THE IDEIA AND THE RIGHT TO AN "APPROPRIATE" EDUCATION

*Andrea Blau**

I. INTRODUCTION

What is an appropriate standard of education for disabled students? The term *appropriate* has been used for over thirty years in federal legislation to mandate to the states the standard. However, despite numerous court rulings and legislative updates, the standard of an *appropriate* education remains inconsistent and uncertain. It is clear that the legislative standard of an *appropriate* education has risen over the years but the courts that enforce the *appropriate* education standard continue to be bound by the dated 1982 Supreme Court decision in *Rowley*. Thus, when parents attempt to litigate the *appropriate*ness of their disabled child's education, the courts often hold the states to a lower standard of *appropriate* than is implied in the legislation. A clear definition of *appropriate* from an authoritative federal source is required to force the courts and states to apply a consistent and more stringent educational standard for disabled students that will lift education for disabled students to the level of the congressional mandate. This paper will discuss the contention and uncertainty caused by the lack of a clear definition of an *appropriate* education* and will address the immediate need for clarification of a standard that is in keeping with the higher requirements intended by Congress.

II. THE LEGISLATIVE HISTORY OF AN "APPROPRIATE" EDUCATION

The most recent congressional directive, the Individuals with

J.D., Benjamin N. Cardozo School of Law; Ph.D., Speech & Hearing Sciences, City University of New York. Dr. Blau has over three decades of experience in designing programs for uniquely challenged students and has testified at impartial hearings and federal actions across the country. Her current focus is on the interplay of Constitutional, Administrative, and Disability Law in shaping public policy. She can be reached at afb@tiac.net.

* *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 212–18 (1982) (White, J., dissenting) ("I agree that the language of the Act does not contain a substantive standard beyond requiring that the education offered must be 'appropriate.'").

Disability Education Improvement Act of 2004 (IDEIA),[1] sustains an ambitious legislative mission that began over thirty years ago. This mission, of ensuring children with disabilities equality in educational opportunities, has both resulted in and has been shaped by a dramatic change in the way society views its responsibility towards its children. Over the course of the past three decades, legislative intent has progressed from simply increasing the number of challenged children given physical access to the benefits of public education, to ensuring children with disabilities cognitive access to the challenging public education curriculum, as provided to all children, in preparation to live adult independent lives.[2]

This legislative mission began with the Education for All Handicapped Children Act of 1975 (EHA).[3] The EHA reflected a major commitment to providing disabled youngsters with a public school education. It was enacted, in part, as a societal and legislative reaction to the de-institutionalization of disabled children, many of whom had been neglected, considered uneducable, or excluded from any form of public education. Under the EHA, local communities were held responsible for educating these children, just as they were responsible for educating non-disabled children. This was a major step forward for local communities because, prior to the EHA, the field of special education was still in its infancy and the majority of teachers were untrained in methodologies suitable for educating students with diverse disabilities.[4]

In addition to demonstrating an initial desire and commitment to provide educational opportunities to disabled youth, the EHA still provides the basis of educational legislation today in two of its main features: the mandate to provide to all children with disabilities (from ages 3-21) a Free Appropriate Public Education (FAPE)[5] within the Least Restrictive Environment (LRE).[6] States that successfully implement the EHA's provisions are eligible for federal special education funding.[7] While the lexical term "*appropriate*" is not

1. Individuals with Disability Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (to be codified at 20 U.S.C. §§ 1400–1482).

2. *See* 20 U.S.C. § 1400(c)(5)(A)(i)–(ii) (2000).

3. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as 20 U.S.C. §§ 1400–1482).

4. Brief for Nat'l Sch. Bds. Ass'n et al. as Amici Curiae Supporting Appellants at 13, Bd. of Educ. v. Rowley, 458 U.S. 176, 212–18 (1982) (No. 80-1002), 1981 WL 389687.

5. 20 U.S.C. § 1412(a)(1)(A) (2000).

6. 20 U.S.C. § 1412(a)(5)(A) (2000).

7. 20 U.S.C. § 1412(a)(1)–(25) (2000).

specifically defined in the EHA, the phrase "*free appropriate public education*" is defined and provides the foundation for states' accountability.

The term 'free appropriate education' means special education and related services which

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State Educational Agency,
>
> (C) includes an appropriate preschool, elementary, or secondary education in the State involved, and
>
> (D) are provided in conformity with the individualized education program [IEP] required under section 1414(a)(5) of this title.[8]

Although the phrases FAPE and LRE would reappear in later legislation, the congressional intent behind the EHA evolved.

III. THE IDEIA AND THE PROGRESSION OF CONGRESSIONAL INTENT

Over the next thirty years, the 1975 EHA mandate led to the Individuals with Disabilities Education Act (IDEA) of 1997[9] and the IDEIA of 2004,[10] both the quality of education and the skills of educators advanced dramatically. Congressional intent in enacting the most recent legislation, the IDEIA, reflects a powerful and proactive mission in raising the educational standard and achievement level for disabled students.[11] Providing children with disabilities entry into the educational system is no longer the primary motivation. The evolution of legislative intent and the congressional commitment to providing high quality education to disabled students is explicitly clear within the IDEIA's preamble:

> Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of

8. 20 U.S.C. § 1401(18) (1982) (as cited in Bd. of Educ. v. Rowley, 458 U.S 176, 188 (1982)).

9. Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997).

10. Individuals with Disability Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (to be codified at 20 U.S.C. §§ 1400–1482).

