

THE INDIVIDUALS WITH DISABILITIES EDUCATION
IMPROVEMENT ACT: CHANGING WHAT CONSTITUTES AN
“APPROPRIATE” EDUCATION

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I. INTRODUCTION

Christopher, diagnosed at six years old with Asperger’s Syndrome,¹ is a child with a disability.² Upon his diagnosis, Christopher’s public school developed his Individualized Education Program (IEP)³ to serve Christopher’s educational needs; however, his needs went unmet. Throughout Christopher’s four years at his public school, his parents repeatedly met with school officials about the appropriateness of services being offered to Christopher as his IEP did not account for the individualized class support Christopher required.⁴ Despite consistent and dedicated efforts by his parents, school officials continually informed them there was nothing more the school or teachers could do.⁵ Unwilling to risk their son’s educational future and unsure they would be able to disprove the vague “meaningful educational benefit” substantive standard of review for an IEP, Christopher’s parents assumed

¹Asperger’s Syndrome is an autism spectrum disorder in which a person exhibits deficiencies in social and communication skills. Online Asperger’s Syndrome Information and Support, <http://www.udel.org/bkibrby/asperger/aswhatisit.html> (last visited on Nov. 29, 2005). These deficiencies are generally marked by a person’s difficulty to read body language and use language in a social context as many people with Asperger’s Syndrome are very literal. *Id.* Persons with Asperger’s Syndrome also exhibit difficulties with transitions or change. *Id.* In spite of these deficiencies, persons with this syndrome normally have average IQ’s, and many possess exceptional talent or skill in a specific area. *Id.*

²The following story reflects events of Christopher’s education as reported by Clara V. in a telephone interview. The name of the interviewee has been changed to respect the privacy of the party. Telephone Interview with Clara V., parent, in Cleveland, OH. (Oct. 2, 2005); *see also*, 20 U.S.C. § 1401(3) (2006). A child with a disability means:

A child-- (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title [20 USCS §§ 1400 et seq.] as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. (B) Child aged 3 through 9. The term “child with a disability” for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child-- (i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3) (2006).

³An Individualized Education Program is, “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d).” MARGARET C. JASPER, THE LAW OF SPECIAL EDUCATION 170 (2000).

⁴Telephone Interview with Clara V., *supra* note 2.

⁵*Id.*

the costs of placing their child in a private school specializing in educating children with disabilities.⁶

The Individuals with Disabilities Education Act (IDEA or the Act) identifies thirteen categories of disabilities that qualify children for its educational protections.⁷ The Act was devised to provide children with qualifying disabilities a “free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁸ Problematic, however, is IDEA’s failure to define the term “appropriate.”⁹ Therefore, the United States Supreme Court in *Board of Education v. Rowley*¹⁰ defined “appropriate” by stating schools have met this substantive standard if an IEP confers “some educational benefit.”¹¹ This definition, “conferring an educational benefit,”¹² has purposely been left very broad as the courts have avoided establishing more stringent guidelines regarding the substantive aspect of an IEP.¹³

The recent Reauthorization of the IDEA seeks to raise the bar regarding what constitutes an “appropriate” education. The Reauthorized IDEA, which became effective July 1, 2005 and entitled the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), amended the IDEA and changed the established substantive guideline by emphasizing and outlining new provisions that must be present for an IEP to be deemed “appropriate” in addition to increasing training and qualifications of special educators.¹⁴ These substantive provisions require courts to alter their interpretations of what is considered an “appropriate” education for students with disabilities. The IDEIA demands a more rigorous substantive

⁶*Id.*

⁷20 U.S.C. § 1401(3)(A) (2006). The thirteen categories of disabilities identified in the IDEA are: cognitive delays, hearing impairments, speech or language impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, multiple disabilities, deafness and blindness, and preschooler with a disability. *Id.*

⁸20 U.S.C. § 1400(d)(1)(A) (2006).

⁹Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity Community for Children With Disabilities*, 103 DICK. L. REV. 613, 619 (1999).

¹⁰*Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

¹¹*Id.* at 206-07. The Court stated:

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.

Id.

¹²*Id.*

¹³*Id.* at 207.

¹⁴20 U.S.C. § 1400 (2006).

guideline for IEP measurement than the “some educational benefit” standard developed in *Rowley*.¹⁵ Courts should therefore adopt the “educational opportunity” standard proposed by the concurring and dissenting opinions in *Rowley* as the new substantive standard defining “appropriate” with regards to a “free appropriate public education.”

Part II of this paper examines the historical evolution of the IDEIA. Part III explains the current substantive standard of “appropriate” as defined by *Rowley*. Part IV discusses the concurring and dissenting opinions from *Rowley* and the “educational opportunity” standard that these opinions propose to be the substantive standard supported by the law and congressional intent. Part V analyzes the decisions of the Third¹⁶ and Sixth¹⁷ Circuit Courts of Appeals post-*Rowley* and the implications the decisions have on adopting a more viable substantive meaning for “appropriate” within the definition of a “free appropriate public education.” Part VI highlights the amendments to the Act in the recent Reauthorization and how these amendments establish a need for the adoption of a higher substantive standard. Part VII furthers the proposition that a new substantive standard should be adopted by the courts by analyzing the congressional intent and goals for the IDEIA. Part VIII proposes that the new substantive standard by which to measure a child’s special education program should be the educational opportunity standard pronounced in *Rowley*’s concurring and dissenting opinions. Part IX analyzes the effect of financial considerations on the adoption of a new substantive standard and concludes that these constraints should not hinder the progress that the IDEIA seeks to ensure for the education of students with disabilities. Part X concludes that the definition purported in *Rowley* is no longer applicable because of the amendments made in the IDEIA and the congressional intent.

II. THE HISTORY OF THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT

A. Background

In the landmark decision of *Brown v. Board of Education*, the United States Supreme Court determined all children must be afforded an equal educational opportunity.¹⁸ While the Court was primarily speaking to the inequality of racially segregated public schools, the decision also impacted parents of disabled students.¹⁹ *Brown* provided the foundation for parents of children with disabilities to begin to challenge school districts for the segregation of disabled children.²⁰ These

¹⁵See *Rowley*, 458 U.S. at 200.

¹⁶See *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988); see also *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004).

¹⁷*Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁸JASPER, *supra* note 3, at 2.

¹⁹*Id.*

²⁰*Id.* “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education . . . [S]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). *Id.*

challenges first arose in two federal district court cases that both ruled in favor of providing students with disabilities access to public education.²¹

In *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*,²² the district court enjoined state officials and school districts from denying or postponing “any mentally retarded child access to a free public program of education and training.”²³ *Mills v. Board of Education*²⁴ further held that no child eligible for public education shall be excluded from public school placement unless “such child is provided (a) an adequate alternative educational services suited to the child’s needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child’s status, progress, and the adequacy of any educational alternative.”²⁵ Even with these two district court holdings in conjunction with the Supreme Court in *Brown* stipulating that “education is a ‘right which must be made available to all on equal terms,’” children with disabilities were continually segregated from regular education programming for twenty-one years following the *Brown* decision.²⁶

Prior to 1975, the educational needs of “millions of children with disabilities were not being fully met.”²⁷ Schools continued to routinely exclude children with

²¹Heather J. Russell, Note, *Florence County School District Four v. Carter: A Good “IDEA;” Suggestions for Implementing the Carter Decision and Improving the Individuals with Disabilities Education Act*, 45 AM. U. L. REV. 1479, 1482 (1996); Jennifer A. Knox, Comment, *The IDEIA Amendments of 1997 and the Private Schools Provision: Seeking Improved Special Education, But Serving Only a Select Few*, 49 CATH. U. L. REV. 201, 203 (1999). As stated by Knox, “[t]wo federal district court cases, *Pa. Ass’n for Retarded Children v. Pa.* and *Mills v. Bd. of Educ.*, further paved the road for equal education for the disabled by requiring all states to provide disabled children with a free public education.” *Id.*

²²*Pa. Ass’n for Retarded Children v. Commonwealth of Pa.*, 334 F. Supp. 1257 (E.D. Pa. 1971).

²³*Id.* at 1258.

²⁴*Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

²⁵*Id.* at 878.

²⁶Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 243 (1994).

