COMMENTS

WHEN CLOSE ENOUGH DOESN'T CUT IT: WHY COURTS SHOULD WANT TO STEER CLEAR OF DETERMINING WHAT IS—AND WHAT IS NOT—MATERIAL IN A CHILD'S INDIVIDUAL EDUCATION PROGRAM

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> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[1]

I. INTRODUCTION

AS a relatively new field, special-education law is terrain not yet fully explored.[2] Many of the most contentious issues arising in this area exist because of the interconnectedness of a developing body of law, overlapping legal statutes, and an alphabet soup's worth of acronyms.[3] Of the many special-education statutes that have been developed, amended, and refurbished, the Individuals with Disabilities Education Act ("IDEA") has been, and will likely

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1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

2. Jim Gerl, Special Education Law Blog, *New Hot Button Issue: IEP Inplementation* [sic] *Part I*, http://specialeducationlawblog.blogspot.com/search?=new+hot+button+issue+IEP+inplementation ("[S]pecial education law is 'new' law.") (last visited Jan. 28, 2010).

3. *See*, *e.g.*, National Education Association: Tools and Ideas—Special-Education Acronyms and Terms, http://www.nea.org/tools/30325.htm (last visited Jan. 28, 2010); Wrightslaw: Glossary of Special Education and Legal Terms, http://www.fetaweb.com/06/glossary.sped.legal.htm (last visited Feb. 28, 2010).

remain, at the forefront of special-education litigation.[4] Often "described as a model of 'cooperative federalism,'" IDEA gives rise to a steady stream of litigation.[5] As mutual cooperation, particularly between state and federal agencies, rarely leads to clarity, it is not surprising that parents, schools, and courts are often left to interpret congressional intent in significant portions of IDEA.[6]

At the core of IDEA is the Individualized Education Program ("IEP"),[7] and while the IEP may be the legislative centerpiece, its practical effects are even more important.[8] Aside from being the document that provides the child's educational roadmap, the IEP represents the comprehensive plan developed by every meaningful player in the child's educational career.[9] Despite this importance, a split among circuits has emerged as to how much of a child's IEP must be implemented—all or most of it.[10]

This article illustrates the development of special-education law, viewed through the lens of the Individual Education Program, and the implementation debate. Part II of this article discusses the history of special-education law by focusing on IDEA and its many amendments. Part III focuses on the Individual Education Program, the backbone of IDEA, and the importance of the IEP document in the special-education context. Part IV introduces the circuit split and the IEP implementation debate, as well as the two schools of thought on just how much "compliance" is required. Part V proposes and Part VI applies a theory that the interpretation debate has promoted an educational void, rather than flexibility. This theory is premised around the belief that the last-agreed-upon IEP is the plan that must be completely implemented and that deviations

4. For some of the main reasons why IEPs end up in court, see, e.g., P.N. v. Seattle Sch. Dist., 474 F.3d 1165, 1173 (9th Cir. 2007) (the scope of "judicial *imprimatur*" is undefined); Frank G. v. Bd. of Educ., 459 F.3d 356, 361-62 (2d Cir. 2006) (evaluation procedures do not meet regulatory requirements); T.F. v. Special Sch. Dist., 449 F.3d 816 (8th Cir. 2006) (placement decisions do not match or are not based on the current IEP).

5. Schaffer v. Weast, 546 U.S. 49, 52 (2005) (quoting Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999)).

6. *See id*. at 52-53. Highlighting the cooperation required between federal and state educational authorities, the Court stated:

> Participating States must certify to the Secretary of Education that they have "policies and procedures" that will effectively meet the Act's conditions …. State educational agencies, in turn, must ensure that local schools and teachers are meeting the State's educational standards …. Local educational agencies (school boards or other administrative bodies) can receive IDEA funds only if they certify to a state educational agency that they are acting in accordance with the State's policies and procedures.

Id.

7. *See* KURT E. HULETT, LEGAL ASPECTS OF SPECIAL EDUCATION 145 (2009) ("The importance of the IEP cannot be overstated.").

8. *Id*.

9. OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1 (2000), http://www.ed.gov/parents/needs/speced/iepguide/iepguide.pdf.

10. *See* Gerl, *supra* note 2.

from this plan should be evaluated based primarily on the intent of the actor. Part VII proposes, perhaps, the next "hot button" special-education question, as it necessarily results from the question that this paper is designed to address. Lastly, Part VIII recognizes the substantial role of IDEA and, while it may not be an ideal solution, its substantive and procedural rights are of paramount importance, particularly to the parents of disabled children.

II. BRIEF HISTORY OF SPECIAL-EDUCATION LAW

The earliest special-education programs were rooted in eighteenth century Europe, where two physicians broke away from norms and set out to educate the uneducable.[11] Jean-Marc-Gaspard Itard and later his protégé, Edouard Seguin, made the first recorded attempts at educating a severely limited child in a structured manner.[12] Focusing on "support, behavior management, and education," they were able to considerably improve the child's behavior.[13] Of the many aspects of their work that remain prevalent today, most notable is the reliance on individualized instruction—the theory that the child's unique characteristics provide the basis for teaching techniques, not a prescribed academic content.[14]

In the United States, the first special-education programs were premised around the idea of keeping "at risk" children, particularly those in urban slums, from becoming delinquents.[15] Educators became notorious for excluding some children because of their supposed "depressing and nauseating" impact on their peers.[16] For those children suffering from blindness, deafness, or mental retardation, there were truly only a handful of special classes and schools that they could attend,[17] though most programs tended to be private, residential, or both.[18] Finding quality services was at best difficult, if not wholly impossible.[19]

Special-education advocates experienced their first legal breakthrough in the years following the landmark Supreme Court decision in *Brown v. Board of*

11. Hulett, *supra* note 7, at 14.

12. *Id*.

13. *Id*.

14. *Id*.

15. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, SPECIAL EDUCATION LAW 11 (2d ed. 2007). By the late nineteenth century, hundreds of thousands of children found themselves learning skills ranging from carpentry to cooking, and while schools placed some emphasis on laudable topics, such as social values, they also subjected African-American children to "moral training." *Id. See also* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957, at 182-226 (1961).

16. *See, e.g.*, State *ex rel.* Beattie v. Bd. of Educ., 172 N.W. 153, 154 (Wis. 1919) (child with cerebral palsy expelled because his uncontrollable drooling, facial contortions, and speech impairment had "depressing and nauseating effect" on others and required too much of the teacher's attention).

17. WRIGHT & WRIGHT, *supra* note 15, at 11.

18. *Id.* at 12.

19. *See id*.

Education.[20] *Brown*, best known for ultimately striking down the notion of separate but equal, concluded that African-American children have the right to equal educational opportunities and segregated schools have no place "in the field of public education."[21] At the same time, though less noticeably at first, *Brown* also opened the door for parents of disabled children to bring suit against school districts for excluding and segregating children on the basis of a *disability*.[22] While it took years to fully implement *Brown*, the case subtly served as a springboard for special-education advocacy.[23]

A little more than a decade after *Brown*, Congress enacted legislation to address inequalities in educational opportunities for disadvantaged and underprivileged children.[24] The Elementary and Secondary Education Act of 1965 ("ESEA") was a centerpiece of President Lyndon Johnson's "Great Society."[25] A former school teacher himself, President Johnson played an integral role in introducing the ESEA bill into Congress and seeing to its rapid passage—with no amendments and little debate—in just eighty-seven days.[26] From this initial foray into educational policy, Congress amended the ESEA and established the Education of the Handicapped Act, all with the intent to prod states in the direction of developing programs and resources for individuals with disabilities.[27] Unfortunately, none of these programs produced the results that Congress, and advocates alike, sought to achieve.[28]

A. Early Case Law

Change, if not results, came in the early 1970s in the form of two landmark court decisions.[29] In *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, the Pennsylvania Association for Retarded Children brought a class-action lawsuit on behalf of all retarded persons who had been excluded from receiving a public education.[30] Pennsylvania state law allowed for the exclusion of any person who had not achieved a "mental age of five years" by the time he or she would ordinarily enroll in the first grade from a public education.[31] Further, state law allowed schools to determine who could be educated and who could be

20. *Id.* at 13.

21. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

22. WRIGHT & WRIGHT, *supra* note 15, at 13-14.

23. *See id*.

24. *Id*.

25. CRITICAL SOCIAL ISSUES IN AMERICAN EDUCATION: DEMOCRACY AND MEANING IN A GLOBALIZING WORLD 269-70 (H. Svi Shapiro & David E. Purpel eds., 3d ed. 2005).

26. Erik W. Robelen, *The Evolving Federal Role*, EDUC. WEEK, Nov. 17, 1999.

27. WRIGHT & WRIGHT, *supra* note 15, at 13.

28. *Id*.

29. BARRY NURCOMBE & DAVID F. PARTLETT, CHILD MENTAL HEALTH AND THE LAW 74 (1994) (citing *P.A.R.C.* and *Mills*, two cases cited *infra*).

30. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 281-82 (E.D. Pa. 1972) [hereinafter *P.A.R.C.*]. *See also* NURCOMBE & PARTLETT, *supra* note 29, at 74.

31. NURCOMBE & PARTLETT, *supra* note 29, at 74.

legally excluded because of a perceived inability to benefit from any education.[32] The court resolved the case by consent decree, enjoining the state from "deny[ing] to any mentally retarded child access to a free program of education and training."[33] The decree, without explicitly stating so, recognized that disabled children were capable of benefiting from a public education, thus entitling them to one. The court further held that the state was obligated to provide a free and appropriate public education to children with mental retardation, an education similar to that of their nondisabled peers.[34] *P.A.R.C.* established the idea of appropriateness—"that each child be offered an education appropriate to his or her learning capacities," a theme that still resonates today.[35]

Mills v. Board of Education of the District of Columbia[36] picked up where *P.A.R.C.* left off. *Mills* involved a challenge from the parents of Peter Mills and the parents of six other disabled children, all of whom alleged that the school district ("District") illegally excluded their children from school based solely on their disability.[37] The District admitted it would not be able to serve some 12,000 disabled children, but stressed that budget constraints precluded them from doing so.[38] Finding for the parents, the court ruled that school districts are "constitutionally prohibited from deciding that they [possess] inadequate resources to serve children with disabilities," as the Equal Protection Clause of the Fourteenth Amendment does "not allow the burden of insufficient funding to fall more heavily on children with disabilities than on other children."[39]

Mills went a step beyond *P.A.R.C.* by emphasizing "the entitlement … of *all* children, including children with disabilities, to a publicly supported education."[40] *Mills* also provided an important procedural victory for parents of disabled children, as the court highlighted the significance of the parent's due process rights "prior to any classification, exclusion, or termination of students."[41]

"P.A.R.C., *Mills*, and several decisions that followed" provided the groundwork for states and local education agencies to ensure that plans are in place for all students, regardless of disability.[42] Combined, these cases held that disabled children must be given access to an adequate education,[43] but no case

32. STEVEN S. GOLDBERG, SPECIAL EDUCATION LAW: A GUIDE FOR PARENTS, ADVOCATES, AND EDUCATORS 2 (1982).

33. *P.A.R.C.*, 343 F. Supp. at 302.

