

**Meg Helder**

**A new standard for educating children with disabilities: How does *Rowley* align with the current requirements of the IDEA?**

In 1975, Congress initially addressed the lack of educational opportunities for children with disabilities in the Education for All Handicapped Children Act (EAHCA).<sup>1</sup> This act required that all handicapped children be given access to education. The first case to reach the Supreme Court under this act was *Hendrick Hudson School District v. Rowley*.<sup>2</sup> The standard that the Supreme Court set in *Rowley* has been used by the courts ever since to evaluate school's compliance with EAHCA and the Individuals with Disabilities Education Act (IDEA), as it has been renamed.<sup>3</sup> Although Congress has updated these acts several times and changed many of the standards for what is expected in the education of children with disabilities, the standard that the courts use to review these decisions has not changed in line with these statutory updates.

This paper will briefly review the history of educating children with disabilities, including the passage of the EAHCA and the Supreme Court's decision in *Rowley*. Then the more recent court cases, including the differing standards used by the circuit courts, and the provisions of the updated IDEA will be examined. Finally, this paper will explain why the standard in *Rowley* is not an adequate standard to measure if schools are

---

<sup>1</sup> Ed Halsell, *Disabled School children: Where Are Their advocates?*, 23 J. JUV. L. 65, 65 (2003).

<sup>2</sup> Julie F. Mead & Mark A. Paige, *Board of Education of Hendrick Hudson v. Rowley: An Examination of its Procedural Impact*, 37 J.L. & EDUC. 329, 329 (2008).

<sup>3</sup> Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standards for "Free Appropriate Public Education?"*, 28 J. NAT'L ASS'N L. JUD. 397, 397 (2008).

meeting the requirements of the new IDEA and discuss mechanisms for changing the standard.

## **I. Overview of the History of Education for Children with Disabilities**

Prior to 1975, when congress passed the EAHCA there were few if any options for education of children with disabilities.<sup>4</sup> Due to the de-institutionalization movement, many of these children were living in their home communities, but had been neglected, labeled as uneducable, or excluded from public education.<sup>5</sup> Until the EAHCA was passed, the only legal requirements for education of children with disabilities were on a state-by-state basis.<sup>6</sup>

### *a. Education for All Handicapped Children Act*

In 1975, Congress passed the EAHCA, which codified the right to a free public education for all disabled children.<sup>7</sup> The EAHCA conditioned the states' receipt of federal money on the provision of a Free Appropriate Public Education (FAPE) to all children with disabilities and on compliance with the procedural safeguards in the Act.<sup>8</sup>

The Act specified that a FAPE is special education and services that:

- (A) have been provided at public expense;
- (B) Meet the standards of the state educational agency;
- (C) Include an appropriate preschool, elementary, or secondary school education; in the State involved; and

---

<sup>4</sup> Halsell, *supra* note 1 at 65.

<sup>5</sup> Andrea Blau, *The IDEA and the Right to an "Appropriate" Education*, 2007 BYU EDUC. & L. J. 1, 2 (2007).

<sup>6</sup> Halsell, *supra* note 1 at 66.

<sup>7</sup> *Id.* at 68.

<sup>8</sup> Halsell, *supra* note 1 at 69.

(D) Are provided in conformity with the student's individualized education program.

While the act provided this basic definition of a FAPE, it did not provide any substantive requirements or set any standards or required levels of learning for children with disabilities.<sup>9</sup>

b. *Rowley*

The first case to reach the Supreme Court under the EAHCA examined whether Amy Rowley was receiving FAPE. Amy Rowley was a child who had been deaf from birth whose parents sought to ensure that she was given the education that she was entitled to under the EAHCA.<sup>10</sup> When Amy was in first grade her parents challenged the IEP that was provided for her.<sup>11</sup> Amy's parents believed that Amy should be provided with a sign language interpreter to help to maximize her potential.<sup>12</sup> However, the school believed that the services that they had been providing, including a FM hearing aide, speech and language therapy, and services of a teacher for the deaf, were adequate.<sup>13</sup> The district court found in favor of Amy's family, specifically noting that without an interpreter only a fraction of the information that was available to other children was available to Amy.<sup>14</sup> Moreover, the district court concluded that under the EAHCA, Amy was entitled to an

---

<sup>9</sup> Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 562 (2003).

<sup>10</sup> Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L & EDUC. 367, 367 (2008).

