NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW

VOLUME 72
ISSUE 2

NEW YORK UNIVERSITY SCHOOL OF LAW
ARTHUR T. VANDERBILT HALL
Washington Square
New York City

A NEW IDEA RATHER THAN A NEW I.D.E.A.: SEPARATE FEDERAL LEGISLATION FOR RTI STUDENTS

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INTRODUCTION

In 2015, Congress passed a significant overhaul to our national education law.[1] But in the process federal legislators overlooked the need to provide procedural protections for struggling general-education students.[2] Congress amended the Individuals with Disabilities Education Act (IDEA) in 2004 to address the overinclusion of students diagnosed with "specific learning disabilities" (SLD)[3] in special education.[4] The amendments permit local education agencies (LEA), which oversee public-school districts, to allocate up to 15 percent of their federal special-education funds each year to the development and implementation of "scientific, research-based in-

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1. Every Student Succeeds Act, Pub. L. No. 114-95 (codified as amended at 20 U.S.C.A § 6301 (2015)).

2. "Regular education is the term often used to describe the educational experience of typically developing children." Jerry Webster, *A Definition of Regular Education*, ThoughtCo. (June 14, 2017), https://www.thoughtco.com/regular-education-definition-3110873 [https://perma.cc/KC8J-2JY6] (noting that "regular education" is a less-preferred term for "general education").

3. A specific learning disability (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." 20 U.S.C. § 1401(30)(A) (2006). SLDs include "such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." § 1401(30)(B).

4. Genna Steinberg, *Amending § 1415 of the IDEA: Extending Procedural Safeguards to Response-to-Intervention Students*, 46 Colum. J.L. & Soc. Probs. 393, 411 (2013).

tervention"[5] methods.[6] Such methods are designed to enhance general-education services and reduce referrals to special education, thereby decreasing the SLD population, by improving the academic and behavioral performance of non-disabled students who are at risk of academic failure.[7] The most widely utilized intervention method to emerge since the 2004 IDEA amendments is "response to intervention" (RTI).[8]

RTI students are struggling, general-education children who present many of the same learning difficulties as their IDEA peers and often receive the same form of targeted academic and behavioral supports. Yet only IDEA students and their parents are entitled to procedural safeguards, which guarantee the students' learning needs are met, through section 1415 of the IDEA. No procedural safeguards exist for non-IDEA students to challenge decisions regarding their learning needs.[9]

To understand how procedural protections (or their absence) impact learning outcomes of students with learning difficulties, consider a simple example.[10] Lisa, a first-grade general-education student, has a hard time decoding words and understanding what she is reading. She attends Public School A, which does not address her decoding and comprehension difficulties. Concerned that Lisa will fall behind grade level, her parents would like to challenge the school's refusal to provide her with targeted support to improve her reading. Without procedural safeguards, there is little Lisa's parents can do to compel their daughter's school to help her.[11] But with such safeguards Lisa's parents could challenge the school's refusal

5. *Id.*

6. § 1413(f)(1).

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

8. Steinberg, *supra* note 4, at 395; *see* Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for Special Education Eligibility*, 42 Teaching Exceptional Child. 62, 62 (2010).

9. *See infra* notes 131–133 and accompanying text. The IDEA guarantees children with learning disabilities the right to a "free appropriate public education" (FAPE), § 1412(a)(1)(A), and protects that right through a unified set of procedural protections, § 1415.

10. This example is based on the U.S. Department of Education's presentation, U.S. Dep't of Educ., Implementing RTI Using Title I, Title III, and CEIS Funds: Key Issues for Decision-makers 18 (2009).

11. One might argue that, in such a situation, Lisa's parents should just transfer their daughter to another school. But perhaps the other schools in the surrounding area similarly feature lackluster support, or maybe Public School A provides a quality education outside of the first grade and so there are good reasons for Lisa to just stay put.

to address Lisa's needs, could sue the district overseeing the school to force it to act, or could enroll Lisa in private school and sue the district or the state for the money needed to pay for such schooling. These would be the options available if Lisa were categorized as having a disability.

To remedy an inconsistency in federal law, which denies at-risk, general-education students procedural protections but provides them to children with learning disabilities, the limited scholarship in this area argues that Congress should extend section 1415 of the IDEA in its entirety,[12] or at least the section discussing disciplinary protections,[13] to RTI students. While this Note agrees there is a need to cure the gap in coverage between disabled and non-disabled struggling students by providing parallel procedural safeguards, it differs from available scholarship as to the solution. As I will demonstrate, Congress did not intend for the IDEA to provide due-process rights to RTI students likely in an effort to prevent diverting funds from the disabled to the non-disabled student population.[14] Given the growing number of RTI students, I will propose separate legislation modeled off of the IDEA that solely addresses the learning needs of non-disabled, at-risk youths.[15] This proposal will include procedural safeguards that help guarantee those learning needs are met.[16]

Part I will begin with a description of the IDEA's section 1415 procedural safeguards afforded to students who qualify for special-education and will also explain why due-process hearings, which are utilized to enforce procedural protections such as section 1415, remain a valid means to ensure the needs of students with learning difficulties are satisfied. I will also address recent criticisms of the IDEA's due-process hearing system levied by the American Association of School Administrators, an influential professional group, and by several academic commentators.

Part II will demonstrate why RTI students deserve due-process rights similar to those afforded to their special-education peers. I will begin this Part by discussing how the national reduction in the number of special-education students since 2004—the year Congress amended the IDEA to address the overinclusion of students diagnosed with SLDs—may be explained by school districts across the country having adopted RTI, resulting in a decreased referral of

12. Steinberg, *supra* note 4, at 396.
13. Ciolfi & Ryan, *supra* note 7, at 334–35.
14. *See infra* Part III.
15. *See infra* Part IV.
16. *Id.*

students to special education. Although there may be a smaller number of special-education students today, there is a growing population of RTI students taking its place. And although RTI might avoid many at-risk students from receiving needless special-education designations, it does not remove their vulnerabilities, which stem from their need for specialized instruction. As special-education students receive procedural safeguards to protect against the risks of receiving inadequate or inappropriate services, so must those students undergoing RTI.

Part III will examine Genna Steinberg's[17] argument that Congress should expand all of section 1415 of the IDEA to cover RTI students. I will also explore Angela Ciolfi[18] and James Ryan's[19] proposal to extend only the disciplinary protections of section 1415(k) to RTI students. Given congressional intent that the IDEA's procedural safeguards not apply to RTI students, a separate piece of federal law—rather than an extension of the IDEA—provides a better solution to the inconsistent provision of procedural protections for special-education versus struggling, general-education students. This conclusion is underscored by the additional benefits that would accrue from freestanding RTI legislation, namely increasing the effectiveness of RTI funding and establishing national standards for implementing RTI services.

Part IV will outline the contours of this legislation using section 1415 of the IDEA as a point of reference.

PART I

Before discussing why RTI students deserve procedural protections already afforded to their special-education peers one must first understand what those are. Part I seeks to develop such an understanding while addressing critiques and reviewing benefits of the current IDEA due-process hearing system.[20]

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17. Genna Steinberg is currently an associate at Kelly Drye & Warren.

18. Angela Cilofi is currently the Director of Litigation and Advocacy at the Legal Aid Justice Center.

19. James Ryan is currently the dean of the Harvard Graduate School of Education.

20. The reader may be wondering why I have chosen to discuss the IDEA's procedural protections and its due-process hearing regime given the focus of this paper is on RTI, not special education. Since the IDEA's procedural safeguards and due-process hearing system will serve as a model for the proposed RTI procedural protections discussed in Part IV, the critiques addressed and benefits reviewed here apply within the RTI context as well.

