Is It Time for Elevating the Standard for FAPE Under IDEA?

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Abstract: This article examines a critical question for the special education community: What should be the current meaning of “free appropriate public education” (FAPE) in light of not only the Supreme Court’s landmark Rowley decision in 1982 but also developments in the 30 years since then? After synthesizing what the Rowley Court, the scholar-commentators, and the post-Rowley lower courts have said, the author examines the latest answer from Congress via the 2004 Individuals With Disabilities Education Act amendments. Particular attention is paid to the provision concerning peer-reviewed research and the recent case law interpreting this provision. The author suggests that the time is ripe for the special education community to help Congress fashion an appropriately heightened substantive or at least procedural standard for FAPE.

The cornerstone of the Individuals With Disabilities Education Act (IDEA) is the child’s entitlement to “free appropriate public education” (FAPE), as documented in an individualized education program (IEP). Ever since the inception of the original version of IDEA in 1975, the key question has been the operational meaning of FAPE, that is, what is the extent of the child’s entitlement (or, conversely, the district’s obligation)? The FAPE issue, including the high-stakes remedies of tuition reimbursement and compensatory education, accounts for the vast majority of the litigation under IDEA (e.g., Zirkel, 2012). It is also of central significance to various stakeholders in both general and special education—including practitioners, professors, and parents—in addressing the needs of individual children with disabilities in the context of school system resources and responsibilities.

Thus far, the special education community has not been prominent in answering this question. Other voices, including advocacy groups and legal commentators, have dominated the deliberations in Congress and in the courts. Yet, scholars and practitioners in special education have both the advancing knowledge and continuing obligation to address FAPE under IDEA.

Reviewing the successive sources that have addressed the FAPE question to the critical, present time facilitates the informed consideration and active participation of the broad special education community. Since the Supreme Court’s landmark decision in Board of Education v. Rowley (1982), the scholarly commentary addressing the FAPE question has been primarily but not exclusively from the legal rather than the special education community. During the same time period, lower courts have interpreted Rowley restrictively rather than expansively. Although Congress, in its 2004 amendments to the IDEA, added a qualified standard of peer-reviewed research (PRR) to the IEP provision for FAPE, recent case law has continued its district-deferential trend. It is
apparent that the time is ripe for Congress to determine a heightened substantive or at least procedural standard FAPE, thus at least restoring Rowley or adjusting it in line with the three decades of post-Royle maturation of the special education field.

**THE ROWLEY DECISION**

In *Rowley* (1982), the Supreme Court provided an initial answer to the question of the operational meaning of FAPE. The child in this case, Amy Rowley, was a deaf student in first grade. The proposed IEP included placement in a general education class, the use of an FM hearing aid, 1 hr per day of instruction from a tutor for the deaf, and speech therapy for 3 hr per week. Amy was doing well with these services, but her parents pointed out the notable disparity between her performance and potential due to her disability. To provide her with an opportunity commensurate with her peers, Amy's parents sought the addition of interpreter services for all of Amy's academic subjects.

The Supreme Court focused on the definition of FAPE in what was then the original version of IDEA, finding it to be helpful but not sufficiently specific to reveal Congressional intent. Against the historical backdrop of exclusion of children with disabilities, the majority opinion viewed the various provisions of the Act as emphasizing access via procedures, such as the prescribed parental notices, IEP team members, IEP format specifications, and dispute resolution mechanisms. As a result, the Court used a clarifying metaphor to conclude that the purpose of the legislation was to "open the door" (*Rowley*, 1982, p. 192) rather than provide a high substantive floor. Thus, the *Rowley* Court concluded that the measure for FAPE is a two-pronged standard: (a) Did the district comply with the various applicable procedures? and (b) Is the IEP "reasonably calculated to enable the child to receive educational benefits?" (*Rowley*, 1982, pp. 206-207). The emphasis was on the first, procedural prong. In contrast, the substantive prong was relatively low; indeed, as the dissent pointed out, a school district apparently could meet it by providing Amy with a teacher who had a loud voice. However, deaf to the dissent, the majority rejected the higher substantive standards of self-sufficiency, commensurate opportunity, and maximization as beyond Congressional intent.

