

WEBINAR MATERIALS

**"The RTI Ruckus:
What Special Education Advocates Need to Know"**

November 2, 2011

Presenters:

Allison Hertog, Esq., M.A. and Edward Schultz, Ph.D.

ABOUT THE PRESENTERS:



Allison Hertog, Esq., M.A. founded Florida School Partners - now Making Schools Work - in 2005 to help South Florida families to understand their childrens' legal rights in public school; gain accommodations and special services in school; find the right public or private school placement and; navigate the process of attaining significant McKay Scholarships for their disabled children. Hertog comes to the field of special education law with a highly unique background. She is one of the few lawyers in the country who has a Masters degree in special education.

Ms. Hertog earned a degree in special education from Columbia University's Teachers College in New York and taught children with a variety of special needs for a number of years before enrolling in Loyola Law School of Los Angeles to become a legal advocate for children in need. Since law school Ms. Hertog has not only continued serving as a passionate educational consultant for children, but has worked in the United States Congress and practiced law in New York City. Ms. Hertog has spoken around the country about ADHD, learning disorders, special education advocacy and special needs vouchers, such as the Florida McKay Scholarship. Ms. Hertog is licensed to practice law in Florida and New York.



Edward Schultz, Ph.D., is currently an assistant professor at the West College of Education at Midwestern State University in Wichita Falls, Texas. In addition to teaching undergraduate and graduate courses at Midwestern State University, he is involved with several school improvement initiatives, primarily helping to create and sustain multi-tiered prevention and intervention systems of support.

His research interests include multi-tiered prevention and intervention systems of support, special education policy, and specific learning disability identification. He has several publications and has made numerous presentations at state, national, and international conferences. Dr. Schultz conducted a state-by-state survey and analysis of state criteria for identification of specific learning disabilities and is the author of SLD Evaluation: Linking Cognitive Assessment Data to Learning Strategies.

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WEBINAR AGENDA

- ▶ **Edward Schultz, Ph.D.**
Review of states' various SLD identification criteria, including RTI, RTI implementation data

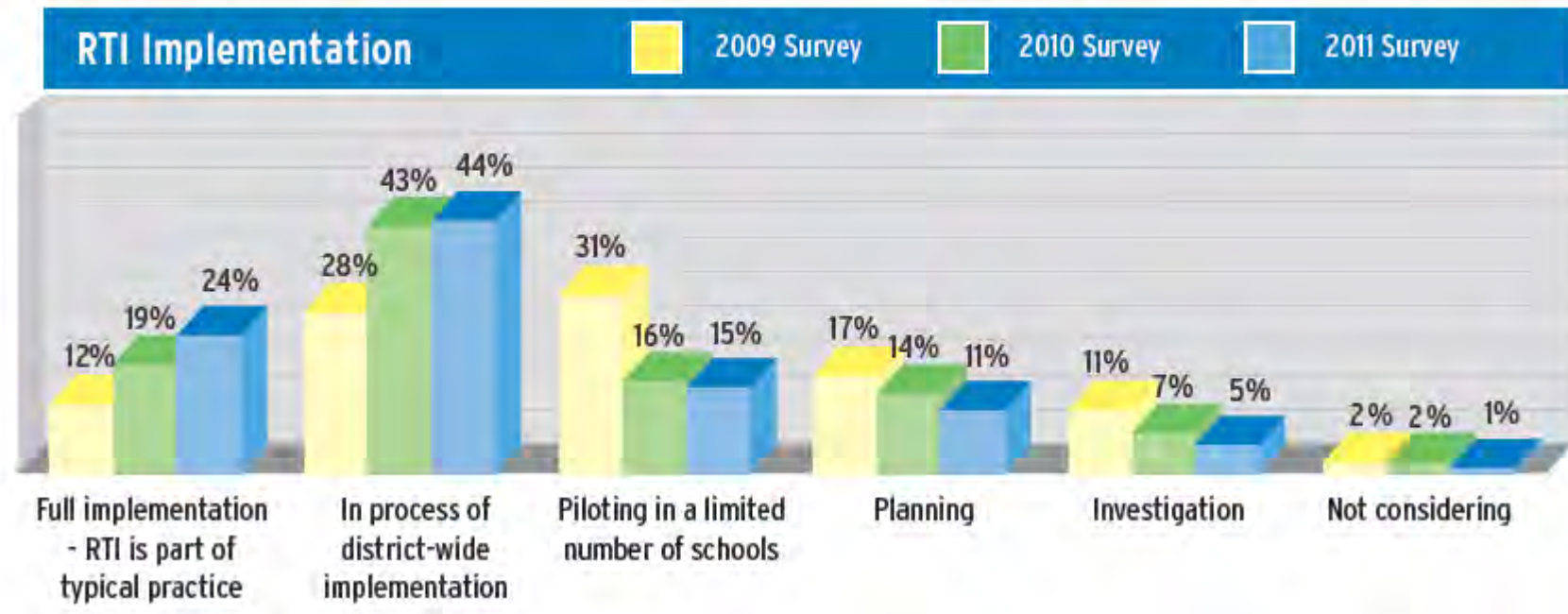
- ▶ **Allison Hertog, Esq., M.A.**
Review of some recent litigation and strategies for working with contemporary approaches to identification and eligibility

