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*All our mistakes sooner or later surely come
home to roost.*

— James Russell Lowell**

Introduction

Although the nation's law guaranteeing special educational services for children with disabilities was enacted nearly 30 years ago in 1975, cases under the Individuals with Disabilities Education Act¹ (IDEA) have only occasionally reached the Supreme Court. One of those seminal cases, *Board of Education v. Rowley*,² set up and applied the principles of deference to the local school district's expertise, and in particular its choice of a teaching methodology. *Rowley*

* Associate Professor, University of Arkansas School of Law. Some of the research for this article was presented at the Virginia Education Law Conference in Williamsburg, Virginia, in April, 2003. Joseph Morrison, J.D. 2004, and M. Craig Smith, J.D. expected 2005, researched material for this article. The University of Arkansas School of Law provided research support. Thanks also to Professors Anne Proffitt Dupre, Gary L. Monserud, and Mark C. Weber for their comments on the draft of this article.

** DEMOCRACY AND OTHER ADDRESSES (1886).

¹ 20 U.S.C. §§ 1400-1474 (2000). IDEA was reauthorized in December of 2004, as this article was being prepared for publication. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004). References to IDEA throughout this article are to the Act as in effect prior to these 2004 amendments. Unless noted, the amendments do not affect the content of this article.

² 458 U.S. 176 (1982).

also stressed the need for courts to give "due weight" to state administrative decisions when reviewing special education disputes.³

The principles of restraint and deference first articulated in *Rowley* have existed in tension with IDEA's mandate that a child in need of special education receive a free appropriate public education (FAPE).⁴ To accomplish this mandate, IDEA provides a statutory scheme that makes parents partners in the planning of an appropriate educational plan for their child and confers extensive due process rights, culminating in federal court review.⁵ The lower courts have grappled with these inherent tensions in reviewing disputes under IDEA. In the decades after the *Rowley* decision, the courts have developed standards for review of state hearing decisions that elaborate upon the deference and "due weight" constraints upon review that were emphasized in *Rowley*.

Recently, cases involving the education of autistic children have arisen with more frequency. For several reasons, these cases present a particularly timely and dramatic prism through which to examine these aspects of IDEA. First, autism appears to be on the rise in the United States, with stunning increases in its prevalence and diagnosis.⁶ Second, programs have been developed that use intensive early intervention to work with autistic children using applied behavioral analysis (ABA) techniques that are taught one-on-one.⁷ These programs are costly and require trained personnel. They also begin in the preschool years. Many school districts have had to develop programs and expertise rapidly in order to offer autistic children a FAPE. District programs may be school-

³ *Id.* at 205-08.

⁴ 20 U.S.C. § 1412(a) (2000). A FAPE means special education and related services that are provided at public expense, meet state standards, and conform with the individualized education program (IEP) developed for the child. 20 U.S.C. § 1401(8) (2000).

⁵ 20 U.S.C. § 1414(d)(1)(B)(I) (2000) (making parents of child with disability members of individualized education program team); 20 U.S.C. § 1415 (2000) (establishing and outlining procedural safeguards, mediation, impartial due process hearing, rights to bring civil actions).

⁶ *See infra* Part II.

⁷ *Id.*

based, and do not always offer the level of one-on-one work that parents may be seeking for their child. Because the stakes are high financially and for the future progress of the child, more of these kinds of disputes have made their way through the state administrative process and into the federal courts.

The courts have had to try to determine when a dispute over a child's educational plan is one over choice of "methodology," which, under *Rowley*, lies within the discretion of the school district, versus one whose resolution implicates the child's rights to appropriate educational services. The courts must approach this task with the further command to give "due weight" to administrative determinations on issues that are often the subject of lengthy hearings with expert testimony.

A recent First Circuit decision, *Lt. T.B. v. Warwick School Committee*,⁸ provides a paradigm case. There, despite a contrary state administrative decision, the appellate court upheld a school district's program as one of "reasonable choices" among "appropriate instructional methods."⁹ Through an analysis of additional federal court cases several themes surface. The courts are far less comfortable weighing in on competing educational perspectives than they are reviewing the procedural compliance of parties with IDEA's requirements. Deference to school districts' prerogatives in the area of methodology tends to lead to upholding of school district proposals. Where the state hearing officer has approved the school district's proposals, the "due weight" given by reviewing courts to the agency's determination reinforces this result. There are few, if any, ways identified by the courts to distinguish when a dispute is one of teaching methodology and when it is one of appropriate or inappropriate educational services, and reliance on experts is typical. One court which has attempted to develop a framework for judging the soundness of a school district's proposed methodology places significant weight on the

⁸ 361 F.3d 80 (1st Cir. 2004).

⁹ *Id.* at 83.

training of those defending and charged with carrying out that choice.¹⁰

A school district or parent involved in the process of developing an educational plan for an autistic child can draw several lessons from these cases. Credible expertise, documented by experience and training, goes a long way. It is vital that decisions be made based on the individual child's needs rather than using a cookie-cutter approach to programs or services. Respecting the IDEA process is important; a school district or parent who treats the other as an enemy to be avoided rather than a participant in a process will find its position on the merits less likely to be adopted. The more successful a school district is in incorporating into its plans the information and recommendations of its experts and those of the parents, the more likely its judgment is to be upheld on appeal. Finally, the child's prior experience and progress is rightly given high importance.

Part I of this article explains IDEA and the significance of the *Rowley* decision to judicial review in IDEA cases. Part II describes autism and its classification as a disability for special education eligibility, and describes approaches to education of the autistic child. Part III analyzes the recent First Circuit decision in *T.B.* as representative of the resolution of methodology disputes in these cases, and also looks at other federal cases to draw out their rationales. This section of the article identifies the guidance these decisions offer to schools and parents, and considers the structural appropriateness of IDEA's provisions, as interpreted and applied in *Rowley*, to disputes like these. It challenges reviewing courts to develop rubrics for assessing the appropriateness of an educational approach for a particular child, in order to realize IDEA's designation of the court as the ultimate guarantor of IDEA rights. Hazards lie in allowing deference to turn into blind acceptance. Too much deference and insufficient scrutiny of the soundness of a school's proposal for the education of a child with a disability can encourage school district decisions

¹⁰ *J.P. ex rel. Popson v. West Clark Comty. Schs.*, 230 F. Supp. 2d 910, 936 (S.D. Ind. 2002); see also *infra* part III.E.

based more on considerations of money and expedience than on appropriateness to the individual child's needs. It may also place the child's educational future at risk.

I. IDEA and Judicial Review of Special Education Disputes

IDEA was meant to open the door to education for children with disabilities who were either routinely excluded from public school, relegated to inadequate programs in separate classrooms, or never identified as in need of special educational support and left to fail.¹¹ IDEA does not promise that a child with a disability will succeed academically; instead it seeks to give that child the same opportunity to succeed as the child without a disability. To accomplish this, IDEA has set up a process that focuses on the ways in which the individual child's disability affects her learning and the specific kinds of support the child requires to progress. The resulting individualized education program, or IEP, is intended as the blueprint for provision of a free appropriate public education (FAPE) to that child.

IDEA envisions that school personnel and parents will work together to develop an understanding of the child and to create the IEP. IDEA's structure protects the child through procedures the parents can use to obtain review in the event of disagreement. The process includes an administrative hearing, and an appeal to the federal court. There, the court looks at both the process used to create the IEP and at the IEP's content. *Rowley* gave direction to the courts on both scores.

A. IDEA Alphabet Soup: FAPE, the IEP, and LRE

Today, over six million children, including nearly 600,000 pre-school-aged children, receive special education services supported through IDEA.¹² IDEA reaches individual children by offering funds to states that agree to comply with

¹¹ 20 U.S.C. § 1400(c) (2000).

¹² 24 OSEP ANN. REP. Executive Summary (2002) (reporting figures for 2000-01 school year).

its provisions.¹³ Those provisions require participating states to identify school-aged children who may have a disability,¹⁴ evaluate them,¹⁵ and provide each public school child with a disability with a free appropriate public education (the FAPE).¹⁶

The free appropriate public education required by IDEA must offer a child with a disability special education¹⁷

¹³ 20 U.S.C. § 1412(a) (2000).

¹⁴ 20 U.S.C. § 1412(a)(3) (2000). This obligation, known as "child find," includes all children residing in the state, including children enrolled in private schools.

¹⁵ The evaluation process is described in 20 U.S.C. § 1414 (2000). Information is gathered from multiple sources, often including testing by school or independent psychologists, teachers' reports, and medical opinion. Parental consent is sought for evaluation, but if refused, the school district may seek to proceed with the evaluation of the child without consent by obtaining authorization through due process procedures, unless that is inconsistent with state laws regarding parental consent. 20 U.S.C. § 1414 (a)(1)(C) (2000).

¹⁶ Students attending private schools who were not placed there by the school system do not have the same individual right to special education as public school students, but the school district is required to address the special education needs of private school students through planned services. 20 U.S.C. § 1412(a)(10) (2000); 34 C.F.R. § 300.454 (2004). Parents who place their child in a private school in order to secure appropriate special education for the child that the district has not offered may in appropriate circumstances, including the giving of prior notice, be able to seek reimbursement for those expenses. 20 U.S.C. § 1412(a)(10)(C) (2000); *Sch. Comm. of Burlington v. Dep't. of Educ.*, 471 U.S. 359, 369 (1985) (known as the *Burlington* case).

¹⁷ Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," including instruction in the classroom or other settings, and instruction in physical education. 20 U.S.C. § 1401(25) (2000).

and related services¹⁸ at public expense, through the implementation of a program derived out of the IEP process.¹⁹

The central document defining the special education and services that are to be provided to a child with a disability is the IEP, a document created by the school district using a team approach.²⁰ The statute itself provides only general definitions of the types of special education and related services an IEP may contain.²¹ The individual needs of the child with a disability are intended to be the focus of the IEP, rather than any preset levels or types of services for a particular disability.²² If a service is needed to comply with the

¹⁸ Related services include transportation, speech-language services, counseling, physical and occupational therapy, and some medical services, where the services are required to assist a child with a disability to benefit from special education. 20 U.S.C. § 1401(22) (2000). For example, health services including suctioning of the breathing tube of a ventilator dependent child, needed to allow the child to attend school, and intermittent catheterization performed by a nurse or trained layperson, have both been held to be covered related services. See *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79 (1999) (holding services of aide including suctioning of breathing tube to be related services); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 (1984) (treating catheterization as related service).

¹⁹ 20 U.S.C. § 1401(8) (2000) (defining FAPE as services conforming to the IEP).

²⁰ The IEP team includes the child's parents, a special education teacher, a school district representative with knowledge of the school system's curriculum and resources and who has either direct or supervisory special educational instruction qualifications, someone who can interpret evaluations, and others with expertise or knowledge of the child whom the district or parents want to include. The child may be part of the team where appropriate, such as when transition services for a child age 14 or over are being considered. *Id.*; see also 34 C.F.R. § 300.34(b) (2004). If the child is likely to be placed in the regular education classroom, a regular education teacher must be part of the team. 20 U.S.C. § 1414(d)(1)(B) (2000).

²¹ See statutory definitions in notes 17-18 *supra*. The statute also requires consideration of certain behavioral services in the case of children whose behavior will impede their learning or that of others; of language needs when a child has limited English proficiency; of Braille instruction for a visually impaired child; and of communication needs and instructional modes for a child who is deaf or hard of hearing. 20 U.S.C. § 1414(d)(3)(B) (2000).

²² Indeed, the courts take a jaundiced view of school districts whose proposed IEPs reflect predetermined programs rather than an individual

FAPE mandate, the school district must furnish it, even if it is costly.²³ What the statute does regulate in some detail is the way the child's needs for special education are to be described, the manner in which the services are to be delivered, and the objectives to be pursued.²⁴

IDEA also requires that children with disabilities be educated in the least restrictive environment (LRE) where their needs can appropriately be met.²⁵ This preference for integration is reflected in provisions that children with disabilities be educated to the "maximum extent appropriate" with children who are not disabled, and that children be removed from the regular educational program or placed in separate classes or schools only when education in the regular class cannot be satisfactorily achieved, even with the use of additional aids and services.²⁶ The LRE provisions thus acknowledge the history of segregation and exclusion surrounding the education of children with disabilities.²⁷ At the same time, IDEA contemplates there will be children for whom the only appropriate setting is a restrictive one, such as a residential school, a hospital, or a separate classroom.²⁸ It mandates that school districts provide for a continuum of

determination of the child's needs. *See, e.g., Malkentzos v. DeBuono*, 923 F. Supp. 505, 514 (S.D.N.Y. 1996), *rev'd. and vacated as moot*, 102 F.3d 50 (2d Cir. 1996) (holding child's needs were being "defined by the program rather than defining the program"); *B.D. v. DeBuono*, 130 F. Supp. 2d 401 (S.D.N.Y. 2000), *post-settlement attorneys fees determination*, 177 F. Supp. 2d 201 (S.D.N.Y. 2001) (stating policy of providing no more than ten hours of in-home therapy violated IDEA); *Sanford Sch. Comm. v. Mr. L.*, No. Civ. 00-CV113PH, 2001 WL 103544, at *7 (D. Me. Feb. 1, 2001) (stating program proposed was for "administrative convenience" rather than to benefit child).

²³ *Cedar Rapids Comty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79 (1999) (rejecting cost-based objections to providing health aide as related service).

²⁴ 20 U.S.C. § 1414(d)(1)(A) (2000).

²⁵ 20 U.S.C. § 1412(a)(5) (2000).

²⁶ *Id.*

²⁷ *See* 20 U.S.C. § 1400(c) (2000).

²⁸ 20 U.S.C. § 1401(25) (2000) (defining special education as including instruction "conducted in the classroom, in the home, in hospitals and institutions, and in other settings").

service settings,²⁹ but justify the use of more restrictive settings for any individual child.³⁰

The Supreme Court has not had occasion to apply or interpret the LRE provisions of IDEA, but the lower federal courts have developed approaches to reviewing the issue. These approaches look at the child's needs, the supports the district is providing, the effect of a placement on the educational process both for the child and for others, and cost.³¹ Disputes between school districts and parents that implicate application of the LRE preference of IDEA can go in both directions — in some cases, parents may argue for the child's placement in regular classes, when the school district believes the child would benefit more from a separate class or the education of other children will be disrupted by the child's presence.³² In other cases, the parents are seeking a more restrictive placement, typically in the form of a private school specializing in educating children with a particular disability, while the school district maintains the child can be

²⁹ 34 C.F.R. § 300.551 (2004).

³⁰ 20 U.S.C. § 1412(a)(5) (2000); 34 C.F.R. § 300.552(e)-(e) (2004).

³¹ See, e.g., *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir.), cert. denied, 537 U.S. 948 (2002); *Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398, 1403-05 (9th Cir. 1994); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1218 n.25 (3d Cir. 1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1043-52 (5th Cir. 1989). For scholarly analyses of LRE standards, see, e.g., Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775 (1997); Patrick Howard, *The Least Restrictive Environment: How to Tell?*, 33 J. L. & EDUC. 167 (2004); Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599 (1995); Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL'Y 147 (2001); Joshua Andrew Wolfe, Note, *A Search for the Best Idea: Balancing the Conflicting Provisions of the Individuals with Disabilities Education Act*, 55 VAND. L. REV. 1627 (2002).

³² See, e.g., *Beth B.*, 282 F.3d at 498-99 (upholding school authorities' placement in a separate classroom of a severely disabled student whose "mainstreamed" placement involved little or no social interaction and an essentially separate curriculum).

appropriately educated within the public school setting with some interaction with children without disabilities.³³

In autism cases, the LRE issue is often invoked by the school district that is offering a classroom-based program in contrast to the more restrictive home-based instruction favored by the parents.³⁴ Some parents, though, have argued that their favored educational approach, combining home instruction with partial day attendance in a regular pre-school, is less restrictive than placement in a class made up entirely of children with disabilities.³⁵ They also argue that a short-term restrictive placement that may lead to a child's successful long-term placement in a regular classroom is appropriate under IDEA.³⁶

B. Rowley and the "Benefit" Test

While IDEA stresses the individually crafted nature of each child's IEP, it gives less guidance on how to determine whether an IEP is adequate to provide the FAPE the law mandates for the child with a disability. In *Rowley*, the Supreme Court provided the standard that today governs the inquiry, ruling that the state is required to provide

³³ See James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD 469, 472-73, 478 (1999) (reporting that in 3 out of 4 placement disputes, parents favored a more restrictive setting than that proposed by the school district).

³⁴ See, e.g., *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 661 (8th Cir. 1999) (noting that parents' home taught program was more restrictive); *Dong v. Bd. of Educ.*, 197 F.3d 793, 803-04 (6th Cir. 1999) (holding school's program offered child FAPE in the least restrictive environment as compared to parents' program, which was appropriate but not least restrictive).

³⁵ See *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 978 (10th Cir. 2004) (reversing the district court's holding that constant presence of "shadow aide" for child in regular preschool made placement more restrictive, especially combined with home program, but remanding for consideration of cost and feasibility of district providing this placement).

³⁶ Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J. L. REFORM 331, 358-60 (1994) (arguing that the appropriate program is one that leads to integration of the child into the regular classroom).

"personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."³⁷ The Court specifically rejected the lower court's standard that the state must provide services allowing the child to maximize his potential "commensurate with the opportunity provided to other children."³⁸

The *Rowley* Court began by noting there was no specific definition of appropriate education in IDEA: "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children."³⁹ It then looked to the purpose of the statute and the legislative history, which emphasized the exclusion and misplacement of children with disabilities. The Court drew from this that the primary purpose of the statute was to provide meaningful *access* to public education rather than to guarantee any particular outcome: "The intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."⁴⁰ The Court read the use of the words "appropriate education" in the statute (and in court decrees in the constitutional cases that preceded IDEA's enactment) not to mean a "potential-maximizing education," but rather as referring to the differences that would make some settings or environments "not suitable" for a child with a disability.⁴¹ It saw the equal protection roots of IDEA as reflecting concern with offering a "basic floor of opportunity" in the form of access, rather than absolute equality of opportunity, regardless of capacity.⁴²

³⁷ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982). The Court was construing the provisions of the Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975), the predecessor to the current IDEA. Throughout this article, references to IDEA encompass its predecessor statute unless otherwise specified.

³⁸ *Rowley*, 458 U.S. at 189-90.

³⁹ *Id.*

⁴⁰ *Id.* at 192.

⁴¹ *Id.* at 197 n.21.

⁴² *Id.* at 199.

To be meaningful, however, and to avoid wasting money, the Court said access must be to an education sufficient to confer "some educational benefit" on the child.⁴³ IDEA required, then, "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁴⁴ Given the wide spectrum of children with disabilities, and the difference in the educational benefits they might obtain, one single test for adequacy could not apply to all children.

Amy Rowley was a deaf first-grader who attended regular classes with the supplemental assistance of an FM hearing aid, a tutor for the deaf, and speech therapy. Her parents sought the addition of a sign language interpreter in all of her academic classes. She was performing better than the average child in her class, and advancing from grade to grade without difficulty. The lower court, finding that Amy was not learning as much or performing as well academically as she would without her handicap, had found she was not receiving a FAPE. The Supreme Court reversed, noting that at least in the case of a child in regular classes, services were sufficient when they were "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."⁴⁵ The current version of IDEA has elaborated on this aspect of *Rowley* by requiring IEPs to enable "progress in the general curriculum" when appropriate.⁴⁶

The educational benefit standard enunciated in *Rowley* has acquired some judicial gloss. The most colorful metaphor speaks of the child as entitled to a "serviceable Chevrolet" as opposed to a Cadillac.⁴⁷ School districts need not provide the

⁴³ *Id.* at 200-01.

⁴⁴ *Rowley*, 458 U.S. at 201.

⁴⁵ *Id.* at 204.

⁴⁶ 20 U.S.C. § 1414(d)(1)(A) (2000); see also Tara L. Eyer, Commentary, *Greater Expectations: How the 1997 IDEA Amendments Raise the Floor of Opportunity for Children with Disabilities*, 26 EDUC. L. REP. 1, 14-16 (1998).

⁴⁷ *Doe v. Bd. of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 459-60 (6th Cir. 1993). But the Chevy has to run. See *Nein v. Greater Clark County Sch. Corp.*, 95 F. Supp. 2d 961, 977 (S.D. Ind. 2000) (finding district's plan was a "Chevrolet without a transmission—even if the engine might

best available program for a child with a disability, even where parents understandably seek it.⁴⁸ Courts have, however, stressed that the "educational benefit" required must be more than "trivial".⁴⁹

[T]he educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be "likely to produce progress, not regression or trivial educational advancement." In short, the educational benefit that an IEP is designed to achieve must be "meaningful."⁵⁰

In light of the individualized aspects of crafting an IEP recognized by the *Rowley* Court, courts have felt comfortable assessing progress and benefit in the light of the child's capacities. This makes the child's potential relevant, even if not the ultimate measure of an appropriate plan.⁵¹

run, no power ever reached the wheels."); *Metropolitan Nashville County Sch. Sys. v. Guest*, 900 F. Supp. 905, 909 (M.D. Tenn. 1995) (referring to parents' argument that the service provider in the student's IEP was "a Yugo").

⁴⁸ See *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004).

⁴⁹ *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) ("Clearly, Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.").

⁵⁰ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); see also *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (requiring "significant learning" and "meaningful benefit"); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries").

⁵¹ See *Ridgewood*, 172 F.3d at 247 (stating benefit "must be gauged in relation to the child's potential") (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988)); *Roland M.*, 910 F.2d at 991 (terming academic potential a relevant factor).

Although the educational benefit standard in *Rowley* was initially viewed by commentators with despair as a retreat from IDEA's promise, its application by the lower courts has proved more encouraging. Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A*

While commentators have argued that other statutory provisions or policies, IDEA amendments after *Rowley*, and related legal developments justify a more rigorous standard for assessing an appropriate education,⁵² the courts have continued to apply the *Rowley* educational benefit standard.⁵³

C. Procedural Due Process as a Guarantor of IDEA Rights

In contrast to the relatively sparse substantive provisions of IDEA, the statute sets out a highly detailed set of processes for evaluation, IEP meetings, and for resolution of disputes over a child's IEP.⁵⁴ At many points, the school district must give detailed notification to a child's parents of

Study in the Interpretation of Radical Statutes, 24 U.C. DAVIS L. REV. 349, 351 (1990); see also Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. LEGAL. COMMENT. 675, 812-28 (2004) (reviewing post-*Rowley* Third Circuit decisions).

⁵² Dixie Snow Huefner, *Judicial Review of the Special Education Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483, 484 (1991) (arguing that review should focus on IEP components to assess appropriateness of program); Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. & L.J. 561, 574-75 (2003) (positing that Congress' stress on high expectations for all children, in 1997 IDEA amendments and enactment of No Child Left Behind Act, combined with state constitutional decisions guaranteeing an "adequate" education for all children, should raise the standard); Charlene K. Quade, Article, *A Crystal Clear IDEA: The Court Confounds the Clarity of Rowley and Contorts Congressional Intent*, 23 HAMLINE J. PUB. L. & POL'Y 37, 58 (2001) (claiming that only broad interpretation of *Rowley* satisfies Congress' intentions).

⁵³ E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004). Some states require by state law that a higher standard apply. See, e.g., *Cone v. Randolph County Schs.*, 302 F. Supp. 2d 500, 509-10 (M.D.N.C. 2004), *aff'd* 103 Fed. Appx. 731 (6th Cir. 2004), *cert. denied* 125 S. Ct. 1077 (2005) (interpreting North Carolina's policy of ensuring every child a "fair and full opportunity to reach his full potential" as placing a higher burden on school districts to "eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible.").

⁵⁴ 20 U.S.C. §§ 1414, 1415. See also 34 C.F.R. §§ 300.500-.528 (2004).

its actions and of the due process provisions of IDEA.⁵⁵ The parents are explicitly made participants in the IEP team process.⁵⁶

The dispute resolution provisions allow the parents to seek an impartial hearing before a state administrative hearing officer.⁵⁷ Before proceeding to a hearing, mediation is made available.⁵⁸ Either the parents or the school district can file a civil action in federal district court to challenge the result of the state hearing.⁵⁹ The court is authorized to hear additional evidence.⁶⁰ It is directed to base its decision on the preponderance of the evidence and to grant what it deems to be appropriate relief.⁶¹ Parents who prevail at either the state

⁵⁵ 20 U.S.C. §§ 1415(b)-(d) (2000).

⁵⁶ 20 U.S.C. § 1414(d)(1)(B) (2000).

⁵⁷ 20 U.S.C. §§ 1415(f)-(h) (2000). Some states use a two-level administrative process which may combine a local hearing officer with state administrative review. *Id.*

⁵⁸ 20 U.S.C. § 1415(e) (2000).

⁵⁹ 20 U.S.C. § 1415(i)(2) (2000).

⁶⁰ *Id.* Although the court is permitted to hear additional evidence, most courts have restrictively interpreted the circumstances when such evidence will be received. *See, e.g., E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998) (requiring "solid justification" be shown by party seeking introduction of new evidence); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 667 (4th Cir. 1998) (interpreting "additional evidence" to mean supplemental, and barring evidence that was or could have been presented at the administrative stage).

For a recent, more liberal approach to admission of additional evidence, *see Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 850 (6th Cir. 2004). The *Deal* court rejected the idea that additional evidence must be supplementary, limiting its admission only by saying the evidence must be "necessary for consideration of whether the original IEP was reasonably calculated to afford some educational benefit," and terming admission a matter within the discretion of the district court. *Id.*

⁶¹ 20 U.S.C. § 1415(i)(2)(B)(iii) (2000). Appropriate relief includes a wide range of equitable relief, including compensatory education, and in appropriate cases, reimbursement for special education expenses, including private school tuition, incurred by parents during the dispute resolution process. *See Sch. Comm. of Burlington v. Dep't. of Educ.*, 471 U.S. 359, 361-67 (1985) (tuition reimbursement); *Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) (compensatory education); *see also* Terry Jean Seligmann, *A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465 (2002) (discussing remedies for IDEA violations in detail).

administrative hearing level or in court may seek attorneys' fees.⁶²

The significance of procedural rights to the enforcement of IDEA was recognized by the *Rowley* Court:

The importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.⁶³

The *Rowley* Court posited that Congress believed compliance with the IEP process would lead to compliance with the provision of a FAPE.⁶⁴ It saw the role of a reviewing court as necessarily one that should avoid displacing that process, and went on to bound the scope of the courts' judicial review under IDEA.

D. *Rowley and the Deferential Scope of Judicial Review*

When the *Rowley* case reached the Supreme Court, the parties were in conflict over the scope of judicial review. The school district argued the reviewing court in an IDEA case had

⁶² 20 U.S.C. §§ 1415(i)(3)(B)-(G) (2000). The award of attorneys fees is bounded both by statutory provisions designed to curb perceived abuses, *see id.*, and by the interpretation of "prevailing party." *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 600 (2001) (requiring judgment on merits or consent decree be entered); Mark C. Weber, *Litigation under the Individuals with Disabilities Education Act after Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357 (2004) (arguing that *Buckhannon* should not be extended to IDEA claims).

⁶³ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982).

⁶⁴ *Id.* at 206.

power only to look at procedural compliance, with no power to look at the substance of the IEP.⁶⁵ The parents contended the statute called for *de novo* review of the school district's educational decisions.⁶⁶ While the Court did not take a completely hands-off approach, it read IDEA's relative absence of substantive requirements, together with the requirement that the administrative record be filed with the reviewing court, to qualify the "preponderance of the evidence" standard. "[The standard] is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."⁶⁷ The record filing requirement obligated the reviewing court to give "due weight" to the administrative proceedings.⁶⁸

The Court outlined a two-step process for the reviewing court in an IDEA dispute:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.⁶⁹

The Court went even further with respect to the deference due school authorities on what it referred to as "questions of methodology."⁷⁰ Courts lack the specialized knowledge and expertise to resolve educational policy questions, and thus must "be careful to avoid imposing their view of preferable educational methods upon the States."⁷¹ A

⁶⁵ *Id.* at 205.

⁶⁶ *Id.*

⁶⁷ *Id.* at 206.

⁶⁸ *Id.*

⁶⁹ *Rowley*, 458 U.S. at 206-07.

⁷⁰ *Id.* at 208.

⁷¹ *Id.* at 207-08.

reviewing court should not "overturn a State's choice of appropriate educational theories."⁷²

The attention given to methodology choices in *Rowley* was not incidental. The Court noted that the hearing officer and the district court had been presented with evidence concerning the best method of educating the deaf, with the Rowleys presenting evidence showing greater success with the use of the sign language interpretation mode of communication that they sought.⁷³ The subject, noted the Court, was one "long debated among scholars."⁷⁴ Rather than weigh in on this controversy, the Court concluded, the reviewing court should have stopped once satisfied Amy was receiving educational benefit from the program designed by the school district.

In the years after *Rowley*, the federal courts have further refined and developed the command to give "due weight" to the administrative proceedings, as well as the deferential standard of review of school district choices. The result has been a steep slope for parents to climb when they seek judicial review, especially where the state administrative outcome favors the school district.

The "due weight" standard has been applied variously depending upon the nature of the evidence, the issues on review, and the structure of the state's administrative review process. The job of the district court has been summarized as to review the administrative record and any supplemental evidence, and to make "an independent ruling based on the preponderance of the evidence."⁷⁵

⁷² *Id.*

⁷³ *Id.* at 207 n.29.

⁷⁴ *Id.*

⁷⁵ *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004). The First Circuit has referred to this as an obligation to render a "bounded, independent decision []--bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 990 (1st Cir. 1990) (quoting *Town of Burlington v. Dep't. of Educ.*, 736 F.3d 733, 791 (1st Cir. 1984)).

The degree of deference due the administrative proceedings is not a settled proposition. Courts often refer to the scope of review as a modified *de novo* review.⁷⁶ At least one Circuit has said that administrative findings in an IDEA case "are entitled to *prima facie* correctness" and a district court that does not intend to follow them must explain why it is not.⁷⁷ Courts have also distinguished between the degree of deference due procedural versus substantive findings, and reserved the most deference for matters requiring educational expertise lacked by the court.⁷⁸

Where there are two levels of administrative review, the courts have addressed how to apply "due weight" to the

⁷⁶ See, e.g., *Kings Local Sch. Dist., Bd. of Educ. v. Zelazny*, 325 F.3d 724, 728 (6th Cir. 2003); *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 270 (3d Cir. 2003); *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 927 (10th Cir. 1995).

⁷⁷ *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). Other courts have downplayed the degree of deference, saying it is a matter of discretion and emphasizing the court's need to form its own opinion of the record, "evaluating each element of the hearing officer's ruling." *Dombrowski v. Wissahickon Sch. Dist.*, No. CIV.A.01-5094, 2003 WL 22271654, at *4 (E.D. Pa. Sept. 30, 2003).

⁷⁸ *Burilovich v. Bd. of Educ. of Lincoln Consol. Schs.*, 208 F.3d 560, 567 (6th Cir. 2000) ("less weight is due to an agency's determinations on matters for which educational expertise is not relevant, so that a federal court would be just as well suited to evaluate the situation.").

Judge Posner of the Seventh Circuit, who has hypothesized that there is no warranted distinction between the "clear error" standard applied by reviewing courts and the "substantial evidence" standard by which administrative decisions are judicially reviewed, has said the degree of deference given a finding on review will often depend on the nature of the case: "the more technical the issue ... the less likely the reviewing court is to feel comfortable second-guessing the agency's resolution." *Sch. Dist. of Wisconsin Dells v. Z.S. ex rel. Littlegeorge*, 295 F.3d 671, 674-75 (7th Cir. 2002). In IDEA review, Posner wrote, the ability to receive evidence and the preponderance of the evidence standard of proof, both "features alien to ordinary judicial review," should be seen as related to each other. *Id.* at 675. If new evidence is admitted, the court's judicial review will be more searching, depending on the significance of the new evidence. If the reviewing court does not receive new evidence, however, the district court should owe the administrative decision "the usual deference that reviewing courts owe agencies when judicial review is limited to the administrative record," that is, the clear error or substantial evidence standard. *Id.*

results of two-tiered proceedings. While in most cases due weight must be given to the final decision of the state authorities, some courts have noted that where the final decision overturns a hearing officer's credibility assessments, the deference owed is to the hearing officer rather than the reviewing agency.⁷⁹

The language in *Rowley* that deference is due to school authorities' choices on matters of educational methodology has been invoked with some frequency, although often in a preliminary way rather than as the determining issue in a particular IDEA dispute. In addition to disputes like *Amy*

⁷⁹ See *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 636-37 (8th Cir. 2003) *cert. denied*, 540 U.S. 984 (2003) (giving final reviewing agency findings due weight where differences in findings and conclusions were not based upon credibility determinations); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 888-89 (9th Cir. 2001) (collecting and discussing cases from other Circuits).

An additional issue on which the Courts have expressed differing views is who bears the burden of proof in the administrative "due process" hearing. Several Circuits place on the school district the burden to show that its IEP is appropriate. See, e.g., *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2002) ("the school district always bears the burden in the due process hearing of showing that its proposed IEP is adequate") (citing cases); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (citing the school district's expertise and access to information and witnesses); *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994). The Fourth Circuit, however, joining the Fifth and Tenth Circuits, recently held that the parents who initiate the due process proceeding bear the burden of proving deficiencies, citing the traditional rule that the party initiating a proceeding bears the burden of proof, and citing in addition the deference owed to the school district's decisions. *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 450 (4th Cir. 2004), *cert. granted*, *Schaffer v. Weast*, 73 U.S.L.W. 3494 (U.S. Feb. 22, 2005); *Johnson v. Indep. Sch. Dist., No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). The *Weast* decision drew a dissent that stressed both the affirmative obligation on school districts under IDEA to offer an appropriate plan, and the relative imbalance between the school district and the average parent regarding educational alternatives. *Weast*, 377 F.3d at 458 (Luttig, J., dissenting). The Supreme Court's recent grant of certiorari in *Weast* means this issue will be decided during the Court's 2005-2006 term.

Rowley's over teaching methods for deaf children, parents seeking the use of particular phonics-based programs to teach reading to their disabled children were sometimes confronted with the "choice of methodology" argument.⁸⁰ But perhaps in no situation invoking a potential clash over methodology have the stakes for both parents and school districts been higher than in the determination of a FAPE for an autistic child.

