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REEXAMINING ROWLEY: A NEW FOCUS IN SPECIAL EDUCATION LAW

Scott F. Johnson*

The Individuals with Disabilities Education Act (IDEA) requires that students be provided with a Free and Appropriate Public Education (FAPE). Exactly what FAPE means or requires is an elusive topic. Twenty years ago, in Board of Education v. Rowley, the United States Supreme Court held that FAPE requires services that provide students with "some educational benefit." 1 Rowley is undoubtedly the most important and influential case in special education law. The "some educational benefit" standard permeates just about every aspect of special education because it is the standard against which all services are measured. Subsequent cases have expanded on this "some educational benefit" requirement somewhat, but it remains essentially intact today.

Much has been written about Rowley and its impact in special education law. 2 This paper presents a new and different perspective on Rowley by examining the Rowley standard for FAPE against the evolving backdrop of state educational standards and litigation over what constitutes an adequate education under state constitutional law. Applying these standards to Rowley's analysis and reasoning, this paper concludes that the "some educational benefit" standard no longer accurately reflects the requirements of the IDEA. Rather, state standards and educational adequacy requirements themselves provide the substantive requirements

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2. A search of the literature shows that Rowley is referenced in over 340 law review articles.
of FAPE, exceeding the “some educational benefit” benchmark. Such a conclusion requires a fundamental change in the way courts, school districts, and parents view special education services.

This paper first lays the background for and explains the Rowley decision. Next, this paper discusses three important changes since Rowley was decided: (1) litigation over what constitutes an adequate education under state constitutional law, (2) state educational standards, and (3) the 1997 amendments to the IDEA, and how these changes render Rowley’s “some educational benefits” standard invalid. Finally, this paper concludes with a discussion of how to incorporate high educational standards and expectations into special education services as required by the amended IDEA.

I. BACKGROUND

The Individuals with Disabilities Education Act (IDEA) requires state and local school districts to provide students with disabilities with a “free and appropriate public education” (FAPE). FAPE is defined by the IDEA as special education and related services that:

(A) have been provided at public expense...without charge [to the parents];

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the student’s individualized education program...³

While the statute provides a basic definition of FAPE, it does not describe the substantive requirements of FAPE, nor set any requisite standards or levels of learning achievement for students with disabilities.⁴ Because of this lack of substance, courts have struggled when asked to determine if a school district has provided FAPE to a student.⁵

In *Board of Education v. Rowley*, the United States Supreme Court attempted to determine the substantive standards of FAPE. The plaintiff in *Rowley* argued that FAPE required schools to maximize the potential of handicapped children commensurate with the opportunity provided to other children. The trial court agreed with this proportional maximization standard, and the Court of Appeals affirmed the trial court's decision without much comment.

The Supreme Court overturned the circuit court's decision finding that the IDEA (then known as the EHA or Education Handicapped Act) did not require schools to proportionally maximize the potential of handicapped children. Rather, the Court said that Congress had more moderate goals in mind. The Supreme Court relied upon the text and legislative history of the statute to find that Congressional intent was only to provide a "basic floor of opportunity" to students with disabilities by providing them access to public education as opposed to addressing the quality of education received once in school. The Court stated:

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. . . . Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

The Court determined, however, that some substantive standard for FAPE was "implicit in the congressional purpose of providing access to a free appropriate public education." The Court found that the substantive standard for FAPE required instruction designed to meet the unique needs of the handicapped child, supported by such services as are necessary

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10. Id. at 192.
11. Id. at 200.
to permit the child "to benefit" from the instruction.\textsuperscript{12} The Court noted that the statute itself provided a checklist of requirements for FAPE that included providing instruction at public expense and under public supervision, providing instruction that both met the State's educational standards and approximated the grade levels used in the State's regular education system, and providing instruction that comported with the child's individualized educational plan (IEP).\textsuperscript{13}

The Court concluded that "if personalized instruction is provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a FAPE as defined by the Act."\textsuperscript{14} The Court stated that when determining whether a student benefited from the services provided, "the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit," because passing grades and grade advancement were methods of monitoring educational progress for students being educated in regular classrooms.\textsuperscript{15}

