STUDY NOTE

Expanding the Definition of FAPE under NCLB: Why Courts Give FAPE the Slip and Leave it Swimming in a Sea of Alphabet Soup

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INTRODUCTION

Jason[1] sat surfing the internet in the library as his one-on-one aide tried to get his attention. Jason was a seventh grader diagnosed with high functioning autism; his aide did not have a bachelor's degree. District writing assessments showed that Jason's writing was witty even though the grammatical structure and spelling errors made it almost incomprehensible. Yet he was passing his resource English class and advancing from grade to grade. Fifteen minutes of a fifty-minute class period elapsed while the aide tried to have Jason determine an English assignment. Jason had spent the time playing on the internet and his only preference for an assignment was to use the internet. The aide finally suggested choosing a place to research and designing a travel brochure on the computer. As a seventh grade English teacher, I was appalled by the exchange. Instead of learning state grade-level standards for English, this student came to an unplanned class and copied information from the internet into bullet points. This would not help Jason learn to put words together in coherent sentences and paragraphs in order to write a research report. Even English Language Learners in my class were writing simple sentences and paragraphs and building written fluency. It seemed like the school system was failing Jason—he may be advancing from grade to grade, but he was not learning the skills that he would need in order to gain employment beyond service industry jobs.

In the United States, education is governed by the individual states.[2] Federal programs such as the No Child Left Behind Act ("NCLB") and the Individuals

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[1] Jason is a fictional student, compiled from the author's experience as a public school teacher.

[2] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a congress of the United States, which shall consist of a Senate and House of Representatives"); U.S. CONST. art. I, § 8, cl. 1-18 (setting forth the powers of Congress, where education is not enumerated); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Brown v. Board of Educ., 347 U.S. 483, 493 (1954). Brown affirmed the state's role in education, noting that:

> [t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to

with Disabilities in Education Act ("IDEA") mandate requirements that states must fulfill in order to received federal funding.[3] Because individual states determine the grade-level content area standards for education and the evaluation of those standards, discrepancies exist in educational programs, expectations, and quality between the states.[4]

Many students with disabilities are caught within these educational discrepancies. They access special education services, yet these services do not guarantee that they receive an education. The Office of Special Education Programs at the U.S. Department of Education states:

> Some students with disabilities have never been taught academic skills and concepts, for example, reading, mathematics, science, and social studies, even at very basic levels. Yet all students are capable of learning at a level that engages and challenges them. Teachers who have incorporated grade level content standards into their instruction cite unanticipated gains in students' performance and understanding. Furthermore, some individualized social, communication, motor, and

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> 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.

Id.

[3] Because Congress has power to provide for general Welfare of the United States under the spending clause, Congress can enact legislation with mandates tied to congressional funding. *See* U.S. CONST. art. I, § 8, cl. 1; *see also* 34 C.F.R. 200.1-21 (describing the states' responsibility for developing challenging academic standards, assessment, and demonstrating progress in order to receive federal funding); Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist. 127 S. Ct. 1994, 1998 (2007) (explaining that under IDEA, "[a]s a condition of receiving [federal] funds, [the school district] must comply with IDEA's mandates. IDEA requires that the school district provide [the child] with a 'free appropriate public education,' which must operate in accordance with the IEP."); Bd. of Educ. of Hedrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 179 (1982) (explaining that the government provides federal funds to assist state and local agencies in educating children with disabilities "and conditions such funding upon a State's compliance with extensive goals and procedures"); Letter from Eugene W. Hickock, Acting Deputy Secretary, U.S. Dep't of Educ., to Dr. Steven O. Lang, Superintendent of Pub. Instruction, Utah State Office of Educ. (Feb. 6, 2004) *available at* http://www.ccsso.org/content/pdfs/USDEdLettertoUtah.pdf (outlining the consequences if Utah did not implement NCLB and rejected federal funding).

[4] CANDACE CORTIELLA, NAT'L CTR. FOR LEARNING DISABLITIES, REWARDS & ROADBLOCKS: HOW SPECIAL EDUCATION STUDENTS ARE FARING UNDER NO CHILD LEFT BEHIND 17 (2007), *available at* http://www.ncld.org/images/stories/downloads/advocacy/ncldrewardsandroadblocks.pdf.