²⁷20 U.S.C. § 1400(c)(2) (2005). In its findings regarding the enactment of the Individuals with Disabilities Education Improvement Act of 2004, Congress found:

Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public law 94-142) [enacted Nov. 29, 1975], the educational needs of millions of children with disabilities were not being fully met because—

- (A) the children did not receive appropriate educational services;
- (B) the children were excluded entirely from the public school system and from being educated with their peers;
- (C) undiagnosed disabilities prevented the children from having a successful educational experience; or
- (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

Id.

disabilities from the educational setting,²⁸ allowing only children with mild impairments to participate in regular classrooms.²⁹ Children with moderate disabilities received little more than custodial care services at school and severely disabled students were referred to institutions.³⁰ In response to this monumental disparate educational treatment that students with disabilities received in comparison to their non-disabled peers, the federal government enacted The Education for All Handicapped Children Act in 1975.³¹

B. The Education for All Handicapped Children Act

The Education for All Handicapped Children Act (EAHCA) sought to ensure all handicapped children would be legally entitled to an education³² by providing substantial federal financial assistance to all public schools that were in compliance with its standards and were committed to educating disabled students.³³ One such standard set forth by this Act established a child's substantive right to a "free appropriate public education" (FAPE).³⁴ In providing students with a disability a FAPE, schools became responsible for locating and identifying students suspected of possessing a disability, engaging a multi-disciplinary team to conduct evaluations, and developing a personalized education program based on the needs of the child.³⁵ The EAHCA also stipulated that a FAPE should be provided in the least restrictive environment able to meet the student's unique needs and in an environment that includes non-disabled peers to the extent possible.³⁶

²⁸JASPER, *supra* note 3, at 1; *see also* Christopher Thomas Leahy & Michael A. Mugman, *Allocation of the Burden of Proof in Individuals with Disabilities Education Act Due Process Challenges*, 29 VT. L. REV. 951, 952 (2005).

²⁹JASPER, *supra* note 3, at 1; *see also* Charlene K. Quade, *A Crystal Clear Idea: The Court Confounds the Clarity of Rowley and Contorts Congressional Intent*, 23 HAMLINE J. PUB. L. & POL'Y 37, 47 (2001). "In 1975, Congress noted that greater than eight million children with disabilities lived in the United States, half of which did not receive appropriate educational services and nearly two million of the children identified were excluded from educational opportunities entirely." *Id.*

³⁰Goldman, *supra* note 26, at 246-47; *see also* Quade, *supra* note 29, at 38. "Before the enactment of IDEA, . . . roughly 200,000 children with disabilities were living in institutional settings and only one in five were being educated." Quade, *supra* note 29, at 38.

³¹JASPER, *supra* note 3, at 3. The Education for All Handicapped Children Act was enacted on November 19, 1975. *Id.*

³²*Id.*

³³*Id.* at 16. *See also* Goldman, *supra* note 26, at 249 (stating that the "federal government enacted new legislation in the 1970s to increase both access to education and funding of special programs").

³⁴JASPER, *supra* note 3, at 16; *see also* Goldman, *supra* note 26, at 253; *see also* Leahy & Mugman, *supra* note 28, at 952.

³⁵Goldman, *supra* note 26, at 251.

³⁶JASPER, *supra* note 3, at 16.

C. The Individuals with Disabilities Education Act

Even though the EAHCA proposed a dramatic educational reform through its provision of a FAPE for students with disabilities, the Act's programs failed in meeting Congress's desired educational goals.³⁷ Students with disabilities were still not being educated appropriately in accordance with the established standards of the EAHCA and Congress's ideals.³⁸ Therefore, Congress reauthorized the EAHCA in 1990 and titled the new legislation the Individuals with Disabilities Education Act (IDEA).³⁹ Providing a FAPE, however, remained an imperative function of the IDEA⁴⁰ as emphasis continued to be placed upon this provision.⁴¹ The IDEA defined "free appropriate public education" as:

Special education and related services that (1) have been provided at public expenses, under public supervision and direction, and without charge, (2) meet the standards of the State educational agency, (3) include an appropriate preschool, elementary or secondary school education in the State involved, and (4) are provided in conformity with the individualized education program. . . .⁴²

The IDEA stipulated that, regardless of the severity of a disability, every child classified as a student with a disability must receive a "free appropriate public education."⁴³ Furthermore, the "free appropriate public education" required to be provided is determined for each child based on that child's specific needs and goals documented in the child's IEP.⁴⁴ The IEP is the document that identifies and defines the special educational services to be rendered to a child with a disability.⁴⁵ Thus, an IEP identifies a child's "appropriate" education.⁴⁶ It is a written statement, developed, reviewed, and revised for each child with a disability⁴⁷ that must include:

³⁷Knox, *supra* note 21, at 204. "Class size also increased, in addition to teachers' workloads, which hindered teachers' abilities to provide appropriate education. Moreover, Congress found that disabled children were not being reached - few programs provided direct services, and only small numbers of children received these services through the aid of research and demonstration projects." *Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰Goldman, *supra* note 26, at 243.

⁴¹JASPER, *supra* note 3, at 22.

⁴²Eyer, *supra* note 9, at 616-17.

⁴³JASPER, *supra* note 3, at 22.

⁴⁴James R. Demmel, Delaware Valley School District v. Daniel G.: *Did the Commonwealth Court Create a New Standard for Determining Whether School Districts Provide Appropriate Education for Disabled Students?*, 12 WIDENER L. J. 271, 273 (2003).

⁴⁵Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 223 (2005).

⁴⁶Goldman, *supra* note 26, at 278. "The IEP is 'the centerpiece of [IDEA's] education delivery system' because it essentially defines a particular child's 'appropriate' education." See also Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*,

(1) a statement of the present levels of educational performance of such child; (2) a statement of annual goals, including short-term instructional objectives; (3) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular education programs; (4) a statement of the needed transition services for students . . . [and] the projected date for initiation and anticipated duration of such services; and (5) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.⁴⁸

In addition to these provisions, the IDEA also develops multiple procedural safeguards to ensure its stipulations are being met.⁴⁹ These safeguards allow parents to challenge a school district in an impartial hearing before a state administrative hearing officer when parents believe their child's rights guaranteed under the IDEA have been violated.⁵⁰ This reauthorization essentially strengthened and expanded upon procedures established by the EAHCA.⁵¹ Divided into four parts,⁵² the legislation became "the most significant piece of legislation affecting the educational rights of disabled children."⁵³

D. 1997 Amendments to the Individuals with Disabilities Education Act

The IDEA was amended in 1997. Even though the definition of a "free appropriate public education" remained, the 1997 amendments to the Act attempted to refine the substantive standard of "appropriate" by emphasizing greater expectations for the educational achievement of students with disabilities.⁵⁴ Upon

2003 BYU EDUC. & L.J. 561, 572 (2003). "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." *Id.*

⁴⁷20 U.S.C. § 1401(14) (2006).

⁴⁸Eyer, *supra* note 9, at 617-18.

⁴⁹See 20 U.S.C. § 1415 (2006); *see also* Goldman, *supra* note 26, at 253.

⁵⁰Seligmann, *supra* note 45, at 230.

⁵¹JASPER, *supra* note 3, at 16.

⁵²*Id.* at 21. The four sections are: (A) General Provisions. Definitions and Other Issues; (B) Assistance for Education of All Children with Disabilities; (C) Infants and Toddlers with Disabilities, and (D) National Activities to Improve Education of Children with Disabilities. *Id.*

⁵³*Id.* at 16; *see also* IDEA: *What's Good for Kids? What Works for Schools Before the S. Comm. on Health, Education, Labor, & Pensions*, 107th Cong. 1 (2002) [hereinafter *Hearings*] (statement of Sen. Susan M. Collins). "No matter what else can be said about the program, no matter what other problems still need to be resolved, we can be proud that IDEA has helped to ensure that the educational needs of some of our most disabled children are being met." *Id.*

⁵⁴Eyer, *supra* note 9, at 613, 619; *see also* Ingrid Carlson Barrier, *Tenth Circuit Surveys: Education*, 76 DENV. U. L. REV. 785, 789 (1999). "In 1997, Congress amended the IDEA because Congress believed 'that the critical issue now is to place greater emphasis on

findings that the Act had not succeeded for many students with disabilities, Congress desired to improve educational outcomes through amendments targeted at heightening substantive requirements.⁵⁵ According to Congress, improving educational outcomes directly correlates to IEP development as the IEP is “critical to improving compliance with the Act and to ensuring the statutory rights of the child with disabilities.”⁵⁶ The amendments strengthened evaluation procedures⁵⁷ and significantly demanded more procedures be followed in the formulation of a child’s IEP.⁵⁸ Essentially, the amendments increased procedural requirements in an effort to confer more substantive rights and provide a better definition of “appropriate.”⁵⁹ Without congressional endorsement, however, the amendments did not achieve success in implementing a more rigorous standard for “appropriate” than that determined in *Rowley*.⁶⁰

III. *BOARD OF EDUCATION V. ROWLEY*: THE SUBSTANTIVE STANDARD DEFINING “APPROPRIATE”

A. *Facts and Procedural History*

In *Board of Education v. Rowley*, the United States Supreme Court, for the first and only time,⁶¹ established the authority defining “appropriate” with regard to a “free appropriate public education.”⁶² Amy Rowley, a deaf child, successfully completed kindergarten in a regular classroom with the assistance of an FM hearing

improving student performance and ensuring that children with disabilities receive a quality public education.” *Id.* See also Johnson, *supra* note 46, at 566-67, 578.