11. 20 U.S.C.A. § 1400(d)(1)(A)–(C) (West 2006).

opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.[12]

Thus, the IDEIA shows the substantial evolution in congressional intent in many of its provisions. This evolution is evidenced in many significant refinements in the procedural due process[13] and accountability measures[14] in the provision of FAPE within the LRE for disabled children. The IDEIA lists the items for which states are held accountable in order to be eligible for federal funding.[15]

In addition, the IDEIA provides very precise definitions[16] for three dozen lexical terms or phrases used frequently within the Act's provisions, such as "child with disability,"[17] "core academic subjects,"[18] "highly qualified,"[19] "individual education program,"[20] "related services,"[21] and "special education."[22] The statutory specificity of these definitions provides the clarity necessary for implementation criteria to be set.[23] Despite the effort made in the IDEIA to provide precise definitions to statutory language and address issues of contention between parents and the state,[24] neither the IDEIA nor the DOE regulations define the substantive term *appropriate* within the phrase

12. 20 U.S.C.A. § 1400(c)(1).

13. 20 U.S.C.A. § 1415.

14. 20 U.S.C.A. § 1414.

15. 20 U.S.C.A. § 1412(a).

16. 20 U.S.C.A. § 1401.

17. 20 U.S.C.A. § 1401(3).

18. 20 U.S.C.A. § 1401(4).

19. 20 U.S.C.A. § 1401(10) (referring to teacher qualifications).

20. 20 U.S.C.A. § 1401(14).

21. 20 U.S.C.A. § 1401(26).

22. 20 U.S.C.A. § 1401(29).

23. For example, the term "Assistive Technology Service" is defined as: any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes—(A) the evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment; (B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child; (C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices; (D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs; (E) training or technical assistance for such child, or where appropriate, the family of such child; and (F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.
20 U.S.C.A. § 1401(2).

24. Paolo Annino, *The Revised IDEA: Will it Help Children with Disabilities?* 29 MENTAL & PHYSICAL DISABILITY L. RPTR. 11–14 (2005).

"*appropriate* education,"[25] the very term that provides the basis of compliance with IDEIA.

The IDEIA, which is far more sophisticated in both its purpose and protocols than the EHA, employs virtually the same definition of an *appropriate* education:

> The term 'free appropriate public education' means special education and related services that-
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State Educational Agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d).[26]

The DOE 2005 regulations, promulgated pursuant to the IDEIA to interpret the Act and to direct state implementation, still do not further clarify the term *appropriate* education:

> Free appropriate public education or FAPE means special education and related services that–
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;
>
> (b) Meet the standards of the SEA (State Educational Agency), including the requirements of this part;
>
> (c) Include an appropriate preschool, elementary school, or secondary school education in the State; and
>
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340-300.350. (Authority: 20 U.S.C. 1401(8).)[27]

Thus, neither the legislature nor its administrative agency provides the specific parameters with which to measure the term *appropriate*.

Despite its failure to insert a definition of appropriate, Congress, in

25. Joshua Andrew Wolfe, Note, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individual With Disabilities Education Act*, 55 VAND. L. REV. 1627, 1633–34 (2002); Bd. of Educ. v. Rowley, 458 U.S. 176, 187 (1982).

26. 20 U.S.C.A. § 1401(9).

27. 34 C.F.R. § 300.13(a)–(d) (2005).

formulating the IDEIA, was well aware of the adversarial process that has steadily evolved over the past thirty years in determining whether disabled children are indeed receiving an *appropriate* education as mandated. The cost of litigation has been substantial, in terms of money, time, and energy expenditure, all of which might better be used in providing the needed education. One of the major refinements of the IDEIA is an attempt to reduce litigation by promoting discussion meetings and mediation as part of the due process protocols.[28] This more collaborative approach holds out the promise of greater policy balance and educational benefit. However, without a clear definition of the *appropriateness* feature, it is unlikely that parents and school systems will find common ground in defining the "educational benefit" standard.

In addition to encouraging collaboration, other enormous refinements within the IDEIA including data driven accountability measures,[29] higher levels of teacher qualification requirements,[30] more intensive parental involvement in IEP development or modification,[31] and incorporation of alternate dispute resolution methodologies,[32] have been put in place by the IDEIA.

A major improvement has been made over the previous legislation by the merging of the accountability for Adequate Yearly Progress (AYP) found in the No Child Let Behind Act of 2001 (NCLB)[33] into the IDEIA requirements.[34] As one of the more recent amendments to the Elementary and Secondary Education Act of 1965 (ESEA), the NCLB Act has raised the threshold of educational accountability dramatically.[35] The Statute itself seeks "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[36] The AYP achieved by students receiving special education is assessed alongside their nondisabled peers in determining whether schools are meeting these

28. 20 U.S.C.A. § 1415(e)–(f).

29. 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV).

30. 20 U.S.C.A. § 1401(10).

31. 20 U.S.C.A. § 1414.

32. *E.g.* 20 U.S.C.A. § 1415(e).

33. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C. (Supp. III 2003))

34. 20 U.S.C. § 6311(b)(2)(C)(i)–(iii) (Supp. III 2003).

35. G. RUESCH & R.L. WATERMAN, IMPACT OF THE NO CHILD LEFT BEHIND ACT ON SPECIAL EDUCATION IN WISCONSIN (Lorman Educ. Servs. 2005).

36. 20 U.S.C. § 6301.

mandated standards.[37] The AYP standard of the NCLB Act, which is well defined, has been incorporated within the newly reauthorized IDEIA of 2004.[38] States are now specifically accountable to provide a "high-quality" of education to all students or they will be out of compliance with the ESEA.[39]

Of note, the state must establish performance goals and indicators that promote the purposes of the IDEIA and use the same definition of AYP, as stated in the NCLB amendment to the ESEA.[40] By explicitly citing the NCLB Act within the reauthorized Act, the IDEIA mandates states to define AYP in a manner that applies the same high standards for academic achievement to all public elementary school and secondary school students in the state, which results in continuous and substantial academic improvement for all students, including students with disabilities.

