



# State Laws for RTI: An Updated Snapshot

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Professionally, and ultimately legally, the definition of *specific learning disabilities* (SLD) has been “a long-standing source of controversy, conflict, and crisis” (Kavale & Forness, 2000, p. 239). Yet students with SLD continue to be more numerous by far than any other group receiving special education services (National Center for Education Statistics, 2009; Zirkel, 2007). The long-time controversy concerning the eligibility criteria for SLD reached a high point with the emergence of response to intervention (RTI) as purportedly more effective than the traditional severe discrepancy approach. The 2004 reauthorization of the Individuals With Disabilities Education Act (IDEA) provided that states may no longer require severe discrepancy and that school districts “may use a process that determines if a child responds to scientific, research-based intervention as a part of” its SLD identification procedures (20 U.S.C. §1414(b)(6)). The resulting IDEA regulations (2008) required states to “adopt” SLD criteria that must not require severe discrepancy, must permit RTI, and “may permit the use of other alternative research-based procedures” for determining SLD eligibility (§ 300.307(a)). This article fills the gap in the literature with regard to the resulting state laws.

## **Previous Literature**

The professional literature concerning approaches for determining eligibility

for SLD is abundant. In recent years, special education and school psychology journals have been replete with articles concerning RTI. The experts in the field tend to fit on a currently fluid continuum ranging from those who support replacing the severe discrepancy approach with RTI (e.g., Bradley, Danielson, & Hallahan, 2002; Fletcher, Coulter, Reschly, & Vaughan, 2004) to those who advocate reconceptualizing severe discrepancy (e.g., Kavale, 2005; Scruggs & Mastropieri, 2002). The assessment depends in part on the scope, including the legal dimension, of the perspective. For example, although characterizing RTI as having promising potential to improve student learning, Burns, Jacob, and Wagner (2008, p. 274) explained why—from a legal, ethical, and professional perspective—they viewed RTI as “almost indefensible” as the primary way of identifying students with SLD. On the professional side, an articulate minority (e.g., Gerber, 2005) remains opposed to the RTI movement, while the balance of more recent articles tend to either raise implementation and research questions on the supportive side (e.g., Barnett et al., 2006; Fuchs & Deshler, 2007) or—as an entire issue of *Psychology in the Schools* illustrated (e.g., Flanagan, Ortiz, Alfonso, & Dynda, 2006)—recommend combining the two approaches.

Thus far, recognition of the legal issues has not been sufficiently accurate, as revealed by Zirkel’s (2006) response to the debate between the RTI advocates (Fletcher & Reschly, 2005; Gresham et al., 2005) and their opponents (Hale, Naglieri, Kaufman, & Kavale, 2004; Kavale, Kaufman, Naglieri, & Hale, 2005; Schrank et al., 2005). The inaccuracy appears to stem primarily from not only the partisan positions of these SLD scholars but also from their insufficiently current and clear legal knowledge.

Although the 2004 amendments of the IDEA moved partially in the direction of RTI by requiring states to at

least permit this approach and no longer require severe discrepancy, systematic study of the legal dimension has been largely lacking before and, even more clearly, after this legal milestone. Accurate information requires objective and up-to-date coverage of two separable clusters of primary authority: (a) the binding effect (within jurisdictional limits) of legislation, regulations, and case law; and (b) the marginal non-binding effect of administrative interpretations, such as U.S. Office of Special Education Programs (OSEP) policy memoranda and state education agency (SEA) guidelines.

In the only comprehensive analysis of the hearing/review officer and court decisions specific to SLD eligibility prior to IDEA 2004, Zirkel (2007) found that school districts won the vast majority of these cases, with severe discrepancy being, by far, the most frequent basis for the outcome and the need for special education being a relatively distant second. This analysis did not include cases based on RTI due to the time lag in the relevant effect of IDEA 2004. The resulting IDEA regulations were not effective until October 2006, and the regulations delegated to the states the choice among three approaches—to require or permit RTI, to permit or prohibit severe discrepancy, and to permit or omit “the use of other alternative research-based procedures” (IDEA regulations, 2008, § 300.307(a)).