II. Autism and IDEA

*He was asking too many questions and he was asking them too quickly. They were stacking up in my head like loaves in the factory where Uncle Terry works. The factory is a bakery and he operates the slicing machines. And sometimes a slicer is not working fast enough but the bread keeps coming and there is a blockage. I sometimes think of my mind as a machine, but not always as a bread-slicing machine. It makes it easier to explain to other people what is going on inside it.*⁸¹

Children who are diagnosed with autism face educational challenges. IDEA recognized autism as a

⁸⁰ See *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 294-97 (7th Cir. 1988) (holding dispute over cued communication versus total communication methodology underlay arguments invoking LRE provisions of IDEA); *E.S.*, 135 F.3d at 569 (rejecting parents' demand that IEP instruct child in Orton-Gillingham method of reading instruction). See also Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 8-9 (2000); Judith DeBerry, Comment, *When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. 503, 534 nn. 148-49 (2003).

⁸¹ Christopher, the 15-year-old autistic narrator, in MARK HADDON, *THE CURIOUS INCIDENT OF THE DOG IN THE NIGHT-TIME 7* (Random House 2003).

specifically covered disability in 1990.⁸² This, along with other factors, may have contributed to the significant documented increases in the number of children diagnosed with autism-related disorders.⁸³ While there may be no cure for autism, research shows early and intensive educational intervention can improve the skills of many autistic children in a variety of areas.⁸⁴ Major therapies include the use of applied behavioral analysis (ABA) techniques involving one-on-one instruction, and communication-based classroom approaches such as TEACCH.⁸⁵ The existence of differing approaches to

⁸² 20 U.S.C. § 1401(3) (2000), amended by Pub. L. No. 101-476 (1990), 104 Stat. 1103 (1990); see also 34 C.F.R. § 300.7(c)(1) (2004) (further defining autism).

⁸³ A 2003 study in metropolitan Atlanta by the Centers for Disease Control and Prevention found a ten-fold increase in the diagnosis of autism over the previous decade. Autism Society of America, *Latest CDC Study Confirms High Autism Prevalence Rates* (Jan. 2, 2003), at <http://www.autism-society.org/site/News>; Sandra Blakeslee, *Study Shows Increase in Autism*, N.Y. TIMES (Jan. 1, 2003), at <http://www.nytimes.com/2003/01/01/health/01AUTI.html>. Other research and studies confirm the increase in reports. See *infra* text accompanying notes 144-158.

⁸⁴ See, e.g., Susan E. Bryson, et al., *Autism Spectrum Disorders: Early Detection, Intervention, Education, and Psychopharmacological Management*, 48 CAN. J. OF PSYCHIATRY 506 (2003); Ian Dempsey & Phil Foreman, *A Review of Educational Approaches for Individuals with Autism*, 48 INT'L. J. OF DISABILITY, DEV. AND EDUC. 103 (2001); L. Juane Heflin & Richard L. Simpson, *Interventions for Children and Youth with Autism: Prudent Choices in a World of Exaggerated Claims and Empty Promises. Part I: Intervention and Treatment Option Review*, 13 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 194 (1998); Rose Iovannone, et al., *Effective Educational Practices for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 150 (2003); Juliann J. Woods & Amy W. Wetherby, *Early Identification of and Intervention for Infants and Toddlers Who Are at Risk for Autism Spectrum Disorder*, 34 LANGUAGE, SPEECH AND HEARING SERVS. IN SCHS. 180 (2003).

⁸⁵ TEACCH stands for Treatment and Education of Autistic and Communication Handicapped Children, a program developed at the University of North Carolina in the 1960s. Heflin & Simpson, *supra* note 84, at 206. Discrete Trial Therapy (DTT) is a specific, systematic method implementing the behavioral modification principles of ABA for children with autism. *Id.* at 201. Dr. Ivan Lovaas reported success in using DTT with a group of autistic children at UCLA in 1987, and ABA therapy programs now abound. See Dempsey & Foreman, *supra* note 84, at 107-10

the education of autistic children set the stage for disputes that have reached the courts in increasing numbers in the past decade.⁸⁶

A. *The Nature of Autism*

Autism is a complex disorder that impairs social interaction, verbal and non-verbal communication, and imagination.⁸⁷ Children with autism may display restricted,

(reviewing literature on ABA therapy); James A. Mulick & Eric M. Butter, *Educational Advocacy for Children with Autism*, 17 BEHAV. INTERVENTIONS 57 (2002) (coaching behavioral psychologists in advocating for ABA in IDEA hearings). There are also many other specific approaches and blended ones. Some, like facilitated communication, become the "flavor of the month" and then fade in the absence of evidence of their effectiveness; see Heflin & Simpson, *supra* note 84, at 198-99; others, such as "floor time," which reviewers have thought appear promising, await empirical research. *Id.* at 196-97.

⁸⁶ The number of children with autism spectrum disorders receiving special educational services increased from 5,415 in the 1991-92 school year, to 65,424 in the 1999-2000 school year. See Mitchell L. Yell et al., *Developing Legally Correct and Educationally Appropriate Programs for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 182, 182 (2003). There has also been a marked increase noted by observers in the number of IDEA cases involving the education of children with autism spectrum disorders. *Id.* at 182; Mitchell L. Yell & Erik Drasgow, *Litigating a Free Appropriate Public Education: The Lovaas Hearings and Cases*, 33 J. SPECIAL EDUC. 205, 205 (2000); Perry A. Zirkel, *Special Education Law Update VII*, 160 EDUC. L. REP. 1 (2002) (citing as new trend the emergence of autism as a major FAPE/LRE contributor); Perry A. Zirkel, *The Autism Case Law: Administrative and Judicial Rulings*, 17 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 84 (2002) (describing volume of autism litigation as on a steadily and steeply rising slope).

⁸⁷ Autism Society of America, at <http://www.autism-society.org> (last visited July 12, 2004); Rowland P. Barrett, *Is There an Autism Epidemic?* BROWN U. CHILD & ADOLESCENT BEHAV. LETTER 7 (April 2004); Dempsey & Foreman, *supra* note 84, at 103-04; Woods & Wetherby, *supra* note 84, at 180-82. For the diagnosis of autistic disorder within the spectrum of related pervasive developmental disorders (PDD), the current Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) of the American Psychiatric Association calls for the presence of impairments in social interaction, such as non-verbal behavior (eye-to-eye gaze, facial expression, and body postures) or development of peer relationships;

repetitive patterns of behavior, physical gestures, and activities.⁸⁸ Typically children with autism are not diagnosed until after they reach 15-19 months of age.⁸⁹ There is no scientific test for autism; it is diagnosed based on recognition of the behavior and characteristics of the disorder.⁹⁰

Once viewed as a fairly rare and serious disorder, often associated with mental retardation, autism is now seen as encompassing a spectrum of disorders, which includes children with higher level functioning under designations such as Asperger's Syndrome.⁹¹ First described in 1943 by Dr. Leo Kanner, autism was for a time wrongly viewed as a response to emotionally cold, "refrigerator" parents.⁹² It is now known

qualitative impairment in communication, shown by delay or total lack of development of speech, or the inability to sustain a conversation with others; and restricted repetitive and stereotyped patterns of behavior, interest and activities. American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 66-67 (4th ed. 1994)[hereinafter DSM-IV]; see also Karen Bowen Dahle, *The Clinical and Educational Systems: Differences and Similarities*, 18 FOCUS ON AUTISM & OTHER DEV. DISABILITIES 238, 240 (2003); Brian J. Gleberzon & Anita L. Rosenberg-Gleberzon, *On Autism: Its Prevalence, Diagnosis, Causes and Treatment*, 8 TOPICS IN CLINICAL CHIROPRACTIC 42, 44-46 (Issue 4, 2001).

⁸⁸ DSM-IV, *supra* note 87; Gary S. Mayerson, *How to Try an Autism Case*, NEW JERSEY LAWYER 28 (June 2003); Woods & Wetherby, *supra* note 84, at 181-82; Heflin & Simpson, *supra* note 84, at 194.

⁸⁹ Barrett, *supra* note 87, at 8; Bryson, *supra* note 84, at 507; Woods & Wetherby, *supra* note 84, at 182.

⁹⁰ Autism Society of America, *supra* note 87; Barrett, *supra* note 87, at 8; Mayerson, *supra* note 88, at 28.

⁹¹ DSM-IV, *supra* note 87, at 65. The five disorders coming under the umbrella of Pervasive Developmental Disorders (PDD) are Autistic Disorder, Asperger's Disorder, Childhood Disintegrative Disorder (CDD), Rett's Syndrome, and PDD-Not Otherwise Specified (PDD-NOS). *Id.* Autism was once considered a rare disorder with a prevalence of around 2-4 per 10,000 children. Rates in recent studies suggest a prevalence of 3-6 per 1,000 for all disorders along the spectrum. Lorna Wing & David Potter, *The Epidemiology of Autistic Spectrum Disorders: Is the Prevalence Rising?*, 8 MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 151, 151-53 (2002); see also Barrett, *supra* note 87, at 8.

⁹² Bryson, *supra* note 84, at 507; Eric Fombonne, *Modern Views of Autism*, 48 CAN. J. PSYCHIATRY 503, 503-05 (2003); James K. Whittaker, *Causes of Childhood Disorders: New Findings*, SOCIAL WORK 91, 91-93 (Mar. 1976); Wing & Potter, *supra* note 91, at 152.

to have a strong genetic component, and research into other environmental causes continues.⁹³ Boys are three to four times more likely than girls to be diagnosed with autism.⁹⁴

B. Autism and Educational Needs

The educational challenges faced by a child with autism can be substantial. There may be significant cognitive impairment. At one time, between 70 percent and 80 percent of autistic children were also diagnosed with mental retardation.⁹⁵ Today, as the diagnosis of autism has expanded to recognize related spectrum disorders at higher cognitive levels, the percentage of autistic children with mental retardation has dropped.⁹⁶ Recent studies now report 56

⁹³ Barrett, *supra* note 87, at 8; Fombonne, *supra* note 92, at 504-06; Gleberzon & Rosenberg-Gleberzon, *supra* note 87, at 46-50; *Autism Mysteries: New Clues*, 20 HARV. MENTAL HEALTH NEWSL. 1 (Dec. 2003) (reporting on negative conclusions of studies of measles, mumps and rubella (MMR) vaccine and autism and on study showing more rapid brain growth in autistic children); Hershel Jick & James A. Kaye, *Epidemiology and Possible Causes of Autism*, 23 PHARMACOTHERAPY 1524, 1525-29 (2003) (reviewing literature, conducting study and concluding that MMR vaccination is not the cause of the increase in the incidence rate of diagnosed autism); Rebecca Muhle et al., *The Genetics of Autism*, 113 PEDIATRICS 472 (2004); S. Panerai et al., *Benefits of the Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) Programme as Compared with a Non-Specific Approach*, 46 J. INTELL. DISABILITY RES. 318 (2002); Patricia M. Rodier & Susan L. Hyman, *Early Environmental Factors in Autism*, 4 MENTAL RETARDATION AND DEV. DISABILITIES RES. REV. 121, 121-28 (1998) (reviewing research on studies of infections, inoculations, pre- and perinatal factors, family histories, and drug and chemical exposures); Wing & Potter, *supra* note 91, at 152; Whittaker, *supra* note 92, at 93.

⁹⁴ NAT'L INST. OF CHILD HEALTH AND HUMAN DEV., *Autism Facts*, at <http://www.nichd.nih.gov/publications/pubs/autism1.htm> (last visited Aug. 24, 2004) [hereinafter NICHHD].

⁹⁵ CAL. HEALTH AND HUMAN SERV. AGENCY, DEP'T. OF DEV. SERVS., *Autism Spectrum Disorders: Changes in the California Caseload; An Update: 1999 through 2002*, at 15-16 (April 2003), at <http://www.dds.ca.gov> [hereinafter Cal. Report].

⁹⁶ *Id.*

percent of the autistic population as without mental retardation.⁹⁷

Communication skills, both spoken and written, are often problems for children with autism. They may not understand how to have a conversation.⁹⁸ They may have language difficulties and be non-verbal or delayed in speech.⁹⁹ They often use words in unusual ways, such as repeating words spoken to them (echolalia) or talking in single words.¹⁰⁰ Some children with autism resort to screaming to communicate their needs.¹⁰¹

Children with autism may also have social deficits and behavioral difficulties that can affect their ability to learn. They may not make eye contact, and may dislike physical contact.¹⁰² Behaviors may include self-injurious behavior, such as head-banging or placing objects in the mouth, and aggressive behaviors towards others.¹⁰³ The child's difficulty with change may also be an interfering characteristic.¹⁰⁴

C. Autism Diagnosis and IDEA Eligibility

Given that many children are diagnosed with autism as toddlers, their special educational needs begin at the earliest point of their interaction with the state's programs,¹⁰⁵ with

⁹⁷ *Id.*

⁹⁸ Autism Society of America, *Behavioral and Communication Approaches*, at <http://www.autism-society.org> (last visited Aug. 24, 2004).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Centers for Disease Control, *About Autism*, at <http://www.cdc.gov/ncbddd/dd/aic/about/default.htm> (last modified August 5, 2004) [hereinafter *About Autism*].

¹⁰³ Autism Society of America, *supra* note 87.

¹⁰⁴ DSM-IV, *supra* note 87, at 67 (referencing inflexible adherence to specific, nonfunctional routines; encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus as hallmarks of an autistic child's inability to cope with change).

¹⁰⁵ Many states have early childhood programs that offer services to children with autism before they reach the age where IDEA would mandate special education. *See, e.g., California Early Start, described at*

IDEA's coverage beginning as early as age three.¹⁰⁶ Moreover, because autism is a life-long biological disorder of development,¹⁰⁷ the educational needs of autistic children may continue until they "age out" of IDEA's coverage at age 22 or upon graduation.¹⁰⁸ In addition, today a far higher percentage of persons with autism are living at home with a parent or guardian than two decades ago, when institutionalization was common.¹⁰⁹

Autism was specifically added to the list of disabilities covered by IDEA in 1990,¹¹⁰ although prior to that amendment the statute had been interpreted as covering children with autism under other categories.¹¹¹ The current federal regulations define "autism" for purposes of IDEA's definitions of disabilities:

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with

<http://www.dds.cahwnet.gov/EarlyStart> (last visited Sept. 30, 2004); New York State Early Intervention Program, *described at* <http://www.health.state.ny.us/nydoh/child/index.htm> (last visited Sept. 30, 2004).

¹⁰⁶ 20 U.S.C. § 1401(3)(B) (2000); 20 U.S.C. § 1412(a)(1)(B) (2000). Services for children under age three are available under Part C of IDEA, 20 U.S.C. §§ 1431-45 (2000).

¹⁰⁷ NICHHD, *supra* note 94.

¹⁰⁸ 20 U.S.C. § 1412(a)(1)(B) (2000); 34 C.F.R. § 300.122 (2004).

¹⁰⁹ Between December 1987 and December 2002 in California, there was a 32 percent increase, from 52.6 to 84.8 percent, in the segment of the autistic population living at home with parents or guardians, and a 22 percent decrease in the segment living in Community Care Facilities. Cal. Report, *supra* note 95, at 17. During the same period the age distribution of persons with autism has shifted toward younger persons, with the largest percentage now reported between ages 5 and 9. *Id.* at 13.

¹¹⁰ 20 U.S.C. § 1401(3) (2000), as amended by Pub. L. No. 101-476, 104 Stat. 1103 (1990).

¹¹¹ H.R. REP. NO. 101-544, at 4-5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1723-27 (noting that federal regulations had defined autism as a disability under "other health impaired" category of definition).

autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. A child who manifests the characteristics of "autism" after age 3 could be diagnosed as having "autism" if the criteria in this section are satisfied.¹¹²

The IDEA definition is both broader and narrower than the Diagnosis and Statistical Manual of Mental Disorders, or DSM-IV, the standard diagnostic criteria developed by the American Psychiatric Association.¹¹³ It is broader in that it does not incorporate and require the specific checklist criteria in the DSM-IV, some of which are designed to differentiate autism from other disorders considered part of the autistic spectrum of disorders. In addition, it allows for a diagnosis of autism for IDEA purposes where the child manifests the characteristics after age three.¹¹⁴ The definition is narrower in that it adds to the DSM-IV criteria the essential criteria for IDEA coverage that the disability "adversely affects a child's educational performance."¹¹⁵

Given IDEA's coverage, most children with autism will be eligible for special educational services. In fact, there are relatively few disputes over eligibility, as compared to

¹¹² 34 C.F.R. § 300.7(c)(1)(i) (2004).

¹¹³ DSM-IV, *supra* note 87, at 66-67; Dahle, *supra* note 87, at 244-46.

¹¹⁴ 34 C.F.R. § 300.7(c)(1)(i) (2004). IDEA also recognizes eligibility for special educational services for children ages three through nine based on "developmental delays" as defined by the state, where the state chooses to include these children. 20 U.S.C. § 1401(3)(B) (2000); 34 C.F.R. § 300.7(b) (2004). Some school districts may serve children under this eligibility category who could also be categorized as autistic for IDEA or other purposes. *See* Dahle, *supra* note 87, at 244-46 (discussing varying scenarios attributable to differences between DSM-IV and IDEA definitions).

