JUDICIAL REVIEW OF THE SPECIAL EDUCATIONAL PROGRAM REQUIREMENTS UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT: WHERE HAVE WE BEEN AND WHERE SHOULD WE BE GOING?

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In the nearly sixteen years since the enactment of the Education for All Handicapped Children Act (EAHCA),[1] hundreds of parents have brought suit in state and federal courts to test the limits of the Act as it affects their school-age children with disabilities.[2] School districts also frequently have filed suit under the Act.[3] The litigation has had an important impact on the identification, evaluation, educational programming, and placement of the more than four million students with disabilities who are receiving services under the Act.[4] Unfortunately,

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1. The Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), extensively amended what is now known as the Individuals with Disabilities Education Act (IDEA; formerly The Education of the Handicapped Act or EHA), 20 U.S.C. §§ 1400-1485 (1988).

When the EHA was renamed the IDEA, the modifying phrase "with disabilities" was substituted for previous references to "handicapped" students, children, youth, infants, et cetera. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103, 1141-50 (1990). This Article adopts the new terminology except where unavoidable, as when referencing the title of Public Law Number 94-142, "The Education for All *Handicapped* Children Act."

2. A LEXIS search reveals that several hundred cases were decided in federal courts under the EAHCA between 1977 and 1990. Several hundred cases were also filed in state courts. *See* T. MARVELL, STUDENT LITIGATION: A COMPILATION AND ANALYSIS OF CIVIL CASES INVOLVING STUDENTS 1977-1981, at 7, 17 (1982). A 1989 study found a "mini-explosion" of special education litigation in the federal courts during the 1980s. By extrapolating data, the study projected a total of 342 reported federal cases and 99 reported state cases during the decade. *See* Zirkel & Richardson, *The "Explosion" in Education Litigation*, 53 Educ. L. Rep. (West) 767, 778-81 (1989).

3. *See, e.g.*, Burlington School Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985); Board of Educ. of N.Y. v. Ambach, 612 F. Supp. 230 (E.D.N.Y. 1985); Norris v. Massachusetts Dep't of Educ., 529 F. Supp. 759 (D. Mass. 1981).

4. According to the latest figures from the Department of Education, 4.3 million students are receiving services under the Education for All Handicapped Children Act. *See* U.S. DEP'T OF EDUC., TWELFTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION OF THE HANDICAPPED ACT A-4 (1990).

the courts have interpreted ambiguous statutory and regulatory provisions in ways that are not consistent, especially with respect to the meaning of the requirement that students with disabilities receive a "free appropriate public education"[5] (FAPE) with their nondisabled peers "to the maximum extent appropriate."[6] The purposes of this Article are to: (1) examine and critique the case law generated by the FAPE provision of the Act; and (2) recommend certain refinements in the judicial interpretation of this provision in the light of the "Individualized Education Program" (IEP) requirements for students with disabilities.[7] In particular, I argue that the courts have not utilized all the required contents of the IEP as a substantive means to advance the quality of educational programming for students with disabilities, and should do so in the future.

I. Background

Prior to passage of the Education for All Handicapped Children Act (hereinafter the IDEA-B or the Act)[8] in 1975, the States had adopted different educational standards and procedural safeguards for students with disabilities. In response to growing sensitivity to the plight of such students, several states enacted statutes in the late 1960s and early 1970s establishing that all children with disabilities had the right to a public school education.[9] In a few areas in the Northeast, federal courts had begun to apply the Due Process and Equal Protection Clauses of the Fourteenth Amendment[10] to protect students with disabilities from exclusion and expulsion from public schools and from placements made without parental notice and input.[11]

5. 20 U.S.C. § 1412(2)(B) (1988).

6. 20 U.S.C. § 1412(5) (1988).

7. *See* 20 U.S.C. § 1401(a)(19) (1988). *See also* 34 C.F.R. §§ 300.340-.349 (1990).

8. As the largest of the various programs authorized by what was the Education of the Handicapped Act (EHA), the EAHCA was frequently referred to in court cases as the EHA-B. Because the EHA has been renamed the Individuals with Disabilities Education Act (IDEA), *see* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1142 (1990), the EAHCA will now be referred to as the IDEA-B.

9. *See* F. Weintraub, A. Abeson & D. Braddock, State Law and Education of Handicapped Children: Issues and Recommendations 16 (1971).

10. U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

11. *See, e.g.*, Mills v. Board of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

Elsewhere, however, many school districts identified, labelled, and served special education students without providing for parental involvement. In some states, schools continued to provide funds for the education of certain groups of children with disabilities but not for others, doing so as a matter of public largesse, not individual right.[12] School district decisions to serve some children with disabilities and exclude others often were motivated as much by historic stereotyping and bureaucratic inertia as by assessment of individual students' abilities.[13]

The IDEA-B amounts to a commitment by the federal government to the States to underwrite a portion of the cost of educating children with disabilities, while mandating that the States guarantee certain substantive and procedural rights of these students. In return for its financial support, the federal government requires assurances from the states that each disabled student under the Act will have available a free, appropriate public education (FAPE) in the least restrictive environment (LRE) appropriate to the student's needs.[14] Each student's needs are to be determined by a multifaceted, nondiscriminatory assessment,[15] which in turn is to provide the basis for the design of an individualized education program (IEP) for each eligible student. The IEP is to report the child's current level of educational performance, set annual goals and short-term instructional objectives, and establish objective criteria by which to measure student progress toward those objectives. The IEP is also to specify the extent of both special education and regular education programs.[16] In special education jargon, the Act requires schools to provide FAPE in the LRE with an IEP, all based on a nondiscriminatory assessment process.

To lessen the risk of arbitrary or self-serving unilateral action by school districts, the IDEA-B includes a number of procedural safeguards designed to ensure that parents of handicapped children are not excluded from the process of special education identification, evaluation, programming, and place-

12. Maine and New York had statutes excluding certain children as ineducable as late as 1975 and 1974, respectively. *See* Dussault, *Is Exclusion Legally Defensible*, in PERSONS WITH PROFOUND DISABILITIES 43, 45 (F. Brown & D. Lehr eds. 1989).

13. *See* Burgdorf & Bersoff, *Equal Educational Opportunity*, in THE LEGAL RIGHTS OF HANDICAPPED PERSONS 53, 57 (R. Burgdorf ed. 1980).

14. *See* 20 U.S.C. § 1412(2)(B), (5) (1988). *See also* 34 C.F.R. §§ 300.1(a), 300.550-.556 (1990).

15. *See* 20 U.S.C. § 1412(5)(C) (1988). *See also* 34 C.F.R. §§ 300.530-.534 (1990).

16. *See* 20 U.S.C. § 1401(a)(19) (1988).

ment. Parental participation was thought by the drafters of the Act to be the surest mechanism against ill-considered decision-making.[17] Among the safeguards is a requirement that parents be given notice of all proposals or refusals to initiate the identification, evaluation, placement, or provision of FAPE to a student with disabilities.[18] In addition, the IDEA-B regulations require the school to seek permission from parents prior to evaluating the child for special education eligibility and prior to initial placement into a special education program.[19] The Act requires the school to provide parents access to their child's personally identifiable educational records and to permit the parents to obtain, at public expense, an independent educational evaluation if dissatisfied with the school district's evaluation.[20] Significantly, parents are to be invited to participate in the development of their child's IEP, including the formulation of educational goals and objectives and the criteria for evaluations of progress.[21] Finally, upon written request, parents are entitled to an administrative hearing conducted by an impartial "due process hearing officer" if they and the school cannot agree on the child's identification as a special education student or on the evaluation, placement, or provision of FAPE to their child.[22] The impartial hearing officer is empowered to resolve the dispute, subject to appeal.[23]

Although thousands of parents have used the administrative hearing remedy, far fewer have sought review in state or federal court of administrative hearing decisions. Most cases challenging decisions of administrative hearing officers respecting substantive rights have focused on programming and placement decisions.[24] A significant number also have challenged school district interpretation of the related services provisions

17. The Fifth Circuit described the formality of the Act's procedures as "itself a safeguard against arbitrary or erroneous decision-making." Jackson v. Franklin County School Bd., 806 F.2d 623, 630 (5th Cir. 1986).

18. *See* 20 U.S.C. § 1415(b)(1)(C) (1988). The statute also provides for the designation of a surrogate parent in situations where the parents or guardian is not known or is unavailable, or the child is a ward of the state. *See* 20 U.S.C. § 1415(b)(1)(B) (1988).

19. *See* 34 C.F.R. § 300.504(b) (1990).

20. *See* 20 U.S.C. § 1415(b)(1)(A) (1988).

21. *See* 20 U.S.C. § 1401(a)(19) (1988).

22. *See* 20 U.S.C. § 1415(b)(2) (1988).

23. *See* 20 U.S.C. § 1415(e)(1) (1988). Each state is given the authority to establish either a one-stage or a two-stage administrative hearing procedure. *See* 20 U.S.C. § 1415(b)(2), (c) (1988). After exhausting the administrative review process, an aggrieved party is given the right to bring a civil action. *See* 20 U.S.C. § 1415(e)(2) (1988).