- ▶ **Questions from participants**

Specific Learning Disabilities (SLD) Identification *Ten Year Trend*

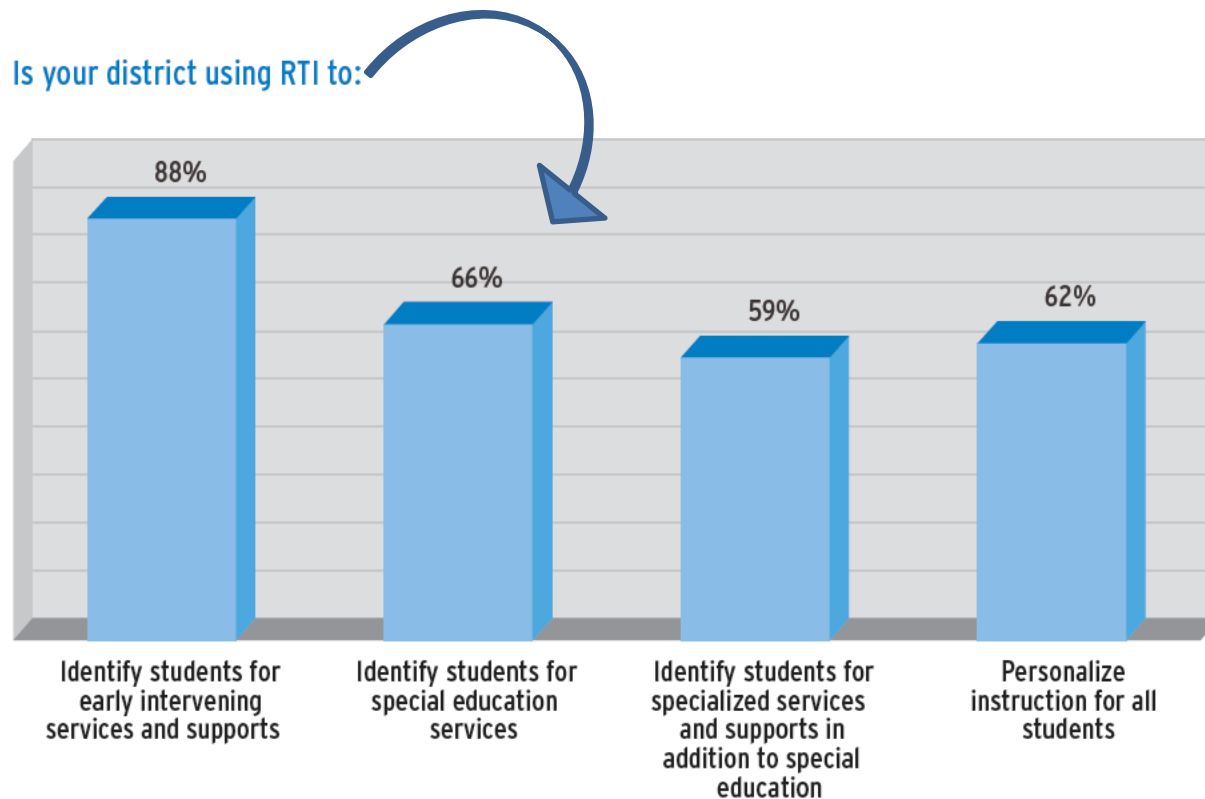
Year	All Disabilities	SLD	% SLD	% SLD chg
2001	5,861,366	2,878,315	49.1	-0.3
2002	5,959,282	2,878,146	48.3	0
2003	6,032,622	2,866,908	47.5	0.4
2004	6,118,437	2,839,694	46.4	-1.0
2005	6,109,569	2,780,218	45.5	-2.1
2006	6,081,890	2,710,476	44.6	-2.5
2007	6,007,832	2,620,240	43.6	-3.3
2008	5,884,739	2,522,735	42.9	-3.7
2009	5,882,157	2,486,419	42.3	-1.4
2010	5,822,808	2,415,564	41.4	-2.8

RTI 2011 Adoption Survey



Source: Response to Intervention (RTI) Adoption Survey 2011, Spectrum K12 School Solutions. Web-based survey of K-12 district administrators, 1,390 respondents

RTI 2011 Adoption Survey



Source: Response to Intervention (RTI) Adoption Survey 2011, Spectrum K12 School Solutions. Web-based survey of K-12 district administrators, 1,390 respondents

RTI 2011 Adoption Survey

- ▶ Schools are increasingly using RTI to create personalized instruction for ALL students with an increase from 49% in 2010 to 62% in 2011.
- ▶ Most districts (8 in 10) tracking RTI results report reduced referrals to special education.
- ▶ While still a small percentage of districts indicate RTI has been the focus of legal proceedings or official complaints (14% in 2011), the number has steadily grown.

