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### NEW DEVELOPMENTS IN FREE, APPROPRIATE PUBLIC EDUCATION FOR STUDENTS WITH DISABILITIES: POLICY AND PRACTICE IMPLICATIONS

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## **Free, Appropriate Public Education**

The basic obligation that the Individuals with Disabilities Education Act (IDEA) imposes on states and local school districts is to provide “free, appropriate public education” (FAPE) to all children with disabilities in their jurisdiction. Since passage of the original version of the law in 1975, millions of children with disabling conditions have been brought into school and given educational opportunities. But issues still exist over the scope of schools’ obligations under IDEA to provide FAPE.

### **The Rowley Case**

What does “appropriate education” mean? The drafters of the statute that is now IDEA apparently drew the term from a consent decree in one of the early class action cases that had relied on the Fourteenth Amendment’s Equal Protection Clause to challenge exclusion of children with intellectual disabilities from public education, *PARC v. Pennsylvania*. That decree required the state to provide “access to a free public program of education and training appropriate to [the] capacities” of each child in the plaintiff class. The federal act used the same term.

But neither the statutory language nor the regulations gave much guidance about what education was appropriate, apart from being special education and related services conforming to the standards of the state educational agency and furnished in accordance with an individualized education plan (IEP). In an effort to develop a standard, some courts looked to a regulation promulgated under an earlier law, Section 504 of the Rehabilitation Act, which forbids disability discrimination by federal grantees. This regulation said that grantees operating public elementary and secondary schools systems had to meet the needs of children with disabilities as adequately as the needs of other children were met. Hence, schools had to offer services that would give children with disabilities the opportunity to achieve their full potential, commensurate with the opportunity afforded children without disabilities.

In *Board of Education v. Rowley*, the Supreme Court rejected that interpretation as applied to the law that is now IDEA. It overturned a lower court decision that had required a school district to provide a sign language interpreter to a first-grader with a severe hearing impairment. Although the child could understand less than sixty percent of what was being said in class, she was performing better than the average child in her class and was advancing from grade to grade. The Supreme Court said that cases like *PARC* that had influenced Congress in writing the law had imposed no requirement greater than access to education, and that a commensurate opportunity standard was unworkable. It noted that the special education law was designed to ensure equal protection of the law for children with disabilities and pointed out that in cases concerning equal protection in education, the Court had not required equal opportunity, but only equal access. The Court also stressed the law’s emphasis on procedure and the importance of allowing deference to states’ and localities’ views of educational methods.

The Supreme Court said that in exchange for the provision of federal money, Congress did expect that states and school districts would provide services that would confer some benefit on students with disabilities. At one point it described the standard as a floor of opportunity; at another it said that it was not greater than what would make access meaningful.

## Recent FAPE Developments

The *Rowley* case resolved the immediate dispute over the commensurate opportunity standard, but did not fully resolve the debate over what appropriate education means. Moreover, although Congress has never amended the special education law specifically to overrule *Rowley*, it has amended the statute's preamble to embody a "high expectations" approach focusing on preparing children to "lead productive and independent adult lives, to the maximum extent possible." The purpose of IDEA is now to give children "special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."

Last October, in *O.S. v. Fairfax County School Board*, the Fourth Circuit U.S. Court of Appeals took up a Virginia case in which parents of a child with multiple disabilities said that he was not being offered adequate instruction in reading, math, and writing, that he needed extended school year services, a one-on-one aide, and access to a full-time school nurse, and that the occupational therapy and speech and language services being offered were not adequate. The parents argued that in light of the amendments to IDEA and some of the language in the *Rowley* decision itself, the case should have been reviewed not under a some-benefit standard but under a higher, "meaningful benefit" standard.

The court rejected the argument. It said that when Congress changes a law to alter a Supreme Court interpretation, it usually does so explicitly, and that other amendments evidenced a focus on various specific matters, such as improvements in IEPs, rather than a change in the standard for appropriate education. The court mentioned decisions from other courts of appeals that appeared to adopt an elevated "meaningful benefit" standard for appropriate education, but said that the Fourth Circuit had never departed from the some-benefit approach, and that the other decisions were without support or actually employed the some-benefit standard but with meaningful benefit language. The court qualified its endorsement of the some-benefit standard by saying that more than trivial or minimal advancement was required, and said this was the way the Supreme Court in *Rowley* had intended the term "meaningful." The *O.S.* court affirmed the determination that the child was offered an appropriate education.

In support of its use of the some-benefit standard, the *O.S.* court cited *Andrew F. v. Douglas County School District. RE 1*, a recent opinion of the U.S. Court of Appeals for the Tenth Circuit. In that case, the court affirmed a decision holding that a child with autism and attention deficit hyperactivity disorder was offered appropriate education when he showed some educational progress over time, and services were offered to meet the student's behavioral challenges, even though a number of IEP objectives were not met and were carried over from year to year. Like *O.S.*, *Andrew F.* rejected the view of other cases that the amendments to IDEA's preamble required an elevated standard embodied in the meaningful benefit concept. It listed cases from courts of appeals for the Third, Fifth, and Sixth Circuits (respectively, *Polk v. Central Susquehanna Intermediate Unit 16*, *Adam J. v. Keller Independent School District*, and *Deal v. Hamilton County Board of Education*); the *O.S.* case listed one from the Ninth Circuit as well (*N.B. v. Hellgate Elementary School District*). But the *Andrew F.* court said that it had already rejected those courts' views in previous cases and saw no reason to depart from that position.