Section 1415 of the IDEA provides several procedural safeguards to guarantee special-education students' needs are met. First, when a school evaluates the learning needs of "children with disabilities,"[21] parents of those children may "examine all records relating to such child[,] participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child."[22] Additionally, parents must be given written notice in their native language whenever a 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 free appropriate public education to the child."[23] Section 1415 also allows a child to remain in his or her then-current educational placement (or, if applying for admission to a public school, to be placed at that school) until all proceedings conducted pursuant to section 1415 have been completed.[24]

When determining whether to order a change in placement for a child with a disability who violates a code of student conduct, school personnel may, on a case-by-case basis, consider any circumstances unique to that student.[25] But school personnel cannot suspend such a child nor remove him or her to an interim alternative educational setting for more than ten days if the behavior that gave rise to the violation is a manifestation of the student's disability.[26] And if a child with a disability who violates a code of student conduct is removed to an interim alternative educational setting, the student 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 Individualized Education Plan (IEP);[27] and 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."[28]

If the parents of a child are not known to the school, the agency cannot locate them, or the child is a state ward, the state

21. 20 U.S.C. § 1415(b)(1) (2006).
22. *Id.*
23. § 1415(b)(3).
24. § 1415(j).
25. § 1415(k)(1)(A).
26. § 1415(k)(1)(B).
27. This is a written statement of the educational program designed to meet a child's individual learning needs.
28. § 1415(k)(1)(D).

must appoint an individual to act as a surrogate for the absent parents.[29] The IDEA requires each state to establish and maintain these procedural safeguards[30] and to provide parents with a copy of them each year or whenever the parents request one.[31]

When disputes arise regarding the provision of appropriate special-education services:

> Section 1415 requires the state or LEA to provide a state-funded opportunity for the parties to resolve the dispute through mediation. Where mediation is unsuccessful, section 1415 requires an impartial due-process hearing, with judicial review in either state or federal court . . . Where a resolution is reached through mediation, the parties must record that resolution in a written agreement, which is enforceable in court.[32]

Despite the critical role that due-process hearings play in effectuating other procedural protections by allowing parents to petition a hearing officer (or if the case is then appealed, a judge) to enjoin a LEA or state to take action on behalf of their child, the current regime for IDEA students has come under attack. The American Association of School Administrators (AASA), a professional organization for educational leaders across the United States, has called for an end to due-process hearings noting that "significant dollars, time, and emotional capitol [sic] will continue to be expended on a process that has little, if any, real connection to improving education outcomes."[33] The AASA contends that due-process hearings are ineffective for three reasons. First, they are difficult for low- and middle-income parents to utilize because of the complex procedures parents must follow to request a hearing.[34] Second, they frustrate public-school staff by frequently causing them to accede to parental requests they deem unreasonable in order to avoid costly litigation.[35] Third, due-process hearings impose unnecessary stress on personnel and legal expenses on school districts.[36]

Critiques of the IDEA due-process hearing system have come not only from those on the receiving end of hearing requests but

29. § 1415(b)(2)(A).

30. § 1415(a).

31. § 1415(d)(1)(A).

32. Steinberg, *supra* note 4, at 418–19.

33. Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495, 501 (2014).

34. *Id.*

35. *Id.*

36. *Id.*

also from several academics.[37] Like the AASA, Professor Eloise Pasachoff argues that due-process hearings, as a private enforcement mechanism, disadvantage low-income parents because they result in enforcement disparities and resource-allocation distortions between the rich and the poor.[38] She prefers a greater role for public enforcement of section 1415[39] in contrast to other scholars who view private enforcement as the best available solution. Another education law scholar, Professor Ruth Colker, depicts low-income parents of IDEA students, in juxtaposition to their wealthy counterparts, as unable to successfully exercise their due-process rights.[40] And a Note published in the Journal of Law and Education characterizes the current due-process hearing regime as "unfair" toward parents of IDEA students and, without specifying what a new system would entail, calls for its replacement.[41]

These critiques do not account for the constitutional necessity of providing due-process hearings to IDEA students. Currently, American courts apply a three-factor balancing test first outlined in *Mathews v. Eldridge*[42] to ascertain how much process is due (including the right to a hearing) according to the U.S. Constitution.[43] *Mathews* held:

> [D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[44]

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37. *Id.* at 501–02.

38. *Id.* at 502.

39. Weber, *supra* note 33, at 502.

40. *See* RUTH COLKER, DISABLED EDUCATION 4–5, 153–60, 169–72, 184–87 (2013); Weber, *supra* note 33, at 502.

41. *See* Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013); Weber, *supra* note 33, at 502.

42. Mathews v. Eldridge, 424 U.S. 319 (1976).

43. *See* Samuel Issacharoff, *Due Process in Law*, *in* INT'L ENCYCLOPEDIA OF SOC. AND BEHAV. SCI. 3894, 3896–97 (N.J. Smelser & P.B. Baltes eds., 2001).

44. *Mathews*, 424 U.S. at 335.

Applying these elements to the provision of IDEA due-process hearings illustrates that they are constitutionally required.[45] The private interest at stake in this situation is that of parents in the education of their disabled children. Courts from *Brown v. Board of Education*[46] onward have recognized the importance of this right. In *Brown*, the Supreme Court declared: "[Education] is the very foundation of good citizenship . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[47] This statement is no less true today. In *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*), the District Court for the Eastern District of Pennsylvania recognized handicapped childrens' legal right to a public education.[48] And one month after the adjudication of *PARC*, the District Court for the District of Columbia concluded that the Board of Education of Washington, D.C. must provide an equal education for students with learning disabilities.[49]

The risk of erroneous deprivation of parents' interest in the education of their children would be high without due-process hearings since, as mentioned, parents would be unable to effectively hold schools accountable for providing adequate services to their kids. And, moreover, as noted below, alternative procedural safeguards (i.e., public enforcement of the IDEA rather than private enforcement through due-process hearings) would not provide much value since this substitute procedure contains significant drawbacks.[50]

Finally, while the government has an interest in conserving resources needed for education, the government's interest here is actually slight. In 2003, the Government Accountability Office (GAO) reported that about five due-process hearings were held per 10,000 students with disabilities.[51] Moreover, since that report was issued, the law changed to dissuade parents from requesting hearings by holding them liable for the school district's attorneys' fees if the request is frivolous.[52] The law seems to have had its intended effect:

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45. Mark C. Weber has also found that, according to the *Matthews* test, due-process hearings are constitutionally required. *See* Weber, *supra* note 33, at 515.

46. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

47. *Id.* at 493.

48. Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259–60 (E.D. Pa. 1971).

49. Mills v. Bd. of Educ., 348 F. Supp. 866, 874 (D.D.C. 1972).

50. *See infra* notes 62–67 and accompanying text.

51. *See* Weber, *supra* note 33, at 508.

52. 20 U.S.C. § 1415(i)(3)(B)(i)(II)–(III) (2006); *see* Weber, *supra* note 33, at 508.

data reveal a 10 percent decline in hearing requests and a 58 percent decline in hearings held since the law was enacted.[53]

In sum, a significant risk of erroneous deprivation of a child's right to an appropriate education without hearings and weak government interest in containing costs to school districts of providing due-process hearings demonstrates that these hearings are constitutionally required. Given this requirement, the claim that due-process hearings should be abolished is untenable.

All of this said, there is a significant income disparity in IDEA due-process hearing outcomes because parents represented by counsel are markedly more successful than parents who appear *pro se*.[54] For the most part, only poor parents proceed *pro se*.[55] Although the critique that wealthier parents fare better on average than their lower-income counterparts is legitimate, the proposed solution of eliminating hearings for everyone is not. Proponents of this solution might equally reason that society should do away with privately afforded shelter, foodstuffs, clothing, medical care, and even legal representation.[56] While inequality of resources is an unavoidable feature of American society,[57] that hardly means Americans would be better off if no one had access to lawyers. More should be done

53. *See* Weber, *supra* note 33, at 508–09.