<sup>11</sup> Mead, *supra* note 2 at 330.

<sup>12</sup> Johnson, *supra* note 9 at 562.

<sup>13</sup> Mead, *supra* note 2 at 330.

<sup>14</sup> *Id.*

education designed to allow her to develop “full potential commensurate with opportunity provided to other children.”<sup>15</sup> The court of appeals upheld this ruling.<sup>16</sup>

The school district appealed this ruling to the Supreme Court and the Supreme Court certified two questions to be addressed:

“What is meant by the Act’s requirement of a ‘free appropriate public education?’ And what is the role of state and federal courts in exercising the review granted by EAHCA?”<sup>17</sup>

A five member majority of the Supreme Court found in favor of the Board of Education. In examining the history of the EAHCA the Court concluded that the EAHCA was primarily intended to remedy the pervasive problem of lack of access to the education system for children with disabilities.<sup>18</sup> From this premise they continued to reason that Congress only intended to require the minimal substantive standard for the education as was necessary to make the access meaningful.<sup>19</sup> According to the majority of the Court the Act was intended to remove the barriers to access and provide a “basic floor of opportunity”, not “to guarantee any particular level of education.”<sup>20</sup> The court rejected various other standards, which would have set the bar higher. Some of the rejected standards include providing children with disabilities with commensurate opportunity, self-sufficiency, and maximization of potential.<sup>21</sup> The court went on to specify two questions that should be asked when reviewing a case under the EAHCA:

---

<sup>15</sup> Halsell, *supra* note 1 at 71.

<sup>16</sup> Mead, *supra* note 2 at 330.

<sup>17</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 186 (1982).

<sup>18</sup> Mead, *supra* note 2 at 331.

<sup>19</sup> *Id.*

<sup>20</sup> Rowley, 458 U.S. at 201.

<sup>21</sup> Zirkel, *supra* note 3 at 401.

“First, has the state complied with the procedures set forth in the Act? And second, is the individualized education 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 court can require no more.”<sup>22</sup>

The decision also stressed that the courts should give deference to the school districts and administrative law findings in regard to education methodologies. They cautioned against judges imposing their own beliefs about what works in education.<sup>23</sup>

The dissent, written by Justice White and joined by Justices Brennan and Marshall, disagreed with this interpretation of the legislative intent. They stated that the act was intended to give children with disabilities “equal educational opportunity”.<sup>24</sup> They wrote that the legislative history “directly supports the conclusion that the Act intended to give handicapped children an educational opportunity commensurate with that given other children”.<sup>25</sup> Moreover, the dissent emphasized that the standard set by the majority established a very low floor and did very little to aid children with disabilities, such as Amy in obtaining an appropriate education.<sup>26</sup> Specifically, the dissent stated “it would apparently satisfy the Court’s standard of ‘access to specialized instruction and related services which are individually designed to provide educational

---

<sup>22</sup> *Id.* at 206-207.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 215. (White, J., dissenting).

<sup>25</sup> *Id.* at 214. (White, J., dissenting).

<sup>26</sup> Zirkel, *supra* note 3 at 402.

benefit to the handicapped child', for a deaf child such as Amy to be given merely a teacher with a loud voice."<sup>27</sup>

Later in the *Rowley* decision, the Court's majority went on to specify that this decision was limited to the situation that was before them, where a young girl was progressing from grade to grade and was receiving support.<sup>28</sup> However, lower courts have used this test regularly, reasoning that if a school district has met these two requirements they have complied with the EAHCA.<sup>29</sup>

## **II. Individuals with Disabilities Education Act of 2004 and Current Court Cases**

The Education of All Handicapped Children Act was reauthorized in 1990 as the Individuals with Disabilities Education Act, to reflect the shift to "people first" language as the correct way to talk about people with disabilities.<sup>30</sup> Since this the reauthorizations in 1997 and 2004 have produced added requirements for what should be included in the IEP and education of a child with a disability.<sup>31</sup> Despite these changes the Supreme Court precedent, as set in *Rowley*, has not been modified. The courts have struggled with the proper way to use the low standard set in *Rowley* to ensure that children with disabilities are receiving an education that meets the elevated standard of the IDEA.

### *a. Individuals with Disabilities Education Act, 2004*

---

<sup>27</sup> *Rowley*, 458 U.S. at 215 (White, J., dissenting).