In this spirit and by the use of the higher educational standards of the NCLB,[41] the IDEIA and the corresponding DOE[42] regulations provide increasing clarity regarding both the due process rights and educational standards to be met in educating disabled students. For the past year, most states have been reworking their own regulations to insure compliance with the reauthorized IDEIA and with the DOE regulations. While these regulations are still being promulgated, increased accountability measures, articulated goals, and improved curricula appear to be emerging.[43] While progress within developmental goals remains an important part of a child's IEP,[44] these life skills goals are now better balanced with educational progress within the core academic subjects.[45] This heightened educational standard has upgraded the

37. 20 U.S.C. § 6311(b)(2)(C)(i)–(v) ("'Adequately yearly progress' shall be defined by the State in a manner that—(i) applies the same high standards of academic achievement to all public elementary school and secondary school students in the State; . . . (iii) results in continuous and substantial academic improvement for all students; . . . (v) includes separate measurable annual objectives for continuous and substantial improvement for each of the following: (I) The achievement of all public elementary and secondary students. (II)(cc) [achievement of] students with disabilities.").

38. 20 U.S.C.A. § 1400(c)(5)(C) (West 2006).

39. 20 U.S.C.A. § 1414(d)(1)(A)(i)–(ii).

40. 20 U.S.C. § 6311(b)(2)(C).

41. 20 U.S.C. § 6301.

42. 34 C.F.R. pt. 300 (2006).

43. M.D. Holbrook & C. Holder, Accessing the General Curriculum: Standard-based Instruction (Feb. 2005), http://www.alsde.edu/html/doc_download.asp?id=2882&section=65.

44. 20 U.S.C.A. § 1400(c)(5)(A)(1).

45. 20 U.S.C.A. § 1400(c)(5)(C); 20 U.S.C. § 7801(11) (2000) ("[C]ore academic subjects' means English, reading or language arts, mathematics, science, foreign languages, civics and

educational expectations and requirements for all students.

Despite the significant improvement of congressional statutes for education of the disabled, the conspicuous absence of one small yet enormously important feature—the definition of the term *appropriate* with which to measure the adequacy of the educational benefit—leaves the process substantially flawed

Therefore, despite reauthorization, reenactment, and resumed sustained commitment to education for students with disabilities, what remains uncertain today is the legal definition of an *appropriate* education for disabled children that each state is mandated to freely and publicly provide.

IV. THE JUDICIAL STANDARD

The right of all citizens to an education does not appear within the U.S. Constitution. To a large extent, both the *Brown v. Board of Education* decision in 1965[46] as well as the earliest disability education cases, *PARC*[47] and *Mills* in 1972,[48] laid the foundation for the EHA of 1975. However, these cases were based on the Fourteenth Amendment's equal protection and due process clauses,[49] and in the case of *Mills*, the Fifth Amendment,[50] and not on an inherent right to education. While there are other unenumerated Constitutional rights that are considered as either fundamental rights for equal protection purposes (the right to vote[51] or travel[52]), or implied fundamental rights based on an expansive reading of liberty (privacy,[53] marriage,[54] autonomy,[55] and self-determination),[56] which receive a higher level of judicial scrutiny, the Supreme Court has made it clear that education is a state responsibility and a not a Constitutional issue.[57] As such, the Supreme Court has shied away from examining cases on the basis of receipt of FAPE and has

government, economics, arts, history, and geography.").

46. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
47. Pa. Ass'n. for Retarded Children v. Commonwealth, 343 F.Supp. 279 (E.D. Pa. 1972).
48. Mills v. Bd. of Educ. 348 F.Supp. 866 (D.D.C. 1972).
49. U.S. CONST. amend. XIV, § 1.
50. U.S. CONST. amend. V.
51. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966).
52. Shapiro v. Thompson, 394 U.S. 618, 629–30 (1969).
53. Griswold v. Conn,, 381 U.S. 479, 483 (1965).
54. Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
55. Roe v. Wade, 410 U.S. 113 (1973).
56. Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 270 (1990).
57. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42–43 (1973).

reiterated reliance on Congress or the states to dictate educational policy.[58]

Prior to the 1982 Supreme Court decision in *Rowley*,[59] there was no single guiding judicial interpretation of the EHA. The various circuit and state courts that addressed the EHA varied in their interpretations. For example, the Eighth Circuit in 1981[60] held that a state provides an *appropriate* education to a disabled student if it offers the "opportunity to achieve . . . full potential commensurate with the opportunity" provided to other [disabled and non-disabled] children. A 1981 Alabama district court held that the purpose of the EHA was to provide "proper educational services" to handicapped children to enable them to "become productive citizens, contributing to society instead of being forced to remain burdens" and to increase individual independence.[61] The 1982 Supreme Court decision in *Rowley*, however, reflected a more restricted interpretation of the educational standard and purpose employed by the EHA.

The *Rowley* Court held that the language of the EHA, in light of its legislative history, was clearly grounded in providing disabled children with "the basic floor of opportunity" for free access to individualized educational instruction and supports within the least restrictive setting.[62] In examining the educational needs of a hearing impaired student who had been provided with specialized instructional supports and was performing at above average grade level, the *Rowley* Court held that the appropriateness requirement of the Act was met.[63] The requested additional support, a sign language interpreter, which might allow Rowley to function at her maximal level was not the responsibility of the school to provide.[64] In his opinion for the Court, Justice Rehnquist relied on legislative history to interpret the EHA in accordance with congressional intent.[65] In 1975, congressional intent reflected the dual priorities of insuring that disabled children were no longer excluded from publicly supported education and that individualized support services

58. *Id*.; Bd. of Educ. v. Rowley, 458 U.S. 176, 207–208 (1982).