54. Kevin Hoagland-Hanson, Comment, *Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV. 1805, 1809 (2015); *see also* Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents?*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 264, 281 (2014). Hoagland-Hanson discusses two studies that reveal this disparity. In a study of 343 IDEA due-process hearings in Illinois over a five-year period, parents prevailed in only 38.3 percent of the cases they brought against school districts. Attorneys in that sample represented the parents in only 44 percent of hearings. Critical to success was attorney representation since parents who were represented succeeded in obtaining relief 50.4 percent of the time, while parents proceeding *pro se* succeeded only 16.8 percent of the time. Hoagland-Hanson, *supra* note 54, at 1819. A similar study of 512 IDEA due-process hearings in Pennsylvania over a five-year period revealed parents represented by counsel prevailed 58.75 percent of the time, while *pro se* parents won only 16.28 percent of the time. In this study, attorneys represented parents in roughly three-quarters of all hearings. When parents were represented by counsel they prevailed 58.75 percent of the time. Hearings in which parents went *pro se*—the other 25.20 percent (129) of hearings studied—had a much lower rate of success, prevailing only 16.28 percent of the time. *Id.* at 1820.

55. *Id.* at 1827 (noting that, in 2012, 37.9 percent of Philadelphia public-school students hailed from families that lived below the federal poverty line and that the parents of these students generally could not afford to pay a retainer for private counsel).

56. Weber, *supra* note 33, at 510.

57. *See id.*

to ensure that everyone is well represented.[58] But we should reject a solution that calls for eliminating the benefit entirely.[59]

Those like Professor Pasachoff suggest that public enforcement of the IDEA could equalize enforcement disparities between wealthy and indigent parents.[60] According to Kevin Hoagland-Hanson, who has argued in favor of maintaining the current IDEA due-process regime, public enforcement "would involve either increasing regulation and oversight of school districts by an administrative agency or attaching performance targets to federal funds, or some combination of both."[61] But the problems associated with public enforcement of the IDEA render this alternative unworkable.

For one, such enforcement would be too expensive[62] to expect federal or state governments to pay for it.[63] Assuming a federal agency were tasked with enforcing the IDEA then, because of the scope of national enforcement, even a relatively small number of complaints could overburden the enforcing agency since it would have limited resources.[64] Moreover, public enforcement in other areas of special education and other areas of civil rights is already weak.[65] As Professor Pasachoff has observed, "even though the federal agency charged with IDEA enforcement repeatedly found states in violation of the IDEA, it has almost never taken any formal action to withdraw funds, limiting its involvement to negotiation and acceptance of minimal improvements."[66] Furthermore, parents would lack any control over public enforcement, thereby potentially creating a situation in which the enforcing agency does not represent the parents' concerns (which would entirely defeat the purpose of having public enforcement replace due-process hearings).[67]

Although public enforcement of the IDEA may not be a satisfactory solution to equalizing the enforcement disparity between

58. *See* Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 158–59 (2011).

59. Weber, *supra* note 33, at 511.

60. *See* Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1492–93 (2011).

61. Hoagland-Hanson, *supra* note 54, at 1834.

62. Pasachoff, *supra* note 60, at 1482 (estimating costs of increased monitoring and comparison studies to be $2.8 billion per year).

63. Hoagland-Hanson, *supra* note 54, at 1834.

64. *Id.* at 1834-35.

65. *Id.* at 1834 n.204, 1835.

66. Pasachoff, *supra* note 60, at 1463.

67. *See* Weber, *supra* note 33, at 525.

the rich and the poor, incentivizing lawyers to take IDEA cases on contingency would help since attorneys' fees are paid from a settlement rather than out of pocket. Hoagland-Hanson has observed that practicing disability-law attorneys are more likely to take on contingency cases in which parents have sought independent educational evaluations of their child's suspected or known disability, as these evaluations help lawyers assess the merits of cases.[68] Yet many low-income families are unable to afford the cost of conducting such evaluations.[69] If Congress amended the IDEA's fee-shifting provision to cover the expenses for conducting an independent evaluation,[70] then attorneys might be incentivized to front the expenditures required to complete these evaluations—and therefore more willing to take IDEA cases on contingency—since they could be reimbursed for those expenses should they demonstrate that the school district failed to comply with the statute.[71]

Existing criticism of the IDEA due-process hearing regime lacks discussion of the positive aspects of the system. For example, hearings often achieve significant results for parents.[72] Moreover, as Hoagland-Hanson notes, "[H]earing officer decisions, despite being redacted prior to dissemination, constitute an important body

68. Hoagland-Hanson, *supra* note 54, at 1828.

69. "While some parents will not be dissuaded from pursuing an IDEA lawsuit by the inability to recover expert fees, many parents of children with [autism spectrum disorder] will not have such an opportunity because they will not have the financial backing to fund an expert." Weber, *supra* note 33, at 520 n.140 (quoting Leslie Reed, Comment, *Is A Free Appropriate Public Education Really Free? How the Denial of Expert Witness Fees Will Adversely Impact Children with Autism*, 45 SAN DIEGO L. REV. 251, 299 (2008)).

70. For parents represented by counsel, IDEA allows the recovery of attorneys' fees at the court's discretion from the local or state education agency. 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2006). But after the Supreme Court's decision in Arlington Central School District Board of Education, plaintiffs cannot recover expert witness fees through the IDEA's fee-shifting provision. Hoagland-Hanson, *supra* note 54, at 1840. Congress can overturn this decision via legislation that enables parents and their attorneys to recover the costs of hiring a professional to conduct an independent educational evaluation. Congress has passed a similar amendment restoring expert fees under the Civil Rights Attorneys Fees Act and Title VII of the Civil Rights Act of 1964. Weber, *supra* note 33, at 520.

71. *See* Hoagland-Hanson, *supra* note 54, at 1840 n.228.

72. During the five-year period studied in his Comment, Hoagland-Hanson observes that Pennsylvania parents won some relief in nearly half of all due-process hearings that reached a final decision, many of which resulted in significant awards to children and their parents. Hoagland-Hanson, *supra* note 54, at 1835. As many as four or five times the number of those victorious parents settled before a due-process hearing commenced, achieving substantive relief for students and their families. *Id.*

of precedent and a resource for both parents and advocates to understand the available rights and remedies under IDEA."[73] These decisions also inform settlement negotiations between parents who and districts that are looking to resolve a dispute over a child's education.[74] This resource would be lost if due-process hearings were abolished and parents could therefore only resolve their disputes under the IDEA through mediation, where the resulting agreements are kept secret.[75] And costly compensatory education awards that arise when a parent successfully challenges a school's decision in a due-process hearing may motivate districts to guarantee that special-education staff are adequately trained and provide the appropriate services.[76]

PART II

Having described the IDEA's procedural protections and addressed criticism of due-process hearings, I will now demonstrate why Congress should also provide those safeguards to RTI students.

In 1970, Congress enacted what has become known as the IDEA to provide support to children with disabilities.[77] The first 30 years of IDEA coverage, however, witnessed a significant expansion in the population of special-education students, especially among students diagnosed with SLDs.[78] Crediting this growth to methods that unreliably diagnosed children with a disability when they might have lacked one, Congress amended the IDEA in 2004 to allow the use of "scientific, research-based interventions" in place of or in addition to previously approved approaches.[79] The goal is to distin-

73. *Id.* at 1837.

74. *Id.*

75. *Id.*

76. *Id.* at 1838.