Source: Response to Intervention (RTI) Adoption Survey 2011, Spectrum K12 School Solutions. Web-based survey of K-12 district administrators, 1,390 respondents

RTI 2011 Adoption Survey

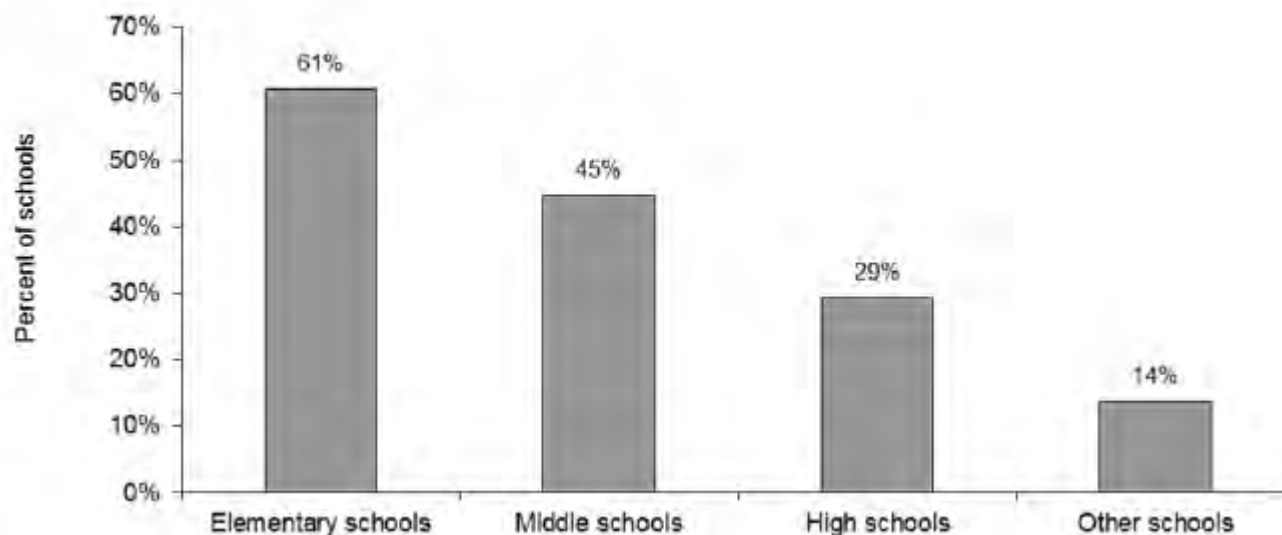
Please indicate the academic implementation level(s) for the following RTI components in your district.

	Fully Implemented	Partially Implemented	Implementing in 2011-2012	Planning	Not Implemented	Don't Know
General standard curriculum is available to all students	72%	18%	2%	4%	2%	2%
Common screening assessment is used for all students at least 3 times per year	47%	36%	3%	7%	5%	2%
Instruction and interventions are organized in a multi-tier system of supports	28%	50%	5%	12%	4%	1%
Research-based academic interventions are implemented for all students identified at risk	25%	52%	5%	12%	4%	2%
Assessments are used to monitor progress frequently for students receiving interventions	31%	49%	5%	10%	4%	2%
Data are collected, analyzed and used to guide decisions with instruction and intervention	29%	54%	3%	9%	4%	2%
Software is used to input and collect data and monitor student progress	26%	42%	6%	11%	12%	4%
Collaborative meetings focused on analysis of grade-level group data to guide overall core instruction are held regularly	26%	52%	5%	9%	6%	3%
A problem-solving approach is used to assist staff in identifying effective interventions and instructional strategies for struggling students	22%	54%	6%	11%	5%	2%
Collaborative meetings focused on problem solving for individual students are held regularly	27%	54%	4%	8%	5%	2%
RTI is used as a part of the process for identification for special education	37%	36%	3%	9%	11%	2%

IDEA National Assessment Implementation Study (IDEA-NAIS)

- Majority of districts (71%) reported using RTI.
- Few districts (11%) voluntarily using IDEA funds to implement RTI (via Coordinated Early Intervening Services provision)

Exhibit 3.15: National Estimates of the Percentage of Schools Using Rtl by School Level (School Year 2008–2009)



Source: IDEA National Assessment Implementation Study (NCEE 2011-4027) Washington, D.C., National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Dept. of Education, July 2011. Nationally representative survey

IDEA National Assessment Implementation Study (IDEA-NAIS)