> A recent comparison of the percentage of students scoring proficient or better on each State's reading assessment versus the percentage scoring proficient or better on the reading portion of the National Assessment of Educational Progress (NAEP) revealed remarkable proficiency gaps—some in excess of 60 points. More than half the states showed a proficiency gap of more than 40 points.

Id.

self-help skill can be practiced during activities based on the content standards.[5]

Why aren't these students being taught reading, writing, and arithmetic when there is evidence that they are capable of learning? Uninformed, short- sighted and conflicting government programs, and conflicting court interpretation of these programs, leave students in school, but not learning. Despite the inadvertent increase in standards for special education students through the No Child Left Behind Act,[6] the lack of a federal directive, ambiguity in the courts and a discrepancy in expectations among the states indicate that NCLB is not enough to insure that students with disabilities receive an education. This Note examines the educational programs available to students with disabilities and argues for governmental reform. Part I characterizes students qualifying for special education under the Individuals with Disabilities in Education Act.[7] Part II explains the education standards for students with disabilities under IDEA. Part III defines the students covered by the No Child Left Behind Act. Part IV examines the impact NCLB has on the education of students with disabilities. Finally, Part V argues for reform.

II. QUALIFYING FOR SPECIAL EDUCATION UNDER IDEA

During the 2005–2006 school year, 6,713,000 students in the United States between the ages of three and twenty-one received special education services[8] for disabilities, including speech or language impairments, other health impairments, mental retardation, specific learning disabilities, serious emotional disturbances, hearing impairments, orthopedic impairments, visual impairments, autism, traumatic brain injuries, deaf-blindness and multiple disabilities.[9] This represents 13.8% of U.S. school-aged children.[10] While many special education students spend their day in a regular education classroom with regular education teachers, others spend a majority of their day in special education classes away from their regular education peers.[11]

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[5] CANDACE CORTIELLA, NAT'L CTR. ON EDUC. OUTCOMES, NCLB AND IDEA: WHAT PARENTS OF STUDENTS WITH DISABILITIES NEED TO KNOW AND DO 14 (2006) (citation omitted), *available at* http://www.education.umn.edu/nceo/OnlinePubs/Parents.pdf.

[6] No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301 (West 2008) (amending the Elementary and Secondary Education Act of 1965, effective January 8, 2002).

[7] Individuals with Disabilities Education Act, Pub. L. 110-84 (current version at 20 U.S.C. §§ 1400 et seq. (2006)).

[8] THOMAS D. SNYDER ET AL., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATIONAL STATISTICS: 2006 tbl. 48 (2007) (citations omitted), *available at* http://nces.ed.gov/programs/digest/d06/tables/dt06_048.asp?referrer=list.

[9] 34 C.F.R. § 300.8 (2008) (definition of a child with a disability).

[10] SNYDER ET AL., *supra* note 8 at tbl.48.

[11] CORTIELLA, *supra* note 4, at 4–5.

In 2004, the Office of Special Education Programs reported to Congress that forty-eight percent of special education students were in a regular education classroom more than eighty percent of the school day.[12] In addition, twenty-nine percent of students were in a regular education classroom at least forty percent of their school day.[13] Conversely, twenty-three percent of special education students were outside a regular education classroom more than sixty-percent of their school day.[14] While it appears that special education students are integrated into regular education classes, the statistics do not indicate whether students are placed in regular education classes for core academic subjects. Students like Jason often have core classes in the special education department and take physical education, social studies, art or other electives in a regular education classroom. For these reasons, students often miss grade level core academic classes such as math and English in a regular education setting.

The danger of placing a student in special education for core classes is that the student will not be exposed to grade level state standards with peers who perform at grade level or above. This gives special education students and teachers a false perspective. The child may succeed in a special education class earning A or B grades, but would not earn those grades if his or her work was compared to that of his or her regular education peers. The student feels success, but actually does not have a realistic grasp of his or her skills and misses the potential of truly functioning at grade level.[15] Instead, special education should give the student a toolkit to help work through the disability in order to perform at grade level standards.

