2010

SOME, MEANINGFUL, OR APPROPRIATE: HOW SHOULD A CHILD’S SPECIAL EDUCATION BE JUDGED? A COMPARISON OF THE APPROACHES IN THE UNITED STATES AND ENGLAND

Bradley M Wanner

Available at: https://works.bepress.com/bradley_wanner/1/
SOME, MEANINGFUL, OR APPROPRIATE: HOW SHOULD A CHILD’S SPECIAL EDUCATION BE JUDGED? A COMPARISON OF THE APPROACHES IN THE UNITED STATES AND ENGLAND

Bradley M. Wanner*

INTRODUCTION

As a high school student, I had the opportunity to tutor Frank, an autistic student who failed the New York State Regents mathematics exam twice. It quickly became clear that Frank did not have a problem with the material; in fact, there were times I felt he knew more than I did. His problem was the environment. At his mother’s request, we met at the same time each week in the school library, where he was most comfortable. For the first month, Frank barely spoke or looked at me. As he became more comfortable working together, he began to speak more and more during our sessions, eventually even joking with me and speaking to me in the hallway. Frank passed the exam the next time he took it, this time in a smaller classroom and with less people in the room than before.

* J.D. candidate, Brooklyn Law School, 2011; B.B.A., The College of William and Mary, 2008. The author wishes to thank his family for their unconditional support and optimism; Frank for introducing him to autism; and Evelyn Hanlon for giving him the opportunity to meet and work with Frank. The author would also like to thank Professor Cynthia Godsoe for her advice, direction, and editorial assistance in the writing process.
This experience led me to question the type of education and services a school or school district must provide for a student like Frank and, in particular, the outcome the education and services provided to the student should aim to achieve. The Individuals with Disabilities Education Act ("IDEA") does not provide a clear answer to these substantive questions.\(^1\) The Supreme Court has addressed the substantive educational guarantee but did not provide a clear standard.\(^2\) This lack of a clear educational guarantee has led to further ambiguity in the circuits, with some circuits requiring "some educational benefit"\(^3\) and others requiring a "meaningful educational benefit."\(^4\) Such ambiguity is harmful generally but even more so when dealing with children on the autism spectrum. In the United Kingdom, the Education Act 1996 also provides that a child must receive an appropriate education.\(^5\) The Regulations promulgated pursuant to the Education Act 1996 emphasize that the child’s progress will help determine the appropriateness of the child’s education.\(^6\)

This paper argues that the best approach is to require a "meaningful educational benefit" measured primarily by the child’s progress under the

---

Individualized Education Program. Such a conception of the education benefit remains true to the purpose of the IDEA expressed by Congress and provides guidance on how to determine whether a child receives this benefit.

Part I of this paper discusses the common foundation to the approaches taken in the United States. Part II provides examples of the application of these two approaches by American courts in cases where the student suffers from a non-autism spectrum disorder. Part III discusses first the unique challenges autism presents to children, parents, and educators. Part III will also discuss two of the more common and popular instructional methods used by educational professionals and psychologists to teach children with autism spectrum disorders. Part III continues with a discussion of the application of the two approaches to cases where the student’s disorder falls within the autism spectrum. The next three parts of the paper will look at the approach taken in England. Part IV covers the statutory structure in England. Part V provides examples of English courts applying the statutory requirements in cases where the student suffers from non-autism spectrum disorders and Part VI provides examples in cases involving students within the autism spectrum. The paper concludes with recommendations for the best approach to the educational benefit disabled children should receive and how this educational benefit should be
I. FOUNDATIONS OF THE AMERICAN APPROACHES

A. Statutory Background

The foundation for all regulation of special education at the federal level is the Individuals with Disabilities Education Act, commonly referred to as the “IDEA.” In passing the IDEA, Congress intended to ensure that the needs of disabled children are met through a free appropriate public education and related services. A free appropriate public education (“FAPE”) is defined by the IDEA as the special education and related services that meet four conditions. The first condition is that the special education and related services provided to the student truly be public, i.e. at public expense, under public supervision, and under public direction. The remaining conditions describe what makes the special education and related services appropriate. To be appropriate, the education provided to the student must meet the standards set by the state educational agency. Second, the education offered must cover education at all levels, from preschool through secondary school. Most important, the education must be provided in accordance with the student’s individualized education plan.