<sup>28</sup> Mead, *supra* note 2 at 334.

<sup>29</sup> *Id.*

<sup>30</sup> Halsell, *supra* note 1 at 68.

<sup>31</sup> See Halsell, *supra* note 1 ; Zirkel *supra* note 3 ; Blau *supra* note 5.

The IDEA, as reauthorized in 2004, emphasizes the need for high quality educational opportunities for individuals with disabilities. The legislative findings in the preamble specifically state:

“Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving education 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.”<sup>32</sup>

When the IDEA was reauthorized in 2004, Congress made an attempt to integrate the requirements of the No Child Left Behind Act (NCLB).<sup>33</sup> The updated IDEA has added requirements for what must be included in an IEP.<sup>34</sup> The IEP must include annual goals stated in measurable terms that facilitate progress in the general education curriculum and address the specific needs arising from the disability.<sup>35</sup> The IEP must also state how progress will be measured and provide for regular progress reports for parents. Children who are eligible for education under IDEA must also be tested on statewide measures and the IEP should state what accommodations are needed for testing.<sup>36</sup> The IDEA has added a focus on creating transition plans for children who are approaching graduation. These measures focus on helping students with disabilities make the transition to the real world and equipping them to be self-sufficient.<sup>37</sup> This focus on access to the general curriculum and transitional services reflect a greater

---

<sup>32</sup> 20 U.S.C.A. §1400(c)(1).

<sup>33</sup> Huefner, *supra* note 10 at 372.

<sup>34</sup> 20 U.S.C. §1414 (d).

<sup>35</sup> 20 U.S.C. §1414 (d).

<sup>36</sup> 20 U.S.C. §1414 (d).

<sup>37</sup> 20 U.S.C. §1414 (d).

willingness of congress to mandate what content should be taught to children with disabilities. Moreover, IDEA now requires that the selection of special education and related services be based on peer-reviewed research to the extent practicable.<sup>38</sup>

Amendments to the IDEA have also added the requirement that education for a child with disabilities take place in the Least Restrictive Environment.<sup>39</sup> For some students this means within the regular classroom, and for others it means just spending non-academic time with non-disabled peers.<sup>40</sup> Either way this provision recognizes that there are benefits that can be achieved by integration that go beyond academics and assist a child's social development.

*b. Current Circuit Court Split*

The Supreme Court has not taken another opportunity to define FAPE since *Rowley*. As a result an education plan for a child with a disability still must only be “reasonably calculated to enable the child to receive educational benefit” to meet that standard of judicial review. However, as these cases have been heard in the lower courts and they have struggled to integrate the changes in the IDEA a few different standards have evolved from the original *Rowley* ruling.

Two different standards seem to have evolved for evaluating whether a school district is providing FAPE. The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits apply a

---

<sup>38</sup> 20 U.S.C. §1414 (d).

<sup>39</sup> Halsell, *supra* note 1 at 69.

<sup>40</sup> *Id.*



“meaningful benefit” test. The First, Eighth, Tenth, Eleventh, and D.C. Circuits require “adequate benefit” or “some benefit.”<sup>41</sup>

The courts requiring a meaningful benefit have noted that provision of merely a “more than trivial educational benefit” does not meet the standards in the IDEA and that the FAPE should provide for meaningful learning.<sup>42</sup> This higher standard has led courts to determine that when a court evaluates whether an educational benefit is meaningful the benefit “must be gauged in relation to a child’s potential”.<sup>43</sup> In evaluating the methods used to educate a child with autism this court looked at the benefit that the child would receive from the school’s recommended educational program compared to the education program recommended by the child’s parents. The court found in favor of the methodology recommended by the child’s parent’s and stated that “there is a point at which the difference in outcomes between two different methods can be so great that provision of the lesser program could amount to a denial of a FAPE.”<sup>44</sup> On the other hand, courts using the less demanding “adequate benefit” or “some benefit” standard have heard similar cases and reached different decisions. In deciding whether to endorse the school’s recommended educational plan, these courts have pointed out that “the IDEA does not require the best possible education or superior results.”<sup>45</sup> They found that the school’s plan met the requirements, restating the proposition from *Rowley*, that “a student is only entitled to some educational benefit.”