¹¹⁵ *Id.*

those that concern the nature or intensity of special educational services for the child.¹¹⁶

D. Educational Approaches to Autism

The range of educational interventions is extensive, and there is no unanimity on whether one approach is better than all others.¹¹⁷ Nor does research yet suggest one practice or approach is right for all children.¹¹⁸ What does appear is that early and intensive educational interventions that target the deficits in behavioral, social, and communication skills of the autistic child are most effective.¹¹⁹

1. Applied Behavioral Analysis, Discrete Trial Training, and Lovaas Therapy

Applied Behavioral Analysis (ABA) is an approach developed from behavior modification studies, in which extensive data about the individual's performance and response to interventions is collected and used to help determine instruction and intervention content.¹²⁰ Discrete Trial Therapy (DTT) implements ABA for students with autism. Typically DTT is a one-on-one method using cues for the student to perform, followed by reinforcement for the wanted behavior.¹²¹ For example, the child may be asked to

¹¹⁶ See PERRY A. ZIRKEL, AUTISM AND THE LAW: RULINGS AND EXPERT ANALYSIS 29, 29 (2001) (analyzing administrative and judicial rulings and finding 17 issues relating to eligibility as compared to 364 relating to FAPE, placement, and services); Julie B. Fogt, et al., *Defining Autism: Professional Best Practices and Published Case Law*, 41 J. SCH. PSYCHOLOGY 201, 207-08 (2003) (reviewing Zirkel's database updated through 2002 and finding a total of 13 cases that raised eligibility issues).

¹¹⁷ Heflin & Simpson, *supra* note 84, at 194; Iovannone, *supra* note 84, at 150; see also sources cited, *supra* note 84; Autism Society of America, *Treatment Options Overview*, at <http://www.autism-society.org> (last visited Aug. 30, 2004).

¹¹⁸ Iovannone, *supra* note 84, at 153.

¹¹⁹ Dempsey & Forman, *supra* note 84, at 104.

¹²⁰ Heflin & Simpson, *supra* note 84, at 200-01.

¹²¹ *Id.*; see also *J.P. ex rel. Popson v. West Clark Comty. Schs.*, 230 F. Supp. 2d 910, 928-29 (S.D. Ind. 2002) (describing DTT program).

match colors or shapes. A response learned in the DTT environment must still be generalized to other settings.¹²²

Studies indicate ABA is an effective approach in teaching children with autism.¹²³ What is more controversial in the literature is whether ABA can "cure" autism, and also whether to be effective it must be the only approach used, and be used at intensive levels such as 20 to 40 hours per week.¹²⁴

In 1987, Dr. Irwin Lovaas of UCLA reported encouraging results from a treatment group of 19 autistic children who received intensive early intervention.¹²⁵ 47 percent had been able to attend public school successfully by first grade.¹²⁶ Subsequent studies have confirmed improvements in the areas of learning new skills and behaviors with the use of Lovaas-type intensive early intervention ABA techniques.¹²⁷

Criticisms of the Lovaas program have included the validity of control groups and selection for studies, as well as concerns with the limitations of ABA in the areas of independent and social play, or the child's ability to deal with new situations.¹²⁸ Despite these criticisms, for many parents, the possibility that their child with autism could be able, after some period of therapy, to integrate successfully into a mainstream classroom has moved them to implement the kind of intensive, home-based, one-on-one DTT program used by

¹²² Heflin & Simpson, *supra* note 84, at 200-01.

¹²³ *Id.*; see also Dempsey & Foreman, *supra* note 84, at 107-10; Iovannone, *supra* note 84, at 157-58.

¹²⁴ Heflin & Simpson, *supra* note 84, at 201.

¹²⁵ Dempsey & Foreman, *supra* note 84, at 109 (citing O. I. Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. CONSULTING AND CLINICAL PSYCH. 3 (1987)).

¹²⁶ *Id.*

¹²⁷ *Id.*; see also Autism Society of America, *supra* note 87.

¹²⁸ Dempsey & Foreman, *supra* note 84, at 109; Autism Society of America, *supra* note 87.

Lovaas, and to seek these services as the appropriate educational placement for their child under IDEA.¹²⁹

2. TEACCH

TEACCH, an acronym for Treatment and Education of Autistic and Related Communication Handicapped Children, was developed at the University of North Carolina, Chapel Hill, in the 1970s. It was the first legislatively mandated statewide program of treatment and services for children with autism.¹³⁰ TEACCH emphasizes structured teaching, including a structured physical environment, such as separate work areas for different activities, clear daily schedules, and visual cues to help children complete activities.¹³¹ It targets communication, social and coping skills.¹³²

As a classroom-based approach, TEACCH has been widely adopted both in the United States and in other countries.¹³³ Studies have validated the effectiveness of the individual components of structured teaching, and survey evidence has found satisfaction with it.¹³⁴ TEACCH components, such as a structured environment and teaching, have been termed "instrumental" for an effective program for

¹²⁹ See, e.g., Yell & Drasgow, *supra* note 86, at 207-08 (reviewing the Lovaas hearings and cases).

¹³⁰ Heflin & Simpson, *supra* note 84, at 206; Dempsey & Foreman, *supra* note 84, at 111; Autism Society of America, *supra* note 87.

¹³¹ Heflin & Simpson, *supra* note 84, at 207; Dempsey & Foreman, *supra* note 84, at 111; Autism Society of America, *supra* note 98; Panerai, *supra* note 93, at 318-20; see also *C.M. ex rel J.M. v. Bd. of Educ. of Henderson County*, 184 F. Supp. 2d 466, 474-76 (W.D.N.C. 2002) (describing TEACCH approach to education of children with autism).

¹³² Autism Society of America, *supra* note 98.

¹³³ E.g., S. Panerai, *supra* note 93 (Italy); Bengt Persson, *Brief Report: A Longitudinal Study of Quality of Life and Independence Among Adult Men with Autism*, 30 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 61 (2000) (Sweden). Division TEACCH at the University of North Carolina states that it has trained professionals from over 45 states and 20 foreign countries, including Brazil, Taiwan, Israel, Saudi Arabia, Russia, and Poland. Division TEACCH, *An Overview of Division TEACCH*, at <http://www.teacch.com/aboutus.htm> (updated Aug. 9, 2004).

¹³⁴ See Heflin & Simpson, *supra* note 84, at 207 (citing studies).

children with autism.¹³⁵ At the same time, there have been criticisms of the empirical research supporting the effectiveness of TEACCH, and of particular aspects of this approach.¹³⁶

3. Many Approaches; Common Themes

There are many other programs for children with autism, with more continually arriving on the scene. Several studies have reviewed and compared various approaches and the evidence for their effectiveness.¹³⁷ Some approaches initially draw attention but are discredited when evidence for effectiveness is lacking.¹³⁸ Others are experimental and await validation by more than anecdotal or individual case study accounts.¹³⁹

¹³⁵ *Id.*; see Iovannone, *supra* note 84, at 153, 157-59 (identifying systematic instruction and structured environments as "essential themes" in an effective educational program, but stating that there is "no empirical basis for recommending one approach or endorsing a single program as being superior for all individuals" with autism, and emphasizing need for individualized plans).

¹³⁶ See Dempsey & Foreman, *supra* note 84, at 111 ("At this time, it remains unclear what gains children make from inclusion in this program."); Glen Sallows, *Educational Interventions for Children with Autism in the UK*, 163 EARLY CHILDHOOD DEV. AND CARE 25 (2000), <http://trainland.tripod.com/glen.s.htm> (last visited Sept. 27, 2004) (identifying weaknesses of TEACCH as including TEACCH's belief that normalcy is not possible, evidence that autistic children learn more slowly in groups, and criticism of TEACCH's approach to behavioral methods as lacking sophistication).

¹³⁷ E.g. Dempsey & Foreman, *supra* note 84; Heflin & Simpson, *supra* note 84; Iovannone, *supra* note 84; NATIONAL RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM (2001) [hereinafter NRC Report]; Autism Society of America, *supra* note 87.

¹³⁸ Into this category would likely fall facilitated communication. See *supra* note 85.

¹³⁹ Heflin & Simpson, *supra* note 84, at 197 (indicating that support for efficacy of floor time approach, which systematically attempts to reestablish child's sequence of communicating with and relating to others by interacting with child in his or her activities, often on the floor, is mainly testimonial in nature); *Id.* at 200 (describing Fast ForWord computer program as at best experimental until efficacy and utility are determined through research).

In its review of educational interventions, the National Research Council (NRC) noted that both practical and ethical considerations make well-controlled studies with random assignment almost impossible to conduct.¹⁴⁰ Nonetheless, the NRC reported there are common characteristics for effective educational programs: early intervention; intensive, full-time, programming of a minimum of 25 hours per week, year round, that actively engages the child; planned teaching using brief periods of time with young children (15-20 minute intervals); enough one-on-one or small group instruction to meet the child's individualized goals.¹⁴¹ Programs should prioritize communication, social instruction, cognitive development, and play skills, and active approaches to behavioral issues.¹⁴² The NRC also recommended that if consistent with achieving the child's educational goals, the setting should be one allowing regular interaction with typically developing children, paralleling IDEA's "least restrictive environment" preference.¹⁴³

E. The Dramatic Increases in the Prevalence of Autism

The rate of diagnosis of autism has skyrocketed in recent years, taking it from a rarely expected occurrence rate of three in 10,000 as recently as 1991, to rates of between three and six in 1,000 in just a decade.¹⁴⁴ Recent reports by the Center for Disease Control of an examination of records from 1996 in Atlanta found a tenfold increase in the prevalence of autism.¹⁴⁵ Figures in California are especially dramatic. The

¹⁴⁰ NRC Report, *supra* note 137, at 6.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Autism Mysteries: New Clues*, *supra* note 93; Barrett, *supra* note 87, at 8; Wing & Potter, *supra* note 91, at 152-53 (2002); Gleberzon & Rosenberg-Gleberzon, *supra* note 87, at 42 (calling autism the third most common pediatric developmental disorder, following mental retardation and cerebral palsy).

¹⁴⁵ Marshalyn Yeargin-Allsopp, *Prevalence of Autism in a US Metropolitan Area*, 289 J. AM. MED. ASS'N. 49, 53 (2003); *About Autism*, *supra* note 102; Autism Society of America, *supra* note 87; Sandra Blakeslee, *supra* note 83. Another study by the CDC of children 3 to 10

results of California studies in 1999 and 2002 indicate autism is now more prevalent than childhood cancer, diabetes, and Down's Syndrome.¹⁴⁶ From December 1998 to December 2002, the population of persons with autism in California's Developmental Services System nearly doubled, a 97 percent increase in four years, and the number of persons with autism served climbed from 10,360 to 20,377.¹⁴⁷ California reported an increase in the population of persons with autism from 1987 to 2002 of 634 percent.¹⁴⁸ These reports have attracted notice beyond the medical journals, and popular media have brought them, and autism, to the public's attention.¹⁴⁹

Researchers have identified a number of factors that may have contributed to this growth in autism diagnoses.¹⁵⁰ The increased recognition and awareness by medical professionals of the characteristics of the autism spectrum disorders may be one factor.¹⁵¹ Some children previously diagnosed with mental retardation may now be more accurately diagnosed with autism.¹⁵² The age of recognition

years of age in Brick Township, New Jersey found a prevalence rate of 6.7 cases per 1000 children for all autism spectrum disorders, and of 4.0 cases per 1000 for cases meeting the full diagnostic criteria for autistic disorder. Jacquely Bertrand, et al., *Prevalence of Autism in a United States Population: The Brick Township, New Jersey Investigation*, 108 PEDIATRICS 1155 (2001).

¹⁴⁶ Cal. Report, *supra* note 95, at i.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., Sandra Blakeslee, *Increase in Autism Baffles Scientists*, N.Y. TIMES, Oct. 18, 2002,

<http://www.nytimes.com/2002/10/18/health/18AUTI.html>;

Blakeslee, *supra* note 83; Susan Fitzgerald, *Catching Up With Autism*, THE PHILA. INQUIRER, Jan. 13, 2003,

<http://www.philly.com/mld/inquirer/news/magazine/daily/4933012.htm>;

Anita Manning, *Autism's Surge Mystifies*, USA TODAY, May 18, 2004, Life at 8; Joetta L. Sack, *Sharp Rise Seen in Identification of Autistic Pupils*, 19 EDUCATION WEEK, No. 8, at 1 (Oct. 20, 1999); Lindsey Tanner, Associated Press, *Autism Numbers Surge, Prompting Call for Research*, HOUSTON CHRONICLE, March 14, 2003,

<http://www.chron.com/cs/printstory.hts/nation/1819125>.

¹⁵⁰ Wing & Potter, *supra* note 91, at 152-59; Barrett, *supra* note 87, at 7-8.

¹⁵¹ Wing & Potter, *supra* note 91, at 155-56; Barrett, *supra* note 87, at 7-8.

¹⁵² Wing & Potter, *supra* note 91, at 156.

may also be dropping. The addition of autism as a disability for IDEA purposes in 1991 has also been cited as a factor, in that the availability of services provided a reason to make the diagnosis.¹⁵³ Because the causes of autism are the subject of active research, it may also be found that there is an absolute increase in the numbers of children with autism, perhaps due to a combination of genetic and environmental factors.¹⁵⁴

Whatever the reasons, the increases in the numbers of children diagnosed with autism are real. They are reflected as well in increases in those receiving services under IDEA. Autism is now the fastest growing category of disability, outstripping learning disabilities in the rate of recent growth.¹⁵⁵ The number of children ages 6 to 12 receiving IDEA services in the category of autism has grown from 5,415 in 1991-92, when the definitions of IDEA were altered to specifically include autism, to 78,749 in 2000-01.¹⁵⁶ The need for early and intensive interventions for these children places demands on the expertise, services, and budgets of school systems nationwide.¹⁵⁷ Not surprisingly, more disputes over

¹⁵³ *Id.* at 157; Barrett, *supra* note 87, at 7; Sack, *supra* note 149, at 1; Tanner, *supra* note 149.

¹⁵⁴ Wing & Potter, *supra* note 91, at 158-60; Barrett, *supra* note 87, at 8; The MIND Institute, *The Epidemiology of Autism in California* 1, 4 (Robert S. Byrd, ed. 2002), available at www.dds.ca.gov/Autism/MindReport.cfm (last visited Sept. 27, 2004) (finding a real increase in autism, and noting that environmental exposures may help explain increase). Several studies have found no connection between autism and thimerosal, a preservative that was used through 1999 in the United States in the vaccines for MMR and for diphtheria, pertussis and tetanus (DPT), which contained traces of mercury. Parents of children with autism often notice a regression in the child's development around the age of 15-18 months, about the time that these vaccinations are generally given. The recent studies have apparently exonerated the vaccines, and the authors of the original study raising a possible connection have retracted their original conclusion. See *Autism Mysteries: New Clues*, *supra* note 93, at 1-2; Barrett, *supra* note 87, at 7.

¹⁵⁵ The Office of Special Education Programs reports that this category has grown more than 400 percent since reporting in the category began in 1992-93. 24 OSEP Ann. Rep. 20 (2002).

¹⁵⁶ *Id.* at 19, Table II-4.

¹⁵⁷ In one recent decision, the court noted that the cost of the ABA program sought by the parents for their child was \$50,000 to \$63,800 per year, and

services for children with autism have begun to work their way through the state administrative process and into the courts on judicial review.¹⁵⁸ There, the courts have confronted and tried to reconcile the child's right to an appropriate education with the commands of deference to school district and state agency expertise.

III. How the Courts are Sorting It Out

By the time a special education dispute reaches a federal district court, it has already been through a series of proceedings involving parents, school officials, and the state.¹⁵⁹ The IEP process has gathered evaluative information and brought the child's parents and school personnel together to attempt to agree on the appropriate program to meet the child's educational needs.¹⁶⁰ The school district has prepared an IEP for the child, and typically the parents have disputed its adequacy and appropriateness.¹⁶¹ There may have been a mediation process.¹⁶² The parents have pursued a hearing before an administrative hearing officer, at which counsel may have been present.¹⁶³ Expert witnesses, or at least their affidavits, have likely been presented to the hearing officer, along with the testimony of teachers. The hearing officer has

the school district's entire preschool budget was \$360,000 to \$400,000 per year. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 973 (10th Cir. 2004).

¹⁵⁸ See sources cited *supra* note 84.

¹⁵⁹ See discussion Part I.A, I.C *supra*. State courts may also have jurisdiction to hear appeals from the state administrative decision or to entertain IDEA-related claims. See, e.g., *In re Pawling Cent. Sch. Dist. v. New York Educ. Dep't.*, 771 N.Y.S.2d 572, 573 (N.Y. App. Div. 2004) (reviewing decision under general provisions for review of administrative hearings); *De Mora v. Dep't. of Pub. Welfare*, 768 A.2d 904 (Pa. Commw. Ct. 2001), *appeal after remand*, *Bucks County Dep't. of Mental Health/Mental Retardation v. De Mora*, 227 F. Supp. 2d 426 (E.D. Pa. 2002), *aff'd*, 379 F.3d 61 (3d Cir. 2004) (ordering reimbursement for services rendered by mother of pre-school child in her role as Lovaas trainer).