### **Systematic studies of state laws specific to SLD eligibility before and after these IDEA regulations have largely relied on surveys . . . and often have blurred the line between legislation or regulations and policies or guidelines that do not have the binding effect of law.**

Moreover, sufficient time for local education agency (LEA) implementation and adjudicative proceedings also account for the lag before reported case law.

Similarly limited, systematic studies of state laws specific to SLD eligibility before and after these IDEA regula-

tions have largely relied on surveys of SEA representatives and often have blurred the line between legislation or regulations and policies or guidelines that do not have the binding effect of law. For example, the latest of the series of SEA surveys prior to the 2004 IDEA amendments (Mercer, Jordan, Allsopp, & Mercer, 1996; Reschly & Hosp, 2004) reported on the definitions and criteria for identifying students with SLD without any differentiation between legal requirements and recommended or prevailing practice.

Zirkel and Krohn’s (2008) state-by-state overview one year after the 2006 IDEA regulations found that for the 49 responding states, 26 were still only at the stage of either planned or proposed, rather than finalized, regulations. For the states that reported having finalized regulations, 4—Colorado, Delaware, Georgia, and West Virginia—reported requiring RTI. Among these 4, Delaware and Georgia reported providing the alternative of additionally using the “pattern of strengths and weaknesses” approach. For the remaining states, all but 3 appeared to be in the permissive category. The 3 “transitional” states were Illinois and Maine (which reported permitting severe discrepancy only until 2010) and Iowa (which reported prohibiting it but allowing RTI and the third, research-based alternative). For the states that had not yet finalized their laws, only Florida and Indiana

reported proposed regulations that would require RTI and prohibit severe discrepancy. The researchers acknowledged the fluidity of the categorization, although they did not specifically identify the reliance on state intermediaries as one of the sources of imprecision.

More recently, Ahearn (2008) conducted a survey of all state and non-state jurisdictions. For the responding 49 states, she found that 7 were still in the process of changing their states' regulations for determining SLD eligibility. For the remaining states, the regulations of 6—Colorado, Delaware, Georgia, Indiana, Iowa, and West Virginia—reportedly required the use of RTI and prohibited the use of severe discrepancy. Her tabulation for the remaining respondents was that 26 allowed both approaches and 10 also allowed another research-based alternative. However, the title of her questionnaire referred to “state policy changes,” and the initial item referred to “state regulations/policies,” thus introducing ambiguity in terms of the respondents' understanding as to scope of the survey.

The most recent study (Berkeley, Bender, Peaster, & Saunders, 2009) relied on an examination of materials available on SEA web sites, but fused together guidelines and practice documents without any systematic examination of the pertinent state laws. Being much more useful as a current picture of state-level practice, these results were difficult to decipher in terms of the IDEA-required adoption with regard to SLD identification. For example, Berkeley and colleagues reported that 15 states “have currently adopted an RtI model” (p. 87); yet they classified only two states—Delaware and Georgia—as using this model exclusively for SLD eligibility (p. 88).

### Methodology

The purpose of this study was to provide a more current and direct “snapshot” of the relevant state laws, separating out to the extent practicable SEA guidelines and survey respondent interpretations. The central question is: In response to the 2006 IDEA regulations' directive, which state laws have opted for mandating or merely permitting RTI, permitting or prohibiting severe discrepancy, and providing for the third other research-based alternative?

The three primary sources of the data were:

- A search of the Westlaw legal database for state statutes and regulations, using various combinations including “special education,” “response to intervention,” and/or “specific learning disability.”
- A search of each state's special education regulations and policy documents in the National Early Childhood Technical Assistance Center (2009) compilation.
- A search of each SEA's web site.

For this third and culminating source, we screened any available policies and guidelines specific to SLD identification and RTI for the sake of completeness and classification.

For the final contents of this legal snapshot, we had originally expected to include only legislation and regulations (i.e., strictly state laws). However, due to the lack of pertinent provisions in some states, we expanded the legal purview to SEA policies that the state board of education had formally adopted. Conversely, we excluded documents that fit under the catchall of “SEA guidelines” except to the extent—for which we provided differentiated entries—that they (a) clarified the state's law, or (b) were the only official source available to show what the state had “adopted” in response to the IDEA regulations' requirement. Additionally, in the exceptional cases of the handful of states where this three-pronged search yielded particularly confounding or missing data, we contacted the SEA special education director or the SEA's designated RTI representative for further, separately noted information.