59. *Rowley,* at 176.

60. Springvale Sch. Dist. v. Grace, 656 F.2d 300, 305 (8th Cir. 1981), *vacated*, 458 U.S. 1118 (1982).

61. Campbell v. Talladega County Bd. of Educ., 518 F.Supp. 47, 54 (N.D. Ala. 1981).

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

63. *Id*. at 209–210.

64. *Id*. at 210.

65. *Id*. at 195–197.

were provided to insure educational benefit from instruction.[66]

The *Rowley* Court noted the clear efforts in the early 1970's, to simply give children with disabilities an opportunity to be "served" or publicly educated alongside their non-disabled peers by the provision of "personalized educational services."[67] Because the majority of children with disabilities were not receiving publicly supported education and the education provided to a few disabled children was considered inadequate, access to a public education for all disabled children was Congress' primary focus.[68] In this historical context, providing disabled children with a free education, with the aspiration that it would benefit them, was landmark in itself.

The Court held that the school was not responsible for providing additional support, and noted that the EHA did not dictate the provision of any specific standard of educational achievement.[69] The *Rowley* Court, citing *San Antonio Independent School District v. Rodriguez*,[70] deferred educational methodological considerations to the states.[71] The Court concluded that if a state complied with the EHA's procedures and the IEP was reasonably calculated to enable the child to receive educational benefits, the education was *appropriate*.[72]

Justice Rehnquist cautioned against over-inclusiveness in the application of the court's narrow holding. In speaking for the majority, Justice Rehnquist specifically stated: "Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services and who is performing above average in the regular classroom of a public school system, we confine our analysis to that situation."[73]

The Supreme Court has not granted certiorari for any subsequent case challenging the appropriateness feature since the *Rowley* decision and neither Congress nor the DOE has supplied clarification of the term

66. *Id*. at 194 (citing H.R. REP. No. 94-332, at 5 (1975); S. REP. No. 94-168, at 8 (1975)).

67. *Id*. at 196–197 (citing S. REP. No. 94-168, at 1).

68. *Id*. at 191 (citing H.R. REP. No. 94-332, at 2).

69. *Id*. at 189 ("Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.").

70. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42–43 (1973).

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

72. *Id*. at 206–207 ("Therefore, a court's inquiry in suits brought under §1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.").

73. *Id*. at 202.

appropriate. Without a definition there has been and can be no uniformity within or across states in how the term should be interpreted or the quality of education states are mandated to provide. The *Rowley* Court's conclusion that an IEP created for the disabled child must "prov[ide] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction,"[74] while leaving the methodological considerations to the states,[75] grants enormous deference to the State Educational Agencies (SEA) and Local Educational Agencies (LEA), and the IEP process but no qualitative legal guidelines. If bottom line educational criteria are met and no significant procedural due process violations arise, the quality of education provided to the student with disabilities has been left to the states to determine.[76] When faced with litigation by parents of disabled children seeking to challenge the educational system's provision of FAPE, both the states and the courts have largely relied upon the *Rowley* standard as their guide.

V. POST ROWLEY DECISIONS

Yet despite the remarkable thirty year evolution in the legislative purpose as well as in the quality and scope of educational services provided to disabled students, the narrow interpretation of the *Rowley* standard, for example, the receipt of "some educational benefit" from a reasonably calculated individualized plan[77] within the least restrictive environment, remains the vague and inconsistently applied measure of educational appropriateness for disabled children.

State, district, and circuit courts, subsequent to *Rowley*, have attempted to define "*appropriate*" education with little consistency or uniformity. The *Rowley* standard has been interpreted both narrowly and more broadly but never in the spirit of providing disabled students with an education commensurate with their non-disabled peers. (*See* Table 1.) Generally, a court's determination of whether a disabled student is in receipt of an *appropriate* education, assuming that mandated procedures have been met, is based on a continuum of interpretations of the *Rowley* standard. This continuum of decisions includes statements such as "a basic floor of opportunity,"[78] "some educational benefit,"[79] "reasonably

74. *Id*. at 203.

75. *Id*. at 207–208.

76. *Id*. at 207.

77. *Id*. at 206–207.

78. Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994); Leonard v. McKenzie, 869

calculated" to provide educational benefit,[80] not meaning "the best possible education,"[81] not required to maximize each child's potential,[82] not utopian,[83] more than trivial or de minimis progress,[84] meaningful benefit,[85] significant learning,[86] calculated to enable child to achieve passing marks and advance from grade to grade,[87] "measurable and adequate gains in classroom,"[88] "gauged in relation to child's potential,"[89] and "specifically designed to meet . . . unique needs."[90]

Following the decision in *Rowley*, many courts have latched onto the "basic floor of opportunity" and "some educational benefit" language to restrict accountability to minimal benefit in educational goals,[91] despite Justice Rehnquist's caution about confining the Court's analysis to the case at hand.[92] (*See* Table 1.) Basing his opinion on the Supreme Court's decision in *Rodriguez*,[93] Justice Rehnquist states that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy,'"[94] and therefore

F.2d 1558, 1561 (D.C. Cir. 1989); Indep. Sch. Dist. 283 v. S.D., 948 F.Supp 860, 885 (D. Minn. 1995).

79. A.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004); Fayette County Bd. of Educ. v. M.R.D., 158 S.W.3d 195, 202 (Ky. 2005).

80. L.T. v. Warwick Sch. Cmty., 361 F.3d 80, 83 (1st Cir. 2004); Brown v. Bartholomew Consol. Sch. Corp., No. 1:03-CV-00939-DFHVSS, 2005 WL 552194, at *9–10 (S.D. Ind. Feb 04, 2005).