Finding no dispute with the lower courts' decisions that the district had complied with the procedures of the Act, the majority concluded that, based on Amy's notably positive progress, the IEP met the substantive standard for FAPE. By way of what is known as "dicta," or ancillary commentary that does not directly answer the issue of the case, the majority provided two caveats. The first, which subsequent lower courts (characterized here as "the Rowley progeny") have largely ignored, is that "We do not attempt to establish any one test for [FAPE]," instead cabining the answer to the context of a child "who is performing above average in the regular classrooms of a public school system" (*Rowley*, 1982, p. 203). The majority's second Shakespearean aside, which the Rowley progeny have frequently applied, is one of judicial deference to state and local authorities, especially for questions of educational methodology.

**THE COMMENTATORS**

In a long line of commentaries in the education law literature, reformist authors have advocated elevating the substantive standard for FAPE. These journal articles generally fit into three successive segments. The first and second segments, or stages, argued that *Rowley* (1982) is outdated in light of more recent Congressional action, particularly the 1997 and 2004 IDEA amendments. For example, the 1997 amendments started with findings that emphasized high expectations for outcomes in general education, and the 2004 amendments appeared to further extend this emphasis on accountability.

**THE FIRST STAGE**

The first segment of commentary was based on the 1997 amendments and was directed at the courts. More specifically, a law student relied on the emphasis on outcomes in IDEA 1997 to posit a heightened benefit standard for the courts: "reasonably calculated to confer measurable educational progress based on the general education curriculum" (*Eyer*, 1998, p. 17). Another law student, who subsequently became a parent attorney,
echoed this position, adding that "judicial enforcement of IDEA can no longer be complacent with merely 'opening the door' of educational opportunity for children with disabilities" (Quade, 2001, p. 71). Subsequently and similarly, a parent attorney advocated that courts apply a heightened substantive standard for FAPE based on the shift from mere access to high expectations in the 1997 amendments of IDEA, with supplementary reference to the No Child Left Behind Act of 2001 (NCLB) and state school finance litigation (Johnson, 2003).

The Second Stage

The next wave of articles relied on the 2004 amendments and directed their proposals largely to the administering agency or Congress. More specifically, one commentator proposed that the U.S. Department of Education adopt a more stringent substantive standard in the IDEA regulations pursuant to the 2004 amendments (Blau, 2007). She relied on the preamble of IDEA 2004, which stresses the importance of improved educational outcomes for self-sufficiency of individuals with disabilities and which incorporates NCLB's "adequate yearly progress" accountability provision (§ 6311[b][2]). However, her message was either too little or too late, because the 2006 IDEA regulations did not incorporate this change. Exhibiting less restraint, Yell, Katsiyannis, and Hazelkorn (2007) opined that the 2004 amendments signified "a fundamental alteration in the ways in which the courts view a FAPE" (p. 9). On the more cautious side, Huefner (2008) distinguished what the courts will do from what they should do—adopt a substantive standard of "substantial progress toward at least a significant portion of the goals [in relation to] the individual child's capacities for growth" (p. 379).

Similarly, another pair of commentators characterized IDEA 2004 as heightening the outcomes-oriented standard of IDEA 1997 but, recognizing the resistance of the intervening court decisions, addressed their more tempered proposal to Congress (Daniel & Meinhardt, 2007). More specifically, they cautiously concluded that the Rowley Court's "minimalist interpretation" (p. 532)—that is, the floor-based standard of reasonable calculation for benefit—could be outdated, suggesting only that "the extent ... remains ambiguous and should be addressed in future legislation" (p. 535).

The Third Stage

The most recent segment of commentary is largely in the January 2012 issue of the Journal of Law and Education, which focused on the substantive side of the Rowley standard. The majority of the contributors echoed the criticism of earlier commentary, but they were more varied in their proposed solutions. Tempering his earlier proposal, Johnson (2012) proposed that courts adopt the Third Circuit's "meaningful benefit" interpretation of Rowley, pending Congressional clarification in an upcoming reauthorization. Selectively citing separate strands of judicial movement in this direction, Weber (2012) reached this even more restrained conclusion: "It is premature to label Rowley obsolete, but a common-law approach to an appropriate education—one that leads to proportional maximization or one that does not—may be glimmering on the horizon" (p. 128). Taking a preemptive approach, Kaufman and Blewett (2012) instead suggested that the outcome standards and enforcement mechanisms of the NCLB are effectively replacing the IDEA Rowley-based litigation, with residual ambiguity and concerns about individual rights. Illustrating a more circuitous alternate route, MacFarlane (2012) speculated that the Common Core State Standards may raise the bar for FAPE via its statutory definition.