\section*{II. Post-Rowley}

Subsequent court decisions interpret \textit{Rowley} to mean that the IDEA does not require schools to provide students with the best or optimal education, nor to ensure that they receive services to enable them to maximize their potential.\textsuperscript{16} Instead, schools are obligated only to offer services that provide "some educational benefit" to the student. Courts sometimes refer to this as the "Cadillac versus Chevrolet" argument, with the student being entitled to a serviceable Chevrolet as opposed to a luxury Cadillac.\textsuperscript{17}

\begin{enumerate}
\item \textit{Id.} at 201.
\item \textit{Id.} at 189.
\item \textit{Id.}
\item \textit{Id.} at 207 n. 28. The \textit{Rowley} Court relied upon grades when a student is "mainstreamed" and educated in the regular education classrooms of a public school system because it assumed that in such a situation, "the system itself monitors the educational progress of the child" by administering regular examinations, awarding grades, and permitting yearly advancement to higher grade levels for those children who attain an adequate knowledge of the course material." \textit{Id.} at 202-03. The value of grades for students who are not mainstreamed is not as certain.
\item See e.g. Lenn \textit{v. Portland Sch. Comm.}, 998 F.2d 1083 (1st Cir. 1993).
\item \textit{Doe ex rel. Doe v. Bd. of Educ.}, 9 F.3d 455, 459-460 (6th Cir. 1993);
\end{enumerate}
Some courts further refine the "some educational benefit" standard to require students to achieve a "meaningful benefit," or to make "meaningful progress" in the areas where the student's disability impacts their education. These courts hold that while the IDEA does not require a school to maximize a student's potential, the student's potential and ability must be considered when determining whether he or she has progressed and received educational benefit. Moreover, when a student displays considerable intellectual potential, the IDEA requires "a great deal more than a negligible benefit."

Despite a myriad of court decisions on the topic, school districts, parents, and courts still have little guidance on how to assess FAPE or educational benefit. The Rowley Court mentioned that grades and advancement from grade to grade were factors in assessing benefit for mainstreamed students. Thus, post-Rowley courts have viewed passing grades and grade advancement as important factors when determining if a student received educational benefit. Grades for students with disabilities, however, are often modified and lose their validity as a measure of benefit or progress.

Some courts have also looked to academic achievement testing in addition to grades and grade advancement to measure educational benefit. These courts have relied upon "objective" academic tests and scores on successive tests to measure educational benefit. Courts using this approach,


19. Ridgewood, 172 F.3d at 247 (benefit must be gauged in relation to the child's potential); Roland M., 910 F.2d at 991 (academic potential one factor to be considered when addressing student's needs).

20. Ridgewood, 172 F.3d. at 247.


23. For example, in Houston Independent School District, the court reviewed the student's scores on the Woodcock Johnson intelligence and achievement test to assess the student's progress and found that the scores showed meaningful progress, and thus, the school had provided the student a FAPE. 200 F.3d at 349-350.
however, have produced varying results with similar information. The variance seems to be due to the fact that courts do not have a substantive standard that defines what a student should know and be able to do at a given point in time. As a result, assessing benefit through improvement in test scores becomes a subjective analysis of whether a gain of a certain amount is sufficient progress or not.

The lack of substantive standards for FAPE, when combined the current “Cadillac versus Chevrolet” perspective, lowers expectations and facilitates a minimalistic view of the substantive education that students with disabilities are entitled to receive. When Congress reauthorized the IDEA in 1997, it expressly noted that low expectations for students with disabilities impeded the implementation of the IDEA. Congress stated that educating students with disabilities could

24. Compare Houston Independent School District, id. at 350, where the following grade equivalent scores were found to demonstrate educational benefit:

<table>
<thead>
<tr>
<th></th>
<th>2nd/3rd grades</th>
<th>4th/5th grades</th>
<th>5th/6th grades</th>
</tr>
</thead>
<tbody>
<tr>
<td>Math</td>
<td>1.7</td>
<td>3.1</td>
<td>4.4</td>
</tr>
<tr>
<td>Written language</td>
<td>1.5</td>
<td>1.9</td>
<td>2.9</td>
</tr>
<tr>
<td>Passage comp.</td>
<td>1.7</td>
<td>2.2</td>
<td>3.9</td>
</tr>
<tr>
<td>Calculation</td>
<td>1.4</td>
<td>3.3</td>
<td>5.0</td>
</tr>
<tr>
<td>Applied problems</td>
<td>2.0</td>
<td>3.0</td>
<td>3.6</td>
</tr>
<tr>
<td>Dictation</td>
<td>1.6</td>
<td>1.8</td>
<td>2.8</td>
</tr>
<tr>
<td>Writing</td>
<td>1.4</td>
<td>2.6</td>
<td></td>
</tr>
<tr>
<td>Word Identification</td>
<td>1.8</td>
<td>2.1</td>
<td>2.8</td>
</tr>
<tr>
<td>Word Attack</td>
<td>0.7</td>
<td>1.8</td>
<td>1.8</td>
</tr>
<tr>
<td>Broad Reading</td>
<td></td>
<td>2.1</td>
<td>3.3</td>
</tr>
<tr>
<td>Written samples</td>
<td></td>
<td>2.6</td>
<td>3.3</td>
</tr>
<tr>
<td>Basic cluster</td>
<td></td>
<td>2.1</td>
<td>2.8</td>
</tr>
<tr>
<td>Proofing</td>
<td></td>
<td>2.3</td>
<td>2.6</td>
</tr>
</tbody>
</table>

with Hall v. Board of Education, 1983-1984 EHLR 555:437 (E.D. NC 1983), aff’d, 774 F.2d 629 (4th. Cir. 1985), where the court found that the following test scores were not sufficient progress to provide educational benefit:

<table>
<thead>
<tr>
<th></th>
<th>3rd grade</th>
<th>5th grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>Math</td>
<td>4.0</td>
<td>5.7</td>
</tr>
<tr>
<td>Reading Recognition</td>
<td>2.6</td>
<td>2.6</td>
</tr>
<tr>
<td>Reading Comp.</td>
<td>2.2</td>
<td>2.7</td>
</tr>
<tr>
<td>Spelling</td>
<td>2.5</td>
<td>3.2</td>
</tr>
<tr>
<td>General Info</td>
<td>5.3</td>
<td>7.0</td>
</tr>
</tbody>
</table>

be more effective by "having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible."26

III. CHANGE IN THE LANDSCAPE

Three important events occurred after the Rowley decision, all of which impact the validity of the "some educational benefit" standard and change the nature of educational services that schools must provide students who receive special education services under the IDEA. The first significant post-Rowley event is state litigation over the constitutional requirements of providing an "adequate" education to students, including students with disabilities, under state constitutional law. An adequate education under state constitutional law requires the state to provide its students with educational services targeted towards the acquisition of sufficient skills to be successful in society. Some of these requirements are at odds with, and require a higher level of educational services than Rowley's "some educational benefit" standard.

The second event is the education standards movement that created high expectations for all students, including students with disabilities, by creating generally applicable content and proficiency standards. These standards define academic performance levels and provide specific substantive benchmarks that students should achieve during their academic careers.

The third event is the reauthorization of IDEA in 1997. At that time, Congress expressly changed the focus of the IDEA from general access to education for children with disabilities to high expectations and real educational results. Many of the 1997 changes emphasized that students with disabilities must be provided with the same quality of educational services already provided to students without disabilities, including access to curriculum that meets state educational standards. These three changes require a reevaluation of what the standard for FAPE and Rowley mean today.

A. An Adequate Education under State Constitutional Law

Most states have state constitutional provisions requiring the state to provide educational services to students.27 Forty-four states have been through some type of litigation concerning the educational requirements outlined by their state constitutions.28 The majority of these cases involved challenges to the state's system of financing education. Commentators organize school finance litigation into three "waves," with some contending the last wave is ending and a potential fourth is beginning.29

The first two waves of school finance litigation dealt primarily with equal protection, or equity, arguments surrounding school funding in local school districts.30 The third wave of school finance litigation has focused on whether states have a constitutional obligation to provide a certain level or quality of education to its students. This qualitative level of education is often referred to as "an adequate education."31

Numerous state supreme courts have held that their constitutions require the state to provide an adequate education to all students.32 These decisions create general state law educational standards and requirements. These standards are subsequently incorporated into the definition of FAPE for

30. Heise, supra n. 29 at 1157-1159; Thro, supra n. 29.
students with disabilities by the statutory provision that requires FAPE to "meet state standards" and include "an appropriate preschool, elementary, or secondary school education in the State involved."  

Some courts hold that an adequate education is not a minimal education. One of the earliest cases to address the requisite qualitative level of educational services under a state constitution was *Pauley v. Kelly*. In *Pauley*, the West Virginia Supreme Court described the requisite quality of education under the West Virginia Constitution as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."

The court further found that the state had an obligation to develop every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Some years later, in *Alabama Coalition for Equity, Inc. v. Hunt*, an Alabama court held that the Alabama constitution required the state to provide students with an education that would ensure:

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34. 255 S.E.2d 859 (W. Va. 1979).

35. Id. at 877.

36. Id.
(viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and

(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential.\(^37\)

State constitutional mandates requiring states to develop every child to his or her capacity and encourage them to live up to their full human potential are directly at odds with the Rowley basic floor of opportunity standard. Rowley rejected the notion that the IDEA itself required states to maximize a student's potential. In a state where the state's constitution requires such a standard for all students, however, the requirement is incorporated into the IDEA's definition of FAPE and should be the standard for students with disabilities.\(^38\) Any other approach would run afoul of the IDEA's requirements.\(^39\)

Other state courts developed and applied similar constitutional requirements without express language regarding maximizing student potential, but these resulting standards remain clearly contrary to the minimalist guideline set by Rowley.\(^40\) For example, the Kentucky Supreme Court decision in Rose v. Council for Better Education, Inc.\(^41\) is considered one of the seminal cases with respect to the requirements of an adequate education. In Rose, the court found the state was obligated to provide every child with:

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38. Natl. Research Council, supra n. 33, at 51-52; Dannenberg, supra n. 33, at 639-43. At the time of the Rowley decision, litigation over a state's constitutional obligations to provide an adequate education was in its infancy. The Court in Rowley made short shrift of this requirement in its decision and did not address what an appropriate education would be in Amy Rowley's state.