77. The Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970).

78. The special-education population grew from 3.694 million to 6.720 million from 1975 to 2005, an 82 percent increase. *See* NAT'L CTR. FOR EDUC. STAT., TABLE 204.30: CHILDREN 3 TO 21 YEARS OLD SERVED UNDER INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), PART B, BY TYPE OF DISABILITY: SELECTED YEARS, 1976–77 THROUGH 2014–15, https://nces.ed.gov/programs/digest/d16/tables/dt16_204.30.asp?current=yes [https://perma.cc/XXV6-D6WA]. During that same period, the SLD population grew from 796,000 to 2.798 million, a 252 percent increase. *Id.*

79. 20 U.S.C. § 1414(b)(6)(B) (2006) ("In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures."); *see also* Steinberg, *supra* note 4, at 403. Congress was concerned by the unnecessary diagnosis of students with SLD because of "the level

guish students with learning disabilities from those who merely suffer from deficiencies that can be remediated through intensive instruction.[80] Yet unlike these previous techniques, which predicated SLD diagnosis on the unexpected disparity between aptitude and achievement levels, research-based interventions serve "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."[81] As a pedagogical tool, research-based interventions are designed to reduce unnecessary referrals to special education, thereby decreasing the SLD population, by improving the academic and behavioral performance of non-disabled students who are at risk of academic failure.[82] The most widely implemented intervention method to emerge since the 2004 amendments is "response to intervention" (RTI).[83]

When used to remediate deficient skills, RTI requires children to undergo three graduated levels of intervention with progress monitoring at each tier before they are referred to special education.[84] Tier I calls for effective, evidence-based instruction in general education.[85] By focusing on such instruction, Tier I helps evaluators to determine whether low-quality instruction, rather than a disability, is causing a student's underachievement.[86] All children receive core instruction, but those students in need of supplemental intervention receive additional instruction at Tier II or III.[87] In Tier II, educators provide students with instruction targeted to their academic and behavioral needs.[88] Children who succeed with Tier II assistance remain in Tier I with all other students.[89] But "stu-

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of stigma typically associated with special education labels." Beth A. Ferri, *Undermining Inclusion? A Critical Reading of Response to Intervention (RTI)*, 16 INT.'L J. INCLUSIVE EDUC. 863, 872 (2012).

80. Steinberg, *supra* note 4, at 395.

81. *Id.*

82. Ciolfi & Ryan, *supra* note 7, at 317.

83. Steinberg, *supra* note 4, at 404.

84. *Id.* at 405. Edward S. Shapiro observes, "[S]ome models discuss an additional fourth tier and other models subdivide the tiers into smaller units." Edward S. Shapiro, *Tiered Instruction and Intervention in a Response-to-Intervention Model*, RTI ACTION NETWORK, http://www.rtinetwork.org/essential/tieredinstruction/tiered-instruction-and-intervention-rti-model [https://perma.cc/6B28-M3BG].

85. *See* Shapiro, *supra* note 84.

86. *See* Ciolfi & Ryan, *supra* note 7, at 313.

87. *See* Shapiro, *supra* note 84. Tier II contains around 15 percent of all general-education students, while Tier III contains between 2 percent and 7 percent of those students.

88. *See id.*

89. Ciolfi & Ryan, *supra* note 7, at 313.

dents who continue to experience academic or behavioral difficulties receive more intensive and specialized intervention in Tier III. For students who are unsuccessful with Tier III assistance, schools conduct individual special-education placement evaluations in accordance with IDEA procedures."[90]

As of 2015, more than 70 percent of school districts across the country use RTI to improve the academic and behavioral performance of non-disabled students who are at risk of academic failure.[91] And as of 2013, seventeen states require their LEAs to utilize RTI to assist in determining whether a student should be referred for an SLD evaluation.[92] According to a 2011 survey of 1,390 school districts, which is about 10 percent of all school districts in the United States,[93] 66 percent of schools reported using RTI as part of the process for determining eligibility for special education (up from 41 percent in the previous year).[94] Eight in ten districts tracking RTI results noted reduced referrals to special education.[95] 35 percent of those districts decreased special-education referrals by at

90. Steinberg, *supra* note 4, at 406.

91. *See* Sarah D. Sparks, *Study: RTI Practice Falls Short of Promise*, EDUC. WEEK (Nov. 6, 2015), http://www.edweek.org/ew/articles/2015/11/11/study-rti-practice-falls-short-of-promise.html?r=543079971&cmp=eml-eb-wnbk1.3 [https://perma.cc/4XYC-BM2H].

92. *See* Laura Boynton Hauerwas et al., *Specific Learning Disability and Response to Intervention: State Level-Guidance*, 80 EXCEPTIONAL CHILDREN 101, 108 (2013) (observing that not all states allow RTI data alone to be sufficient to identify SLD). In 2010, just twelve states required their LEAs to use RTI to aid in determining whether a student should be evaluated for SLD. Zirkel, *supra* note 8, at 62. All fifty states allow the use of RTI in helping to determine whether a student should be diagnosed with SLD, and forty states have shown evidence of actual RTI implementation in one or more schools. *See* Steinberg, *supra* note 4, at 408.

93. *See* NAT'L CTR. FOR EDUC. STAT., TABLE 214.10: NUMBER OF PUBLIC SCHOOL DISTRICTS AND PUBLIC AND PRIVATE ELEMENTARY AND SECONDARY SCHOOLS: SELECTED YEARS, 1869-70 THROUGH 2012-13, http://nces.ed.gov/programs/digest/d14/tables/dt14_214.10.asp?current=yes [https://perma.cc/VL5N-SC4K] (indicating that in 2010–2011—the year in which the survey was conducted—there were 13,588 school districts in the United States).

94. CANDACE CORTIELLA & SHELDON H. HOROWITZ, NAT'L CTR. FOR LEARNING DISABILITIES, THE STATE OF LEARNING DISABILITIES 34 (3rd ed. 2014), https://www.ncld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf [https://perma.cc/CFE7-LRGM].

95. *2011 Response to Intervention Report by GlobalScholar, NASDSE, CASE and AASA Uncovers Latest Trends in RTI Adoption Among US School Districts*, PN NEWSWIRE (Aug. 18, 2011), http://www.prnewswire.com/news-releases/2011-response-to-intervention-report-by-globalscholar-nasdse-case-and-aasa-uncovers-latest-trends-in-rti-adoption-among-us-school-districts-128001008.html [https://perma.cc/8CKB-GMR4].

least 10 percent and some districts decreased the number by as much as 50 percent.[96]

It appears undeniable that the implementation of RTI has contributed to a substantial decrease in the number of children identified with SLD.[97] After peaking at 2.860 million students (45.4 percent of all IDEA disability diagnoses) in 2000–2001, SLD rates have shrunk to 2.278 million children (34.8 percent of all IDEA disability classifications) through 2015 (the most recent year for which we have data).[98]

It is possible that school districts manipulated referral rates for special education by directing teachers to make fewer referrals.[99] This is unlikely, however, since overall numbers of students diagnosed with a learning disability under the IDEA increased until the 2004–2005 school year (two years after the rate of SLD students began to decline) and then again from 2012 to 2015 (as SLD rates continued to decrease from 2004–2005 until 2014–2015, when there was actually a slight increase).[100] Fewer referrals should have reduced, not increased, special-education enrollments.

It is also possible that the addition of the IDEA categories "attention deficit disorder" (ADD) and "attention-deficit/hyperactivity disorder" (ADHD) to the list of conditions that qualify for "other health impairment" (OHI) explains the decrease in the number of students identified with SLD.[101] Since this reclassification occurred,

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96. Nirvi Shah, *Survey of School, District Workers Shows Wider Use of RTI*, EDUC. WEEK (Aug. 19, 2011), http://blogs.edweek.org/edweek/speced/2011/08/yet_another_study_shows_the.html?_ga=1.208245141.661921897.1458076482 [https://perma.cc/ST4M-95QW].

97. *See* Ciolfi & Ryan, *supra* note 7, at 317–18. Professors Tina Hudson and Robert McKenzie observe researchers have had difficulty demonstrating that RTI decreases special-education referrals or SLD placement because of "[t]he apparent gaps in quality assurance among many states and Local Education Agencies related to the procedures used and data collected contribute to differing perceptions among administrative personnel such as state directors of special education, and hence, exacerbate the difficulty in substantiating the impact of RTI. For stakeholders that use RTI to identify SLD, a major piece of unfinished business is to contemplate how they may move toward unanimity in processes and eligibility criteria." Tina M. Hudson & Robert G. McKenzie, *Evaluating the Use of RTI to Identify SLD: A Survey of State Policy, Procedures, Data Collection, and Administrator Perceptions*, 20 CONTEMP. SCH. PSYCHOL. 31, 43 (2016).