34. HULETT, *supra* note 7, at 20.

35. Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, THE FUTURE OF CHILDREN: SPECIAL EDUC. FOR STUDENTS WITH DISABILITIES, Spring 1996, at 25, 28, *available at* http://futureofchildren.org/futureofchildren/publications/docs/06_01_01.pdf.

36. 348 F. Supp. 866 (D.D.C. 1972).

37. *Id.* at 868. *See also* RICHARD S. VACCA & WILLIAM C. BOSHER, JR., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 330-31 (6th ed. 2003).

38. Martin et al., *supra* note 35, at 28.

39. *Id*.

40. VACCA & BOSHER, *supra* note 37, at 331 (emphasis added).

41. *Id*.

42. *See id.*

43. Bd. of Educ. v. Rowley, 458 U.S. 176, 193 (1982).

specified the substantive level of education that must be provided,[44] a void that would remain unfilled for another decade.[45] Among the changes, states were now obligated "to make reasonable efforts to tailor educational programs to the unique needs of children" and to continually involve the parents of such children in decisions relating to the child's placement and progression.[46] As these cases alluded to, and as subsequent legislation would explicitly state, emphasis was clearly shifting away from a one-size-fits-all solution to a uniquely-tailored education for all disabled children. By 1973, just one year after the *P.A.R.C.* and *Mills* decisions, "more than [thirty] federal court decisions … upheld" these principles.[47]

B. Congressional Interest

Guided by *P.A.R.C.* and *Mills*, Congress set out to investigate the current state of disabled children in the education system.[48] Hearings in 1975 unearthed the blight that families with disabled children faced on a day-to-day basis.[49] "Millions of children with disabilities were still being shut out" of schools, unable to receive any education, and more than three million disabled children were not receiving an education suitable for their needs.[50] Not only was tailoring to the unique needs of the child out of the question, but a disabled child receiving *any* education seemed to be the exception, rather than the rule.[51]

Congressional response was twofold, focusing on nondiscrimination and an educational-grant program.[52] Considered one of the first national civil-rights statutes to address the rights of the disabled, the Rehabilitation Act, particularly Section 504, stated: "No otherwise qualified handicapped individual … shall solely by reasons of his handicap, be excluded from the participation in … or be subjected to discrimination under any program or activity receiving Federal financial assistance."[53] The intent of Section 504 was clear: discrimination solely

44. *Id*.

45. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

46. VACCA & BOSHER, *supra* note 37, at 331.

47. Martin et al., *supra* note 35, at 28.

48. *See generally, e.g.*, *Oversight Hearings Before the Select Subcomm. on Education of the Comm. on Education and Labor*, 93rd Cong. (1973). *See also* Martin et al., *supra* note 35, at 29.

49. Martin et al., *supra* note 35, at 29.

50. *Id*.

> By 1971-72, despite the fact that every school district in the United States had some kind of ongoing special education program, seven states were still educating fewer than 20% of their *known* children with disabilities, and 19 states, fewer than a third. Only 17 states had even reached the halfway figure.

Id.

51. *See id*.

52. *Id*.

53. VACCA & BOSHER, *supra* note 37, at 333 (citing 29 U.S.C. § 794 (1973)). *See also* 34 C.F.R. § 104 (2009).

on the basis of a disability was illegal.[54] Unfortunately, state and local educational agencies largely ignored Section 504, most likely because the Act provided no funding and no monitoring, making enforcement and oversight virtually impossible.[55] Most parents, though they had the right to bring suit under Section 504, preferred to seek remedies under Public Law 94-142 instead.[56]

C. Public Law 94-142—In All Its Forms

On November 19, 1975, Congress enacted Public Law 94-142, better known as the Education for All Handicapped Children Act of 1975 ("EHCA").[57] Not surprisingly, given the bleak landscape painted by years of congressional investigations, the Act passed by an overwhelming majority[58] and, despite reservations in the White House that the Act could upset the balance between parents and local school districts, the Act took effect in 1977.[59]

Congress intended for the EHCA to solidify what earlier case law already determined: that all students with disabilities should receive a "free appropriate public education" ("FAPE").[60] Additionally, for the first time, funding would be available to help defer some of the costs associated with such a far-reaching goal.[61] According to the Department of Education, the four main purposes of the EHCA were:

> [T]o assure that all children with disabilities have available to them … a free appropriate public education which emphasizes special education and related services designed to meet their unique needs;

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54. *See* VACCA & BOSHER, *supra* note 37, at 333.

55. Martin et al., *supra* note 35, at 29.

56. *Id.* Children protected under IDEA are also protected under the Americans with Disabilities Act (ADA) and likely Section 504 as well. IDEA imposes affirmative obligations, Section 504 and the ADA simply require equality of treatment.

57. WRIGHT & WRIGHT, *supra* note [15], at 14.

58. There were only 14 votes against the Act in the House and Senate combined. *See U.S. Congress, Committee on Labor and Human Resources, Subcomm. on Disability Policy, and Committee on Economic and Education Opportunities, Subcomm. on Childhood, Youth and Families, Joint Hearing on the Individuals with Disabilities Education Act, Part B*, 104th Cong. (1995) (testimony of Dr. John Brademas), S. REP. NO. 104-275, at 9 (1996).

59. *See Statement on Signing the Education for All Handicapped Children Act of 1975* (Dec. 2, 1975), *in* 2 PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: GERALD R. FORD: CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT, at 1935-36 (U.S. Gov't Printing Office 1975).

60. *See* HULETT, *supra* note 7, at 91, 95 (President Ford stated that "[u]nfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains").

61. Martin et al., *supra* note 35, at 29. It is worth noting that both at the time the Martin article was published, and at the time this article is being written, appropriations for Public Law 94-142 have never approached the authorization level. *See, e.g.*, RICHARD N. APLING, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): CURRENT FUNDING TRENDS (Feb. 6 2004). "Although appropriations for IDEA Part B grants to states have increased significantly over the last 9 years, funding still falls short of the amount that would be necessary to provide maximum grants to all states." *Id.*

> [T]o assure that the rights of children with disabilities and their parents … are protected;
> [T]o assist States and localities to provide for the education of all children with disabilities;
> [T]o assess and assure the effectiveness of efforts to educate all children with disabilities.[62]

While it would be unwise to suggest that any one purpose is more important than another, the assurance of a FAPE[63] for all disabled children is doubtless one of the most significant passages in the entire statute.[64]

The FAPE provision, more so than any other, reflected Congress' recognition that millions of special needs children were being inadequately educated or not educated at all.[65] By specifying that FAPE requirements were only satisfied when a school truly individualized each child's educational program, Congress gave the Act the teeth that prior legislation lacked.[66] In a move that reflected either a general unawareness or a true appreciation of the inherent differences in the development of disabled children, Congress did not specifically define what an "appropriate" education would look like.[67] Though Congress likely intended to provide schools with the flexibility necessary to craft each student's educational plan, the lack of a definition left the courts in the unenviable position of having to determine what constitutes an "appropriate" education.[68]

D. Rowley, *and Its Future Implications*

In its first case under the EHCA, the Supreme Court had the opportunity to clarify Congress' intended meaning of an "appropriate" education.[69] In *Board of Education of Hendrick Hudson Central School District v. Rowley*, Amy Rowley,

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62. *See* U.S. DEP'T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, http://www.ed.gov/policy/speced/leg/idea/history.pdf (last visited Feb. 2, 2010).

63. The four words that make up the acronym FAPE are best understood, at least for the purposes of understanding why there is such contention over the meaning of the phrase, by dissecting each word individually. *See* HULETT, *supra* note 7, at 94.

64. *Id.* at 91 ("In fact, one may safely say that mandating and ensuring a FAPE for all children with disabilities was the driving force behind the passage of the Act.").

65. *Id*.

66. *Id.* at 92.

67. *Id*.

68. *Id*. at 93.

> FAPE is problematic in its actual implementation … due to the nebulous and subjective nature of what constitutes an "appropriate" education …. What a parent considers appropriate may be vastly different from what the school finds to be appropriate …. The law [however] simply charges the IEP team with determining what is most appropriate for the child based on his or her needs.

Id.

69. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

a child deaf since infancy, sought to have the assistance of a sign-language interpreter in her first-grade classroom.[70] The issue before the Court was whether the interpreter was needed to provide Amy with a FAPE.[71] According to the Court's definition of FAPE, a child "required meaningful access to publicly financed special education, which, in turn, required personalized instruction delivered in conformity with an [IEP]."[72] In evaluating whether the school district had met Amy's FAPE requirements, the Court employed a two-prong test:[73] (1) Has the school complied with the procedures of [EHCA]; (2) Is the IEP, developed through the procedures of the Act, "reasonably calculated to enable the child to receive [some] educational benefit[]?"[74] If the answer to both of those questions was yes, then the school had very likely met its FAPE mandate and was likely in compliance with the Act.[75]

Despite the Court's recognition that personalized instruction, per Amy's IEP, was an integral part of FAPE requirements,[76] it noted that the Act did not require schools to "maximize each child's potential,"[77] but rather, only required a "basic floor of opportunity"[78] that would provide "some educational benefit."[79] Since Congress failed to provide any "substantive standard" as to the level of education that should be afforded to handicapped children,[80] the Court was content with the fact that Amy's grades and progress indicated that she was receiving an appropriate education.[81] Without ever listing Amy's IEP goals, or deciding whether or not she was progressing towards them (rather than her progress vis-à-vis her peers), the Court found her progress "to be dispositive."[82]

70. *Rowley,* 458 U.S. at 184. *See also* Rowley v. Bd. of Educ., 483 F. Supp. 528, 532 (D.C.N.Y. 1980) (Amy, despite considerable skill at reading lips, was still missing approximately 40% of what was being spoken in class).

71. *Rowley,* 458 U.S. at 184.

72. Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 367 (2008).

73. *Rowley*, 458 U.S. at 206-07. *See also* HULETT, *supra* note 7, at 95.

74. *Rowley*, 458 U.S. at 206-07.

75. *Id.* at 207.

76. *See* Huefner, *supra* note 72, at 368.

77. *Rowley*, 458 U.S. at 198.

78. *Id.* at 201.

79. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

80. *Id.* at 189.

81. *Id.* at 203 n.25. *See also* Huefner, *supra* note 72, at 368.

82. *Rowley*, 458 U.S. at 203 n.25. *See also* Bertolucci v. San Carlos Elementary Sch. Dist., 721 F. Supp. 1150, 1154 n.3 (N.D. Cal. 1989) (noting *Rowley*'s inclusion of progress from grade to grade and test scores as important factors in determining educational benefit). *But see* Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635-36 (4th Cir. 1985) (noting that the "*Rowley* Court considered Amy Rowley's promotions in determining that she had been afforded a FAPE [but] … limited its analysis to that one case … and in [the instant case] … a showing of minimal improvement on some test results" did not prove the school had provided a FAPE); Mather v. Hartford Sch. Dist., 928 F. Supp. 437, 447 (D. Vt. 1996) (finding that a gap between achievement and grade level does not necessarily reflect the fact that no educational benefit was being received).

