

**MICHIGAN'S SPECIFIC LEARNING DISABILITY
EVALUATION CRITERIA: A CASE STUDY IN THE FAILINGS
OF THE INDIVIDUALS WITH DISABILITIES EDUCATION
ACT**

I. INTRODUCTION

Nowadays, it is hard to imagine a version of the United States in which large groups of children have no broad access to public education. But just 45 years ago, a large portion of the children in this country with special needs and disabilities received little or no educational services from the states at all.¹ Through the federal enactments of the Education of All Handicapped Children Act (EAHCA),² later renamed the Individuals with Disabilities Education Act (IDEA),³ Congress has provided federal funds to the states in order to ensure that all children, regardless of disability, obtain a free and appropriate public education (FAPE).⁴

According to the most current data, approximately 6,600,000 children, ages three to twenty-one years, and 340,000 children ages from birth to two years, receive services under the IDEA.⁵ Roughly forty

1. See Education of All Handicapped Children Act of 1975, 20 U.S.C. § 1401(b)(2)-(5) (1975) [hereinafter EAHCA of 1975] (stating that at that time, in 1975, more than half of the children with special needs and disabilities in the United States were not provided with any special education opportunities, or were not receiving appropriate educational services sufficient to afford them equal educational opportunity). See also Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400(c)(2)(A)-(D) (2010) [hereinafter IDEIA of 2004]; S. REP. NO. 94-168, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1431-33 (1975), at subheadings "Hearings", "Need for Legislation" (noting statistics showing large numbers of disabled children failing to receive adequate educational services). The Senate report also states that regardless of legislative and judicial recognition of the right to education for all children, states struggled financially to implement statewide special education programs. *Id.*

2. EAHCA of 1975, 20 U.S.C. §§ 1400-91 (1975) (superseded by 20 U.S.C. §§ 1400-91 (2007)).

3. Individuals with Disabilities Education Act of 1997, 20 U.S.C. §§ 1400-91 (1997) (amended in 2004-07) [hereinafter IDEA of 1997].

4. See EAHCA of 1975, 20 U.S.C. § 1401(c) (1975) (superseded by 20 U.S.C. § 1401(c) (2007)), which states that:

It is the purpose of this Act to assure that all handicapped children have . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . . [and] to assist States and localities to provide for the education of all handicapped children

Id. See also IDEIA of 2004, 20 U.S.C. § 1400(c)(3) (2010).

5. U.S. DEP'T OF EDUC. (USDOE), IDEA Data Part B Child Count, "Number of children and students served under IDEA, Part B, by age group and state: Fall 2008" (2008), available at http://www.ideadata.org/TABLES32ND/AR_1-1.xls; USDOE,

percent⁶ of those students are designated as having a “Specific Learning Disability” (SLD).⁷ But before these children receive services, they must be identified as having a disability, and that their disability contributes to a need for special education services under the IDEA.⁸ This note will focus on the debate over the appropriate means of SLD evaluation insofar as they relate to the IDEA legislation. This note also considers the shortcomings of the IDEA as exemplified by the problems of identifying students who have special needs and disabilities.

Section II of this note discusses the historical background of special education in the United States, federal special education legislation in the last 45 years as it relates to Specific Learning Disabilities (SLDs), and Michigan’s new evaluation criteria for SLDs. Section III explores the shortcomings of the federal special education legislation as exemplified by Michigan’s new SLD evaluation criteria, and argues that Congress should provide clearer conditions on state receipt of federal funds under the IDEA. Lastly, Section IV recapitulates the current backdrop of U.S. special education, and concludes that in order to effectuate the purposes of IDEA, Congress needs to establish standards that create a more uniform and equal application of special education eligibility evaluations across the country.

IDEA Data Part C Child Count, “Number of infants and toddlers ages birth through 2 and 3 and Older, and percentage of population, receiving early intervention services under IDEA, Part C, by age and state: Fall 2008” *available at* http://www.ideadata.org/TABLES32ND/AR_8-1.xls (last visited Jan. 11, 2012).

6. Percentage derived by calculations using data from: USDOE, IDEA Data Part B Child Count, “Number of students ages 6 through 21 served under IDEA, Part B, by disability category and state: Fall 2008,” *available at* https://www.ideadata.org/TABLES32ND/AR_1-3.xls (last visited Aug. 1, 2012).

7. *See* IDEA of 1997, 20 U.S.C. § 1401(30)(A)-(C) (2010). Section 1401(30)(A)-(C) defines a “specific learning disability” as a disorder affecting one 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). A specific learning disability could include “perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 20 U.S.C. § 1401(30)(B). However, the statute notes that the term “specific learning disability” for the purposes of the IDEA does not include learning problems that are a result of “visual, hearing, or motor disabilities, of intellectual disabilities, emotional disturbance, or of environmental, cultural, or economic disadvantage.” 20 U.S.C. § 1401(30)(C).