⁵⁵Quade, *supra* note 29, at 38-39.

⁵⁶*Id.* at 51.

⁵⁷*Id.* Students must be assessed once every three years and evaluation procedures must include review of relevant data such as a medical diagnosis and past educational performance. *Id.* The evaluation process must also review any information provided by the parent(s) of the child. *Id.*

⁵⁸Eyer, *supra* note 9, at 632. There must now be a statement of measurable annual goals, a statement indicating how the disability affects the child’s involvement and progress in the general curriculum, and a statement describing the methods employed to measure the child’s progress toward annual goals. *Id.*

⁵⁹*Id.* at 631.

⁶⁰*Id.* at 634 (stating that “Congress’ silence must be taken as an endorsement of the standard’s continued validity given the key role of *Rowley*’s principles in development of the IDEA over the past twenty-two years. Absent legislation imposing a new standard, there is little support for abandoning the ‘educational benefit’ test”).

⁶¹*Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004) (stating that “*Rowley* is the only Supreme Court decision to have addressed the level of educational benefit that must be provided pursuant to an IEP”).

⁶²Steven N. Robinson, Note, *Rowley: The Court’s First Interpretation of the Education for All Handicapped Children Act of 1975*, 32 CATH. U. L. REV. 941, 943 (1983). The Supreme Court interpreted the EAHCA for the first time in *Rowley*. *Id.*

aid⁶³ and school personnel learning sign-language interpretation.⁶⁴ Amy's IEP, developed when she entered first grade, provided for Amy to be educated in a regular classroom with use of her FM hearing aid.⁶⁵ The IEP also stipulated Amy would receive supplemental services from a tutor and speech therapist.⁶⁶ Desiring a sign-language interpreter instead of the offered assistance, the Rowleys disagreed with the school's proposal.⁶⁷ They asserted their procedural rights under the Act⁶⁸ and filed for a hearing before an impartial officer, claiming Amy's IEP did not afford her a "free appropriate public education" as guaranteed by the EAHCA.⁶⁹

Upon a review of the evidence, the impartial officer quashed the Rowley's challenge explaining Amy's academic and social success in kindergarten established that an interpreter was an unnecessary accommodation.⁷⁰ After an affirmation by the New York Commission of Education, the Rowleys appealed to the District Court for the Southern District of New York.⁷¹ The district court, finding a discrepancy between Amy's potential and her actual achievement, reversed the ruling of the two lower authorities, determining Amy did not receive a "free appropriate public education."⁷² After the Court of Appeals for the Second Circuit upheld the district court's decision, the school district then petitioned for review by the Supreme Court.⁷³ The Supreme Court granted certiorari to review the interpretation of "free appropriate public education" made by the lower courts.⁷⁴

⁶³An FM hearing aid is a listening system which picks up a speaker's voice through use of a microphone and then transmits it as a radio signal directly to the person wearing a hearing aid. American Hearing Aid Associates, <http://www.ahaanet.com/glossary.asp#F> (last visited Nov. 28, 2005).

⁶⁴*Bd. of Educ. v. Rowley*, 458 U.S. 176, 184 (1982).

⁶⁵*Id.*

⁶⁶*Id.* (stating that "Amy should be educated in a regular classroom . . . , should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week").

⁶⁷*Id.*

⁶⁸20 U.S.C. § 1415 (2006).

⁶⁹*Rowley*, 458 U.S. at 185.

⁷⁰*Id.* (explaining that "[a]fter receiving evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because 'Amy was achieving educationally, academically, and socially' without such assistance").

⁷¹*Id.*

⁷²*Id.* at 185-86 ("This disparity between Amy's education and her potential led the court to decide that she was not receiving a 'free appropriate education,' which the court defined as 'an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.'").

⁷³*Id.* at 186.

⁷⁴*Id.*

B. The Supreme Court's Opinion

In its decision, the Court examined both the statutory language and congressional intent of the Act to determine the definition of "appropriate."⁷⁵ Echoing the language from *Mills*, the Court stated that deciding whether the offered special education programming is appropriate hinges on two questions.⁷⁶ First, it must be decided whether the State complied with the procedures stipulated in the Act.⁷⁷ Second, it must be decided whether the "individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."⁷⁸ The second question pertains to the substantive standard of what constitutes the meaning of "appropriate." According to the statutory definition, the Court reasoned that if supportive services combined with individualized instruction allow a child to gain an educational benefit, an "appropriate" education is being offered.⁷⁹ Furthermore, such services and instruction must be provided at public expense, approximate grade levels used in regular education programs, meet state educational standards, and align with the child's IEP.⁸⁰

Congressional intent further confirms this determination as "some standard for FAPE was 'implicit in the congressional purpose of providing access to a free appropriate public education.'"⁸¹ However, Congress sought to merely ensure that public education was accessible to handicapped children, not require that such education would be anything greater than meaningful.⁸² Therefore, the Court overturned the district Court's ruling that an "appropriate" education needs to

⁷⁵*Id.* at 190. The Court stated, "[a]lthough we find the statutory definition of 'free appropriate public education' to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard." *Id.*

⁷⁶*Id.* at 206-07.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.* at 189.

⁸⁰RONALD D. WENKART, *APPROPRIATE EDUCATION FOR STUDENTS WITH DISABILITIES: HOW COURTS DETERMINE COMPLIANCE WITH THE IDEA 5* (2000) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203-04 (1982)). *See also* Johnson, *supra* note 46, at 564.

⁸¹Johnson, *supra* note 46, at 564.

⁸²*Rowley*, 458 U.S. at 192 ("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.").

maximize a child's potential.⁸³ Instead, the Court held an education need only confer "some educational benefit" to meet the substantive standard of the Act.⁸⁴

Applying this rationale, the Act does not promise academic success but does promise "some educational benefit."⁸⁵ The standard of a "free appropriate public education" is designed to implement only a basic floor of opportunity.⁸⁶ While it ensures that the door to a public education will be open, it does not guarantee a specified substantive educational level.⁸⁷ To meet the substantive standard of the Act, a student's IEP must provide only an appropriate education, not necessarily the best education.⁸⁸ Consequently, an appropriate education must produce only some progress in both academic and non-academic settings.⁸⁹

IV. THE "EDUCATIONAL OPPORTUNITY" STANDARD

Justices Blackmun and White, however, disagreed with the majority's standard in their respective concurrence and dissent.⁹⁰ Instead, the Justices proposed a different standard by which to measure whether a child's IEP is "appropriate."⁹¹ "Appropriate," they decided, should equate to affording a child with disabilities an equal educational opportunity.⁹²

⁸³*Id.* at 200 ("The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children.").

⁸⁴*Id.* The Court ruled, "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.*

⁸⁵Seligmann, *supra* note 45, at 228.

⁸⁶Demmel, *supra* note 44, at 276.

⁸⁷Eyer, *supra* note 9, at 621 ("Thus, the intent of the Act was more to open the door of public education to [children with disabilities] on appropriate terms than to guarantee any particular level of education once inside." (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982))).

⁸⁸Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L.J. 35, 45 (1996); see *Rowley*, 458 U.S. at 195 (stating that the "Act imposes no clear obligation upon recipient States beyond the requirement that all handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an 'appropriate education' to the receipt of some specialized educational services").

⁸⁹Streett, *supra* note 88, at 46.

⁹⁰*Rowley*, 458 U.S. at 210, 212 (Blackmun, J., concurring) (White, J., dissenting).

⁹¹*Id.*

⁹²*Id.* at 214 (White, J., dissenting).