24. *See, e.g.*, T. MARVELL, *supra* note 2, at 6-7.

of the Act.[25] A smaller number have concerned identification and evaluation issues, and these have lent themselves to class action suits.[26] Recently, a number of attorney's fees cases have been brought under the Handicapped Children's Protection Act.[27]

In many of the cases in which parents claim a violation of a substantive educational right, they also claim that the school district has failed to honor the procedural requirements of the Act. The Supreme Court made clear in *Hendrick Hudson District Board of Education v. Rowley*[28] that the procedural safeguards are at the heart of the Act and are a primary focus of judicial review.[29] Nevertheless, procedural safeguards alone do not assure a student with disabilities the substantive right to an appropriate education in the least restrictive environment appropriate to the student's needs.

When a parent or the school files suit because of a disagreement over what constitutes an appropriate special education program, courts not only should examine compliance with the procedures, but they also should determine whether schools have met the programming requirements of the Act. The programming requirements of the IDEA-B are also an integral part of the Act and must be enforced to comply with the purpose of the Act. To a large extent, these programming requirements determine the meaningfulness of the student's education; accordingly, they are the main focus of this Article.

Part II of this Article begins with an analysis of *Rowley*, in which the Supreme Court established a "some educational

25. Among the more interesting cases involving related services are Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984); Bevin H. by Michael H. v. Wright, 666 F. Supp. 71 (W.D. Pa. 1987); Detsel by Detsel v. Board of Educ., 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd*, 820 F.2d 587 (2d Cir.), *cert. denied*, 484 U.S. 981 (1987); and Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

26. Among the important cases involving evaluation and identification are Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980); and Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd in part*, 793 F.2d 969 (9th Cir. 1984).

27. Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified in scattered sections of 20 U.S.C.). Major cases include Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir.), *cert. denied*, 111 S. Ct. 556 (1990); McSomebodies v. Burlingame Elementary School, 886 F.2d 1559 (9th Cir. 1989); Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1117 (1990); Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988); and Eggers v. Bullit County School Dist., 854 F.2d 892 (6th Cir. 1988).

28. 458 U.S. 176 (1982).

29. *See Rowley*, 458 U.S. at 205-06 ("Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard.").

benefit" standard for determining whether students with disabilities are receiving an appropriate education under the IDEA-B. I assert that the Court in *Rowley* was interested not only in the IEP document but also in its implementation. Therefore, only those courts that interpret the *Rowley* standard to require educational process under the IEP understand the true intent of that standard.

In Part III, I argue that the elements of the IEP provide an overlooked means of gauging whether students with disabilities are progressing sufficiently to be receiving a FAPE. In particular, I urge the courts to go beyond a focus on the nature of special education services, and especially to examine and apply the criteria by which progress toward achievement of IEP objectives is to be measured. I also argue that the burden of proof in FAPE disputes properly rests with the school district at the administrative hearing level. Finally, I conclude that many courts misconstrue the Supreme Court's admonition that questions of methodology are for the schools, and, as a result, invoke that admonition as an excuse for failing to determine whether the IEP produces an appropriate education for students with disabilities.

II. Programming Issues

A. *The* Rowley *Case*

In *Hendrick Hudson District Board of Education v. Rowley*,[30] the first and most important case to reach the Supreme Court regarding the IDEA-B, the Court addressed two issues: (1) what standard of educational services is required by the IDEA-B's requirement of a "free appropriate public education," and (2) what the role of state and federal courts is in reviewing administrative hearing decisions under the Act.

Addressing the first issue, the *Rowley* Court stated:

> Noticeably absent from the language of the [IDEA-B] is any substantive standard prescribing the level of education to be accorded handicapped children. . . .
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> . . . [I]n seeking to provide . . . access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to

30. 458 U.S. 176 (1982).

> make such access meaningful. . . . [T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.[31]

The Supreme Court rejected several standards that lower courts had adopted regarding the FAPE provision. Among them was a standard requiring maximization of special education students' chances of self-sufficiency.[32] Another was a standard providing opportunities to reach "potential commensurate with the opportunity provided to other children."[33] A third was an absolute standard that required maximizing the potential of children with disabilities.[34]

Before rejecting these standards, the Court analyzed the language and legislative history of the IDEA-B. It noted that the Act defined a free appropriate public education (FAPE) as follows:

> The term "free appropriate public education" means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.[35]

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31. *Rowley*, 458 U.S. at 189, 192.

32. Such a standard was adopted in Armstrong v. Kline, 476 F. Supp. 583, 604 (E.D. Pa. 1979), *aff'd on other grounds sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 449 U.S. 1109 (1981).

33. Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982). *See also* Springdale School Dist. No. 50 v. Grace, 693 F.2d 41 (8th Cir. 1981). After the Supreme Court's decision in *Rowley*, this relative maximization standard was also found to be North Carolina's and California's standard. *See* Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 983 (4th Cir. 1990) (citing Harrell v. Wilson County Schools, 58 N.C. App. 260, 264, 293 S.E.2d 687, 690 (1987), *cert. denied*, 460 U.S. 1012 (1988)); Pink v. Mount Diablo Unified School Dist., 738 F. Supp. 345, 347 (N.D. Cal. 1990).

34. *See Rowley*, 458 U.S. at 197 n.21, 200. *Cf.* David D. v. Dartmouth School Comm., 775 F.2d 411, 423 (1st Cir. 1985) (Massachusetts higher standard of "maximum possible development" incorporated into federal standard), *cert. denied sub nom.* Massachusetts Dep't of Educ. v. David D., 475 U.S. 1140 (1986); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575, 583 (3d Cir. 1985) (New Jersey standard is "best available placement"). The New Jersey standard applied in *Geis* has since been lowered to conform to the federal standard. *See* Lascari v. Board of Educ., 116 N.J. 30, 35, 560 A.2d 1180, 1189 (1989) (requiring the school's individualized education program to provide an education "according to how the pupil can best achieve success in learning").

35. *Rowley*, 458 U.S. at 188 (emphasis added by the Court) (quoting 20 U.S.C. § 1401(a)(18)).

After examining the Act's definitions of special education and related services, the Court concluded that a FAPE, as defined by the Act, consists of educational instruction specially designed to meet the unique needs of the child with disabilities, supported by such services as are necessary to permit the child to benefit from the instruction.[36] In addition, the Court noted that a FAPE is to be delivered in accordance with requirements (A) through (D), as listed by the Court.[37]

After reviewing the legislative history to determine whether Congress intended to require schools to provide more instruction than the statutory language indicated, the Court concluded that

> [i]mplicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be *sufficient to confer some educational benefit* upon the handicapped child. *It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.*[38]

The Court's language clearly indicates that the purpose of providing access to an appropriate education is to confer actual benefit upon the child. The phrase "sufficient to confer some educational benefit" has been cited by lower courts as a substantive standard by which to review Individualized Education Programs (IEPs).[39] The Court continued:

> The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the hand-

36. *See id.* This standard was taken directly from the statutory definitions of special education and related services. *See* 20 U.S.C. § 1401(a)(16), (17) (1988).

37. *See Rowley*, 458 U.S. at 188.

38. *Id.* at 200-01 (emphasis added).

39. *See, e.g.*, Knight v. district of Columbia, 877 F.2d 1025, 1029 (D.C. Cir. 1989); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1047 (5th Cir. 1989); Abrahamson v. Hershman, 701 F.2d 223, 228 (1st Cir. 1983); Matta v. Board of Educ.-Indian Hill Ex Vil Schools, 731 F. Supp. 253, 254 (S.D. Ohio 1990); Lascari v. Board of Educ., 116 N.J. 30, 35, 560 A.2d 1180, 1189 (1989).

icapped child.[40]

In other words, the Court maintained that because related services are meant to enable the "handicapped child" to *benefit* from special education, special education instruction too must be intended to benefit the student. It then concluded that the special instruction and related services delivered to a student with disabilities are to be "individually designed to provide educational benefit,"[41] a phrase to which this Article will return.

In establishing the "some educational benefit" standard, the Supreme Court acknowledged both that self-sufficiency was too low a goal for some high-functioning students with disabilities and that a strict "equal"-opportunity standard could well disregard the extensive needs of some students with disabilities.[42] Therefore, it interpreted the Act as establishing a modest but nonetheless genuine right to beneficial, personalized instruction.

The *Rowley* Court did "not attempt . . . to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[43] Instead, it confined its analysis to the situation before it, that of Amy Rowley, a young hearing impaired student who had attained an above-average level of achievement in a regular elementary school classroom with the help of a tutor for the deaf, a speech therapist, and an FM wireless hearing aid. Amy's parents were seeking the related service of a sign-language interpreter to enhance Amy's academic progress. The Court determined, however, that because her achievement was "above average in

40. *Rowley*, 458 U.S. at 201 (footnote omitted) (emphasis added by the Court) (quoting 20 U.S.C. § 1401(a)(17)).

41. *Id.* at 201.