One might question the ability of all special education students to perform at their grade level. The answer to this question lies in the categories of students that are identified as needing special education. While there are some students who will never meet grade level standards, greater expectations help all students attain a higher level of functioning. During the 2005–2006 school year, students receiving special education services were classified into twelve categories.[16] Out of these categories, Specific Learning Disabilities, Speech or Language Impairments, Emotional Disturbance, Hearing Impairments, Orthopedic Impairments, Visual Impairments and Developments Delays are disabilities that "in no way preclude[] them from—with appropriate services and supports—functioning at or above grade level or from achieving proficiency on a state's academic content standards in reading and math.[17] During 2005–2006, eighty-five percent of students receiving special education services fell into the categories that do not "preclude them from. . . functioning at or above grade level."[18]

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[12] *Id.* (citation omitted).

[13] *Id.*

[14] *Id.* (citation omitted).

[15] Based on author's experience as a public school teacher in Alaska, Utah and California.

[16] SNYDER ET AL., *supra* note 8 at tbl.48. The table shows that 40.7% of students had specific learning disabilities; 21.9% had speech or language impairments; 7.1% had an emotional disturbance; 1.2% had a hearing impairment; 1.1% had orthopedic impairments; 8.5% had other health impairments; 1.4% had visual impairments; 5.1% had a developmental delay; 8.9% had mental

III. EDUCATIONAL STANDARDS FOR STUDENTS WITH DISABILITIES UNDER IDEA

Under the Individuals with Disabilities in Education Act ("IDEA"), schools are required to provide all children identified with disabilities that need services a Free Appropriate Public Education ("FAPE").[19] FAPE includes specially designed instruction and related services that are provided without charge, meeting the state educational agency standards for an appropriate education.[20] The specially designed instruction must:

> [A]dapt[], as appropriate to the child's needs, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability; to ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.[21]

Students have an individualized education program ("IEP").[22] The IEP includes information on the special education services a district needs to provide to meet a student's special education needs "to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other needs that result from the child's disability."[23] These federal standards are important to states that run their own education programs but receive federal funding.

The courts have struggled to define what comprises an appropriate education for disabled students under FAPE. While the Supreme Court in *Rowley* defined FAPE as an education that is "sufficient to confer some educational benefit upon the handicapped child," what that benefit entails is unclear.[24] The *Rowley* Court upheld the law's access to education for students with disabilities, but it set an ambiguous standard of "some educational benefit" for these students and did not support equal education for disabled students and their non-disabled peers.[25] The

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retardation; 2.1% had multiple disabilities; 3.3% had autism; and 0.4% had a traumatic brain injury. *Id.*

[17] CORTIELLA, *supra* note 4, at 8.

[18] *Id.*

[19] 34 C.F.R. § 300.101 (2008).

[20] 20 U.S.C.A. § 1401(29) (West 2008). Specially designed instruction is instruction that meets "the unique needs of a child with a disability, including-- [] instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. . . ." *Id.*

[21] 34 C.F.R. § 300.39(b)(3) (2008).

[22] Individuals with Disabilities Education Act, 20 U.S.C.A. § 1401 (West 2008).

[23] *Id.* at § 1414(d)(1)(A)(i)(I-VIII) (describing the requirements of an IEP).

[24] Bd. of Educ. of Hedrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200–01 (1982).

[25] *Id.* at 198. The Court stated that "the [FAPE] requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" *Id.* (citation omitted). While non-disabled children do not have a right to

Court did not require the states to provide special education services that would maximize a child's potential.[26] Rather, the *Rowley* Court held that special education services must: (1) be provided at public expense; (2) meet the State's educational standards; (3) approximate the grade levels used in the State's regular education; and (4) comport with the child's IEP.[27] Also, when a child is mainstreamed in the regular education classroom, personalized instruction "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[28] While the federal standard for special education is "the achievement of effective results—demonstrable improvement in the educational and personal skills identified as special needs—as a consequence of implementing the proposed IEP," state standards for special education may be higher.[29] A free appropriate public education must "meet the standards of the State educational agency."[30] If the state standard for special education is higher than the federal standard, the state standard will be used to determine the appropriate education for a student in that state.[31] Yet, this creates a discrepancy between the states about what educational benefits are required. The solution would be national standards for education; instead we have a split in the Circuit Courts of Appeals.