A. Justice Blackmun's Concurrence

In his concurring opinion, Justice Blackmun pronounced that Congress clearly intended to guarantee students with disabilities an equal educational opportunity.⁹³ Otherwise, the legislation would only represent “politically self-serving but essentially meaningless language about what the [handicapped] deserve at the hands of the state . . . authorities.”⁹⁴ Declining to follow the majority’s standard, questioning whether Amy Rowley’s education was “reasonably calculated to enable [her] to receive educational benefits,”⁹⁵ Justice Blackmun believed an educational program, viewed as a whole, must be analyzed according to whether it gives a student with disabilities an opportunity to learn and participate in the classroom that is substantially equal to the opportunity afforded to nonhandicapped peers.⁹⁶ This, according to Justice Blackmun, should be the standard by which to measure whether an education is deemed “appropriate” according to the Act.⁹⁷

B. Justice White's Dissent

This standard was further emphasized by Justice White in his dissent. Agreeing that the language on the face of the statute does not imply a substantive standard for educational programming beyond “appropriate,” Justice White relied on the purpose and legislative history of the Act in determining the equal educational opportunity standard was more viable than the majority’s “some educational benefit” proclamation.⁹⁸ Both explicit language within the Act⁹⁹ and congressional intent support this definition.¹⁰⁰ Therefore, “appropriate” means affording “handicapped children an educational opportunity commensurate with that given other children,”¹⁰¹ not the “some educational benefit” standard adopted by the majority.

⁹³*Id.* at 210 (Blackmun, J., concurring). “Congress unambiguously stated that it intended to ‘take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity*.’” *Id.*

⁹⁴*Id.* (quoting *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 32 (1981) (Blackmun, J., concurring in part and concurring in judgment)).

⁹⁵*Id.* at 211 (Blackmun, J., concurring).

⁹⁶*Id.*

⁹⁷*Id.* at 210-11.

⁹⁸*Rowley*, 458 U.S. at 213 (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.’ However, if there are limits not evident from the face of the statute on what may be considered an ‘appropriate education,’ they must be found in the purpose of the statute or its legislative history.” *Id.*

⁹⁹*Id.* (“The Act itself announces it will provide a ‘full educational opportunity to all handicapped children.’”).

¹⁰⁰*Id.* at 214. “The legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.” *Id.*

¹⁰¹*Id.*

Even though Justices Blackmun and White did not reach the same conclusion regarding whether Amy Rowley's education was appropriate, they did agree on the standard by which to measure whether an education was "appropriate."¹⁰² Both Justices believed students with disabilities must receive an education that provides opportunities to learn similar to those given non-disabled students. It is not enough that students receive "some educational benefit," as the basic floor of opportunity is "intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible."¹⁰³ To give students with disabilities an "equal opportunity to learn," IEP's must be measured against the "educational opportunity" standard as the "some educational benefit" standard is not viable.

V. POST-ROWLEY DECISIONS

A. Polk v. Central Susquehanna Intermediate Unit 16

Although bound by *Rowley's* holding, decisions of the Circuit Courts of Appeals have elaborated on the "some educational benefit" standard, perhaps indicating a preference for a higher substantive standard like that suggested by Justices White and Blackmun in their respective opinions in *Rowley*.¹⁰⁴ The Third Circuit, in *Polk v. Central Susquehanna Intermediate Unit 16*, entertained a challenge of an IEP's appropriateness.¹⁰⁵ Christopher Polk, a severely disabled student, required physical therapy as part of the related services provided by his IEP.¹⁰⁶ His school sought to meet this need by providing Christopher's teacher training in physical therapy.¹⁰⁷ The Polks argued that this did not provide their son with a "free appropriate education" as Christopher's individual needs required he receive therapy directly from a licensed physical therapist.¹⁰⁸ In its decision, the court identified that "meaningful" in "meaningful educational benefit" must demand a level of education that is more than de minimis or trivial.¹⁰⁹ The court rationalized this interpretation through its analysis of congressional intent.¹¹⁰ This holding slightly expanded the "some educational benefit" standard, possibly impressing a preference for a higher substantive standard like that suggested by Justices White and Blackmun.

¹⁰²*Id.* at 211, 214 (Blackmun, J., concurring) (White, J., dissenting).

¹⁰³*Id.* at 215.

¹⁰⁴*Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988). "Therefore we must examine the Act's notion of 'benefit' and apply a standard that is faithful to Congressional intent and consistent with *Rowley*." *Id.*

¹⁰⁵*Id.* at 171.

¹⁰⁶*Id.* at 173-74.

¹⁰⁷*Id.* at 174.

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 180.

¹¹⁰*Id.* at 182 ("Instead, we infer that the emphasis on self-sufficiency indicates in some respect the quantum benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom. . .").

B. Deal v. Hamilton County Board of Education

Continuing to further the substantive requirement of *Rowley*, the Sixth Circuit Court of Appeals in *Deal v. Hamilton County Board of Education*, combined the *Rowley* standard with the de minimis requirement from *Polk*.¹¹¹ Zachary Deal, a child diagnosed with autism, began receiving services from his public school district at the age of three, as per his IEP.¹¹² In conjunction with his school-provided services, the Deals also provided Zachary with private teaching that followed methods of applied behavior analysis (ABA) therapy.¹¹³ For the following two school years, the IEP team developed plans that utilized a variety of teaching methods.¹¹⁴ However, the district continually refused to pay for Zachary's private ABA therapy, neglected to provide extended school year services for the summer of 1999, and only provided for limited engagement in a regular classroom.¹¹⁵ The Deals, desiring that Zachary spend more time in a regular classroom and that the district pay for his ABA therapy, subsequently rejected the district's proposed IEP for the 1999-2000 school year and placed Zachary in a private preschool program.¹¹⁶ The district responded the following year by developing an IEP that primarily placed Zachary in a regular kindergarten classroom with various supportive services.¹¹⁷ Rejecting the proposed IEP once again, the Deals contended the district should pay for Zachary's ABA therapy program and requested an administrative hearing alleging violations of IDEA against the district.¹¹⁸

Among its findings, the Administrative Law Judge (ALJ) determined that the district substantively violated the IDEA.¹¹⁹ On appeal, the district court reversed the ruling of the ALJ, stating the district did not substantively or procedurally violate the IDEA.¹²⁰ The Deals appealed to the Sixth Circuit.¹²¹ Within its analysis of the substantive standard required by IDEA, the court noted deference to the United States Supreme Court's decision in *Rowley*, but expanded the standard as much as

¹¹¹*Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 861 (6th Cir. 2004). The court followed the *Rowley* standard stating that the level of education required to be provided to a child with a disability must only be calculated to provide the child with more than a de minimis educational benefit. *Id.*

¹¹²*Id.* at 845.

¹¹³*Id.*

¹¹⁴*Id.* at 846-47.

¹¹⁵*Id.* at 846.

¹¹⁶*Id.* at 846-47.

¹¹⁷*Id.* at 847.

¹¹⁸*Id.*

¹¹⁹*Id.* The ALJ found that "[t]he School System had substantively violated the IDEA by failing to provide a proven or even describable methodology for educating autistic children." *Id.*

¹²⁰*Id.* at 849.

¹²¹*Id.*

possible within its authority.¹²² Similar to the Third Circuit in *Polk*, the court first stated the educational benefit must be more than de minimis.¹²³ Continuing in its substantive analysis, the court profoundly stated this level of substantive review is capable of becoming insufficient as “there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to denial of a FAPE.”¹²⁴ Therefore, the court agreed with other circuit court decisions, that “the IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue.”¹²⁵ Supporting this expansion to the *Rowley* standard, the court stated:

[n]othing in *Rowley* precludes the setting of a higher standard than the provision of ‘some’ or ‘any’ educational benefit; indeed, the legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence.¹²⁶

Analyzing the *Rowley* decision and recent legislative history surrounding the 1997 amendments to the IDEA, the Sixth Circuit concluded that providing only some educational benefit would never permit children with disabilities to attain the goals Congress foresaw when creating the legislation.¹²⁷ Following this interpretation and in furtherance of the substantive standard imposed by the IDEA, the Sixth Circuit reversed and remanded the decision of the district court, requiring the district court to analyze whether the education offered to Zachary Deal would provide a meaningful educational benefit in consideration of his individual abilities.¹²⁸

Deal presented a forceful step among case law authority in defining what is considered appropriate, as it furthered the decision of the Third Circuit in *Polk*.¹²⁹ These decisions represent a movement toward a heightened substantive standard, as lower courts now analyze an appropriate education to be one that provides “some *meaningful* educational benefit.”¹³⁰ In citing a standard that is more than “some educational benefit,” these recent decisions promulgate a standard more aligned with

¹²²*Id.* at 854-55. “The Supreme Court has spoken on the level of education that the states are required to provide to disabled children. . . . The court explicitly rejected the argument that school districts are required to provide services ‘sufficient to maximize each child’s potential commensurate with the opportunity provided other children.’” *Id.*

¹²³*Deal*, 392 F.3d at 861.

¹²⁴*Id.* at 862.

