>174</sup>

In addition to facilitating effective advocacy by parents, this amendment would protect RTI students directly, to the same extent and in the same manner, that § 1415 protects special-education students. Thus, RTI students would be entitled to remain in their then-current educational placements during the pendency of a mediation or proceeding conducted pursuant to § 1415, and would not be subject to disciplinary sanctions when the behavior at issue resulted from the same problems underlying their placement in RTI.<sup>175</sup>

Professors Angela Ciolfi and James Ryan have proposed a more narrow amendment to the IDEA that would extend only the disciplinary protections of § 1415(k) to RTI students.<sup>176</sup> Noting that racial minorities are overrepresented in special education, and disproportionately subject to disciplinary sanctions in general education, they argue that such an amendment would reduce these racial disparities.<sup>177</sup> However, as described in Part III.B, even without such an amendment, RTI students may receive such disciplinary protection if their parents or teachers have expressed concern about their need for special education.<sup>178</sup>

An amendment extending all § 1415 procedural safeguards to RTI students would resolve the problematic inconsistencies between the denial of § 1415 safeguards to RTI students and the goals of § 1415 and education-policy reform in two ways. First, by protecting all students receiving specialized services, the amendment would align the scope of § 1415 with its purpose of protecting students in need of such services. Second, this

---

174. See 20 U.S.C. § 1415(d)(1)(A) (2006).

175. See 20 U.S.C. §§ 1415(b), (k) (2006).

176. Ciolfi & Ryan, *supra* note 13, at 334-35. By its terms, § 1415 provides for “procedural safeguards” to students receiving special education services under the IDEA. 20 U.S.C. § 1415 (2006). Subsection (k) of § 1415 pertains to those procedural safeguards that relate to disciplinary situations (i.e., situations in which a student receiving special education violates a code of student conduct). 20 U.S.C. § 1415(k) (2006). Professors Ciolfi and Ryan argue that “some of the procedural and discipline protections of special education” should be extended to students who receive RTI services. Ciolfi & Ryan, *supra* note 13, at 307. In discussing which of these protections should be extended, Professors Ciolfi and Ryan focus only on procedural protections pertaining to discipline. Ciolfi & Ryan, *supra* note 13, at 322-25. Therefore, although they do not explicitly say so, they address only procedural disciplinary protections set forth in § 1415(k).

177. Ciolfi & Ryan, *supra* note 13, at 341.

178. See 20 U.S.C. § 1415(k)(5)(B) (2006).

amendment would recognize the changing significance of the categorical boundary between general and special education. While this boundary retains significance in that it distinguishes students diagnosed with disabilities from those who are merely underachievers in need of more intensive instruction, the development of RTI and standards-based instruction has weakened this distinction. Special education no longer encompasses the full scope of specialized services provided under the IDEA. Rather, RTI and the education-policy reform movement establish a new category of students receiving specialized instruction that includes students from both general and special education. The proposed amendment would recognize this category's significance.

The proposed amendment to § 1415 might be challenged on several grounds. First, critics might challenge the added expense of providing procedural protections to RTI students, particularly in light of the cost-saving objectives of the 2004 IDEA amendments. The costs of this amendment would derive from the need to notify and meet with parents concerning the educational placement of their children, the assignment of surrogate parents, mediation and court fees, and attorneys' fees. However, many of these costs, particularly those associated with dispute resolution, are merely potential, incident-driven costs, and do not constitute necessary expenditures. Furthermore, when these potential costs do arise, they will be unlikely to exceed the long-term costs of placing a student in special education,<sup>179</sup> given that the cost of procedural protections is only a subset of the costs of special education. Therefore, any added costs of this amendment would not defeat the cost-saving objectives of the 2004 IDEA amendments.

Second, critics might argue that a better solution to the problematic inconsistencies is to redefine the term "specific learning disability" in the IDEA to encompass all students who require specialized services. By broadening the SLD definition to include RTI students, such students would in turn be afforded IDEA protections. Some observers have argued that, rather than focusing on the development of an appropriate "operational"<sup>180</sup> definition of SLD, such as discrepancy or RTI, policymakers should focus on

---

179. See Vaughn & Fuchs, *supra* note 36, at 137 ("The cost per student for special education is nearly twice that for general education . . .").

180. An "operational" definition is one that "translates the concepts described in the formal definitional statement into tangible actions." Kavale et al., *supra* note 37, at 39.

redefining its formal definition.<sup>181</sup> They argue that the current formal definition is “too broad to be wrong and too vague to be complete.”<sup>182</sup> In other words, although the present definition specifies the eligible disorders, it fails to explain why those disorders are eligible for this classification.<sup>183</sup> Therefore, it is nearly impossible to accurately operationalize this definition.<sup>184</sup> The argument in favor of clarifying the formal definition of an SLD is strong. However, the inclusion of RTI students in this definition would contradict the goals of the 2004 amendments, RTI and the education-policy reform movement, because it would worsen the financial and stigmatic problems associated with over-inclusion in special education.

Third, critics might argue that the extension of procedural protections should be legislated at the state level. Given that RTI represents a relatively new advance in education law, and that education is traditionally regulated by state legislatures, Congress could reasonably decide to allow states to determine how to best implement RTI, should they choose to do so at all. However, allowing states to determine the scope of § 1415 would contradict the basis for a federal special-education law in the first place — namely, uniformity across states, and the historical failure of states to properly address the needs of students requiring specialized instruction.<sup>185</sup>

The proposed amendment would further the goals of § 1415 and education policy reform, while resolving the problematic inconsistencies within special-education law.

## V. CONCLUSION

Recent decreases in the number of special-education referrals indicate that RTI is effective in mitigating over-inclusion in special education, allocating the limited resources funded under the

---

181. Kavale, *supra* note 39, at 553.

182. Kavale, *supra* note 39, at 553.

183. Kavale et al., *supra* note 37, at 40.

184. Kavale et al., *supra* note 37, at 40; Kavale, *supra* note 39, at 553–54 (“The disconnect between the formal definition and its operational components demonstrates the impossibility of the theoretical being accurately represented in the operational and vice versa.”).

185. See 20 U.S.C. § 1400(c)(2) (2012); Baird, *supra* note 10, at 4–5 (noting Congress was motivated by scattered failures of local educational boards).

IDEA, and increasing the quality of services provided in both general and special education. However, denying the procedural safeguards set forth in § 1415 of the IDEA to RTI students creates inconsistencies within the IDEA and special-education law. Providing such protections only to students who qualify for traditional forms of special education contradicts the goals of § 1415 and reinforces an outdated distinction between general and special education. For RTI to achieve its intended goals, procedural safeguards under the IDEA must be extended to students receiving RTI or other scientific, research-based intervention services in general education.