---

<sup>41</sup> Lester Aron, *Too Much or Not Enough: How Have the Courts Defined a Free Appropriate Public Education After Rowley?*, 39 SUFFOLK U. L. REV. 1, 7 (2005). The Seventh Circuit has adopted a combination of these two standards.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> Deal ex. rel. Deal v. Hamilton County Bd. of Educ., 392 F.3d840, 864 (6<sup>th</sup> Cir. 2004).

<sup>44</sup> *Id.*

<sup>45</sup> O’Toole ex rel. O’Toole v Olathe Dist. Schs. Unified Sch. Dist No. 233, 144 F.3d 692, 696-97 (10<sup>th</sup> cir., 1998)

### III. Discussion

The *Rowley* standard was developed while the field of special education law was still in its infancy.<sup>46</sup> More recently, many commentators in the fields of education and law have advocated for a higher standard.<sup>47</sup> The need for this higher standard is particularly obvious when one examines the difference between the standard set forth in *Rowley* and the requirements in the current IDEA.

The Congressional findings that were part of the reauthorized IDEA of 2004 indicated that they were interested in providing something more than “some educational benefit” to children with disabilities. Congress stated that the IDEA had been successful in providing access to education for children with disabilities, but that implementation had been limited by low expectations for these children and an insufficient focus on research based interventions.<sup>48</sup> Congress also referred to the large number of individuals with disabilities who are reaching graduation and indicated that beyond just receiving “some educational benefit” these students should be given transitional services to promote post-school employment or education.<sup>49</sup>

The IDEA requires that there be measurable goals established, that these goals be based upon the general curriculum and address the specific disability of the child, and that the methods used be based on peer-reviewed research.<sup>50</sup> Each of these requirements imply that more than “some educational benefit” is expected for children who are eligible for education under the IDEA. The reference to peer reviewed research suggests that

---

<sup>46</sup> Blau, *supra* note 5, 2.

<sup>47</sup> Zirkel, *supra* note 3, 403.

<sup>48</sup> 20 U.S.C. §1400 (c).

<sup>49</sup> 20 U.S.C. §1400 (c).

<sup>50</sup> 20 U.S.C. § 1414 (d).

mere deference to local educators assumed knowledge is not appropriate and that these educators should have a basis for their selected methodology.

One recommendation that has been made to bring the standard in line with the requirement that children with disabilities have access to the general curriculum is providing that a FAPE must be “reasonable calculated to confer measurable educational progress based on the general educational curriculum.”<sup>51</sup> Other commentators have suggested that the failure to select a methodology based upon peer-reviewed research would be a failure to provide FAPE.<sup>52</sup>

While the reauthorized IDEA of 2004 seems to present a higher standard than *Rowley*, courts have shown hesitancy to change the standard that they use to review these decisions. One federal district court even pointed out that Congress must be aware of the *Rowley* standard and that if they intended to change it the definition of FAPE would be amended to coincide with the strong language in the congressional findings section.<sup>53</sup> If the standard that the courts use to ensure that a student receives the education that they deserve under the IDEA is to be clarified and updated to match the standards in the IDEA it appears that either the Supreme Court or Congress will need to specifically address the *Rowley* standard. If the Supreme Court chooses to take another IDEA case, they should provide a more specific definition of what is required to meet the FAPE standard and specify how a court or administrative judge can tell if a IEP is providing an adequate education as required by the current IDEA. If the Supreme Court does not take the opportunity to set a clear standard, Congress should consider overruling the *Rowley*

---

<sup>51</sup> Zerkel, *supra* note 3 at 404.

<sup>52</sup> *Id.* at 414.

<sup>53</sup> *Mr. C. v. Me. Sch. Acmin. Unit No. 6*, 538 F. Supp. 2d 298, 301 (D.Me. 2008).

standard, since it does not require the same level of education that the recent reauthorizations of IDEA. Congress should set a more specific definition for FAPE to ensure that children with disabilities are receiving the high level education that the IDEA requires.

The IDEA sets high standards for the education of children with disabilities. Congress has set a goal of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. The recent changes to the IDEA provide for children with disabilities to be provide with an education plan that addresses their disability, provides access to the general curriculum, is based upon peer reviewed research, and provides services to allow for successful transition out of school. These requirements cannot be reconciled with the low requirement of the *Rowley* court that a child be provided with an education “reasonably calculated to enable the child to receive educational benefits.” A new standard should be developed that incorporates the new substantive requirements of the IDEA into the standard that courts use to review a school district’s provision of FAPE.