In stark contrast with the other contributors, viewing the glass on the full side, Seligmann (2012) celebrated Rowley in comparison to the more recent shift in the Supreme Court and societal landscape. She concluded that although Rowley's substantive standard for FAPE is relatively low, its insistence on individualization not dependent on costs has "supported the development of a powerful mandate for special education" (p. 94). However, in the context of autism cases, she previously focused on the empty side of the glass, concluding that Rowley had not provided sufficient "teeth" (Seligmann, 2005, p. 287) to defeat cost contentions and pro-district deference, particularly in FAPE disputes centered on methodology.
Filling out this third segment, three other articles recently proposed varying approaches to the FAPE standard. In a special education journal, Etscheidt (2012) suggested that the general access orientation of IDEA and the aggregate accountability influence of NCLB had an eroding effect on FAPE. Instead, to assure the individualized integrity of the Rowley educational-benefit standard, she proposed that Congress (a) remove the NCLB cap on the number of students with disabilities taking alternative assessments with alternative standards, and (b) strengthen IDEA’s progress monitoring provisions.

At about the same time, two law review articles appeared that suggested different solutions. In one, a law student proposed that the Department of Education issue an IDEA regulation defining FAPE similar to the commensurate opportunity standard in the definition of FAPE in the Section 504 regulations (Coldschmidt, 2011). In the other and much more thorough analysis, a law professor proposed that courts reinvigorate the procedural emphasis of Rowley by interpreting the oft-ignored procedural-violation provision in IDEA 2004 in light of three structural principles—individualization, collaboration, and contractualization (Romberg, 2011).

THE ROWLEY PROGENY

During the 30 years since Rowley (1982), including the successive periods of this continuing commentary, the lower courts have applied its two-pronged standard to hundreds of FAPE cases—thus providing the precedents for thousands of hearing and review officer decisions under IDEA—in four significant ways. The first way is specific to the procedural prong, whereas the other three are applications of the substantive prong.

PROCEDURAL PRONG: EROSION

First, the Rowley progeny gradually eroded the prong specific to compliance with the procedural requirements of the Act by developing a harmless-error (i.e., no harm, no foul) approach, akin to a football referee not throwing a penalty flag for interfering with the pass receiver if the pass was so overthrown as not to be catchable. In a long and increasingly consistent line of cases under IDEA (e.g., Zirkel, 2012), the courts have ruled if the district violated various applicable procedures, but the noncompliance did not result in failure to meet the floor-based substantive prong, the child was not denied FAPE.

At the same time, with occasional exceptions, the lower courts have generally treated as procedural not only IDEA’s notice and meeting requirements, including IEP team membership (e.g., A.H. v. Department of Education, 2010), but also various other IDEA specifications that special education experts would arguably find at least equally substantive: the IEP’s key contents, such as present educational levels (e.g., Nack v. Orange City School District, 2006), measurable annual goals (e.g., Leticia H. v. Yelta Independent School District, 2007), related services specifications (e.g., Stanley C. v. M.S.D. of Southwest Allen County Schools, 2008), and—at least at age 16—transition services (e.g., Tindell v. Evansville-Vanderburgh School Corp., 2011). As a result, in these cases, the parents lost at a second hurdle; despite preponderant proof of a procedural violation, the court did not find a resulting loss of educational benefit. Similarly and even more starkly, appellate courts in recent years have undercut the IDEA structure of providing for corollary state laws that may provide higher standards by treating such standards as merely procedural and thus subject to this defendant-friendly, harmless-error approach (A.C. v. Board of Education, 2009; L.M. v. Capistrano Unified School District, 2009).