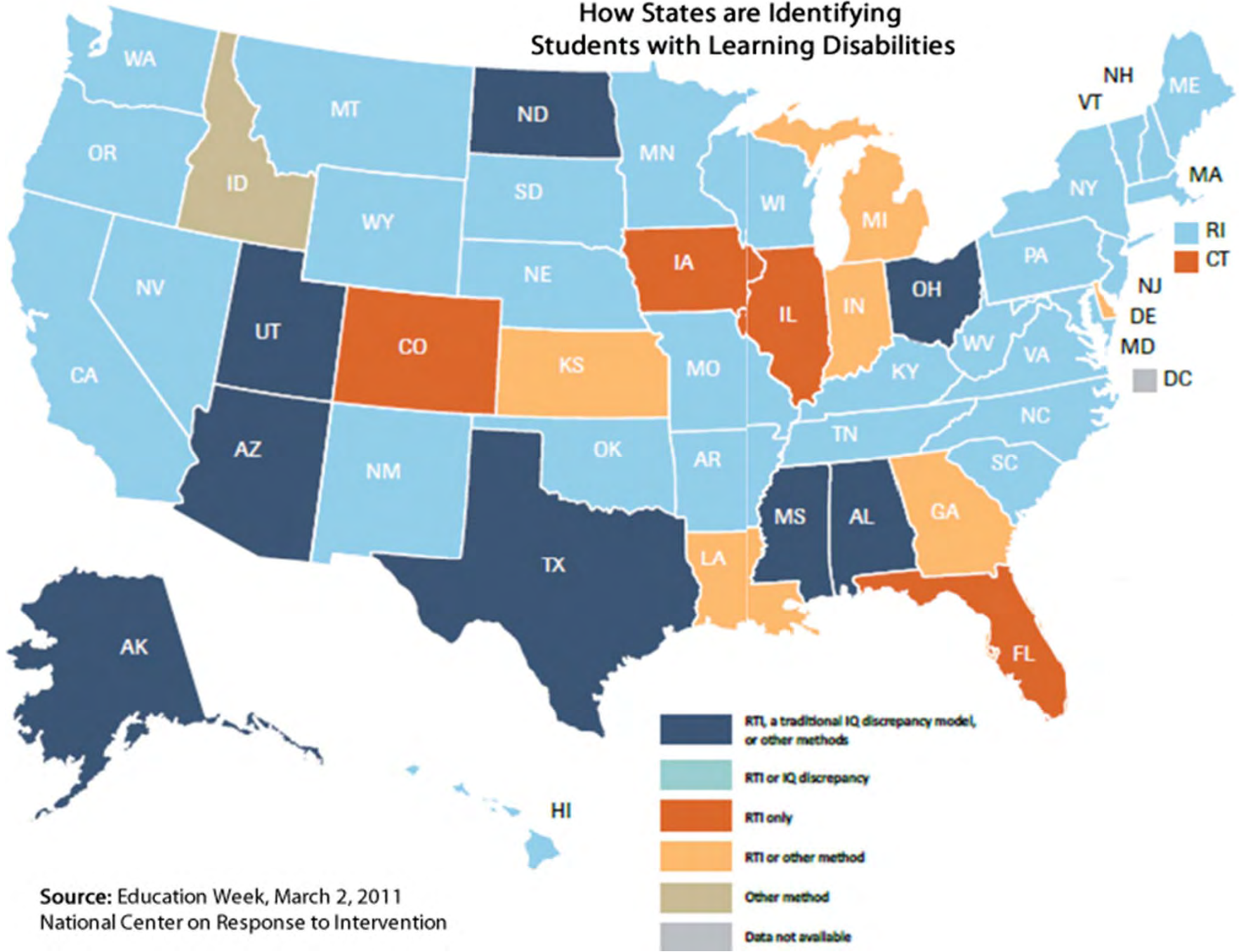
- Significantly lower percentage of students determined to be eligible for sped in districts using RTI w/o discrepancy data.

Exhibit 3.25: Percentages of All Students in Grades K–3 That Were Evaluated, and Results by Use of Types of Evaluation Data (School Year 2008–2009)

	Districts That Use RtI Data without Discrepancy Data	Districts That Use Discrepancy Data without RtI Data	Districts That Use Both RtI Data and Discrepancy Data	Overall ANOVA
	%	%	%	p-value
Percentage of all students evaluated for special education eligibility	2.96	3.96	3.38	0.051
Percentage of all students determined to be eligible for special education	1.97	2.81	2.43	0.010*
Percentage of evaluated students determined to be eligible for special education	66.57	70.90	71.83	0.837

Source: IDEA National Assessment Implementation Study (NCEE 2011-4027) Washington, D.C., National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Dept. of Education, July 2011. Nationally representative survey

How States are Identifying Students with Learning Disabilities



Source: Education Week, March 2, 2011
National Center on Response to Intervention

Approaches

- I. Discrepancy approaches: Prior to the IDEA regulatory changes in 2006, mathematical approaches, specifically the discrepancy model, have been the primary approach to identification of specific learning disabilities. (Baer, 2000; Dombrowski, Kamphaus, & Reynolds, 2004; Frankenberger & Fronzaglio, 1991; Kavale, 2002; Meyer, 2000).**