¹²⁵*Id.*

¹²⁶*Id.* at 863.

¹²⁷*Id.* at 864. “Indeed, states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress.” *Id.* (emphasis in original).

¹²⁸*Id.* at 867.

¹²⁹Telephone Interview with Nessa G. Siegel, Esq., Partner, Nessa G. Siegel Co., L.P.A., in Cleveland, Ohio (Jan. 16, 2006).

¹³⁰Telephone Interview with Kerry M. Agins, Esq., Partner, Nessa G. Siegel Co., L.P.A., in Cleveland, Ohio (Jan. 16, 2006).

the educational opportunity standard opined by Justices Blackmun and White. The educational opportunity standard requires a level of educational benefit that is more than de minimis, one that is meaningful and one that ensures each child is offered a full educational opportunity. The Reauthorization of the IDEA seeks to continue the insight of the Circuit Courts of Appeals, as its new regulations also promote the adoption of the educational opportunity standard.

VI. THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT: A CALL TO INCREASE THE SUBSTANTIVE STANDARD DEFINING “APPROPRIATE”

The IDEA became the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) upon its Reauthorization, effective July 1, 2005.¹³¹ Amending provisions regarding IEP development and teaching qualifications for children with special needs, the IDEIA seeks to further the goals of the 1997 IDEA amendments by establishing a higher substantive meaning for an appropriate education than that applied in *Rowley*.¹³² Once again, the federal government, now through the IDEIA, seeks to implement a better education for children with disabilities, as Congress found that the implementation of the IDEA “has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.”¹³³ This directly reflects the need for courts to adopt a new substantive standard for “appropriate,” other than merely conferring “some educational benefit.”

A. IEP Amendments

Analyzing the amendments, it first must be noted that the government removed mandating the inclusion of short-term objectives and benchmarks in IEPs for all students with disabilities.¹³⁴ These objectives and benchmarks are now only required to be included in IEPs for students placed on alternative assessments.¹³⁵ The new

¹³¹20 U.S.C. § 1400 (2006); Cory L. Shindel, *One Standard Fits All? Defining Achievement Standards for Students with Cognitive Disabilities Within the No Child Left Behind Act's Standardized Framework*, 12 J.L. & POL'Y 1025, 1039-40 (2004). “Reauthorization of a statute is required when Congress approves sections of a law for a fixed period of time. At the termination of the fixed period, Congress must affirmatively re-approve the select provisions, of the IDEA that are permanently authorized, the reauthorization process gives Congress an opportunity to reconsider and revise the IDEA generally.” *Id.*

¹³²20 U.S.C. § 1400 *et seq.* (2006); *see* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

¹³³20 U.S.C. § 1400(4) (2006).

¹³⁴20 U.S.C. § 1414(d) (2006); *see also* CHARLES J. RUSSO ET AL., INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT VS. IDEA '97: CHARTING THE CHANGES 221-22 (2005). The 1997 IDEA stated an IEP must include:

[A] statement of measurable annual goals, including benchmarks or short-term objectives, related to – (1) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and (2) meeting each of the child's other educational needs that result from the child's disability.

Id.

¹³⁵20 U.S.C. § 1414(d)(1)(A)(i)(II). Students who have IEPs and are unable to participate in State or local standardized testing due to their disability are issued alternate assessments to replace taking a standardized test. Alternate Assessments are a “collection of evidence that

language reads that an IEP must include “a statement of the child’s present levels of academic performance, including – (cc) for children with disabilities who take alternative assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives.”¹³⁶ This omission in the IDEIA facially appears to reduce the substantive standard of “appropriate” within the meaning of a FAPE.¹³⁷ However, this concern of the recent exclusion of short-term objectives and benchmarks is erroneous.

In light of the IDEIA becoming law, neither attorneys representing school districts nor those working as child advocates, have witnessed the language omitting benchmarks to affect or minimize provisions of FAPE.¹³⁸ Admittedly, this elimination might hinder a school district’s ability to measure progress and objectively determine the appropriateness of an IEP as only overarching goals will need to be stipulated in an IEP.¹³⁹ However, in practice, while the omission of the language is a loss for the child, schools are still including short-term objectives and benchmarks for most students as it safeguards the school districts from entertaining challenges regarding their provision of FAPE.¹⁴⁰ School districts will also likely be advised by their attorneys to decide whether to include these statements on a case-by-case basis looking at the needs of the individual child.¹⁴¹ Furthermore, this omission is not likely to hinder the level of what constitutes an appropriate education, as school districts will now have to craft more measurable goals to ensure that a FAPE is still being provided.¹⁴² If there can no longer be reliance on short-term objectives and benchmarks to provide measurable standards, school districts must ensure written goals are precise and accurately convey that an appropriate education is being offered.¹⁴³ Additionally, some state laws still require short-term

shows student performance of standards-based knowledge and skills within the context of classroom instruction.” Ohio Department of Education, http://www.ode.state.oh.us/proficiency/Alternate_Assessment/ (last visited Feb. 12, 2006).

¹³⁶20 U.S.C. § 1414(d)(1)(A)(i)(I)(cc).

¹³⁷Stephen A. Rosenbaum, *Aligning of Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of it All*, 15 HASTINGS WOMEN’S L.J. 1, 3 (2004); see also Shindel, *supra* note 131, at 1077-78.

¹³⁸Telephone Interview with Agins, Esq., *supra* note 130; Telephone Interview with Siegel, Esq., *supra* note 129; Telephone Interview with Christina Peer, Esq., Squire, Sanders & Dempsey, in Cleveland, Ohio (Jan. 17, 2006).

¹³⁹Telephone Interview with Agins, Esq., *supra* note 130.

¹⁴⁰Telephone Interview with Siegel, Esq., *supra* note 129.

¹⁴¹Telephone Interview with Peer, Esq., *supra* note 138. Even if a student is not on an alternative assessment, it might be advisable to still include short-term objectives and benchmarks. Whether or not to include short-term objectives and benchmarks must be determined on a case-by-case basis. *Id.*

¹⁴²*Id.*

¹⁴³*Id.*

objectives and benchmarks to be included in every IEP.¹⁴⁴ This negates the elimination of this IEP feature even though the IDEIA does not require it.

The objective of this omission within the IDEIA is to reduce the paperwork burden placed on special education teachers, not to reduce the meaning of what constitutes an “appropriate” education.¹⁴⁵ The legislators hoped that a reduction in required paperwork would enable educators to focus on quality education and allot more time for direct instruction.¹⁴⁶ Therefore, combined with the remaining amendments to IEP development and the requirement that teachers become highly qualified, the retraction of mandating that each IEP contain short-term objectives and benchmarks is likely minimal and does not outweigh the remaining provisions that support the incorporation of a higher substantive level for an education to be deemed “appropriate” than that purported by the Court in *Rowley*.

The “some educational benefit” standard is no longer viable, as the IDEIA implements new provisions that highlight a desire to increase the standard of what constitutes an “appropriate” education. Because a free appropriate public education is measured through a child’s IEP, many aspects of the IDEIA sought to address and establish more stringent provisions in IEPs that emphasize substantive education as opposed to mere procedural guidelines.

First, the statement of a student’s present levels in the IEP must now include academic and functional performance.¹⁴⁷ Emphasizing that both academic and functional performance levels be included clarifies the vague “educational performance” term used in the 1997 amendments.¹⁴⁸ This added terminology reflects the Senate’s desire that children with disabilities be afforded the same opportunities as individuals without disabilities to live independent and productive lives, as functional performance speaks to incorporating life skill goals.¹⁴⁹ Ensuring that students with disabilities are afforded not only educational opportunities, but also opportunities to live independently and self-sufficiently, imposes a greater

¹⁴⁴*Id.* Ohio still mandates that short term objectives and benchmarks be incorporated in an IEP. *Id.*

¹⁴⁵*Hearings, supra* note 53, at 64 (statement of Robert Runkel, Administrator of the Division of Special Education, State of Montana).

Our current preoccupation in special education on process has contributed to the paperwork burden that you hear so much about. . . . Most parents I know are more concerned about the benefit their child is receiving from the program than they are about the number of parental rights brochures they have received . . . some parents fear that a paperwork reduction could mean the loss of certain procedural rights now afforded under the protections of the IDEA. It is our job to maintain the protections of the IDEA while solving our dilemma with paperwork.

Id. See also 20 U.S.C. § 1408(a) (2006).

¹⁴⁶RUSO ET AL., *supra* note 134, at 32.