98. TABLE, *supra* note 78.

99. Ciolfi & Ryan, *supra* note 7, at 318.

100. TABLE, *supra* note 78.

101. CANDACE CORTIELLA, NAT'L CTR. FOR LEARNING DISABILITIES, THE STATE OF LEARNING DISABILITIES 12 (2011), http://illinoiscte.org/PDF/research_and_reports/state_of_learning_disabilities.pdf?lbisphpreq=1 [https://perma.cc/L95D-ZV2M].

the number of students identified as OHI has increased by about 184 percent,[102] while the proportion of all IDEA disability diagnoses characterized by OHI rose by 8.4 percent from 2000–2001 to 2014–2015.[103] Much of this growth is attributable to the addition of ADD and ADHD to the panoply of IDEA disabilities.[104] Prior to 1999, many of the ADD or ADHD students may have been diagnosed instead with SLD.[105] Thus, given a 10.6 percent[106] decline in the proportion of all SLD disability designations from 2000–2001 to 2014–2015, the classification of students as OHI instead of SLD might explain why fewer students were diagnosed with SLD.[107] Yet the strength of this assertion is limited by two facts. First, students with ADD or ADHD do not represent the entire population of the OHI category,[108] which is quite broad; thus, there may be other disabilities accounting for the growth of the OHI classification that one could not have alternatively diagnosed as SLD.[109] Second, according to Professor Perry Zirkel, the absolute numbers and proportion of children characterized by OHI started rising before ADD and ADHD were added to the list of conditions that qualify as OHI in part because of a U.S. Department of Education policy memorandum regarding ADHD and OHI.[110]

Increasing enrollments in the "autism" classification (which has grown approximately 476 percent between 2000–2001 and 2014–2015),[111] like within OHI, may also account for declining rates of SLD diagnoses.[112] Yet the possibility of autism accounting

102. TABLE, *supra* note 78.

103. *Id.*

104. CORTIELLA, *supra* note 101, at 12.

105. *Id.*

106. TABLE, *supra* note 78.

107. *See* Perry A. Zirkel, *The Trend in SLD Enrollments and the Role of RTI*, 45 J. LEARNING DISABILITIES 473, 477 (2013)

108. CORTIELLA, *supra* note 101, at 12.

109. OHI means "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—(i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(9) (2007).

110. Zirkel, *supra* note 107, at 477.

111. TABLE, *supra* note 78.

112. *See id.* (declining rates of SLD coupled with a corresponding increase in enrollments with the "autism" category suggests students who would have formerly been diagnosed with SLD are now diagnosed with some form of autism); Zirkel, *supra* note 107, at 477.

for students who previously would have been diagnosed with SLD is remote because autism's definition in the IDEA regulations is rather restrictive and so unlikely to encompass behavior exemplifying SLD.[113]

The SLD population decline could also be a product of pressures to keep SLD enrollments down to save money when the economy weakened. Or perhaps the enactment of the No Child Left Behind Act (NCLB),[114] which obligated schools to disclose the performance of their special-education students (among other population groups) for accountability purposes, had something to do with it.[115] Under NCLB, schools and districts are permitted to forego reporting the performance of subgroups of special-education students, such as SLD, only if they are "so small that they are statistically unreliable."[116] The risk of being penalized for underperforming students may have encouraged some schools to keep their enrollments of SLD students low so as to avoid NCLB's disclosure requirements.[117] Furthermore, these factors are significant only to the extent that they differentially affect enrollments of SLD as compared with other IDEA classifications.[118] Because economic downturn and the NCLB reporting requirements affect all special-education diagnoses, one would expect these two factors to exert downward pressure on all IDEA designations. But this has not happened.[119] Given that enrollments in some non-SLD special-education classifications have remained the same while others have increased, the decreasing number of SLD students is unlikely to have

113. Zirkel, *supra* note 107, at 477. Autism means "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." § 300.8(c)(1)(i).

114. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002); Zirkel, *supra* note 107, at 477.

115. *See* Christina A. Samuels, *Learning-Disabled Enrollment Dips After Long Climb*, EDUC. WEEK (Sept. 8, 2010), http://www.edweek.org/ew/articles/2010/09/08/03speced_ep.h30.html [https://perma.cc/PME4-AJMV].

116. *Id.*

117. *Id.*

118. Zirkel, *supra* note 107, at 477.

119. As discussed in more detail above, some IDEA designations have witnessed a rise in enrollment since the passage of NCLB in 2001, including autism, developmental delay, and other health impairment, while others have remained relatively level, such as hearing impairment, speech or language impairment, traumatic brain injury, and visual impairment. *See* TABLE, *supra* note 78.

been caused by a shrinking national economy and NCLB disclosure obligations.

This discussion suggests that RTI is the most plausible explanation for the decrease in the number of children classified as SLD.[120] Professor Dawn Polcyn, for example, demonstrated a statistically significant reduction in the number of referrals for special-education evaluations once students received a daily reading intervention (i.e., RTI over a two-year period).[121] Kerry Bollman investigated the effects of RTI on the incidence of SLDs in Minnesota's St. Croix River Education District and reported that over a ten-year period SLD rates decreased by over 40 percent.[122] Wayne Callender observed that, from 2002 until 2004, Idaho school districts with at least one school implementing a RTI program had a 3 percent decline in special-education placements, while statewide the special-education population increased by 1 percent.[123] Dr. Amanda VanDerHeyden found a 2.5 percent decrease in the proportion of elementary-school children classified as SLD in an Arizona school district.[124] And Professor Rollanda O'Connor reported that after four years of implementing RTI, the rate of placement in special education dropped by nearly 50 percent.[125]

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120. *See* Samuels, *supra* note 115; CORTIELLA, *supra* note 101, at 12. Professor Zirkel has hypothesized that one possible contributor to the decline in SLD enrollments is that parents and school districts, in response to 80 percent of approximately 115 hearing/review officer and court decisions from 1983–2013 that have resulted in favor of district determinations of non-eligibility for SLD, are no longer pushing for as many referrals to special-education. Zirkel, *supra* note 107, at 477–78. Even assuming these statistics are accurate (Zirkel does not specify how he located this information), more research is needed to determine whether parents and school districts are aware of these decisions and have acted in response to them.

121. Dawn M. Polcyn et al., *Reading Intervention and Special Education Referrals*, 8 SCH. PSYCHOL. FORUM 156, 163 (2014).

122. Kerry A. Bollman et al., *The St. Croix River Education District Model: Incorporating Systems-Level Organization and a Multi-Tiered Problem-Solving Process for Intervention Delivery*, *in* HANDBOOK OF RESPONSE TO INTERVENTION 319, 326 (Shane R. Jimerson et al. eds., 2007).

123. Wayne A. Callender, *The Idaho Results-Based Model: Implementing Response to Intervention Statewide*, *in* HANDBOOK OF RESPONSE TO INTERVENTION 331, 339–40 (Shane R. Jimerson et al. eds., 2007) (noting that results-based model schools accounted for the majority of the 3 percent decrease).

124. Amanda VanDerHeyden et al., *A Multi-Year Evaluation of the Effects of a Response to Intervention (RTI) Model on Identification of Children for Special Education*, 45 J. SCH. PSYCHOL. 225, 250–51 (2007).

125. Rollanda E. O'Connor et al., *Tiers of Intervention in Kindergarten Through Third Grade*, 38 J. LEARNING DISABILITIES 532, 536 (2005).