In the end, the fact that Amy was receiving special-education services that were leading to above-average grades proved good enough for the Court.[83]

The *Rowley* decision left lower courts to their own devices in determining how much educational benefit is enough.[84] While courts considered each case individually, it was generally agreed that trivial progress toward IEP goals was insufficient, but the requisite progress sufficient to satisfy the requirements varied.[85] Courts were similarly left in the unenviable position of judging an IEP at the time it was created, without "the benefit of hindsight,"[86] thus leaving the question of IEP implementation unanswered.

E. Amendments … and More Amendments

Though the EHCA was dubbed the "single most important piece of federal education legislation enacted during the 1970's,"[87] Congress opted to amend the Act after investigations highlighted that many of the EHCA's highly touted programs were still not meeting expectations.[88] While the shortcomings were many, several that stood out: the hiring of special-education providers who failed to meet school standards;[89] overcrowded classrooms, resulting in teachers failing to provide an appropriate education;[90] and schools overlooking disabled children by not providing direct services to them.[91]

In an effort to redress many of the Act's shortcomings, Congress amended the EHCA in 1990—renaming it the Individuals with Disabilities Education Act ("IDEA").[92] Though the core of the EHCA remained the same, it became

83. *See* Huefner, *supra* note 72, at 368. Huefner notes that during a 2006 Education Law Association address, attorney for the school district, Raymond Kuntz, mentioned that the Court seemed "concerned with procedural regularity and 'how Amy was doing' overall in her general education classroom." *Id.*

84. *See, e.g.*, Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (measurable gains are necessary in order to demonstrate "meaningful benefit" and "significant learning"); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988) (*de minimis* progress is not acceptable); Town of Burlington v. Dep't of Educ., 736 F.2d 773, 778-79 (1st Cir. 1984) (some educational benefit means students, under IDEA, must demonstrate measurable progress that yields effective results). *See also* Huefner, *supra* note 72, at 368. Further, to some extent, the Court in *Rowley* made the already ambiguous statutory term ("appropriate") more ambiguous by holding that an appropriate education is one that provides "some educational benefit." *Id*. at 371.

85. Huefner, *supra* note 72, at 368. *See also* Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (calling for "meaningful academic and social progress"); J.S.K. v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991) (defining "appropriate education as making measureable and adequate gains in the classroom"); *Polk*, 853 F.2d at 182 ("meaningful" progress).

86. Huefner, *supra* note 72, at 369.

87. John C. Pittenger & Peter Kuriloff, *Educating the Handicapped: Reforming a Radical Law*, PUB. INT., Winter 1982, at 72, 72.

88. *See* S. REP. NO. 101-204, at *5 (1989), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: PUBLIC LAW 101-476 AS AMENDED BY PUBLIC LAW 102-119, at 5 (1994).

89. *Id*.

90. *Id*.

91. *Id*.

92. Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1400–1491 (2006).

apparent that IDEA was supported by six "pillars," each relying on the other to address the rights of disabled children and their families.[93] Briefly described, the six pillars are: "[1] the Individualized Education Program ("IEP"), [2] the guarantee of a free appropriate education ("FAPE"), [3] the requirement of education in the least restrictive educational environment ("LRE"), [4] appropriate evaluation, [5] active participation of parent and student in the educational mission, and [6] procedural safeguards for all participants."[94]

Despite its prominence in the original statute and every amendment since, by the mid-1990s, it became "clear that the IEP program was not living up to its promise as the primary tool" for meeting the educational needs of special needs children.[95] Of the statute's failures, its lack of measurable short-term objectives and annual goals was most prominent,[96] yet even more troubling, for parents and advocates alike, was the fact that IEPs were "often [being] overlooked by educators," despite their congressionally mandated importance.[97]

In 1997, Congress amended IDEA again, this time with some long overdue changes.[98] Despite the Supreme Court's assertion in *Rowley* that advancing from grade to grade was certainly a factor in determining whether FAPE requirements were met, it was clear to Congress that advancement was not always enough to establish a FAPE.[99] The 1997 amendments represented Congress' attempt at clarifying what an appropriate education should look like.[100]

With a desire to improve outcomes, Congress began to emphasize greater expectations for educational achievement—for disabled and non-disabled children alike.[101] This desire stemmed from Congress' attempts at meshing the Act with two rather ambitious education acts: the Improving America's Schools Act of 1994 and the Goals 2000: Educate America Act.[102]

Believing the best way to improve educational outcomes was through the IEP document itself, Congress implicitly gave much credence to the entire IEP process, including the final product.[103] Some of the more notable changes

93. *See* HULETT, *supra* note 7, at 31.

94. For a more detailed description of each pillar, see *id.* at 31-35.

95. Huefner, *supra* note 72, at 369.

96. *Id*.

97. *Id*.

98. *See* HULETT, *supra* note 7, at 30. *See also* Huefner, *supra* note 72, at 370.

99. *See* Huefner, *supra* note 72, at 370 (discussing the fact that the *Rowley* Court "did not anticipate the inclusion movement and the concomitant placement of children with severe cognitive disabilities into general education classrooms. These children were often advanced with their chronological peers while not performing academically at grade level.").

100. *See* Andrea Valentino, Note, *The Individuals with Disabilities Education Improvement Act: Changing What Constitutes An "Appropriate" Education*, 20 J.L. & HEALTH 139, 146 (2006-07).

101. *Id*. at 147. *See also* Huefner, *supra* note 72, at 370 ("At the same time, Congress wanted to encourage progress in the general curriculum for all students with disabilities, regardless of severity, in line with amendments to the Elementary and Secondary Education Act in the mid-1990s.").

102. Huefner, *supra* note 72, at 370.

103. *See* Charlene K. Quade, Comment, *A Crystal Clear Idea: The Court Confounds the Clarity of* Rowley *and Contorts Congressional Intent*, 23 HAMLINE J. PUB. L. & POL'Y 37, 51 (2001).

included requirements that annual goals be stated in measurable terms and facilitate progress in the general curriculum for all IDEA students and, similarly, that each IEP show how the student's progress toward stated goals will be measured.[104] While the amendments sought to confer additional substantive rights on the child, as well as a better definition of an appropriate education,[105] Congress' relative silence on the *Rowley* requirement essentially left an appropriate education stuck on the same floor where it was left by *Rowley*.[106]

In 2004, IDEA ("IDEA '04") went through another reauthorization and revision; and while the basic structure and civil-rights guarantees were preserved, there were also significant changes.[107] IDEA '04 represented an effort to integrate IDEA with the previously enacted No Child Left Behind Act of 2001, predominantly for academic reasons.[108] The benefit of doing so, according to Congressman George Miller, Chairman of the Committee on Education and Labor, was "to improve educational services to students with disabilities, with the focus on improving student performance" (student academic performance to be exact).[109] For the alignment of IDEA and No Child Left Behind to have any meaningful benefit, Congress had to strengthen both the IEP program and IDEA's due-process procedures.[110]

The essence of the IEP, the core belief that it is the chief document in leveling the playing field for disabled children, has not changed much since its inception in 1975.[111] IDEA '04, however, began to address some of the academic shortcomings of the original IEP program.[112] Now, IEPs must specify the services and modifications necessary to allow a child to "advance appropriately toward attaining the annual goals," rather than simply listing the goals.[113] Moreover, IEP revisions must note any "lack of expected progress" toward those

104. 20 U.S.C. § 1414(d)(1)(A)(i)(II), (III) (2006). *See also* Huefner, *supra* note 72, at 370-71.

105. Valentino, *supra* note 100, at 147. *See also* Tara L. Eyer, Comment, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 DICK. L. REV. 613, 631-32 (1998).

106. Valentino, *supra* note 100, at 147.

107. RICHARD N. APLING & NANCY LEE JONES, CRS REPORT, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): ANALYSIS OF CHANGES MADE BY P.L. 108-446 (2005) (for a fairly comprehensive list of the changes made, the Summary of the CRS Report lists each in some detail).

108. Huefner, *supra* note 72, at 372. For example, by the 2013-14 school year it is expected that all students, regardless of disability will be proficient in reading, math and science. *Id.* "One clarification in the IEP particularly reflects the desire to mesh the two laws: all IEPs must first contain present levels of *academic* achievement and then *academic* achievement goals, no matter how severe the disability; developmental, behavioral, or functional goals alone are not enough." *Id.*

109. GEORGE MILLER, H.R. COMM. ON EDUCATION AND LABOR, KEY CHANGES IN THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) 2004 AMENDMENTS 1 (2007), http://edlabor.house.gov/publications/IDEA2004keychanges.pdf.

110. *Id*.

111. *See* Education For All Handicapped Children Act of 1975, Pub. L. No. 94-142 (1975); Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476 (1990); Individuals with Disabilities Education Act, Pub. L. No. 108-446 (2003) (highlighting that, despite multiple amendments, the basic framework of the IEP has remained the same).

112. *See* Valentino, *supra* note 100, at 155-60.

113. Huefner, *supra* note 72, at 372 (citing 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(aa) (2006)).

goals.[114] And, for the first time, the selection of special-education services must be "based on peer-reviewed research to the extent practicable," perhaps placing educators in a position that requires their justifying why certain services are utilized rather than others.[115]

III. THE INDIVIDUALIZED EDUCATION PROGRAM

If there is a common thread woven through the many amendments to IDEA, it is the recognition that the IEP will forever be the cornerstone of both the Act and the child's education.[116] The provision of a "free appropriate public education" requires that "each handicapped child [is] considered as an individual."[117] The only way to achieve this guarantee is through the creation of an IEP and an education "provided in conformity with the [IEP]."[118]

In its simplest terms, an IEP must be individually designed to meet the unique educational needs of a particular child.[119] According to the Department of Education, the department responsible for promulgating educational regulations, "[e]ach public school child who receives special education and related services must have an Individualized Education Program."[120] While there is no "mechanical checklist" for creating the ideal IEP,[121] they are "by their very nature idiosyncratic."[122] This becomes clear given that the underlying purpose of the IEP is to "tailor the education to the child; not tailor the child to the education."[123] The emphasis on tailoring and individuality of the IEP, and special-education on the whole, cannot be overstated. Thus, it is not a stretch to

114. *Id.*

115. *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)(IV) (2006)).

116. *Id.* at 369 (noting that the IEP is "the primary tool for assessing the effectiveness of special education services").

117. St. Louis Developmental Disabilities Treatment Ctr. Parents Ass'n v. Mallory, 591 F. Supp. 1416, 1440 (W.D. Mo. 1984).

118. 20 U.S.C. § 1401(9)(D) (2006).

119. *See* 20 U.S.C. § 1414(d)(1)(A) (2006) (defining "individualized education program").

120. OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVS., U.S. DEP'T. OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1 (2000), http://www.ed.gov/parents/needs/speced/iepguide/iepguide.pdf (last visited Feb. 2, 2010) [hereinafter GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM].

121. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 23 (1st Cir. 2008).