42. The Court chose to equate the concept of equal opportunity with the concept of same opportunity. The standard proposed by the trial court, namely, an equal opportunity to learn commensurate with the opportunity offered to nonhandicapped students, did not mean delivery of the same services but delivery of an equivalent opportunity to learn through delivery of different, individualized services appropriate to the student's needs. *See* Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982). The Supreme Court found that the statute provided no basis for the standard utilized by the district court: "Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that states maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.' " *Rowley*, 458 U.S. at 189-90 (quoting Rowley v. Board of Educ., 483 F. Supp. at 534). The Court commented that requiring states to provide strict equality of opportunity seemed to present an "entirely unworkable standard requiring impossible measurements and comparisons." *Id.* at 198.

43. *Rowley*, 458 U.S. at 202.

the regular classrooms of a public school system,"[44] the substantial specialized instruction and related services that Amy received were enough to provide her with a FAPE.[45]

Concluding its analysis of the FAPE provision, the Court declared: "[A] state . . . satisfies [the FAPE] requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. . . . In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act . . . ."[46]

In a subsequent section of the *Rowley* opinion addressing the scope of judicial review, the modest substantive standard established in the earlier portion of the opinion was restated as follows:

> [A] court's inquiry in suits brought [after exhaustion of administrative remedies] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.[47]

This language, taken out of the previous substantive context, raises the question whether a standard requiring some demonstrable educational benefit has been reduced to a standard requiring only a paper IEP that is likely to produce some benefit if implemented. The phrase "reasonably calculated to enable the child to receive educational benefit" seems to limit courts to an assessment of a school district's *proposed* IEP instead of an implemented IEP—to a review of the IEP document rather than the actual individualized education program.[48] An exclu-

44. *Id.*

45. *See id.* at 203 n.25.

46. *Id.* at 203-04.

47. *Id.* at 206-07 (footnotes omitted).

48. It is important to remember that IEP stands for an "individualized education *program*," not an individualized education plan, as many courts and commentators mistakenly refer to it. Congressional choice of the word "program" conveys the intent that the IEP is more than just a planning document; it is a "written statement" both "developed and implemented." 34 C.F.R. § 300.340 (1990). The IEP is to be formulated at a meeting in which the school and parents together establish the goals and objectives for the student, the special education and related services, the duration and length of the special education services, the extent of time to be spent in regular education, and the criteria for measuring progress toward achievement of IEP objectives. Parents are to be

sively document-oriented review would appear to preclude courts from assessing whether any benefit has actually resulted and instead would confine judicial review to a consideration of the design of the IEP and what the design was expected to produce.

A review limited to a proposed IEP does not fit the facts of *Rowley*, in which Amy's parents were challenging the appropriateness of an ongoing IEP. In fact, the *Rowley* Court did not base its analysis on its "reasonably calculated" or "individually designed" phraseology. Instead, it examined Amy's actual progress under the IEP that had been implemented. It then ruled that Amy had received sufficient benefit from her special education services because her achievement in the regular classroom was good enough to allow her to pass easily from grade to grade. Curiously, it never mentioned what goals and objectives had been established in Amy's IEP and did not use them as a standard against which to measure whether her program was benefitting her.

The Court's review of Amy's progress in her regular classroom suggests that it was creating two standards of benefit applicable in slightly different situations. When a parent-requested or district-proposed program has not been implemented, courts are to review the district's proposed IEP to see if it is "individually designed"[49] or "reasonably calculated"[50] to provide educational benefit. When an IEP has been implemented, courts are to review the student's progress to see whether the IEP was "sufficient to confer some educational benefit."[51] The first standard is future-oriented; the second is anchored in the past and present. In some cases, a court must base its decision on the first standard because parents will have removed their child from public school without giving the school district an opportunity to demonstrate that its proposed IEP was appropriate. In others, a court will be able to use the second standard because the student with disabilities will have remained in the allegedly unsatisfactory program pending resolution of the dispute, thereby providing evidence of whether

co-participants in designing the IEP. *See* 34 C.F.R. pt. 300 app. C (Question 26) (1990). The program agreed upon is then to be implemented and evaluated by the school. *See* 34 C.F.R. § 300.341(a) (1990).

49. *Rowley*, 458 U.S. at 201.

50. *Id.* at 207.

51. *Id.* at 200.

the proposed program actually provided some educational benefit.

Once one regards the *Rowley* decision as establishing slightly different substantive standards for implemented and unimplemented IEPs, one is still left with the important questions: How is benefit to be measured, and how much benefit is enough to provide a student with a FAPE? The Court did not decide these questions in *Rowley*, stating that it was making no attempt to define benefit across a range of student needs and abilities.[52] It noted that where a student is being educated in regular classrooms, grading and promotion standards constitute "an important factor"[53] in assessing the sufficiency of benefit. Obviously, if a student with disabilities is not being educated in regular classes, this factor does not apply. Even where a student is able to participate in regular classroom activity, however, grading and promotion standards may be entirely inapplicable if the student's progress is not being measured by ordinary minimum standards for promotion.

B. *Post*-Rowley *Interpretation*

Courts have viewed the *Rowley* "some educational benefit" standard as establishing that a school is not required to provide the best education that money can buy.[54] The standard is viewed as workable because an obligation to provide the "best" or an "ideal" education would have financial implications far

52. *See id.* at 202.

53. *Id.* at 203. The *Rowley* Court assumed that for those being educated in the regular classroom, "the system itself monitors the educational progress of the child." *Id.* Yet some students with disabilities are mainstreamed for a substantial portion of their day in the regular classroom with a different set of goals and objectives than those that are implicitly established for all nondisabled students. For these students with disabilities, the regular education system does not monitor their educational progress. That is, some students with disabilities are not held to the minimum standards for promotion, but are placed in the regular classroom so that they can see and model appropriate social behaviors; their academic programming is conducted separately from that of their nondisabled peers. Furthermore, the regular education system does not have exclusive responsibility for monitoring the progress of children with disabilities. If this were the case, there would be no need for the establishment of individualized education goals and objectives to meet unique needs of students with disabilities.

54. *See, e.g.*, Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 1583 (D.C. Cir. 1984) (emphasis in original) ("[R]esources are not infinite, and many other demands compete for limited public funds. The [IDEA-B] does not secure the *best education* money can buy; it calls upon government, more modestly, to provide an appropriate education for the child."); Wilson v. Marana Unified School Dist. No. 6, 735 F.2d 1178, 1182 (9th Cir. 1984) (education need not be the best education); Hessler v. State Bd. of Educ., 700 F.2d 134, 139 (4th Cir. 1983) (same).

outdistancing current state and federal funding capabilities and commitments. Moreover, schools are not obliged to guarantee the realization of the goals and objectives set forth in the IEP.[55] If the IEP were a contract obligating the school to achieve the specified goals and objectives, districts would set the most minimal of goals and objectives to protect themselves from liability. By the same token, however, many courts have concluded that the IEP is nevertheless an obligation to provide students with disabilities with more than just physical access to minimal special education services. Most recent cases construing the *Rowley* educational benefit standard have concluded that special education should produce satisfactory or meaningful progress toward achievement of a special education student's unique educational needs.[56]

The Third Circuit provided one of the best statements of the progress standard in rejecting a "toothless standard" requiring only *de minimis* benefit to the child in *Polk v. Central Susquehanna Intermediate Unit 16*.[57] In reversing the district court's summary judgment for the school district, the court noted the strenuous disagreement between the parties over whether the school district had a blanket policy excluding Christopher Polk and others from receiving the services of a licensed physical therapist and whether he needed those services in order to receive meaningful benefit from his special education program. The circuit court ruled that the lower court had mistaken the *Rowley* standard for a *de minimis* standard.[58] The anticipated benefit

55. The regulations implementing the IDEA-B make clear that the creation of an obligation to meet the goals and objectives was not the intent of the Act. *See* 34 C.F.R. § 300.349 (1990). *See also* 34 C.F.R. pt. 300 app. C (Question 60) (1990).

56. *See, e.g.*, Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990) (affirming district court finding that day program constituted FAPE because student made good "educational progress" in that setting); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988) (*Rowley* directive to allow school district to choose method of instruction means that "if a child is progressing satisfactorily" with the current method, court is not to question whether another method might work better); Abrahamson v. Hershman, 701 F.2d 223, 228 (1st Cir. 1983) ("educational progress" necessary for FAPE); Brown v. Wilson County School Bd., 747 F. Supp. 436, 442 (M.D. Tenn. 1990) (educational benefits under *Rowley* need not maximize child's potential but must offer a " 'basic floor of opportunity' which will allow the child to progress with his education"); Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524, 1531 (M.D. Ala. 1990) (IDEA-B "requires a plan likely to produce progress" (quoting Board of Educ. v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986))); B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140, 1149 (D.N.J. 1988) (least restrictive environment requires setting in which "education progress, rather than educational regression, can take place").