RTI/MTSS

- **Response-to-intervention (RTI)(aka Multi-Tiered System of Supports or MTSS): and problem solving approaches: Response-to-Intervention (RTI) is a multi-tiered prevention model of support that delivers interventions and services at increasing levels of intensity based on the response of the student (Bradley,Danielson, & Doolittle, 2007).**

RTI/MTSS

- Many benefits when used as prevention/pre-referral/service delivery model/prior to and part of SLD Diagnosis

SLD Diagnosis

- Diagnosis by “treatment responsiveness”
- Dual Discrepancy
- Gap Analysis

RTI Only Approaches: Issues

- Does not consider “psychological processes”
- Implementation: takes 3-5 years, approaches, resources
- Focus on reading
- Paucity of research at the secondary level
- No agreed upon teacher training standards or supervision methods to ensure interventions are carried out with integrity;
- RTI has no mechanism for differential diagnosis of SLD and other disorders;

Processing Deficit Approaches

- Identification based on processing deficits approaches have primarily focused on operationalizing the federal definition of SLD and the processes linked to reading such as “phonological processing.”
- Integrated Models (Idaho) and Pattern of Strengths and Weaknesses (PSW) Models
- Views RTI as complementary/not competing
- Requires an integrative approach of data analysis (IDA; Curran & Hussong, 2010).
- See LDA White paper

Common Legal Misconceptions about RtI

- RtI interventions are a mandatory prerequisite to an SLD evaluation
- All Tiers must be completed prior to referral for an evaluation
- Data from RtI interventions is a mandatory part of an eval for SLD

Legal Challenges to RtI

- Legal Challenges to RtI: Framed as “Child Find” Complaints.
 - When reasons arise to suspect a disability and the potential need for special education, districts have a duty to refer and evaluate a child for eligibility.
 - IDEA 2004 has not lessened the child find duty, but has allowed schools to delay initiating a referral for evaluation while general ed interventions are proceeding. Two big questions are: How long of a delay is allowed and how much “progress” is enough to avoid referral?

Legal Challenges to RtI

- ***El Paso* Two Step Analysis to Review if School Complied with Child Find:**
 - 1. Did the school have reason to suspect that the student had a disability and need for special ed.
 - 2. Did the school evaluate the child within a reasonable period of time after the reason to suspect a disability needing special ed. *El Paso Indpt. Sch. Dist. V. R.R.* (W.D. TX, July 14, 2008) 50 IDELR 256.

Legal Challenges to Rtl

- **Many Districts are unsuccessfully using Rtl as a defense to Child Find complaints when general education interventions went on for two or more years without a referral for a psycho-ed evaluation.** (See, e.g., *El Paso, supra*; *A.P. v. Woodstock Bd. of Ed.* (D. Conn. 2008) 50 IDELR 275; *W.H. v. Clovis Unified School District* (E.D. Cal, June 8, 2009) 52 IDELR 258; *In re the Matter of Student v. Delaware College Preparatory Academy*, (DE DP 09-12 (7/30/09)); *D.B. v. Bedford Cnty. Sch. Bd.* (W.D. VA, April 23, 2010) 54 IDELR 190; *Jackson v. Northwest Local Sch. Dist.*, 55 IDELR 71 (S.D. Ohio, August 3, 2010)).

Court Challenges to RtI cont.

However courts appear to be more willing to forgive delays in SLD identification if:

- **a) “Progress” is shown using general ed interventions.** (*See, e.g., Student v. Austin Indep. Sch. Dist., 110 LRP 49317 (SEA TX 2010); Pajaro Valley Unified Sch. Dist., 109 LRP 31586 (SEA CA 2009); Montgomery County Bd. of Educ., 51 IDELR 259 (SEA AL 2008)*)
- **b) Parent is on board with the general ed intervention or “agrees” that there is no need for a psycho-ed evaluation.** (*See, e.g., Salado Indep. Sch. Dist., 108 LRP 67655 (SEA TX 2008); Compare, El Paso Ind. Sch. Dist. v. R.R., 50 IDELR 256 (W.D. TX 2008) decision for the parent when parent forewent sped eval. but was not provided with refusal or procedural safeguards and repeatedly referring ADHD student for “interventions” over a three year period, Contra, Scott v. District of Columbia, 45 IDELR 160 (D.D.C. 2006) parent prevailed in claim that child should have been evaluated, even though agreed to “alternative strategies”).*)

Court Challenges to Rtl cont.