Although these results demonstrate that "RTI procedures are associated with a decrease in the number of students identified as [SLD],"[126] they are not conclusive. For one, the research designs of these investigations were not sufficiently rigorous to prove causation (i.e., RTI reduces SLD enrollments).[127] Second, with the exception of the Bollman study, the studies do not prove whether RTI is actually decreasing the number of students diagnosed with SLD or merely delaying a special-education evaluation.[128] Only a longitudinal study could show that.[129]

Despite the limitations in these studies, RTI remains the likely explanation for why nearly 600,000 fewer elementary and secondary school students are eligible for special-education since the 2004 IDEA amendments were passed.[130] Although the amendments have adjusted these individuals' classifications, they have not eliminated the risks of receiving inadequate or inappropriate specialized services to address RTI students' learning difficulties.[131] That children with learning disabilities receive procedural safeguards to prevent these same risks from materializing demonstrates that RTI participants should also receive them.[132] Indeed, without the 2004 IDEA amendments, these nearly 600,000 RTI students would probably be special-education students themselves and so entitled to procedural protections under the law.[133]

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126. Rachel Brown-Chidsey & Mark W. Steege, Response to Intervention: Principles and Strategies for Effective Practice 159 (1st ed. 2005).

127. *See* Charles Hughes & Douglas D. Dexter, *The Use of RTI to Identify Students with Learning Disabilities: A Review of the Research*, RTI Action Network, http://www.rtinetwork.org/learn/research/use-rti-identify-students-learning-disabilities-review-research [https://perma.cc/QQJ5-MM5L].

128. *Id.*

129. *Id.*

130. This statistic was calculated by subtracting the total SLD population in 2013 (2.277 million) from the total such population in 2001 (2.860 million). *See* Table, *supra* note 78.

131. *See* Steinberg, *supra* note 4, at 422–23.

132. *See id.* at 422 n. 157 (discussing how discriminatory treatment and inadequate programming can result from disability classifications).

133. Professor Douglas Fuchs has observed, "Over time, in many places what's happened is RTI has been deliberately used as a kind of general education substitution for special education. My strong sense is that over time, more and more kids with greater and greater severity of learning problems are being served in an RTI framework." *See* Sparks, *supra* note 91. RTI students not only share a need for specialized services and face risks of receiving inadequate or inappropriate services, but also often have learning difficulties identical to those of their IDEA peers and receive the same form of academic and behavioral supports (interventionists—educators responsible for implementing Tier II and III RTI instruction—sometimes teach Tier II or III RTI students and individuals with SLD as a collective unit).

PART III

Genna Steinberg, along with Professors Angela Ciolfi and James Ryan, agree that RTI students deserve procedural safeguards already afforded to their special-education peers under section 1415 of the IDEA, and argue that Congress should extend those same protections to children undergoing RTI. Yet, as this Part shows, Congress did not intend for section 1415 to apply to RTI students. Because of this, a separate federal law is needed to provide children receiving RTI services the due-process rights they deserve. Part IV will discuss the contours of this legislation.

Steinberg provides two reasons Congress should expand the coverage of section 1415 to RTI students. First, she claims that denying the IDEA's procedural protections to RTI participants, while simultaneously granting them to special-education students, produces an inconsistent result since "§ 1415's goal is to protect students requiring specialized services" and both RTI students and children with learning disabilities require targeted instruction.[134] Second, withholding due-process rights from students undergoing RTI strengthens, rather than loosens, the boundary between general and special education, undermining the objective of the education-policy reform movement to blend general and special education into one unified system.[135]

Ciolfi and Ryan have jointly proposed extending only section 1415(k), which provides disciplinary protections to special-education students, to RTI students[136] because racial minorities are disproportionately subjected to disciplinary sanctions. Congress, they argue, should widen the coverage of the IDEA's disciplinary safeguards to prevent unwarranted discipline and removal of minority RTI participants.[137]

Despite their arguments, Steinberg, Ciolfi, and Ryan have failed to account for evidence in section 1413 of the IDEA, which establishes criteria for LEAs to receive funds under the Act, that illustrates Congress does not intend for the IDEA's procedural pro-

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These observations are based on the author's experience serving as a Response to Intervention Coordinator for Dolores T. Aaron Elementary School in New Orleans, LA.

134. Steinberg, *supra* note 4, at 422–23.

135. *Id.* at 423.

136. As Steinberg observes, although Ciolfi and Ryan do not explicitly say so, they address only procedural disciplinary protections set forth in section 1415(k). *Id.* at 426 n.176.

137. Ciolfi & Ryan, *supra* note 7, at 341.

tections to cover children receiving RTI services.[138] Within section 1413 lies subsection (f), which allows (and in certain instances mandates)[139] LEAs to utilize as much as 15 percent of IDEA funds to provide academic or behavioral interventions designed to prevent the unnecessary identification of struggling general-education students for special education.[140] In other words, section 1413(f) permits or requires LEAs to use some of their federal special-education money on RTI.[141] Section 1413(f)(3) observes: "Nothing in this subsection shall be construed to limit or create a right to a free appropriate public education under this subchapter."[142]

The IDEA defines "free appropriate public education" as "special education and related services."[143] Because one could plausibly interpret "related services" to include RTI (since RTI, like special education, is used to address students' learning difficulties), Con-

138. The one exception is section 1415(k), which allows general-education students (including children undergoing RTI) to receive disciplinary protection if their parents or teachers have expressed concern about their need for special education. 20 U.S.C. § 1415(k)(5)(B) (2006). Hence, one may conclude that Ciolfi's and Ryan's proposed amendment is somewhat superfluous.

139. 20 U.S.C. § 1418(d)(2) (2006). "In the case of a determination of significant disproportionality [based on race or ethnicity] with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with paragraph (1), the State or the Secretary of the Interior must . . . [r]equire any [LEA] identified under paragraph (1) to reserve the maximum amount of funds under section 1413(f) of this title to provide comprehensive coordinated early intervening services to serve children in the [LEA] . . . ." *Id.*

140. Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 8, 22 (2006). Section 1413(f) was added to the IDEA in 2004 to stymie the growing population of students diagnosed with SLD, *see* Ciolfi & Ryan, *supra* note 7, at 304, which would in turn decrease the costs of educating students, *see* U.S. DEP'T OF EDUC., OSEP 08-09, COORDINATED EARLY INTERVENING SERVICES (CEIS) UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) 2 (2008), http://www2.ed.gov/policy/speced/guid/idea/ceis-guidance.pdf [https://perma.cc/QL9P-WM8A] ("The rationale for using IDEA funds for CEIS is based on research showing that the earlier a child's learning problems or difficulties are identified, the more quickly and effectively the problems and difficulties can be addressed and the greater are the chances that the child's problems will be ameliorated or decreased in severity. Conversely, the longer a child goes without assistance, the longer the remediation time and the more intense and costly services might be.").

141. *See* U.S. DEP'T OF EDUC., OSEP 08-09, COORDINATED EARLY INTERVENING SERVICES (CEIS) UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) 6 (2008), http://www2.ed.gov/policy/speced/guid/idea/ceis-guidance.pdf [https://perma.cc/QL9P-WM8A]. Note this is RTI as a pedagogical tool, not a diagnostic method.

142. 20 U.S.C. § 1413(f)(3).

143. § 1401(9).

gress likely added section 1413(f)(3) to prevent such a reading. In clarifying this rule of statutory construction,[144] the legislative history states: "The bill is also explicitly clear that children served under this section do not have the same rights and protections as students that are identified as eligible for services under the Act in sections [1414] and [1415]."[145] The "children served under this section" refers to RTI students, as noted.[146] Section 1414 describes procedures LEAs should follow to evaluate a child for special-education services, while section 1415, as previously discussed, covers procedural safeguards. Hence, the legislative history indicates that Congress, in amending the IDEA to account for the use of research-based interventions like RTI, purposefully drew a distinction between students receiving special-education services and those undergoing RTI, affording the former with due-process rights while denying them to the latter. That Congress, by adding section 1413(f)(3), acted to preclude an interpretation of the IDEA that would allow for RTI students to claim the IDEA's procedural protections underscores its intent that section 1415 should not be extended to cover children receiving RTI services.

