3
RESPONSE TO INTERVENTION, MULTI-TIERED SYSTEMS OF SUPPORT, AND FEDERAL LAW
Analysis and Commentary

Mitchell L. Yell

Response to intervention (RTI), now more frequently referred to as multi-tiered systems of support (MTSS), are school-wide systems that consist of multiple tiers of instructional and behavioral supports provided to students who are not succeeding in general education. Such systems usually have three or four tiers that increase the intensity of academic and behavioral support to students in the higher tiers. The goals of RTI and MTSS systems are to identify students with learning and behavioral challenges who are not succeeding in the general education setting and move them to a tier in which they are provided the type and degree of support they need to succeed. In this chapter I address RTI/MTSS systems and federal law. First, I examine the legal basis of RTI and MTSS in the Individuals with Disabilities Education Act (IDEA). Second, I explain guidance issued from the Office of Special Education and Rehabilitative Services (OSERS) and the Office of Special Education Programs (OSEP) in the U.S Department of Education. Third, I address the Child Find requirements of the IDEA and how school personnel and officials may inadvertently violate the IDEA if they use their RTI/MTSS system in an inappropriate manner. Fourth, I review RTI/MTSS in the 2015 reauthorization of the Elementary and Secondary Education Act (ESEA), which was titled the Every Student Succeeds Act (ESSA). Finally, I offer guidelines on how school district personnel can develop and implement RTI/MTSS systems that comport with federal law.

RTI/MTSS may also be a matter of state education law. An examination of state law is beyond the scope of this chapter, but I encourage readers to consult their state laws. State laws can be located on the following websites: Cornell Law by Source: State at www.law.cornell.edu/states/listing.html or at FindLaw: State resources at www.findlaw.com/casecode/.

RTI/MTSS and the IDEA

Before the IDEA was reauthorized in the Individuals with Disabilities Education Improvement Act of 2004, two influential reports, the President’s Commission on Excellence in Special
Education and the Thomas B. Fordham Foundation and Progressive Policy Institute’s report *Rethinking Special Education for a New Century*, were issued. Both reports made recommendations to Congress regarding important issues in reauthorization. Complete coverage of these reports, which were comprehensive and included many recommendations, is beyond the scope of this chapter to review. Nevertheless, both of these reports addressed the importance of (a) adopting the sort of school-wide systems that we now call RTI or MTSS and (b) abandoning the so-called discrepancy formula to determine if a student had a learning disability (LD) in favor of adopting a system based on a student’s response to evidence-based interventions. I next briefly review pertinent sections of the reports.

**RTI/MTSS, the President’s Commission, and the Fordham Foundation/Progressive Policy Institute Reports**

In October 2001, President George W. Bush appointed a commission to make recommendations to Congress on reauthorizing the IDEA. The commission, which was created by executive order, was chaired by Terry Branstad, the former governor of Iowa. The commission held 13 public hearings in cities throughout the nation and heard testimony from hundreds of individuals including experts in special education, educational finance, administrators, teachers, educational researchers, parents, and students with disabilities who either testified before the commission or submitted written comments. The commission’s written report, which was titled *A New Era: Revitalizing Special Education for Children and Their Families*, was issued on July 1, 2002. The purpose of the Commission’s report was to begin a dialogue about needed reforms to the IDEA prior to the reauthorization.

Almost a year earlier, in November 2000, the Thomas B. Fordham Foundation, a conservative think tank in Washington DC that supports research, publications, and projects of national significance in elementary and secondary education reform, and the Progressive Policy Institute, a liberal Washington DC think tank that defines and promotes progressive politics for America in the twenty-first century, commissioned a set of papers and sponsored a conference to examine special education in America prior to the reauthorization of the IDEA.

In May 2001 the Foundation and the Institute published a series of reports, entitled *Rethinking Special Education for a New Century* (Finn, Rotherham, and Hokanson, 2001). The purpose of the reports, which were edited by Chester Finn and Charles Hokanson of the Thomas B. Fordham Foundation and Andrew Rotherham of the Progressive Policy Institute, was to begin a discussion about special education that would influence congress and the administration in the forthcoming reauthorization of the IDEA.

Both reports contained a number of recommendations that were to guide Congress during reauthorization of the IDEA. Interestingly, the President’s Commission Report and the Fordham Foundation reports had strikingly similar proposals regarding the category of learning disabilities and the importance of schools intervening early for students with learning and behavior problems to prevent school failure and obviate their need for special education services.