Even when sweeping various hallmarks of current special education practice under the procedural umbrella, courts have even gone so far as apply the opposite per se approach, finding automatic substantive adequacy. For example, in Alex R. v. Forrestville Valley Community Unit School District (2004), the Seventh Circuit Court of Appeals summarily rejected the parents’ challenge to the adequacy of their child’s behavior intervention plan (BIP) without considering whether it was reasonably calculated for the child’s benefit. Instead, finding no IDEA definition or standards for a BIP, the court blithely concluded that the IEP’s BIP, regardless of what it provided or lacked, “could not have fallen short of substantive criteria that do not exist” (p. 615).
Second, acknowledging that the Supreme Court established a merely "modest" substantive standard (e.g., *Z. W. v. Smith*, 2006), the lower courts have consistently resisted raising this other prong of *Rowley*, interpreting the preamble and purposes of the successive amendments of IDEA as insufficient in light of the unchanged statutory definition of FAPE (*Zirkel*, 2008a). As this comprehensive canvassing of the case law clearly showed, the courts addressing the contentions of the first two stages of the commentary have clearly rejected these arguments, with the one unpublished federal district court decision serving as the limited and only temporary exception, or outlier (*Zirkel*, 2008a). More recently, the Ninth Circuit Court of Appeals reversed the district court, thus making the pattern quite consistent (*J.L. v. Mercer Island School District*, 2010). Following the approach of the rest of the *Rowley* progeny, the Ninth Circuit acknowledged the lofty prefatory language in the IDEA's successive amendments, but concluded that if Congress had intended to revise *Rowley* (1982) it would have expressed its disagreement and changed the FAPE definition in the Act.

More generally, although the courts have varied in their specific elaborations of *Rowley*'s substantive prong (e.g., *Wenkart*, 2009), the variation has been relatively limited within a consistently district-favorable range that is short of the *Rowley*-rejected standards of self-sufficiency, commensurate opportunity, and maximization. For example, at the high end of the range the Third Circuit Court of Appeals has interpreted *Rowley* (1982) as requiring a "meaningful" educational benefit (e.g., *Ridgewood Board of Education v. N.E.*, 1999). However, the lower courts in the Third Circuit have followed this standard to accept rather minimal results, showing that the adjective did not add significant rigor. For example, a Pennsylvania court ruled that an IEP for a student with a specific learning disability that resulted in 2 months of progress in the next 10 instructional months met this substantive standard (*Delaware Valley School District v. Daniel G.*, 2002).

Similarly, consider from the perspective of special education expertise whether, generalization is one of the criteria for substantive FAPE—that is, should the child be able to transfer classroom benefit to demonstrable functional performance in other settings, such as the community and the home? Thus far, without clear Congressional direction, the courts have rather consistently concluded that generalization is not part of FAPE's substantive formulation (e.g., *San Rafael Elementary School District v. California Special Education Hearing Office*, 2007; *Thompson R2-J School District v. Luke P.*, 2008).

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**Substantive Prong: Deference**

Third, reinforcing this low rigor of the substantive prong, the lower courts have interpreted the concluding dicta in *Rowley* (1982) about leaving the choice of "educational method ... to state and local educational agencies" (p. 207) as generally establishing an adjudicative deference, which starts with hearing and review officers, to districts. This general expansion of the *Rowley* dicta has gone well beyond methodological issues and ignores the dicta's tandem phrase "in cooperation with the parents ... of the child" (p. 207). For example, in applying the *Rowley* reasonably calculated test to an IEP that the parents had successfully challenged at the hearing, the Seventh Circuit Court of Appeals correctly concluded:

> The hearing officer substituted her judgment for that of the school administrators. The hearing officer thought the administrators were mistaken and they may have been. However, the administrators were not unreasonable. (*Alex R. v. Forrestville Valley Community Unit School District*, 2004, p. 611)

Similarly, in upholding a district's extended school year policy for students with disabilities, a federal district court cited *Rowley* for "the strong deference" accorded to local and state education authorities (*McQueen v. Colorado Springs School District No. 11*, 2006, p. 1309).
**Substantive Prong: Non-NCLB**

Fourth, to the extent that the most recent commentaries have alternatively relied on NCLB, the lower courts have consistently minimized the role of NCLB in IDEA FAPE cases. As described in more detail elsewhere (Daniel, 2008; Zirkel, 2008a), the courts have summarily rejected the application of the NCLB academic content/achievement standards to elevate the substantive standard for FAPE (e.g., Fisher v. Stafford Township Board of Education, 2007; Leighty v. Laurel School District, 2006; School Board v. M.M., 2007). Moreover, the prolonged delay in reauthorization of NCLB and the reduced rigor in the latest draft bills (e.g., Klein, 2012) would seem to warn against robust reliance on the role of this Act to elevate the standard for FAPE.