- **c) Child has missed a significant amount of school or has had traumas in home life.** (*See, e.g., S. v. Wissahickon Sch. Dist.*, 50 IDELR 216 (E.D. Pa. 2008); *Lake Park Audubon Ind. Sch. Dist.*, #2889, 50 IDELR 117 (SEA MN 2008); *Contra, City of Chicago Sch. Dist.* 299, 109 LRP 72479 (SEA IL, 2009) school district found liable even though child missed a year of school because third grade student was failing and was retained)

OSEP Memo 1/21/2011

- OSEP “Definition” of RtI Models
 - “ A schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and interventions within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. “ . . . schools must “adjust the intensity and nature of those interventions depending upon a student’s responsiveness.”
- “Core Characteristics”
 - “High quality research-based instruction” in gen. ed.
 - “Continuous” monitoring of student performance
 - All students screened for academic and behavioral probs.
 - Multiple levels of instruction that are “progressively more intense,” based on the students response to instruction

OSEP Memo 1/21/11 cont.

- Parental Request for Initial Evaluation:
 - May be requested “any time to determine if the child is a child with a disability”
 - “Use of Rtl strategies cannot be used to delay or deny the provision of a full and individual evaluation to a child suspected of having a disability”
 - If the LEA agrees with a parent that the child “may be a child who is eligible for special education and related services, the LEA must evaluate the child.”
 - If LEA does “not suspect that the child has a disability,” and denies the parental request, LEA must provide written notice explaining why they refuse and the information used as basis for their decision.
 - **LEA cannot reject a referral or delay initial evaluation on basis that child has not participated in Rtl.**

State Complaint Decisions 2011

- Ohio Department of Education Letter of Findings, dated August 29, 2011
 - Nine parents in a single school district prevailed in a state complaint against their school district in a affluent community. State found that dist violating IDEA because:
 - a) students with suspected LD subjected to intervention process which did not address their academic difficulties (despite being a researched-based intervention) and were denied timely evaluations (2-4 years) even when not making adequate progress;
 - b) district did not comply with policies and procedures – students were not referred for evals until parents repeatedly requested them; district engaged in practice which caused parents to falsely believe were being psycho-educationally evaluated called “Differentiated Evaluation.”
 - Dist requ’d to cease using “Differentiated Evaluation” form; develop a “corrective action plan” including professional development; participate in “on-site records review to verify IDEA and state compliance.

State Complaints cont.

- Iowa Department of Education State Complaint Final Decision, dated March 31, 2010
 - Not Rtl case on its face. School delayed evaluation without gen ed interventions and unilaterally placed child in sped class prior to referral.
 - Complaint filed by Iowa Protection and Advocacy on behalf of a single child with behavioral difficulties. Mother and private therapist asked for an IEP and was denied without formal refusal. Child wasn't made eligible for sped services until about a year and a half after the district should have suspected he was a child with a disability.
 - State concluded that the following violated IDEA: a) district did not document its purported offer to evaluate which was allegedly rejected by mother; b) parent was not adequately informed of her right to demand an evaluation; c) parent's consent to an evaluation was unreasonably delayed by the district; d) district unilaterally placed child in sped classroom prior to eligibility.

Strategies for Working with Contemporary Approaches to Identification and Eligibility

- **Two Main Ways to Work with Rtl**
 - **Challenge SEA/LEA Rule/Implementation**
 - **Use as Advocacy (and litigation) Tools**

 - **Challenge SEA/LEA Implementation**
 - **Federal Law Violations**
 - Does SEA/LEA Implementation Violate IDEA?
 - » Child Find – delays/denials of identification
 - » Districts using Rtl as Defense to Child Find claims
 - **Rebuttal Arguments**
 - Bogus “Rtl”
 - Dist. denied parent request for eval. w/o basis
 - Parent told could not have eval or district “defacto” denied eval.
 - Parent “agreed” to gen ed interventions, but did not get procedural safeguards
 - Quality of Rtl intervention so poor or not followed with fidelity that child should have been referred earlier

Strategies – Federal Law Cont.

- **Does SEA Law/Guidelines (itself) Violate IDEA?**
 - » Can't challenge under IDEA for failure to implement adequate RtI framework.
 - » State illegally mandates discrepancy model
 - » State has RtI law/guidelines but they don't require or recommend core characteristics of RtI
 - » Examples
 - N.J. law does not explicitly or implicitly require tiers of progressive interventions or universal screening.
 - F.L. state rule mandates of RtI for Speech/Language Impairment identification, not only SLD identification
 - A.Z., N.Y., F.L. recommend that Tier 2 and T3 can last up to 30 weeks each.
 - » Suit against St. DOE in Federal Court
 - » State Complaint
 - » OCR Complaint that discriminates vs. class of disabled

Strategies – State Law

- LEA Violates State Law/Guideline
 - Failure to implement Rtl as required by State
 - » Examples
 - State explicitly requires continuous progress monitoring but LEA only monitors using standardized assessments 2x/year.
 - But – this can be fudged by the LEA in court
 - State explicitly requires multiple tiers of progressively more intense instruction, but that's not happening.
 - » State Complaint vs. LEA
 - » Child Find due process complaint based on state and federal law violations.