A minority of courts after *Rowley*, struggling to refine the Supreme Court's hazy FAPE definition, decided that Congress's intent for education for a student with a disability was more than a "trivial benefit," "afford[ing] children with special needs an education that would confer meaningful benefit."[32] Circuit Courts of Appeals have "split on whether educational programs must provide *some* non-de minimis educational benefit, or must satisfy a heightened and inherently subjective *meaningful* educational benefit standard."[33] Providing some educational benefit is the standard for the majority of states, and this rule is also observed in the First, Fourth, Seventh, Eighth, Tenth, Eleventh and D.C. Circuit Courts of Appeals.[34]

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even "some educational benefit," the implication of not providing services "commensurate with the opportunity provided other children" is that the other children have a greater opportunity, and hence, greater educational benefit.

[26] *Id.* at 198.

[27] *Id.* at 203.

[28] *Id.* at 203–204.

[29] Town of Burlington v. Dep't. of Educ. for Mass., 736 F.2d 773, 788–89 (1st Cir. 1984) *affd*, 471 U.S. 359 (1985).

[30] 20 U.S.C.A. § 1401 (West 2008).

[31] *Town of Burlington*, 736 F.2d at 779.

[32] Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3rd Cir. 1988); *see also* M.A. *ex rel.* G.A. v. Voorhees Tp. Bd. of Educ., 202 F.Supp.2d 345, 362 (D.N.J. 2002) ("The relevant inquiry here is whether plaintiff's IEP would confer a *meaningful* educational benefit. . . not just 'more than a trivial education benefit.'") (citation omitted).

[33] Petition for Writ of Certiorari at 2, Deal v. Hamilton County Dep't of Educ., 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005) (No. 5-55), 2005 WL 1596483.

[34] *Id.* at 11–12. (citing cases which demonstrate the split in the Circuit Courts of Appeals on the standard for FAPE). Recent cases in the Circuit Courts of Appeals that reflect the majority view include: C.P. v. Leon County Sch. Bd. Florida, 483 F.3d 1151, 1152–53 (11th Cir. 2007) (stating that because C.P. received similar instruction in jail as he did in school with "one-on-one instruction in economics and environmental science in the jail library, and special education classes in attorney booths, from qualified instructors," he received "some educational benefit under the stay-put IEP, in

The interpretation of this standard is clarified in the case of David Bradley. David had Asperger's Syndrome.[35] The Eighth Circuit Court of Appeals found that the fact he made educational progress was supported by his standardized test scores that were consistent from grade to grade.[36] In other words, "for David to be performing consistently, he had to be learning at the same pace as his peers, that is, he was making academic progress."[37] In addition, the court cited *C.J.N. v. Minneapolis Public Schools*, which stated that "[t]he IDEA does not require that schools attempt to maximize a child's potential or guarantee that a student make any educational progress at all."[38]

The Second, Third, Fifth, Sixth and Ninth Circuit Courts of Appeals require the states to provide a meaningful educational benefit to students with disabilities.[39] However, this meaningful educational benefit does not mean that education has to make the child meet his or her potential.[40] For instance, using an automobile analogy to distinguish what is meaningful, the Sixth Circuit Court of Appeals indicated an "educational equivalent of a serviceable Chevrolet" is what must be provided to a disabled student—not a Cadillac.[41]

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conformity with. . . [the] basic floor of opportunity standard."); A.K. *ex rel.* J.K v. Alexandria City Sch. Bd., 484 F.3d 672, 675, 687–88 (4th Cir. 2007); Gellert v. D.C. Pub. Sch., 435 F. Supp.2d 18, 21–22 (D. D.C. 2006) (defining FAPE as "reasonably calculated to enable the child to receive additional benefits"); Missouri Dept. of Elem. & Sec. Educ. v. Springfield K-12, 358 F.3d 992, 999, n.7 (8th Cir. 2004); Maine Sch. Adm. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 11 (1st Cir. 2003); Todd v. Dunland Sch. Corp., 299 F.3d 899, 905 & n.3 (7th Cir. 2002); O'Toole *ex rel.* O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692, 700 (10th Cir. 1998).

