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When Good Enough Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the *Rowley* Definition of a Free Appropriate Public Education

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This Article asks the basic question whether the good enough education standard required by the *Rowley*[1] Court is still good enough in the high-stakes context of the No Child Left Behind Act ("NCLB").[2] In *Hendrick Hudson School District v. Rowley*,[3] the Supreme Court provided a framework to determine whether students with disabilities are provided with a "free and appropriate public education" ("FAPE") in accordance with the Individuals with Disabilities Education Act ("IDEA").[4] The *Rowley* Court interpreted IDEA as focusing more on students with disabilities accessing some educational benefits, rather than on assessing and maximizing their educational performance.

Examining the reauthorizations of IDEA in 1997 and 2004, Congress seems to have shifted its emphasis from access to some educational benefits, to assessing students' actual academic performance. That is to say that Congress has shifted its focus from what schools do to how students perform. This seems especially true when examining the IDEA reauthorizations in the context of NCLB's stringent requirements regarding penalties for schools not making adequate yearly progress ("AYP"), and

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1. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).
2. 20 U.S.C. § 6301 (2002).
3. *Rowley*, 458 U.S. at 176.
4. *Id.* at 181.

the mandate that the assessment of students with disabilities be included among the disaggregated data on which schools must report.

Because Congress and the President are in the process of shaping the reauthorization of NCLB once again, this Article not only contemplates a new student performance-oriented definition of FAPE but also calls for more stringent enforcement mechanisms inspired by NCLB so that the "good enough" standard from *Rowley* will no longer be good enough for students with disabilities.

Part I of this Article explores the initial purposes and application of FAPE as articulated in the precursor to IDEA, the Education for All Handicapped Children Act[5] ("EAHCA"), and the *Rowley* decision, which interpreted FAPE in the context of the EAHCA. The EAHCA was passed as a means to reform an education system in which students with disabilities were routinely denied access to an education. This emphasis on access, and not results, influenced the interpretation of the statute. *Rowley*'s holding required that a school's failure to provide a FAPE must be because the school did not comply "with the procedures set forth in the Act"[6] rather than the result of an ineffective or even a poorly designed individualized education program ("IEP").

Rowley held that a student receives a FAPE when the State provides "personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."[7] Under *Rowley*, "if the child is being educated in the regular classroom," the IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade-to-grade."[8] The *Rowley* court said that a school was not required to maximize a disabled student's educational outcome, but merely to provide an education "reasonably calculated" to provide "some educational benefit" as a baseline of educational services and instruction to allow the student with disabilities to advance from one grade to the next in a regular classroom setting.[9] Thus, the *Rowley* court chose to focus on the school's attempts at good enough access rather than on the student's actual good outcomes.

Part II of this Article explores the 1997 reauthorization of IDEA and its shift from the actions a school takes and procedures it follows, to

5. Pub. L. No. 94-142, 89 Stat. 773 (1975).
6. *Rowley*, 458 U.S. at 206.
7. *Id.* at 203.
8. *Id.* at 204.
9. *Id.* at 198-99.

impacts on student outcomes and performance. This section also discusses how the shift from school action to student outcomes also influenced how courts defined what constituted a FAPE and consequently how the courts' definitions led to confusion regarding *Rowley's* singular emphasis on a school's compliance with procedures and actions.

The original EAHCA did not focus on student results; instead, the Act was merely a first step to provide access to an education for students with disabilities. However, in 1997, Congress reauthorized IDEA to focus more on student results and educational outcomes; introducing requirements that school districts assess the effectiveness of the FAPE that was being provided to students with disabilities. The reauthorization called for students with disabilities to participate in statewide testing. Moreover, this reauthorization requierd performance indicators for students with disabilities to assess their educational progress.[10] Thus, even before NCLB, and despite the precedent of *Rowley*, Congress was moving toward an IDEA concerned with assessment of student outcomes as well as schools providing access.

Part III of this Article examines NCLB's stringent focus on educational outcomes, with particular emphasis on the requirement that the assessment of students with disabilities be disaggregated and reported. As stated earlier, NCLB reformed the model of federal funding for public schools by requiring, among other things, rigorous standards-based assessment for all students, including traditionally marginalized students with disabilities. Based on the results of these assessments, the United States Department of Education ("DOE") can require school districts to "restructure": penalizing schools by withholding funding, unless school districts engage in corrective action such as replacing administrators and closing schools.[11]