57. 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

58. *See Polk*, 853 F.2d at 180-83.

must be meaningful, which in turn means that more than trivial progress must occur and certainly more than mere prevention of regression.[59]

In general, courts correctly understand the implications of the IDEA-B definition of special education as "specially designed instruction . . . to meet the student's unique needs."[60] Courts have repeatedly adopted a broad view of education in ruling on such matters as the placement of children with disabilities in residential settings, thus rejecting a definition of educational needs that is limited to the regular education curriculum.[61] That this is appropriate is obvious when one considers the problems visually- and hearing-impaired students face. They certainly need special instruction designed to heighten their sensory awareness and to compensate for their sensory disabilities. For instance, mobility training is important for the blind, and development of speech or signing capacity is important for the deaf. Yet we do not consider such instruction to be noneducational just because it falls outside the regular education curriculum. Similarly, many physically impaired students, such as those with cerebral palsy, need instruction in such motor development skills as walking and speaking, along with instruction in academic subjects. Others with learning dis-

59. In so ruling, the court expanded its earlier decision in Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986) (affirming residential placement of child with severe disabilities because child was regressing under school district's day program). The court in *Polk* rejected the argument that an IEP confers benefit if it prevents regression, and emphasized that although regression was one measure of whether benefit was lacking, trivial progress was another. *See Polk*, 853 F.2d at 183-84.

The court remanded the *Polk* case for further fact-finding under the higher standard. Other circuits are following the *Polk* standard. *See, e.g.*, Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 730 (1990).

60. 20 U.S.C. § 1401(a)(16) (1988). The term "unique" is interpreted as a reference to the individualized needs of a given student with disabilities rather than to the exclusive needs of one student. "Unique" cannot mean unique only to one such student because many students with disabilities have similar needs, and no one child's needs are entirely exclusive to that child. *See* Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir. 1980) ("there can be little doubt that by requiring attention to 'unique needs,' the Act demands that special education be tailored to the individual").

61. *See, e.g.*, Evans v. District No. 17, 841 F.2d 824, 831 n.7 (8th Cir. 1988); Abrahamson v. Hershman, 701 F.2d 223, 228 (1st Cir. 1983); Kruelle v. New Castle School Dist., 642 F.2d 687, 693-94 (3d Cir. 1981); Christopher T. v. San Francisco Unified School Dist., 553 F. Supp. 1107, 1120 (N.D. Cal. 1982); Papacoda v. Connecticut, 528 F. Supp. 68, 71-72 (D. Conn. 1981); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979). All of these cases, and the other "residential placement" cases, recognize that children with severe and multiple disabilities have educational needs that go well beyond regular academic requirements, and that, for them, education consists of systematic instruction to produce growth toward such societally approved objectives as the development of functional life skills.

abilities and behavior problems suffer from academic or social gaps that are unique to those disabling conditions. In addition to specially designed academic instruction, such students may need instruction in how to read the social environment and behave in socially appropriate ways. While we expect regular education students to pick up these skills indirectly or to acquire them outside of school, for many students with disabilities the skills must be systematically and directly taught. Instruction in such social and behavioral skills is appropriately considered "educational."

If a school district chooses to provide only individualized academic instruction to an emotionally disturbed child and neglects to address the student's primary emotional problems, the district fails to address the most significant of the student's needs for special education. In such a case, the program—although perhaps beneficial in some limited sense—does not respond to the child's underlying need for special education. For many students with disabilities, their unique academic needs interrelate with their unique behavioral, physical, and sensory needs. If such a child's IEP addressed only some of the special education needs and ignored others, it would not be providing services individually designed or reasonably calculated to provide meaningful progress.

A recent decision by the United States Court of Appeals for the First Circuit challenges, in an unusual and perhaps unintended way, the *Polk* court's explicit requirement of meaningful progress. In *Timothy W. v. Rochester, New Hampshire School District*,[62] the First Circuit held that the IDEA-B imposes no requirement that an initial determination of a child's ability to benefit is a prerequisite to eligibility under the Act.[63] The court declared that, for purposes of IDEA-B eligibility, it is irrelevant whether a profoundly disabled student can benefit from special education so long as the student is in need of it, as it found

62. 875 F.2d 954 (lst Cir. 1989), *cert. denied*, 110 S. Ct. 519 (1990). At the time that *Timothy W.* was decided, the Act was still entitled, and the First Circuit referred to, the EHA-B. To be consistent with the remainder of this Article, in this discussion of the case I refer to the Act as the IDEA-B.

63. The IDEA-B requires that those who receive services under the Act must not only fit within one of the specified categories of disability but must also "require special education." 20 U.S.C. § 1401(a)(1) (1988). The reason that the IDEA-B requires a student evaluated as disabled to need special education is that some students with disabilities can be educated successfully in the regular classroom without special education and related services.

Timothy to be.[64] Timothy's disabling conditions were multiple and severe, including "complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder, and cortical blindness."[65] The court observed that the IDEA-B, in unmistakable terms, requires the provision of special education to *all* disabled children in need thereof, including, without exception, the most severely disabled, without regard for level of achievement.[66] This observation is consistent with *Rowley* and, in and of itself, is not a source of concern. The following paradox emerges, however, from the *Timothy W.* holding: If ability to benefit from special education is irrelevant for eligibility purposes, why is it not irrelevant for programming purposes as well? That is, if a school must accept a student who is unable to benefit, then why should one measure FAPE by whether the IEP will enable the child to benefit?

In *Timothy W.*, the First Circuit seemed to alter the Supreme Court's understanding of the IEP. What seemed to be a Supreme Court requirement that an IEP produce or be designed to produce some educational benefit was reduced to a requirement that a school district propose and provide an IEP that addresses the student's "needs," regardless of whether any benefit can realistically be expected to result from its implementation.

What lurks behind these questions is a resurrection of the debate over whether some children with disabilities are so profoundly impaired as to lack the ability to benefit from educational services. The court in *Timothy W.* assumed a peculiar stance in acknowledging on the one hand that the IDEA-B anticipates service to all children with disabilities who need special education, and inferring on the other hand that Congress does not care whether federal monies are spent on children who can benefit from the education. The *Rowley* Court did not make the same assumption; recall its statement that "[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education."[67]

The reasoning of the First Circuit in *Timothy W.* is curious in

64. *See Timothy W.*, 875 F.2d at 960.
65. *Id.* at 956.
66. *See id.* at 959-61.
67. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200-01 (1982).

light of dicta in the opinion acknowledging the validity of a broad definition of education.[68] The court emphasized that Congress, in enacting the Education for All Handicapped Children Act, was adopting the "zero-reject" model urged by the expert witnesses in *Pennsylvania Association for Retarded Children v. Pennsylvania*,[69] and cited other cases that embrace the principle that even profoundly disabled children are capable of responding to systematic instruction and can learn certain skills that make them less dependent on others.[70]

Despite its sympathy with the proposition that all students with disabilities are educable, the court in *Timothy W.* concluded that the IDEA-B requires schools to provide all disabled students with a chance to progress, regardless of whether they are capable of progressing. In other words, it again raised the spectre that some children are, in fact, ineducable. In the First Circuit, under the logic of *Timothy W.*, school districts must produce an IEP regardless of whether the child can benefit from it. Under that logic, a school district presumably would be expected to provide sensory stimulation services to a special education student who becomes comatose.[71]

The reasoning of *Timothy W.* is inherently contradictory. The court should not have held that the ability to benefit is irrelevant to eligibility while simultaneously concluding that Timothy met the eligibility criterion of being a child "in need of special education."[72] It is difficult to understand how Timothy could *need* special education and at the same time not

68. *See Timothy W.*, 875 F.2d at 970, 973.

69. 343 F. Supp. 279 (E.D. Pa. 1972) (*PARC*). Expert testimony in *PARC* was overwhelmingly to the effect that many severely mentally retarded students need instruction in self-help skills, such as toileting, feeding, and dressing skills. When such instruction is offered, these students become far more self-sufficient and may enable their families to care for them at home rather than placing them in an institution. Similarly, self-help skills, such as riding the bus, may equip them for partial independence as adults. Educators, not medical doctors or social service workers, are the ones trained to provide such instruction. On the basis of the testimony in the *PARC* case, the State of Pennsylvania chose not to present its defense but instead to negotiate for a consent agreement accepting responsibility for the education of the mentally retarded. For an account of this landmark consent agreement, see L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN (1973).

70. *See Timothy W.*, 875 F.2d at 969.

71. The more sensible view would be that students with disabilities who become comatose are no longer in "need" of special education because until they are able to respond volitionally to stimuli, they are not in a position to benefit from systematic instruction.

72. *Timothy W.*, 875 F.2d at 962. *See supra* note 63. The First Circuit court did not review the lower court's factual finding that Timothy could not benefit from special

be able to benefit from it, unless someone can need a service that he cannot use.

The court might have reached a similar outcome and have ordered special education services for Timothy on alternative grounds. The evidence was sufficient for the First Circuit to have found that the district court's factual findings were clearly erroneous and that Timothy was able to benefit from special education. While the practical effect would have been the same, such a holding would have created fewer philosophical and policy dilemmas. A finding that Timothy could benefit educationally would not have produced an interpretation of the IDEA-B that imputes congressional indifference as to whether federal money is being well spent. Furthermore, such a finding would not have appeared to limit the application of the concept of educational benefit to those who are capable of more normal achievement than Timothy. The First Circuit had invoked a broad definition of education in the earlier case of *Abrahamson v. Hershman*,[73] and it could have drawn on that precedent in finding that Timothy's ability to respond to stimuli and to progress in responding to sound, bright light, and physical handling made him clearly able to benefit from special education services. Had it so ruled, the court would not have been in the position of indirectly reinterpreting the principles behind *Rowley* to be indifferent as to whether actual benefit would result from an implemented IEP. As it stands, *Polk* and *Timothy W.* appear to be on a collision course. Although the Supreme Court denied certiorari in both of these cases, sooner or later the Court is likely to need to elaborate on its educational benefit standard to address differing interpretations by the lower courts.[74]

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education. It limited its review to the lower court's legal determination that ability to benefit is a prerequisite for eligibility under the Act. *See Timothy W.*, 875 F.2d at 959.