¹⁴⁷20 U.S.C. § 1414(d)(1)(A)(i)(I) (2006). “The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes . . . a statement of the child’s present levels of academic and functional performance. . . .” *Id.*

¹⁴⁸RUSO ET AL., *supra* note 134, at 221.

¹⁴⁹*Hearings, supra* note 53, at 1 (statement of Sen. Edward M. Kennedy).

substantive quality to education than just “some educational benefit.” The IDEIA speaks to ensuring lifelong benefits, not just some meaningful education. The incorporation of functional performance in the IDEIA language purports to further the need to incorporate a substantive standard that expands and departs from the views of *Rowley*.¹⁵⁰

Additionally, an IEP must now describe how a child’s progress toward meeting annual goals will be measured and when periodic reports will be provided.¹⁵¹ This increases accountability standards important to Congress in meeting the goals of the IDEIA.¹⁵² It also ensures authorities can no longer claim that a child is progressing when IEP goals and objectives remain identical over consecutive years.¹⁵³ Accountability that primarily focuses on procedural compliance regarding special education and related services is no longer viable, as it neglects to hold authorities accountable for the substantive aspect of a special education program.¹⁵⁴ Requiring documented statements regarding how a child’s progress will be measured and when reports will be provided aids in ensuring students make “strides towards challenging and appropriate learning and developmental goals.”¹⁵⁵ This language advocates documenting clear progression, which seeks definitive progress, not just minimal growth.

Furthermore, special education and related services provided to students with disabilities must now be based upon peer-reviewed research when available.¹⁵⁶ This requires school and state officials to consider the best practices and methods that peer-reviewed journals and conferences endorse.¹⁵⁷ School officials will no longer be able to justify services on what they deem acceptable. This addition to IEP development is in direct contrast to *Rowley*’s determination that the standard for education of students with disabilities is to merely implement only a basic floor of

¹⁵⁰*Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

¹⁵¹20 U.S.C. § 1414(d)(1)(A)(i)(III) (2006).

¹⁵²*Hearings, supra* note 53, at 17 (statement of Sen. Jack Reed) (“Accountability and monitoring of programs must be improved.”).

¹⁵³*Id.* at 21 (statement of Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education).

¹⁵⁴PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUC. FOR CHILDREN AND THEIR FAMILIES 36 (2002) [hereinafter COMMISSION]. “In testimony and public comment the Commission heard repeatedly about the need to focus special education accountability on the results achieved by students with disabilities. Witnesses from a variety of perspectives told us the current approach to accountability in special education is too focused on procedural compliance.” *Id.*

¹⁵⁵*Id.*

¹⁵⁶20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2006).

The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes - . . . (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable. . . .

Id.

¹⁵⁷RUSO ET AL., *supra* note 134, at 223.

opportunity.¹⁵⁸ Requiring schools to base services upon peer-reviewed research requires educators to do more than just open the door to public education for students with disabilities. Instead, the IDEIA requires authorities to research and consider best practices, not simply those that are adequate or will only produce some progress.

Finally, regarding IEP development, the IDEIA is dedicated to improving transition services within a child's IEP.¹⁵⁹ Transition services are a coordinated set of activities for a child with disabilities that are focused on improving a child's movement from school to post-school activities.¹⁶⁰ Once again, functional and academic performance is clearly emphasized, as the definition of transition services was refined to not only state that the activities promote movement from school to post-school activities, but also that transition activities are "focused on improving the *academic and functional achievement* of the child with a disability to facilitate the child's movement from school to post-school activities."¹⁶¹ Additionally, the definition in the 1997 amendments stated transition service activities must be "designed within an outcome-oriented process,"¹⁶² while the IDEIA states these activities must be "designed within a results-oriented process."¹⁶³ The key is no longer to only reach an outcome, but to achieve specific results within attaining the prescribed outcome.

Prior to the IDEIA, transition services were often not implemented to the fullest extent, resulting in non-beneficial outcomes.¹⁶⁴ The language regarding these services in the IDEA was also confusing, leading to the provision of ineffective services.¹⁶⁵ Accordingly, under the IDEIA, an IEP must now include "appropriate measurable postsecondary goals based upon age appropriate transition assessments."¹⁶⁶ Transition services must be addressed in a child's IEP no later than

¹⁵⁸Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982).

¹⁵⁹Hearings, *supra* note 53, at 2 (statement of Sen. Edward M. Kennedy); *see also* COMMISSION, *supra* note 154, at 47. "The Commission finds that IDEA must be changed to clearly link students' long-range transition goals to the development of the annual IEP goals, objectives and activities." *Id.*

¹⁶⁰20 U.S.C. § 1401(34) (2006).

¹⁶¹20 U.S.C. § 1401(34)(A) (emphasis added).

¹⁶²RUSO ET AL., *supra* note 134, at 21.

¹⁶³20 U.S.C. § 1401(34)(A).

¹⁶⁴COMMISSION, *supra* note 154, at 46. "The Commission found that transition services are not being implemented to the fullest extent possible and that meaningful results do not happen."

¹⁶⁵*Id.*

School personnel must be provided clear and concise rules and regulations outlining how to provide effective and relevant transition services to students with disabilities seeking to enter the workforce immediately following high school as well as for students planning to attend college. The IDEA's current requirements are too complex and do not adequately meet this need.

Id.

¹⁶⁶20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(cc) (2006).

when the child reaches the age of sixteen¹⁶⁷ and they must serve to assist a child in reaching enumerated postsecondary goals.¹⁶⁸ Emphasizing transition services exhibits a heightened standard of “appropriate,” as the IDEIA is concerned with increasing a child with disabilities’ progression through life.¹⁶⁹ Congress’s goal is not for education to provide only “some educational benefit,” but to encourage independence and allow students with disabilities to become “self-sufficient members of their communities.”¹⁷⁰ Therefore transition services, through the IDEIA, now emphasize results, not just a scripted outcome.¹⁷¹ It is not sufficient for students with disabilities to just reach the outcome of transitioning into society. Students must be provided the tools and knowledge to live independently; hence, the results of transition services are to be emphasized.¹⁷² Accordingly, efforts to increase transition services directly supports strengthening the meaning of “appropriate” as Congress is concerned with a child’s progress through life’s stages, not merely grade to grade progress.¹⁷³

B. Highly Qualified Teachers

The IDEIA also seeks to ensure that special educators are highly qualified and can provide the level of education necessary for students with disabilities.¹⁷⁴ Under the IDEIA, special education teachers must now meet the provisions of “highly qualified” status to be employed to teach special education.¹⁷⁵ This requirement parallels the mandate of the Elementary and Secondary Education Act of 1965 and aligns with the No Child Left Behind Act, which requires all teachers to meet highly qualified standards in addition to obtaining an educational license.¹⁷⁶ To be deemed highly qualified, a teacher, according to the No Child Left Behind Act, must possess full certification, a bachelor’s degree and prove competence in subject knowledge and teaching.¹⁷⁷ The IDEIA expands upon this definition and details specific provisions for special educators which include that:

¹⁶⁷20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

¹⁶⁸20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

¹⁶⁹*Hearings, supra* note 53, at 2 (statement of Sen. Edward M. Kennedy). “Most important, we need to explore new ways to aid children with disabilities as they progress through life’s many transitions from early childhood to elementary school, from elementary school to high school, from high school to college, and on to a good job.” *Id.*

¹⁷⁰*Hearings, supra* note 53, at 5 (statement of Sen. James M. Jeffords).

¹⁷¹*See* 20 U.S.C. § 1401(34) (2006).

¹⁷²*See* COMMISSION, *supra* note 154, at 47-48.

¹⁷³*Hearings, supra* note 53, at 2 (statement of Sen. Edward M. Kennedy).

¹⁷⁴*Id.* at 4 (statement of Sen. Susan M. Collins).

¹⁷⁵20 U.S.C. § 1401(10) (2006).

¹⁷⁶RUSO ET AL., *supra* note 134, at 7.

¹⁷⁷United States Department of Education, <http://www.ed.gov/nclb/methods/teachers/teachers-faq.html> (last visited Feb. 12, 2006).