The rigid outcomes-based character of NCLB, as exhibited by its explicit goals and legislative history, seemingly runs counter to the FAPE standard articulated in *Rowley*. Not focusing merely on access, NCLB also focuses on student performance through standard-based assessment. Specifically, NCLB requires that assessments be disaggregated for specific groups of students, including students with disabilities.[12] Under NCLB, schools are required to make AYP on these assessments, both for their general student body, as well as specifically for stu-

10. Pub. L. No. 105-17, 111 Stat. 37 § 601(b)(1)-(4) (1997).
11. 20 U.S.C. § 6316 (2002).
12. 20 U.S.C. § 6301 (2002).

dents with disabilities, else they face stiff and progressive penalties.[13] NCLB embraces the notion that schools should be held accountable for helping each student, whether disabled or not, to achieve academic excellence.[14] In section 6301, NCLB states that one of its purposes is to ensure that all children "obtain a high-quality" education regardless of disability, race, socioeconomic status, or other disadvantage so they can "at a minimum [achieve] proficiency on challenging State academic achievement standards and state academic assessments."[15]

Thus, NCLB makes clear that it is concerned with educational outcomes and achievement. But this focus on maximizing educational outcomes and grade-level achievement at a minimum is exactly what the *Rowley* Court rejects. *Rowley* eschews student outcomes, requiring instead that individualized education plans be "reasonably calculated to enable the child to achieve passing marks and advance from grade-to-grade."[16] For *Rowley*, it did not matter whether the child performs at grade-level, only that there was a reasonable attempt on the part of the school. Thus, for NCLB, grade-level achievement is a minimum, while for *Rowley* it is a hopeful goal.[17] The different emphases of these two approaches are distinct and end up creating confusion.

Part IV of this Article will examine the 2004 IDEA reauthorization. The reauthorization took the changes and evolving emphasis on outcomes in the 1997 reauthorization a step further. This more pronounced emphasis on outcomes in the 2004 reauthorization is even apparent in the new name of the statute. Instead of the Individuals with Disabilities Education Act, the statute is now to be referred to as the Individuals with Disabilities Education *Improvement* Act ("IDEIA").[18]

It appears that Congress attempted to more closely align IDEIA with NCLB, explicitly requiring actual student improvement as proven with rigorous standards-based assessment. As stated above, NCLB reformed the model of federal funding for public schools by requiring standards-

13. 20 U.S.C. § 6316 (2002).

14. George W. Bush, *President Signs Landmark No Child Left Behind Education Bill*, George W. Bush White House Archives (Jan. 8, 2002), http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020108-1.html. "every single child, regardless of where they live, how they're raised, the income level of their family, every child [deserves to] receive a first class education." *See also* 20 U.S.C. § 6301 (1), (9) (2002).

15. 20 U.S.C. § 6301 (2002).

16. *Rowley*, 458 U.S. at 204.

17. 20 U.S.C. § 6311 (2006).

18. 20 U.S.C. § 1400 (2010).

based assessment for all students, even those traditionally marginalized, such as students with disabilities.

Following NCLB's lead, IDEIA requires an enhancement of teacher qualifications and accountability for learning results, two of the cornerstones of NCLB.[19] Furthermore, IDEIA also provides for the allocation of funds for children not yet diagnosed with disabilities, a forward-looking mechanism to ensure that schools can be prepared to satisfy the requirements of both NCLB and IDEIA.[20] Thus, IDEIA, more than the preceding versions of the statute, stays true to its name by attempting to encourage, facilitate, and mandate student improvement as opposed to providing only "some educational benefit." The question then becomes, does this NCLB "carrots-and-sticks" approach, in light of IDEIA's improvement of the academic performance of students with disabilities supplant the "some educational benefit" standard and singular focus on schools as articulated in *Rowley*?

Part V of this Article addresses that very question while also examining the benefits of the implementation and enforcement mechanisms of NCLB as a model for IDEIA in light of current discussions about reauthorization. Litigation for a violation of FAPE pursuant to the IDEIA is almost always a costly and time-consuming process that may not resolve the issues that led to the litigation in the first place. Furthermore, during the costly and often lengthy litigation, the developing student with disabilities may not be receiving much needed education and services, which can negatively impact their development and life trajectory.[21] Additionally, relationships between parents and schools that must continue after litigation are often strained by weathering such an adversarial process. This is one of the reasons why the current IDEIA encourages and at times requires mediation or resolution sessions.

However, the Act remains difficult to enforce. For example, in *Corey H. v. Board of Education for the City of Chicago*, the District Court found that the City of Chicago and Illinois State Board of Education

19. 20 U.S.C. § 1400(d) (2010).