73. 701 F.2d 223 (1st Cir. 1983) (unique needs of student with severe retardation required residential placement with round-the-clock training and reinforcement in order to produce any educational progress).

74. Since the *Timothy W.* decision was handed down, a federal district court in Texas concluded that the IDEA-B does not hold school districts responsible when a student does not succeed under her IEP. *See* McDowell v. Fort Bend Indep. School Dist., 737 F. Supp. 386, 390 (S.D. Tex. 1990). Although the court found *sua sponte* that the IDEA-B issues raised were moot, it addressed the merits nonetheless. The court stated that a *res ipsa loquitur* theory was inapplicable and could not establish liability on the part of the school for a student's failure to learn. Although the court stated that the failure might be in the implementation of the IEP, and that a failure to properly teach, properly assess, or properly modify the curriculum might be negligence, it concluded that such failures did not result in failure to comply with the IDEA-B. In doing so, it summarily

III. Proposed Standards for Measuring Benefit

A. *Better Use of IEP Goals, Objectives, and Evaluation Criteria as Reference Points for Measuring Benefit*

Polk, Timothy W., and *Rowley* are potentially reconcilable. The IDEA-B does not obligate schools to enable a special education student to achieve any certain level of education, and IEP goals do not require a school district to guarantee their achievement. Schools should, however, be held to the requirements of the IEP and ordinarily should be required to modify a student's IEP if no progress is occurring.

The *Rowley* Court, while discussing the paramount importance of the IEP as a procedural safeguard for parents, overlooked an opportunity to illustrate the importance of the IEP requirements to which it paid lip service. The Court seemingly placed no weight on the IEP goals and objectives, or on IEP evaluation criteria, in deciding that Amy had received adequate educational benefit. Instead, it simply noted that she was performing above average in her regular classroom and was re-

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rejected the hearing officer's finding that the student "had made no significant educational progress and that her behavioral problems had not been adequately addressed." *Id.* at 389. The court also concluded that inability to foresee whether a proposed IEP would succeed was not discrimination on the basis of handicap, a conclusion directed toward Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988) (prohibiting discrimination on the basis of handicap in programs or activities receiving federal money). In other words, the court focused exclusively on the IEP as proposed, and treated the effect of its actual *implementation* as irrelevant under the IDEA-B.

Another recent case exemplifies what appears to be a different misapplication of the *Rowley* standard—in this case, a failure to examine a *proposed* but unimplemented IEP. In Angevine v. Jenkins, 752 F. Supp. 24 (D.D.C. 1990), the court focused on progress in a private school and did not assess whether a revised but unimplemented IEP could also have produced progress. The case has a long history, and an unpublished memorandum opinion preceded this one. In its motion to amend or alter the memorandum judgment, the District of Columbia Public Schools argued that Ann Marie Angevine's progress in a private school should not be the measure of educational benefit under *Rowley* and that a progress standard is suggestive of a potential-maximizing standard. *See id.* at 27. The court disagreed and denied the motion, concluding that a progress standard does not equate with potential-maximizing. *See id.* My disagreement is not with this part of the opinion. The court then determined that Ann Marie had made little or no progress under her old IEP and was progressing in her private setting. What is puzzling is why the court did not assess Ann Marie's revised but unimplemented IEP. The IEP had been revised in compliance with an order by a hearing officer who, at the second hearing, judged the revised IEP sufficient to provide Ann Marie with a FAPE. Ann Marie's parents appealed this second decision to federal court. Because Ann Marie's parents had placed her unilaterally in a private school during the interval between the first and the second hearing, the revised IEP could not be implemented. The court gave no explanation for why it did not determine whether progress was likely under the school district's revised IEP. The decision has been appealed. Interviews with Jeffrey M. Ford, Attorney for Defendants, and Michael Eig, Attorney for Plaintiffs (Feb. 21-22, 1991).

ceiving substantial special education services, which from their nature were obviously related to lessening the negative impact of her hearing impairment.

A process anchored more tightly to the IEP might have produced the same result in *Rowley* while offering guidance as to how benefit is to be measured for other students. The goals and objectives of Amy's IEP presumably reflected a multidisciplinary evaluation of her strengths and weaknesses. Unfortunately, we do not know what goals were proposed, because the Supreme Court omitted discussion of them. Their omission by the Supreme Court is probably a result of the failure of the two lower courts to analyze the goals,[75] though it is difficult to imagine that the contested IEP was not in the record on appeal. Given what we know about Amy from various treatments of the case by the three courts, the IEP goals are likely to have proposed (1) the enhancement of her receptive-language skills[76] through maximization of her residual hearing and continuing development of her lip reading skills, and (2) the development of expressive language[77] through development of her ability to produce accurate consonant and vowel sounds. The IEP goals then should have been broken down into short-term, measurable objectives on which the actual special instruction would be based.[78] Based on the multidisciplinary assessment that determined Amy's initial eligibility for IDEA-B services, the Court might have determined that the goals and objectives were relevant to Amy's unique needs, that the services of a speech therapist and a tutor for the deaf were reasonably calculated to provide sufficient benefit to enable her to make meaningful progress on those objectives, and that the argument regarding

75. *See* Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980).

76. Receptive language refers to language, whether spoken, written, or nonverbal, that is received and understood by another. Basic receptive-language skills are listening and reading.

77. Expressive language refers to the capacity to communicate with others, either by speaking, by writing, or by some other means such as signing.

78. Short-term instructional objectives are described in Appendix C to the regulations implementing the IDEA-B as

> measurable, intermediate steps between a handicapped child's present levels of educational performance and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.

34 C.F.R. pt. 300 app. C (Question 39) (1990).

the sign-language interpreter was an argument regarding an additional method of accessing classroom information.

Because Amy had been receiving the services prescribed in her IEP, the Court properly attempted to assess her benefit from those services. The fact that she was achieving above grade level in her academic subjects was relevant in the Court's view, apparently because the Court inferred a relationship between Amy's regular education progress and her special education services. It would have been helpful, however, to learn whether the IEP itself proposed measuring the effectiveness of the special education services by whether or not Amy maintained her grades in her regular education setting. Indeed, by adopting grading and promotion standards as the measure of educational benefit for Amy, the Court may have been substituting its own criteria for those of the IEP team. It is possible, for instance, that the criteria for evaluation established in the IEP were related to whether or not Amy's lip-reading and expressive-language skills were increasing. We do not know, however, because the Court did not discuss the IEP criteria for measuring progress toward the achievement of IEP goals and objectives. It may be that the objectives were consonant with the result reached by the Court and were simply not mentioned, but it is also possible that their potential as a tool in assessing benefit was not realized at the time.

In sum, the *Rowley* Court failed to address the goals and objectives of Amy's IEP and the criteria by which progress toward them was to be evaluated. This failure obfuscated the use of the IEP as a judicial tool by which to determine how much educational benefit is enough to provide a child with a FAPE. Although many district court opinions contain detailed information about the disability of the child in question, the opinions tend to focus on the nature of the special education services and seldom discuss the child's educational needs in terms of specific and current performance data, IEP goals and objectives, and criteria for measuring the effect of special education on achievement of those objectives.[79] Yet, by reference to such matters, a court would be in a better position to decide

79. Some cases refer to due-process hearings in which the hearing officer rejected an incomplete IEP. *See e.g.*, Kerkam v. District of Columbia Bd. of Educ., 672 F. Supp. 519, 522 (D.D.C. 1987) (school district failed to specify objectives related to annual goal of reinforcing acquired self-help and socialization skills), *rev'd and remanded on other grounds*, 862 F.2d 884 (D.C. Cir. 1988).

if proposed or implemented services are designed to produce (or are actually producing) meaningful benefits.

The wasted opportunity resulting from avoidance of consideration of IEP goals and objectives is illustrated by two recent cases. In *Hudson v. Wilson*,[80] the Fourth Circuit Court of Appeals upheld the findings of the district court that Cody Hudson's contested dual placement in a "behavioral adjustment" classroom for four hours a day and in a learning disability resource room[81] for forty-five minutes a day[82] was appropriate. The Fourth Circuit concluded that dual placement for the time allotted represented a "reasonable judgment by local school officials"[83] that Cody suffered from both an emotional disturbance and a learning disability. The court appeared to base its deference to school officials on evidence supporting the dual labels rather than on any discussion of the particular IEP objectives for the student. One really cannot determine, however, whether four hours a day in a classroom for students with emotional disturbances is appropriate without any reference to the particular behavioral goals and objectives being sought for Cody. The Fourth Circuit noted that the district court was "undoubtedly somewhat deferring, as *Rowley* commands, to the school authorities' expertise."[84] What *Rowley* "commands," however, is deference to the school authorities on questions of methodology and policy,[85] not on questions of whether an IEP constitutes a FAPE.