39. Providing different educational standards for students with disabilities could also raise equal protection concerns. See Brown v. Bd. of Educ., 347 U.S. 483 (1954) (educational opportunities must be provided equally to all).

40. This objective is right in line with the amendments to the IDEA in 1997 discussed infra. The purpose of the IDEA is now to prepare students with disabilities for independent living and employment. 20 U.S.C. § 1400(c)(1), (d)(1)(A) (West 2002). This purpose itself is arguably inconsistent with Rowley's minimalist approach.

41. 790 S.W.2d 186.
(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

(ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

(iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

(iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market. 42

Several other state supreme courts have also adopted the seven criteria set forth in *Rose* as requirements under their state constitutions. 43 These courts clearly hold a constitutionally adequate education is not a minimal education. The New Hampshire Supreme Court stated in *Claremont v. Governor (Claremont II)*,

Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the critical requirements of the many that it must address. Mere

42. *Id.* at 212.

43. See *e.g.* McDuffy, 615 N.E.2d at 554; Claremont, 703 A.2d at 1359.
competence in the basics—reading, writing, and arithmetic—is insufficient in the waning days of the twentieth century to insure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.\textsuperscript{44}

When states properly incorporate these constitutional requirements into the IDEA's definition of FAPE, students with educational disabilities become entitled to more than just a basic floor of opportunity or some educational benefit. They are entitled to receive an education enabling meaningful participation in a democratic society, as well as competition for post-secondary education and employment opportunities.\textsuperscript{45}

The IDEA requires incorporation of broad educational adequacy goals into an individual educational program (IEP) meeting the unique needs of each individual disabled student. Every student with a disability, as defined by the IDEA, is entitled to an IEP under the IDEA.\textsuperscript{46} An IEP must be individually tailored to meet the unique needs of the student.\textsuperscript{47} The IEP is the cornerstone of providing FAPE. Courts look to whether an IEP is appropriate when assessing whether a school district has provided FAPE.\textsuperscript{48}

Aligning IEPs with a state's constitutional requirements regarding an adequate education presents challenging issues for school officials and parents. Educators and families must boil down broad adequacy goals to a personalized and detailed plan for a specific student. An IEP must contain specific goals and objectives to meet the student's unique needs, as well as outline the special education and related services the student will receive to meet the goals and objectives.\textsuperscript{49}

When the state constitutional adequacy requirements are incorporated into the IEP process, the goals, objectives, the

\textsuperscript{44} Claremont, 703 A.2d at 1359.
\textsuperscript{45} See e.g. Rose, 790 S.W.2d at 212; Claremont, 703 A.2d at 1359; Abbott v. Burke, 693 A.2d 417, 428 (N.J. 1997).
\textsuperscript{46} 34 C.F.R. § 300.341(a)(1) (2002).
\textsuperscript{47} Ilonig v. Due, 484 U.S. 305, 311 (1998); Roland M., 910 F.2d at 987.
\textsuperscript{48} Honig, 484 U.S. at 311; Pihl v. Mass. Dept. of Educ. 9 F.3d 184, 187 (1st Cir. 1993); Roland M., 910 F.2d at 987; David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 415 (1st Cir. 1985).
\textsuperscript{49} 34 C.F.R. § 300.347 (2002).
special education, and related services must be targeted towards enabling the student to meet the educational adequacy requirements. The broad educational adequacy requirements alone may not be specific enough to enable schools and parents to readily meet this requirement. In this respect, state educational standards can assist by providing specific, measurable standards establishing what students should know and be able to do at certain stages in their academic progression. These standards can be individualized and incorporated into students' IEPs.

B. State Educational Standards

The IDEA's definitional checklist of FAPE referenced by the Supreme Court in Rowley includes a requirement that the education provided to students with disabilities meet state standards. When the Court decided Rowley, this requirement did not have the same meaning it does today. Most state standards at the time of the decision did not involve substantive requirements for the educational services provided to students. Instead, the standards addressed the process by which the services would be provided and were designed to be "minimum" standards.

However, today the focus of educational standards has changed. State and federal educational standards address the essential core of knowledge of what students should learn. Known in the educational world as "standards-based education reform," state and federal educational standards now include content standards specifying what students should learn, proficiency standards setting the expectations for what students must know and be able to do at certain stages, and assessment measures determining whether the student has achieved the expectations in the standards.