[35] Bradley *ex rel.* Bradley v. Ark. Dept. of Educ., 443 F.3d 965, 968 (8th Cir. 2004).

[36] *Id.* at 973.

[37] *Id.*

[38] *Id.* at 974–75 (citing C.J.N. v. Minneapolis Pub. Sch., 323 F.3d 630, 642 (8th Cir. 2003), *cert. denied*, 540 U.S. 984 (2003)).

[39] Petition for Writ of Certiorari, *supra* note 33, at 12–13 (citing cases which support the meaningful educational benefit FAPE standard). Recent cases showing a requirement of a meaningful educational benefit standard include: Lauren W. *ex rel.* Jean W. v. Deflaminis, 480 F.3d 259, 273 (3rd Cir. 2007) (stating that even though a student's work habits and behavior were inconsistent, improved grades, friendship and self esteem showed student was receiving meaningful benefit); Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 (2d Cir. 2006); Shore Reg'l High Sch. Bd. of Educ. v. P.S. *ex rel.* P.S., 381 F.3d 194, 198 (3d Cir. 2004); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 864 (6th Cir. 2004) ("Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children."); Adam J. *ex rel.* Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808–09, 811 (5th Cir. 2003) ("[A]cademic progress and anticipated graduation [were factors that lead to the]. . . conclu[sion] that his IEPs were reasonably calculated to enable him to receive educational benefits."); Adams v. Oregon, 195 F.3d 1141, 1149–50 (9th Cir. 1999).

[40] Bd. of Educ. of Hedrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 201 (1982).

[41] Doe By & Through Doe v. Bd. of Educ. of Tullahoma City Sch., 9 F.3d 455, 459–60 (6th Cir. 1993) ("Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.").

IV. STUDENTS COVERED BY THE NO CHILD LEFT BEHIND ACT

The issue is further complicated by the No Child Left Behind Act of 2001 ("NCLB").[42] While IDEA sets forth procedures for individual student educational progress according to his or her disability, NCLB creates general school accountability by measuring all student progress. Under NCLB, each school is responsible for making adequate yearly progress ("AYP") in student achievement.[43] In addition to overall school-wide progress, NCLB requires that schools track progress of specified groups including racial minorities, English Language Learners and students with disabilities through standardized tests.[44] Achieving AYP forces schools to focus on special education and other low-achieving groups in order to raise overall standardized test scores. However, this tailored approach may create a perverse incentive to place too much emphasis on IEP grade level standards while neglecting a more holistic approach to disabled students' education. Many components of an IEP involve speech, social and other areas beside academic achievement.

With changes in the law to have students meet academic goals, the emphasis is shifting to "curricular" mainstreaming focusing on where the individual child will best meet IEP goals for the general curriculum.[45] Cases demonstrate that if a child is under ten, the courts place more emphasis on socialization than academics to determine placement; if a child is older than ten, more emphasis is placed on academics.[46] If socialization is emphasized, it is more likely that a child will be placed in a regular classroom.[47] If academics are emphasized, the placement determination depends on whether the child has an academic benefit or is simply "monitoring classes."[48] Under NCLB, AYP accountability starts at the end of third

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[42] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (amending 20 U.S.C. § 6301 et seq.).

[43] *Id.* at §1111(b)(2)(B).

[44] 34 C.F.R. § 200.7 (2008).

[45] Jose L. Martín, Esq., Whatever Happened to LRE and Inclusion? Least Restrictive Environment in the Modern Era 5, 7, Conference Presentation at the Utah Institute on Special Education Law (Aug. 1, 2007) (on file with the *Journal of Law and Family Studies*); *see also* 20 U.S.C.A. § 1414(d)(1)(A)(i)(vi)(aa) (West 2008); 34 C.F.R. § 300.320 (2008).