One might conclude that the *Hudson* court affirmed a placement and concomitant, but undescribed, instructional program based on evidence supporting a certain label rather than on consideration of an individualized set of IEP goals and objectives. In fact, the IEP is to be developed prior to placement to

80. 828 F.2d 1059 (4th Cir. 1987).

81. A resource room is one in which the student receives special education instruction for a portion of the day under the supervision of a resource teacher. The resource teacher and resource program are intended to be what their name implies: a resource to the regular classroom, where the bulk of the student's education occurs. *See* M. REYNOLDS & J. BIRCH, ADAPTIVE MAINSTREAMING: A PRIMER FOR TEACHERS AND PRINCIPALS 126-27 (3d ed. 1988).

82. The remainder of the day was to be spent in the regular classroom. *See Hudson*, 828 F.2d at 1062.

83. *Id.* at 1063.

84. *Id.*

85. *See* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 207-09 (1982).

avoid such blanket assumptions about placement.[86] *Hudson*, however, omits any discussion whatsoever of the contents of the IEP. Courts should be more careful than covertly to support labels as the basis for placement and program decisions.

A somewhat different problem arose in *Doe v. Defendant I*,[87] in which the Sixth Circuit Court of Appeals affirmed the denial of a parental request for reimbursement of private tutoring and private school tuition. The Sixth Circuit concluded that the IEP had not been given a chance to succeed before the parents pulled their child out of the public school. The court discussed the fact that the dysgraphic student[88] was not succeeding in regular junior high school classes. Furthermore, the court noted that because of his absences and his parents' lack of cooperation, the contemplated "consultative" services by the resource teacher and volunteer tutoring had not been implemented as prescribed by the IEP.

As in *Hudson*, the *Doe* court did not discuss the IEP goals and objectives to determine whether they related to Doe's primary educational needs.[89] Moreover, a statement regarding the child's current educational performance was missing from the IEP, as were the criteria to evaluate his progress. The court ruled that omission of Doe's current educational performance was insignificant because the parties knew he was failing his academic subjects in junior high. The court also ruled that omission of the evaluation criteria was insignificant because Doe "was to be given instruction in the regular classroom, [and] he would be graded according to the normal criteria used in the class. Only his method of instruction would be different."[90] This conclusion may well be accurate, but it is belied by a statement from his multidisciplinary team, quoted in the opinion,

86. *See* 34 C.F.R. § 300.342(b)(1) (1990) (IEP must be in effect before special education and related services are provided).

87. 898 F.2d 1186 (6th Cir. 1990).

88. Dysgraphia is a deficit in ability to produce handwritten work, which may include a memory deficit affecting ability to remember the motor movements required to form letters, memory deficit regarding spelling patterns, or a deficit affecting ability to construct grammatically correct sentences when language is expressed in written form.

89. One can speculate that, based on such factors as the child's evaluation data, prior school performance, and his parents' preferences, the objectives might have been (1) to strengthen his motor memory and writing fluency, or (2) to compensate for his motor deficits by teaching him how to use a word processor with a speller attached. In any event, the special education team should not have seen its role as simply tutoring him in academic content areas if the primary goal of Doe's IEP was to help him communicate effectively in some written form.

90. *Doe*, 898 F.2d at 1190.

that his "total program needs modification because of his difficulty in motor skills. Written tasks are very difficult for [him]; therefore, cutbacks in assignments may be needed."[91] If a student is given fewer assignments, not only is the method of instruction likely to be different, but the grading criteria are also likely to differ. Although the IEP data missing from the court's opinion might have reported only *regular* education classroom grades as performance levels and specified only regular education grades as evaluation criteria, the assumptions made by the *Doe* court show little understanding of the special education data that is to be provided on an IEP. A well-drafted IEP document would have reported current, specific, rather detailed performance on a variety of educational skills. It might well have specified criterion-referenced evaluation standards,[92] such as the accuracy of Doe's handwritten work or, alternatively, word-processed work, first in his tutored setting and later in his regular education classrooms. Failure to understand the possible range of IEP content may have led the court to assume that the IEP would relate to regular education alone because the student was being instructed primarily in the regular classroom. *Rowley* does nothing to discourage this misunderstanding.

Not only did the *Doe* court miss the potential importance of the IEP's criteria as a measure of the sufficiency of the benefit, it construed *Rowley* as "giving utmost deference to specific educational decisions once it is determined that they stem from the procedures outlined in the Act."[93] This interpretation conflicts with the court's own pronouncement that it must review *de novo* whether an IEP provides a student with a FAPE.[94] A related

91. *Id.* at 1187-88.

92. A criterion-referenced evaluation standard is one in which the student's performance is compared to a specific criterion of acceptable performance on a given task. The criterion is tailored to the abilities of and objectives for the individual student.

93. *Doe*, 898 F.2d at 1189.

94. *See id.* at 1190. As the Supreme Court in *Rowley* acknowledged, under the IDEA-B, a court reviewing an administrative hearing is to accept additional evidence when warranted and make an independent ruling based on the preponderance of the evidence. *See* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982). Some courts have interpreted this provision and the *Rowley* construction of it as requiring *de novo* review. *See, e.g.*, Wilson v. Marana Unified School Dist., 735 F.2d 1178, 1181 (9th Cir. 1984); Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983); Bonadonna v. Cooperman, 619 F. Supp. 401, 407 (D.C.N.J. 1985). Others have interpreted the "due weight" to be accorded to administrative proceedings under *Rowley* as calling for something less than *de novo* review. *See, e.g.*, Roland M. v. Concord School Comm., 910 F.2d 983, 988 (1st Cir. 1990) ("bounded independent review");

remark by the Court in *Rowley* contributes to the confusion: "[C]ongressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."[95] This observation is true in situations in which the home and school agree on the content of an IEP. Nevertheless, the statement should not be read to establish a presumption that a district-proposed IEP that is challenged by parents provides a FAPE. If such a reading were given to the statement, the substantive rights provided by the IDEA-B would be reduced to little more than rights whose parameters and implementation were at the mercy of the subjective inclinations of the schools. The statutorily required contents of the IEP undermine such a view.

To return to the case of Amy Rowley, let us assume, hypothetically, that Amy's IEP addressed only her receptive-language needs, when the development of expressive language was clearly a primary need. Under such a circumstance, the Supreme Court would be justified in concluding that the IEP was inappropriate and ordering the addition of expressive-language objectives. On the other hand, if Amy was regressing in her ability to keep up with her class, despite the appropriateness of her IEP goals and objectives, then the Court should determine whether some other component of her IEP was deficient. For example, the extent of services provided by the speech therapist or tutor for the deaf might have been inadequate to enable progress toward otherwise appropriate goals and objectives, or the methods and materials chosen to achieve those objectives might have been inappropriate. If the evidence suggested the former, the Court should order extended services and would not need to examine the methods selected by the school. If, on the other hand, the evidence suggested that

Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 981 (4th Cir. 1990) ("bounded independent decision"). In any event, the "due weight" requirement applies to the proceedings, not to the administrative decision. In fact, sometimes the court must choose between two conflicting administrative rulings in states where two-stage hearings are conducted. *See, e.g.*, Board of Educ. of N.Y. v. Ambach, 628 F. Supp. 972 (E.D.N.Y. 1986) (court affirmed state-level hearing officer (the Commissioner of the New York Education Department), who had reversed local due-process hearing officer's decision in part).

95. *Rowley*, 458 U.S. at 206.

the chosen method was simply not producing progress, the Court would need to find another avenue to follow its admonition that "questions of methodology are for resolution by the States."[96] One such approach would be for the Court to order the school district to introduce a new method of its choosing, one better calculated to achieve progress. In other words, if no demonstrable progress is being made despite significant expenditures of time, another method should be implemented. Although the district is not accountable for a failure to achieve IEP objectives, and the IEP is no guarantee of success, if its implementation does not result in progress, some aspect of the IEP must be inappropriate. In short, in the face of failure, courts should not allow a school to be intransigent and refuse to alter an IEP.

Use of IEP objectives and criteria as reference points in determining the sufficiency of educational benefit serves students from one end of the handicapped spectrum to the other—from Amy Rowley to Timothy W. No progress, vastly diminished progress, trivial progress toward IEP objectives, or actual regression would be indications either that the goals and objectives, the special education services, or the methods and materials were inappropriate. Courts should examine the student's assessment data and current levels of performance to determine whether the goals and objectives match the student's unique educational needs. If they do, and progress is minimal or nonexistent, then courts should require the school district to extend services, try a different method, or both, depending on the evidence. This is not an unfair burden on the school. If no meaningful or measurable progress can be shown after a reasonable trial period, a school district should be required to try another approach.

Alternatively, if no progress is occurring, a school district should have the burden of explaining (1) why the present IEP has a better chance of success than an expanded one, (2) why prevention of regression, that is, maintenance of the status quo, is sufficient under the circumstances, or (3) why some regression is unavoidable.[97] For instance, school district evidence

96. *Id.* at 208.