### Results

Table 1 presents the state-by-state results as of our final data collection and analysis stage in September 2009. A threshold caveat warrants recognition: Although this direct focus on law rather than the officials and undifferentiated documentary sources of SEAs is a significant step beyond previous studies, it is ultimately limited to the interpretation of a knowledgeable and impartial individual. The frequency of the “?” symbol accompanying various entries in the table illustrates the lack

of definitiveness, with the final legal test being at the hearing/review officer and court levels.

A pair of threshold findings merits mention. First, several states have responded to the requirement to adopt criteria for SLD identification via policies or guidelines rather than legislation or regulations. Indeed, in a few states (e.g., Arizona and Wisconsin), earlier regulations requiring severe discrepancy (SD) are still “on the books” pending formal revision. The second threshold finding is that despite the interval of almost 2 years since the effective date of the 2006 IDEA regulations, the basic choices in approximately one fifth of the states are less than clear, particularly with regard to options beyond RTI. For example, the use of “pattern of strengths and weaknesses,” without further delineation in the relevant regulation or related guidelines, leaves unclear whether the intended referent is severe discrepancy and/or the third, research-based alternative.

The major finding is that 12 states have adopted RTI as the required approach for SLD identification. These 12 mandatory states fall into the following clusters:

- Colorado, Connecticut (by guidelines), Louisiana, Rhode Island, and West Virginia—completely with express or implicit prohibition of the severe discrepancy approach.
- Florida, Illinois, and, possibly for the combination, both Georgia and (by guidelines) Maine—completely but allowing the addition of a combination with severe discrepancy and/or the other, alternative approach.
- Delaware, New Mexico, and New York—only partially.

These various states provide deadlines ranging from dates already in the past (e.g., Connecticut, Delaware, and New Mexico) and those in the near future (e.g., Florida and Illinois) to New York's more cautious July 2012 deadline for Grades K–4.

The converse major finding is that—while reduced from a mandatory

**Table 1. State Laws Regarding SLD Eligibility Determination, September 2009**

State	Basis for Determination			Source Citation/Reference	Comments
	RTI	SD	Other		
AL	▲	▲	▲	ALA. ADMIN CODE r. 290-8-9-.03(10)	
AK	▲	▲	▲	ALASKA ADMIN. CODE tit. 4, § 52.130*	*Incorporation of IDEA regs
AZ	△*	△*		(www.ade.state.az.us/ess/policyprocedures)	*Third option is RTI or SD on an individual-child basis <sup>a</sup>
AR	▲	▲*	▲*	arksped.k12.ar.us/sections/rulesandregulations.html - §6.07	*Clarifying "pattern"
CA	▲	▲		CAL. EDUC. CODE § 56337	
CO	■*	●		1 COLO. CODE REGS. § 301-8: 2220-R-2.08(6)	*Deadline of 8/15/09
CT	□*	⊗*		(www.sde.ct.gov/sde/cwp/view.asp?a=2678&Q=320730#publications)	*Deadline of 7/1/09 ("SRBI")
DE	■*/▲	●*/▲		www.doe.k12.de.us/infosuites/students_family/specialed/ - §925.6.11	*Deadlines of 9/1/08 for elementary and 9/1/09 for other grades in reading and math (with RTI permissive for other 3 areas)
DC	▲	▲*		www.k12.dc.us/boe/documents/searesolutions/2006/sr06-05.pdf - § 3006.4	*Implicit
FL	■	+ ?*	+ ?*	FLA. ADMIN. CODE ANN. r. 6A-6.03018	*Deadline of 7/1/10, including alternative of combination of RTI and "pattern"
GA	■	+ ?*	+ ?*	GA. COMP. R. & REGS. 160-4-.05	*Via "pattern"
HI	[▲]	[▲]		HAWAII CODE R. 8-60-309 [proposed] <sup>b</sup>	
ID	▲	▲		http://www.sde.idaho.gov/SpecialEducation/manual.asp*	*Effectively binding via delegation under § 109 in http://adm.idaho.gov/adminrules/rules/idapa08/0203.pdf
IL	■*	+		ILL. ADMIN. CODE tit. 23, § 226.130	*Deadline of 9/1/10
IN	▲	●	▲*	511 IND. ADMIN. CODE 7-40-5(g) & 7-41-12	*Via "pattern"
IA	▲	▲?*	▲	IOWA ADMIN. CODE r. 281-41.309	*SEA guidelines: "accepted standards" but not IQ
KS	▲	▲?*	▲?*	KAN. ADMIN. REGS. § 91-40-10	*Via "pattern"
KY	▲	▲?*	▲?*	707 KY. ADMIN. REGS. 1:310	*Via "pattern"
LA	■	●?*	+ ?*	LA. ADMIN. CODE tit. 28, Pt. XLIII, § 308 & Bulletin 1508 <sup>c</sup>	*Via "pattern" with specified standardized achievement measurement