52. For example, in New Hampshire, the state has had "minimum standards" since roughly 1953. These standards address inputs like the number of credits students must have to graduate, the general course that schools must of students (i.e, math, science, language arts, etc), the size of classrooms, etc. They also address school operational issues like the size of buildings and classrooms, teacher certification, etc. See N.H. Dept. of Educ. Minimum Stands., ED 300, et seq.

53. Natl. Research Council, supra n. 33, at 3, 22, 27-28, 36-40, 113-18; Leave No
The standards based education reform effort became prominent at the national level with Goals 2000. This federal law proposed national education goals requiring states receiving funds under the program to develop strategies for meeting national education standards. These strategies, moreover, had to include developing and adopting state education standards and assessment methods.54

Other federal laws like Title I of the Elementary and Secondary Education Act, as amended by the Improving America's Schools Act of 1994, require states to develop or adopt challenging content, proficiency standards, and assessment mechanisms.55 Under Title I, students who receive Title I services must make adequate yearly progress toward meeting the state standards.56 Schools whose students do not make adequate progress must develop corrective action plans.57

The passage of the No Child Left Behind Act of 2001 (NCLB)58 greatly expanded the scope of Title I's requirements and reaffirmed the federal government's position that all students should meet high academic standards.59 Schools with

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56. Id.
57. Id.
59. The No Child Left Behind: A Desktop Reference 2002, prepared by the undersecretary of the United States Department of Education, begins with a message from President George W. Bush that states:

The NCLB Act is designed to help all students meet high academic standards by requiring that states create annual assessments that measure what children know and can do in reading and math in grades 3 through 8. These tests, based on challenging state standards, will allow parents, educators, administrators, policymakers, and the general public to track the performance of every school in the nation. Data will be disaggregated for students by poverty levels, race, ethnicities, disabilities, and limited English proficiencies to ensure that no child—regardless of his or her background—is left behind. The federal government will provide assistance to help states design and administer these tests. States also must report on school safety on a school-by-school basis.

No Child Left Behind: A Desktop Reference 2002 9-10 (available at <http://www.ed.gov/offices/OESE/reference.html>). The publication goes on to say that, "Title I, Part A, is intended to help ensure that all children have the opportunity to obtain a high-quality education and reach proficiency on challenging state academic
Title I students must now make adequate yearly progress based upon annual testing. In fact, under NCLB, all children, regardless of Title I status, in schools that do not make adequate yearly progress and are deemed in need of improvement now have the right to attend another public school or receive supplemental services such as tutoring from the school district.

Virtually every state has now adopted some form of content and/or proficiency standards setting forth specific performance standards and establishing the required outcomes for providing students with an adequate or appropriate education under state law. In addition, a majority of states have developed specific assessment measures that test students’ levels of achievement in meeting state standards.

There are two important aspects of standards based reform related to FAPE and the Supreme Court’s decision in Rowley. First, education standards establish high expectations for all students including students with disabilities. Such standards assume all students can achieve elevated levels of learning after setting high expectations, clearly defining standards, and designing teaching to support student achievement. The intended result of education standards is that all students will learn more. Some states have even developed specific standards for students with disabilities, but most simply created one set of standards for all students. The high expectations in state education standards are at odds with the core holding in Rowley, which stated that school districts need only meet the minimalistic “some educational benefit” standard.

The second important aspect of educational standards shifts the focus from process to outcome. Content and proficiency

standards and assessments.” Id. at 13.

60. 20 U.S.C. § 6311(a) (West 2003).


63. Id. at 27-29, 154-58.


65. Vohs et al., supra n. 64.

66. Natl. Research Council, supra n. 33, at 137-38; Vohs, supra n. 64.

standards center on what students actually learn as opposed to the process by which the students learn the information. Currently, special education focuses in large part on the process of providing services to students and not necessarily the outcomes that result from the services. Education standards redirect the inquiry to the effectiveness of the education actually provided to the student. The focus on student achievement contradicts Rowley's finding that the purpose of the IDEA is to provide access to education and not to address the substance or quality of services students receive once they have access.

The state-established Curriculum Frameworks in New Hampshire illustrate one example of content and proficiency standards. The Frameworks set content and proficiency standards in various academic areas. In the area of Language Arts, the Framework sets forth the following general reading standard:

Students will demonstrate the interest and ability to read age-appropriate materials fluently, with understanding and appreciation.

The Language Arts framework then sets forth the following broad goals:

- Students will read fluently, with understanding and appreciation.
- Students will write effectively for a variety of purposes and audiences.
- Students will speak purposefully and articulately.
- Students will listen and view attentively and critically.
- Students will understand, appreciate, interpret, and critically analyze classical and contemporary American and British literature as well as literary works translated into English.