While the legislative history of section 1413 fails to explain why RTI students are not entitled to section 1415's procedural safeguards,[147] the policy concern underlying section 1413 may provide an explanation. Section 1413 was written with the understanding that there is a tendency for general education to absorb special-education funds, which in turn frustrates the goal of assisting students with learning disabilities.[148] There is a finite amount of funding for special-education.[149] When money allotted for students with learning disabilities is spent instead on non-learning disabled children there are fewer resources left for special-education students.

144. A "rule of construction" or "canon of construction" helps "interpreters discern likely legislative intent." *Canon*, BLACK'S LAW DICTIONARY (10th ed. 2014). Therefore, an analysis of section 1413(f)(3) will assist in determining whether Congress intended for the IDEA to provide due-process rights to RTI students.

145. H.R. Rep. No. 108-77, at 104 (2003). While the Senate committee report to the 2004 amendments does not contain the same language, it does not contain contrary language. Moreover, the House committee report should carry greater weight than the Senate report in determining legislative intent since Congress enacted the House version of the 2004 amendments, H.R. 1350, 108th Cong. (2003).

146. *See supra* note 141 and accompanying text.

147. Nor any other section of the IDEA or its corresponding legislative history, for that matter.

148. Weber, *supra* note 140, at 22.

149. Kathleen B. Boundy, *Examining the 2004 Amendments to the Individuals with Disabilities Education Act: What Advocates for Students and Parents Need to Know*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 550, 554 (2006).

Thus, Congress placed restrictions on the eligibility of IDEA grants to prevent states from redistributing special-education funds to general education.[150] Section 1413 requires that IDEA "money be used only for the excess costs of special education over general education,"[151] and mandates that IDEA funds supplement, rather than supplant, state, local, or other federal funds allocated to address the needs of children with learning disabilities (since supplanting the local effort effectively diverts the federal special-education funds into general education).[152]

These fiscal concerns apply in the context of extending section 1415 to RTI students. Providing section 1415's procedural protections to children participating in RTI would further deplete IDEA funds as LEAs or their state counterparts face additional expenditures for notifying and meeting with parents regarding their child's intervention plan,[153] assigning surrogate parents when the school cannot locate a child's guardians, holding mediation sessions or due-process hearings, or paying court-awarded attorneys' fees (should the parents prevail in a dispute with their child's school).[154] As more special-education money flows toward general-education, there are fewer teachers or programs to assist students with learning disabilities.[155] Congress consequently may have wanted to avoid this problematic result, which might have transpired had section 1415 encompassed RTI students as well.

Even though Congress did not intend for section 1415 to cover RTI students, those children still deserve procedural safeguards to guarantee their learning needs are met. To provide RTI students with due-process rights, while avoiding the issue of schools having to spend special-education funds on general-education students in the process of doing so, Congress should pass legislation distinct from the IDEA that does not rely on special-education money.[156] In

150. The U.S. Department of Education, through its regulations implementing the IDEA, has also limited the amount of funds (whether they be federal or state and local) that may be diverted away from special-education students to children within general education. *See* 34 C.F.R. §§ 300.205(d), 300.226(a) (2015).

151. Weber, *supra* note 140, at 22 n. 84; *see also* 20 U.S.C. § 1413(a)(2)(A)(i) (2006).

152. *See* Weber, *supra* note 140, at 22 n. 84; *see also* § 1413(a)(2)(A)(ii).

153. An "intervention plan" is the RTI equivalent of an IEP.

154. *See* Steinberg, *supra* note 4, at 427. When parents are represented by counsel, IDEA allows the recovery of attorneys' fees, at the court's discretion, from the local or state education agency. § 1415(i)(3)(B)(i)(I).

155. This problem would be compounded by the fact that special-education funding is often inadequate. *See* Boundy, *supra* note 149, at 554.

156. One might argue that Congress should just allocate funding through the IDEA to cover the costs of extending § 1415 to RTI students. Doing so, however,

addition to affording RTI students procedural protections without affecting funding for children with learning disabilities, there are two additional reasons Congress should produce a separate statute regarding RTI participants.

First, using the creation of the IDEA as a historical guide, Congress could improve the delivery of RTI services by consolidating their sources of funding into an independent piece of legislation. In addition to section 1413(f) of the IDEA, LEAs may finance RTI through Titles I and III of the Elementary and Secondary Education Act of 1965 (ESEA).[157] Congress initially legislated on behalf of children with learning disabilities through amending the ESEA in 1966 to include a new section, Title VI, that would provide special-education grants to the states.[158] In 1970 Congress repealed Title VI and created a statute disconnected from previously enacted education law to serve students with learning disabilities. By 1990 this statute became known as the IDEA.[159] Congress produced separate legislation for special-education students in order to combine "a number of previously separate federal grant authorities relating to handicapped children."[160] Therefore, to increase the efficiency of funding RTI programs, which will in turn enhance the delivery of RTI interventions, Congress should centralize such funding pro-

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could divert money from special-education to RTI (i.e., general-education) students since there is a tendency for fewer funds to be spent on special-education students when money for those students is placed in the same pot as money for general-education students. *See supra* note 148 and accompanying text. Hence, RTI students could absorb funds beyond those allotted to provide them with procedural safeguards and that are meant for special-education students. Such absorption would unfairly deprive special-education students of a free appropriate public education. Therefore, I have avoided this concern by recommending Congress separate funding for RTI students and their special-education peers.

157. 20 U.S.C.A. § 6301 (1965). The relevant sections of Title I, which provides financial assistance to LEAs and schools with large numbers of children from low-income families, and Title III, which helps ensure that limited English proficient students master English and meet the same challenging state academic achievement standards that all children are expected to meet, are §§ 6314–6315, 6821, 6825(c). Congress has reauthorized and amended the ESEA on multiple occasions, most recently on December 10, 2015 with the passage of the Every Student Succeeds Act, Pub. L. No. 114-95. The Every Student Succeeds Act replaced the No Child Left Behind Act (Pub. L. No. 107-110).

158. The Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191, 1204 (1966).

159. Pub. L. No. 91-230, 84 Stat. 175 (1970). This statute, which was originally titled the Education of the Handicapped Act, was called the Education for All Handicapped Children Act of 1975. Pub. L. No. 94-142, 89 Stat. 773 (1975).

160. Edward D. Berkowitz, *A Historical Preface to the Americans with Disabilities Act*, 6 J. POL'Y HIST. 96, 102 (1994).

vided by the IDEA and ESEA under a freestanding statute as it did for special education.

Second, Congress could also establish national standards regarding the implementation of RTI, thereby improving outcomes for students. Currently, no such federal standards exist leaving "substantial variability in the structure of RTI between and within states as well as districts."[161] This variability has in turn presented school psychologists with legal and ethical challenges while assisting at-risk, general-education students, reduced the ability for schools to accurately identify students with SLDs, and complicated research efforts attempting to demonstrate that RTI reduces rates of SLD diagnoses.[162] Consequently, Congress should mandate that states implement similar RTI structures in regard to diagnosing SLDs and ameliorating learning deficiencies[163] in separate legislation.[164]

PART IV

Having shown the value of a separate statute that addresses RTI students, this Part will articulate the contents of the proposed legislation.

This law should incorporate the safeguards outlined in section 1415 of the IDEA[165] and tailor those procedural protections to RTI students.[166] The statute would allow parents to inspect all records pertaining to their child, participate in meetings regarding the placement of the student within RTI, and obtain an independent assessment of whether the child requires Tier II or III[167] RTI services.[168] Parents would receive written notice in their native lan-

161. Hudson & McKenzie, *supra* note 97, at 32.

162. *See id.* at 32–34. For more information on SLDs, see *supra* note 3 and accompanying text.

163. As noted these are the two ways in which RTI is utilized. *See supra* notes 81–82 and accompanying text.

164. *See* Hudson & McKenzie, *supra* note 97, at 43.

165. *See supra* notes 21–32 and accompanying text.