122. *Id.*

123. S. REP. NO. 105-17, at 24 (1997). IEPs should not be written to "fit" a particular placement—as a sort of one-size-fits-all application—nor should it be written prior to the first set of conferences regarding a child's placement. *See also* Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 858 (6th Cir. 2004) (*aff'g* N.L. v. Knox County Schs., 315 F.3d 688, 694-95 (6th Cir. 2003), that school officials are permitted to form opinions and compile reports prior to IEP meetings, however, such conduct is only harmless as long as school officials are "willing to listen to the parents"); GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM, *supra* note 120, at 3 (discussing the writing of each student's IEP as taking place within the larger picture of the special-education process under IDEA).

say that if the IEP is the cornerstone of IDEA, then uniqueness is the cornerstone of the IEP.[124]

A. IEP Development: The Goals

Any discussion of IEPs necessarily begins with the IEP development process—a thorough process that essentially lays the foundation for the child's educational future.[125] When crafting an IEP, there are statutory and regulatory requirements that must be met; a mere recitation of them in the document will not suffice. Among the necessary components, each IEP must include:

> [A] statement of the child's present levels of academic achievement and functional performance …;
> [A] statement of measurable annual goals, including academic and functional goals …;
> [A] description of how the child's progress toward meeting the annual goals … will be measured and when periodic reports on the progress the child is making toward meeting the annual goals … will be provided;
> [A] statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child …;
> [A]n explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class …;
> [A] statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments ….[126]

Curiously, when amending IDEA in 2004, Congress removed the phrase "including benchmarks or short-term objectives" from the statement-of-measurable-annual-goals section.[127] Congress removed this in an effort to alleviate special-education teachers' frustrations at the paperwork burden imposed by IDEA.[128] Rationalizing that the No Child Left Behind Act had

124. For a thorough discussion of the various aspects of the IEP process, see HULETT, *supra* note 7, at 149 ("The IEP must address the who, what, when, where, how, and why of the student's educational program."). *See also* Honig v. Doe, 484 U.S. 305, 311 (1988) (discussing the uniqueness of the IEP, and its importance as the "primary vehicle for implementing … congressional goals").

125. IEPs are typically in place for one academic year, though some schools are participating in a pilot program to employ the same IEP for up to three years. *See* 20 U.S.C. § 1414(d)(5)(A)(i) (2006).

126. 20 U.S.C. § 1414(d)(1)(A) (2006).

127. *Compare* 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2004), *with* 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2006). *See also* Wrightslaw: 20 U.S.C. § 1414 Evaluations and IEPs, *available at* http://www.wrightslaw.com/idea/law/section1414.pdf (last visited Mar. 1, 2010) (showing changes made between the 2004 and 2006 version of the Act).

128. 149 CONG. REC. 9994-95 (2003) (statement of Rep. Boehner).

regular reporting requirements, Congress felt there was no longer a need for short-term objectives and benchmarks.[129] While the amendment passed in both houses of Congress, not all were convinced that the removal of short-term objectives served the best interest of special-needs children.[130]

Measureable annual goals, however, remain critical in the creation and implementation of an IEP. The goals portion of the IEP is meant to mesh with the statement of present levels of performance, enabling the IEP team to create goals in line with current and anticipated performance.[131] Goals and objectives are instrumental in determining if desired outcomes are being met and whether services and placement are appropriate. These requirements are the best, and often only, way to follow the child's progress.[132]

The overall responsibility of ensuring compliance with IDEA sits with the state educational agency, but the day-to-day responsibility for developing, reviewing, and revising IEPs lies with local education agencies. Though the specifics vary from state to state, a state education agency has the basic duty of ensuring that every child with a disability within its borders has a FAPE provided to them.[133]

B. IEP Team: The Players

An IEP meeting is conducted to develop the appropriate placement for the child, and the history of IDEA makes clear that there should be as many IEP meetings as necessary to finalize the placement.[134] To create and implement an IEP, a team of individuals representing every aspect of the child's educational

129. *Id.*

130. *Id.* at 10006 (Congressman Stark noting that "[i]nstead of promoting this need, the bill eliminates the requirement that every school have short-term instructional objectives for each student. This greatly decreases the chance for students with disabilities to succeed because their individual educational needs may well go unaddressed for what could be years"). *See also id.* at 10009 (statement of Rep. Eshoo). Representative Eshoo notes:

> H.R. 1350 fails special ed kids for these reasons: It undermines their civil rights and their educational opportunity by removing parental involvement in actions relating to the identification, evaluation and education of their child …. It eliminates short term objectives for a student's Individualized Education Program and limits a teacher of special ed to participate in the process.

Id.

131. *See* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,662 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300-01).

132. *Cf.* O'Toole v. Olathe Dist. Schs. Unified Sch. Dist., 144 F.3d 692, 706 (10th Cir. 1998) (rejecting claim that "annual goals and short-term objectives" were not sufficiently specific).

133. *See* 34 C.F.R. § 300.149 (2009).

134. 34 C.F.R. § 300.324(b) (2009) (IEP is to be reviewed periodically). *See also* 64 Fed. Reg. 12,239, 12,476 (Mar. 12, 1999) (referencing 121 CONG. REC. S20428-29 (Nov. 19, 1975) (remarks of Sen. Stafford) ("The legislative history … makes it clear that there should be as many meetings a year as any one child may need.")).

career must be assembled.[135] The IEP team is a carefully crafted set of individuals who each bring certain information about the child to the table that is essential to the successful creation of the plan.[136] Though each team member is vital, the parent's importance in the process cannot be overstated.[137] This importance is evident in both the legislative history of IDEA and case law.[138]

Parental participation has been described as the "letter and spirit of the IEP."[139] While there has been an increasing emphasis[140] on parental involvement in the entire process—from participation to placement decisions[141]—a parent is not afforded the right to "dictate the outcome" of an IEP meeting.[142] Similarly, IDEA is not violated simply because school officials decline to accept the suggestions of the parent or if the parent disagrees with the placement decision.[143]

Aside from parents (and the child, where appropriate), the rest of the team is comprised of "not less than one"[144] regular education teacher; "not less than one" special-education teacher;

> a representative of the local education agency who—is qualified to provide or supervise … specially designed instruction to meet the unique needs of children with disabilities; … an individual who can interpret the instructional implications of evaluation results; [and] … other individuals who have knowledge or special expertise regarding the child" (as appropriate).[145]

135. *See* M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 648 (9th Cir. 2005) (finding failure to include a regular education teacher on the IEP team was a serious procedural error that led to a loss of educational opportunity and a denial of FAPE).

136. *See* GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM, *supra* note 120, at 1.

137. This importance is well supported in the legislative history of IDEA. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 208-09 (1982) (internal citation omitted).

138. *See* THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 106 n.37 (2d ed. 2001) (presenting a discussion of the legislative history and cases important to parental involvement).

139. *Id.* at 106.

140. *See, e.g.*, 34 C.F.R. § 300.322 (2009).

141. 34 C.F.R. § 300.501(c)(1) (2009) ("Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.").

142. White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003).

143. Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 47 (D.D.C. 2007) (where parent and advocate were present at the multi-disciplinary team meetings and some of their suggestions were adopted, the fact that parent ultimately disagreed with the placement decision did not show that "she did not participate meaningfully") (internal citations and quotations omitted).

144. The "not less than" language replaced "at least" when the IDEA was amended in 2004. *See* Peter W.D. Wright, The Individuals with Disabilities Education Improvement Act of 2004: Overview, Explanation and Comparison: IDEA 2004 v. IDEA 97, at 31, http://www.wrightslaw.com/idea/idea.2004.all.pdf.

145. 20 U.S.C. § 1414(d)(1)(B) (2006).

C. IEP Creation: The Plan

Once assembled, the IEP team must operate within parameters to chart the course most appropriate for the child.[146] Of the many elements that come into play when plotting the academic year,[147] the IEP team must consider the following in drafting the document: "(i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental and functional needs of the child."[148] These categories are nothing if not broad and nondescript, but other sections of IDEA provide the specificity needed for certain types of disabilities.[149]

When the IEP team completes its objectives and a plan is created, a copy of the IEP is given to the parents.[150] The IEP must also be accessible to "regular education teacher[s], special-education teacher[s], related service[s] provider[s], and any other service provider … responsible" for implementing a portion of the IEP.[151] Ensuring that each potential service provider and teacher is provided with a copy of the IEP is essential in guaranteeing a FAPE in accordance with the IEP.[152]

Predictably, the document-creation process is remarkably fluid.[153] Amendments and revisions to the IEP are allowable—and often foreseeable.[154] Aside from the annual review, IEPs should be revised, as appropriate, to address any of the following: a "lack of expected progress toward [the] annual goals;" the child's anticipated needs; or "information about the child provided to, or by, the parents."[155]

Given the difficulty involved in convening the IEP team on a regular basis, the 2004 IDEA amendments afford the opportunity to amend or modify the current IEP with a written document[156] in lieu of an IEP team meeting, provided that the IEP team is informed of any changes.[157] The agreement to change the

146. *See supra* Part III.A.

147. One year is the typical IEP length, though some schools are allowed to experiment with a pilot program that provides for 3-year IEPs. *See* 20 U.S.C. § 1414(d)(5)(A)(i) (2006).

148. 20 U.S.C. § 1414(d)(3) (2006).

149. *See, e.g.*, 20 U.S.C. § 1414(d)(3)(B) (2006) ("[I]n the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP; [or] … in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille ….").

150. 34 C.F.R. § 300.322(f) (2009).

151. 34 C.F.R. § 300.323(d)(1) (2009)

152. *See* 71 Fed. Reg. 46,681 (2006).

153. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist., 144 F.3d 692, 702 (10th Cir. 1998) ("[T]he implementation of the program is an ongoing, dynamic activity, which obviously must be evaluated as such.").

154. *See* 20 U.S.C. § 1414(d)(3)(F) (2006); 20 U.S.C. § 1414(d)(4) (2006).

155. 20 U.S.C. § 1414(d)(4)(A)(ii) (2006).

156. 34 C.F.R. § 300.324(a)(4)(i) (2009).

157. 34 C.F.R. § 300.324(a)(6) (2006). Note that parents must be provided a revised copy of the IEP. *Id.*

IEP without a full IEP team meeting need not be in writing, but changes to the actual IEP must be in writing and all teachers and service providers need to be notified of the changes as well.[158] While the impetus behind the 2004 amendments may have been the desire to eliminate some of the paperwork and administrative burden on the IEP team,[159] the IEP team's role necessarily remained the same: to "act in the best interest of the child."[160]

IEP creation is a delicate, yet well-regulated task that can quickly become overwhelming. Parents can easily lose the forest for the trees, so to speak, when looking at the complexity of the process; yet, the importance of the IEP comes not from the success in drafting it, but rather from the success in seeing it carried out. For the student who is unable to advocate for herself, the IEP *is* her advocate.