¹⁶⁰ See 20 U.S.C. § 1414 (2000).

¹⁶¹ See 20 U.S.C. §§ 1414, 1415 (2000).

¹⁶² 20 U.S.C. § 1415(e) (2000).

¹⁶³ 20 U.S.C. § 1415(f)-(h) (2000).

issued a decision which reviews both the procedural and substantive claims raised by the parents. In some states, a further review of the hearing officer's findings has taken place before a state review panel.¹⁶⁴

The district court approaches such a dispute as both a reviewer of the administrative record and a potential fact-finder itself, as the statute gives it the authority to receive additional evidence in some circumstances.¹⁶⁵ Yet it is more than a rubber stamp of either the school district's plan or the hearing officer's decision; it sits to determine compliance with IDEA based on a preponderance of the evidence.¹⁶⁶

Once the district court acts, there may yet be an appeal to the Circuit Court of Appeals. There, too, the appellate court will review how well the district court executed the tricky dance of respecting local and state expertise and authority, and enforcing the child's and parents' rights under IDEA.

As disputes involving programs for children with autism have made their way through this process and into the courts, judges have had to sort out legal questions from educational debates, and distinguish when a dispute invokes educational appropriateness (which is their role to review) as opposed to a choice among differing educational approaches (which is not). A look at the ways the courts have approached and resolved these tasks in the shadow of *Rowley* shows that, as with most situations where a court is asked to wade into areas where law, science and policy intersect, comfortable ground for the court extends to legal points, but starts to give way when the substance of a plan is questioned.

Because the cases involving programs for children with autism starkly paint this dilemma, they offer an opportunity to look at how well IDEA's provisions and the *Rowley* Court's counsel on review of IDEA disputes are working. To help assure both appropriate education for children with disabilities and appropriate deference to school

¹⁶⁴ *Id.*

¹⁶⁵ 20 U.S.C. § 1415(i)(2)(B)(iii) (2000); sources cited *supra* note 60.

¹⁶⁶ 20 U.S.C. § 1415(i)(2)(B)(iii) (2000); *see also* discussion Part I.D *supra*.

authorities and state expertise, better standards than those gleaned from *Rowley* may be needed.¹⁶⁷

In the meantime, school districts and parents should recognize the importance, given the courts' role, that procedural and other legal issues can play in resolution of IEP disputes, and prepare accordingly. When a dispute boils down to differences over programming, the parties should be sure to document the child's progress and the qualifications of the teachers. They should also seek expert testimony that is credible in terms of the background of the expert, the familiarity the expert displays with the program options, and the expert's knowledge of the child's individual characteristics and needs.

¹⁶⁷ Although there have been both empirical and qualitative reviews of autism cases, this article takes a structural look at the court's role in IDEA enforcement. See Claire Maher Choutka, et al., *The "Discrete Trials" of Applied Behavior Analysis for Children with Autism: Outcome-Related Factors in the Case Law*, 38 J. SPEC. EDUC. 95 (2004); Susan Etscheidt, *An Analysis of Legal Hearings and Cases Related to Individualized Education Programs for Children with Autism*, 28 RESEARCH & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 51 (2003); Yell, *supra* note 86; Yell & Drasgow, *supra* note 86; Zirkel, *supra* note 86. The Zirkel studies have reviewed both state administrative and court decisions, assembling an extensive database with which to try to identify trends and issues. The Yell and other studies have sought to draw from their review advice to school districts on how to best avoid attacks on a proposed IEP, or to parents on how to bolster a case on appeal. Nearly all of these analyses have addressed a non-legal audience and appeared in the educational literature. But see Daniel, *supra* note 80, at 6-9 (considering relationship between substantive rights and methodology generally, including in some autism cases); Mayerson, *supra* note 88 (offering practical advice to the practitioner representing a child with autism); Monserud, *supra* note 51 (describing several individual autism cases); Rachel Ratcliff Womack, Comment, *Autism and the Individuals with Disabilities Education Act: Are Autistic Children Receiving Appropriate Treatment in Our Schools?*, 34 TEXAS TECH. L. REV. 189 (2002)(arguing that Lovaas ABA Therapy should be given to all autistic children and attacking the Fifth Circuit's treatment of IDEA disputes).

*A. The First Circuit's T.B. Cases as Paradigms for IDEA
Judicial Review*

Recent U.S. District Court and Circuit Court of Appeals decisions in the case of *Lt. T.B. v. Warwick School District*¹⁶⁸ provide insights into the approach courts take to these thorny issues. In *T.B.*, parents seeking an ABA-based program for their autistic son, N.B., challenged the school district's IEP. The district's IEP adopted the TEACCH model and also included significant one-on-one behavioral instruction. Both courts upheld the school district's proposed IEP. In one respect, the cases are less typical — the hearing officer at the state level had ruled in favor of the parents.¹⁶⁹ But review of the decisions can serve as a primer on the application of the principles of due weight, deference and FAPE under IDEA.

1. The Facts About N.B.

N.B. was diagnosed with autism at the age of three while residing in Georgia.¹⁷⁰ His parents consulted Dr. Dennis B. Mazingo, a behavioral analyst at Florida State University with a Ph.D. in psychology who specialized in the Applied Behavioral Analysis approach to treating children with autism. Dr. Mazingo recommended, and N.B.'s parents implemented, a program of in-home discrete trial therapy ("DTT"). N.B. briefly attended a public pre-school, but when the school system refused to provide a DTT trainer, his parents withdrew him and enrolled him in a private pre-school.

In 1998, Dr. Mazingo moved to Rhode Island to head an ABA-based program in Warwick known as Pathways. N.B. attended a regular kindergarten class in Georgia under an IEP that called for teachers who were trained in and used DTT techniques, and also provided part-time one-on-one DTT

¹⁶⁸ No. Civ.A. 01-122T, 2003 WL 22069432 (D. R.I. June 6, 2003), *aff'd*, 361 F.3d 80 (1st Cir. 2004).

¹⁶⁹ *Id.* at *3-4.

¹⁷⁰ The facts in this section, except where otherwise noted, can be found at *id.* at *1-3.

assistance. The next year, N.B. attended a different elementary school program based on the TEACCH method.

N.B.'s parents had visited Dr. Mozingo in Rhode Island in the fall of 1999, and he advised them the Pathways program would be appropriate for N.B. In late March 2000, Navy Lieutenant T.B. was reassigned to Warwick, and the parents notified the school district in order to discuss what special educational services would be available for N.B., telling the district N.B. would be ready to start school April 11.¹⁷¹

In the words of the First Circuit, "Warwick acted quickly."¹⁷² It obtained the Georgia school districts' records of N.B.'s evaluations, his IEP there, and other reports. It tried to obtain additional records but was unable to get a release from N.B.'s mother until later, after the initial IEP meeting was held on April 13.

At the IEP meeting, N.B.'s mother was accompanied by a "parent advocate" from Families for Early Autism Treatment. Eligibility was established, and the school district proposed an IEP with a placement for N.B. in a self-contained special education classroom with part-time one-on-one instruction as needed, and related services. The district refused the mother's request that DTT be identified in the IEP as the specific method to be utilized, saying the state agency recommended specific methodologies not be included in IEPs. The mother produced a typed letter rejecting the IEP on the grounds N.B. needed intensive DTT training and requesting that Warwick place N.B. at Pathways. Letters ensued and a second IEP meeting was held for three hours on May 4, with counsel present for both school district and parents. Warwick agreed to adopt most of the features of the Georgia IEP but not to specify DTT. Officials proposed to observe N.B. in the proposed elementary school placement and reconvene, but N.B.'s parents rejected that proposal, enrolled N.B. at Pathways, and sought a due process hearing.

¹⁷¹ *T.B.*, 361 F.3d at 81.

¹⁷² *Id.*

2. The Due Process Hearing

The hearing before the state hearing officer lasted 20 days and included the testimony of 19 witnesses and 79 exhibits. Warwick's primary witness was Dr. Gary Mesibov, the Director of the original TEACCH program at the University of North Carolina. Dr. Mozingo testified for the parents.¹⁷³ The hearing officer ruled on three claims. First, she ruled Warwick was required to maintain Pathways during the pendency of the dispute as N.B.'s "then current educational placement."¹⁷⁴ Second, she ruled Warwick had violated IDEA by preventing the parents from meaningful participation, accepting their claim that Warwick had predetermined the IEP before the IEP meeting.¹⁷⁵ Third, applying the rationale of the *Burlington* decision, she ruled the parents were entitled to have Warwick pay for the Pathways placement in light of these violations and her finding that Pathways was an appropriate placement for N.B.¹⁷⁶ The hearing officer also required full initial evaluation of N.B. be completed within 45 days of her order, and stayed the reimbursement until that time.

3. The District Court's Review

a. The Scope of Review

The case came to the district court when the parents of N.B. sought attorneys' fees for the administrative proceedings

¹⁷³ *Lt. T.B. ex rel. N.B. v. Warwick Sch. Dist.*, No. Civ.A. 01-122T, 2003 WL 22069432 at *3 (D. R.I. June 6, 2003), *aff'd*, 361 F.3d 80 (1st Cir. 2004). It appears that at least some of Dr. Mozingo's testimony at the hearing may have been in the form of an affidavit. *See T.B.*, 361 F.3d 85.

¹⁷⁴ *T.B.*, 2003 WL 22069432 at *4; *see* 20 U.S.C. § 1415(j) (2000).

¹⁷⁵ *T.B.*, 2003 WL 22069432 at *4. Because of the importance of parental participation to the IEP process, such a violation would normally be viewed as affecting the child's right to an appropriate education and be grounds for finding a violation of IDEA. *See Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990) (discussing procedural violations as IDEA violations).

¹⁷⁶ *See supra* note 61 and accompanying text, discussing tuition reimbursement and the *Burlington* decision.

in which they were the prevailing parties.¹⁷⁷ Warwick counterclaimed to challenge the hearing officer's decision. After setting out the important provisions of IDEA, the court turned to the standard for its review, describing it as "independent" but "something short of complete *de novo* review."¹⁷⁸ "In contrast to other administrative appeals," the court wrote, it was "not required to accept the hearing officer's findings simply because they were supported by substantial evidence in the record."¹⁷⁹ It noted its obligation to give an independent decision based on the preponderance of the evidence, as well as its obligation to recognize the expertise of the administrative agency and to give that decision due weight. The weight due, the court noted, would vary with the nature of the matter reviewed, whether procedural or substantive, and the degree to which it involved educational expertise.¹⁸⁰ It considered the determination of how much deference would be due the administrative findings as ultimately within its discretion.¹⁸¹ The First Circuit later described the district court's obligation as an "intermediate level of review" reflecting the concern that courts not substitute their own notions of educational policy for that of the state agency with "greater expertise in the educational arena."¹⁸²

b. Reviewing "Pure" Legal Questions

The district court first disposed of the issue that was most properly viewed as one of "pure law," that of whether Pathways represented N.B.'s "stay-put" placement. IDEA explicitly provides that during the pendency of a dispute, a child will remain in his "then current placement," generally meaning the last placement agreed upon by both school

¹⁷⁷ See 20 U.S.C. § 1415(i)(2)(B)(iii) (2000).

¹⁷⁸ *T.B.*, 2003 WL 22069432 at *6 (quoting *Roland M.*, 910 F.2d at 987).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting *Burilovich v. Bd. of Educ. of the Lincoln Consol. Sch. Dist.*, 208 F.3d 560, 566 (6th Cir. 2000)).

¹⁸¹ *Id.*

¹⁸² *T.B.*, 361 F.3d at 83-84.

district and parents before the dispute arose.¹⁸³ Because the last agreed-upon placement of N.B. had been in a Georgia elementary school and had terminated, the court wrote, the stay-put provision could not apply until there was a new placement that the parents and either the school district or the state agreed upon. This legal question appeared relatively easy for the court to resolve using precedents and a memorandum on the question issued by the Office of Special Education Programs.¹⁸⁴ On appeal, the First Circuit noted that all parties agreed the hearing officer had been in error.¹⁸⁵

c. Reviewing for Procedural Violations

IDEA established many procedural requirements for school districts engaged in the IEP process, in part because due process and parental rights were seen as an important method to ensure delivery of appropriate special education to children with disabilities. Reflecting the activist enforcement era in civil rights litigation and the imposition of due process requirements upon government action in cases like *Goldberg v. Kelly*¹⁸⁶ and *Goss v. Lopez*,¹⁸⁷ procedure was given at least as much attention and priority in IDEA as substance.¹⁸⁸

¹⁸³ 20 U.S.C. § 1415(j) (2000). If a state hearing officer or a court issues a ruling that a different placement is the appropriate one, and the parent agrees, that placement then becomes the "stay put" placement as of that time. 34 C.F.R. § 300.514(c) (2004). If the ordered placement is one the parents have already placed the child in, such as a private school, a school district would then be obligated to maintain that placement until a different IEP placement was either agreed upon through the IEP process or ordered upon review.

¹⁸⁴ *T.B.*, 2003 WL 22069432 at *7 (citing *Michael C. v. Radnor Township Sch. Dist.*, 202 F.3d 642, 651 (3d Cir. 2000); OSEP Policy Memorandum 96-5, reprinted in 24 *Indiv. Disabil. Educ. L. Rptr.* 320 (U.S. Dep't. of Educ. Dec. 6, 1995)).

¹⁸⁵ *T.B.*, 361 F.3d at 82 n.3.

¹⁸⁶ 397 U.S. 254 (1970) (holding due process required hearing prior to termination of AFDC welfare benefits).

¹⁸⁷ 419 U.S. 565 (1975) (holding notice and opportunity to be heard required in connection with suspension of student from school).

¹⁸⁸ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., v. Rowley*, 458 U.S. 176, 205 (1982); see also Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, in *LAW AND SCHOOL REFORM* 205, 214-

Given the myriad points in the IEP process where IDEA and its regulations set requirements about time, notice, and personnel, to name a few, the courts have differentiated in reviewing procedural claims between the kind of procedural violations that require intervention and those that do not substantially affect the rights of the child and his parents. The district court, turning to the claimed violations in N.B.'s case, quoted the First Circuit's guidance on this issue:

Procedural violations are grounds for rejecting an IEP only if there is "some rational basis to believe that [the] procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." Mere technical violations are not sufficient.¹⁸⁹

The parents had raised 10 procedural claims, and although the hearing officer had rejected three of them, she did not make separate findings on the others, instead deciding the "totality" of the procedural deficiencies showed an individual assessment was not completed and the "parents were not given an adequate opportunity to review the child's previous IEP with the district."¹⁹⁰ The Court identified five items that had apparently contributed to the hearing officer's decision and looked at each of them, finding them all to lack legal merit or to be at the most technical violations.

First, the court looked at the claim that the school district had, in effect, predetermined the IEP for N.B. before discussing the appropriate educational plan for N.B. with his

16 (Jay P. Heubert ed., 1999) (relating due process to special education); David L. Kirp, *Student Classification, Public Policy, and the Courts*, 44 HARVARD EDUC. REV. 7, 43 (1974) in SPECIAL EDUCATION AT THE CENTURY'S END: EVOLUTION OF THEORY AND PRACTICE SINCE 1970 (Thomas Hehir ed., 1992) (identifying the appeal of procedural safeguards).

¹⁸⁹ T.B., 2003 WL 22069432 at *9 (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990)).

¹⁹⁰ *Id.*

parents at the IEP meeting. If a school district does, in fact, enter an IEP meeting with a closed mind, it would defeat the collaborative commands of the statute.¹⁹¹ On the other hand, as the district court ruled here, school officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP meeting.¹⁹²

The next claims asserted the parents had not been given enough notice of Warwick's reasons for refusing their request to place N.B. at Pathways, Warwick had failed to evaluate N.B. adequately before proposing an IEP, and Warwick had insufficient knowledge of N.B. on which to formulate an IEP. The court rejected all of these, noting the extensive IEP meetings and letter exchanges on the reasons for Warwick's refusal to agree to Pathways, and the parents' own role both in demanding very fast action and in refusing to sign a release or allow Warwick to meet with N.B. before the IEP meeting. Because Warwick had evaluations from Georgia in nearly every area that N.B.'s special needs were affected, and had also shown its willingness to proceed on an interim basis and to reconvene promptly to assess N.B.'s placement further in light of any additional information, it had fulfilled its obligations.¹⁹³

Finally, the parents had attacked the district's refusal to specify DTT methods in N.B.'s IEP. Here, the court noted it was the district's obligation to consider all information concerning educational strategies, but not to adopt what the parents might prefer, or to engage in debate over the pros and cons of particular strategies.¹⁹⁴ N.B.'s mother had spoken at

¹⁹¹ See, e.g., *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 850, 858 (6th Cir. 2004). In *Deal*, the appellate court found a "Golconda of circumstantial evidence" that the school district had a policy of refusing to consider Lovaas-type ABA therapy as an option, and held that this predetermination, regardless of the individual child's needs, represented a procedural violation of IDEA. *Id.*

¹⁹² *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, No. Civ.A. 01-122T, 2003 WL 22069432 at *10 (D. R.I. June 6, 2003), *aff'd*, 361 F.3d 80 (1st Cir. 2004) (citing 34 C.F.R. Pt. 300, App. A, No. 32 (2003)).