81. Kenton City Sch. Dist. v. Hunt, 384 F.3d 269, 281 (6th Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 24498 (U.S. App. 2004); E.S. v. Indep. Sch. Dist.,135 F.3d 566, 569 (8th Cir. 1998).

82. Tucker v. Calloway Bd. of Educ., 136 F.3d 495, 505 (6th Cir. 1998); Ahern v. Keene, 593 F.Supp. 902 (D. Del. 1984).

83. Cone v. Randolph County Sch., 302 F. Supp.2d 500, 510 (M.D.N.C. 2004), *aff'd*, 103 Fed. Appx. 731, 2004 App. LEXIS 14682 (4th Cir. 2004), *cert. denied,* 125 S. Ct. 1077 (2005).

84. Ridgewood Bd. of Educ. v. N.E.*,* 172 F.3d 238, 247 (3d Cir. 1999); Bd. of Educ. v. I.S., 325 F. Supp.2d 565 (D. Md. 2004).

85. Polk v. Cent. Susquehanna Indep. Unit 16, 853 F.2d 171, 184 (3d Cir. 1988).

86. *Ridgewood,* 172 F.3d at 247.

87. Bd. of Educ. v. Rowley, 458 U.S. 176, 210 (1982).

88. Devine v. Ind. River County Sch. Bd., 249 F.3d 1289, 1293 (11th Cir. 2001).

89. Deal v. Hamilton, 392 F.3d 840, 861–62 (6th Cir. 2004), *rehearing denied*, 2005 U.S. App. LEXIS 5631 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 7325 (U.S. 2005); T.R. v. Kingwood Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).

90. Laughlin v. Cent. Bucks, No. 91-7333, 1994 WL 8114, at *1 (E.D. Pa. Jan. 12, 1994).

91. Marissa F. v. William Penn. Sch. Dist., No. Civ.A.04-286, 2005 WL 2304738, at *4 (E.D. Pa. Sept. 20, 2005).

92. *Rowley,* 458 U.S. at 187.

93. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42–43 (1973).

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

"questions of methodology are for resolution by the States."[95] In a 1984 Sixth Circuit decision, only two years after *Rowley*, the procedure for the determination of *appropriateness* was explained:

> The district court's decision on whether a given educational program is appropriate for an individual child appears to be a mixed question of fact and law. The trial judge is required to measure the factual situation of a handicapped child and the educational program proposed to accommodate his handicap against the legal standard of appropriateness.[96]

Given the tension that now exists between the statutory provisions adopted by Congress within the reauthorized IDEIA of 2004 and the Rowley standard used by the courts, the current legal standard of *appropriateness* by which this measurement should be made remains unclear and a source of contention.

Appropriate educational goals, therefore, have been left to the states to create, with parental input, and not for the courts to dictate.[97] Because courts are currently required by *Rowley* to give deference to the states, this limits the actions they take. If a court decides that an individualized learning plan is not *appropriate*, often in response to procedural due process violations which have negatively impacted the provision of FAPE,[98] the court is not limited by a restricted *Rowley* interpretation and assumes authority to fashion appropriate relief.[99] But if the IEP is deemed appropriate, and the courts give a great deal of deference to state educators in making this determination,[100] then the states have typically not been required to provide the best education,[101] an education that maximizes a disabled child's potential,[102] or even an education commensurate with his non-disabled peers.[103] The recent NCLB amendment to the ESEA stresses testing, school district accountability,

95. *Id*.

96. Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 516 (6th Cir. 1984).

97. *Rowley*, 458 U.S. at 207.

98. 20 U.S.C. § 1415(f)(3)(E) (2000) (new provision of the reauthorized IDEIA instructs impartial hearing officers to base their determinations on substantive grounds rather than procedural grounds, unless there is a direct link between the procedural violation and the denial of FAPE).

99. Diatta v. District of Columbia, 319 F.Supp. 2d 57, 63–64 (D.D.C. 2004); *Rowley*, 458 U.S. at 210.

100. Sherman v. Mamaroneck, 340 F.3d 87, 93 (2d Cir. 2003); Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144–45 (N.D.N.Y. 2004), *aff'd,* 142 Fed. Appx. 9, 2005 U.S. App. LEXIS 15534 (U.S. App. 2005).

101. *Rowley*, 458 U.S. at 187.

102. Leonard v. McKenzie, 869 F.2d 1558, 1561 (D.C. Cir. 1989).

103. *Rowley,* 458 U.S. at 198–199.

and AYP for all students.[104] These NCLB standards have been incorporated into the IDEIA, which opened the door for challenging the "basic floor of opportunity" level of education for disabled children. Yet, the cases that have made their way through the state and federal courts still have been decided using the *Rowley* standard to determine the level of education that states must provide to students with disabilities in compliance with the IDEA.[105] The enactment of the IDEIA, incorporating the NCLB Act as an educational standard, creates a potentially significant conflict between the terms of the Act and the narrow interpretation of *Rowley*.

Although the Supreme Court could revisit *Rowley* and offer a more substantive definition of "appropriateness," this is unlikely. So, despite more sophisticated understanding of special education issues and possibilities, with the Supreme Court reluctant to examine educational standards and in the absence of congressional clarification, lower courts are left with *Rowley* as the precedent-setting measurement standard. As long as the Supreme Court does not overrule *Rowley* or refine its interpretation in a subsequent decision, the meaning of the term *appropriate* remains unclear, undefined, inconsistently applied, and a source of frustration in educational implementation.