**The 2004 IDEA Amendments**

The 2004 IDEA amendments enacted two provisions pertinent to the FAPE two-pronged standard. The first largely codified the judicial erosion of the procedural prong, which limited denial of FAPE to procedural noncompliance that had a harmful substantive result. In contrast, the second provision presented for courts' possible elevation of the substantive prong.

**Codification of Procedural Erosion**

First, recognizing and reinforcing the lower courts' harmless-error approach Congress codified the relaxation of Rowley's (1982) primary prong, with a limited exception. In this IDEA provision, Congress emphatically established, by repeating the limitation in two ways, that a hearing officer may find a denial of FAPE only for procedural violations that "impeded the child's right to FAPE" or "caused a deprivation of educational benefit" (20 U.S.C. § 1415[f][3][E]). The first alternative's reference to "right to FAPE" arguably refers to the substantive prong, as the second alternative clarifies by incorporating the Rowley Court's formulation in terms of educational benefit. Providing another interpretation, Romberg (2011) argued that the first prong distinctly requires a more strict procedural test: whether "the process the school district has employed in creating the IEP has diverged from the structural due process right to a collaborative, open-minded, individualized assessment" (p. 466). Thus far, the courts that have cited this new provision have done so in continuing their relatively relaxed harmless-error approach rather than adopting Romberg's approach (e.g., A.H. v. Department of Education, 2010; Tindell, 2011).

In any event, the arguable exception in this provision is where the district has "significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of [FAPE]" (20 U.S.C. § 1415[f][3][E]). Seeming to select one procedural violation as singularly fatal due to centrality of parental participation, this language appears to represent a per se standard, that is, that its violation is automatically a denial of FAPE without evidence of impeding or depriving the child of FAPE. However, this interpretation has had difficulty gaining judicial traction in two successive ways. First, as a threshold matter, parents have not succeeded in preponderantly proving its violation in most of the pertinent court decisions to date (e.g., A.M. v. Monrovia Unified School District, 2010; E.H. v. Board of Education, 2009; K.E. v. Independent School District No. 15, 2011); the exceptions have been relatively rare (e.g., Drobnicki v. Poway Unified School District, 2010). Second, the published case law directly supporting this per se interpretation of this language has been insignificant to date (Board of Educ. v. Schaefer, 2011), thus effectively eviscerating its exceptional, rigorous status.

**Potential for Substantive Elevation**

The second and potentially reverse, or compensating, provision appeared in the specifications for IEPs, which indirectly but intimately concerns FAPE. Specifically, IDEA 2004 provided that the IEP's specification of specially designed instruction and related services be based on "peer reviewed research to the extent practicable" (§ 1414[d][1][A][IV]). The regulations merely repeat this conditional requirement without elaboration (§ 300.320[a][4]), but the comments accompanying the regulations explained that peer-reviewed research (PRR) "generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before
the research is published” (IDEA Final Regulations Commentary, p. 46,664) and that “to the extent practicable, as used in this context, generally means that services and supports should be based on [PRR] to the extent that it is possible, given the availability of [PRR]” (p. 46,665). Based on its centrality to current special education best practice, the case law interpreting this provision merits separate attention.

**THE PRR CASE LAW**

**ONE APPROACH**

A hearing officer in Iowa, who is a full-time professor of special education, provided the initial and potentially groundbreaking PRR decision in relation to *Rowley’s floor-based substantive standard for FAPE* {Waukee Community School District, 2007). In the relevant part of her opinion, the hearing officer concluded that the district’s behavioral interventions with the child, an 8-year-old with autism, violated the IDEA 2004 provision for PRR. This part of her decision is remarkable because she primarily relied on a whole host of studies published in peer-reviewed journals while also citing, as a responsible academician, various articles in the professional literature that question the assumptions underlying PRR. However, several subsequent legal developments mitigated the thrust of her reasoning.