8. IDEA of 2004, 20 U.S.C. § 1414 (2010); 34 C.F.R. § 300.306(c)(1)-(2) (2007).

II. BACKGROUND

*A. The History of Special Education in the United States**1. The Education for All Handicapped Children Act of 1975 and Beyond*

Prior to 1975, very few educational opportunities were offered to students with disabilities and other special needs.⁹ Many students with special needs were either excluded from the classroom altogether, or provided only with “minimal learning environments.”¹⁰ The stigmatization and isolation of people with “disabilities” changed when Congress enacted the Education for All Handicapped Children Act of 1975 (EAHCA).¹¹ The EAHCA entitled children with disabilities and special needs to education and other supportive services within the public school systems, in order to provide all students with a “free and appropriate public education” (FAPE).¹² The EAHCA also provided parents with the ability to participate in the development of a child’s education plan, and provided parents with a legal remedy to enforce their children’s right to FAPE.¹³

A number of Congress’s concerns underlined the final version of EAHCA, included the worry that states would misuse identification and classification procedures, leading to misclassification of a child as having a disability, and consequentially resulting in larger federal payout.¹⁴ Members of Congress also feared that including the definition of “specific learning disabilities” (SLDs) in the definition of a child with disability would be too expansive and subject to abuse.¹⁵ Thus, in the final bill of the EAHCA, Congress set a cap at two percent of all students

9. See IDEA of 2004, 20 U.S.C. § 1400(c)(2) (2007); Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1147 (2007).

10. Hensel, *supra* note 9, at 1147.

11. EAHCA of 1975, 20 U.S.C. §§ 1400-91 (1975). See also Hensel, *supra* note 9, at 1148.

12. EAHCA of 1975, 20 U.S.C. § 1401(e) (1975). See generally 20 U.S.C. § 1412(a)(1)(A) (2007).

13. EAHCA of 1975, 20 U.S.C. § 1402(a)(19) (1975). See generally 20 U.S.C. §§ 1414(d), 1415 (2007).

14. S. REP. NO. 94-168, reprinted in 1975 U.S.C.C.A.N. 1425, 1438 (1975), subheading “DISCUSSION—Assistance to States for the Education for All Handicapped Children” (stating that one purpose of the Senate bill was to focus “on the problem of erroneous classification and labeling of children by setting a limitation on the population of children who may be counted as eligible for services”).

15. See S. REP. NO. 94-168, at 1433-34 (1975), subheading “DISCUSSION—Definitions.” See also Hensel, *supra* note 9, at 1154-55.

for the number of children who could be identified with an SLD, and further provided that the SLD category should not include children who have learning problems that result primarily from cultural, environmental, or economic disadvantage.¹⁶

Interestingly, from 1975 to 1996, Congress continued to amend the EAHCA to expand its reach and inclusion of students with special needs and disabilities.¹⁷ Amendments in 1986 provided for early intervention services with the hope that if young children between birth and two years of age who “displayed disabilities or developmental delays” received early interventions, fewer students would need special education services once they entered public school.¹⁸ The 1986 Amendments also created a grant program for states to establish preschools for special needs students.¹⁹ Amendments in 1990 expanded the statute’s definition of eligibility to include additional classifications of disability, such as autism, traumatic brain injury, and other health impairments such as Attention Deficit Disorder.²⁰ The 1990 amendments also renamed the Act the “Individuals with Disabilities Education Act.”²¹

In *Board of Education v. Rowley*,²² the Supreme Court laid out the judicial standard for determining special education eligibility under EAHCA. The Supreme Court rejected the argument that a school or state, in order to provide FAPE to a special needs child, must provide every service possible in order to equalize the educational opportunities of all students.²³ Instead, the Court held that where a state or school district fulfills the procedural requirements of the EAHCA and establishes an Individual Education Plan that confers *some* meaningful educational progress upon a child with a disability, the school has fulfilled its duty under the EAHCA.²⁴ Thus, while Congress was trying to expand the number of children covered under the IDEA statutes,²⁵ the

16. EAHCA of 1975, 20 U.S.C. §§ 1401(30)(C), 1411(a)(5)(A)(i)-(ii) (1975).

17. Hensel, *supra* note 9, at 1155-56.

18. The Education for All Handicapped Children Act Amendments of 1986, 20 U.S.C. §§ 1471-77 (1986) (superseded by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-91 (2010)) [hereinafter EAHCA 1986 Amendments].

19. EAHCA 1986 Amendments, 20 U.S.C. §§ 1423, 1471 (1986).

20. The Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1401(a)(1) (1990) (superseded by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-91 (2010)) [hereinafter IDEA of 1990].

21. *See* IDEA of 1990, 20 U.S.C. § 1400(a) (1990) (superseded by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-91 (2010)).

22. 458 U.S. 176, 176 (1982).

23. *Id.* at 198-99.

24. *Id.* at 200-01, 206-07.

25. Hensel, *supra* note 9, at 1155-56.

Supreme Court lessened the burden on states and school districts to provide special education services.²⁶ Nevertheless, the result of the Court's decision does not necessarily lower how much the federal government would have to pay out to the states, but allows states to reduce their special education expenditures.

2. The Individuals With Disabilities Education Act of 1997 and the Individuals with Disabilities Education Improvement Act of 2004

In 1997, Congress passed significant amendments to the Individuals with Disabilities Education Act (IDEA).²⁷ The IDEA amendments expanded the definition of "child with a disability" to include students age three to nine who show developmental delays, in order to recognize children with disabilities who do not fall neatly within the other enumerated categories of disabilities in the Act.²⁸ While Congress was concerned that school districts were failing to identify certain students as learning disabled, they also worried about over-identification of students who performed poorly due to language barriers, socioeconomic disparities, and inadequate academic instruction.²⁹ Thus, the 1997 amendments provided that a student could not be determined to have a disability if the cause behind such a determination results from a lack of appropriate instruction in math or reading, or results from limited proficiency in the English language.³⁰

In 2004, Congress passed the Individuals with Disabilities Education Improvement Act (IDEIA),³¹ amending IDEA, in response to a growing fear that children were being mislabeled as "disabled" due to racial disparities and lack of appropriate classroom instruction, and thus drawing resources away from children who really needed special education services.³² Congress authorized states to use up to fifteen percent of their federal funding for "early intervening services" in order

26. *See Rowley*, 458 U.S. at 200-01, 206-07.