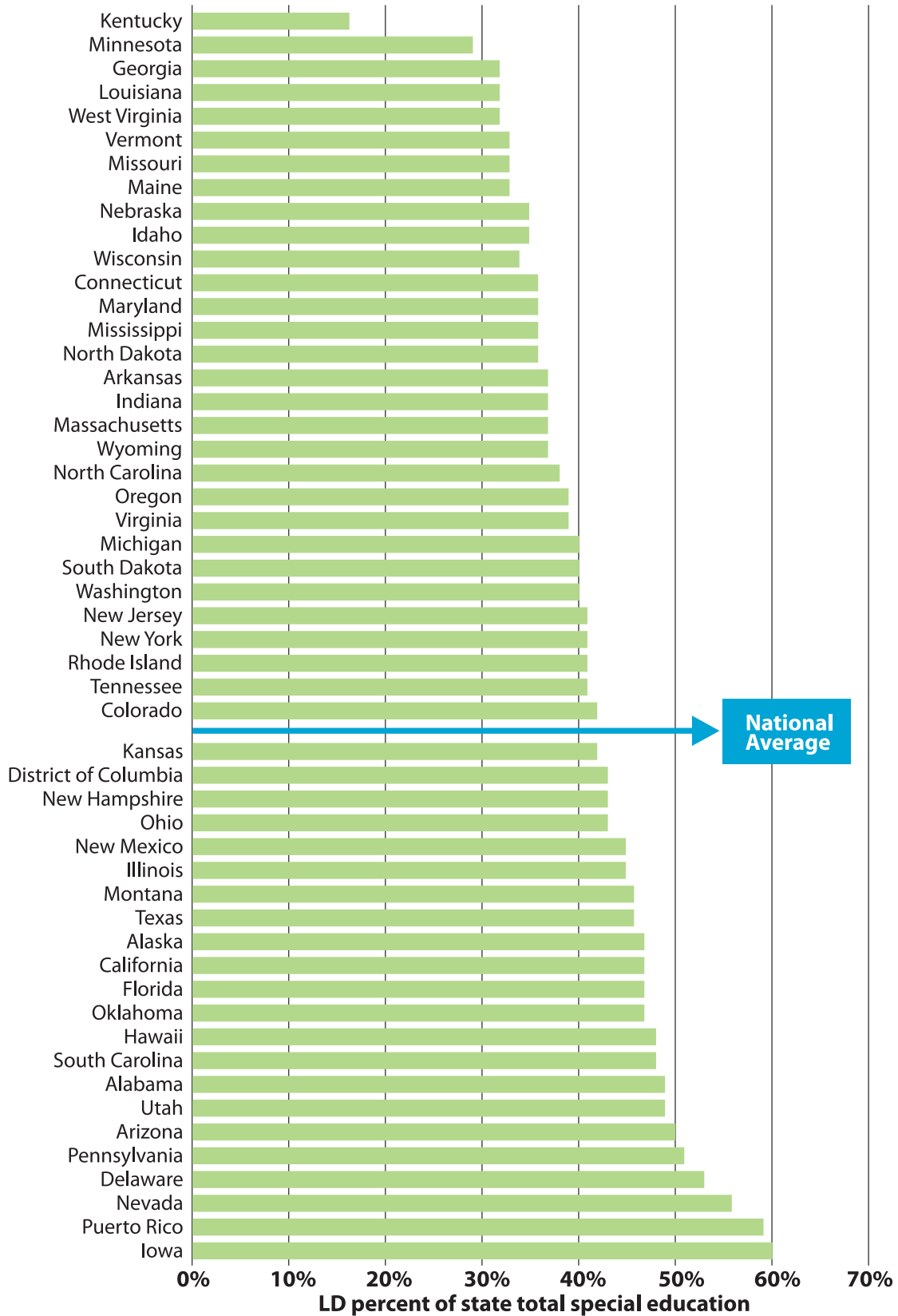
Strategies – Rtl as Advocacy (and litigation) Tools

- Finally , “high quality” or “scientific” research-based instruction and continuous progress monitoring is mandated for struggling learners.
 - At SST or IEP meetings, demand:
 - » What gen ed interventions are available?
 - Get dist. SLD personnel involved in case.
 - » What tier of Rtl is child in?
 - » How long is each Tier? When will child move from Tier 2 to Tier 3?

Strategies – Rtl as Advocacy (and litigation) Tools

- » To see the progress monitoring data.
- » To see the research supporting an intervention's validity for the learning needs of the child.
- » To know how often the child receives the intervention.
- » If child in Tier 2 or Tier 3, that intervention should be progressively increasing in intensity. Ask for that data.
- » Parent needs to draw a clear line in writing – are they agreeing to the gen ed interventions, or are they requesting an eval, or both?