97. The only situation of which I am aware in which maintenance has been seen as sufficient to establish benefit is summer programming for students with severe disabilities. Some school districts provide just enough service to keep the student from regressing during the summer months, on the theory that the student will then be in a

of limited technological advances in serving some students with profound autism might justify its continuance of a program that was not producing any change for the better. Comparably, evidence of a student's degenerative disease, such as muscular dystrophy, might justify continuance of given levels of physical therapy even though the student's performance was declining under them.

Where progress is expected to be limited and slow, as in a case like Timothy W.'s, what constitutes sufficient benefit will be different from a situation like Amy Rowley's, and the time allowed for a school to show measurable benefit may well be longer. The goals and objectives themselves may be quite limited, but courts should presume that progress toward them will be discernable and meaningful for the given child, when measured against the individual student's goals and objectives.

In cases in which norm-referenced regular classroom standards,[98] such as grading and promotion standards, are inapplicable to a student with disabilities or provide only part of the measure of benefit, the sufficiency of the benefit could be measured against a criterion-referenced standard of the student's own progress toward individualized objectives. Such a standard is common in special education classrooms and is quantifiable in settings in which teachers gather continuous data on student performance and learning rate. It is also used where a child has demonstrated good ability to learn in a private program but has made only marginal progress in a public school program. Some courts have used a similar standard, without realizing it, by comparing progress in a private school program with progress (or lack thereof) in a public school program.[99] In short, courts should identify the criteria for measuring progress that are specified in the IEP in question and include them as important

position to continue progressing when school is resumed in the fall and will not have lost the benefit of the previous year's services. For example, the Utah Special Education Rules provide that extended school-year services are designed to "*maintain* . . . the current level of a student's skills and behaviors in areas identified as crucial in reaching self-sufficiency." Utah State Office of Educ., State Board of Education Special Education Rules, Appendix H, at H-3 to H-4 (Apr. 1988) (emphasis added). Prevention of regression in this situation appears to be sufficient "progress." *See, e.g.*, Bales v. Clark, 523 F. Supp. 1366 (E.D. Va. 1981) (pre-*Rowley* case in which irreparable loss of progress during summer months was required before child was entitled to year-round schooling).

98. Norm-referenced standards are those in which the student's performance is compared to that of an appropriate reference group.

99. *See, e.g.*, Adams v. Hansen, 632 F. Supp. 858 (N.D. Cal. 1985).

factors in determining whether the student is benefitting sufficiently from the IEP. In doing so, they would honor criteria proposed by the IEP team itself, rather than substituting their own notions of appropriate criteria. They would also thereby create an incentive for the education system to increase its accountability, while leaving it to the schools to determine what technologies to implement.

B. *The Burden of Proof In Administrative Hearings and In Court*

An examination of an IEP by a court must necessarily begin with the due-process hearing. An aggrieved party must utilize the administrative hearing procedure before filing in court, except where "exhaustion would be futile or inadequate."[100] Unfortunately, the IDEA-B is silent as to which party bears the burden of proving the appropriateness of a special education program both in the hearing and in court. One trial court held that, at least in court, parents bore the burden of proving that both an implemented and a subsequently proposed IEP were inappropriate.[101] Two other courts have come to the opposite conclusion.[102] Other courts give the burden to the party (frequently the school district) proposing to change a previously agreed-upon IEP or placement.[103] Still other courts place the burden on the party appealing the administrative decision.[104] This occurred in *Doe v. Defendant I*,[105] and may have had a direct

100. Honig v. Doe, 484 U.S. 305, 327 (1988); *see* Smith v. Robinson, 468 U.S. 992, 1014 n.17 (1984).

101. *See* Bales v. Clark, 523 F. Supp. 1366, 1370 (E.D. Va. 1981).

102. *See* Davis v. District of Columbia Bd. of Educ., 530 F. Supp. 1209 (D.D.C. 1982); Lascari v. Board of Educ., 116 N.J. 30, 560 A.2d 1180 (1989). *Davis* appears to have been overturned silently by subsequent decisions by the Court of Appeals for the District of Columbia Circuit. *See* cases cited *infra* notes 103-04.

103. *See, e.g.*, McKenzie v. Smith, 771 F.2d 1527, 1531 (D.C. Cir. 1985); Grymes v. Madden, 672 F.2d 321, 322 (3d Cir. 1982). *Cf.* Tatro v. Texas, 703 F.2d 823, 824 (5th Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom.* Irvington Indep. School Dist. v. Tatro, 468 U.S. 883 (1984); Burger v. Murray County School Dist., 612 F. Supp. 434, 437 (D.C. Ga. 1984); Lang v. Braintree School Comm., 545 F. Supp. 1221, 1228 (D. Mass. 1982).

104. *See, e.g.*, Roland M. v. Concord School Comm., 910 F.2d 983, 991 (1st Cir. 1990); Tice v. Botetourt County School Bd., 908 F.2d 1200, 1206 (4th Cir. 1990) (citing Spielberg v. Henrico County Public Schools, 853 F.2d 256, 258 n.2 (4th Cir. 1988)); Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989); Leonard v. McKenzie, 869 F.2d 1558, 1561 (D.C. Cir. 1989) (citing Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988)); Hiller v. Board of Educ., 743 F. Supp. 958, 967-68 (N.D.N.Y. 1990); Hall v. Freeman, 700 F. Supp. 1106, 1111 (N.D. Ga. 1987); Tracey T. v. McDaniel, 610 F. Supp. 947, 948 (N.D. Ga. 1985).

105. 898 F.2d 1186, 1191 (6th Cir. 1990). The court in *Doe* suggested that it was following Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part*

impact on the outcome. As it is often dispositive, resolution of the burden question is becoming increasingly urgent.

Placing the initial burden on parents misconstrues the provisions of the IDEA-B and undermines the procedural protections provided to parents. Such a burden properly belongs on the school district for a number of reasons. First, the parents lack access to the same information concerning the program and service alternatives considered by the school district.[106] The parents also lack expertise in special education programming and placement decisions and may not understand the full import of the IEP's provisions concerning goals, objectives, and evaluation criteria. The school district can plead no such ignorance. Furthermore, parents do not necessarily have an attorney at the administrative hearings to represent their child's interests and may not understand their legal rights.[107] If the parents appeal the hearing decision in court, and if they bear the burden in the administrative hearing, they are doubly burdened by the "due weight" given to the administrative record under *Rowley*.[108] Finally, the extensiveness of the IDEA-B's procedural safeguards suggests congressional intent to make school districts accountable for their decisions. The school district is far less accountable if the burden is placed on a parent to prove that an IEP is not appropriate.[109]

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sub nom. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984), in placing the burden on the party challenging the IEP. *See Doe*, 898 F.2d at 1191. In *Tatro*, however, the school district proposed to change a previously *agreed-upon* IEP, while in *Doe*, the parents challenged the school district's *proposed* IEP, to which they had not consented. *See Tatro*, 703 F.2d at 829; *Doe*, 898 F.2d at 1188. The IEP in *Doe* was upheld by the hearing officer, and the parents appealed the hearing decision. I therefore conclude that the court in *Doe* actually placed the burden on the party appealing the administrative decision.

106. The regulations implementing the IDEA-B require that written notice to parents include a "description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected." 34 C.F.R. § 300.505(a)(2) (1990). Notwithstanding this provision, I have seldom seen evidence in school records or court cases that schools provide parents with written explanations of district-rejected options. Even if they did, it is highly doubtful that the written notice would equalize the parents' and school district's knowledge of the school's reasoning.

107. While parents are given the right to counsel at the administrative hearing stage, *see* 20 U.S.C. § 1415(d)(1) (1988), some parents do not or cannot avail themselves of that right.

108. *See* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

109. The best judicial discussion of this view can be found in the New Jersey Supreme Court decision, Lascari v. Board of Educ., 116 N.J. 30, 560 A.2d 1180 (1989) (allowing parents of dyslexic child to recover expenses of private education from school district because the goals of the school's program could not be evaluated objec-

If the school district is given the burden of proof in the administrative hearing, it may make sense to give the burden in court to the party appealing the administrative decision. Courts giving the burden of proof to the party challenging the administrative decision, however, make no reference to the burden below.[110]

Moreover, courts may confuse the *Rowley* Court's deference to school officials on methodological matters with matters of burden of proof. Although the *Rowley* Court admonished that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States,"[111] this does not imply broad deference to the judgment of the administrative hearing officer, nor does it imply deference to all school decisionmaking. Rather, it is deference to a state's choice of methods to attempt to achieve IEP goals and objectives. It is important to realize that methods and materials need not be specified in the IEP[112] and, therefore, deference to methods is justifiably a separate matter from deference to the proposed contents of the IEP.