27. *See generally* The Individuals with Disabilities Education Act Amendments of 1997, 20 U.S.C. §§ 1400-06, 11-19, 31-45, 51-36, 61, 71-74, 81-83, 85-87 (1997) (superseded by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-91 (2010)) [hereinafter IDEA Amendments of 1997].

28. IDEA Amendments of 1997, 20 U.S.C. § 1401(3)(B) (1997); S. REP. NO. 105-17, at 6 (1997); H.R. REP. NO. 104-614, at 5 (1996).

29. IDEA Amendments of 1997, 20 U.S.C. § 1400(c)(8)-(10) (1997); S. REP. NO. 105-17, at 4-5 (1997); H.R. REP. NO. 104-614, at 13 (1996).

30. 20 U.S.C. § 1414(b)(5) (2005).

31. The Individuals with Disability Education Improvement Act of 2004, 20 U.S.C. §§ 1400-82 (2010) [hereinafter IDEIA of 2004].

32. H.R. REP. NO. 108-77, at 84, 98-99 (2003). *See also* S. REP. NO. 108-185, at 22 (2003).

to provide both behavior and academic support to allow at-risk students to be more successful in general education.³³ The Amendments also changed the requirements for school district evaluations of students with SLDs,³⁴ which will be discussed in the next subsection of this paper.

B. Determining Special Education Eligibility for Students with Specific Learning Disabilities

1. Michigan and Federal Law—Special Education Eligibility

Because federal law mandates that schools provide all students that have disabilities with FAPE, children with special needs are entitled to special education services upon a determination of eligibility.³⁵ In order to be eligible for special education services in Michigan, a student must have one of the statutorily enumerated disabilities,³⁶ which adversely affects the student's education and thus necessitates special education services.³⁷

A parent or a state or local agency may request an eligibility evaluation.³⁸ Upon parental consent,³⁹ the child is evaluated by a multidisciplinary evaluation team (MET),⁴⁰ which makes a written recommendation of eligibility.⁴¹ A parent is also entitled to an Independent Educational Evaluation (IEE) at public expense.⁴² If a child

33. IDEIA of 2004, 20 U.S.C. § 1413(f)(1) (2005); H.R. REP. NO. 108-77, at 84.

34. *See generally* IDEIA of 2004, 20 U.S.C. § 1401(30) (2010).

35. IDEIA of 2004, 20 U.S.C. § 1412(a)(1) (2005); 34 C.F.R. § 300.17 (2010).

36. 34 C.F.R. § 300.8(a)(1) (2010) states that:

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 C.F.R. § 300.8(a)(1) (2007). *See also* IDEIA of 2004, 20 U.S.C. § 1401 (2010); MICH. ADMIN. CODE r. §§ 340.1702, 340.1705-1711, 340.1713-1716 (2010).

37. IDEIA of 2004, 20 U.S.C. § 1414 (2005); 34 C.F.R. § 300.306(c)(1)-(2) (2007); MICH. ADMIN. CODE r. 340.1702 (2010).

38. IDEIA of 2004, 20 U.S.C. § 1414(a)(1)(B) (2005); 34 C.F.R. § 300.301(b) (2007).

39. IDEIA of 2004, 20 U.S.C. § 1414(a)(1)(D)(i) (2005); MICH. ADMIN. CODE r. 340.1721 (2010).

40. MICH. ADMIN. CODE r. 340.1701b(b) (2010).

41. MICH. ADMIN. CODE r. 340.1721a(2) (2010).

42. 34 C.F.R. § 300.502 (2007); MICH. ADMIN. CODE r. 340.1723c (2010).

is deemed eligible, then an Individual Education Program Team⁴³ (IEPT) creates an Individual Education Program (IEP) laying out the special education services that will be provided to the child.⁴⁴

While the IDEA has the potential of being a potent tool to parents by providing rights to due process hearings,⁴⁵ independent educational evaluations,⁴⁶ and attorney's fees,⁴⁷ federal courts generally show significant deference to school districts and states when parents seeking special education services bring suit. For example, in the 2005 case *Schaffer v. Weast*, the Supreme Court held that a student has the burden of proving his entitlement to and the inadequacies of special education services.⁴⁸ The Sixth Circuit, two years later, reaffirmed this burden of proof, holding that a student must show that the school district overlooked clear signs of a disability or negligently failed to evaluate a student.⁴⁹ Other federal courts of appeals have followed suit, and tended to dismiss parents' claims for special education services.⁵⁰

43. 34 C.F.R. § 300.321 (2007); MICH. ADMIN. CODE r. 340.1721b (2010).

44. 34 C.F.R. § 300.320 (2007); MICH. ADMIN. CODE r. 340.1722 (2010). Because this Note discusses Michigan's determination of the existence of specific learning disabilities, information regarding the development of special education services has been omitted. For more information on special education procedures following a determination of student eligibility, see 20 U.S.C. § 1414 (2005); 34 C.F.R. §§ 300.320-300.328 (2007); MICH. ADMIN. CODE r. 340.1721b-340.1722a, 340.1733, 340.1738-340.1749c (2010).

45. IDEIA of 2004, §§ 20 U.S.C. 1415(b)(6)-(b)(8), (c)(2), (f)-(h) (2010); 34 C.F.R. § 300.507 (2007).

46. IDEIA of 2004, 20 U.S.C. § 1415(b)(1) (2007); 34 C.F.R. § 300.502 (2007).

47. IDEIA of 2004, § 20 U.S.C. 1415(i)(3)(B)-(G) (2010); 34 C.F.R. § 300.517 (2007).

48. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

49. *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.* 478 F.3d 307, 313 (6th Cir. 2007).

50. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007) (holding that the child did not prove that he necessitated services as a result of his behavioral issues, when he performed adequately in academics); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1106 (9th Cir. 2007) (holding that even when an SLD exists, a student is not entitled to services where her inadequate academic performance can be corrected in a general education classroom); *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 65, 67-68 (2d Cir. 2000) (holding that the student failed to show a need of special education services as a result of his disability as required by IDEA). *But see Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 10-16 (1st Cir. 2007) (finding a student entitled to special education services, because of non-academic reasons and regardless of adequate academic success).

2. *Evaluation of the Existence of SLDs: A Shift from the Severe Discrepancy Model to the Response-To-Intervention Model under Federal Law*

“Specific Learning Disabilities”⁵¹ (SLDs) comprise one of the enumerated disability groups under IDEA.⁵² Over the past ten years, Congress has changed the evaluation models for determining the existence of an SLD for the purposes of special education law.⁵³ The 1997 amendments of IDEA provided that SLDs were to be evaluated using the “Severe Discrepancy” (SD) model.⁵⁴ The SD model generally compared a child’s IQ scores as a measure of intellectual ability with the child’s academic performance scores as a measure of academic achievement.⁵⁵ While the SD model allows for a quick determination of an SLD in those students who have average to above average IQ, but below average academic performance, there exists a number of drawbacks with the model.⁵⁶ First, many commentators critique the SD model as a “wait-to-fail” model, where there exists a delay in identification of a learning disability until the student has failed or dropped below some threshold of sufficient academic performance.⁵⁷

51. 34 C.F.R. § 300.8(10)(i) (2007) defines a “Specific Learning Disability” as: [A] disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Id. Note that SLDs do not include: “learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” 34 C.F.R. § 300.8(10)(i) (2007).

52. 34 C.F.R. § 300.8(a)(1) (2007).

53. See Hensel, *supra* note 9, at 1157-62.

54. 34 C.F.R. § 300.541 (1995) (superseded by Individuals with Disabilities Education Improvement Act of 2004, §§ 20 U.S.C. 1400-1482 (2010); 34 C.F.R. § 300.307 (2007)). Section 300.541 provided that:

A team may determine that a child has a specific learning disability if (1) [t]he child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child’s age and ability levels; and (2) [t]he team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas: (i) Oral expression. (ii) Listening comprehension. (iii) Written expression. (iv) Basic reading skill. (v) Reading comprehension. (vi) Mathematics calculation. (vii) Mathematics reasoning.

Id.

55. Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 123-24 (2009).

56. *Id.*

57. Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 355 (1999); Nicholas L. Townsend, *Framing a Ceiling*

Second, students may be misidentified as a result of a lack in English language proficiency, inadequate instruction, or cultural biases, even if the student does not have an SLD.⁵⁸ Third, commentators have expressed concern over the exact level of academic performance schools or states set the discrepancy cut-off at, claiming such decisions about where to set the bar would be entirely arbitrary;⁵⁹ at any given cut-off point, the system would be excluding some students who could benefit from services but have not met the “severe discrepancy” requirement.⁶⁰ Additionally, school districts could set the bar really low, enabling them to exclude students from special education services who do not meet the severe discrepancy cut-off, and thus have no SLD determination.

In response to many of these concerns, and because of a failure of the SD model to effectively identify students with SLDs, Congress amended IDEA with the Individuals with Disabilities Education Improvement Act (IDEIA) in 2004.⁶¹ The current federal statutory definition of 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 mathematical calculations . . . [Specific learning disabilities] includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. . . [but] 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.⁶²

Currently, the IDEIA prohibits states from requiring school districts to use the SD model, and must allow school districts to utilize Response-

as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students, 40 CREIGHTON L. REV. 229, 257 (2007).

58. Herr, *supra* note 57, at 346. Congress specifically addressed misidentification of SLDs because of lack of English proficiency, inadequate instruction, and cultural biases via the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-82 (2010).

59. Weber, *supra* note 55, at 124; Herr, *supra* note 57, at 345.

60. Weber, *supra* note 55, at 124; Herr, *supra* note 57, at 345.

61. Hensel, *supra* note 9, at 1158-59.

62. IDEIA of 2004, 20 U.S.C. § 1401(30)(A)-(C) (2007).

To-Intervention (RTI) models, as well as Patterns of Strengths and Weaknesses (PSW).⁶³

The RTI model provides intervening instruction for children who are not performing commensurate with their classroom peers or the grade-level norms.⁶⁴ Such instruction must be validated via scientific research, and is provided by the general education teachers, allowing the children to remain in their regular classroom.⁶⁵ A child's inadequate academic progress in response to intervention is viewed as evidence of an underlying SLD.⁶⁶

The PSW evaluation model compares a student's performance in areas of academic performance laid out by federal regulations: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving.⁶⁷ If a student performs at or above the state-approved standards or average in some of these academic areas, but performs below the state-approved standard or average in others, it may be indicative of an SLD.⁶⁸

Congress and many legal and educational commentators have cited a number of benefits to the RTI model. First, the RTI model excludes children whose learning difficulties stem from inadequate instruction via the intervention of intense research-based teaching methods.⁶⁹ Second, the RTI model provides targeted instruction to struggling students before the emergence of a severe test-score discrepancy.⁷⁰ Third, the RTI model reduces stigmatization of children with special needs by reducing the labeling of students with the title "learning-disabled" and keeping children in general education classrooms.⁷¹ Fourth, RTI models provide data on the intervention techniques that do not work for a particular

63. 34 C.F.R. § 300.307(a) (2007). *See also* OFFICE OF SPECIAL EDUC. AND EARLY INTERVENTION SERVS., MEMORANDUM NO. 10-07, MICHIGAN CRITERIA FOR DETERMINING A SPECIFIC LEARNING DISABILITY, 5 (2010) [hereinafter Memorandum No. 10-07].