68. Natl. Research Council, supra n. 33, at 36-39, 114-18; Vohs, supra n. 64.
Students will use reading, writing, speaking, listening, and viewing to:

- gather and organize information;
- communicate effectively; and
- succeed in educational, occupational, civic, social, and everyday settings.

While these requirements may appear rather basic at first, this perception changes when applied to a student with a disability. These goals become significant and require school districts to provide services to enable the student to meet these goals; this will likely be a significant change for some school districts and students. For example, requiring a student with dyslexia to read age appropriate materials fluently is a goal that some school districts might ordinarily not set because of the difficulties a student with dyslexia often has reading. Instead, a school district might set a goal targeting simple improvements to the student's reading ability, even if that improvement left the student several years behind in his/her reading level.

Incorporating state educational content and proficiency standards into the statutory definition of FAPE means high expectations must now be included in disabled students' IEPs. Educational standards define performance criteria for students that school districts and parents must use when developing goals and objectives in a student's IEP. School districts, parents, and courts may also use these standards when assessing whether a school district has successfully provided a student a FAPE.


72. There is a potential risk of using high standards to the detriment of some students with disabilities. For example, requiring a student with a disability to pass a high stakes test in order to receive a high school diploma can be a major obstacle to the student if the student cannot read due to their disability. For a discussion of high stakes testing and students with disabilities, see Paul T. O'Neill, Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy, 30 J.L. & Educ. 185, 186 (2001); Ryan R. West, Student Author, The Fallacy Behind Increased Accountability: How Disabled Students' Constitutional Rights Have Been Disregarded In a Rush to Implement High-Stakes Exams, 2002 B.Y.U. Educ. & L.J. 351 (2002). These problems must be addressed so that students with disabilities are not punished or assessed based upon their disability. Raising the expectations for students with disabilities must include raising the expectations for how we teach and how we assess students with disabilities.
C. The 1997 Amendments to the IDEA

Congress amended the IDEA in 1997. The amendments show Congress’ conscious decision to incorporate state educational standards into special educational programming for students. The statute now explicitly mandates that states establish performance goals for children with disabilities that are consistent with other goals and standards set for all children. The IDEA now requires states to establish performance indicators that assess progress toward achieving those goals. At a minimum, the goals must address the performance of children with disabilities on assessments, dropout rates, and graduation rates.

The amendments to the IDEA mark a significant change of direction from the Court’s decision in Rowley. The amendments establish high expectations for children with disabilities to achieve real educational results. The amendments change the focus of IDEA from one that merely provides students with disabilities access to an education to one requiring improved results and achievement. The changes are made explicit in the House Committee Report which states:

This Committee believes that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education. Educational achievement for children with disabilities, while improving, is still less than satisfactory.... This review and authorization of the IDEA is needed to move to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement.

Similarly, the findings section of the 1999 IDEA amendments states that:

Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible...[and] supporting high-quality, intensive

74. Id.
75. H.R. Rpt. 105-95, at 83-84 (May 13, 1997).
professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children.\textsuperscript{76}

Whenever possible a general curriculum must now include students with disabilities, and IEPs must contain goals and objectives that enable disabled students' involvement and progress in the general curriculum that is available to all students.\textsuperscript{77} This is one method of incorporating the high expectations of educational standards into special education programming for students with disabilities.\textsuperscript{78} The IEP details the special education services schools must provide disabled students. The definition of special education in the IDEA now expressly states that special education means specially designed instruction to ensure access to the general curriculum so that the student can meet "the educational standards within the jurisdiction of the public agency that apply to all children."\textsuperscript{79}

States and school districts must now include disabled students in their assessments or provide them with an alternate examination.\textsuperscript{80} These assessments commonly measure the extent to which the student meets the content or proficiency standards. States and districts must consider the student's performance on these assessments when developing

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\item \textsuperscript{76} 20 U.S.C.A. 1400(c)(5)(A), (E)(i) (West 2002).
\item \textsuperscript{77} 34 C.F.R. § 300.347(2)(i) (2002).
\item \textsuperscript{79} 34 C.F.R. § 300.26(b)(3)(ii) (2002).
\item \textsuperscript{80} Approximately half of all students with disabilities are currently excluded from state and district-wide assessments. The new 1997 amendments to the IDEA specifically require:
\begin{enumerate}
\item [1] The development of state performance goals for children with disabilities that must address certain key indicators of the success of educational efforts for these children— including, at a minimum, performance on assessments, dropout rates, and graduation rates, and regular reports to the public on progress toward meeting the goals; (2) that children with disabilities be included in general state and district-wide assessments, with appropriate accommodations, if necessary; and (3) that schools report to parents on the progress of the disabled child as often as such reports are provided to parents of non-disabled children.
\end{enumerate}
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the student’s IEP. States and districts may also use these results to measure student progress towards meeting IEP goals and objectives.\textsuperscript{81} Results on some of these tests indicate that programming for students with disabilities is not yet aligned to state educational standards.