*continues*

**Table 1. Continued**

■ Required by law	▲ Permitted by law	● Prohibited by law
▣ Required by law as clarified by guidelines	△ Permitted by law as clarified by guidelines	⊗ Prohibited by guidelines
□ Required only by guidelines	△ Permitted only by guidelines	[ ] At proposal stage
	+ Permitted combination	? Evident ambiguity
		*See Comments

State	Basis for Determination			Source Citation/Reference	Comments
	RTI	SD	Other		
ME	▣*	+ ?**	+ ?**	05-071 ME. ADMIN. CODE Ch. 101, §§ V & VII	*Deadline of 7/1/10 <sup>d</sup> **Via "pattern," and for Grades 4-12 additional requirement of prescribed "cognitive" deficit
MD	▲	▲*	▲	MD. CODE REGS. 13A.05.01.06	*Implicit
MA	△/+*	△/+*		( <a href="http://www.doe.mass.edu/sped/iep/sld/default.html">http://www.doe.mass.edu/sped/iep/sld/default.html</a> )	*Third option is a combination of both
MI	▲	△*	▲	MICH. ADMIN. CODE r. 340.1713	
MN	▲*	▲		MINN. R. 3525.1341	*RTI = "SRBI" (+ separate state legislation with prereferral requirements)
MS	▲/+*	▲/+*	▲/+*	<a href="http://www.mde.k12.ms.us/special_education/policies.html">www.mde.k12.ms.us/special_education/policies.html</a> *	*LEA must "first consider" RTI + "and/or" allows any combination of the 3
MO	▲	▲*		<a href="http://www.mde.k12.ms.us/special_education/policies.html">www.mde.k12.ms.us/special_education/policies.html</a> *	**"Professional judgment" alternative for SD
MT	▲	▲*		MONT. ADMIN. R. 10.16.3019-10.16.3125	*Including alternative assessment for SD
NE	▲	△		92 NEB. ADMIN. R. & REGS. Tit. 92, § 51-006	
NV	▲	▲		NEV. ADMIN. CODE § 388.420	
NH	▲	▲	▲	N.H. CODE ADMIN. R. ANN. EDUC. 1107.02	
NJ	▲	▲		N.J. ADMIN. CODE §§ 6A:14-3.4 & 6:14-3.5	
NM	■*/▲	■*/▲		N.M. CODE R. § 6.31.10	*Deadline of 7/1/09 for Grades K-3 ("dual discrepancy" model)
NY	■*/▲	●*/▲		N.Y. COMP. CODES R. & REGS. Tit. 8, §§ 100.2 & 200.4	*Deadline of 7/1/12 for Grades K-4
NC	▲	▲		<a href="http://www.dep.state.nc.us/ec">www.dep.state.nc.us/ec</a> *	*Policies adopted by state board of education
ND	△	△		( <a href="http://www.dpi.state.nd.us/speced/guide/SLDGuide07.pdf">http://www.dpi.state.nd.us/speced/guide/SLDGuide07.pdf</a> )	
OH	▲	▲*	▲	OHIO ADMIN. CODE 3301:51-06	*Implicit
OK	▲	▲		<a href="http://sde.state.ok.us/Curriculum/SpecEd/Default.html">http://sde.state.ok.us/Curriculum/SpecEd/Default.html</a> *	*Policies adopted by state board of education
OR	▲	▲*	▲*	OR. ADMIN. R. 581-105-2170	*Clarifying "pattern"