20. *Id.*

21. While IDEIA has a "stay put" provision that ensures a student who is suing for not receiving a FAPE will be no worse off than they would under the status quo, it is often this very status quo level of education that the student is pursuing litigation over. Litigation can last years, and if the court does end up determining a FAPE was not provided, that decision may alter the child's life trajectory for as many years as the litigation took, if not more. For example, the stay put provision would have Amy Rowley continue to use an FM hearing aid through the many years of litigation, the very approach that the parents were suing over.

were systematically failing to follow the provisions of IDEA even through the course of litigation and negotiations with the district court judge.[22] On the other hand, many school administrators fear NCLB and, therefore, obey it proactively with greater consistency.[23] NCLB has stricter, more direct, and more enforceable penalties for lack of educational achievement than IDEIA, making compliance more viable.

Moreover, NCLB and its assessment-based standards model allow (and to a great extent, demand) that schools be forward-looking in their maintenance and execution of their special education programs. Schools must pay more attention to the creation of each and every IEP for their students with disabilities to ensure not only that the students are receiving a FAPE, but also that they are able to learn and grow in a manner that will lead to meaningful results both on the IEP and in the disaggregated test scores.

Undoubtedly, NCLB seems to be replacing *Rowley* as the standard for satisfying a FAPE. While the DOE can withhold federal funds under IDEIA, the "some educational benefit" standard seems to be far weaker than a demand that students with disabilities show yearly improvement on assessments. Standards-based assessments create a very powerful proactive enforcement mechanism that IDEA litigation cannot provide. Systemic enforcement (firing principals, shutting down schools, and

22. Corey H. v. Bd. of Educ., 995 F.Supp. 900 (N.D.Ill. 1998). In *Corey H.*, the District Court found that the Board of Education of the City of Chicago and the State Education board were systematically failing to follow the provisions of IDEA. Despite the finding of almost a complete systemic failure to follow IDEA, the remedies of the court (a "comprehensive compliance plan" to be submitted to the court detailing how failures are being addressed) pale in comparison to the funding and corrective action threats within NCLB.

23. At the time of the publishing of this article, the Obama Administration announced it would grant waivers to schools that were not making AYP. While some may see this as an indication that the NCLB penalties are not as consequential as they have seemed, it does not detract from the fear that has and will likely continue, amongst administrators about the potential penalties. There is still little indication about who will be granted a waiver and under what conditions. The administration has insisted that the use of waivers does not mean accountability is dead. *See* http://www.nytimes.com/2011/08/08/education/08educ.html?_r=1&ref=nochildleftbehindact. Secretary of Education Arne Duncan stated the concern amongst administrators, "I can't over emphasize how loud the outcry is for us to do something right now." Many states are facing failure rates of well over 50%. *See also, No Child Left Behind: Improving Educational Outcomes for Students with Disabilities*, American Youth Policy Forum & Educational Policy Institute, http://www.aypf.org/publications/NCLB-Disabilities.pdf. One national organization representative that was interviewed stated, "Many [administrators] are focused on the consequences—to the extent that those who can manipulate legislation will. It becomes an issue of 'the letter versus the intent of the law.' If we believe that other things have to be put in place for those subgroups to truly achieve the dream, then that will take a while. Otherwise, it will just be a legislative issue and local implementers will do what they need to do but no more. Those who have a deep conceptual belief will go further, but those who do not will only meet the letter of the law."

withholding funds) can have a very powerful and proactive effect, which is more beneficial for students with disabilities than the "good enough" standard that *Rowley* demands.

I. PART I: THE *ROWLEY* STANDARD

The United States Congress passed the Education for All Handicapped Children Act in 1975. This legislation required public schools that accept federal funding to provide educational access to children with disabilities. Congress was primarily motivated to pass the EAHCA because children with disabilities were systematically denied access to schools and educational services.[24] Under the EAHCA, public schools were required to provide children with disabilities a "free and appropriate education." The EAHCA defined FAPE as "special education . . . services that: (a) have been provided at public expense . . . ; (b) meet the standards of the State [E]ducation [A]gency ("SEA"); (c) include appropriate preschool, elementary school, or secondary school education in the state involved; and (d) conform with the [I]ndividualized [E]ducation [P]rogram."[25] Congress and the Supreme Court did not define FAPE beyond these vague parameters until the *Rowley* case.[26]

The parents of Amy Rowley, a deaf first grade student, sued Amy's school district for failing to provide Amy with a FAPE under the EAHCA by refusing to provide her a qualified sign language interpreter. Amy had residual hearing and was an excellent lip reader.[27] After trying several methods of instruction, the school district determined that Amy would best be served by using an FM hearing aid in a normal kindergarten class and that she would get special instruction from a tutor for the deaf once a day. They refused to provide a qualified sign language interpreter despite the Rowleys' concerns that Amy was not doing as well as she could in school because she was missing information.