IV. ONE CIRCUIT SPLIT, TWO CAMPS

So, what then is the problem? When an IEP is finally drafted and agreed upon by the myriad of parties involved, it requires complete compliance … or does it require only substantial compliance? Nothing in the statute(s) seem to indicate so much flexibility that a teacher can unilaterally change certain portions of the IEP; yet recent court decisions seem to have found a gap, allowing schools to pick and choose which portions of the IEP require full implementation and which portions require only substantial implementation.

A. Compliance Means "Complete" Compliance …

In *D.D. v. New York City Board of Education*, the Second Circuit held that an IEP must be fully implemented, that is to say, it must be complied with.[161] In *D.D. by V.D.*, the parents of three New York City preschool children with disabilities filed a class action suit alleging that the New York City Department of Education and the New York State Education Department (together referred to as "Defendants") violated their rights[162] under IDEA by, among other things, failing to immediately provide them with the "educational services mandated by their [children's IEPs]."[163]

D.D., a special-needs child, received his first IEP in November 2002 and an amended IEP in March 2003, but as of May 2003, he had not received any of the

158. 20 U.S.C. § 1414(d)(3)(D) (2004). *See also* 71 Fed. Reg. 46,685 (2006).

159. *See* MILLER, *supra* note 109, at 3.

160. *See* ELIZABETH TRULY, IDEA 2004 FINAL REGULATIONS: REFERRAL, REEVALUATION, IEP TEAM MEETINGS, AND IEPS 18 (2006), http://www.aft.org/topics/specialed/downloads/finalregschart.pdf. *See also* 71 Fed. Reg. 46,676 (2006).

161. D.D. v. New York City Bd. of Educ., 465 F.3d 503, 512 (2d Cir. 2006). The court in *D.D.* does not use any adjective before the word "compliance," thus, it is not referred to as "complete," "strict," or "full" compliance, it is merely compliance. *See id.* Implicit in this is the belief that the word "compliance" incorporates any and all modifiers that would precede it.

162. *Id.* at 505-06.

163. *Id.* at 506.

services required by either version of the IEP.[164] Through counsel, D.D. had a hearing before an impartial hearing officer,[165] who concluded that D.D. required the services listed in the IEP and ordered the Defendants to provide them.[166] After the New York City Department of Education failed to follow the orders of the hearing officer, requiring implementation of the portions of the IEP it previously failed to implement, D.D. filed suit in district court.[167] The district court denied D.D.'s request for an injunction, reasoning that in order to prevail, D.D. needed to demonstrate that the Defendants were not in "substantial compliance" with the provisions of IDEA.[168] Since the Defendants demonstrated that they were able to provide services to at least 97% of children with IEPs throughout New York, the court held that they complied with the requirements of IDEA.[169]

On appeal, the Second Circuit disagreed.[170] While "IDEA contains a substantial compliance provision authorizing the Secretary of Education to … withhold" funding to a particular school if that school fails to substantially comply with the Act, the Second Circuit held that the substantial compliance language does not implicate the school's FAPE requirements.[171] The court further noted, at length, that IDEA established the right to a free appropriate public education for all children with disabilities, emphasizing the words *all* and *unique*.[172] Ultimately, the court concluded that the substantial-compliance standard was the wrong yardstick by which to determine whether or not a school has complied with its obligations to provide a free appropriate public education to an individual child.[173] "IDEA does not simply require substantial compliance … it requires compliance."[174] The Second Circuit's holding was seemingly straightforward—compliance must be complete—particularly when it comes to implementing an IEP.

B. ... Or Does it Mean "Substantial" Compliance?

The opposing view came in *Van Duyn v. Baker School District 5J*, where the Ninth Circuit relied on the *Rowley* standard, as well as a Fifth Circuit decision, to hold that compliance means "substantial" or "material" compliance, rather than strict or complete compliance.[175] Before introducing *Van Duyn*, it is

164. *Id.* at 507 n.4 (services mandated by the IEP that D.D. was not provided included occupational therapy, counseling, and school placements).

165. The impartial hearing officer is one step available to parents in the due process safeguards of IDEA. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 509-10.

169. *Id.* at 510 (representing the total number of special needs children in the New York area).

170. *Id.*

171. D.D. v. N.Y. City Bd. of Educ., 465 F.3d 503, 510-11 (2d Cir. 2006).

172. *Id.* at 511 (and cases cited therein).

173. *Id.* at 512.

174. *Id.*

175. 502 F.3d 811, 818, 821-22 (9th Cir. 2007).

necessary to revisit *Rowley* and explain the Fifth Circuit decision in *Houston Independent School District v. Bobby R.*[176]

1. Rowley *Revisited and* Bobby R.

Rowley[177] provided the groundwork for the Ninth Circuit in *Van Duyn*, as the court used it to reason that IDEA did not require maximization of the child's potential, but merely access to a free public education.[178] The question in *Van Duyn*, however, goes beyond *Rowley*. Where *Rowley* was premised around the content of the IEP, the question in *Van Duyn* concerned the implementation of services and objectives listed in the IEP.[179] For that, the *Van Duyn* court turned to the 2000 decision in *Bobby R.*[180]

Caius R., son of Bobby R., attended the Houston Independent School District ("the District") for about "seven years before being removed to [a] private school."[181] As a student, Caius struggled with dyslexia and considerable "deficiencies in reading, oral language, and written language skills."[182] The District had difficulty meeting some of the provisions in Caius's agreed-upon IEP and, while they sought to compensate for what they could not provide, Caius's parents objected to the District's implementation of other portions of the IEP.[183] Ultimately, after more IEP modifications were not met, Caius's parents sought administrative review of the IEP.[184] The administrative-hearing officer concluded that the goals set forth in the IEP were "reasonable and calculated to provide … an educational benefit," and the District's failure to implement portions of the IEP deprived Caius of his right to a free appropriate education under IDEA.[185]

On appeal, the district court reversed the hearing officer's findings.[186] In the eyes of the court, Caius showed "improvement in most areas of study."[187] Accordingly, the court determined that he therefore received an educational benefit in accordance with IDEA.[188]

176. 200 F.3d 341 (5th Cir. 2000).

177. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

178. *Van Duyn*, 502 F.3d at 818-19.

179. *Id.*

180. *Id.*

181. *Bobby R.*, 200 F.3d at 343.

182. *Id.* at 343-44.

183. *Id.* at 344.

184. *Id.*

185. *Id.*

186. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 345 (5th Cir. 2000).

187. *Id.* at 345. This language harkens the Supreme Court's language in *Rowley*, where the Court relied on the child's advancement to conclude that she was afforded a FAPE. *Rowley*, 458 U.S. at 203.

188. *Bobby R.*, 200 F.3d at 345.

Appealing to the Fifth Circuit, Caius presented evidence of the District's failures in several of the IEP provisions.[189] Specifically, he pointed to the District's failure to provide a speech therapist for a substantial portion of the 1994-1995 academic year, its failure to provide an Advanced Placement program for a few months during the 1996-1997 academic year, and its general failure to consistently provide "highlighted and taped texts in accordance with the IEP."[190] The District acknowledged its failures, but argued that they were not tantamount to legal failures.[191] Instead, the District urged the court to look to the "overall educational benefit received by the child" and "whether the IEP was *substantially or materially* implemented."[192] In the end, the Fifth Circuit ultimately fell back on the *Rowley* standard of providing a "basic floor of opportunity" to handicapped children and determined that Caius's IEP, as drafted, was reasonably calculated to enable him to receive educational benefits.[193]

The court listed several additional reasons why the district court was correct in reversing the hearing officer's conclusions.[194] Central to their holding was the belief that local educational agencies should retain "some flexibility in scheduling services and … providing compensatory services."[195] The court held that the "failure to provide all the services and modifications outlined in an IEP does not constitute a *per se* violation of the IDEA."[196] Rather, FAPE requirements are satisfied where "significant provisions" of a child's IEP are followed.[197]

Rowley undoubtedly set a rather low bar for the foundation of special-education requirements, but it was the Fifth Circuit in *Bobby R*. that set forth the notion that an IEP-implementation challenge must demonstrate more than a *de minimis* failure to implement elements of the IEP.[198] An implementation challenge must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.[199] This hybrid rule, comprised of both the *Rowley* and *Bobby R*. holdings, ultimately provided the context for the decision in *Van Duyn.*

189. *Id.* (noting the alleged failures included "HISD's failure to provide a speech therapist … its failure to provide an AP program for approximately two months … and its general failures consistently to provide highlighted and taped texts").

190. *Id.*

191. *Id.*

192. *Id.* (emphasis added).

193. *Id.* at 346.

194. *Id.* at 348.

195. *Id.*

196. Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000).

197. *Id.* at 349.

198. *Id.*

199. *Id.*

2. Van Duyn

Van Duyn, a severely autistic child at South Baker Elementary School, received extensive special-education services through the school.[200] His mother, and the rest of the IEP team, finalized an IEP for the 2001-2002 school year—a year leading to Van Duyn's transition from elementary to middle school.[201] Van Duyn's IEP laid out specifics for his work in language arts (six to seven hours per week), math (eight to ten hours per week), and physical education (three to four hours per week).[202] Among other provisions, the IEP contained a Behavior Management Plan to be implemented full-time, which required all material be presented at his level, that he placed in a "self-contained" special-education room, that a "regional autism specialist visit" twice per week, and that one of his teachers receive specialized state autism training.[203]

The record was replete with evidence of IEP-implementation failures.[204] The School District did not accurately record Van Duyn's behavior, follow his behavior management plan, or provide his teacher with state-level training in educating autistic children.[205] Additionally, though the IEP called for Van Duyn's progress to be measured against seventy short-term objectives, only some of the IEP categories were addressed, and of those, several indicated that he was not working toward all of the objectives set out in the IEP.[206]

After espousing the virtue of IDEA, and lauding both its intended purpose and desired outcome, the Ninth Circuit noted the importance of IEP implementation, going so far as to mention that "[t]he child's parents … must receive written notice of any proposed changes to the IEP."[207] Despite this importance, the court's analysis leaned on the *Rowley/Bobby R*. framework, concluding that any failures on the part of the School District were not material, but instead were *de minimis*.[208]

The court rejected Van Duyn's proposition that failing to implement an IEP is the equivalent of changing an IEP.[209] The court refused to see all IEP implementation failures as procedural violations of IDEA.[210] Further, the court noted that although the language of the statute indicates that a failure to implement an IEP may deny a child a free appropriate public education, it also "counsels against making minor implementation failures actionable," as the word

200. Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 815 (9th Cir. 2007).
201. *Id.*
202. *Id.*
203. *Id.* at 815-16.
204. *See* Brief of Plaintiff-Appellant at 8, Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007) (discussing the "District's … failures to implement [the] IEP").
205. *Van Duyn*, 502 F.3d at 816.
206. *Id.*
207. *Id.* at 818.
208. *Id.* at 826.
209. *Id.* at 819.
210. Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 819 (9th Cir. 2007).