VI. STATE RESPONSIBILITY IN DEFINING STANDARDS

IDEIA implementation efforts by the states, frustrated by the lack of an *appropriateness* definition, have also compounded the problem. While states are responsible for the provision of FAPE within the LRE to secure federal funding, if states do not want to apply for federal funding, they are under no obligation to comply with the IDEIA. States have their own constitutions and statutes to which they are accountable in administering their education systems.[106] Each state (and the District of Columbia) has its own education laws and regulations guiding the implementation of those laws.[107] Given the high costs of educating

104. 20 U.S.C. § 6311(b)(2)(C) (Supp. III 2003).

105. Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982); Kenton City Sch. Dist. v. Hunt, 384 F.3d 269, 281 (6th Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 24498 (U.S. App. 2004); Tucker v. Calloway Bd. of Educ., 136 F.3d 495, 505 (6th Cir. 1998); Reid ex re. Reid v. District of Columbia, 401 F.3d 516, 519 (D.D.C. 2005).

106. Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 983 (4th Cir.1990).

107. A.F. Blau & A.L. Allbright, *50-State Roundup: Ensuring Children with Disabilities a Free Appropriate Public Education*, 30 MENTAL & PHYSICAL DISABILITY L. RPTR. 1 (2006) (fifty-state, plus District of Columbia, citations of special education law in relation to FAPE).

children with disabilities, receiving federal funding is of significant importance to states.[108]

States may also implement their own standards. If a state's educational standards are more stringent than those of the federal Act, that state is held responsible for implementing the heightened standard.[109] In examining the statutory provisions of all fifty states (plus the District of Columbia), with the exception of Alaska,[110] which simply mimics the language of the federal Act as defined in *Rowley,* and the state of Washington,[111] which provides a broad definition of an *appropriate* education, no definition for the lexical term *appropriate* appears within their constitutions, statutes, or regulations.[112] While not clearly defining what constitutes *appropriate* education, all fifty states, including the District of Columbia, do however have laws mandating the education of children with disabilities. All of the states use language similar to the Act, many deferring[113] or referring[114] explicitly to the Act.[115] Missouri, prior to the EHA of 1975, maintained a more stringent standard, but later amended its statute to track the language of the Federal Act.[116] California's statute explicitly states that it is not responsible for providing a higher level of education than mandated by the IDEA.[117] North Carolina[118] has enacted a more stringent statute than

108. Virtually all states apply for federal funding. Correspondence from U.S. Dept. of Educ. (February 27, 2006) (on file with author).

109. *Id*.

110. ALASKA STAT. §14.30.350(1) (2004) ("'[A]ppropriate education' means personalized instruction with sufficient support services to permit a child to benefit educationally from the instruction.").

111. WASH. REV. CODE ANN. § 28A.155.020 (West 2006) ("[A]ppropriate education is defined as an education directed to the unique needs, abilities, and limitations of the children with disabilities.").

112. Blau & Allbright, *supra* note 107, at 1.

113. E.g. CAL. EDUC. CODE § 56000 (West 2006).

114. E.g. ARK. CODE ANN. § 6-41-101 (West 1999); MO. ANN. STAT. § 162.670 (West 2006); WYO. STAT. ANN. § 21-2-501 (2005).

115. 20 U.S.C. § 1400(c)(2)(A)–(D) (2000).

116. McEuen v. Mo. Bd. of Educ. 120 S.W.3d 207, 209 (Mo. 2003) (Court upheld constitutionality of state special education law changing state's maximization standard to federal standard for educational sufficiency. The statute was amended from a "declared policy" of the state "to provide. . . all handicapped and severely handicapped children . . . special education services sufficient to meet the needs and maximize the capabilities . . . ." to providing "a free appropriate education consistent with the provisions set forth in state and federal regulations implementing [IDEA].").

117. CAL. EDUC. CODE § 56000 (West 2006) ("It is also the intent of the Legislature that this part does not set a higher standard of educating individuals with exceptional needs than that established by Congress under the Individuals with Disabilities Education Act.").

118. N.C. GEN. STAT. § 115C-106(a), (b) (2005) ("policy of the State is to ensure every child a

the federal Act. However, recent Fourth Circuit decisions[119] have weakened North Carolina's accountability to the statute by denying children educational programs that provided stronger educational services, stating that the State is not responsible for providing "utopian" programs,[120] relying again on the Supreme Court's holding in *Rowley*.

Without a federal definition of what constitutes *appropriateness*, either within the Act or the DOE regulations promulgated to guide states in the enforcement of the Act, states have been free to use the minimal *Rowley* definition as a guidepost for their own statutes. Given the amount of funding that is at stake for the states, they have no incentive to maintain a higher standard. In fact, the lack of definition in legislation serves as a disincentive for states to pass or maintain laws with higher standards.

Over the past thirty years, students and their school systems, have sought to determine whether the education provided by a school district or requested by a student complies with the EHA and its progeny, the IDEA and IDEIA.[121] With the passage of refined educational standards and accountability measures of the IDEA of 1997, litigation increased, reflecting parental attempts to increase the educational standards *appropriate* for their children while schools attempt to justify the *appropriate*ness of the educational levels they are already providing.[122] Litigation challenging procedural due process violations has been considered remediable through court decision.[123] However, when substantive due process issues have been the basis of an action, most specifically when the methodologies used to assure the receipt of an *appropriate* education are at issue, courts have been far more reticent to

fair and full opportunity to reach his full potential" and "to provide a free appropriate publicly supported education to every child with special needs.").

119. Polk v. Cent. Susquehanna Indep. Unit 16, 853 F.2d 171, 184 (3d Cir. 1988) (District court removed an autistic child from residential program at Benedictine School in Ridgely, Maryland, where child made significant progress, returning him to local school district in North Carolina with admittedly inferior program in accordance with his IEP; IEP held to be reasonably calculated to provide educational benefit).

120. Harrell v. Wilson County Sch., 293 S.E.2d 687, 691 (N.C. Ct. App. 1982) (heightened North Carolina standard does not require that educational authorities develop "utopian educational program[s]" for handicapped students).