The Rowleys contended that Amy should have been provided with a qualified sign language interpreter in all of her classes, instead of the hearing aid and tutor proposed by the school, so that she could maximize her academic performance and realize her scholastic potential commen-

24. 121 Cong. Rec. 19486 (1975).
25. 20 U.S.C. § 1401(9)(A)-(D).
26. *Rowley*, 458 U.S. at 176.
27. *Id.* at 184.

surate with the opportunity provided to other children. The District Court found that Amy was performing better than average in her class without the sign language interpreter and that she was advancing easily from grade-to-grade.[28] However, the court also found that Amy was "not learning as much, or performing as well academically, as she would without her handicap."[29]

It was this disparity between Amy's academic achievement and her academic potential that led the District Court to conclude that she was being denied a FAPE in accordance with the EAHCA.[30] Essentially, the District Court interpreted the EAHCA to provide that each child with disabilities should be given an opportunity to achieve their maximum educational potential commensurate with their non-disabled schoolmates. A divided Court of Appeals affirmed the District Court's decision that the EAHCA was concerned with academic potential.

The Supreme Court granted certiorari to hear the case, making it the first case the Court would hear interpreting any part of the EAHCA.[31] Citing the legislative history of the EAHCA, the Supreme Court overturned the decision of the lower courts, stating that Congress intended merely to make public education *available* to children with disabilities, but did not intend to impose any greater substantive educational standard than to make such access to education somewhat meaningful.[32]

The Court also found that the face of the statute "evinces a [C]ongressional intent to bring previously excluded handicapped children into the public education systems of the State and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child."[33] Clinging to this interpretation of the Congressional intent, the Court hedged on laying down any meaningful requirement for providing children with disabilities an effective FAPE, stating that the EAHCA was meant to provide educational opportunities, but that it did not "guarantee any particular level of education once inside."[34] For Justice Rehnquist, specific student achievement was not required nor even examined. Justice Rehnquist did not even look at the

28. Rowley v. Bd. of Educ., 483 F.Supp. 528, 532 (S.D.N.Y. 1980).
29. *Id.* at 532.
30. *Id.* at 534.
31. *Rowley*, 458 U.S. at 187.
32. *Id.* at 192.
33. *Id.* at 189.
34. *Id.* at 192.

students at all. All that Justice Rehnquist required for FAPE compliance was minimal action "reasonably calculated" to lead to "educational benefits."[35]

Viewing the EAHCA as a civil rights bill, the Court found that states were required to do nothing more than to provide "a basic floor of opportunity" and that states could not be held responsible for doing anything more than providing an IEP which may lead to educational benefits.[36] In the two-part test created by the Court, a child receives a FAPE as defined by the EAHCA when: (1) a school provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction"; and (2) if the requirements of the individual student's IEP and education in the classroom based on that IEP are reasonably calculated to enable the child to achieve passing marks and advance from grade-to-grade if the child is being educated in the regular classroom.[37] Essentially, if the state complies with the requirements of the EAHCA, and the child's IEP is reasonably calculated to allow them to achieve passing grades, then the child is being provided with a FAPE.

This two-part test, requiring that states merely grant equal access, not equal benefits or results, spawned two trends in the resulting litigation. First, District and Circuit Courts continued to struggle to assign firm substantive requirements for FAPE because *Rowley's* test was still extremely vague leading to a conflict among the circuits. For example, shortly after *Rowley*, the Fourth Circuit rejected the notion that *Rowley* required only a minimum showing of improvement in results.[38] The Fourth Circuit interpreted the "some educational benefit" standard from *Rowley* as something more than minimal results. However, a Third Circuit decision a few years later held that a student's lack of academic progress does not retrospectively render an IEP inappropriate, reasoning that under the second prong of the *Rowley* test, the analysis must focus

35. *Id.* at 207.

36. *Id.* at 201.

37. *Id.* at 203-204.

38. Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985). The Fourth Circuit affirmed the District Court's ruling that a student was denied a FAPE when his IEP improved his performance only minimally from year-to-year. The student in the case had advanced from grade-to-grade, but not improved on assessments related to his disability. In affirming the District Court's finding that the student was not provided with a FAPE, the Court stated, "*Rowley* recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children." *Id.* at 636.

on if the IEP seemed reasonable at the time.[39] The dictum of these two cases seems to confound how the *Rowley* court intended "some educational benefit" to be interpreted. On the one hand, the Fourth Circuit insisted that "some educational benefit" must lead to an improvement in educational results, whereas the Third Circuit was more focused on what the school did prior to the results of the IEP, regardless of whether or not they were effective.