"conformity" is used instead of the phrase "perfect adherence."[211] Since the services provided to Van Duyn were not materially different from those stipulated in the IEP, there was no violation of IDEA.[212]

Dissenting, Judge Ferguson noted that the majority of the court now involved itself in determining the "'materiality' of a school district's failure to implement" an IEP.[213] With a cautionary tone, Judge Ferguson warned that not only is the majority's standard inconsistent with the language of IDEA, but it is both unworkably vague and an inappropriate foray for the judiciary to undertake.[214] Appreciating the complexity of the special-education process, he noted, "[g]iven the extensive process and expertise involved in crafting an IEP, the failure to implement *any* portion of the program … is *necessarily* material."[215] Judge Ferguson's concerns, as well as his interpretation of IDEA, ultimately served as the central theme for advocates who believe that compliance does not mean *substantial* compliance, and that the court system is the wrong place for determining what is and is not material in an IEP.[216]

3. *Camp #1—Compliance*[217]

The compliance camp bears the relative simplicity of the Ferguson dissent in *Van Duyn*—that any failure is necessarily material. Until *Van Duyn*, many special-education legal practitioners operated under the assumption that complete compliance was the only option with respect to IEPs.[218] This assumption likely stems from prior case law, which seemed to indicate that the failure to implement portions of an IEP or other provisions of IDEA amounted to a denial of a free appropriate public education.[219] Several cases are illustrative of Judge Ferguson's arguments.

In *Marie O. v. Edgar*, an action was brought on behalf of four infants with disabilities and a class of about 26,000 other children who were eligible, but not receiving, early intervention services under Part H of IDEA.[220] Part H established a program to provide federal funds to states with early intervention services for "developmentally delayed infants and toddlers."[221] To receive funding, a state is required to establish a comprehensive intervention system to assist in development from birth through age two.[222] The State of Illinois, a

211. *Id.* at 821.
212. *Id.* at 826.
213. *Id*. (Ferguson, J., dissenting).
214. *Id.*
215. *Id.* at 826-27.
216. *Id. See also generally* Gerl, *supra* note 2.
217. While "complete" compliance would be a more descriptive title, I feel it would be redundant, as I am arguing that compliance—by its very definition—incorporates the meaning of "complete."
218. *See, e.g.*, Gerl, *supra* note 2.
219. *Id.*
220. 131 F.3d 610, 612 (7th Cir. 1997).
221. *Id*.
222. *Id.*

participant in the Part H program, had received substantial funding for their intervention services.[223] In 1993, the Auditor General of Illinois reviewed the state's progress in implementing its intervention system and issued a report indicating some alarming failures in the overall program.[224] The defendants in the case conceded their lack of compliance with Part H of IDEA, but argued that the action was barred by the Eleventh Amendment and because Part H did not create rights enforceable by private citizens.[225]

The court disagreed with the defendants and held that the language of Part H was mandatory, clear, and indicative of an enforceable individual right.[226] As for the funding provision, the court noted that "Congress intended to require the states to undertake specific and concrete obligations to eligible individuals … in exchange for the federal funds granted under Part H."[227] Moreover, the court highlighted that where the statute read "services will be available to all infants and toddlers with disabilities," it meant *all*, not substantially all.[228] As far as the court was concerned, the statute spelled out the services to be provided and the recipients thereof; thus the statute did not simply require "substantial compliance," it required compliance.[229]

The IDEA provisions mandating an IEP contain language similar to that of Part H.[230] It would not be a stretch for courts to hold that congressional intent as to IEPs, as evidenced by congress' choice of language, indicates an equally narrow reading.[231]

Strictly in terms of implementation, courts have regularly found that the failure to completely implement an IEP amounts to a denial of a free appropriate public education, thus amounting to a violation of IDEA.[232] In *J.P. v. County School Board of Hanover County*, the court ordered a school to reimburse the

223. *Id.* at 613.

224. *Id.* at 614 ("The report indicated that services were not available in all parts of the state, many eligible children were not being served and were on waiting lists, some federal and state program components were not fully implemented and no tracking or other follow-up was being conducted.").

225. *Id.*

226. *Id.* at 620.

227. *Id.*

228. *Id.*

229. *Id.* at 620-21.

230. For a discussion on Part H, see *Marie O. v. Edgar*, 131 F.3d 610, 612-13 (7th Cir. 1997). "Part H sets up a federal program by which federal funds are granted to states for the development and implementation of systems to provide early intervention services to developmentally-delayed infants and toddlers from birth through age two." *Id.* at 612. Contrast this with language from 20 U.S.C. § 1412: "A State is eligible for assistance … if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions." 20 U.S.C. § 1412(a) (2006).

231. For example, IDEA offers services to *all* handicapped children, not substantially all handicapped children. *See Marie O.*, 131 F.3d at 620.

232. *See, e.g.*, LegalWatch: Topic–Procedural Violations, http://www.special-ed-law.com/Brief%20Bank5g7jr/Procedural%20violations%20may%20result%20in%20denial%20of%20FAPE.pdf (last visited Feb. 7, 2010) (summarizing cases where cases considered procedural violations of FAPE).

parents of an autistic child where the school failed to properly implement substantial portions of the child's IEP and failed to replace the inadequate IEP that had been in place for two consecutive school years.[233] The court also faulted the school for failing to adequately document the child's progress, noting that progress "must be assessed against [the child's] capacity to progress."[234]

Similarly, in *Miller ex rel. S.M. v. Board of Education,* the school's failure to properly implement a reading program called for in the child's IEP led to a tuition reimbursement for the child's parents.[235] In *S.A. v. Riverside Delanco School District Board of Education*, the court agreed with an administrative law judge ("ALJ") that the failure to implement discrete trial training as part of the child's IEP constituted a denial of a free appropriate public education.[236] Based on expert testimony, the ALJ concluded, and the court agreed, that "a program lacking [discrete trial training] could not meet the FAPE standard set forth by the Supreme Court in [*Rowley*]."[237] Each of these decisions highlights that the failure to implement portions of an IEP is not a harmless, inconsequential error, but instead an error that often results in a denial of FAPE, violating a child's procedural and substantive rights under IDEA.[238]

To further the argument that IDEA requires strict compliance, in *D.D. v. New York City Board of Education*,[239] the court looked to the Supreme Court decision in *Blessing v. Freestone*.[240] *Blessing* used a similarly worded statute, a provision from the Social Security Act, to help demonstrate the difference between the compliance and substantial-compliance standard.[241]

Though the funding provision in the Social Security Act was similar to IDEA's, the Court held that the substantial-compliance standard is not applicable when dealing with individual rights.[242] The court in *D.D.*, recognizing the similarities between the Social Security Act and IDEA, applied the same rationale regarding the individual rights conferred by IDEA.[243]

In *Blessing*, a group of mothers, believing their children were eligible for services under Title IV-D (the funding provision of the Social Security Act), sued the director of Arizona's child-support agency, claiming an enforceable individual right to have the State program's "substantial compliance" with the provisions of Title IV-D.[244] The Court held that "[f]ar from creating an individual entitlement to services, the [substantial compliance] standard is simply

233. J.P. v. County Sch. Bd., 447 F. Supp. 2d 553, 591 (E.D. Va. 2006), *vacated by* 516 F.3d 254 (4th Cir. 2008).

234. *Id.* at 585.

235. 455 F. Supp. 2d 1286, 1290 (D.N.M. 2006), *aff'd,* 565 F.3d 1232 (10th Cir. 2009).

236. No. Civ. 04-4710 (RBK), 2006 WL 827798, at *3-4 (D.N.J. Mar. 30, 2006).

237. *Id.* at *2.

238. For more cases mandating strict compliance, *see* Gerl*, supra* note 2.

239. 465 F.3d 503 (2d Cir. 2006).

240. 520 U.S. 329 (1997).

241. *Id.* at 335.

242. *D.D.*, 465 F.3d at 511.

243. *Id.* at 511-12.

244. *Blessing*, 520 U.S. at 337.

a yardstick for the Secretary to measure the system wide performance of a State's Title IV-D program."[245]

Applying this reasoning to IDEA, the court in *D.D.* held that the "complies substantially"[246] standard in § 1416(e) of IDEA, is simply the "yardstick by which the Secretary of Education determines whether a state will receive federal funding."[247] "In contrast, access to a 'free appropriate public education' is a right that the IDEA *guarantees* to individual disabled children" a right that participating states are obliged to provide.[248]

The cases comprising the compliance camp generally show two things. First, the substantial-compliance provision of IDEA pertains only to a school district's ability to receive funding; it has nothing to do with the individual substantive rights granted through the text of IDEA and its legislative history. Second, the failure to implement portions of an IEP inherently amounts to a failure to provide a free appropriate public education. The IEP, when followed, is the document that establishes an "appropriate education." When the IEP is violated, so are the child's individual rights.

4. *Camp #2—Substantial Compliance*

The substantial-compliance camp is comprised of those cases that, more or less, follow the *Rowley/Bobby R*. hybrid rule, which provides that a failure-to-implement claim must show more than a *de minimis* failure.[249] A claim must, instead, demonstrate that substantial or significant provisions were not implemented.[250] Without directly stating as much, *Rowley* laid the foundation for the entire substantial-compliance camp through its interpretation of IDEA.[251] By holding that the intent of IDEA aimed more at opening a door for a special-needs child to receive an education than maximizing the child's education,[252] cases have continually cited *Rowley* when holding that a denial of FAPE is found only where a failure is material.[253]

For example, in *Neosho R-V Sch. Dist. v. Clark*, the court acknowledged that the *Bobby R.* standard for evaluating material failures to implement was the appropriate framework to evaluate the case.[254] Yet neither side framed its argument as a failure-to-implement, so the court confined its analysis to the *Rowley* standard.[255] Concluding that *Rowley* was "pliable enough" to fit the case

245. *Id.* at 343 (emphasis removed).

246. "Complies substantially" and "substantial-compliance" are interchangeable.

247. *D.D.*, 465 F.3d at 512.

248. *Id*. (emphasis added).

249. In addition to the cases discussed, see Slama v. Indep. Sch. Dist., 259 F. Supp. 2d 880, 888 (D. Minn. 2003) (citing approvingly Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000)).

250. *Bobby R.*, 200 F.3d at 349.

251. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982).

252. *See id.*

253. *See, e.g.,* Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 (8th Cir. 2003).

254. *Id.* at 1027 n.3.

255. *Id.*

before it, the court believed *Rowley* would "safeguard the same principles [as *Bobby R.*]," because an IEP is not reasonably calculated to provide a free appropriate public education where there is evidence that the school failed to implement an *essential* element.[256] Thus, the court reasoned that there was no need to discuss *Bobby R.*[257]

In *Manalansan v. Board of Education*, the court cited approvingly to the *Bobby R.* standard, but in the context of the case before it, held the school's failures to be material.[258] Manalansan's IEP required the help of an aide during various classroom activities and other times throughout the day, but the court found that an aide was not made consistently available to the child.[259] Given the nature of the child's physical disabilities, the court had difficulty seeing how such a provision could be "anything but substantial and material."[260] Despite the court siding with the student, it still engaged in a materiality analysis,[261] something Judge Ferguson would no doubt have qualms with.