(i) the teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher . . . (ii) the teacher has not had a special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and (iii) the teacher holds at least a bachelor's degree. . . .¹⁷⁸

Requiring personnel to be highly qualified reflects statements made by the Commission on Excellence in Special Education which recommended that to improve special education services:

States and districts must devise new strategies to recruit more personnel who are highly qualified to educate students with disabilities. State licenses and endorsements for all teachers should require specific training related to meeting the needs of students with disabilities and integrating parents into special education services. States must develop collaborative, career-long professional developmental systems that conform to professional standards.¹⁷⁹

While recommending recruitment of teachers and stipulating that special education teachers be highly qualified, committees proposing amendments for the IDEIA also recognized the current shortage of special education teachers.¹⁸⁰ Since 1988, the field of special education has been plagued by shortages and the IDEA has not increased teacher retention, as the 1997 Amendments to the IDEA neglected to address this problematic issue.¹⁸¹ In developing the IDEIA, however, teacher shortages were addressed and solutions to this problem were recommended.¹⁸² Such solutions included higher wages, differential pay scales, and improving working conditions.¹⁸³ Because of Congress's realization and commitment to retain special educators, it is unlikely that requiring personnel to be highly qualified will further deter individuals from entering the field of education. Instead, educators will now desire to provide an appropriate education to students with disabilities and be qualified to do so.

The purpose of implementing requirements for schools to employ highly qualified teachers is to ensure special education reaches higher levels and meets

¹⁷⁸20 U.S.C. § 1401(10)(B).

¹⁷⁹COMMISSION, *supra* note 154, at 51.

¹⁸⁰*Id.* at 52-54.

¹⁸¹*Id.* at 52, 54. "The growing shortage of special education teachers alarms this Commission. Ninety-eight percent of school districts report special education teacher shortages. Roughly 10 percent of special education positions nationally – 39,140 positions – are filled by uncertified personnel who serve approximately 600,000 students with disabilities." *Id.* at 52.

¹⁸²*Id.* at 55. The Commission suggested States and districts devise new approaches to retain special educators who are highly qualified. *Id.*

¹⁸³*Id.*

more rigorous demands.¹⁸⁴ Untrained educators hinder movements to increase the achievement of students with disabilities.¹⁸⁵ “Consistently, the single biggest factor affecting academic progress of populations of children is the effectiveness of the individual classroom teacher – period. The sequence of teachers that a child has will add more to their own personal academic achievement than probably any other single factor.”¹⁸⁶ Stipulating that teachers must be highly qualified will, therefore, provide a greater educational benefit to students with disabilities.¹⁸⁷ Providing a greater educational benefit once again speaks to the IDEIA’s promulgation that a higher substantive standard be associated with the meaning of “appropriate.”

The crux of the IDEIA is to promulgate higher standards for the education of students with disabilities. Each of the amendments regarding IEP development and the stipulation that teachers must now obtain highly qualified status support this contention and promote the purpose stated in the IDEIA to “assess, and ensure the effectiveness of, efforts to educate children with disabilities.”¹⁸⁸

VII. CONGRESSIONAL INTENT AND THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT

Congressional intent, in addition to the language of the IDEIA, also impresses a need for a more rigorous substantive standard in educating students with disabilities. The amendments to the IDEIA focus attention on substantive components, thus analyzing and improving the meaning of “appropriate” in “free appropriate public education.” Furthermore, Congress’ intent is clearly to strengthen legislation and provide “the right services to the right children at the right time, in the right settings, and with the right personnel to achieve the right results.”¹⁸⁹ Findings by Congress stipulating the need for the IDEIA noted that increasing results for students with disabilities “is an essential element of our national policy.”¹⁹⁰ As noted in the first hearings discussing the Reauthorization, “[w]hile progress has been made, the true

¹⁸⁴*Hearings, supra* note 53, at 16 (statement of Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education). “[I]f we do not have highly-qualified teachers instructing students, we are never going to get the kinds of results that parents have a right to expect and Congress has the right to demand.” *Id. See also* COMMISSION, *supra* note 154, at 52.

¹⁸⁵COMMISSION, *supra* note 154, at 51.

¹⁸⁶*Id.* at 52.

¹⁸⁷*Hearings, supra* note 53, at 4 (statement of Sen. Susan M. Collins) (“Providing more quality special education teachers will bring us a great deal further toward providing quality education to students with disabilities.”).

¹⁸⁸20 U.S.C. § 1400(d)(4) (2006).

¹⁸⁹*Hearings, supra* note 53, at 11 (statement of Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education).

¹⁹⁰20 U.S.C. § 1400(c)(1). “Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” *Id. See also* H. R. REP. NO. 108-813, pt. 2 (2005). “The report emphasized the need to move the IDEA away from compliance with cumbersome and bureaucratic rules and restore the focus to educational results for students.” *Id.*

promise of [the] IDEA – a free appropriate public education for all children with disabilities – has not yet been realized.”¹⁹¹ Eighty percent of states failed to comply with the requirements concerning a “free appropriate public education”¹⁹² and compliance has been focused on process, not results.¹⁹³ While compliance with process has produced gains for the education of students with disabilities, it is now time to introduce a culture focused on accountability and emphasizing results.¹⁹⁴

Furthermore, students with special needs remain “those most at risk of being left behind” creating “an urgency for reform that few can deny.”¹⁹⁵ Congress, therefore, in reauthorizing the IDEA, sought to refocus the states and emphasize substantive, not procedural, aspects of the law.¹⁹⁶ The IDEIA should be flexible in order to achieve desired outcomes for students with disabilities.¹⁹⁷ Additionally, the IDEIA should include “a unified system of services from birth through 21, and simplify the . . . IEP to focus on substantive outcomes.”¹⁹⁸

Congress’ emphasis on substantive results and its realization that states continuously fail to meet the full expectations of the IDEA’s premise and vision, unequivocally demands that courts reanalyze the current substantive standard. If increasing results for students with disabilities is truly a primary national policy, the “some educational benefit” standard must be discarded. This standard does not effectuate Congress’s goal to ensure substantive results, as it only ensures an education will be more than trivial. Students’ individual needs and unique capabilities leading to future success will not always be accounted for in a disabled student’s educational programming if only “some benefit” need be shown for schools to be in compliance with the IDEIA. This level of education does not pass muster under the standards Congress sought with the issuance of the IDEIA. Accordingly, the “some educational benefit” standard set forth by *Rowley* is no longer appropriate in evaluating the education of students with disabilities.

¹⁹¹*Hearings, supra* note 53, at 6 (statement of Sen. Jack Reed).

¹⁹²*Id.* at 7 (statement of Sen. Jack Reed).

¹⁹³*Id.* at 14 (statement of Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education). “Under current law, compliance does not focus on improved results for children. Instead, compliance has been too focused on process as opposed to results.” *Id.* See also COMMISSION, *supra* note 154, at 7. “[T]he current system often places process above results, and bureaucratic compliance above student achievement, excellence and outcomes.” *Id.*

¹⁹⁴Rosenbaum, *supra* note 137, at 5. “Paige unveiled a set of principles which stated that the ‘IDEA must move from a culture of compliance with process to a culture of accountability for results.’” *Id.*

¹⁹⁵COMMISSION, *supra* note 154, at 4. “Although it is true that special education has created a base of civil rights and legal protections, children with disabilities remain those most at risk of being left behind. The facts create an urgency for reform that few can deny.” *Id.*

¹⁹⁶*Hearings, supra* note 53, at 14 (statement of Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education) (“We want the States to focus on results and compliance with the key substantive requirements of the law.”).

¹⁹⁷COMMISSION, *supra* note 154, at 11.

¹⁹⁸*Id.*

VIII. THE ADOPTION OF A NEW SUBSTANTIVE STANDARD

The purpose of the IDEIA is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”¹⁹⁹ Fulfilling this ideal is essential to the success of the legislation and the education of students with disabilities. Minimal efforts by educators will not lead to this desired result; however, this is all the *Rowley* standard requires by stipulating students will receive “some educational benefit.”

Lower courts have realized this problem and have responded by interpreting *Rowley* to require that education must provide a meaningful benefit.²⁰⁰ This expansion, while making apparent the desire that a more substantive education be offered to students with disabilities, cannot be fully realized under the current *Rowley* precedent. Therefore, a new substantive standard for determining “appropriate” within a free appropriate public education must be adopted. Based upon the language of the IDEIA and the goals Congress sought to achieve through the legislation, the “educational opportunity” standard suggested by Justices Blackmun and White in *Rowley* should be the new standard in determining whether an offered education is “appropriate” within the meaning of the IDEIA.²⁰¹

The “educational opportunity” standard stipulates students with disabilities must be provided an education substantially similar to that afforded to their non-disabled peers.²⁰² This is not to suggest that a child’s education must be maximized,²⁰³ only that children with disabilities be afforded the same opportunities to learn as non-disabled students receive.²⁰⁴ Educational curriculum for students without disabilities is focused on providing knowledge and tools to assist with post-secondary education, future employment, and preparing them to live independently. This is the exact focus special education programming must have as purported by the purpose of the IDEIA.²⁰⁵

Providing an equal educational opportunity not only reflects explicit language in the IDEIA,²⁰⁶ but the heightened procedures incorporated through the amendments

¹⁹⁹20 U.S.C. §1400(d)(1)(A) (2006).