More often, courts would find a denial of a FAPE only if the school committed a procedural error. As Justice Rehnquist noted in *Rowley*, "We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."[40] Thus, if parents thought their child was receiving inadequate services, they had to first carefully analyze the school's compliance status before pursuing legal action.

In the wake of *Rowley*, nonchalantly checking boxes on an IEP became more important than checking boxes on any assessment. Sadly, the incentive for schools in light of *Rowley* was to do the minimum necessary to satisfy the school's requirements to take action that is "reasonably calculated" to provide "some educational benefit." By aiming so low, *Rowley* resulted in students with disabilities being fortunate if they received a good enough education and absolutely astonished if they received a high-quality, individualized education.

II. PART II: 1997 IDEA REAUTHORIZATION

In 1997, Congress reauthorized the EAHCA as the Individuals with Disabilities Education Act.[41] This major reauthorization was primarily motivated by the fact that while students with disabilities had sufficient access to public education, the original law created low expectations that impeded the spirit and purpose of the law.[42] There was little performance

39. Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993).

40. *Rowley*, 458 U.S. at 206.

41. The EAHCA was actually renamed IDEA in 1990 and received several minor amendments in 1991. The first major reauthorization of the law since 1975 was in 1997.

42. Pub. L. No. 105-17 § 601(c)(4), 111 Stat. 37 (1997).

data available for students with disabilities. What data there was indicated that while many children with disabilities had access to public education, dropout rates were higher and graduation rates were lower than the rates of non-disabled peers.[43] Furthermore, Congress was mandated by the Government Performance for Results Act of 1993 to increase the efficiency of federal spending programs.[44]

This changed the focus of Congress from compliance to results across federal programs including IDEA. As a result, Congress sought to ascertain why students with disabilities were not performing better than they were and to implement steps to improve their performance. Thus, even before NCLB, Congress was moving beyond access and embracing accountability.

The stated purposes of IDEA in the 1997 reauthorization were: (1) to ensure that all students with disabilities were provided with a FAPE designed to meet their unique needs and prepare them for employment and independent living; (2) to assist states in the implementation of a statewide cohesive system of early intervention for infants and toddlers with disabilities; (3) to ensure that educators and parents have the necessary tools to improve educational results of students with disabilities "by supporting systemic-change activities; coordinated research and personnel preparation"; and (4) "to assess, and ensure the effectiveness of, efforts to educate children with disabilities."[45]

This explicit language shows a marked change in the focus of IDEA towards academic results. Congress made it very clear that IDEA is not just about welcoming students with disabilities into schools but also about preparing and teaching them the life skills they need to thrive beyond graduation. IDEA is not solely about warehousing students with disabilities as they bide their time in school but rather requires that districts seek out children with disabilities as young as possible to ameliorate the effects of their disability and provide them with an education to help transform their life trajectory.

Moreover, in 1997, Congress made it clear that schools are to assess whether their interventions and education are working. In addition, the 1997 reauthorization sought to integrate students with disabilities into the general curriculum and align the goals and assessments of students with disabilities into the same goals and assessments that were already

43. Pub. L. No. 105-17 § 601(c)(4), (8)(E)-(F).
44. Pub. L. No. 103-62, 107 Stat. 285 (1993).
45. 20 U.S.C. § 1400 (d)(1)-(4).

in place for all students "to the maximum extent possible."[46] Thus, Congress wanted students with disabilities to thrive to the maximum extent possible in the real world. This transparent congressional intent in favor of student potential seemed to undermine *Rowley's* clear rejection of it.

III. PART III: NO CHILD LEFT BEHIND ACT

In 2001, Congress passed the No Child Left Behind Act.[47] The bill was passed with bipartisan support, and it marked a major shift in educational policy. Unlike IDEA, which was a civil rights bill, NCLB created new conditions for federal funding for public schools. While IDEA confers the right to a FAPE to children with disabilities, NCLB enumerates standards for schools and ties state educational funding to stringent academic results. This shift towards accountability reverberated throughout the educational policy community and became the status quo. NCLB reformed the federal model for funding for public schools by requiring standards-based assessment for all students. Under NCLB, public schools are required to make reports of "adequate yearly progress" that are "statistically valid and reliable," part of a process that "results in continuous and substantial academic achievement for *all* students."[48] Thus, NCLB eschews mere access in favor of stringent tests for results. The title of the statute, "No Child Left Behind," originates from the goal of helping every child reach his or her academic potential and aiding each child to self-actualize into smart and effective adults no matter how disadvantaged by discrimination on the basis of race, ethnicity, economic circumstances, and disability. Even the grade-to-grade advancement and yearly progress mandated by NCLB provide *some* students with disabilities a greater educational achievement than minimal actions "reasonably calculated" to provide "some educational benefit" required by *Rowley*. NCLB's measurement of some educational outcomes of students with disabilities with respect to their grade level counterparts is far more comprehensive than no measurement at all.