121. *See generally* 20 U.S.C.S. § 1412 interpretive notes and decisions 18–45 (LexisNexis 2006).

122. *See generally* 28 MENTAL & PHYSICAL DISABILITY L. RPTR. nos. 1–6 (2004); 29 MENTAL & PHYSICAL DISABILITY L. RPTR. nos. 1–6 (2005).

123. Bd. of Educ. v. Rowley, 458 U.S. 176, 210 (1982); M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 642 (9th Cir. 2004).

substitute their own opinions for those of state professional educators.[124] Over the past two decades, many courts have deferred to the narrow *Rowley* standard to establish whether a child's progress was in compliance with the Act. (*See* Table 1.) Yet, there appear to be a number of decisions that have used a somewhat broader interpretation of the *Rowley* standard, either by examining the individual child's specific needs as suggested by the *Rowley* Court[125] or by holding schools accountable for a higher level of education, in line with the pre-*Rowley* decisions,[126] the amicus brief,[127] and the dissent in *Rowley*.[128] While precedent within a state or circuit has influenced subsequent decisions,[129] the body of common law that has emerged has not woven a clear or cohesive picture of the specific measurement standard used when assessing state compliance with the provision of FAPE.[130]

VII. CONCLUSION

The explicit purpose of the reauthorized IDEIA has also gone much further than its predecessors. The IDEIA ensures all children with disabilities FAPE within the LRE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.[131] State agencies are basing their educational curricula on the reauthorized IDEIA and on the regulations promulgated by the DOE. There now exists a large chasm between the *Rowley* standard and the standards incorporated in the Act itself. The minimal *Rowley* standard of providing the bottom floor educational opportunity, the promise of "some educational benefit," or the provision of some progress towards a reasonably calculated individual plan[132] no longer can be seen as the attributes of an

124. *Rowley*, 458 U.S. at 187; J.K. v. Springville-Griffith Inst., No. 02-CV-765S, 2005 WL 711886, at *10 (W.D.N.Y. March 28, 2005).

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

126. *Id*. at 176; Sch. Dist. v. Grace, 656 F.2d 300, 305 (8th Cir. 1981), *vacated*, 458 U.S. 1118 (1982).

127. Brief for Nat'l Sch. Bds. Ass'n et al., as Amici Curiae Supporting Appellants at 13, *Rowley*, 458 U.S. 176 (1982) (No. 80-1002), 1981 WL 389687.

128. *See Rowley*, 458 U.S. at 212–18 (1982) (White, J., dissenting) ("I agree that the language of the Act does not contain a substantive standard beyond requiring that the education offered must be 'appropriate.'").

129. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S.Ct. 1278 (1973); *Rowley*, 458 U.S. at 187 (1982).

130. *See infra* tbl. 1.

131. 20 U.S.C.A. § 1414 (West 2006).

132. *Rowley*, 458 U.S. at 187.

appropriate educational plan for a child with disabilities. In the absence of a congressionally supplied definition of the term *appropriate*, and with no definition forthcoming from the DOE, the chasm will inevitably grow wider.

The lack of a substantive definition of the appropriateness standard has caused substantial litigation between school systems and parents of children with disabilities. Even a general definition of the term "educational appropriateness," as education that supports a quantifiable measure of meaningful and adequate progress towards achieving skills to promote literacy, communication and self-sufficiency, might be enough, if stated within the IDEIA itself or within the DOE's regulations. The achievement of educational adequacy can no longer focus upon minimal educational benefit, based on a state's unguided standard of appropriate goals. As long as individualized special education and support services are provided in the LRE, the student is making some progress towards reasonably calculated goals, and proper procedure has been followed, states have been given latitude to do as little as is warranted to comply with the Act. Valid requests for more effective educational methods have been seen as "maximizing potential"[133] or providing "utopian" measures.[134] Yet, methodological considerations make a substantial difference in the rate or even ability of a child with disabilities to learn what is clearly prerequisite to self sufficiency as currently mandated within the Act.[135]

Without a clear federal definition to support the IDEIA, a source of controversy, dispute, and litigation may exist for years to come. The DOE has had the opportunity to refine this ambiguous standard by incorporating a definition for the term *appropriate* within the guidelines they have promulgated for the IDEIA. Before the dust settles on the enactment of the DOE's regulations for this very comprehensive and well-crafted Act, it would be wise for this administrative body to insure the inclusion of this long absent definition. States have been awaiting the finalization of the DOE regulations to ensure that their own standards are in compliance with the IDEIA. The pressures of the moment make it all

133. *Rodriguez,* 411 U.S. at 42–43.

134. Polk v. Cent. Susquehanna Indep. Unit 16, 853 F.2d 171, 184 (3d Cir. 1988).

135. Marissa F. v. William Penn. Sch. Dist., No. Civ.A.04-286, 2005 WL 2304738, at *4 (E.D. Pa. Sept. 20, 2005). *See also* Deal v. Hamilton, 392 F.3d 840, 861–62 (6th Cir. 2004) (stating that in assessing differences in methodologies, while states, as noted by the *Rowley* ruling, are not required to maximize each child's potential, "at some point this facile answer becomes insufficient. . . . [T]here is a point at which the difference in outcomes between the two methods can be so great that provision of the lesser program could amount to denial of FAPE.").

the more important for the DOE or some other authoritative federal source to resolve this open question.