New Hampshire’s test results show vast differences between students with disabilities and students without disabilities. New Hampshire divides its test scores into four categories: novice, basic, proficient, and advanced. During the test administered in 2000, only thirty-two percent of students with disabilities scored basic and above in third grade language arts, compared to eighty-three percent for all other students. Moreover, only five percent of students with disabilities scored proficient and above in third grade language arts compared to forty-three percent of all other students. Overall, only twenty-five percent of students with disabilities scored basic and above compared to seventy percent of all other students. Only four percent of students with disabilities scored proficient and above compared to thirty-one percent of all other students.\textsuperscript{82}

The 1997 amendments to the IDEA incorporate the high expectations of state educational standards into the programming for disabled students. The amendments also show that FAPE is now more than access to a basic floor of opportunity. FAPE is now aligned with the high expectations in state education standards. As a result, these high expectations must be incorporated into the IEPs of students with disabilities.

IV. HOW TO INCORPORATE HIGH STANDARDS INTO IEPs

A student’s unique needs and abilities determine how educators incorporate standards into an IEP. As a general matter, a student’s IEP Team must assess the student’s needs and abilities and then determine the best method of incorporating specific standards in the student’s programming.\textsuperscript{83}

With respect to academics, a student’s IEP need only

\textsuperscript{81} 34 C.F.R. § 300.346(a)(1) (2002).


\textsuperscript{83} 34 C.F.R. §§ 300.340 - 300.350 (2002).
address those areas where the student's disability affects their ability to progress in general curriculum.\textsuperscript{84} Therefore, the IEP does not necessarily need to address every education standard in every academic area.\textsuperscript{85} Rather, an IEP Team should assess how the student's disability impacts his/her ability to participate in and progress in the general curriculum, and identify the content and proficiency standards that apply to the impacted areas. In some cases, the content and proficiency standards may be used directly as a goal or an objective in an IEP. In other cases, the IEP team may need to modify content or proficiency standards by individualizing the standard and providing more detail on what the student will accomplish in a period of time.\textsuperscript{86}

The Team may also determine that the student cannot presently meet a content or proficiency standard and choose to develop its own standard as an immediate goal or objective.\textsuperscript{87}

\textsuperscript{84} 34 C.F.R. at § 300.347; Appendix A to 34 C.F.R. Part 300, Questions 2, 4. School districts must, however, address more than just academic needs. Lenn, 998 F.2d at 1089.

\textsuperscript{85} See Appendix A to 34 C.F.R. Part 300, Questions 2, 4. The House Committee report on the reauthorization of the IDEA states:

The new emphasis on participation in the general education curriculum is not intended by the Committee to result in major expansions in the size of the IEP of dozens of pages of detailed goals and benchmarks or objectives in every curricular content standard or skill. The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general education curriculum and the special services which may be necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability. Specific day to day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP Team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, or short term objectives, or in any of the services or program modifications, or other components described in the child's IEP, the LEA must ensure that the child's IEP Team is reconvened in a timely manner to address those changes.

H.R. Rpt. 105-95, at 100.

\textsuperscript{86} Natl. Research Council, \textit{supra} n. 33, at 140-151.

\textsuperscript{87} The issue of whether the student is capable of attaining certain standards at certain grade levels is one that will have to be carefully assessed for each student. In some cases, the student's impairment may be so severe that the proficiency standard is unrealistic. However, these situations will likely be rare. Research has demonstrated that children with disabilities are capable of attaining high learning standards when they are provided with educational services that enable them to do so. This is true even when the student has a history of low academic achievement. John Bruer, \textit{Schools for Thought} 77-79 (Mass. Inst. of Tech. Press 1992); Sally E. Shaywitz, \textit{Dyslexia}, 275 Sci. Am. 98, 102 (Nov. 1996).
When this is done, the IEP Team's standard should be linked with the state content or proficiency standard. The standard developed for the student should be challenging yet achievable, and designed to assist the student with ultimately meeting overall state standards. 88

Similarly, the IEP Team must focus on developing the student's access skills needed to satisfy the content and proficiency standards. 89 Direct services and remediation (such as one-on-one tutoring in Orton-Gillingham or Lindamood Bell, etc.) are often necessary to help students with certain disabilities develop the access skills necessary to fulfill content and proficiency standards. The Team must develop additional goals and objectives for these access skills. The IEP Team must also determine if any other accommodations or modifications are required to enable the student to meet the relevant content and proficiency standards and to enable the student's participation in state or district assessments. 90

88. The Committee on Goals 2000 and the Inclusion of Students with Disabilities made a number of recommendations regarding students with disabilities and standards including the following:

1. States and localities that decide to implement standards-based reforms should design their common content standards, performance standards, and assessments to maximize participation of students with disabilities. 89

2. The presumption should be that each student with a disability will participate in the state or local standards; however, participation for any given student may require alterations to the common standards and assessments. Decisions to make such alterations must have compelling educational justification and must be made on an individual basis.