LD percent of total special education by state in 2009



Source: IDEA Part B 2009 Child Count, Ages 6-21, www.IDEA.org

IDEA Part B Child Count, Specific Learning Disability, Ages 6-21

State	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	Percent Change '04-'09
Alabama	41,635	41,696	40,509	38,882	37,863	37,396	-10.0%
Alaska	8,098	7,872	7,545	7,410	7,450	7,492	-7.5%
Arizona	58,639	59,323	59,076	55,909	55,832	55,287	-5.7%
Arkansas	22,475	22,845	22,568	20,912	19,663	19,289	-14.2%
California	324,318	312,622	303,042	293,652	286,859	282,792	-12.8%
Colorado	31,175	30,500	29,996	29,795	29,991	30,430	-2.4%
Connecticut	25,875	24,537	22,960	22,960	21,867	21,634	-16.4%
Delaware	9,192	9,173	9,297	9,230	9,060	8,980	-2.3%
District of Columbia	6,132	5,384	4,987	4,608	4,624	4,644	-24.3%
Florida	179,783	179,783	176,939	172,077	166,494	159,096	-11.5%
Georgia	53,274	54,322	54,387	52,842	51,520	51,937	-2.5%
Hawaii	9,801	9,455	9,061	8,634	8,404	8,400	-14.3%
Idaho	11,940	11,320	10,447	9,400	8,888	8,329	-30.2%
Illinois	141,131	140,904	140,798	135,745	130,080	124,450	-11.8%
Indiana	62,909	62,969	62,187	60,741	59,258	56,892	-9.6%
Iowa	37,469	37,106	36,972	36,322	37,038	36,438	-2.8%
Kansas	23,936	23,992	23,785	23,374	23,229	23,188	-3.1%
Kentucky	16,789	15,338	14,408	13,728	13,587	13,891	-17.3%
Louisiana	34,071	29,475	27,919	26,469	25,104	24,391	-28.4%
Maine	12,006	11,344	10,642	10,038	9,816	9,504	-20.8%
Maryland	38,543	37,074	34,845	33,211	33,332	32,874	-14.7%
Massachusetts	68,742	66,102	63,974	61,927	59,739	55,585	-19.1%
Michigan	96,459	94,646	92,486	88,358	85,370	82,273	-14.7%
Minnesota	35,185	33,875	32,385	31,320	30,525	30,626	-13.0%
Mississippi	30,994	29,722	27,704	24,682	21,966	19,597	-36.8%
Missouri	55,664	52,260	48,041	44,028	40,058	37,216	-33.1%
Montana	9,299	8,826	8,368	7,955	7,454	7,087	-23.8%
Nebraska	15,172	14,696	14,291	14,037	13,670	13,903	-8.4%
Nevada	25,288	25,294	25,203	24,711	24,248	23,138	-8.5%
New Hampshire	13,376	13,267	12,996	12,983	11,988	11,619	-13.1%
New Jersey	106,306	104,134	100,022	96,519	84,480	86,585	-18.6%
New Mexico	24,211	22,389	20,253	18,550	17,888	17,776	-26.6%
New York	180,695	174,692	170,959	167,073	160,314	163,136	-9.7%
North Carolina	67,010	64,535	63,006	62,476	62,659	63,133	-5.8%
North Dakota	4,970	4,590	4,377	4,307	4,223	4,159	-16.3%
Ohio	97,519	100,563	102,837	104,375	102,469	102,129	4.7%
Oklahoma	46,717	46,587	45,371	44,106	41,414	40,658	-13.0%
Oregon	31,104	30,060	28,992	28,042	27,664	27,681	-11.0%
Pennsylvania	142,385	144,224	143,318	141,013	138,113	134,525	-5.5%
Puerto Rico	45,929	51,349	52,295	53,211	56,239	62,927	37.0%
Rhode Island	13,215	12,572	11,835	10,957	10,277	9,633	-27.1%
South Carolina	47,764	47,708	46,872	45,587	44,296	43,334	-9.3%
South Dakota	6,971	6,688	6,560	6,443	6,255	6,153	-11.7%
Tennessee	48,279	46,558	45,866	45,166	43,576	43,171	-10.6%
Texas	251,732	243,509	231,900	214,728	197,280	186,933	-25.7%
Utah	28,493	28,216	27,601	27,617	27,909	28,928	1.5%
Vermont	4,261	4,143	4,097			4,128	-3.1%
Virginia	67,359	65,505	63,202	60,517	58,733	57,478	-14.7%
Washington	47,740	46,470	44,852	44,002	44,134	44,375	-7.0%
West Virginia	16,819	15,873	14,936	14,134	13,535	12,864	-23.5%
Wisconsin	46,866	45,043	42,850	40,671	38,569	37,574	-19.8%
Wyoming	4,910	4,763	4,686	4,524	4,451	4,370	-11.0%
Totals	2,830,625	2,775,893	2,704,505	2,609,958	2,519,455	2,480,028	-12.4%

Source: IDEA Part B Child Counts 2004-2009, Ages 6-21, www.IDEA.org