In the President’s Commission Report, the IDEA’s eligibility process for determining the existence of a specific learning disability, which usually relied on calculating a discrepancy formula, was derided as overly complex and lacking validity. These problems lead to “thousands of children being misidentified every year, while many others are not identified early enough or at all” (p. 8). The Commission made three major recommendations to improve the LD eligibility process. First, the IDEA should emphasize early identification of academic and behavioral problems through screening. When young children are identified as having educational problems, educators must intervene aggressively using research-based strategies and procedures. According
to the Commission, too often special education used a “wait to fail” model to identify children in need of special help. That is; schools did not assess students for eligibility in special education until students had failed in school for a year or two. The Commission members believed that by relying on the “wait to fail” model instead of stressing prevention and early intervention, students with disabilities often did not get the help they needed early enough to benefit from the programming. The commission, therefore, stressed the importance of adopting a special education model that was based on prevention, early and accurate identification, and aggressive intervention using research-based strategies and procedures. Moreover, such a model would include universal screening of young children, which the commission members believed would lead to better outcomes and results for all students because the system would identify those children who were most at risk for later achievement and behavioral problems, so school personnel could implement research-based early intervening programs. These recommendations clearly were very similar to RTI/MTSS systems.

Second, the Commission recommended that the IDEA’s identification and eligibility process should be simplified. The current system was found to be overly cumbersome, time consuming, and expensive. Additionally, the Commission stressed that the purpose of the assessment should be to drive instruction rather than merely to serve a gate-keeping function. As part of their assessment recommendations, the Commission recommended that Congress eliminate the regulatory requirement regarding the use of the IQ-Achievement discrepancy model to identify students with learning disabilities. One of the Commission members, Wade Horn, memorably stated that “I would like to encourage this commission to drive a stake through the heart of this over reliance on the use of the discrepancy model for determining for determining the kinds of children that need services” (p. 25).

Third, special education should incorporate models during the identification and assessment process that are based on response to intervention and progress monitoring. The commission found that many students “who are placed into special education are essentially instructional casualties and many students who do not learn to read or who do poor academically is that the instruction they received was not research-based.” According to the Commission, such students do not have disabilities; rather they have not been taught using procedures and strategies that work and when they fail to learn they are referred to special education. The problem is not the student; therefore, it is inappropriate instruction. To address this problem, the Commission recommended that the IDEA be modified so that students’ response to scientifically-based instruction becomes part of the criteria for determining the existence of LD and other high-incidence disabilities. Such a model would be designed to identify students who are having academic or behavior problems when these problems first become apparent and then matching evidenced-based instruction to their educational needs. Additionally, these models would use progress-monitoring systems to track how students were responding to interventions, so that the intensity of the interventions can be increased when students fail to respond.

Although the reports issued by the Fordham Foundation were considerably longer and contained more detail than the report of the President’s Commission, many of the final recommendations were similar. First, the Fordham Foundation report cited one of the major policy failures in education as being the failure to identify and address students’ preventable and remediable learning and behavior problems before they became intractable problems. The prevention problem, which was very similar to the President’s Commission warnings about education relying on the wait to fail model, was particularly acute in the area of learning disabilities, which according to the Fordham report “continues to focus on the identification and remediation of learning problems after they have grown severe” (p. 339). Thus, a
principle that the Foundation report suggested guide federal policy makers in the reauthorization of the IDEA was that the law should focus on prevention and early intervention using research-based practices.

Second, a chapter in the final Fordham report, *Rethinking Learning Disabilities* (Lyons et al. 2001) decried the use of the discrepancy formula when used as the primary criterion to determine whether a student had a specific learning disability. Following a thorough review of the literature and research on the LD identification process, Lyon and his colleagues made a number of recommendations to guide the Congressional reauthorization process. The recommendations were based on the following assumptions: (a) the discrepancy formula method for determining whether a student has a LD had serious scientific and educational problems and should not be used for making eligibility decisions, (b) the instructional methods used by teachers of students with LD often are of limited effectiveness because they are not started until a students’ problems are already very serious and difficult to remediate, and (c) early intervention and prevention strategies could ameliorate the serious academic problems of many students who eventually are served in special education. Lyons et al., noted that reliance on a discrepancy formula, which was “fraught with psychometric, statistical, and conceptual problems” (p. 266), harmed more children than it helped because it essentially required the use of a “wait-to-fail” model in which a child had to endure two or three years of school failure before he or she would receive special education interventions. Such practices had “devastating, lifelong consequences” for a child (p. 266) and should be replaced by the use of research-based prevention and early intervention efforts. Moreover, the authors suggested that the discrepancy formula be jettisoned in favor of “consideration of a student’s response to well-designed and well-implemented early intervention” for identification of LD (p. 279).