3. When content and performance standards or assessments are altered for a student with a disability:

   • the alternate standards should be challenging yet potentially achievable;
   • they should reflect the full range of knowledge and skills that the student needs to live a full, productive life; and
   • the school system should inform parents and the student of any consequences of these alterations.

4. Assessment accommodations should be provided, but they should be used only to offset the impact of disabilities unrelated to the knowledge and skills being measured. They also should be justified on a case-by-case basis, but individual decisions should be guided by a uniform set of criteria.

Natl. Research Council, supra n. 33, at 197-209.

89. Access skills are simply skills that are aligned with the content and proficiency standards and that enable the student to meet these standards. See Patricia Burgess & Sarah Kennedy, What Gets Tested, Gets Taught; Who Gets Tested, Gets Taught: Curriculum Framework Development Process (Mid-S. Regl. Resource Ctr. 1998) (available at http://www.mhdi.uky.edu/MSRRC/Publications/whatgets.htm>).

90. 34 C.F.R. at § 300.347.
Consider, for instance, a third grade student with dyslexia who is having difficulty reading. The IEP Team should assess how the dyslexia affects the student’s involvement and progress in meeting the content and proficiency standards that are part of the general curriculum. In New Hampshire, the IEP Team would need to review the state’s Curriculum Frameworks in Language Arts that set forth grade specific benchmarks that students should meet. The Frameworks state that by the end of the third grade, students should be able to:

- Determine the pronunciation and meaning of words by using phonics (matching letters and combinations of letters with sounds), semantics (language sense and meaning), syntactics (sentence structure), graphics, pictures, and context as well as knowledge of roots, prefixes, and suffixes.

- Understand and use the format and conventions of written language to help them read texts (for example, left to right, top to bottom, typeface).

- Identify a specific purpose for their reading such as learning, locating information, or enjoyment.

- Form an initial understanding of stories and other materials they read by identifying major elements presented in the text including characters, setting, conflict and resolution, plot, theme, main idea, and supporting details.

- Reread to confirm their initial understanding of a text and to extend their initial impressions, developing a more complete understanding and interpretation of the text.

- Identify and understand the use of simple figurative language including similes, metaphors, and idioms.

- Recognize that their knowledge and experiences affect their understanding of materials they read.

- Make and confirm simple predictions to increase their level of understanding.
• Seek help to clarify and understand information gathered through reading.

• Employ techniques, such as previewing a text and skimming, to aid in the selection of books and articles to read.

• Demonstrate the ability and interest to read independently for learning, information, communication, and pleasure.91

The Team should conduct the necessary evaluations to determine which of these standards are impacted by the student’s dyslexia and if the student can meet any of these standards. The Team should then consider how to develop a program that enables the student to meet the unmet standards. The Team may include some of the unmet standards themselves as goals and objectives in the student’s IEP, or it may need to modify and individualize those standards depending on the student’s unique needs. The team may also need to develop linking standards aligned with the unmet standards in the curriculum frameworks. Goals and objectives that develop access skills will also need to be part of the student’s IEP. The Team should then consider standards for other academic areas such as math, science, and social studies in determining if the student’s dyslexia will inhibit his or her ability to meet these standards. If so, the Team should follow the same process for developing goals and objectives to address the issues.

V. CONCLUSION

The 1997 reauthorization of the IDEA and the emergence of state educational standards and constitutional requirements should lead to fundamental changes in how IEPs are written, implemented, and evaluated. This, in turn, should also influence how courts assess FAPE. These changes require a reexamination of Rowley and its “some educational benefit” standard.

Reexamining Rowley is no small undertaking. It has provided the basic framework for special education services for

the last 20 years. However, the 1997 amendments to the IDEA make clear that the foundation underlying Rowley's reasoning is no longer present. That is, the IDEA is no longer intended to simply provide students with access to educational services that provide some benefit. The IDEA is intended to go beyond that to ensure that students with disabilities receive educational services based upon the high expectations in state educational standards and in state court cases regarding an adequate education. Once these elements are incorporated into the analysis, much of Rowley seems inapplicable to questions about the contours of a free and appropriate public education. State educational standards and adequacy requirements now provide the parameters of FAPE. When determining if a school provides a student FAPE, courts should look to these requirements and the extent to which a school develops a program that enables a student to meet these requirements.