¹⁹³ *Id.* at *11-13.

¹⁹⁴ The district court distinguished between the lack of discussion of DTT, which it characterized as a procedural claim, and the omission of DTT

length about DTT's appropriateness and had submitted supporting documents that Warwick reviewed. Warwick had also tried to address her concerns about its proposed IEP. In light of this, the district court found no violation of her rights to participate in the process.¹⁹⁵

d. Reviewing the Adequacy of the IEP

The court turned to the questions of the educational adequacy of Warwick's IEP, noting that to satisfy IDEA, it

from N.B.'s educational plan, which it said would be reviewed as a substantive attack on the adequacy of the IEP. The court noted the obligation of school districts to consider educational strategies. *Id.* at *12. The parents relied before the district court on their reading of Attachment 1 to the Department of Education's promulgation of IDEA regulations in 1999. *Id.* at *13-14 (citing Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, Attachment 1, 64 Fed. Reg. 12406-01, 12552 (Mar. 12, 1999) [hereinafter "Attachment 1"]). The Department of Education, in explaining why it had retained the word "methodology" in the definition of "specially designed instruction" had indicated that certain kinds of instructional methods would in some instances form the basis for the goals, objectives, and other parts of a child's IEP, and where integral, should be "discussed at the IEP meeting and incorporated into the student's IEP." Attachment 1 at 12552. The example given was a mode of instruction such as cued speech, as opposed to teaching approaches as contained in day-to-day lesson plans. *Id.*

The district court engaged in an extensive and fascinating discussion of the degree of deference, if any, due to this Attachment, which it categorized as at most an interpretive or policy statement (as contrasted with a legislative rule promulgated after notice and comment) and therefore only to be followed if persuasive. *T.B. v. Warwick Sch. Dist.*, No. Civ. A. 01-122T, 2003 WL 22069432 at *14 (D. R.I. June 6, 2003), *aff'd*, 361 F.3d 80 (1st Cir. 2004). The court concluded the statement was persuasive only to the extent it meant parents could present their views on the need to include particular methodologies, and school officials "must listen and consider those methodologies." *Id.* at *15. The court found the statement unpersuasive if it were construed to mean that the pros and cons of particular methods be debated at IEP meetings. *Id.* The court referred to legislative history in the form of a House committee report indicating that while discussion of teaching methodologies was an appropriate topic for IEP team consideration, they were not expected to be written into the IEP, nor was an IEP meeting necessary to change them. *Id.* at *16 (citing H.R. Rep. No. 105-95 at 101 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 99).

¹⁹⁵ *Id.*

needed to apply the "educational benefit" test of *Rowley*, rather than identify the plan that would yield the best academic results, or make any comparison among programs.¹⁹⁶ Although normally the hearing officer's findings would be entitled to some deference under the "due weight" provisions of *Rowley*, the court said that the weight "due" would depend on the circumstances.¹⁹⁷ Here, the hearing officer had mainly relied on the procedural violations to find the IEP inadequate, and had given little attention to the IEP itself. She had also discounted the school district's expert witness in favor of the parents' expert, based primarily on the lack of personal observation of N.B. by the district expert, and his late observation of the proposed class placement.¹⁹⁸

The court instead credited the testimony of the district's expert, Dr. Gary Mesibov, who is an acknowledged authority and the director of the original TEACCH program. Dr. Mesibov testified the placement proposed by Warwick was appropriate for N.B. and N.B. did not need DTT to make educational progress. The court noted that Dr. Mesibov had reviewed the data and IEPs from Georgia, Pathways' progress reports, and had observed the proposed Warwick classroom placement for several hours. The court cited several reasons for its rejection of the hearing officer's choice among experts. First, Dr. Mesibov had impressive credentials and appeared more objective to the court than Dr. Mazingo, who was neither licensed nor board certified as a psychologist, had not written in peer reviewed journals, had not testified as an expert on autism, and who was an admitted advocate for DTT in general and his Pathways program specifically.¹⁹⁹ Dr. Mesibov's deep experience with the TEACCH program also weighed in his favor.

Second, the school district had provided evidence that its program had a "record of success" in helping autistic children.²⁰⁰ The psychologist, therapist, and teacher involved

¹⁹⁶ *Id.* at *17.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *T.B.*, 2003 WL 22069432 at *16.

²⁰⁰ *Id.* at *19.

in the program were all well-qualified and experienced within the program.

Third, the evidence indicated there was no single way to educate N.B. or other children with autism. The parents' own expert had conceded DTT was not the only method to educate children with autism. The court referenced several decisions "referring to both TEACCH and DTT as accepted methodologies and citing a lack of consensus in the medical and educational communities as to which is more effective."²⁰¹ The Court also noted what it said were "many similarities" between TEACCH and DTT, stressing that the Warwick program offered a significant amount of one-on-one behavioral instruction and that the teacher used stimulus response and reward methods along with taking individual data, characteristics central to DTT.²⁰²

Finally, the court rejected the basis for the hearing officer's preference for the parents' expert. It found the absence of a personal meeting by the school district expert with the child should have been a factor to consider but not a ground for rejection of his testimony. The court noted that the post-IEP timing of Dr. Mesibov's classroom observation had no significance to the legitimacy of his opinion. Dr. Mozingo, the parents' expert, had himself reached his views after only a 45-minute visit to the same class, a visit that had also taken place after the IEP had been prepared.²⁰³

4. The First Circuit's Review

The First Circuit affirmed the district court and approached the issues in a similar sequence. As to the scope of its own review of the district court, the appellate court rejected the notion that it sat *de novo* as if it were a district court. Instead, even where the district court took in no evidence because that court was making a judgment call on the adequacy of the IEP – which was a mixed question of law and

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at *20.

fact – the appellate court would apply a clearly erroneous standard of review to that conclusion. That is, the appellate court would uphold the determination unless it was “clearly erroneous on the record as a whole.”²⁰⁴

The court then reviewed the procedural claims. It took a situational approach to the argument of whether a meeting with the child would always be required in order to perform an evaluation. Warwick had requested both a meeting with the child and additional materials, and the court noted the timing of N.B.’s parents’ move was the cause for the lack of these at the time of the IEP meeting. These circumstances in the record would support viewing the district as proposing an interim IEP. Given this interim purpose, the court upheld the district court’s finding that there was adequate information about N.B. to propose the IEP, noting “[i]f no further information developed, that was because N.B. was never presented to or placed in the Warwick school system; he was instead enrolled in Pathways.”²⁰⁵ The court also rejected the argument that Warwick had predetermined its proposed IEP before the IEP meeting, terming the parents’ argument an “over-reading” of a teacher’s statement.²⁰⁶

With respect to the adequacy of the IEP, the First Circuit took time to acknowledge that autism was “very difficult” for parents, and there were “divergent theories as to

²⁰⁴ *T.B.*, 361 F.3d at 84.

²⁰⁵ This aspect of the First Circuit’s opinion carefully avoids suggesting to a school district that it need not observe the child or gather relevant evaluative data as part of the usual IEP planning process.

²⁰⁶ *Id.* at 84-85. The overall perception of the interaction between school district and parents that emerges from both the district court, and especially, the First Circuit opinions, is that the parents, rather than the school district, had predetermined the outcome of the IEP process. The implication is that the parents decided to move to Rhode Island specifically in order to enroll N.B. in Pathways with Dr. Mozingo. Their initiation of the IEP process was likely meant to lay the groundwork for their effort to have Pathways’ costs assumed by the school district, and they would not have accepted anything different. The reviewing court, and any parent, would not fault the B’s. for wanting the best available program for their child. Here, however, the parents’ single-mindedness worked against their efforts to show school district intransigence or inadequacy.

the best treatment." It noted that N.B.'s parents were firm in their belief that Pathways was the only available program that would benefit their child, and called them "admirable in their efforts to do what they think is best for their son."²⁰⁷ Under *Rowley*, however, IDEA did not require a school district to supply the best possible program for a child with a disability, but rather one which was reasonably calculated to provide an appropriate education.²⁰⁸ It stressed that the *Rowley* standard recognizes "that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate educational methods."²⁰⁹

The adequacy of the IEP had been attacked before the First Circuit on the ground it did not differ sufficiently from the Georgia IEP, which the parents' viewed as a failure because of the lack of sustained one-on-one attention. The court noted that neither the hearing officer nor the district court had specifically addressed this contention.²¹⁰ But its review of the administrative record suggested the programs differed. The Georgia class was twice as large as the proposed Warwick class, and not set up specifically for autistic children. The training and experience of the Georgia teachers did not appear on the evidence to be comparable either. The court then held that the district court had "reasonably relied" on the district's expert testimony concerning Warwick's trained staff and record of success. It termed the record "clearly sufficient to support" the district judge's conclusion that the district's expert testimony should be weighed more heavily given his expertise.²¹¹ Because it affirmed the district court's conclusion

²⁰⁷ *Id.* at 83.

²⁰⁸ *Id.* at 83. The parents argued to the First Circuit that language in the 1997 Amendments to IDEA changed this standard and required school district plans to provide "maximum benefit" to children with disabilities. The *T.B.* court characterized the language relied on by the parents as aimed at underlining the importance of teacher training, and not at overruling *Rowley*. *Id.*

²⁰⁹ *Id.*

²¹⁰ *T.B.*, 361 F.3d at 85.

²¹¹ *Id.* at 85-86.

of adequacy, the appellate court saw no need to consider whether any other program was better.²¹²

*B. Procedure and Legal Error as the
Focus of Judicial Review*

The *T.B.* courts' approach to judicial review is a typical one — tackling legal and procedural issues before confronting the issues of content and adequacy of the IEP. While school personnel and parents may start out focusing on the appropriate program for the child, when the case moves to the level of court review, legal issues and procedural compliance can move to the forefront. This may create a poor interface between the goals of educators and parents, on the one hand, and the court's comfort zone for decisions, on the other. Educators and parents are typically less concerned with procedural matters, and when a dispute occurs over the IEP's appropriateness, may want to have it resolved on the merits. But the court, due to its perception of its proper role, and to its lack of institutional expertise, may well base its rulings on other grounds.²¹³

In the studies that have been done of hearings and appeals involving disputes over methodology in autism cases, procedural error has consistently been identified as a critical factor in decisions that are in favor of the parents.²¹⁴ Without questioning that upon judicial review parties raise and courts seriously examine, and often base decisions upon, claims of procedural error, a finding of procedural error may be a convenient ground on which to rest a decision in favor of

²¹² *Id.* at 86.

²¹³ See Zirkel, *supra* note 86, at 93 (“[T]he higher proportion of inconclusive decisions upon moving the dispute from the [state administrative level] to the judicial forum runs counter to the unilateral interest in winning and the mutual interest in closure.”).

²¹⁴ Choutka, *supra* note 167, at 99-100; Yell, *supra* note 86, at 186-87; Yell & Drasgow, *supra* note 86, at 208, 211. Yell identifies as categories of procedural errors (1) parental participation (notice and meaningful involvement in the process); (2) evaluation (parental consent, timely evaluation, individualized and thoroughness); (3) procedurally inadequate IEPs; (4) predetermined placements; (5) lack of qualified personnel.

parents that is more motivated by a judgment on the merits. Because of the *Rowley* deference standards, the reviewing court will not feel free to reject the school district's IEP even if it believes, on the evidence, that the school district is wrong about how to appropriately meet the child's needs. Particularly in a case where the parents have already placed the child in what they contend is an appropriate placement, and the pending dispute is more about financing than which placement the child will enter, a procedural violation will support a tuition reimbursement order and create a new "stay-put" placement just as well as a decision overturning the adequacy of the IEP, without the difficulty of overcoming the deference standards. Just as a court will avoid deciding a constitutional question if there are other grounds for its decision of the case, one may wonder whether rulings finding a procedural violation are a convenient way to reach a result that "feels right" to the court.

For example, in a recent decision after a protracted battle between the parents, who had sought and funded an intensive Lovaas-type ABA program for their child, and the school district, which had proffered a TEACCH placement, the appellate court rested its decision on a finding of predetermination, a procedural violation, rather than ruling ABA was appropriate and TEACCH was not.²¹⁵

Other procedural violations that prevent parental participation or unduly delay delivery of educational services have been the basis for court findings of IDEA violations. A school district violated IDEA by withholding from parents reports obtained during evaluation suggesting the child was autistic, thereby delaying by two years the diagnosis of autism.²¹⁶ Even an appropriate program offered too late can be

²¹⁵ *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 859-60 (6th Cir. 2004).

²¹⁶ *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890-95 (9th Cir. 2001).

insufficient,²¹⁷ as can repeated delays in evaluation, preparation of the IEP, and notice to parents.²¹⁸

A second kind of error that will give a reviewing court no pause in analyzing is what might be termed a "pure legal error." This is one which transgresses an explicit provision of IDEA directly connected to the provision of FAPE. The incorrect application of the "stay-put" provision in *T.B.* represents this kind of error.²¹⁹ Schools that refused to provide more than a certain number of hours of ABA therapy because of a policy to cap services at a particular level were found to violate the command of IDEA that decisions on services be made in accordance with the individual needs of the particular child.²²⁰ So were schools that offered IEPs to meet the programs or budget of the school, rather than allowing the needs of the child to dictate the program.²²¹ Similarly, denying services because of a lack of staff violated the child's right to FAPE.²²² It is when the analysis moves into the core question

²¹⁷ *Jaynes v. Newport News Sch. Bd.*, 13 Fed. Appx. 166, 2001 WL 788643 at *4 (4th Cir. 2001), *aff'd* 33 IDELR 121 (E.D. Va. 2001)

²¹⁸ *Delaware County Int. Unit v. Martin K.*, 831 F. Supp. 1206, 1215 (E.D. Pa. 1993). In a recent decision, the failure to have a regular education teacher present at the IEP meetings when there was a possibility that the child would be placed in an integrated classroom was held to be an IDEA violation. *M.L. v. Federal Way Sch. Dist.*, 387 F.3d 1101, 1117 (9th Cir. 2004).

²¹⁹ *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, No. Civ.A. 01-122T, 2003 WL 22069432 at *6-7 (D. R.I. June 6, 2003), *aff'd* 361 F.3d 80, 82 n.3 (1st Cir. 2004).

²²⁰ *B.D. v. DeBuono*, 130 F. Supp. 2d 401, 436 (S.D.N.Y. 2001), *post-settlement attorneys fees determination*, 177 F. Supp. 2d 201 (S.D.N.Y. 2001); *see also Deal*, 392 F.3d at 858-59 (noting that school district must base its placement decision on the IEP formed for the individual needs of the child, not on its pre-existing investment in a particular program).

²²¹ *Malkentzos v. DeBuono*, 923 F. Supp. 505, 514 (S.D.N.Y. 1996), *rev'd and vacated as moot*, 102 F.3d 50 (2d Cir. 1996) (holding child's needs were being "defined by the program rather than *defining* the program"); *Sanford Sch. Comm. v. L.*, No. Civ. 00-CV113 PH, 2001 WL 103544, at *7 (D. Me. Feb. 1, 2001) (program proposed was for "administrative convenience" rather than to benefit child); *Mr. X v. New York Educ. Dep't.*, 75 F. Supp. 546, 558 (S.D.N.Y. 1997) (recommendations were made on assumption that no funds were available for in-home therapy).

²²² *See Adams v. Oregon*, 195 F.3d 1141, 1151 (9th Cir. 1999) (extended year service hours were set by staff vacation schedule); *Still v. DeBuono*,

of the appropriate educational plan for the individual child that the courts' footing turns more treacherous and their stride becomes more cautious.

C. FAPE and Methodology Choices — The Role of Deference

At least two layers of deference come into play when a court reviews the appropriateness of an IEP proposed by a school district. First, both the hearing officer at the administrative level and any reviewing court, whether district or appellate, must respect local educational authorities' expertise and defer to their decisions concerning educational policy and their choice of teaching methods.²²³ Second, the court must give "due weight" to the administrative decision, which may itself have involved more than one layer of state administrative review.²²⁴ Finally, if an appellate court is reviewing a district court's findings concerning the appropriateness of the IEP, at least in some Circuits, the appellate court may apply a "clearly erroneous" standard, whether or not the district court has taken in additional evidence.²²⁵

101 F.3d 888, 892-93 (2d Cir. 1996) (ordering reimbursement for private staff hired by parents after district was unable to hire licensed therapist).

²²³ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 207-08 (1982); see *supra* notes 63-80 and accompanying text.

²²⁴ *Id.* at 206. In its elaboration on this obligation, the Fourth Circuit has circumscribed the district court even further, holding that the administrative findings in an IDEA case are entitled to *prima facie* correctness, and that if the district court chooses not to follow them, it must explain why. *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004).