Lyons et al., also recommended that Congress should allow school-based teams to consider a student’s response to well-designed and well-implemented research-based instruction as part of the LD identification process and that the more complex assessments should be reserved for students who had not responded to these procedures. Moreover, the authors stated that school districts should use evidence-based early intervention and prevention programs with students who are not responding to instruction as soon as academic problems appear. The authors argued that by implementing school-wide early intervention programs, school personnel could significantly reduce the number of students who are later identified as LD and who would require intensive long term special education programs throughout their school careers. The authors also noted that without early and effective intervention, “the poor first-grade reader almost invariably becomes a poor middle school reader, high school reader, and adult reader. In short children who get off to a poor start in reading rarely catch up. While ‘we wait—they fail’ ” (p. 270).

The reports of the President’s Commission and the Fordham Foundation were very influential in the drafting of the IDEA reauthorization legislation. Of the many recommendations made in these report, the recommendations regarding the LD discrepancy formula and the importance of early intervention were to be included in the new law.

**RTI and IDEA Reauthorization**

When the IDEIA was signed into law by President Bush, it included major changes in the ways that school districts (a) determine eligibility for the category of LD and (b) spend a portion of their IDEA funds on schoolwide early intervening and prevention services. It is important to note that the only mention of response to instruction language is in the section of the identification of students with LD (IDEA, 20 U.S.C. § 1414[b][6]).
This part of the law prohibits states from requiring that school districts use a discrepancy formula to identify students with LD. Instead, school districts “may use a process that determines if the child responds to scientific, research-based intervention” (IDEA, 20 U.S.C. § 1414[b][6][B]). Thus, the IDEA permits school districts, also referred to as local educational agencies (LEAs), to use either a discrepancy formula, a response to intervention system, or a combination of both methods to determine if a student has a LD. The regulations issued by the Department of Education further clarified that when determining the existence of a LD, state educational agencies (SEAs) may (a) permit or prohibit the use of a severe discrepancy, (b) permit or require the use of RTI, or (c) permit or require the use of an alternative research-based procedures (34 C.F.R. § 300.307[a]).

In 2006, the U.S. Department of Education further emphasized the role of RTI in determining the existence of a learning disability:

Consensus reports and empirical synthesis indicate a need for major changes in the approach to identifying children with (specific learning disabilities). Models that incorporate RTI represent a shift in special education toward goals of better achievement and improved behavioral outcomes for children with (specific learning disabilities) because the children who are identified under such models are most likely to require special education and related services.


The U.S. Department of Education also noted that in SEAs and LEAs that use an RTI process to identify students with LD, the evaluation process must still use a variety of assessment tools and strategies and must not rely on any single criterion for determining eligibility. In fact, the Director of the Office of Special Education Programs (OSEP) wrote that “An RTI process does not replace the need for a comprehensive evaluation, and the results of an RTI process may be one component of the information reviewed” (Letter to Zirkel, 2007). Thus, RTI must not be the only factor in making the determination of eligibility but must be part of a full and individualized evaluation. Nonetheless, the inclusion of RTI in the IDEA “reflects the (U.S. Department of Education’s) position on the identification of children with SLD and our support for models that focus on assessments that are related to instruction and promote intervention for identified children” (U.S. Department of Education, 2006).

Three points are important to an understanding of RTI and the IDEA with respect to evaluation of eligibility for special education. First, determining eligibility of students with LD is the only context within the IDEA that RTI is mentioned. Using RTI for eligibility determination is not required for determination of any other disability area (e.g., emotional disturbance, other health impaired). Certainly, a student’s IEP team may use data collected from a school’s RTI process as information for developing a student’s individualized education program (IEP) but using RTI to determine eligibility in other categories is a matter of state law and not the IDEA (Letter to Brekken, 2010). Second, if in a schoolwide RTI system a particular assessment is used to screen all students in the school, written parental permission is not needed to conduct the assessment, even if the data is used prior to the eligibility or IEP process for a student with disabilities (Letter to Torres, 2009). Third, according to Zirkel and Thomas (2010), 12 states required the use of RTI in their evaluation processes. Of these twelve, only a few states have extended the RTI eligibility language beyond the category of LD. However, state law should be consulted to determine if there are additional requirements regarding the use of RTI in eligibility determination.
A second change that was especially significant, and directly related to the findings and recommendations of the President’s Commission and the Fordham report recommendations regarding prevention and early intervention, was the addition of early intervening services (EIS) to the section in the IDEA regarding the ways that a local education agency (LEA) may spend their IDEA funds (IDEA 20 U.S.C. § 613(a)(2)(C)). Early intervening services are coordinated, structured, academic and behavioral supports provided to at-risk students. The purpose of EIS is to identify students who are at risk for developing academic and behavioral problems while they are still in general education settings, and then to address these problems by delivering interventions in a systematic manner by using research-based academic and behavioral interventions along with progress monitoring systems. The regulations implementing EIS allow school districts to use up to 15% of its IDEA Part B grants to:

- develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

(34 C.F.R. § 300.226(a))

When implementing EIS, school districts may carry out activities including (a) professional development activities for teachers and other school staff to enable them to deliver scientifically based academic and behavioral interventions, and (b) providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction. Additionally, school district officials who use IDEA funds for early intervening services must describe the services that they are providing to general education students in a report to the respective state educational agencies (SEAs). Furthermore, the district officials must report on the number of students who are served in its early intervening services and the number of students in the services who were eventually found eligible for special education services.

The advantages of early intervening services include (a) identifying students early in their school careers using a risk rather than a deficit model, (b) emphasizing research-based practices in intervention, and (c) focusing on student outcomes rather than services received (Fuchs and Vaughn, 2012; Lane, Menzies, Ennis, and Oakes, 2015). Although RTI systems are included in neither the IDEA’s statutory nor regulatory language, the Office of Special Education and Rehabilitative Services (OSERS) has recognized that EIS funds may be used to support RTI as long as the funds are used for services provided to students without disabilities who need additional academic or behavioral support (U.S. Department of Education, 2007). So, for example, in a three-tier school-wide RTI system EIS funds could not be used for tier one activities, because such activities typically support all students in general education and special education, thus violating the prohibition against using EIS funds for students in special education. However, EIS funds could be used to support tier two activities (e.g., academic and behavioral supports provided to a small group of students who were at risk for developing serious academic and behavioral problems) and tier three activities (e.g., intensive interventions for students with serious academic or behavioral needs) as long as the students in these tiers were not in special education programs (U.S. Department of Education, 2008).

Although the reference to RTI in the IDEA is limited to a single instance—SEAs and LEAs may use a student’s response to research-based interventions in determining his or her eligibility
in the category of learning disabilities—OSEP has issued policy guidance letters that address RTI/MTSS in the much broader context of schoolwide interventions used with all students.

**RTI/MTSS and OSEP**

Officials of departments and agencies within the federal government often issue statements or letters that offer guidance regarding particular areas of law. For example, OSERS and OSEP in the U.S. Department of Education have frequently issued such documents to superintendents of public schools that provide the official’s interpretation of how to appropriately implement the IDEA. These guidance documents, which may be issued as question and answer documents, memoranda, or Dear Colleague Letters (DCLs), are essentially open letters that provide information on meeting particular obligations under a law and offer members of the public information about their rights under the laws that the agency enforces (Office of Management and Budget, 2007). The U.S. Department of Education has issued many such guidance documents. These open letters do not create law; neither do they add requirements to existing law; rather, they inform recipients about how the particular agency will evaluate compliance to legal obligations under the law by covered entities. Readers should note that many of these guidance documents can be found on the U.S. Department of Education’s website at www2.ed.gov/policy/speced/guid/idea/.

In the past few years OSEP have issued guidance documents that have addressed the use of RTI/MTSS systems of a schoolwide basis as well as on the more limited mention in the IDEA. For example, in a document entitled “Questions and Answers on RTI and EIS,” (U.S. Department of Education, 2007), OSEP officials wrote that EIS could be used to support an RTI system. OSEP officials also noted that although the U.S. Department of Education did not endorse any particular RTI model, the following core characteristics were at the basis of all RTI systems:

- Students receive high quality research-based instruction in their general education setting;
- continuous monitoring of student performance;
- all students are screened for academic and behavioral problems; and
- multiple levels (tiers) of instruction that are progressively more intense, based on the student’s response to instruction.