*continues*

**Table 1. Continued**

■ Required by law	▲ Permitted by law	● Prohibited by law
▣ Required by law as clarified by guidelines	▲ Permitted by law as clarified by guidelines	⊗ Prohibited by guidelines
□ Required only by guidelines	△ Permitted only by guidelines	[ ] At proposal stage
	+ Permitted combination	? Evident ambiguity
		*See Comments

State	Basis for Determination			Source Citation/Reference	Comments
	RTI	SD	Other		
PA	▲	▲*		22 PA. CODE § 14.125	*Clarifying "pattern"
RI	■*	●*		(www.ride.ri.gov/specialpopulations/programs_services/learning_disabilities_and_Response_to_Intervention_(RTI).aspx)**	*Deadlines of 9/1/10 for elementary schools and 9/1/11 for secondary schools **Policies adopted by state board of education
SC	▲	▲	▲	S.C. CODE ANN. REGS. 43-243.1*	*Incorporation of IDEA regs only pending further development <sup>e</sup>
SD	▲	▲		S.D. ADMIN. R. 24:05:24.01:18-24:05:25:13	
TN	▲	▲		www.state.tn.us/education/spced/assessment.shtml#INITIAL <sup>f</sup>	
TX	▲	▲*	▲?*	19 TEX. ADMIN. CODE § 89.1040	*Partially clarifying "pattern"
UT	▲/+*	▲/+*		www.schools.utah.gov/sars/lawsregs/rules.htm	*Third option (in SEA guidelines) is combination of both.
VT	▲	▲		education.vermont.gov/new/html/pgm_spced/laws.html - §§ 2362.1(b) & 2362.2.1(h)(7)	
VA	▲	▲?*	▲?*	http://www.doe.virginia.gov/VDOE/sess/ - § 20-81-80(T)	*Via "pattern"
WA	▲/+*	▲/+*		WASH. ADMIN. CODE 392-172A-03045 & 392-172A-03080	*Third option is a combination of both
WV	■*	●*		http://wvde.state.wv.us/osp/policy2419.html - Ch. 4	*Deadlines of 7/1/09 for elementary schools; 7/1/10 for middle schools; and 7/1/12 for high schools
WI	[▲?]*	[▲/+?]*		http://dpi.wi.gov/sped/ld.html - first proposed revision*	*Originally issued proposal provides unclear role for "pattern" <sup>g</sup>
WY	▲	▲		7 WY. CODE R. EDU. GEN. § 10	

Note. RTI = response to intervention. SD = severe discrepancy. IDEA = Individuals with Disabilities Education Act. SRBI = scientific research-based intervention. SEA = state education agency. LEA = local education agency.

<sup>a</sup>The regulations, which require SD, still await finalized revision. E-mail confirming telephone conversation with Colette Chapman, Arizona's SEA director of special education, September 18, 2009, at 10:20 a.m.

<sup>b</sup>Scheduled for final approval in approximately November 2009. E-mail from Kathleen Nishimura, Hawaii's SEA director of special education, September 9, 2009, at 3:10 pm.

<sup>c</sup>For the Bulletin 1508, see [http://wwwprd.doa.louisiana.gov/LaServices/PublicPages/ServiceDetail.cfm?service\\_id=2316](http://wwwprd.doa.louisiana.gov/LaServices/PublicPages/ServiceDetail.cfm?service_id=2316).

<sup>d</sup>The regulations, unlike the guidelines, contain the qualifier "as appropriate," which adds to the interpretational tentativeness of the entries for Maine.

<sup>e</sup>South Carolina is in the process of developing new regulations specific to the approach(es) for SLD identification. E-mail from Marlene Metts, South Carolina SEA Director of Special Education, September 15, 2009, at 2:30 p.m.

<sup>f</sup>The state board of education adopted these policies. E-mail from Veronica MacDonald, Tennessee's SEA division of special education's director of program improvement, September 9, 2009 at 3:20 pm.

<sup>g</sup>The regulations, which require SD, still await finalized revision. A revised version of the original proposal is currently pending.

E-mails from Vaunce Ashby, Wisconsin's SEA consultant for SLD, September 10, 2009, at 2:51 pm, and September 18, 2009, at 12:47 p.m.

to a permissive status—the severe discrepancy approach remains viable rather than prohibited in the vast majority of states, with the choice delegated to the local district level. Moreover, in addition to the intermediate cluster listed previously, Massachusetts, Mississippi, Utah, and Washington explicitly allow a combined approach of RTI and severe discrepancy.