[46] Melinda Baird, Esq., The New Seven Deadly Sins: Common Legal Errors that Lead to Litigation, Conference Presentation at the Utah Institute on Special Education Law (Aug. 1, 2007) (transcript of notes on file with the *Journal of Law and Family Studies*); *see, e.g.*, Beth B. v. Van Clay, 282 F.3d 493, 495, 499 (7th Cir. 2002) (noting that a non-verbal thirteen-year-old girl with Rett Syndrome was not placed in a regular education classroom because "academic progress was virtually nonexistent and her developmental progress was limited. Although the school district provided her with aides, communication devices, computerized books, and an individual curriculum, she was receiving very little benefit from her time there. . . . a modicum of developmental achievement does not constitute a satisfactory education."); Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1002–03 (4th Cir. 1997) (holding that an eleven-year-old autistic boy should not be placed in regular education because the social benefits did not outweigh the fact he did not make educational progress in the regular education classroom).

[47] Baird, *supra* note 46, at 1–2.

[48] *Hartmann*, 118 F.3d at 1002–03.

grade.[49] After NCLB, it is likely that the courts will decide that after third grade, if it is necessary to modify curriculum "beyond recognition," it is not appropriate to have a child in regular education because of AYP accountability.[50]

However, placement in a situation where the child is learning and not distracting other students from learning curricular standards will benefit all students' ability to help the school make AYP. For example, Rachel Holland "a moderately mentally retarded" child, was mainstreamed into a regular kindergarten classroom in a private school rather than a public school because the public school district said that they could not mainstream her full-time.[51] The school district offered a proposal where Rachel would be in a self-contained class for part of the time with other handicapped children and the other part of the time in a regular classroom with non-disabled peers.[52] When the district court reviewed the case, they found that she was receiving "substantial benefits in regular education" in her private school placement.[53] Furthermore, her IEP goals could be implemented in public school regular education with an aide.[54] Placing Rachel in a regular education classroom provided non-academic benefits such as developing "social and communication skills," and "self-confidence."[55]

V. NO CHILD LEFT BEHIND'S IMPACT ON FAPE

NCLB could modify the provision of a FAPE under IDEA in several ways.[56] If the standard for FAPE is "some educational benefit," as defined by *Rowley* and the majority view in the Circuit Courts of Appeals, the definition of FAPE could change with NCLB to insure that students with IEPs make AYP on grade level content standards. Because NCLB looks at the school's yearly progress in terms of student grade level achievement, it makes sense that individual student achievement would come into play in the development of an IEP. Individual Education Plans are more likely to focus on state content level standards and the specialized instruction and services a student needs to meet these goals. The end result for FAPE would be more than the minority standard of a meaningful educational benefit. While the minority standard "attempted to identify an intermediate standard between 'some' benefit and a 'maximum' benefit, pursuant

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[49] 20 U.S.C.A. § 6311(b)(3)(C)(v)(I)(aa) (West 2008).

[50] Baird, *supra* note 46, at 2.

[51] Sacramento Unified Sch. Dist. v. Holland, 14 F.3d 1398, 1399–1400 (1994) (describing a case involving parents who litigated to have a student, now age eleven, with an I.Q. of forty-four, placed in a regular education class).

[52] *Id.*

[53] *Id.* at 1401.

[54] *Id.*

[55] *Id. see also* Martín, *supra* note 45, at 7, (contrasting the previous goals of inclusion advocates for mainstreaming special education students to increase "opportunities for modeling of age-appropriate academic, verbal, behavioral, and social skills, and post-school social benefits of interaction with non-disabled students" with the current trend to focus on the regular curriculum).

[56] U.S. DEPT. OF EDUC., OFFICE OF SPECIAL EDUC. PROGRAMS,TOPIC: ALIGNMENT WITH THE NO CHILD LEFT BEHIND ACT 4 (2007), *available at* http://www.ed.gov/policy/speced/guid/idea/tb-nclb-align.pdf.

to which an IEP must 'be reasonably calculated to confer a meaningful benefit on the child,'"[57] the NCLB result would be closer to the goal of grade level achievement and a "potential-maximizing education."[58]