²²⁵ See *T.B.*, 361 F.3d at 84 (applying clearly erroneous standard to adequacy and appropriateness determination); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995) (reviewing district court's finding of IEP's appropriateness as factual question under clearly erroneous standard); *Kings Local Sch. Dist. v. Zelazny*, 325 F.3d 724, 729 (6th Cir. 2003) (applying clearly erroneous standard to findings of fact of district court and *de novo* standard to its conclusions of law); cf. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1289 (5th Cir. 1991) (holding decision that IEP provides FAPE to be mixed question of fact and law subject to *de novo* review but underlying fact findings subject to

In addition to these deferential standards, the burden of proof with respect to the appropriateness or inappropriateness of the IEP also has an impact, most importantly at the administrative level. There is a split among the Circuits on whether the burden should be on the party instituting the due process hearing, usually the parents, to produce evidence that the IEP is not appropriate, or on the school district in all instances to support the appropriateness of the IEP.²²⁶ The Circuits that place the burden upon the parents are setting an even higher bar for a successful challenge to an IEP's appropriateness than the deference doctrine already raises.²²⁷

clearly erroneous standard); *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 655 (8th Cir. 2000) (reviewing determination for clear error in absence of mistake of law, but characterizing review of ultimate decision as *de novo*); *Amanda J. v. Clark County Sch. Dist.*, 267 F.2d 877, 887 (9th Cir. 2001) (reviewing district court's findings of fact using clearly erroneous standard even when based on written record of administrative hearings but calling question of whether IEP offered FAPE a mixed question of law and fact reviewed *de novo*); *but see A.B.*, 354 F.3d at 325 (4th Cir. 2004) (*de novo* standard applied in review of district court); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 293 (7th Cir. 1988) (reviewing determination *de novo* as mixed question of law and fact); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 973-74 (10th Cir. 2004) (reviewing district court's "bench trial on the administrative record" *de novo*); *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (11th Cir. 2003) ("whether IEP provides a FAPE is a mixed question of fact and law subject to *de novo* review). On review, the Fourth Circuit noted, "we need not defer to factual recitations made by a district court from the administrative record, because that court stands in no better position than we do in reviewing the record. *A.B.*, 354 F.3d at 325 (quoting *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991)).

²²⁶ See *supra* note 79.

²²⁷ In practice, the sophisticated parent who brings a due process appeal will be likely to present evidence that the IEP is not appropriate to the child's needs, regardless of the burden of proof. But in the occasional circumstance where the absence of evidence on a particular aspect of the IEP's appropriateness is material, placing this burden on the parent challenging the IEP can affect the outcome. For the parent with fewer resources, placing this burden on the parents seems inconsistent with IDEA's direction to the school district to create and offer an appropriate plan. See *Weast v. Schaffer*, 377 F.3d 449, 458 (4th Cir. 2004) (Luttig, J., dissenting), *cert. granted*, *Schaffer v. Weast*, 73 U.S.L.W. 3494 (U.S. Feb. 22, 2005).

There are thus strong incentives for a reviewing court to uphold the state administrative decision, arrived at after hearing often lengthy testimony and considering many exhibits.²²⁸ Where the state decision upholds the school district's proposed IEP, the incentives are even greater, as the policy of deference to school officials is then also effectuated.²²⁹

²²⁸ See, e.g., *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1037-38 (8th Cir. 2000). The parents in this case sought funding by the school district of the in-home therapy program of 35 hours per week of one-on-one Lovaas training that they had implemented for their child. *Id.* at 1032. The district's IEP, written after consulting with an autism expert, included twelve hours per week in a self-contained classroom, seventeen hours in a "reverse mainstream" classroom mixing non-disabled students with disabled students, additional one-on-one training during school, and the hiring of a classroom aide. *Id.* at 1032-33. The three person panel that heard the appeal consisted of two special education experts and an attorney with prior experience chairing hearing panels. *Id.* at 1033. The hearing took eight days and generated a transcript of over 2,000 pages. *Id.* at 1037. The panel upheld the district's IEP as appropriate, with two of the three voting to require funding of ten hours of weekly one-on-one training at home. *Id.* at 1033. On review of the district court's judgment upholding the panel's determination, the Eighth Circuit noted that the evidence indicated that the child's verbal skills had improved under the in-home program but that his social skills suffered, possibly due to his reduced school attendance. The court summarized:

Children with autism have difficulty in developing cognitive, linguistic and social skills. Although early diagnosis and therapy improve the outlook for such children, autism experts have a variety of opinions about which type of program is best. Federal courts must defer to the judgment of *education experts who craft and review a child's IEP* so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible.

Id. at 1038 (emphasis added).

²²⁹ The author's review of 31 district and circuit court opinions involving claims for an ABA/DTT program found that in 17 of the 31, the court upheld the decision of either the hearing officer or the state review officer. Zirkel's study of 290 state administrative and judicial decisions in autism cases found a modestly pro-district result over a five year period, but noted that the effect of deference could not be determined, as only the highest decision in a particular case was examined. Zirkel, *supra* note 86, at 92.

The failure of either a hearing officer or reviewing court to defer appropriately can lead to significant verbal lashing on further review. For example, in one review, the Fourth Circuit chastised the district court:

[I]n conducting its own assessment of MM's IEP, the court elevated its judgment over that of the educators designated by the IDEA to implement its mandate. The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators.²³⁰

And in what is perhaps the strongest, albeit legally questionable, version of deference yet articulated by a court, the Seventh Circuit upheld a reversal of a state administrative decision, saying:

The administrative law judge's decision could not survive even the deferential review to which it was entitled. The critical issue before him was whether the school administrators were unreasonable in thinking it would be a mistake to send Z.S. back to his regular public school ... Administrative law judges in Wisconsin who hear IDEA cases are, we grant, specialists, and are not required to accept supinely whatever school officials testify to ... A particular [IEP] ... need only be "reasonably calculated to enable the child to receive educational benefits." The administrative law judge substituted his own opinion for that of the school administrators. He thought them

²³⁰ *MM ex rel. D.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir. 2002); see also *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 84 n.4 (1st Cir. 2004) ("Warwick expressed an educational policy choice in its IEP, which the hearing officer rejected largely on procedural, not substantive, ground. In the end, by reversing the hearing officer's decision, the district court reinstated the policy choice of the school system.").

mistaken, and they may have been; but they were not unreasonable.²³¹

Even with so much respect being accorded the school district's choices and the expertise of local and state educators, IDEA decisions are being issued in autism cases, as in other cases, that find a school district's IEP inappropriate.²³² So with so much predisposition toward upholding the school district's IEP, what do courts rely upon, beyond the administrative hearing itself, to decide if the IEP offers an appropriate education for the child?

D. Factors in Determining an IEP's Appropriateness

The origins of the factors that the courts have cited in reviewing the adequacy of an IEP, and of a parentally-proposed program, can be found in IDEA itself, and more significantly in the *Rowley* test. First, the IEP process must be truly individual in its assessment of the child's needs and in the design of the program and services to meet those needs. Second, the people who will be responsible for explaining and for implementing the services must have the training and qualifications to do so. And perhaps most important, the program must have the prospect for benefiting the child educationally, most significantly as judged by the child's experience.

²³¹ *Sch. Dist. of Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676-77 (7th Cir. 2002) (emphasis in original) (citations omitted). The *Wisconsin Dells* court's transmutation of a test calling for an IEP to be reasonably calculated to confer educational benefit into a test that asks only if the school district's actions are "not unreasonable" seems to go well beyond a fair reading of what *Rowley* intended in recognizing a sphere of discretion for school districts' IEP decisions.

²³² See sources cited *supra* note 167. Indeed, the outcome statistics at both the administrative and judicial levels do not seem to clearly favor either school districts or parents. Zirkel, *supra* note 86, at 92.

1. Individualized Evaluation and Program Design

Treating each child with a disability as an individual for purposes of evaluation and educational planning is a cornerstone concept of IDEA, and part of what dramatically distinguishes it from the group approach to public educational planning that most students experience.²³³ Where the school district fails to offer a program that addresses clearly identified needs, its IEP has been found inappropriate.²³⁴

For example, where a plan for a mainstream classroom supplemented with DTT therapy each afternoon was not successful with the child, the school had proposed placing the child into a separate classroom with verbal children who had varying disorders. The teacher described a vague "milieu" approach and the program offered no DTT. The court upheld the parents' appeal, noting the revised IEP "bore no relation to any diagnostic information that would have supported a change" in the child's placement.²³⁵ In contrast, a school

²³³ 20 U.S.C. § 1414 (2000). *Rowley* also referenced the need for "individually designed" services and "personalized instruction." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201, 203 (1982).

²³⁴ A recent, significant case recharacterized what the district court had viewed as a methodology dispute over ABA and TEACCH, and invoked the "due weight" owed to the administrative hearing decision to reinstate a hearing officer's determination that the school district's IEP using the TEACCH program was inappropriate. *County Sch. Bd. of Henrico County v. Z.P.*, No. 03-2338, 2005 WL 327026 (Feb. 11, 2005), *rev'g* 258 F. Supp. 2d 701 (E.D. Va. 2003). The hearing officer had found that the autistic child's individual needs were so severe that the proposed class size would not allow "the amount of direct, one-on-one instruction that would be necessary to keep him focused and to stop him from engaging in self-stimulatory behavior," and would therefore offer him no educational benefit. *Id.* at *6. The appellate court disclaimed that the dispute was one over methodology, in light of the administrative findings that the school district program was inappropriate. *Id.* at *8. Instead, the court chastised the district court for rejecting the administrative hearing officer's findings without a legitimate basis to discount or disregard them. *Id.* See also Choutka, *supra* note 167, at 100; Etscheidt, *supra* note 167, at 53-61; Yell & Drasgow, *supra* note 86, at 213.

²³⁵ *Sanford Sch. Comm. v. L.*, No. Civ. 00-CV113PH, 2001 WL 103544 at *7 (Feb. 1, 2001); see also *Walker County Sch. Dist. v. Bennett ex rel.*

district whose IEP reflected the district's autism specialist's recommendations that a child's program provide language development services, an imitation program, use of visual or concrete cues, and which included DTT, was upheld as against the parents' effort to fund a 40-hour per week Lovaas program.²³⁶ The court noted that the district had articulated specific concerns related to the child and his age over the number of hours of service he could tolerate.²³⁷ Some courts have adversely compared Lovaas programs proposed by parents as themselves imposing a standardized approach rather than an individualized one.²³⁸

2. Qualified and Knowledgeable School Personnel

The reviewing courts in *T.B.* were clearly influenced by the experience of the Warwick school personnel involved in planning for N.B.'s autism program.²³⁹ Several courts have noted the importance of the presence of qualified personnel to carry out a proposed IEP.²⁴⁰ Analyses of outcome related

Bennett, 203 F.3d 1293, 1296-97 (11th Cir. 2000) (affirming hearing officer's determination that plan for autistic child who had been self-abusive, had emotional outbursts, and lacked focus on classroom tasks was inappropriate, when it lacked behavior management, occupational therapy, extended year services, and communication aids).

²³⁶ *Adams v. Oregon*, 195 F.3d 1141, 1146-47 (9th Cir. 1999).

²³⁷ *Id.*; see also *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1037 (8th Cir. 2000) (observing that district considered diagnosis of autism expert and made substantial alterations to child's program); *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 653 (8th Cir. 2000) (recounting school district evaluation by team of six employees who tested child, observed her at home and in school, and produced a twenty-five page diagnostic summary of her health, skills and abilities).

²³⁸ See *Burilovich v. Bd. of Educ. of the Lincoln Consol. Schs.*, 208 F.3d 560, 571 (6th Cir. 2000) (noting that district court did not see how the parents' proposed "standard" 40 hours of DTT therapy was tailored to child's needs); *Renner v. Bd. of Educ. of Ann Arbor*, 185 F.3d 635, 643 (6th Cir. 1999) (same).

²³⁹ *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, No. Civ.A. 01-122T, 2003 WL 22069432 at *19 (D.R.I. June 6, 2003), *aff'd* 361 F.3d 80, 86 (1st Cir. 2004) (referring to Warwick's "well-trained teaching staff").

²⁴⁰ Compare, e.g., *J.P. ex rel. Popson v. West Clark Comty. Schs.*, 230 F.

factors at the administrative and judicial levels have stressed this criterion as well.²⁴¹

For example, a district court upheld a hearing officer's finding that an IEP was inadequate, and ordered reimbursement of the parents' home-based DTT program where the school produced no witnesses with training in autism.²⁴² One witness had described her approach as "floor time," but could not explain how it could benefit the child in question.²⁴³ In contrast, in one of the few cases that has attempted to articulate standards by which to judge a proposed educational approach, the court stated as a criterion for soundness that "the teachers and special educators involved in implementing that approach have the necessary experience and expertise to do so successfully."²⁴⁴

Supp. 2d 910, 938-39 (S.D. Ind. 2002) (finding teachers were familiar with the special problems and needs of autistic children, attended conferences and workshops on autism, and were "fully competent" to administer district's program); *with Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 931 (11th Cir. 1987) (holding residential placement was necessary for mentally retarded, autistic teenager; noting that professionals at board-proposed program were untrained in the special needs of autistic children); *T.H. v. Bd. of Educ. of Palatine Comty. Consol. Sch. Dist.*, 55 F. Supp. 2d 830, 838 n. 9 (N.D. Ill. 1999), *aff'd sub nom Bd. of Educ. of Oak Park v. Kelly E.*, 207 F.3d 931 (7th Cir. 2000) (noting that teacher could not explain how her "floor time" approach could be effective for autistic children who have problems attending, and that "the district did not present a single early childhood teacher with significant training in the education of autistic children").

²⁴¹ See Yell & Drasgow, *supra* note 86, at 211; Yell, *supra* note 86, at 187.

²⁴² *T.H.*, 55 F. Supp. 2d at 838 n.9; see also *G. ex rel R.G. v. Ft. Bragg Dependent Schs.*, 343 F.3d 295, 301 (4th Cir. 2003) (noting as a significant issue that the IEP did not provide for the participation of a Lovaas-certified consultant).

²⁴³ *Id.* Floor time is a recognized educational approach for autistic children, see Heflin & Simpson, *supra* note 84, at 196-97, but apparently the teacher in question had an insufficient understanding of it to testify knowledgeably at the administrative hearing.

²⁴⁴ *J.P.*, 230 F. Supp. 2d at 936.

3. Evidence of Educational Benefit

When it comes to judging the appropriateness of an educational program, the best evidence is success. Conversely, even a procedurally perfect plan that accurately describes the child and proposes a carefully conceived array of services, if it has been tried and found wanting, will be a hard sell to a hearing officer or court. In theory, the appropriateness of an IEP is to be judged as of the time it is proposed, rather than in hindsight.²⁴⁵ But given the length of time a case takes to rise through the administrative and judicial review process, there may be several years of IEPs at issue by the time a decision is due.²⁴⁶ Or there may be a history of failed approaches leading up to a contested IEP.²⁴⁷ Courts have referenced evidence of the child's experience to assist in determining the appropriateness of the IEP under review.²⁴⁸ For example, where the record showed an autistic child had made progress in a classroom setting and benefited from school based instruction, despite the fact he also benefited from the home-based instruction his parents provided and improved his verbal skills more quickly there, a school-based plan that the district

²⁴⁵ As one court put it:

[A]n [IEP] is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.

Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993)).

²⁴⁶ For example, in *Bd. of Educ. of County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600, 602-04 (S.D.W. Va. 2000), the child was diagnosed with autism at age three and was eight at the time of the district court decision, which finally determined his challenge to IEPs from 1996 through 1999 for failing to include a supplemental home-based Lovaas program.

²⁴⁷ E.g. *Sanford Sch. Comm. v. L.*, No. Civ. 00-CV113PH, 2001 WL 103544 at *7 (Feb. 1, 2001); see also *Walker County Sch. Dist. v. Bennett ex rel. Bennett*, 203 F.3d 1293, 1296-97 (11th Cir. 2000).

²⁴⁸ *Kanawha*, 95 F. Supp. 2d at 609 n.8 ("[T]he fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP. Otherwise, the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed.").

supplemented with one-on-one training at school was found appropriate.²⁴⁹ In contrast, where all of the people who examined or worked with an autistic child for a significant period of time felt that he needed at-home instruction, and the only conceded expert characterized his progress in preschool as "minimal," the IEP was found inappropriate without an additional ten hours of at-home instruction.²⁵⁰

For the parents who are committed to following an intensive DTT program, this creates a risk. If the child is never placed under a school-based IEP, it may be far more difficult to show the IEP would not have benefited him²⁵¹ than it would be to show, after trying it, that the proposed program would continue failed approaches.²⁵² On the other hand, most parents with both the desire and the means to pursue the more intensive program would not delay the child's entry into the

²⁴⁹ *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1037-38 (8th Cir. 2000). See also *J.P. ex rel. Popson v. West Clark Comty. Schs.*, 230 F. Supp. 2d 910, 922 (S.D. Ind. 2002) (recording that preschool child had made progress in toileting, playing with adults, and imitative drawing and building, but not verbalization; subsequent school-based IEP upheld against parents' request for 40 hours per week of combined school and home training supervised by local ABA/DTT program); *Alexander K. v. Va. Bd. of Educ.*, 30 IDELR 967 (E.D. Va. 1999) (holding IEP appropriate where child had "clearly made progress" in the school system but parents removed him to private Lovaas program); cf. *Samuel Tyler W. v. Northwest Indep. Sch. Dist.*, 202 F. Supp. 2d 557, 563 (N.D. Tex. 2002) ("when plaintiff was allowed to attend the pre-kindergarten program, he did very well and received significant educational benefit").