First, on appeal, the federal district court affirmed her decision but largely sidestepped the PRR issue by folding it into the *Rowley* standard (Waukee Community School District v. Douglas L., 2008). More specifically, the court concluded that the hearing officer’s delineation of criteria for behavioral interventions with substantive rights constituted legal error, but that she could permissibly consider these factors in applying *Rowley* (1982). Subordinate to this conclusion, the court responded to the parents’ citation of the IDEA’s PRR provision with a brief footnote: “An IEP which relies on behavioral interventions which are not supported by, or are contrary to, the relevant research may be such that it is not ‘reasonably calculated’ to provide an educational benefit” (p. 20). Applying this merged use of PRR, the court concluded that the preponderance of the evidence, with notable reliance on expert testimony and no citation of peer-reviewed studies, supported the hearing officer’s decision that the formulation and implementation of the behavioral interventions fell short of the *Rowley* standard.

**THE ALTERNATIVE APPROACH**

Second, the developments of a contemporaneous hearing officer decision in California were even more divergent from the Iowa hearing officer’s approach. The issue in the California case was whether the district’s eclectic approach, which included applied behavioral analysis (ABA), provided FAPE rather than the parents’ proposed ABA-only method {Rocklin Unified School District, 2007). The California hearing officer, who is a full-time administrative law judge, upheld the district’s IEP with this much more deferential reasoning:

If the component parts of a plan are peer-reviewed, then it follows that the sum of those parts should be considered as peer-reviewed as well, particularly in light of the moral, legal and ethical constraints that prevent the truest form of scientific study from being conducted. The ultimate test is not the degree to which a methodology has been peer-reviewed, but rather, whether the methodology chosen was believed by the IEP team to be appropriate to meet the individual needs of the child. (p. 1036)

On appeal, the federal district court upheld the hearing officer, reasoning much more concisely as follows:

It does not appear that Congress intended that the service with the greatest body of research be used in order to provide FAPE. Likewise there is nothing in the Act to suggest that the failure of a public agency to provide services based on [PRR] would automatically result in a denial of FAPE. As other Ninth Circuit courts have noted, if Congress intended to modify the *Rowley* standard, it would have said so. (Joshua A. v. Rocklin Unified School District, 2008, p. 1142)

Next, the Ninth Circuit affirmed, with this reasoning:

This eclectic approach, while not itself peer-reviewed, was based on “peer-reviewed research to the extent practicable.” . . .
need not decide whether District made the best decision or a correct decision, only whether its decision satisfied the requirements of the IDEA. In doing so, we “must be careful to avoid imposing [the court’s] view of preferable education methods upon the State.” (Joshua A. v. Rocklin Unified School District, 2009, p. 695, citing Rowley).

**The Predominant Choice**

The subsequent lower court decisions predominantly followed the path of the Joshua A. case (2008/2009). For example, a federal district court summarily rejected a parent’s PRR challenge to the IEP’s writing-instruction component, relying instead on the language arts coordinator’s testimony that the provision was in accord with best practice and appropriate for children with learning disabilities; the Third Circuit affirmed by citing this testimony without even mentioning PRR (Souderton Area School District v. J.H., 2009/2010). More recently, the Third Circuit expressly addressed PRR, following the district-deferential approach (G.S. v. Cranbury Township Board of Education, 2011). In addition, citing the lower court decision in Joshua A. v. Rocklin Unified School District for the conclusion that does not prohibit districts from using special education methods or materials that are not peer-reviewed, three federal district courts similarly denied parents’ PRR-based FAPE claims (Board of Education v. J.A., 2011; Ridley School District v. M.R., 2012; Stanley C. v. M.S.D. of Southwest Allen County Schools, 2008). Other courts followed this district-deferential and non-rigorous approach in interpreting and applying PRR (e.g., Doe v. Hampden-Wilbraham Regional School District, 2010; S.M. v. State of Hawaii Department of Education, 2011). The limited exception was a federal district court decision that ruled in favor of the parents based in part on the lack of evidence for “any scientific basis for the point system” (B.H. v. West Clermont Bd. of Education, 2011, p. 698) of the IEP’s behavioral component; however, the court would have found a denial of FAPE regardless of their PRR claim based on (a) prejudicial procedural violations, including not providing the parents with an opportunity for meaningful participation; (b) proof that the behavior component was incomprehensible and inconsistent; (c) the child’s behavioral regression rather than progress; and (d) deference to the hearing officer’s credibility determinations.