Finally, approximately 20 states appear to permit the third, research-based alternative, although almost one third of them have done so only ambiguously via the “pattern” language. Complicating classification, a few states allow a combination with severe discrepancy as the third alternative, while a few others allow other combinations as a final option.

## Discussion

The relatively frequent use of guidelines—and perhaps even board-approved policies—to establish or clarify the required state adoption of SLD identification criteria is subject to question. The primary advantage is flexibility for both the SEA and the local school districts, but the countervailing problem is confusion between legal requirements and professional recommendations. For example, in *Holmes v. Millcreek Township School District* (2000), the Third Circuit Court of Appeals rejected the parents’ reliance on guidelines, distinguishing their optimal focus from the binding effect of law, which in this IDEA case consisted of federal and state legislation and regulations. More recently, in a gifted education case, a Pennsylvania appeals court similarly rejected the parent’s reliance on the policies stated in a state agency’s manual, explaining that “the ODR Manual does not rise to the level of a properly promulgated Pennsylvania regulation, and [thus] does not have the force of law” (*Bethlehem Area School District v. Zhou*, 2009, p. 1287). The court cited rulings by other courts in various contexts that emphasized the difference between regulations and adjudications, which are legally binding, and general statements of policy, which are merely announcement of

tentative future intentions subject to the rulemaking or adjudicative process. Thus, depending on the statutes and precedents in each jurisdiction, even the use of policies formally adopted by the state board of education is a potentially gray area.

The overlapping lack of definitive clarity in terms of the specific choices in several states is largely attributable to the odd mixture of language in the IDEA regulations. Although the aforementioned regulation (§ 300.7(a)) requires each state to choose among the three approaches, just as long as RTI is at least permitted and severe discrepancy is permitted or prohibited but not required, the accompanying regulation (§300.9(a)) only provides two options—either RTI or “a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of [SLD].” In subsequent policy interpretations, which courts often consider persuasive but are not binding (Zirkel, 2003) and that was not necessarily available or at least agreed to by each state upon its required adoption of a choice, the U.S. Office of Special Education Programs (OSEP) opined that this “pattern” language refers to both the severe discrepancy and the third, research-based alternative (Letter to Zirkel, 2008).

The adoption of RTI as mandatory either completely or, in some cases, partially, in approximately one fourth of the states updates the earlier studies (Ahearn, 2008; Zirkel & Krohn, 2008) in four significant ways. First, it shows changes or corrections with regard to certain states. For example, both earlier studies reported, based on surveys of SEA representatives, that Indiana required RTI, but direct review of Indiana’s regulation reveals that while prohibiting severe discrepancy it permits RTI or, via “pattern,” the third alternative. Second, this later and more direct snapshot reveals previously unclear distinctions between law and guidelines. Third, it similarly reveals distinctions between complete and—in terms of grades or subject areas—par-

tial adoptions and among implementation deadlines. Finally, it identifies combinations and other complexities not previously canvassed systematically. Overall, the variations in and alternative to the mandate for RTI reveal shades of gray in what its advocates and opponents picture as a black-and-white matter.

The explicit recognition of a combined approach in a cluster of states (e.g., Florida, Illinois, Mississippi, and Washington) and its seemingly implicit allowance in all of the remaining states that do not prohibit severe discrepancy is particularly noteworthy because one segment of the professional literature advocates such an alliance between these competing paradigms (e.g., Flanagan et al., 2006; Hale, Kaufman, Naglieri & Kavale, 2006). Moreover, OSEP has opined that in states that allow all three approaches, the LEA may use any one or any combination of these alternate models (Letter to Zirkel, 2007).

In sum, whether RTI is viewed as a “negative,” its legal dimension has not sufficiently developed to be an entirely definitive snapshot. Moreover, its legal contours and contents are nuanced, fuzzy, and inevitably incomplete. We are preparing a follow-up study that will systematically examine the scope and standards of RTI in not only these states’ law but also the additional SEA guidelines, thus providing a more in-depth view that reveals the states’ specific legal requirements and normative recommendations.

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