²⁰⁰*See* Polk v. Cent. SuSusquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988); *see also* Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004).

²⁰¹Bd. of Educ. v. Rowley, 458 U.S. 176, 211, 214 (1982) (Blackmun, J., concurring) (White, J., dissenting).

²⁰²*Id.* at 213-14 (White, J. dissenting).

²⁰³*Id.* at 212-13 (White, J., dissenting) (“Certainly the language of the statute contains no requirement like the one imposed by the lower courts – that states maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”).

²⁰⁴*Id.* at 211 (Blackmun, J., concurring) (“Rather, the question is whether Amy’s program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates.”).

²⁰⁵*See* 20 U.S.C. §1400(d)(1)(A) (2006).

²⁰⁶20 U.S.C. § 1412(a) (2006) (providing that a state must establish a goal of providing a full educational opportunity to all children with disabilities).

and congressional intent also advocate implementing the “educational opportunity” standard as the new measurement of “appropriate.”²⁰⁷ The IDEIA itself serves to provide students with disabilities every opportunity afforded to non-disabled Americans.²⁰⁸ As noted in the House Report detailing the activities of the Committee on Education and the Workforce, “[n]ow more than ever, we must see that children with disabilities are given access to an education that maximizes their unique abilities and provides them with the tools for later success.”²⁰⁹ This thought is heralded in the numerous amendments written in the IDEIA. Each new IEP provision speaks to enhancing a child’s education by providing for life-long benefits, accounting for functional performance and concentrating on results, not just a minimum outcome.²¹⁰ Additionally, requiring that special educators become highly qualified ensures students with disabilities will receive the same level of education as non-disabled students, as teachers will now be appropriately trained. Each amendment represents the sentiments expressed in the “educational opportunity” standard, as they serve to detail an education extremely similar to that offered to regular education students. Focusing on a curriculum that will ensure future success promotes societal goals to educate students for independent and functional lives. Accordingly, to meet society’s expectations of developing productive individuals, education of students with disabilities must do more than provide some benefit. It must provide these students the same opportunities to learn and succeed as their non-disabled peers. Therefore, the “educational opportunity” standard, which requires courts to determine whether a disabled child’s IEP provides “an educational opportunity commensurate with that given other children,”²¹¹ should be the standard adopted by the courts.²¹²

If the goal is to give all handicapped students the same opportunities as non-handicapped students to learn, function, progress, and live independently, a standard for “appropriate” must mean more than merely conferring “some educational benefit.” The standard does not hold officials accountable to the purpose and high standards set forth by the IDEIA, and does not purport to ensure a level of education equal to that given to non-disabled peers. The focus for the education of students with disabilities has shifted to emphasize the importance of the outcomes of the provided education, not merely procedural compliance with the law.²¹³ The

²⁰⁷Hearings, *supra* note 53, at 12 (statement of Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, U.S. Department of Education).

²⁰⁸*Id.* at 1 (statement of Sen. Edward M. Kennedy).

²⁰⁹H.R. REP. NO. 108-813, pt.2, at 140 (2005).

²¹⁰*See* 20 U.S.C. § 1400 *et. seq.* (2006).

²¹¹*Bd. of Educ. v. Rowley*, 458 U.S. 176, 214 (1982) (White, J., dissenting).

²¹²*Id.* at 214 n.2 (“In any case, the very language that the majority quotes from *Mills*, . . . sets a standard not of *some* education, but of educational opportunity equal to that of nonhandicapped children.”).

²¹³Hearings, *supra* note 53, at 64 (statement of Robert Runkel, Administrator of the Division of Special Education, State of Montana).

I cannot emphasize enough how important it is to focus on outcomes for students with disabilities. A local education agency can be in total compliance with every

“educational opportunity” standard, promulgated through the IDEIA, fulfills both congressional and societal expectations of equality in educational opportunities for the disabled and the non-disabled, and therefore should be the accepted standard in this country.

IX. FINANCIAL CONCERNS

Intrinsic with the adoption of a new substantive standard for what constitutes an “appropriate” education is the implication that this result will surely impose greater financial costs. With the heightening of any standard, it must be expected that costs will increase to some degree.²¹⁴ Since the enactment of the IDEA, Congress has been aware of the financial burdens that the federal law requires.²¹⁵ However, Congress’s ability to rationalize such expenditures revolves around the theory that mandating greater educational attention for students with disabilities will result in limiting future monetary spending, as these students will be better able to be self-sufficient members of society.²¹⁶

A. Past Financial Difficulties

Upon the original enactment of the IDEA, the federal government promised to assume forty percent of the costs associated with implementing the provisions set forth in the law.²¹⁷ States would then be responsible for the remainder of the balance.²¹⁸ Unfortunately, there has been a historical under-funding of special education at the federal level.²¹⁹ Federal government reimbursement never reached levels of supplying forty percent of special education funding. In fact, the federal government reimbursement decreased to comprise only seven percent of special education expenditures.²²⁰ While this results in billions of public dollars spent annually, the educational level envisioned by the IDEA is applied inconsistently and unevenly among states and school districts.²²¹

B. Resolutions to Solve Financial Difficulties

These facts are disheartening for special education funding. However, while it may seem unlikely that a heightened substantive standard could be monetarily supported, this consideration was taken into account upon the drafting of the IDEIA. The Commission on Excellence, in its proposals for the IDEIA, specifically targeted

procedural step and still not guarantee positive educational outcomes for its students. That is why it is so important to continue to strengthen our focus on outcomes.

Id.

²¹⁴Eyer, *supra* note 9, at 636.

²¹⁵Russell, *supra* note 21, at 1514.

²¹⁶*Id.*

²¹⁷Goldman, *supra* note 26, at 283.

²¹⁸*Id.*

²¹⁹COMMISSION, *supra* note 154, at 29.

²²⁰Goldman, *supra* note 26, at 283.

²²¹*Id.*

financing problems and ways to resolve concerns to ensure states and districts are provided adequate means to provide the desired educational results.²²² The Commission proposed to revise calculations of excess costs and to maximize the use of federal funds.²²³ The goal is to allow states greater flexibility in their spending and to balance the shared responsibility for financing special education.²²⁴ The Commission further proposed to increase funding to states who have submitted state improvement plans consistent with No Child Left Behind for implementing new accountability systems that will better measure results for students with disabilities.²²⁵ The IDEIA echoed the sentiments and goals of the Commission.²²⁶ Now included in the law is the federal government's original promise of providing for forty percent of special education funding.²²⁷ The government has set the goal to achieve this level of support by the year 2011.²²⁸

While financial constraints do play a significant role in being able to adopt a more sufficient substantive standard, they should not halt the progress towards amending the "some educational benefit" standard. The federal government is not ignoring the fact that special education requires funding and has addressed these concerns in the IDEIA. Additionally, opinion polls calculated during the enactment and passage of the IDEIA proved Americans were more concerned with emphasizing "high standards and accountability for results" to improve public schools than increasing government spending.²²⁹ Any time improvement is sought, costs must be incurred. However, providing the proper education for students with disabilities that the law and Congress seek to ensure must take precedent.

X. CONCLUSION

The amendments made in the IDEIA exhibit intent to implement a heightened substantive meaning of the word "appropriate." Evident in the amendments is a desire to provide a quality education to students with disabilities. Therefore, the "some educational benefit" standard devised in *Rowley* should be abandoned, as it does not coincide with the recent standards set forth by the IDEIA. Applying the "educational opportunity" standard, however, aligns with the purpose of the IDEIA. This standard increases substantive provisions, as it ensures students with disabilities are afforded an opportunity commensurate with that given to other children. Therefore, the "educational opportunity" standard, directly echoing

²²²COMMISSION, *supra* note 154, at 29.

²²³*Id.*

²²⁴*Id.* at 33. "We must allow states greater flexibility to financially manage their short-term and long-term financial responsibility. Federal policy with respect to IDEA funding must give states more discretionary ability to direct funds that best serve children with disabilities in their state rather than a prescribed set of requirements that do not take unique local conditions and needs into account." *Id.*

²²⁵*Id.*

²²⁶*See* 20 U.S.C. § 1400 *et. seq.* (2006).

²²⁷RUSSO ET AL., *supra* note 134, at 95.

²²⁸*Id.*

²²⁹H.R. REP NO. 108-813, pt. 2, at 9 (2005).

congressional intent and explicit language in the IDEIA, should be the determinate against which an “appropriate” education is measured.

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