(p. 14)

Officials at OSEP also wrote that “The No Child Left Behind Act and IDEA call on educational practitioners to use scientifically based research to guide their decisions about which interventions to implement” (p. 15). They also reiterated that EIS funds could also be used to pay professional development activities and academic and behavioral evaluations, services, and supports. It is certainly understandable that officials at OSEP support an RTI/MTSS system to identify at-risk children and provide them with more intensive research-based interventions because it is consistent with the goal of EIS, which is “to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children” (20 U.S.C. 1401 [c][5][F]). RTI/MTSS systems are also consistent with the recommendations of both the President’s Commission and Fordham Foundations reports on the importance of the law emphasizing prevention, intervention, and moving away from the wait-to-fail model of identifying children for appropriate services.
On August 1, 2016 OSERS and OSEP issued a joint DCL that addressed the importance of implementing a multi-tiered behavioral framework. In the DCL, Sue Swenson, the Acting Assistant Director of OSERS, and Ruth Ryder, the Acting Director of OSEP, wrote that “implementing evidence-based, multi-tiered behavioral frameworks can help improve overall school climate, school safety, and academic achievement for all children, including children with disabilities” (p. 8). Specifically, the letter recognized that:

behavioral supports are most effectively organized within a multi-tiered behavioral framework that provides instruction and clear behavioral expectations for all children, targeted intervention for small groups not experiencing success, and individualized supports and services for those needing the most intensive support. (p. 8)

The DCL writers also acknowledged that the U.S. Department of Education has provided support to RTI/MTSS by funding centers such as the OSEP Technical Assistance Center on Positive Behavioral Interventions and Supports (www.pbis.org) and the National Center of Response to Intervention (www.rti4success.org) and by disseminating tools and resources to SEA and LEAs.

RTI/MTSS is included in the IDEA and embraced by OSERS and OSEP. Nonetheless, if school district personnel implement RTI/MTSS systems, and they fail to adhere to the Child Find requirements of the IDEA, they may find they have inadvertently violated the law.

**RTI/MTSS and the Child Find Requirement of the IDEA**

The IDEA and its implementing regulations require that SEAs must ensure that all students with disabilities, from birth to age 21, residing in the state who are in need of special education and related services or are suspected of having disabilities and needing special education are identified, located, and evaluated (20 U.S.C. § 1414[a][1][A]; 34 C.F.R. § 300.220). These Child Find requirements constitute an affirmative duty, because LEAs must have policies and procedures in place to find these students; LEAs must not wait for parents to request that a school district identify and evaluate their child with disabilities because it is the LEA’s responsibility. When students are identified in Child Find, the LEA is required to determine whether they have a disability under the IDEA. Child Find is triggered when LEA personnel have reason to suspect that a student has a disability covered under the IDEA, and that the student may need special education.

If school district officials fail to meet the IDEAs Child Find requirements, they may deprive children of a FAPE (Yell, 2016). This is potentially a very serious violation of the IDEA and could possibly result in a district having to pay compensatory education, tuition reimbursement, and attorneys’ fees (Tatgenhorst, Norlin, and Gorn, 2014). Failing to adhere to Child Find when school district personnel are aware that a student with academic or behavioral problems may have a disability but fail to refer the student for a special education evaluation can be a critical error (Yell, 2016; Zirkel, 2015). When Child Find disputes go to litigation, hearing officers and judges will generally focus on the following two issues: (a) Did school district personnel have reason to suspect that a student may be eligible for services under the IDEA and (b) Did the school district meet its evaluation obligation under the IDEA within a reasonable period of time (Zirkel, 2015).

When students who may qualify for special education services are located through a LEA’s Child Find process, these students should be referred for special education evaluation.
In addition to locating a student who may need special education through a Child Find process, a student’s parents or school personnel may also initiate a request for an evaluation to determine if the student has an IDEA disability. Additionally, before an evaluation can be conducted, a student’s parents or guardians must give their informed written consent to conduct the evaluation. After written consent is received, the evaluation must be conducted in a timely manner. The IDEA requires the initial special education evaluation must be conducted within 60 days of receiving parental consent to conduct the evaluation (IDEA, 20 U.S.C. § 614(a)(1)(C)(i)(I)). In cases in which SEA establish timelines, schools within that state must follow those guidelines.

RTI/MTSS is a school-wide approach that addresses the academic and behavioral needs of all students. The goal of the RTI process is to identify students at risk for school failure and then provide evidence-based procedures and progress monitoring procedures to adjust the intensity and nature of those interventions (U.S. Department of Education, 2011). The RTI system, because a general education tool that helps identify at-risk students, provides interventions in general education settings, and monitors the progress of all students (U.S. Department of Education, 2007). The ultimate goal is to successfully ameliorate a student’s academic and behavioral problems before a referral to special education is necessary.