Rowley mandates that the school district formulate the IEP in accordance with the requirements of the IDEA-B.[113] Compliance in form rather than substance should not be seen as meeting this mandate. In other words, the contents of the IEP matter. *Rowley* does not require the schools to provide the best education possible but only to provide meaningful access to some educational benefit. Therefore, it does not seem burdensome to ask the school district to demonstrate that: (1) its proposed goals and objectives address the student's unique needs for special education and related services; (2) the IEP delivers services addressed to those needs in a way that should or does provide some meaningful, measurable progress toward those goals and objectives; and (3) its criteria to evaluate progress are in place and can actually measure the extent to which the objectives are attained. All three matters are crucial to the appropriateness of the IEP. Without integrated attention to all three

tively, the child's progress could not be measured, and hence, the program was incapable of review).

110. *See* cases cited *supra* note 104. In the cases cited *supra* notes 101-03, the courts also failed to discuss the burden of proof at the administrative hearing level.

111. *Rowley*, 458 U.S. at 208.

112. *See* 20 U.S.C. § 1401(a)(19) (1988); 34 C.F.R. pt. 300 app. C (Question 39) (1990).

113. *See Rowley*, 458 U.S. at 203-04, 206 n.27.

requirements, schools could provide minimal special education services that appear beneficial, while shielding themselves from court review of whether the content of the services is, in fact, relevant and making any positive difference in the life of the child. Ironically, contrary to the expressed intent of *Rowley*, to attend to only some of the requirements and contents of the IEP and ignore others may be to substitute judges' ignorance about special education matters for the combined expertise of special and regular educators.

C. *The Temptation of Courts to Compare the Efficacy of Various Methods*

As noted above, the *Rowley* Court envisioned that "questions of methodology are for resolution by the states."[114] Such guidance creates no special difficulty in a situation such as Amy Rowley's, in which a dispute over competing methods of instructing the hearing impaired arose and progress was demonstrated under the method chosen by the school. In at least one situation, however, it does not function so well.

The court's decision in *Adams v. Hansen*[115] provides an example. Andy Adams, a learning-disabled student, was placed by his mother in a private school as a result of her dissatisfaction with her son's progress in a regular third-grade classroom with additional resource services of up to ninety minutes each day. The district court had access to assessment measures indicating that Andy progressed only four months in "total reading" achievement and eight months in math achievement after some twenty months (two years) of instruction in the third grade.[116] The court found this lack of progress dispositive. The court also cited *Rowley* and noted Andy's inability to achieve passing marks and advance from grade to grade under his old IEP.[117] The court could have ended its analysis at that point. It did not do so, however, because it was influenced by evaluation data indicating that Andy's specific learning disability involved defi-

114. *Id.* at 208.

115. 632 F. Supp. 858 (N.D. Cal. 1985).

116. These assessment data were based on scores on the Woodcock-Johnson test battery given to Andy Adams after two years in the third grade. After only one year in a private school, Andy's scores on the same test battery showed a two-year growth in reading ability. The judge concluded that Andy's "prior lack of growth was due to the ineffectiveness of the Resource Specialist Program." *Adams*, 632 F. Supp. at 862.

117. *See id.* at 866.

cits in auditory, visual, and sensory-motor learning modalities and that, as a result, he required an "intensive simultaneous multi-sensory approach"[118] to learning. The court accepted as valid the recommendation that this particular method of instruction was required for Andy and had not been provided in his public school setting. It placed considerable emphasis on the fact that, at a mediation conference, the school district agreed with the parents that Andy required such an approach for reading and language instruction, along with "minimal distractions; auditory sequencing; visual-motor integration; [and] small-group instruction."[119] The court determined that these objectives and methods could not be implemented in either of the placements proposed by the school district, and were being implemented successfully in the private placement.

Adams exemplifies the temptation for courts to consider, implicitly or explicitly, methodology wherever progress in a private school setting is compared to progress in a public school setting. Had the school district unequivocally challenged the need for a simultaneous multi-sensory approach, the court would still have been faced with the evidence of unsuccessful programming in the public school under one method and successful programming at the private school under another. One can hardly ignore the effectiveness of a given method in such circumstances. If Andy had been making meaningful progress under the school's chosen method, however, as apparently Amy Rowley was, then the court could have upheld it, even if it were less effective than an alternative method. On the other hand, when progress using the school's method is marginal or nonexistent, and evidence demonstrates that another method has produced significant progress, it is difficult to ignore that evidence.[120]

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118. *Id.* at 863.

119. *Id.* at 865.

120. For another case in which meaningful progress in a private-school setting is compared to no progress in a public-school setting, see Beasley v. School Bd., 6 Va. App. 206, 367 S.E.2d 738 (1987) (proposed IEP did not provide FAPE because it continued a program that had failed to teach plaintiff to read—in face of evidence that plaintiff was learning to read under different, private school program), *rev'd*, 238 Va. 44, 380 S.E.2d 884 (1989) (appeals court erred in redetermining facts established by trial court). A case in which significant progress is compared to no progress is to be differentiated from a case in which different amounts of progress are made under two different instructional methods. *See* Roland M. v. Concord School Comm., 910 F.2d 983, 992, 993 (1st Cir. 1990) ("courts should be loathe to . . . become embroiled in captious disputes as to the precise efficacy of different instructional programs"; "com-

IV. CONCLUSION

Courts need to hold school districts accountable for meeting the requirements of IEPs and for producing some meaningful progress toward IEP goals and objectives. "Some educational benefit" ordinarily does not result from the delivery of special education and related services unless meaningful progress can be produced by implementing the child's individualized education program. The appropriateness of IEP goals and objectives can be judged by reference to a student's multidisciplinary evaluation of eligibility and by current levels of educational performance. The result of this inquiry can then become the focus for a determination of whether the IEP is really designed to provide educational benefit across the range of the child's unique educational needs. The inquiry should also examine whether a direct relationship exists between the student's current level of educational performance and the specific services. This will make possible a determination regarding whether services are reasonably calculated to provide, or are providing, meaningful progress toward achievement of the goals and objectives.

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parative academic progress, in and of itself, is not necessarily a valid proxy for, or determinative of, the degree to which an IEP was reasonably calculated to achieve the mandated level of educational benefit"). *But cf.* Visco v. School Dist. of Pittsburgh, 684 F. Supp. 1310 (W.D. Pa. 1988) (IDEA-B does not require two hearing-impaired students to shift from successful oral instruction at private school to total communication method in public school). In determining whether two hearing-impaired students could receive a FAPE in a public-school setting, the court in *Visco* considered the effect of a change of placement and change of methodology on the quality of services needed by the children. In doing so, it referred to a little-known regulation under the IDEA-B, which states that "[i]n selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs." *Id.* at 1315 (quoting 34 C.F.R. § 300.552(d) (1987)). The court concluded that

> [o]nce a student is making good progress in a particular program, a change must be viewed with a great degree of caution. In balancing the potential benefits against the potential harms, even if the benefits and the harms were to weigh equally, the child in question should not be moved from one program to another.

Id. In reaching this conclusion, the court in *Visco* relied on a pre-*Rowley* case, Grkman v. Scanlon, 528 F. Supp. 1032, 1036, 1037 (W.D. Pa. 1981) (court "can not escape the task of comparing [private and public] programs and determining . . . which placement is 'appropriate' "; risks of change in placement outweigh benefits when student is making satisfactory progress in private setting and when it is important to maintain momentum). The *Visco* court was concerned about loss of fundamental language skills as a result of the district-recommended method of instruction. The regulation cited above that allows for consideration of the quality of services in determining the least restrictive placement appears to conflict with the *Rowley* view that quality is not to be determinative so long as the poorer program is providing a FAPE. *See Rowley*, 458 U.S. at 207 & n.29.

In addition to paying closer attention to current levels of performance and IEP goals and objectives, courts should use the criteria specified in the IEP as measures of the student's progress toward IEP objectives, unless the criteria are being challenged by the parents. In cases in which criteria are being challenged, courts will need to base decisions on the preponderance of the evidence as to the suitability of those criteria. Although methods and materials may be examined as evidence that the school's efforts are conscientious and in good faith, courts usually will not need to determine whether one set of methods or materials might produce better benefits than another, especially because methods and materials are not required to be included in the IEP document. If a comparison of methods is unavoidable, the court can simply determine whether the school's chosen methods and materials are designed to produce (or are producing) meaningful educational progress.

Whenever a court is given evidence comparing actual progress of the student under two different methods, however, the court inevitably must make some judgment regarding whether the less effective method is effective enough to meet the *Rowley* standard of sufficient educational benefit. This judgment is not difficult if the public school's method is producing no progress. If both methods are producing some meaningful progress, *Rowley* indicates that courts are to resist the temptation to decide that the superior method is required for the student to receive a FAPE. Provision of a program conferring some educational benefit, or design of a program calculated to confer some educational benefit, remains the test of whether a FAPE is being provided.

The IEP is the statutorily designated vehicle for deciding how much benefit is enough under the *Rowley* definition of an appropriate education. While the last decade has seen intense judicial attention to the procedural provisions of the IDEA-B, it is time to focus more closely on the IEP. Together, the IEP document, its implementation, and its undergirding—the evaluation of the student's unique needs—provide a basis for evaluation of school district programming that relies both on school district expertise and parents' knowledge of the unique needs of their children. By focusing on the IEP, courts will help special educators realize the intent of the law.