64. Weber, *supra* note 55, at 127-28. For more information on specific research-based RTI methodologies, visit the National Center on Response to Intervention online, available at <http://www.rti4success.org> (last visited Aug. 1, 2012).

65. Weber, *supra* note 55, at 127-28.

66. *Id.*

67. *See* 34 C.F.R. § 300.309 (2007).

68. Memorandum No. 10-07, *supra* note 63, at 5.

69. Weber, *supra* note 55, at 130.

70. *Id.* at 131; Townsend, *supra* note 57, at 259.

71. Hensel, *supra* note 9, at 1193; Robert A. Garda, Jr., *Untangling Eligibility Requirements under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 486 (2004); Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 23 (2006).

student, which the IEP team can then use to craft a more effective IEP.⁷² Additionally, because teachers implement RTI methods in the general education classroom, all students are conferred extra educational benefits when teachers utilize research-based interventions,⁷³ and fewer referrals to special education result.⁷⁴

While a number of benefits exist to the RTI models, there are a number of drawbacks as well. Smart children who perform adequately despite learning disabilities may still benefit from special education services, but likely would be excluded under the RTI model.⁷⁵ Additionally, a number of compliance issues could exist, including inadequate implementation by teachers because they are ill equipped to, or uneducated on how to, implement RTI methodologies.⁷⁶ Another commentator has expressed concern that school districts could intentionally fail to properly implement RTI methods in order to lower the number of children found to have a SLD and lower special education costs.⁷⁷ Most notable, however, is the suggestion that because Congress did not mandate, but merely required states to allow districts to use RTI models, districts' broadened discretion on how to evaluate SLDs could result in inconsistent standards or a failure to even pick up and implement RTI models.⁷⁸

3. Michigan's 2010 Criteria for Determining the Existence of a Specific Learning Disability

On May 14, 2010, and pursuant to federal regulations,⁷⁹ the Office of Special Education for the State of Michigan's Department of Education distributed a memorandum to all Michigan School Districts setting forth "Michigan['s] Criteria for Determining the Existence of a Specific Learning Disability."⁸⁰ Public schools in the state follow the criteria

72. Weber, *supra* note 55, at 132.

73. *Id.*

74. *Id.*

75. *Id.* at 133; Townsend, *supra* note 57, at 260, 264; Weber, *supra* note 71, at 8.

76. Weber, *supra* note 55, at 135, 142; Townsend, *supra* note 57, at 260.

77. Townsend, *supra* note 57, at 261.

78. *Id.* at 256.

79. 34 C.F.R. § 300.307(a) (2007).

80. Memorandum No. 10-07, *supra* note 63, at 1. Note that this memorandum sets forth the Office of Special Education's evaluation policy; while it is generally followed by all school districts in the state, it does not have the legal effect that administrative regulations do.

when determining whether a student has a “Specific Learning Disability.”⁸¹

The criteria first reiterate that schools and METs are obliged to follow federal and state laws and regulations pertaining to eligibility evaluations.⁸² Michigan’s criteria reflect the federal and state statutory language and provide that schools must use a student’s response to scientific, research-based intervention,⁸³ or if unavailable, patterns of strengths and weaknesses⁸⁴ when determining the existence of a SLD.⁸⁵

81. 34 C.F.R. § 300.307(b) (2007).

82. Memorandum No. 10-07, *supra* note 63, at 1. *See also* 20 U.S.C. § 1414 (2005); 34 C.F.R. §§ 300.301-.306, 300.307, 300.309 (2007). MICH. ADMIN. CODE r. 340.1713 provides that:

(1) “Specific Learning Disability” means a disorder in 1 or more of the basis psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of cognitive impairment, of emotional impairment, of autism spectrum disorder, or of environmental, cultural, or economic disadvantage.

(2) In determining whether a student has a learning disability, the state shall:

(a) Not require the use of a severe discrepancy between intellectual ability and achievement.

(b) Permit the use of a process based on the child’s response to scientific, research-based intervention.

(c) Permit the use of other alternative research-based procedures.

(3) A determination of learning disability shall be based upon a full and individual evaluation by a multidisciplinary evaluation team.

MICH. ADMIN. CODE r. 340.1713 (2010).

83. An indicative response to Scientific, Research-Based Intervention methodologies is defined as:

(1) The student does not achieve adequately for the student’s age or to meet State-approved grade-level standards in one or more of the areas identified at 34 C.F.R. § 300.309(a)(1)(i) when provided with learning experience and instruction appropriate for the student’s age or State-approved grade-level standards; and (2) The student does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified at 34 C.F.R. § 300.309(a)(1)(i) when using a process based on the student’s response to scientific, research-based intervention.

Memorandum No. 10-07, *supra* note 63, at 6.