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46. 20 U.S.C. § 601 (c)(5)(A)

47. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

48. 20 U.S.C. § 6311 (a)(2)(C) (2006) (emphasis added). It is worth noting that data disaggregation is not required when there is such a small amount of students in a category to yield an insufficient amount of data as to provide statistically reliable data.

Particularly relevant to this Article, NCLB called not only for broad testing across all groups (testing became mandatory for students with disabilities in IDEA 1997), but also for the tests to be disaggregated by groups that have been historically disadvantaged.[49] NCLB requires the statistical disaggregation of economically disadvantaged students, students from major racial and ethnic groups, students with limited English proficiency, and students with disabilities.[50] Like the general student population, which must display AYP on a state-administered exam, these disaggregated groups must likewise show AYP, lest the school district lose partial or total federal funding.

NCLB's requirement of data collection, disaggregation, and accountability for results complemented the requirements already in IDEA 1997. However, the fact that these requirements were in NCLB gave the requirement some meat on its bones: if schools did not comply by showing AYP, they now faced funding repercussions. NCLB states that it should work in conjunction with the requirements of IDEA, and the language of the statute indicates that the authors of the legislation viewed the two laws as congruent.[51] After NCLB, it seemed plausible that while a school could provide "sufficient" services to pass the FAPE threshold established in *Rowley*, it may still face the threat of reduced or withheld federal funds for not showing adequate academic progress for students with disabilities. In many cases, NCLB's threat of withholding funding or closing schools provides more compliance and a better education than enforcement of IDEA.[52]

IV. PART IV: 2004 IDEIA REAUTHORIZATION

In light of the massive shift in educational policy brought about by NCLB, Congress reauthorized IDEA in 2004 as the Individuals with Disabilities Education Improvement Act. IDEIA mainly sought to align the last reauthorization of IDEA in 1997 with NCLB, which had been codified in the intervening period. "Improvement" became the word of the day. While IDEIA left much of the original law intact, it made several important changes that encouraged and required academic improve-

49. *Id.*
50. *Id.*
51. 20 U.S.C. § 6311 (a)(1).
52. *See* Corey H., *supra* note 23.

ment and thus had a bearing on how and when a FAPE was being conferred.

The main changes in the IDEIA reauthorization included, but were not limited to, the following: (a) more closely aligning the special education law and NCLB; (b) allocating funds for serving students with disabilities who have yet to be identified as children with disabilities; (c) changing eligibility determinations for students with learning disabilities; (d) reforming due process hearing procedures; and (e) altering the rules for discipline of students with disabilities. One of the motivating ideas behind the IDEIA reauthorization was that special education teachers should be held to the same or similar accountability standards as their general education counterparts.[53] One way Congress aligned IDEIA with NCLB was requiring special education teachers to be "highly qualified." NCLB increased the standards for public school teachers, requiring a baseline of achievement and licensure. Under IDEIA, a highly qualified special education teacher must have full state certification or pass a special educational exam and must have obtained at least a bachelor's degree.[54] Thus, there was a clear concern and shift away from *Rowley*—it was not just about providing an education but providing for the effectiveness of that education.

As far as defining substantively what a FAPE is, the biggest change in IDEIA was its closer alignment of IDEA with NCLB's accountability and results-oriented approach to educational policy. By bringing special education under the assessment and accountability provisions of NCLB, IDEIA, like its 1997 reauthorization, guarantees that students with disabilities are fully included in district-wide achievement measures. These assessments determine whether the school will face coercive action. Thus, while Congress does not explicitly eschew *Rowley*'s definition of FAPE, Congress requires an education that results in adequate performance. Being reasonably calculated to provide "some educational benefit" does not cut it in the world of NCLB and IDEIA. Nonetheless, it appears courts are still not ready to dismiss the "some educational benefit" standard intended by the *Rowley* court.

The effect of IDEIA's closer alignment with NCLB has been double-edged. On one hand, schools can and should be tracking the progress of

53. Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 8 (2006).