NCLB also eliminates the number of students labeled with a learning disability. Before a student is referred for specialized services eligibility determination, reading, math or English proficiency problems are often addressed through scientifically designed peer reviewed response to intervention methods.[59] While correcting reading problems and other issues early on is effective in helping students excel academically, the fewer students labeled as learning disabled puts a greater burden on the school and the special education department to design IEPs for educational programs for the remaining students with disabilities since these students struggled more with content standards in the beginning.[60] Even though the special education department may serve fewer students with disabilities, the type and severity of those disabilities may make it more difficult for these students to meet grade level standards and attain AYP as a group. The students may suffer because the non-academic parts of the IEP such as speech, socialization and other services could fall away in the quest to meet academic standards. While NCLB allows for one percent of all students with the most significant cognitive disabilities in a state to be tested using alternate academic achievement standards and two percent of all students in the grades to be tested using modified academic achievement standards, this cap may not allow all students who need modified measures or alternative achievement standards to be tested using these accommodations.[61] The disaggregation of disabled students in the school's AYP places a burden to make certain the students excel academically so the school does not lose federal funding.[62] If special education students lose services that are not academic, and are struggling academically, their frustration with learning may prevent them from making the progress they otherwise could.

Parents of students with disabilities have noticed the higher standards that NCLB places on the schools. In five states, parents have argued that FAPE has been changed by NCLB.[63] In all five cases, the courts determined that FAPE has

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[57] Petition for Writ of Certiorari, *supra* note 33, at 12–13 (citing Adams v. Oregon, 195 F.3d 1141, 1150 (9th Cir. 1999)).

[58] *Id.* at 13.

[59] *See* 34 C.F.R. §§ 300.306(b), 300.35.

[60] Perry A. Zirkel, *NCLB: What Does it Mean for Students with Disabilities?*, 185 ED. L. REP. 805, 807–08 (2004) (explaining that NCLB requires states to initially set student achievement levels based on "either its lowest achieving disaggregated group or based on its lowest achieving schools, but the state must raise this initial level after 2 years and at least once every 3 years thereafter – *one problem is that if the district makes the desired progress with students with modest or moderate disabilities such that they no longer qualify for special education, the disaggregated group has a lower average via successful attrition*") (emphasis in original).

[61] *See* 34 C.F.R. § 200.13(2)(c)(i–ii) (2008).

[62] *See id.* § 200.7.

[63] *See* Fisher v. Stafford Twp. Bd. of Educ., No. 05-2020 (D.N.J. Feb. 28, 2007); Sch. Bd. of Lee County, Fla. v. M.M., Nos. 2:05-CV-5-FtM-29SPC, 2:05-cv-7-FtM-29SPC (M.D. Fla. Mar. 27, 2007); Leighty v. Laurel Sch. Dist., 457 F.Supp.2d 546 (W.D. Pa. 2006); Kirby v. Cabell County Bd.

not changed to offer more than some educational benefit.[64] Unfortunately, the courts are tentative and reluctant to create binding authority. While the courts have not given reasons for issuing non-precedential opinions, this may be out of deference to: (1) administrative law due process hearings that allow for individual determinations on a case by case basis;[65] (2) state content area standards for education as outlined in the IDEA regulations;[66] and (3) educators as professionals to make educational decisions.[67]

VI. CONCLUSION: ADDITIONAL REFORM IS NEEDED

While the courts have not acknowledged a higher standard for students after NCLB, the de facto impact of NCLB has been to raise educational standards for students with disabilities. In the 2007 Nation's report card for reading, students with disabilities scored lower than their non-disabled peers.[68] The 2007 Nation's

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of Educ. Nos. 3:05-0322, 3:03-0320 (S.D.W.Va. Sept. 19, 2006); Levi v. O'Connell, 144 Cal. App. 4th 700 (Cal. App.3d Dist. 2006).