84. An indicative response to Patterns of Strengths and Weaknesses methodologies is defined as:

The student does not achieve adequately for the student’s age or to meet State-approved grade-level standards in one or more of the areas identified at 34 C.F.R. § 300.309(a)(1)(i) when provided with learning experiences and instruction appropriate for the student’s age or State-approved grade-level standards; and the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the MET to be relevant to the identification of an SLD, using appropriate assessments,

It is important to note the contradictory language in the rules: on page four of the memorandum, the criteria state that school districts “must use the following processes” and then go on to list both scientific, research-based interventions and patterns of strengths and weaknesses;⁸⁶ on page six, the criteria provide that a school is required to use scientific, research-based interventions data if the school has implemented such evaluation methods, but if they have not, the schools may evaluate a student using patterns of strengths and weaknesses.⁸⁷ Michigan’s criteria also note that “the continued use of severe discrepancy is discouraged” and that it “must never be used exclusively to determine the existence of an SLD.”⁸⁸

In order to complete a SLD determination evaluation, the school or MET “must document a student’s achievement in one of the following areas: Oral expression; Listening comprehension; Written expression; Basic reading skill; Reading fluency skills; Reading comprehension; Mathematics calculation; [or] Mathematics problem solving.”⁸⁹ Then, when evaluating data provided by the different methodologies used, the school or MET must find that the child possesses an academic skill deficit.⁹⁰ While Michigan’s criteria leave it up to the individual school districts to define what objective data criteria triggers a finding of a skill deficit, the state’s criteria provides suggested parameters.⁹¹ Most notable, the suggested parameters state that for curriculum-based measurements and other tests that utilize percentile ranks, a score at or below the ninth percentile may represent an academic deficit.⁹² The criteria also require a member of the evaluation team to perform a formal observation of the

consistent with the IDEA Evaluation Procedures and Additional Requirements for Evaluations and Reevaluations.

Memorandum No. 10-07, *supra* note 63, at 5 (2010).

85. Memorandum No. 10-07, *supra* note 63, at 6.

86. *Id.* at 3.

87. *Id.* at 6.

88. *Id.* at 3.

89. *Id.* at 6-7 (as defined by 34 C.F.R. § 300.309(1) (2007)).

90. *Id.* at 7.

91. Memorandum No. 10-07, *supra* note 63, at 6-7.

92. *Id.* at 6. The suggested parameters also provide recommendations when using Criterion Reference Measures (CRMs), which usually are provided with the education materials themselves as a certain grade level expectancy of performance. For example, Michigan’s criteria gives the example that if the CRM provides that the grade level comprehension should be that student answer questions with 80% accuracy, and a student suspected of an SLD continues to perform at 40% accuracy, that could be indicative of an SLD. *Id.*

child in the “child’s learning environment” and “address academic performance in the specific area(s) of difficulty.”⁹³

Federal law prohibits using just one method of determining the existence of a SLD.⁹⁴ Thus, Michigan’s criteria point out that “the public agency must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, as well as information about the student’s physical condition, social or cultural background, and adaptive behavior.”⁹⁵

While Congress tackled the challenge of enacting far-reaching legislation that provides education services to those children with special needs, questions remain as to the effectiveness of the IDEA. The rest of this note explores the shortcomings of the IDEA as demonstrated by Michigan’s new SLD eligibility evaluation criteria.

III. ANALYSIS

A. General Failures of the Current SLD Evaluation Models in Effectuating Congressional Intent under the IDEIA

The Individuals with Disabilities Education Act (IDEA) seeks to provide maximum educational support to children with special needs, including learning disabilities, while protecting against providing special education funding to children who do not have learning disabilities or do not need extra services.⁹⁶ Schools need a student evaluation system that effectuates both of these underlying goals.

The Severe Discrepancy (SD), Response-to-Intervention (RTI), and Patterns of Strengths and Weaknesses (PSW) models all have the potential of being under-inclusive models.⁹⁷ The SD model sets an arbitrary cut off point at which academic performance relative to other students is somehow indicative of a learning disability, while excluding all students whose performance does not fall below the cut off.⁹⁸ Thus, the SD model does little more than identify students whose performance

93. *Id.* at 7.

94. IDEIA of 2004, 20 U.S.C. § 1414(b)(2)(B) (2005).

95. Memorandum No. 10-07, *supra* note 63, at 4 (citing 34 C.F.R. § 300.8 (2007)).

96. *See* IDEIA of 2004, §§ 20 U.S.C. 1400(c)(5)(D), (F) (2007); IDEA Amendments of 1997, 20 U.S.C. §§ 1400(c)(8)-(10), 1401(a)(3) (1997); EAHCA of 1975, 20 U.S.C. § 1401(c) (1975) (earlier amendments superseded by IDEIA of 2004).

97. *See generally* Weber, *supra* note 55, at 124, 133; Herr, *supra* note 57, at 345; Townsend, *supra* note 57, at 260, 264; Weber, *supra* note 71, at 8.

98. Weber, *supra* note 55, at 124; Herr, *supra* note 57, at 345.

is significantly lower than peers with similar academic ability;⁹⁹ the model does not seek to identify learning disabilities, but just infers that a disability exists if performance level is low. The PSW model suffers from similar problems. While the PSW model also performs an ability-to-performance comparative evaluation, it measures ability based on that student's adequate performance in certain educational areas, instead of measuring ability on IQ or some other equivalent test.¹⁰⁰ Thus, the PSW model fails to identify a learning disability *per se*, but infers one where performance is significantly below average in some academic area(s). It is easy to see how these models can exclude students who may have learning disabilities if their performance is above the set cut-off point.¹⁰¹

The RTI model suffers from entirely different problems. While in theory, RTI better targets learning disabilities because it allows teachers to interact with students utilizing research-based methodologies in evaluating the potential for a learning disability,¹⁰² the RTI model assumes that implementation of the techniques occurs properly, or that they in fact are put into effect at all.¹⁰³ States and school districts have an economic incentive to entirely forego implementing RTI for two reasons: one, because it costs money to train all the general education teachers state-wide to integrate RTI methodologies into their classrooms, and two, because it may lead to increased identification of students with learning disabilities, thus requiring the state or district to have to shell out more money to support special education.¹⁰⁴

On the other hand, all of these models serve legitimate purposes. Both the SD and PSW models quickly target those students who have already fallen below a given academic performance standard.¹⁰⁵ The RTI model, when implemented properly, confers great educational benefits both to students with and without learning disabilities in the general education classroom.¹⁰⁶ Thus, the problems that occur in using these models to identify specific learning disabilities exist not because of the fact that they are used, but *how* they are used. If the models were all used in tandem, in addition to an evaluative model that works well in high-performing LD students, more exact targeting would likely ensue. If states and school districts fail to use RTI models in tandem with the SD

99. See Weber, *supra* note 55, at 124; Herr, *supra* note 57, at 345.

100. See generally Memorandum No. 10-07, *supra* note 63, at 5.

101. Weber, *supra* note 55, at 124; Herr, *supra* note 57, at 345.

102. See Weber, *supra* note 55, at 130-32.

103. *Id.* at 135, 142; Townsend, *supra* note 57, at 260.