**Subordination via Judicialization?**

Thus, PRR has not become the “lever for . . . elevation of the substantive standard for FAPE” (Zirkel, 2008a, p. 409). Even at the juncture when court decisions had not predominated in either direction, the hearing officer in Waukee (2007) contributed to the peer-reviewed literature with tempered predictions. Although urging IEP teams to comply with not only the letter but also the spirit of the PRR provision (Etscheidt & Curran, 2010b), her ultimate conclusion was an accurate assessment of the impact on, and persistent preeminence of the substantive standard under Rowley (1982): “What has not changed with the reauthorized statute is the requirement that an IEP, with or without research-based methods, be reasonably calculated to provide educational benefit” (Etscheidt & Curran, 2010a, p. 147). The underlying reason may be the difference between the research-based, best-practice perspective of the special education profession, as personified by the Waukee hearing officer, and the more minimalist, precedent-based perspective of attorney adjudicators, as personified by the Rocklin (2007) hearing officer. If so, the gradual trend is toward “judicialization”—that is, more formal, and cumbersome, legalization akin to court proceedings—of impartial hearings under the IDEA (Zirkel, Karanxha, & D’Angelo, 2007) and to full-time administrative law judges as hearing officers (Zirkel & Scala, 2010). Indeed, Iowa recently became the latest state to change their system of IDEA hearing officers from part-time professionals with predominant special education backgrounds to attorneys in a generic governmental office of full-time administrative law judges, thus ending Etscheidt’s adjudicative tenure.

The judicialization of IDEA hearing officers, the conservative trend of the post-Rowley courts, and the effect of the decision-making reliance on precedents do not augur well for either PRR or other arguments for judicial elevation of the relatively relaxed substantive standard of Rowley (1982). Providing analogous evidence, Zirkel’s (2011) systematic analysis of the case law con-
cerning functional behavioral assessments and BIPs found that (a) the percentage of rulings in favor of parents shifted steadily from 63% in the parents' favor between 1998 and 2001 to 18% in 2010, and (b) for the overall period, the court rulings were significantly more favorable to school districts than those by hearing officers.

CONCLUDING ASSESSMENT

The focal question in *Rowley* (1982) for the three decades since then concerns the operational meaning of FAPE. The commentators have generally advocated elevating the substantive standard beyond the *Rowley* Court's interpretation. However, despite the Court's express effort to confine its ruling to Amy Rowley's particular circumstances, disavowing an intent "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act" (*Rowley,* 1982, p. 203), the lower courts have consistently adhered to its relatively relaxed substantive standard. Thus, the commentators who relied on the prefatory language in the successive 1997 and 2004 amendments of IDEA formed a chorus that amounted to a *vox clamantis in deserto.* Those who additionally or alternatively relied on NCLB also have been unheeded voices, with further problems including the collective and narrow academic emphasis of this legislation as starkly contrasted with the individualized and whole-child orientation of IDEA (e.g., Zirkel, 2004). Finally, Weber's (2012) reliance on the common law is likely to be fruitless because (a) the issue is one of statutory interpretation; (b) if "common law" is intended to only be used as an analogy, *Rowley* did not leave the door wide open for the lower courts; and (c) the *Rowley* progeny has expanded but not elevated its substantive standard, with the exceptions being far too limited to swallow the rule.

Even more significant, the courts have roundly rejected elevation of the substantive side of *Rowley* based on the more central, IEP language in IDEA 2004 in terms of PRR. The non-rigorous deferential lens of the courts has been distinctly different from the normative lens of the profession.