TABLE 1: COURTS APPLICATION OF ROWLEY STANDARD

Cases	State	District	Circuit	Interpretation of Standard
Ahern v. Keene, 593 F.Supp. 902 (D. Del. 1984).		x		States not required to provide best education money can buy nor one which maximizes handicapped child's potential.
Polk v. Cent. Susquehanna Indep. Unit 16, 853 F.2d 171, 184 (3d Cir. 1988) (cert. denied 1989).			x	Meaningful benefit
Leonard v. McKenzie, 869 F.2d 1558, 1561 (D.C. Cir. 1989).		x		Some educational benefits (not maximizing potential); basic floor of opportunity.
Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994).			x	"Appropriate education" does not mean best or potential maximizing education; basic floor of opportunity through individually designed educational benefit to child.
Laughlin v. Cent. Bucks, No. 91-7333, 1994 WL 8114 at *1 (E.D.Pa. Jan. 12, 1994).		x		Specifically designed to meet unique needs supported by services to permit benefit. IEP must be reasonably calculated to receive educational benefit, more than trivial or deminimus progress.
Independent School District 283 v. SD 948 F. Sup 860 (D. Minn. 1995).		x		IDEA does not require educational benefits to maximize potential but merely offers basic floor of opportunity to progress within his education.
E.S. v. Indep. Sch. Dist.,135 F.3d 566, 569 (8th Cir. 1998).			x	IDEA does not require best possible education.

Cases	State	District	Circuit	Interpretation of Standard
Tucker v. Calloway Bd. of Educ., 136 F.3d 495, 505 (6th Cir. 1998).			x	School's placement upheld if reasonably calculated to provide educational benefits; appropriate public education does not mean absolutely best or potential maximizing.
Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999).			x	IEP must provide more than trivial educational benefit for educational appropriateness; significant learning and meaningful benefit are required to meet higher standard of the IDEA.
T.R. v. Kingwood Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000).			x	Meaningful educational benefit must be gauged in relation to child's potential.
Devine v. Indiana River County Sch. Bd., 249 F.3d 1289, 1293 (11th Cir. 2001).			x	Appropriate education means that child is making measurable and adequate gains in classroom.
McEuen v. Mo. Bd. of Educ. 120 S.W.3d 207, 209 (Mo. 2003)	x			Constitutional for State to reduce "maximization standard" policy to less stringent Federal standard for educational sufficiency.
A.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004).			x	IEP held if reasonably calculated to provide some educational benefit. Local schools deserve latitude in determining IEPs most appropriate for a disabled child.
Cone v. Randolph County Sch., 302 F. Supp.2d 500, 510 (M.D.N.C. 2004), *aff'd*, 103 Fed. Appx. 731, 2004 App. LEXIS 14682 (4th Cir. 2004), *cert. denied,* 125 S. Ct. 1077 (2005).		x	aff	NC State policy "to ensure every child a fair and full opportunity to reach full potential" but not "utopian educational program for handicapped students."

Cases	State	District	Circuit	Interpretation of Standard
L.T. v. Warwick Sch. Cmty., 361 F.3d 80, 83 (1st Cir. 2004).			x	Not required to provide what is best for a special needs child; "reasonably calculated" to provide an "appropriate" education as defined in federal and state law.
Watson v. Kingston City Sch. Dist. 325 F. Supp. 2d 141, 144-45 (N.D.N.Y. 2004), *aff'd,* 142 Fed. Appx. 9; 2005 U.S. App. LEXIS 15534 (U.S. App. 2005).		x	aff	Methodological considerations must be left to state and local schools - deference due; not for Federal courts to judge.
Bd. of Educ. V. I.S., 325 F. Supp.2d 565 (D. Md. 2004).		x		Did not provide FAPE - child made de minimus progress on old IEP and new IEP was identical.
Kenton City Sch. Dist. v. Hunt, 384 F.3d 269, 281 (6th Cir. 2004), *rehearing denied*, 2004 U.S. App. LEXIS 24498 (U.S. App. 2004).			x	Appropriate education is "not synonymous with best possible education" nor is it an education that enables a child to achieve his or her full potential.
Bucks County Dept, of MHR v. Penn 379 F.3d 61 (3rd circuit 2004).			x	A somewhat broader interpretation of the term "appropriate" determining that Courts can remedy if IEP is found insufficient
Deal v. Hamilton, 392 F.3d 840, 861-62 (6th Cir. 2004), *rehearing denied*, 2005 U.S. App. LEXIS 5631 (6th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 7325 (U.S. 2005).			x	"Requires IEP to confer meaningful educational benefit gauged in relation to child's potential." ". . .there is a point at which the difference in outcomes between two methods can be so great that provision of lesser program could amount to denial of FAPE."
Fayette County Bd. of Educ. v. M.R.D., 158 S.W.3d 195, 202 (Ky. 2005).	x			Some educational benefit conferred with student progressing academically is in receipt of FAPE.

Cases	State	District	Circuit	Interpretation of Standard
Brown v. Bartholomew Consol. Sch. Corp., 2005 WL552194 at *9-10 (S.D. Ind. 2005).		x		IEP reasonably calculated to provide educational benefit.
J.K. v. Springville-Griffith Inst.,.No. 02-CV-765S, 2005 WL 711886 at *10 (W.D.N.Y. March 28, 2005).		x		". . .educational strategy and methodology requiring deference to expertise of administrative offices."
Reid ex re. Reid v. District of Columbia, 401 F.3d 516, 519 (D.D.C. 2005).			x	At a minimum provide personalized instruction with sufficient support to permit child to benefit educationally from that instruction. . .if in regular class. . .reasonably calculated to enable child to achieve passing marks and advance from grade to grade.
Marissa F. v. William Penn. Sch. Dist., No. Civ.A.04-286, 2005 WL 2304738 at *4 (E.D. Pa. Sept. 20, 2005).		x		IEP sufficient as provided minimal education benefit. "[I]t is not the court's place to substitute its idea of good educational policy for ideas and techniques adopted by Pennsylvania educators."