104. See generally Weber, *supra* note 55, at 135, 142; Townsend, *supra* note 57, at 260.

105. See generally Weber, *supra* note 55, at 123-24.

106. See generally *id.* at 132.

or PSW models, there likely will continue to be over-identification of students who are not receiving adequate instruction,¹⁰⁷ and under-identification of higher-performing students with learning disabilities.¹⁰⁸

Congress's failure to mandate RTI interventions, while allowing states and school districts to choose their methods of evaluation, is a huge failing on the part of the IDEIA amendments.¹⁰⁹ As noted above, the economic incentives for states and school districts to decline to implement the RTI techniques will urge states to continue utilizing SD-like models.¹¹⁰ Michigan's current SLD identification criteria exemplify this problem.¹¹¹

B. Michigan's SLD Criteria – An Example of the Shortcomings of the IDEIA of 2004

Michigan's new SLD identification criteria essentially fail to incorporate and effectuate the intended change under the IDEIA amendments. Most notably, Michigan's criteria reiterates much of the IDEA and IDEIA language but does not mandate the use of RTI methodologies, nor provides any instruction on how to implement such techniques.¹¹² The guidelines thus epitomize the underlying idea that the IDEIA provides little, if any, incentive to utilize RTIs, and states, like Michigan, will choose not to push or mandate RTI methods.

Instead, the criteria provide detailed instructions on how to implement identification based both on a student's failure to demonstrate adequate academic achievement as compared to grade-level standards, and patterns of strengths and weaknesses.¹¹³ Additionally, the guidelines suggest a cut-off parameter of academic performance that would establish an academic skill deficit indicative of a specific learning disability at or below the ninth percentile.¹¹⁴

The new guidelines make clear that a complete evaluation must be pursued in determining special education eligibility, a complete

107. See Herr, *supra* note 57, at 346.

108. See generally *id.* at 345; Weber, *supra* note 55, at 124.

109. IDEIA of 2004, 20 U.S.C. § 1414(a)(6) (2004); See also 34 C.F.R. § 300.307(a) (2010).

110. See generally Weber, *supra* note 55, at 135, 142; Townsend, *supra* note 55, at 260.

111. See generally Memorandum No. 10-07, *supra* note 63.

112. *Id.* at 5-6.

113. *Id.*

114. *Id.* Note that the ninth-percentile parameter is used for curriculum-based assessments or other tests that provide percentile ranks. A fifty percent parameter is set in criterion reference measure assessments. *Id.*

evaluation requires observation of the student participating in the academic area that he or she has struggled with while still in the normal educational environment; parental input; consideration of exclusionary factors such as language barrier and inadequate academic instruction; and some measure of insufficient academic performance such as curriculum-based standardized testing below the ninth percentile for the student's grade level.¹¹⁵ Consequentially, however, Michigan's standards act, in effect, like an SD-model. While evaluation teams must give consideration to the sufficiency of classroom instruction, thereby lowering erroneous identification of learning disabilities, the most probative portion of the evaluation requirements lies in the academic performance of the student as compared to state-level standards.¹¹⁶ Additionally, setting the bar at the ninth percentile will assure that a large number of students who have learning disabilities will likely be excluded from identification altogether.¹¹⁷

States, like Michigan, are expressly authorized in the IDEIA of 2004 to create evaluation systems that maintain the status quo of identifying specific learning disabilities:¹¹⁸ systems that set the bar extremely high to find a specific learning disability, limit the number of children found to have learning disabilities, and also minimize the investments that the state's school districts actually have to put into creating an evaluation model that effectively identifies students with learning disability, thereby reducing costs to the state and districts.¹¹⁹ This outcome certainly could not have been the intent of Congress when they enacted the IDEIA.¹²⁰

C.A Critique of the IDEIA and Potential Solutions

While the IDEIA of 2004 appears to reflect the idea that states should be the primary deciders of how they provide education to their

115. *Id.* at 5-6.

116. *See id.*

117. *Cf. Weber, supra* note 55, at 124; *Herr, supra* note 57, at 345. Note that by taking into account external factors such as socioeconomics and inadequate instruction, schools reduce the number of students misidentified with specific learning disabilities. This reduction in identifications is compounded by setting a low bar at the ninth percentile, thus allowing schools to reduce the number of students identified with specific learning disabilities.

118. IDEIA of 2004, 20 U.S.C. § 1414(a)(6) (2010); *See also* 34 C.F.R. § 300.307(a) (2010).

119. *See generally* *Weber, supra* note 55, at 135, 142; *Townsend, supra* note 57, at 260.

120. *See* IDEIA of 2004, 20 U.S.C. 1400(d)(4) (2007). *See also* *Hensel, supra* note 9, at 1158-59.

residents, Congress has its own intents in enacting the IDEA.¹²¹ Congress specifically made findings that when RTI methods are implemented effectively, they better target students with learning disabilities was excluding those who do not need services.¹²² Additionally, the entire purpose of the IDEA was to provide special education services to those in need,¹²³ thus allowing states to under-identify students who actually have specific learning disabilities, which would utterly contradict the IDEA program's purpose.