Interestingly, the school attempted to argue that it implemented the child's IEP "'to the best of its ability,'"[262] thus satisfying IDEA's "good faith" requirement.[263] The court, however, read the same regulation differently, holding that the "good faith" requirement applies to the educator who tries "his or her best" to help the child, but is unable to fulfill every objective in the IEP.[264] The court noted that the "good faith" requirement is not applicable in the context of services that are required by the IEP.[265] Provision of required services is "within the control of and is the obligation of the school," as they are the services

256. *Id.*

257. Ultimately the district court concluded that the school's evidence of the child's academic progress should be discounted, and that the panel's determination that the materials attached to the child's individualized education program (IEP) did not constitute a proper behavior management plan. The Eighth Circuit determined upon an independent review that because the IEPs did not appropriately address the child's behavior problem, the child was denied a free appropriate education. *Id.* at 1028.

258. No. Civ. AMD 01-312, 2001 U.S. Dist. LEXIS 12608, at *33-34 (D. Md. Aug. 14, 2001).

259. *Id.* at *34.

260. *Id*. The court noted, somewhat poignantly, that "[j]ust as the court must respect the expertise of educators in determining best practices for educating children with special needs, the court must hold the school to its word: if it has determined that an aide is necessary to provide FAPE, an aide must be provided." *Id.* at *35.

261. *See id.* at *32-47.

262. *Id.* at *36.

263. *Id*. The court quoted the pertinent part of the regulation:

> "(a) Provision of services. Subject to paragraph (b) of this section, each public agency must—(1) *Provide special education and related services* to a child with a disability *in accordance with the child's IEP*; and (2) Make a *good faith effort* to assist the child to achieve the *goals and objectives* or benchmarks listed in the IEP."

Id. (quoting 34 C.F.R. § 300.350). It is worth mentioning that this provision, to make a good faith effort, has since been removed from the statute's regulations. 34 C.F.R. § 300.350 (2009).

264. *Id.* at *36-37.

265. *Id.* at *37.

necessary for the child to receive a FAPE.[266] A "good faith" effort is insufficient to meet IDEA's "statutory and regulatory commands."[267]

Somewhat similarly, in *Melissa S. v. School District of Pittsburgh*, the parents of a child with Down's syndrome brought suit against the school district for failing to implement several portions of the agreed-upon IEP.[268] Relying on *Bobby R.*, the court concluded that "there was no evidence of non-implementation."[269] Concerning the specific claim that the child was not provided an aide in accordance with her IEP, the court held that the school made reasonable accommodations to remedy this shortcoming.[270] While Melissa's parents asserted, and the court accepted, that the failure to provide an aide occurred "'several' times," the court concluded that particular failure did not constitute a violation of IDEA.[271]

The substantial-compliance camp is dominated by a reliance on *Bobby R.*, and to a certain extent, *Rowley*. Both cases have shaped the belief that there is no denial of FAPE unless an IEP-implementation failure is material or substantial.[272] *De minimis* failures are not enough to determine that an IEP was not properly implemented or that IDEA was violated.[273] While these cases do not show that the substantial-compliance inquiry is an insurmountable hurdle, the vague definition of a *de minimis* failure creates an uncomfortable blending of the courtroom and the classroom.

V. MY THEORY

There is considerable evidence that Congress intended the substantial-compliance provision to apply *solely* to the funding requirement of IDEA.[274]

266. *Id.* at *37-38.

267. *Id.* at *38.

268. 183 F. App'x 184, 186 (3d Cir. 2006).

269. *Id.* at 187.

270. *See id.* Melissa's IEP "set various educational goals … and placed her in a learning support classroom for most subjects. Additionally, the IEP called for a full-time aide to assist Melissa during the school day." *See id.* These accommodations seem rather reasonable, as the school avoided ignoring, or rewriting, the IEP by involving the parents of the child whenever an aide could not be found.

271. *Id.* at 187. Melissa's parents also complained about Melissa's math instruction being above her skill level, and the school's failure to provide Melissa with homework. Both claims, however, were dismissed by the court as being *de minimis* failures. *Id.*

272. *See* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982).

273. *Bobby R.*, 200 F.3d at 349 ("[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP.").

274. *See generally* 34 C.F.R. § 300.604(c) (2008); 20 U.S.C. § 1416(e)(3) (2006). *See also* U.S. DEP'T OF EDUC., IDEA REGULATIONS: MONITORING, TECHNICAL ASSISTANCE AND ENFORCEMENT 5 (2006), http://idea.ed.gov/object/fileDownload/model/TopicalBrief/field/PdfFile/primary_key/24. The Department of Education monitors IDEA compliance, and where there is a "substantial failure to comply," the Secretary of Education may recover or withhold funds. *Id. But see* GUERNSEY & KLARE, *supra* note 138, at 6 ("IDEA is a funding statute"). Despite Congress not providing a definition of what a substantive education looks like, the funding was designed as a way to assist schools in providing education to special needs students. Recognizing that it would cost a

Were it intended as the standard by which to measure conformity with IDEA's procedural and substantive requirements, such as the IEP, the language would assuredly read differently. The elaborate procedural safeguards available to parents of children who have been deprived of a FAPE alone should demonstrate that IDEA was designed to provide substantive rights—rights that have an enforcement mechanism when violated.[275]

Detailed procedural safeguards ensure not only fairness and adequacy in hearings, they also "effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement … and a right to judicial review."[276] Given the trend toward results rather than procedural compliance,[277] it should come as no surprise that implementation debates are occasionally tabled when a student progresses academically.[278] Regardless, FAPE requirements stem from IDEA, not from the more results-driven No Child Left Behind Act;[279] thus, results at the sake of compliance may still pose a significant legal hurdle for school districts.

The court in *Catalan v. District of Columbia* recognized that an "abstract inquiry into the significance of various 'provisions' … of [an] IEP" would not be the preferable method for courts to identify FAPE violations.[280] There, the court wisely noted that "[v]ery few, if any, 'provisions' of an IEP will be insignificant or insubstantial," and educators should not "distinguish in the abstract between important and unimportant IEP requirements."[281] To the contrary, the *Catalan* court cautioned, "all the requirements in an IEP are significant, and educators should strive to satisfy them."[282]

The *Catalan* court toed a thin line by lumping together a therapist missing and cutting short scheduled sessions with snow days, holidays, and the child's absence from school.[283] The jump from uncontrollable acts—snow days and absences—to intentional acts—shortening scheduled sessions and missing some altogether—highlights the gap that may widen when flexibility turns to

substantial amount of money, Congress made funding available, provided a school district could show they were substantially complying with the IDEA provisions. *See generally* IDEA REGULATIONS, *supra.*

275. For a listing of the safeguards, and how they changed in the most recent amendments, see generally PETER W.D. WRIGHT, 20 U.S.C. § 1415 PROCEDURAL SAFEGUARDS, http://www.wrightslaw.com/idea/law/section1415.pdf. *See also* 121 CONG. REC. 37417 (1975) (statement of Sen. Schweiker) ("It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. [The bill] takes positive necessary steps to insure that the rights of children and their families are protected.").

276. Smith v. Robinson, 468 U.S. 992, 1011 (1984) (by statute).

277. *See* Huefner, *supra* note 72, at 377 ("[IDEA's] emphasis over the past 11 years on results rather than mere procedural compliance is clear.").

278. If a student is performing well academically, it would seem apparent that they would be less likely to complain of implementation failures, much less make it to the court system.

279. *See* Huefner, *supra* note 72, at 377.

280. 478 F. Supp. 2d 73, 76 (D.D.C. 2007).

281. *Id*.

282. *Id*.

283. *Id*.

indifference. Given the level of intricacy needed to develop an IEP and the procedures available for amending or revising, any failure to perform amounts to a de facto re-write of the IEP.[284]

When faced with an IEP-implementation claim, courts should strive to remove any gray area[285] that may arise by looking simply at *why* the failure occurred. *De minimis* failures should be viewed as those failures that occur for any reason *other than* the intentional act or omission of a party involved in the execution of the child's IEP.[286] This inquiry's objective is twofold: it does not allow school officials to unilaterally alter an IEP, but does allow courts to avoid what *Catalan* cautioned against—abstract inquiries into the significance of IEP provisions.[287]

Under this theory, the intent of the actor—typically the teacher or a school administrator—becomes paramount in determining whether an IEP violation has occurred. The current, more than a *de minimis* failure standard would be preserved, but the interaction between the intent of the actor and the current standard would more easily distinguish between IEP variations that are unavoidable, and those that are not. An intent standard should serve as a sufficient deterrent to side-stepping the IEP revision process, but it would not undermine the purpose of the court's *de minimis* failure inquiry.[288]

Ideally, this evaluation will encourage schools and school districts to use the abundance of amendment and revision resources prescribed by IDEA, rather than making unilateral decisions without involving the IEP team.[289] This will not, of course, render *de minimis* failures moot; and while this inquiry may appear likely to give rise to more litigation, the dispute settlement procedures of IDEA are

284. *See, e.g.*, OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1 (2000), *available at* http://www.ed.gov/parents/needs/speced/iepguide/iepguide.pdf.

285. The gray area is the gap that exists in the language must be more than a *de minimis* failure it must instead by material or substantial. *See* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000). Does nothing fall between material and *de minimis*?

286. This inquiry is simple, it's intended to be. If the overall goal is "to act in the best interests" of the child, and IDEA contains elaborate provisions for revising and amending an IEP, then why would any *intentional* act of an administrator not warrant some challenging?

287. *Catalan*, 478 F. Supp. 2d at 76. It is worth noting that at the time *Bobby R.* was written, C.F.R. 300.350 (requiring a "good faith effort" to implement portions of the IEP) was still controlling, however, that language has since been struck from the C.F.R., as well as the controlling statute under IDEA. *See also* Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988) (discussing that a difference of opinion regarding methodological approaches should be handled in the schools); Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 155 (4th Cir. 1991) (specific methodology used to determine the best needs of a disabled child should be left to the discretion of the school).

288. The reason for keeping the *de minimis* failure inquiry at all would be to keep frivolous claims of parents out of the court systems.