Unfortunately, there is an inherent tension between RTI and Child Find (Walsh, 2008, 2016). This is because the purpose of RTI is to slow down LEA referrals to special education whereas the purpose of Child Find is to locate, identify, and evaluate as soon as LEA personnel have reason to suspect that a student has a disability covered under the IDEA, and because of that disability the child may need special education services (Walsh, 2016).

When an RTI/MTSS system is implemented with the IDEA legal framework, the system should support and inform the Child Find process because when a student continues to struggle academically or behaviorally, data from the LEA’s progress monitoring system can be used to support a referral of the student to special education (Tatgenhorst, et al., 2014). The RTI/MTSS system leads to more accurate referrals by ensuring that only students who truly need special education services receive those services and those students who struggle academically and behaviorally, but are not disabled under the IDEA, receive appropriate services in general education through the RTI/MTSS system (Tatgenhorst, 2014; Yell, 2016). In this sense the LEA’s use of RTI/MTSS process compliments the IDEA’s Child Find process, because it helps to identify students who have IDEA disabilities and should be referred for special education evaluation.

Unfortunately, in 2011, concerns that LEAs were not using RTI systems in this manner but were instead using RTI to delay and deny students’ evaluations for special education led Melody Musgrove, then the director of OSEP, to write a memorandum to all state directors of special education informing them that inappropriate use of RTI/MTSS could be a violation of the Child Find and evaluation mandates of the IDEA. In the memorandum, Musgrove wrote that “the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation . . . to a child suspected of having a disability under [the IDEA]” (p. 3). Musgrove also noted that after it is determined that a student may have a disability, a special education evaluation should be conducted expeditiously.

A case out of the federal district court for the western district of Texas, El Paso Independent School District v. Richard R. (2008; hereafter El Paso ISD) illustrated the potential problems that may occur when an RTI/MTSS system is used in such a way that it delays or denies special education evaluation. Although the case did not involve an actual RTI/MTSS system, the findings of the court can easily be understood in light of the inappropriate use of RTI/MTSS. In this case, the El Paso ISD had repeatedly referred a student with learning and behavior
problems for additional interventions in the LEA’s general education classroom rather than evaluating the student for special education services. The parents requested that a special education evaluation be conducted. When the district continued to refer their child for additional interventions in general education, rather than evaluate for special education services, the parents filed for a due process hearing.

At the hearing level, the state education hearing officer ruled that the LEA had violated child find requirements because the LEA’s Student Teacher Assessment Team (STAT) repeatedly referred the student for additional interventions in general education; the STAT had devolved from a body meant to “provide support and intervention” to “an obstacle to parents who want to access the special education referrals” (p. 18). The hearing officer wrote that the STAT process, which consisted of a team of school-based personnel who suggested interventions in the general education setting prior to referral, “while a mandatory district requirement, is not a prerequisite to conducting a special education evaluation” (p. 18). The hearing officer also noted that after a parent makes a request for a special education evaluation, the LEA should begin the special education evaluation process while at the same time providing intervention strategies through the STAT process.

The El Paso Independent School District appealed the hearing officer’s decision to the District Court of West Texas. The district court judge affirmed the hearing officer’s decision and used a two-part test to determine whether the LEA was in compliance with its Child Find responsibilities. The first part of the test involved an examination of whether the LEA had reason to suspect that the student had a disability, and whether there was reason to suspect that special education services might be needed to address that disability. The judge noted, because the first part of the test was answered in the affirmative, then the court would move to the second part of the test, which involved determining if the LEA evaluated the student within a reasonable time after having notice that the student’s academic and behavior problems were likely to indicate a disability.

Officials in the El Paso School District stated that the school’s STAT had delayed starting the special education evaluation process because the team needed time to implement intervention strategies in the general education setting. The district court judge was not impressed by this argument, finding that “one of the factors used to measure whether a local educational agency has met its IDEA responsibility to provide a FAPE is whether the accommodations accorded to the student demonstrate positive academic benefits” (El Paso Independent School District, 2008, p. 22). The facts in this case showed that the student in question had failed the Texas Assessment of Knowledge and Skills (TAKS), a statewide achievement test, for three years in a row and continued to display significant academic difficulties in reading, math, and science despite the district’s implementation of intervention strategies in the general education setting. According to the hearing officer, these should have been “clear signals that an evaluation was necessary and appropriate” (p. 22) because the general education interventions that had been used over the past three years had been shown to be ineffective in helping the student achieve passing scores on the TAKS. The district court judge found that faced with three years of repeated failure, a special education evaluation should have been conducted.