Perhaps Congress anticipated the potential drawback that a mandate on implementing and using RTI methodologies could result in states using the federal grant money to train teachers in RTI techniques, instead of spending it directly on students with special education needs. If such a risk exists, a cost-benefit analysis should be done to consider the cost of implementing the new methodologies while considering the potential reduction in the number of students who would be identified as having a learning disability. Notably, Congress hoped that by allowing states to utilize fifteen percent of the IDEA funds for early-intervention services and implementing RTI methodologies, states inevitably would *lower* the number of children in special education, thus *lowering the costs* associated with special education.¹²⁴ If such an outcome were possible, it would seem that states would have an incentive to switch over to an RTI system of identifying students with specific learning disabilities, thereby lowering the number of students who would be identified as a child with a disability and lowering special education costs. Although, it is likely that the upfront investment in switching over to RTI technologies and early-intervention services deters states from doing so.

Congress has the power to condition receipt of the \$11.5 billion IDEA grants¹²⁵ on the states' compliance with relevant federal laws.¹²⁶

121. See IDEA of 2004, 20 U.S.C. § 1400(c)(6) (2007). See also Hensel, *supra* note 9, at 1158-60.

122. Hensel, *supra* note 9, at 1158-60.

123. IDEA of 2004, 20 U.S.C. §§ 1400(c)(3), (d)(1)(A) (2007). See also Hensel, *supra* note 9, at 1148.

124. See IDEA of 2004, 20 U.S.C. § 1413(f)(1) (2007); H.R. REP. NO. 108-77, at 84 (2003). See also Hensel, *supra* note 9, 1148.

125. See U.S. DEP'T OF EDUC., United States Federal Education Budget for FY 2009-2011, *available at* <http://www2.ed.gov/about/overview/budget/budget11/summary/index.html> (last visited Aug. 1, 2012).

126. See *S. Dakota v. Dole*, 483 U.S. 203, 206-07 (1987) (citing *United States v. Butler*, 297 U.S. 1, 66 (1937)) (stating that Congress, under its constitutional spending power, "may attach conditions on the receipt of federal funds upon compliance by the recipient with federal statutory and administrative directives" without offending the 10th Amendment of the U.S. Constitution). The Court in *Dole* noted that Congress's spending

Absent any arguments or proof from states that implementing a mandatory RTI or more comprehensive learning disability identification system¹²⁷ would be infeasible economically, or conflicts with the states' own interests, Congress should incentivize the states by mandate, in order to implement more desirable and uniform identification systems.¹²⁸ Indeed, a state could hardly argue that it is not the state's interest to provide adequate education to all students in the state. Thus, incentivizing states to use RTI models inevitably will allow states to provide services to those students who truly need special education services, while lowering the number of misidentified students and lowering special education costs.¹²⁹ Unfortunately, as of now it appears that the IDEIA did nothing to more effectively target those children with SLDs.

IV. CONCLUSION

Congress had noble aspirations when it sought to provide federal money to states in order to ensure that all children received a free and appropriate public education, regardless of special needs or disabilities. Congress hoped that by providing better education services to individuals with disabilities, those individuals would have greater ability in

power is not absolute, but is limited by a number of restraints. *Id.* at 207. Exercise of the spending power (1) must be for the general welfare, (2) must be done unambiguously, (3) must be related to national interests or programs, and (4) the action must not be prohibited by a different portion of the Constitution aside from the 10th Amendment. *Id.* at 207-08. The Court also suggested that certain exercises of the spending power may be unconstitutional if they amount to economic coercion. *Id.* at 211.

127. A more comprehensive system could include utilizing all of the identification techniques mentioned in this paper (Severe Discrepancy, Response-To-Intervention, Patterns of Strengths and Weaknesses) and requiring development of new testing that targets high-performing students.

128. *Cf.* S. REP. NO. 94-168, at 9 (1975). The report states that: This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue . . . Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. *Id.* The Senate Report suggests that only federal oversight of special education will establish uniformity and equality in the educational opportunities offered to students with disabilities. *Cf. id.*

129. *See generally* Hensel, *supra* note 9, at 1148.

becoming independent and productive citizens capable of contributing to society.¹³⁰

Unfortunately, these goals cannot be effectuated where the states and school districts either do not have the tools to effectively target those students in need of special education services, or can circumvent student identification altogether in order to reduce their special education expenditures.¹³¹ Congress made the finding that utilizing Response-To-Intervention methodologies would both provide students that are struggling academically with immediate instruction and ultimately reduce the number of children identified with specific learning disabilities in the long run. Congress should mandate such an identification program in order to ensure the realization of its underlying goal: educating all students equally, and allowing those with disabilities to become productive and independent citizens.¹³²

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130. IDEIA of 2004, 20 U.S.C. § 1400(c)(1) (2010), stating that:

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

Id. See also S. REP. NO. 94-168, at subheading “Need for Legislation” (1975), stating that:

The long range implications of [failing to educate individuals with disabilities] are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society. There is no pride in being forced to receive economic assistances. Not only does this have negative effects upon the [disabled] person, but it has far-reaching effects for such person’s family. . . . This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to [disabled] children cannot be allowed to continue.

S. REP. NO. 94-168, at subheading “Need for Legislation.”

131. See Part III for a discussion on the ineffectiveness of the IDEA to incentivize the states into proper and effective SLD identification.

132. See IDEIA of 2004, 20 U.S.C. § 1400(c)(1) (2010); S. REP. NO. 94-168, at subheading “Need for Legislation” (1975).