In sum, there is a glaring gap between the prevailing norms of special education and the prevailing interpretations of the courts. Without crystal-clear and specific provisions in the legislation, the courts obviously are not going to raise the standards for FAPE. Contrary to the *Rowley* Court (1982), which provided considerable weight to legislative history in determining Congressional intent, the modern emphasis in judicial interpretation for new obligations under federal statutes that provide funding under the Constitution's spending clause is on clear, unambiguous language in the legislation itself. Consider, for example, *Arlington Central School District Board of Education v. Murphy* (2006), in which the Supreme Court interpreted IDEA as not providing for recovery of the fees of expert witnesses for parents who prevailed in litigation under the IDEA, thus making it more difficult for parents to win FAPE cases. In subordinating legislative history to the unambiguous text of the IDEA, the Court intoned: "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds" (p. 304).

It is quite clear that if the operational meaning of FAPE is to change, the appropriate forum is Congress. For this purpose, the prescriptive proposals of the commentators have been predicated on one significant interest, that of children with disabilities, and their reliance on empirical research has not been prominent. However, in considering whether to raise the substantive standard for FAPE, and, if so, to what extent—meaningful benefit (per the Third Circuit), commensurate opportunity, self-sufficiency, or maximization—Congress will have to consider other competing interests. One is obviously cost considerations, given that (a) special education averages approximately two times the per-pupil cost of general education (Chambers, Parrish, & Harr, 2002), (b) the current political climate is fiscally "tight," (c) the previous Congressional promise for "full" (i.e., 40%) funding of special education remains a chimera, and (d) the resistance to "unfunded mandates" is increasingly influential. Other competing priorities obviously include education more generally, defense, health care, the infrastructure, and the environment.
In assessing the countering weight of the tangible and poignant interest of students with disabilities, as a symbol of our diverse and democratic society, Congress should consider two additional supporting rationales that the commentators have not articulated. First, even if the Rowley Court (1982) arrived at an enduringly just interpretation of FAPE, its lower court progeny and—via the 2004 amendments—Congress changed the balance by eroding the emphasis and rigor of the procedural side of its standard. As a matter of fairness, if Congress does not heighten the substantive prong, it should tighten the procedural prong, removing the harmless-error language for procedural violations and thus putting the impartial hearing process in sync with IDEA’s complaint resolution process (e.g., Zirkel, 2008b).

Congress changed the balance by eroding the emphasis and rigor of the procedural side of [the Rowley] standard.

Second, and most significantly, 30 years of experience have passed since Rowley (1982). Not only is the focus now adequacy for eligible children rather than access for excluded children, but also special education has had the relatively well-funded and increasingly accepted opportunity to mature as a professional field. Is it not time to raise the FAPE floor accordingly? Leading scholars in special education recently echoed this reasoning:

During 25 years of funding by the . . . U.S. Department of Education, special education researchers, often in collaboration with special education teachers, developed and validated a “technology” of assessment and instruction for the most instructionally needy students. . . . It is time, too, for policymakers, administrators, advocates, and academics to have high expectations of special educators. (Fuchs, Fuchs, & Compton, 2012, p. 271)

Markers of the maturation of the special education field in recent years include the increasing emphasis on both empirical research and interrelatedness with general education, as exemplified by the response-to-intervention movement, or what IDEA refers to as “a process that determines if the child responds to scientific, research-based intervention” (§ 1414(b)[6]). In light of its active role in the shaping of such other initiatives, the special education community needs to reverse its relative silence with regard to advancing the standards for FAPE.

To facilitate a well-balanced answer to the fundamental FAPE question via imposing reason on emotion, scholars and practitioners in the field of special education need to become more prominent in this policy determination. Thus far, the commentary concerning the FAPE standard has been largely absent in the special education literature; the early and rather tempered assessments of the PRR provision serve as a minor exception. As the directly affected professional field, special education needs to be much more active in contributing to prudent policy making concerning FAPE—“the central pillar of the IDEA statutory structure” (Sysytema v. Academy School District, 2008, p. 1312). For example, does research support an elevated standard of FAPE? If so, what should the operationally specific and—what the courts obviously demand—unambiguously transparent standards on both the procedural and substantive sides? What would be the practical effects of these revisions? Now is the time for the special education community to take a leading role in providing well-informed answers.

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