[64] *Fisher*, No. D5-2020, slip op. at 13 ("[B]ecause the IDEA was enacted pursuant to Congress' authority under the Spending Clause, the statutory language regarding coordination must constitute an unambiguous change in the conditions imposed on recipient states by the IDEA before the court would view the coordination language as altering the IDEA's FAPE and IEP requirements."); *Sch. Bd. of Lee County, Fla.*, Nos. 2:05-CV-5-FtM-29SPC, 2:05-cv-7-FtM-29SPC, slip op. at 4 (finding no clear intent in the federal standard to increase FAPE requirements in IDEA through NCLB); *Leighty*, 457 F.Supp.2d at 562 ("[S]ince no reasonable state official would clearly understand that, by accepting IDEA funds, a State is obligated to provide FAPE's and IEP's specifically designed to increase the scores of disabled children on standardized assessments mandated by the NCLB, the Leightys' argument must fail."); *Kirby*, Nos. 3:05-0322, 3:03-0320, slip op. at 6 (stating NCLB "does not contain specific obligations to children with disabilities nor does it alter the Court's standard of review in regards to the IEP."); *Levi*, 144 Cal. App.4th at 708–09 (noting that nothing in NCLB or California law entitles the child to a "free appropriate college education" since being a gifted student does not qualify under IDEA or California law as a child with a disability).

[65] *Kirby*, Nos. 3:05-0322, 3:03-0320, slip op. at 5 (explaining that the district court is to consider administrative proceedings as "prima facie correct," and if it does not find them to be correct, it is to explain why they are not correct).

[66] 20 U.S.C.A. § 1401(9)(B) (West 2008) (applying state educational agency standards to special education and related services).

[67] *See* Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997) ("[IDEA recognizes] that federal courts cannot run local schools. Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. Rather it establishes a 'basic floor of opportunity' for every handicapped child.") (citation omitted); DIXIE SNOW HUEFNER, GETTING COMFORTABLE WITH SPECIAL EDUCATION LAW: A FRAMEWORK FOR WORKING WITH CHILDREN WITH DISABILITIES (discussing the implications of recent modification to disability-related laws and litigation) (2d ed. 2006); Scott F. Johnson, *Reexaming Rowley: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. & L. J. 561, 573–78.

[68] NAT'L CTR. FOR EDUC. STATISTICS, THE NATION'S REPORT CARD: READING 2007 58, 66 (2007) (relating a national difference in scaled scores of 190 for students with disabilities and 223 for students without disabilities in fourth grade and a scaled score of 226 for students with disabilities and a scaled score of 265 for students without disabilities in eighth grade). In addition, only thirteen percent of disabled fourth graders scored at or above proficient, while thirty-four percent of non-disabled fourth graders scored at or above proficient. In the eighth grade, seven percent of disabled students scored at or above proficient, in contrast to thirty-one percent of non-disabled students. *Id.*

report card for math showed a similar discrepancy.[69] Because scores of students with disabilities are disaggregated from other students, this population will receive an increased focus in the schools; hopefully, this focus will lead to an educational benefit that is meaningful. The problem is that NCLB and the IDEA reforms fail to go far enough. The government program mandates change; however, it is inadequately funded to provide the staffing, programs and other change that is needed to ensure meaningful education for these students.[70] Without a program funded to ensure that every student makes educational progress, the laws just leave disabled students swimming in alphabet soup; wondering exactly what educational benefits they are entitled to under FAPE.

[69] NAT'L CTR. FOR EDUC. STATISTICS, THE NATION'S REPORT CARD: MATHEMATICS 2007 54, 62 (2007) (relating a national difference in scaled scores of 220 (disabled) and 241 (non-disabled) for fourth graders). In addition, only nineteen percent of disabled students were proficient, in contrast to forty-one percent of non-disabled fourth graders. In eighth grade, the scaled scores differed from 246 (disabled) to 284 (non-disabled). Only eight percent of disabled eighth graders were proficient, in contrast to thirty-three percent of their non-disabled peers. *Id.*

[70] While IDEA funds services for special education students, the alignment with the NCLB regulations allows a school district to use no more than fifteen percent of the Part B IDEA funds for intervening services for students who are in kindergarten through grade two who are not currently identified as special education students, but need additional academic and behavioral support to succeed in a general education environment. 20 U.S.C.A. §1413(f) (West 2008); 34 C.F.R. § 300.226 (a)–(b) (2008). While this helps implement Response to Intervention strategies and corrects academic problems early on, it takes designated money away from special education. In essence, this transfers funds from special education into regular education, without increasing funds for teacher training and the cost of special programs.