54. 20 U.S.C. § 1401 (10)(B) (2006). This requirement does not apply to teachers at public charter schools.

students with disabilities and should be rewarded or penalized accordingly. This ensures schools are creating goals and helping students with disabilities improve their educational abilities. Schools that hire better teachers and take extra steps to produce substantive improvement among their students with disabilities should be rewarded for that effort. And the looming threat of reduced funding or school closure may perhaps bolster the FAPE standard and give students with disabilities a potentially higher level of educational success than they are legally required to receive under IDEA.

However, there has also been resistance to standards-based assessment from special education teachers and parents of students with disabilities. These two groups are skeptical of standards-based assessment for students with disabilities because they see a large gap between test results and real substantive learning.[55] The challenges of assessing students with disabilities with statewide tests are well-known and well-documented.[56] Another problem is that states are increasingly trying to redefine and reorganize who should be taking which assessment. Some schools have taken action that has diminished the number of students with disabilities that are included in assessments.[57]

Nonetheless, states are still bound by NCLB, regardless of what statistical maneuvers they take. The bottom line still remains that states and school districts must show academic progress among students with disabilities, or they will face penalties. As a result, students with disabilities are in somewhat of a legal purgatory: while IDEA was reauthorized to include more assessment-based requirements that focus on the impact a FAPE has on a student with disabilities, the *Rowley* standard focusing on what the school must provide remains good law. The *Rowley* standard makes it difficult for a student with disabilities to win a case for denial of FAPE without showing that the school did not take steps in the IEP

55. *See* Alfie Kohn, *Standardized Testing and its Victims*, Educ. Wk., Sept. 27, 2000, available at http://alfiekohn.org/teaching/edweek/staiv.htm.

56. *See* http://www.washingtonpost.com/wp-dyn/articles/A16409-2005Apr26.html. Standards-based assessment has shifted the substantive educational focus away from life skills and towards rigid academic achievement, which does not always better prepare students with disabilities for a productive adult life.

57. Stephanie Banchero & Darnell Little, *New Rules help Raise Test Scores: Schools Learning How to Navigate Federal Reforms*, Chi. Trib., Dec. 15, 2004, available at http://www.chicagotribune.com/news/local/chi-0412150299dec15,0,5518480.story. Some schools have raised the number of students that are required for statistically "sufficient" data. Others did not count students who transferred into the school past a certain point, or did not count tests that did not have enough questions answered.

"reasonably calculated" to lead to "some educational benefit."[58] However, schools are required to show more stringent and tangible data regarding students with disabilities under NCLB. Under NCLB, schools must demonstrate AYP based on rigorous standardized assessments.[59]

So while the threat of losing a lawsuit for a denial of a FAPE is unlikely for schools, the threat of reduced federal funding or school closure looms large and is perhaps as effective, if not a more effective method of strong-arming schools into providing students with disabilities a FAPE with real substantive learning results.[60] The question then becomes, does this "carrots-and-sticks" approach to improving the academic performance of students with disabilities supplant the "sufficient" standard articulated in *Rowley*?

V. PART V: A NEW DEFACTO FAPE STANDARD?

Given the shift in light of NCLB, the reauthorizations of IDEA and IDEIA, and the accountability movement, the federal appellate courts are now split on how they interpret FAPE; yet, neither camp has ventured to overturn *Rowley*. A majority of state courts and Circuit Courts (First, Fourth, Seventh, Eighth, Eleventh and the D.C. Circuit) maintain the *Rowley* standard as articulated in the 1982 decision that schools must provide "some educational benefit" and that schools are not required to maximize a disabled student's potential.[61] However, a minority of Circuit Courts (Second, Third, Fifth, Sixth and Ninth Circuits) require that states provide a "meaningful educational benefit."[62] It is unclear whether or not there is any real difference between the majority "some educational benefit" standard and the minority "meaningful educational bene-

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

59. 20 U.S.C. § 6311 (2006).

60. *See* Corey H., *supra* note 23.

61. *See, e.g.*, Maine Sch. Adm. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 11 (1st Cir. 2003); A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 675 (4th Cir. 2007); Todd v. Duneland Sch. Corp., 299 F.3d 899, 905 (7th Cir. 2002); Missouri Dept. of Elem. & Sec. Educ. v. Springfield R-12, 358 F.3d 992, 999 (8th Cir. 2004); C.P. v. Leon County Sch. Bd. Florida, 483 F.3d 1151, 1152-53 (11th Cir. 2007); Gellert v. D.C. Pub. Sch., 435 F.Supp.2d 18, 21-22 (D.D.C. 2006).