289. *See* 20 U.S.C. § 1414(d)(4) (2000). *See also* Wrightslaw: IDEA 2004: Roadmap to IDEA 2004: What You Need to Know About IEP's, IEP Teams, IEP Meetings-IEP Meetings, Content, Review & Revision, Placements, Transition & Transfers, http://www.wrightslaw.com/idea/art/iep.roadmap.htm (last visited Feb. 28, 2010).

more than capable of discerning between those alterations to an IEP that are unavoidable and those that are not.[290]

VI. APPLICATION OF MY THEORY

Looking at an IEP, both as drafted and implemented, is the clearest way to demonstrate that a rule questioning the motives of an implementation failure serves the interests of both the child and the court. The IEP created in *Van Duyn* is illustrative.[291]

Among other things, Van Duyn's IEP called for reading and written work on a daily basis, including a note home produced on a word processor, eight to ten hours per week of math instruction, a Behavior Management Plan ("BMP"), and several "related services" provisions.[292]

Of these IEP requirements, many went unmet,[293] some for seemingly innocuous reasons and others for reasons unknown. Because of a scheduling conflict, Van Duyn's reading and written work were not offered on a daily basis, but instead were provided closer to every *other* day.[294] His daily notes home did not begin until several months after the IEP was drafted and even then they did not occur on a daily basis.[295] Additionally, he did not have access to a word processor regularly (much less daily).[296] Similarly, Van Duyn's math requirements went unmet, as he regularly received less math time than called for by his IEP.[297] On the whole, an ALJ found that Van Duyn received 184 fewer hours of math instruction than required by his IEP.[298] Van Duyn's BMP, originally designed to be a series of positive behavioral supports, was also inconsistently implemented.[299] While a full discussion of Van Duyn's BMP failures is unnecessary, among the most significant failures were: a "failure to properly use social stories" (supposed to be repetitive each morning, but never used); a failure to make "in-room calming activities" available (out of class

290. *See* U.S. DEP'T OF EDUC., IDEA REGULATIONS: PROCEDURAL SAFEGUARDS: SURROGATE PARENTS, NOTICE AND PARENTAL CONSENT (2006), http://idea.ed.gov/object/fileDownload/model/TopicalBrief/field/PdfFile/primary_key/15. *See also* U.S. DEP'T OF EDUC., IDEA REGULATIONS: PROCEDURAL SAFEGUARDS: RESOLUTION MEETINGS AND DUE PROCESS HEARINGS (2006), http://idea.ed.gov/object/fileDownload/model/TopicalBrief/field/PdfFile/primary_key/16.

291. *See* Plaintiff-Appellant's Opening Brief, at 8, Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007) (discussing how the district failed to implement the IEP).

292. Van Duyn's IEP called for, in considerable detail, a number of objectives and educational goals; these are the most notable for the purposes of implementation failures. The IEP required consultants in autism; augmentative communications; occupational, physical, and speech therapy; and adaptive physical education. *Id* at 8-9.

293. *Id*. at 8.

294. *Id*. at 9.

295. *Id*.

296. *Id*. Interestingly, the ALJ found that reading and language arts were presented on a daily basis, and while the court held the opposite—that the short term objectives required them to be provided *daily*—the court held that this failure was not material!

297. *Id.* at 14.

298. *Id*.

299. *Id*. at 14-15.

breaks were utilized instead, translating into a loss of educational time); and a failure to use a behavior card on a daily basis.[300]

Relying on the *Rowley/Bobby R*. standard, the court fell back on the argument that "[t]here is no statutory requirement of perfect adherence to the IEP, … nor any reason … to view minor implementation failures as denials of a free appropriate public education," to conclude that the math shortfall was material, but the failures regarding the Behavioral Management Plan were not.[301]

Had the Ninth Circuit used an intent-based standard to evaluate each failure to implement, the overall outcome would have been much different and the court could have avoided weighing in on the materiality of the failures.[302] For example, the court determined that Van Duyn received sufficient daily and reading instruction, as he had a language arts/reading class on some days of the week and "relevant classes" on other days of the week.[303] Rather than noting a clear failure to implement the *daily* aspect of the requirement, the fact that Van Duyn did not work toward all of the short-term objectives was acceptable "given the extremely large number of such objectives."[304] Conflicting schedules are no doubt an obstacle occurring regularly in special-education, but they can most likely be worked out through the IEP Team.[305] In any event, a decision to alter an IEP's requirement for daily instruction amounts to a re-write of an IEP. Regardless of how many objectives are called for in the IEP, it would seem nonsensical to conclude that an over abundance of goals permits schools to determine which goals to implement.

More unnerving is the fact that one of Van Duyn's aides never received the state autism training called for by the IEP.[306] Van Duyn offered considerable evidence that this particular failure kept the aide from identifying some of his autistic characteristics, as well as his educational goals and modifications.[307] Though lacking appropriate training, the aide was permitted to alter Van Duyn's BMP, select educational materials, and present material to Van Duyn in a

300. *See id.* at 10.

301. Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 821 (9th Cir. 2007).

302. *Id.* at 823 n.5.

> On the remaining allegations of implementation failure, our conclusions, briefly, are as follows: Van Duyn did receive daily reading and writing instruction, as required by his IEP, since he had language arts/reading on [some] days and three relevant classes on [other] days. He did not work toward all of the short-term objectives laid out in his IEP, *but this failure was not material given the extremely large number of such objectives*.

Id. (emphasis added).

303. *Id.*

304. *Id*. For a discussion on the importance of only using as many objectives as may reasonably be achieved in an academic year, see Huefner, *supra* note 72, at 377-79. However, there is nothing to suggest that once a certain number of objectives are listed, any additional objectives can be implemented at the discretion of the school.

305. *See Van Duyn*, 502 F.3d at 823 n.5.

306. Plaintiff-Appellant's Opening Brief at 14-15, Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007).

307. *Id.* at 15.

classroom without supervision.[308] Though the IEP called for the aide to receive *state* level training, the court was content with the aide taking some autism classes and attending a few meetings with "people knowledgeable about Van Duyn's experience with the condition."[309] Arguably, this is the type of implementation failure that should be viewed with the most caution. Though the court never revealed the circumstances surrounding the aide's failure to receive the IEP-proscribed training, if the failure occurred as the result of an intentional act or omission on the part of the school, it should raise a number of red flags.

Among the IEP-implementation failures that should be meticulously avoided are those where teachers or therapists are, in essence, choosing which IEP goals and objectives to implement and which not to implement. The IEP, in its final form, is the document designed to deliver the education necessary to bring the child on a par with her peers.[310] While teachers, therapists, and service providers remain the experts, there are enough procedures in place to yield to their concerns without resorting to altering the IEP.[311]

For those concerned that this approach would magnify an already steady stream of litigation, it is worth pointing out just how few cases make it into the court system.[312] A strikingly small number of IDEA-based cases actually move on from administrative hearings into the courts.[313] The Special-Education Expenditure Project ("SEEP") estimated that during the 1998-1999 academic year, only 301 actions were filed for judicial review under IDEA.[314] Skeptical, Professor Samuel Bagenstos performed a comprehensive search of available dockets since January 1, 2000 to verify that the number of actions was actually that low.[315] Professor Bagenstos's results verified SEEP's findings.[316] Between

308. *Id.*

309. *Van Duyn*, 502 F.3d at 823 n.5.

310. Bd. of Educ. v. Rowley, 458 U.S. 176, 203-04 (1982).

> [T]he IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id.

311. *See* HULETT, *supra* note 7, at 157 (discussing the requirement of parental consent before "IEP revisions, changes in placement, and initiation [or] termination of special-education services"). Hulett notes that "[s]ervices cannot be provided or removed without parental consent. In addition, parents must be provided prior notice in writing of any proposed change in a student's services or placement *and any refusal to implement a recommended change*." *Id.* (emphasis added).

312. *See generally* Samuel R. Bagenstos, *Where Have All the Lawsuits Gone? The Shockingly Small Role of the Courts in Implementing the Individuals with Disabilities Act* (Washington University in St. Louis School of Law: Faculty Working Paper Series, Paper No. 08-12-05), *available at* http://ssrn.com/abstract=1302085 (confirming few cases are filed in federal court under IDEA).

313. JAY G. CHAMBERS ET AL., CTR. FOR SPECIAL EDUC. FIN., WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL-EDUCATION, 1999–2000?, at 8 (2003), http://csef.air.org/publications/seep/national/Procedural%20Safeguards.PDF.

314. *Id*.

315. Bagenstos, *supra* note 312, at 10.

January 1, 2000 and January 1, 2008, an average of 374 cases were filed in federal court each year.[317] That number averages "to just over four cases each year for each of the eighty-nine federal district courts."[318] In terms of cost, SEEP estimated that in the 1999-2000 school year, school districts spent approximately $146.5 million on special-education mediation, due process and litigation activities.[319] Litigation specifically cost about $56.3 million.[320] The total expenditure on procedural safeguards broke down to about $9 per special-education student for litigation cases.[321]

In the end, there are those who argue that this would likely end up as another costly addition, both in terms of time and money, to an already bogged down process.[322] But the alternative to this approach cannot be, as some have suggested, abandoning IDEA's dispute-resolution process altogether.[323]

VII. CONUNDRUM OF THE FUTURE?

Implementation failures, contentious as they are, risk being overshadowed by an even more complex problem. What should be done where a child, whose IEP is not being fully implemented, is succeeding academically? With an emphasis on results and academic progress, it was seemingly only a matter of time before the No Child Left Behind Act came to head with IDEA, and this inquiry may do just that. Granted, the child who is progressing academically is unlikely to bring suit for IEP-implementation failures, but that does little to quell the inquiry. Suppose a child has objectives similar to Van Duyn's,[324] and further suppose that a considerable amount of each reading/writing class or math class was being shaved off by a teacher who felt the child had done enough for the day. If that child performs well on her assessments, alternative or otherwise, is the failure to implement negated? Under the No Child Left Behind Act, it would

316. *Id*.

317. *Id*.

318. *Id*.

319. CHAMBERS, *supra* note 313, at 5. "This amount represents less than one-half of one percent ([0.3] percent, to be exact) of total special-education expenditures." *Id*. (emphasis removed).

320. *Id.*

321. *Id.* "These per pupil figures were obtained by dividing the total estimated expenditures on procedural safeguards by the nearly 6.2 million students with disabilities, regardless of whether or not they were involved in mediation, due process, or litigation cases." *Id.*

322. *See, e.g.*, Clint Bolick, *A Bad IDEA Is Disabling Public Schools: 'Perverse Incentives' in an Unfunded Mandate*, EDUC. WEEK, Sept. 5, 2001, http://www.connsensebulletin.com/badidea.html; Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. L. REP. 35, 35-36 (2005) (finding special education litigation has dramatically increased).

323. *See* Zirkel, *supra* note 322, at 38 (advocating a "single-session hearing without judicial appeal"). *See also cf.* Bolick, *supra* note 322 (observing that "IDEA's monomaniacal focus on process [is] abetted by a battery of lawyers who tie school districts in knots rather than academic progress").

324. *See* Plaintiff-Appellant's Opening Brief at 6, Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007) (seeking compensatory education due to denial of FAPE where school district failed to implement an agreed-to IEP).

seem that given the child's academic progress, an appropriate education is being provided. Yet, under IDEA, it seems fairly clear that a violation has occurred. Granted, success is the paramount goal by which to view the entire special-education process, but success at the expense of an obvious disparity in IEP implementation seems a risky endeavor.

VIII. CONCLUSION

Special-education law is an ever-changing field, and rightfully so given the delicate nature of the work. The ability of courts to leave educational decision-making to schools—and more specifically, the IEP team—is paramount. By engaging in a debate over whether a provision of an IEP is material, the court necessarily adds judges to the list of members of the IEP team. If a provision was significant enough to merit discussion and ultimately inclusion in the final IEP, it is necessarily material. IDEA was designed to afford a certain level of flexibility to schools, administrators, and teachers alike, and given the extensive procedures for revising or amending an IEP, there should be no reason for school officials to alter the document without the consent of the parents and the rest of the IEP team.