²⁵⁰ *D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist.*, 348 F. Supp. 2d 92, 96 (S.D.N.Y. 2004).

²⁵¹ But not impossible. See *T.H. v. Bd. of Educ. of Palatine Comty. Consol. Sch. Dist.*, 55 F. Supp. 2d 830, 839, 841 n.13 (N.D. Ill. 1999) (finding IEP inadequate where it had proposed a cross-categorical setting that all autism experts testified was inappropriate, and where one "felt it would be 'irresponsible' to try the district's program as an experiment").

²⁵² See *Kanawha*, 95 F. Supp. 2d at 609 (finding home portion of program was necessary to sustain his progress); cf. *G. ex rel. R.G. v. Ft. Bragg Dep. Schs.*, 343 F.3d 295 (4th Cir. 2003) (upholding expenses of six months of Lovaas in-home program during period that IEP was inadequate; child had attended two years of district supported education without progressing; two years later in Lovaas home therapy, he had made significant educational progress).

program in order to bolster their claim for reimbursement.²⁵³ If the child is placed under the IEP and makes some progress, that may be enough to meet the educational benefit test, although the benefits may not be as good as those available from the program the parents are seeking.

E. Rowley's Unanswered Question — Assessing the Appropriateness of a Methodology Choice

Many judicial dispositions of IEP disputes are resolved on procedural grounds or on a finding of inappropriateness resting on the factors discussed above. There remains in some cases, however, the task of reviewing the school's program for the educational soundness of its approach to the child's needs. To a large extent, the evidence on this is developed at the administrative level through expert testimony by school personnel, school district witnesses, and witnesses called on the parents' behalf. The court then can use the "due weight" and deference standards to filter its review and avoid the hazards of diving into the foreign waters of educational research.

Indeed, most courts confronted with these issues in autism cases have invoked *Rowley* and, once satisfied that there is a division of legitimate opinion about educational approaches, have deferred to the school district. Where the dispute is viewed as essentially turning on a choice between an exclusive and intensive DTT-based program and another approach, parents have not been successful in obtaining court decisions.²⁵⁴

²⁵³ This appears to be what N.B.'s parents decided to do when they moved to Warwick, Rhode Island to enroll their son in the Pathways DTT-based program. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 81 (1st Cir. 2004).

²⁵⁴ *E.g. T.B.*, 361 F.3d at 83-84 and n.4; *see also Gill*, 217 F.3d at 1038 ("experts have a variety of opinions about which type of program is best"); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (reciting that neither the parties nor the hearing officer dispute that Lovaas is an excellent program, but "there are many available programs which effectively help develop autistic children"); *J.P. ex rel. Popson v. West*

There is the underlying question of whether and how to judge the soundness of an educational approach. As noted above, educational approaches in the area of autism have come in and out of vogue, as have scientific theories about the disability's cause and treatment.²⁵⁵ The same could be said of many other educational approaches, whether for children with disabilities or not. For example, a whole generation of children learned to read with the "whole language" approach, before the demand for a return to phonics became so insistent that federal legislation now requires as part of its conditions the use of what the government decides are scientifically proven reading instructional methods.²⁵⁶

Clark Comty. Schs., 230 F. Supp. 2d 910, 939 (S.D. Ind. 2002) (declining a *per se* ruling that anything but ABA/DTT approach could not be a *bona fide* methodology); *Samuel Tyler W. v. Northwest Indep. Sch. Dist.*, 202 F. Supp. 2d 557, 563 (N.D. Tex. 2002) (rejecting argument that only one method "proven" effective for children with autism; "Methodology ... is not an issue for the court to resolve."); *Pitchford v. Salem-Keizer Sch. Dist.*, 155 F. Supp. 2d 1213, 1230-32 (D. Ore. 2001) ("Lovaas methodology, while supported by many, also has its detractors"; holding it not the court's role to determine that Lovaas program would be more beneficial, even if it agrees); *Alexander K. v. Va. Bd. of Educ.*, 30 IDELR 967 (E.D. Va. 1999) (stating that court would not take sides in "long-standing and heated debate among academics" regarding the benefits of ABA over TEACCH models).

On the other hand, as the evidence has grown that the principles of structured, one-on-one interaction underlying DTT and behavioral therapy are positive interventions, the techniques have been adopted by many school districts as a part of the programs they offer to children with autism. *See, e.g., T.B.*, 361 F.3d at 86 (finding school district's TEACCH plan contained "many elements of DTT"); *J.P.*, 230 F. Supp. 2d at 938 (noting plan incorporated both DTT and TEACCH elements); *Gill*, 217 F.3d at 1033 (revising plan in accord with autism consultant and adding one-on-one training at school). Disputes have become less focused on the usefulness of DTT techniques and more on whether a 30-40 hour per week commitment is necessary for all children. *See Adams*, 195 F.3d at 1146 (indicating evaluators questioned wisdom of so many hours for very young child with difficulties attending). A school district that adopts an "anything but Lovaas" position may find itself in trouble for failing to make an individualized decision or for foreclosing parental input. *See Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 850, 858 (6th Cir. 2004) (finding evidence of such a policy as violative of IDEA's procedural requirements).

²⁵⁵ *See supra* Part II.

²⁵⁶ *See* U.S. DEPARTMENT OF EDUCATION, OFFICE OF THE DEPUTY

Is there a point at which deference becomes abdication? To put it another way, can an educational approach so lack foundation that it would be error to classify it as a "methodological choice"? If so, what guidance do courts, and derivatively, hearing officers, have in hearing and determining such issues?

The most common approach, of course, is to listen to those who do have expertise — the expert witnesses, whether they are knowledgeable school personnel or retained experts. And indeed, this is what hearing officers routinely do. A hearing officer's decision to credit experts, and the court's reviewing decision whether to give the hearing officer's determination weight, draw on familiar criteria — the qualifications and training of the witness; the foundation for the witness' opinion, including opportunities to observe and review of data; the affiliative bias of the witness.²⁵⁷

SECRETARY, NO CHILD LEFT BEHIND: A TOOLKIT FOR TEACHERS 30-31 (2004) available at

www.ed.gov/teachers/nclbguidance/nclb-teachers-toolkit.pdf

(describing scientifically based reading programs under the NCLB act and importance of phonetic awareness); Richard T. Vacca, *The Reading Wars: Who Will be the Winners? Who Will be the Losers?*, READING TODAY 3 (Oct./Nov. 1996) (discussing alleged wars between proponents of whole language and proponents of phonics); Sharon Cromwell, *Whole Language and Phonics: Can They Work Together?*, EDUCATION WORLD, at http://www.education-world.com/a_curr/curr029.shtml (Sept. 22, 1997)

(reviewing pendulum swings in reading instruction though 20th century).

²⁵⁷ See, e.g., *T.B.*, 361 F.3d at 85-86; *supra* text accompanying notes 198-203. On thoroughness of evaluation, see also *Faulders v. Henrico County Sch. Bd.*, 190 F. Supp. 2d 849, 953 (E.D. Va. 2002) (disfavoring expert evaluations made after only limited review or little direct interaction with the student); *Malkentzos v. DeBuono*, 923 F. Supp. 505, 511 (S.D.N.Y. 1996) (same). On qualifications, see *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1523 (9th Cir. 1994) (holding evaluation incomplete when no one with knowledge of autism was in the group). On bias, see *Renner v. Bd. of Educ.*, 185 F.2d 635, 642 n.12 (6th Cir. 1999) (expert cited as "strong proponent of Lovaas-style programming"); *Burilovich v. Bd. of Educ. of Lincoln Consol. Schs.*, 208 F.3d 560, 571 (6th Cir. 2000) (discounting the same parents' witness); *Dong v. Bd. of Educ. of Rochester Comty. Schs.*, 197 F.3d 793, 801-02 (6th Cir. 1999) (observing that same expert, who had consulted with parents only a few times, recommended her "usual and customary program for all young autistic children with general needs").

Showing the efficacy of an educational approach through research has some difficulties. When dealing with children's educational future, there are ethical issues around studying a promising technique by setting up a control group.²⁵⁸ Much of the literature on autism reports promising results by measuring gains using a particular technique; less by comparison to other approaches.²⁵⁹ Programs that show dramatic results when conducted by skilled professionals in a university setting with trained assistants may not provide the same benefit when extrapolated to public school classrooms with limited budgets and personnel, or to multiple vendors using college student trainers.²⁶⁰

The fact remains that neither IDEA nor *Rowley* nor any Circuit court has offered a rubric for a court to assess the soundness of an approach proposed by a school district (or for that matter, by parents). One district court, *J.P. v. West Clark Community Schools*,²⁶¹ has tried to articulate standards for this purpose. The set of criteria the *J.P.* court produced incorporated many of the techniques being used by courts already as a matter of instinct, common sense, or experience in similar matters:

An educational approach proposed by a school district for teaching a disabled child meets the legal standard for soundness if: (a) the school district can articulate its rationale or explain the specific benefits of using that approach in light of the particular disabilities of the child; (b) the teachers and special educators involved in

²⁵⁸ See text *supra* note 140.

²⁵⁹ See sources cited *supra* note 84.

²⁶⁰ The original Lovaas study, which was conducted at UCLA with a group of 19 relatively high functioning autistic children and which reported a 47 percent "recovery" rate, has been critiqued on these grounds. See *Pitchford v. Salem-Keizer Sch. Dist.*, 155 F. Supp. 2d 1213, 1230 (D. Ore. 2001); see also *Deal v. Hamilton County Dept. of Educ.*, 259 F. Supp. 2d 687, 698 (E.D. Tenn. 2003) *rev'd in part*, 392 F.2d 850 (6th Cir. 2004) (citing testimony of co-worker of Dr. Lovaas that Lovaas had used varying techniques and that program parents sought would be offered in a different, non-clinical setting).

²⁶¹ 230 F. Supp. 2d 910 (S.D. Ind. 2002).

implementing that approach have the necessary experience and expertise to do so successfully; and (c) there are qualified experts in the educational community who consider the school district's approach to be at least adequate under the circumstances.²⁶²

To recognize the "due weight" standard, the court wrote that a hearing officer's finding that a school district's proposed approach was sound would be "persuasive evidence that each of these three criteria has been satisfactorily met."²⁶³

The *J.P.* court compared the dispute before it with one in another district court case, *T.H. v. Bd. of Educ. of Palatine*.²⁶⁴ In both cases, parents seeking a 35-40 hour per week DTT program challenged the school district's IEP. In *T.H.*, the earlier case, the parents prevailed. The district's proposed IEP had called for placement of the child into a cross-categorical classroom. The district could not explain the rationale for its "floor time" approach or the benefits it offered the child, and the teachers and special educators lacked experience or expertise in autism. No expert testimony was presented to show the district's approach was "reasonably likely to accomplish its purpose" given the child's disabilities; indeed, there may have been no expert testimony offered by the district.²⁶⁵

In contrast, the plan proposed for the child in *J.P.*, while described as "eclectic," drew upon both TEACCH and DTT methods. The plan used group time deliberately to provide a context for the child's learning and to bring him into the general preschool program. The school personnel were able to discuss the effects of DTT methods on the child's vocalizing, and articulate the goal of functional communication in relation to the other methods proposed. The teachers knew the problems and needs of autistic children, and

²⁶² *Id.* at 936.

²⁶³ *Id.*

²⁶⁴ 55 F. Supp. 2d 830 (N.D. Ill. 1999), *aff'd sub nom Bd. of Educ. of Oak Park v. Kelly E.*, 207 F.3d 931 (7th Cir. 2000).

²⁶⁵ *J.P.*, 230 F. Supp. 2d at 937.

were specifically trained in DTT and other techniques. The district presented two expert witnesses to address the parents' contention that DTT was the only reasonable way to teach an autistic child, and to support the effectiveness for J.P. of the district's proposed IEP.²⁶⁶

The standards proposed and applied in *J.P.* could be viewed as placing more of a burden on a school district than *Rowley* might contemplate.²⁶⁷ On the other hand, IDEA was structured to impose an obligation on the school district to provide an appropriate educational plan, and some method of determining the appropriateness of a method proposed by a district should be inherent in this obligation. Whether or not it is viewed as a "test" for methodological soundness, the *J.P.* criteria are appropriate inquiries for any hearing officer or court confronted with the contention that a proposed approach is inappropriate for lack of educational efficacy.

F. Cost as the "Elephant in the Room"

The mostly unspoken-about issue present in the autism disputes is that of cost. The kind of intensive, one-on-one, DTT program that is being sought in many of the IDEA autism cases is not cheap. In one recent case, the cost of an intensive ABA program for one pre-school aged child was estimated at between \$50,000 and \$63,800 per year.²⁶⁸ The district's entire preschool budget for all children was \$360,000 to \$400,000 per year.²⁶⁹ But the denial of special educational services that are needed for the child to receive a free appropriate public education cannot be based on cost.²⁷⁰

There are circumstances under IDEA when it is permissible for a school district to consider cost and feasibility

²⁶⁶ *Id.* at 938.

²⁶⁷ Certainly the Seventh Circuit, in which the *J.P.* district court sits, might think so. See *supra* note 231 and accompanying text.

²⁶⁸ *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 973 (10th Cir. 2004).

²⁶⁹ *Id.*

²⁷⁰ *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79 (1999) (holding services of aide, including suctioning of breathing tube, to be related services required regardless of cost).

in making program and placement decisions. If there are two approaches that would both offer the child an appropriate education, that is, that would provide educational benefit to the child, the district may choose the less expensive option.²⁷¹ It need not choose the educationally superior one.²⁷² And in determining whether a particular placement is the least restrictive environment appropriate for a child with a disability, the cost of providing the supports and services that would be required for the child to be placed into a less restrictive setting can be a factor.²⁷³

Dollars for education are perennially scarce, and dollars for special education have long been viewed as inadequate.²⁷⁴ The fact that school districts offer classroom based programs that may incorporate the generally endorsed DTT methods, rather than funding intensive one-on-one programs, is understandable. So long as those programs offer a real prospect of educational benefit to the child, it is hard to fault such a choice. But it is also important that reviewing

²⁷¹ *J.P.*, 230 F. Supp. 2d at 941 n.14.

²⁷² *E.g., Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child"); *Deal v. Hamilton County Dep't. of Educ.*, 259 F. Supp. 2d 687, 697 (E.D. Tenn. 2003) *re'vd in part*, 392 F.3d 850 (6th Cir. 2004) ("it is not necessary to FAPE status that the [proposed] program be equal to or better than the parents' preferred methodology").

²⁷³ *See Oberti v. Bd. of Educ.*, 955 F.2d 1204, 1218 n.25 (3d Cir. 1993); *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1049 n.9 (5th Cir. 1989).

The Tenth Circuit has suggested that even where a determination is made that the appropriate placement is one such as an intensive DTT program, a school district's reimbursement obligation may be affected by equitable factors, including whether it would impose "a disproportionate burden" on the district's preschool budget. *L.B.*, 379 F.3d at 979 n.18 (citing *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 16 (1993)).

²⁷⁴ *See* Thomas B. Parrish & Jay G. Chambers, *Financing Special Education*, in 6 SPECIAL EDUCATION FOR STUDENTS WITH DISABILITIES 121, 122 (Richard E. Behrman ed., 1996) (reporting that in 1987-88, federal aid ranged from 65 percent of total special education expenditures in Kentucky to 3 percent in Minnesota and New York); Thomas B. Parrish & Jean Wolman, *Trends and New Developments in Special Education Funding: What the States Report*, in FUNDING SPECIAL EDUCATION 215 (Thomas B. Parrish et al. eds., 1999) (surveying expenditures in 24 states and finding federal percentages of support from 4 percent to 17 percent).

courts be willing to provide a counterbalance to the understandable pressure on a school district to make the most of scarce resources, and to avoid automatically assuming every program a school proposes is appropriate.²⁷⁵ Some teeth in the judicial review process will be needed to prevent economically driven but educationally harmful decision-making.²⁷⁶

Conclusion

Perhaps the reason that IDEA jurisprudence has continued for more than 20 years since *Rowley* without standards by which to assess the appropriateness of an educational methodology is attributable to the infrequency of "pure" methodology disputes until the present spate of autism cases. Perhaps it is because courts tend to dispose of cases on more familiar procedural and legal grounds. Perhaps it is overindulgence of the *Rowley* deference and due weight standards, or the intensely individual nature of each child's circumstances and the individual focus of IDEA. All of these may have played a part in the paucity of legal guidance. The autism cases have brought these issues under IDEA into stark relief. To carry out the mandate for an appropriate education, courts must ultimately be willing to take a look at school district proposals on their merits. Examination of school district proposals using the criteria of individualized planning, qualified teachers, educational benefit, and expert foundation for proposed educational approaches can and should be used to make such determinations, consistent with both IDEA and *Rowley*. To the extent possible, courts should conduct their judicial review in a way that develops and further defines this

²⁷⁵ Cf. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 850, 858-59 (6th Cir. 2004) ("[T]he school district may not, as it appears happened here, decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, regardless of any evidence to the contrary of the individualized needs of a particular child.") (emphasis in original).

²⁷⁶ *Id.* at 863-65 ("Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole.").

process so as to provide guidance for the future, including assistance to the hearing officers who continue to be the final arbiters of many more IDEA disputes than will reach judicial review.