62. *See, e.g.*, Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 (2d Cir. 2006); Lauren W. *ex rel.* Jean W. v. Deflaminis, 480 F.3d 259, 273 (3d Cir. 2007); Adam J. *ex rel.* Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808-09, 811 (5th Cir. 2003); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 864 (6th Cir. 2004); Adams v. Oregon, 195 F.3d 1141, 1149-50 (9th Cir. 1999).

fit" other than semantics. For example, the Sixth Circuit follows the "meaningful educational benefit" standardalso noted that *Rowley* did not preclude the creation of a higher standard than just "some or any" educational benefit.[63] The Ninth Circuit has also found that the 1997 IDEA reauthorization called for a "meaningful educational benefit," but also observed IDEA is limited to guaranteeing a basic floor of opportunity.[64] Courts are confused because of the IDEIA and *Rowley* conflict. The courts are, perhaps, playing with semantics, as each circuit seems to take a different path in how it reaches its conclusions of whether the FAPE standard is satisfied.

But the important point is that whether or not *Rowley* is good law, one can hardly see how it is relevant in a school that relies on federal funds and, therefore, must comply with NCLB. Moreover, how can *Rowley* make sense in light of IDEIA, which is clearly concerned about individual student achievement and performance? IDEIA seems to obfuscate the second prong of the *Rowley* test by requiring schools to demonstrate actual educational benefits; not just "some educational benefits" but ones that correspond to grade level, in spite of disability.

It appears that we have reached a point of intersection. On the one hand, courts continue to apply the two-part standard laid out in *Rowley* that a school must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" and that the IEP must be reasonably calculated to enable the child to achieve passing marks and advance from grade-to-grade.[65] On the other hand, states are now required to show AYP among students with disabilities under NCLB, something that seems like more than just "some educational benefit."[66] However, courts have refused to acknowledge a substantive difference between these two standards. In 2008, the Seventh Circuit decided a case in which a school district sought a declaratory judgment that NCLB conflicted with IDEA.[67] The plaintiffs claimed that adherence to the IDEA requirements would cause the school district to miss its targets for AYP under NCLB.[68] Overturning the

63. Deal v. Hamilton Co. Bd. Educ., 392 F.3d 840 (6th Cir. 2004).

64. R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932 (9th Cir. 2007); N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202 (9th Cir. 2008).

65. *Rowley*, 458 U.S. at 203-204.

66. 20 U.S.C. § 6311 (2006).

67. Bd. of Educ. of Ottowa Township High Sch. Dist. v. Spellings, 517 F.3d 922 (7th Cir. 2008).

68. *Id.* at 925.

decision of the District Court that the plaintiffs lacked standing, the Seventh Circuit affirmed the lower court's decision on different grounds, holding that while the plaintiffs' claim was too weak to justify further litigation, if the acts are irreconcilable, NCLB must give way to IDEA.[69] But this approach is short sighted and unrealistic. In providing federal funding in conjunction with the power of corrective action, the consistent and strict systematic oversight of NCLB is much more likely to be enforced than the still good "some educational benefit" standard of *Rowley* and IDEIA and, therefore, might have greater influence in terms of what schools provide and what they consequently measure.

Litigating a violation of FAPE pursuant to the IDEIA is usually a costly and time-consuming process that often does not actually resolve the issues that led to the litigation.[70] Furthermore, during the litigation, the developing student with disabilities could lose access to much needed education and services, which when denied, can negatively impact the student's development and life trajectory in a way that does not allow them to maximize their potential as a productive adult as they might have had if they received proper education and services. Additionally, relationships that must continue after litigation among families and schools are often strained after weathering such an adversarial process. Due to such problems, the current IDEIA encourages and sometimes requires mediation or resolution sessions. NCLB, on the other hand, is feared by many school administrators and, therefore, NCLB compliance has greater consistency. Moreover, NCLB and its assessment-based standards model allow (and to a great extent, demand) that schools be forward-looking in the maintenance and execution of their special education programs. Furthermore, schools must pay greater attention to the creation of each and every IEP for their students with disabilities to ensure both that the student receives a FAPE and also that they are able to learn and grow in a manner that will lead to meaningful results both on the IEP goals and in the disaggregated test scores. Undoubtedly, NCLB is replacing *Rowley* as the standard for satisfying a FAPE. Standards-based assessments create a powerful proactive enforcement mechanism that IDEA litigation cannot provide. Systemic enforcement and corrective action (firing principals, shutting down schools, and withholding funds) can have a very powerful and proactive effect, which is

69. *Id.* at 925-926.
70. S. Rep. No. 105-17, at 26-27 (1997).

beneficial for students with disabilities, but creates some ambiguity and concerns about individual needs and rights under IDEA.