The district court then turned to the second prong of the court’s Child Find inquiry to determine if the LEA had evaluated the student within a reasonable time after suspecting the student might have a disability. The district court in this case pointed to other federal courts that had developed standards varying from a delay of 6 months (A. W. v. Jersey City Public Schools, 2007) to a delay of 12 months (O. F. ex rel. N.S. v. Chester Upland School District, 2002) from the time that a child’s parents had informed a school district that the child was experiencing difficulties or the point at which school officials had reason to suspect a child had a disability.
After the passage of this amount of time, therefore, a LEA should schedule a special education evaluation; if it does not, this could be a Child Find violation. In the *El Paso* case the court ruled that the 13 months that passed between the request for evaluation and the school’s offer of evaluation was unreasonable.

Finally, the court adopted the hearing officer’s finding that the IDEA “gives the parent a right to seek an evaluation and overrides local district policy concerning intervention procedures. . . . In those instances where the STAT committee impedes the exercise of rights guaranteed by federal law, those practices violate the IDEA” (p. 18). The decision in El Paso ISD and the OSEP memorandum should serve as a warning to LEA officials not to use an RTI/MTSS system to delay or deny a special education evaluation when a student’s performance indicates such a need, as this could be found to violate the IDEA.

Tatgenhorst et al. (2014) asserted that the key to LEAs balancing the Child Find requirements of the IDEA and RTI/MTSS is the LEA’s appropriate monitoring use of progress monitoring data. That is, when the data indicate that a student is continuing to struggle academically or behaviorally despite the implementation of evidence-based interventions in the RTI/MTSS system, that is a strong indication that a student may need to be referred to special education. Similarly, if the data shows academic or behavioral improvement, that is an indication that the research-based interventions are proving to be successful.

It is also critical that LEA personnel understand that, if a student’s parents refer their child for a special education evaluation, there are only two appropriate responses from the LEA. First, LEA officials could agree to conduct a special education evaluation, obtain the parents’ written consent, conduct an evaluation, and give the parents a copy of their procedural safeguards. Second, LEA officials could decide not to conduct a special education evaluation, give the student’s parents a prior written notice (PWN) form that describes the LEA personnel’s reason for refusing to conduct the evaluation, and provide the parents with a copy of their procedural safeguards. Of course, the student’s parents could request a due process hearing or file a state complaint, thereby taking legal action against the LEA for refusing to evaluate their child. It is not appropriate for LEA personnel to tell parents that their child is still in the LEA’s RTI/MTSS system and that an evaluation will not be conducted until the process is completed. That is not a legally defensible position and may violate the Child Find requirements of the IDEA. If the RTI/MTSS data does show that a student is making progress, and the data used is legitimate and correctly interpreted, however, that could be cited as part of the reason behind a LEA’s position list in the PWN, if the decision is not to evaluate a student.

**RTI/MTSS and the Every Student Succeeds Act of 2015**

On December 10, 2015 President Obama signed the Every Student Succeeds Act (ESSA). The law, which was a reauthorization of the Elementary and Secondary Education Act, replaced the No Child Left Behind Act. Although LEAs are not required to implement RTI/MTSS systems, SEAs and LEAs have great flexibility to adopt such systems to improve academic and behavioral programming. The ESSA defines MTSS as “a comprehensive continuum of evidence-based systematic practices to support a rapid response to students’ needs, with regular observations to facilitate data-based instructional decision making” (20 U.S.C. § 8802 [33]). Moreover, the law addresses the importance of professional development to prepare teachers of students who are at risk for developing academic and behavioral problems, students with disabilities, other teachers and instructional staff to address the instructional and academic needs of their students, including positive behavioral interventions and supports (PBIS) and MTSS systems. Additionally, the ESSA allows LEAs to use federal monies to support PBIS and MTSS. Although SEAs are

36
still developing plans to implement the ESSA, it is likely with the law’s emphasis on PBIS and RTI/MTSS, the use of such systems in LEAs will only increase.