## Relevant Developments in Areas Other than FAPE

The resolution of *O.S.* and *Andrew F.* against the parents' position is by no means the end of the story. There are provisions in the law governing special education other than the free, appropriate public

education section, and in many instances parents have been successful in obtaining contested services for their children by invoking those parts of the law. Although “appropriate education” has not been redefined, children with disabilities may in some instances be entitled to quite extensive aids and services by virtue of other legal obligations. Three of particular importance are the least restrictive environment (LRE) requirement, the all areas of suspected disability provision, and the prohibition on disability discrimination in Section 504 and the Americans with Disabilities Act (ADA).

The least restrictive environment provision of IDEA is phrased in a unique manner. It states:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

This language does not prohibit restrictive settings. What it does is ban removal of children from general education settings that include children without disabilities if supplemental aids and services could enable them to learn in those settings. A number of courts have recognized this language as a requirement to provide the aids and services that make less restrictive environments work; accordingly, children are entitled to the aids and services under this provision. Perhaps the most prominent such case is *Oberti v. Board of Education*, in which the Third Circuit Court of Appeals ordered inclusion of a child with Down Syndrome in a mainstream class, saying the key to resolving tensions between appropriate education and the least restrictive environment was proper use of supplemental aids and services. In that case, the services included an itinerant special education instructor, special education training for the general education teacher, modifications of the curriculum, parallel instruction, and part-time resource room services. The basis for the services was the LRE provision rather than the definition of appropriate education interpreted in *Rowley* and recent cases such as *O.S.*, so *Rowley* was not the controlling authority.

As the *O.S.* court indicated, Congress amended the IEP provisions of IDEA in 1997, so that the statute now requires that children be assessed “in all areas of suspected disability” and that their IEPs contain goals and education and related services to meet “each of the child’s . . . educational needs that result from the child’s disability.” Courts have applied this language to require services in specific areas. Writing, occupational therapy, behavioral services, and transition have all been areas of individual need that courts have required school districts to address. In one noteworthy case, *Dracut School Committee v. Bureau of Special Education Appeals*, a district court found that a student’s IEP was deficient as to transition when it failed to address pragmatic language skills, vocational skills, and independent living skills, even though the student did well in mainstream high school courses and graduated in the top half of his class. The deficiency was that areas of need identified by the assessment were not all addressed. Again, this obligation was separate from the duty to provide appropriate education interpreted in *Rowley*. The court was not requiring anything more than adequate services, but they had to be provided in each area of need.

Finally, some, though by no means all, courts have placed duties on schools to afford education and services under the Americans with Disabilities Act even though the services the schools already provided were sufficient to meet IDEA’s appropriate education test under *Rowley*. The leading case is

*K.M. v. Tustin Unified School District*, in which the Ninth Circuit Court of Appeals ruled that the ADA may entitle children with hearing impairments to Communication Access Real Time word-for-word captioning (CART), even though the students did not prevail on a claim that the school violated IDEA standards for appropriate education in failing to provide CART. The court reasoned that the ADA Title II communications regulation requires state and local government agencies such as public schools to communicate as effectively with students with disabilities as they do with other students. This is different from IDEA, which does not demand equality of treatment. The children who brought the case had hearing impairments but with residual hearing and with other accommodations, they were successful in school. Nevertheless, they complained that they were unable to maximize their potential and claimed that the school had failed to use available means to communicate as effectively with them as it did with hearing students. The students lost on their IDEA claims, but the court overturned lower court rulings against the students on the ADA claim and remanded for application of the ADA effective-communications regulation.

### **Policy and practice implications**

The upshot is that the *Rowley* standard for appropriate education is alive and well and residing comfortably in the part of the United States that includes Virginia and its neighbor states. *O.S.* reinforces the some-benefit standard's relevance to educational decision-making today. At the same time, educators should be aware that they are subject to other obligations that may require them to provide special education and related services that a surface reading of *Rowley* and *O.S.* might lead them to think would not be demanded. Educators need to be attentive to the obligation to provide services to enable children to succeed in less restrictive settings, the requirement to assess in all areas of suspected disability and provide services in all areas of identified need, and the duty to provide accommodations under Section 504 and the ADA.

### **References**

20 U.S.C. §§ 1400-1482 (Individuals with Disabilities Education Act)

20 U.S.C. § 1412(a)(5) (Least Restrictive Environment)

29 U.S.C. § 794 (Section 504 of the Rehabilitation Act)

42 U.S.C. §§ 12131-12165 (Americans with Disabilities Act, Title II Public Services)

Pub. L. No. 105-17 § 101, 111 Stat. 37 (1997), *codified at* 20 U.S.C. § 1414 (IEP-related amendments)

28 C.F.R. §§ 35.160-.164 (ADA Effective-Communications Regulations)

34 C.F.R. § 104.33 (Section 504 FAPE Regulation)

*Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003)

*Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840 (6th Cir.2004)

*Dracut Sch. Comm. v. Bureau of Special Educ. Appeals*, 737 F. Supp. 2d 35 (D. Mass. 2101)

*Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE 1*, 798 F.3d 1329 (10th Cir. 2015), *petition for cert. filed*, No. 15-827 (Dec. 22, 2015)

*Hendrick Hudson Central School Disrrict v. Rowley*, 458 U.S. 176 (1982).

*K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, 1494 (2014)

*N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir.2008).

*O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354 (4th Cir. 2015)

*Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993)

*PARC (Pa. Ass'n for Retarded Children) v. Pennsylvania*, 343 F. Supp. 279, 314 (E.D. Pa. 1972)

*Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988)

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**Note:** The views expressed in this commentary are those of the author.