166. These proposed due-process rights are modeled off Genna Steinberg's proposed extension of section 1415 of the IDEA to cover RTI students. *See* Steinberg, *supra* note 8, at 424–26. The similar nature of the services that RTI and special-education students receive to address their learning difficulties renders the IDEA's procedural protections a good model for my proposed procedural safeguards for RTI students because these safeguards are designed to prevent students from being subjected to inadequate or inappropriate instruction. *See supra* notes 131–133 and accompanying text.

167. All students automatically receive Tier I instruction so there is no need for an evaluation to determine if a child requires interventions within this Tier. *See supra* notes 86–87 and accompanying text.

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

guage whenever a LEA proposes or refuses to initiate a change in their children's intervention tiers,[169] and those kids would be able to remain in their then-current educational placements until any proceedings conducted pursuant to these procedural protections have been completed.[170]

While school personnel may, on a case-by-case basis, consider any circumstances unique to a child when determining whether to order a change in placement for an RTI student,[171] they would not be able to suspend that student (or remove him or her to an interim alternative education setting for more than ten days) if the behavior that gave rise to the violation is a manifestation of the child's academic or behavioral deficiency identified in his or her intervention plan.[172] In addition, if an RTI student who violates his or her school's code of conduct is removed to an interim alternative setting then the child should continue to receive services so as to enable him or her to keep progressing towards meeting the goals of that student's intervention plan.[173] The student would also receive, as needed, a functional behavioral assessment and targeted support designed to address the behavioral violation so that it does not recur.[174]

If a disagreement were to arise between parents and their child's school regarding the provision of appropriate RTI services,

169. *See* § 1415(b)(3). As suggested by Steinberg, "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. It would also include a description of other options that were considered by the school or LEA and an explanation for their rejection. 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." Steinberg, *supra* note 4, at 425.

170. *See* § 1415(j).

171. *See* § 1415(k)(1)(A).

172. "For example, a disruptive outburst while working on a fractions worksheet from a student undergoing RTI for math may be treated differently from an act of defiance on the playground by that same student. If the child's outburst was directly and substantially related to the child's frustration with not knowing how to do the assignment or from the school's failure to faithfully implement the math intervention, the child should be returned to the classroom to continue receiving RTI. In situations where the student is participating in Tier 2 or 3 intervention for behavioral reasons, one could ask whether the type of behavior is properly targeted for intervention and whether the child's behavior is a direct result of failure to implement the intervention. If so, the child should continue receiving those interventions until the behavior is addressed." Ciolfi & Ryan, *supra* note 7, at 335–36. This recommendation is based on § 1415(k)(1)(B).

173. *See* § 1415(k)(1)(D)(i).

174. *See* § 1415(k)(1)(D)(ii).

such as whether the student needs targeted support to develop his or her phonemic awareness, the statute would allow those parents to enter state-sponsored mediation.[175] Should mediation fail, the law would allow parents to submit a formal complaint detailing their concerns and request a due-process hearing.[176] Should they prevail in a legal dispute with the school or the state, parents of RTI students, at the court's discretion, would be able to recover from the local or state education agency attorneys' fees[177] and the costs of hiring an expert to conduct independent evaluations for due-process hearings.[178]

Similar to the case of children with learning disabilities, if the parents of an RTI student are not known to the school or cannot be located, or if the child is a ward of the state, then the state must appoint an individual to act as a surrogate for the absent parents.[179]

As mentioned, all students undergo RTI in some capacity since Tier I covers core instruction, which each student receives.[180] Although each RTI student, including those without learning difficulties, could possibly benefit in some way from procedural safeguards, "it is neither necessary nor practical to extend these safeguards to students who lack the unique risks associated with the need for specialized instruction."[181] Thus, these proposed due-process rights should be granted only to children receiving Tier II and Tier III interventions since at those tiers students need their rights to a free appropriate public education to be protected because they require targeted instruction to address their learning difficulties and face risks of receiving inadequate or inappropriate support.[182]

The proposed statute should also consolidate all sources of federal funding for RTI to improve the delivery of RTI services.[183] Once these funding streams are combined, the only costs of this

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

176. *See* §§ 1415(b)(6)(A)–(B).

177. *See* §1415(i)(3)(B)(i)(I).

178. See *supra* notes 70–71 and accompanying text for a discussion of the benefits of allowing parents to recover expert fees in the special-education context. Those benefits apply within the RTI context as well since both special-education and RTI rely on evaluations of a child's suspected or known learning difficulty.

179. *See* § 1415(b)(2)(A).

180. *See supra* note 86–87 and accompanying text.

181. Steinberg, *supra* note 4, at 423–24.

182. *See supra* notes 131–33 and accompanying text. For a district that utilizes RTI, these procedural protections would therefore cover between 17 percent and 22 percent of all general-education students. *See supra* note 87 and accompanying text.

183. *See supra* notes 157–60 and accompanying text.

legislation not currently covered by pre-existing allocations of funds would be the added expenditures of providing due-process rights to Tier II and Tier III RTI students.[184] Steinberg observes that "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" since procedural protections would help guarantee that students receive appropriate RTI services so that they do not unnecessarily end up requiring special education, which is more expensive than general education.[185]

Finally, the proposed legislation should address the variability that currently plagues the implementation of RTI across the country, as discussed in Part III, by setting unified standards[186] for the utilization of RTI to accurately diagnose SLDs and remediate missing skills.[187] For example, in regard to the use of RTI to determine the presence of SLD, Congress should establish the specific intervention data a local multidisciplinary team must have in order to properly diagnose SLDs and create a single process through which such data may be collected and analyzed.[188] And in terms of utilizing RTI to remedy learning deficiencies, Congress could define the requirements for membership in each tier of RTI along with the criteria that a student must meet to move from one tier to another.[189]

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184. Section 1413(f) of the IDEA allows LEAs to use as much as 15 percent of their IDEA funds to implement RTI. $11,912,848,000 was allocated in Fiscal Year 2016 to fund the IDEA (the same amount was requested for Fiscal Year 2017). *Funding Status - Special Education—Grants to States*, U.S. DEP'T OF EDUC. (May 5, 2016), http://www2.ed.gov/programs/osepgts/funding.html [https://perma.cc/95WZ-D8MQ]. This left $1,786,927,200 for RTI expenditures in 2016 and therefore represents the minimum that already exists to fund my proposed legislation. There are no data publically available that shows how much of Title I and Title III ESEA funds (the other sources of federal funding for RTI) were spent on RTI.

185. Steinberg, *supra* note 4, at 427 n.179 ("The cost per student for special education is nearly twice that for general education . . . .").

186. Technically, Congress should authorize the U.S. Department of Education to create the standards since it likely has more expertise in this area than Congress.

187. As mentioned these are the two ways in which RTI is utilized. *See supra* notes 81–82 and accompanying text.

188. *See* Hauerwas et al., *supra* note 92, at 102 (establishing that there is no national standard for using RTI data in SLD determinations).

189. *Cf.* U.S. DEP'T OF EDUC., OSEP 08-09, COORDINATED EARLY INTERVENING SERVICES (CEIS) UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) 6 (2008), http://www2.ed.gov/policy/speced/guid/idea/ceis-guidance.pdf [https://perma.cc/QL9P-WM8A].

CONCLUSION

Research suggests that there are no fewer than a half-million elementary and secondary students receiving RTI services who are avoiding needless special education services. Yet while RTI allows children to remain in general education, it does not remove their vulnerabilities. Thus, students undergoing RTI face risks of receiving inadequate or inappropriate specialized instruction and therefore deserve procedural protections to prevent those risks from materializing. This Note has proposed legislation that will allow Congress to provide such safeguards while consolidating federal funding and setting national standards for implementing RTI. Enacting this law will allow schools to take further advantage of the cost-saving benefits of RTI by reducing the unnecessary placements of students within special education[190] and to secure a better education for children.

190. *See supra* note 185 and accompanying text.