**Recommendations**

Federal law does not require that LEAs adopt and use RTI/MTSS systems. Rather, the only mention in federal law is in the IDEA, which allows a LEA to use a process that determines if a child responds to scientific, research-based intervention as part of the LD eligibility process. Additionally, the ESSA does allow federal funds to be expended on RTI/MTSS and PBIS systems. Unfortunately, the improper use of RTI/MTSS systems can result in a violation of the IDEA. The following guidelines are offered to ensure that RTI/MTSS is implemented in a legally correct manner.

**Recommendation 1: Provide Ongoing Professional Development to Ensure that School District Administrators, Teachers, and Staff Understand Their Responsibilities under the IDEA**

If an LEA implements an RTI/MTSS system, it is important that school personnel do not inadvertently violate the Child Find provisions of the IDEA by delaying or denying a special education evaluation when school personnel believe a student may have a disability and need special education. Because laws are amended, LEAs should ensure that school administrators, teachers, and staff are kept abreast of all applicable state and federal laws regarding RTI/MTSS. SEAs and LEAs, therefore, should provide frequent and systematic professional development opportunities to school personnel on the IDEA and other federal and state education laws.

**Recommendation 2: Develop an RTI System Based on Best Practices**

The use of schoolwide RTI/MTSS systems is a relatively new development in education. Nonetheless, there is a growing body of evidence on how LEAs should structure and implement RTI/MTSS systems and tools and resources to assist LEA personnel with implementation. For example, OSEP currently funds the Technical Assistance Center on Positive Behavioral Interventions and Supports (www.pbis.org) and the American Institutes of Research maintains the Center of Response to Intervention (www.rti4success.org). The mission of these centers is to provide information and technical support to SEAs and LEAs.

**Recommendation 3: Use Instructional Practices that are Based on Evidence and Research**

Well-functioning RTI/MTSS systems are based on school-wide, multilevel instructional and behavioral programming for preventing school failure based on evidence-based instructional and behavioral interventions. The likelihood of student success in RTI/MTSS is increased if such systems are grounded in evidence-based practices.

**Recommendation 4: Adopt and Use Research-Based Progress Monitoring Systems**

When LEA personnel use RTI/MTSS, they need to rely on meaningful data to monitor student progress and make decisions. An LEA’s multidisciplinary team can then use this
information to determine if a student is responding to intervention in the general education setting; and if they are not, the student may be moved to a tier involving more intensive support. If a student is failing to respond to instruction in the intensive tiers, the team can use these data to determine if a student should be referred for special education services.

Summary

Prior to the reauthorization of the IDEA in 2004, two influential reports were issued that make recommendations to Congress to improve the special education law. These two reports, authored by the President’s Commission on Excellence in Education and the Thomas B. Fordham Foundation and Progressive Policy Institute included many recommendations, but two in particular became an impetus for developing RTI. One suggestion was that Congress change the emphasis on LD eligibility from a wait to fail model to a more proactive model in which school personnel would determine how children responded to scientific, research-based instruction. In the IDEA reauthorization congress changed the law to prohibit state educational agencies from requiring that local school districts use a discrepancy formula to identify students with LDs. Instead, states were allowed to require, or at least permit, school districts to adopt an identification method in which students’ response to research-based instruction was used to determine if students had LDs. A second suggestion made in the reports was to require LEAs to intervene early in the school careers of students with learning and behavior problems to prevent school failure and obviate their need for special education services. This suggestion influenced Congress to allow LEAs to use 15% of their IDEA funds to provide early intervening services to students who were at risk of developing academic or behavior problems.

In the past few years, however, the U.S. Department of Education has recognized that RTI/MTSS has become a nationwide movement toward making systematic changes in SEA and LEAs that improve the education of all students. The goal behind RTI/MTSS is that, by identifying students who are at risk of academic failure early in their school years and then providing increasing intensities of research-based instruction and progress monitoring, educators can prevent academic failure. The ESSA allows federal funds to be used to develop systems based on MTSS. Nevertheless, LEAs that adopt and implement such models must be aware of their responsibilities under the IDEA and ensure that they do not violate the Child Find and evaluation requirements of the law by using RTI/MTSS systems to delay or deny evaluations for special education eligibility.

References

A.W. v. Jersey City Public Schools, 486 F.3d 791 (3d Cir. 2007).
Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.
Individuals with Disabilities Education Act Regulations, 34 C.F.R. § 300 et seq.
Letter to Brekken, 56 IDELR 80 (OSEP 2010).
Letter to Torres, 53 IDELR 333 (OSEP 2009).
Letter to Zirkel, 47 IDELR 106 (2007).