---

8 Id. at § 1400(d)(1)(A).
9 Id. at § 1401(9).
10 Id. at § 1401(9)(A).
11 Id. at § 1401(9)(B).
12 Id. at § 1401(9)(C).
program, or IEP; otherwise there can be no FAPE.  

The requirements of a valid IEP are set forth in the IDEA. For example, an IEP must include a statement of the student’s current level of performance and achievement, including a description of how the disability affects the child’s progress and involvement in the general education curriculum. The IEP must also include a statement of measurable annual academic and functional goals that meet the child’s needs and will enable the child to be involved and make progress in the general education curriculum. An IEP must set forth the special education, related services, and supplementary aids and services that will be provided for the child, and that will enable the child to appropriately advance toward reaching his annual goals, to be involved and make progress in the general education curriculum and to participate in extracurricular activities, and to be part of the mainstream curriculum.

Beyond these requirements of the IDEA, there is no guarantee of what the child must receive from the IEP. Rather, the focus of the IDEA, and the Department of Education regulations promulgated pursuant to the

---

13 Id. at § 1401(9)(D).
14 Id. at § 1414(d)(1)(A)(i); see also 34 C.F.R. § 300.320 (2007).
15 Id. at § 1414(d)(1)(A)(i)(I).
16 Id. at § 1414(d)(1)(A)(i)(I)(aa).
17 Id. at § 1414(d)(1)(A)(i)(II).
18 Id. at § 1414(d)(1)(A)(i)(II)(aa).
19 Id. at § 1414(d)(1)(A)(i)(IV).
20 Id. at § 1414(d)(1)(A)(i)(IV)(aa).
21 Id. at § 1414(d)(1)(A)(i)(IV)(bb).
IDEA, are on the procedures to develop the IEP and the procedures to challenge the IEP. The IDEA requires that the school district have procedures in place to determine if a child has a disability that requires special education.\textsuperscript{23} The IDEA describes the type of procedures to be followed in these evaluations to determine whether a child has a qualifying disability under the IDEA.\textsuperscript{24} For example, the IDEA requires school districts to use a variety of assessment tools and strategies to determine if the child qualifies for services under the IDEA\textsuperscript{25} and the content of the child’s IEP.\textsuperscript{26} The composition of the team developing the IEP\textsuperscript{27} and what the IEP development should consider during this process\textsuperscript{28} are also proscribed by the IDEA. The IDEA instructs school districts to consider the strengths of the particular child,\textsuperscript{29} the parents’ concerns,\textsuperscript{30} the evaluation results,\textsuperscript{31} and the academic, developmental, and functional needs of the child\textsuperscript{32} when developing the IEP. The IDEA also recognizes certain special conditions that require additional consideration from the school district.\textsuperscript{33} For example, the school district should consider the needs of a child who

\footnotesize
\begin{itemize}
  \item[22] Id. at § 1414(d)(1)(A)(i)(IV)(cc).
  \item[23] Id. at § 1414(a)(1)(C).
  \item[24] Id. at § 1414(b).
  \item[25] Id. at § 1414(b)(2)(A)(i).
  \item[26] Id. at § 1414(b)(2)(A)(ii).
  \item[27] Id. at § 1414(d)(1)(B).
  \item[28] Id. at § 1414(d)(3).
  \item[29] Id. at §1414(d)(3)(A)(i).
  \item[30] Id. at §1414(d)(3)(A)(ii).
  \item[31] Id. at §1414(d)(3)(A)(iii).
  \item[32] Id. at §1414(d)(3)(A)(iv).
\end{itemize}
has limited English language ability as that affects the child’s IEP, and should consider the use of Braille for a child who is blind or visually impaired. In addition, the IDEA requires state and local education agencies to establish procedures that allow parents and children to enforce the rights given under the IDEA. These procedures include the opportunity for parents and children to challenge the development of the IEP or the IEP itself. A challenge is made first in an impartial due process hearing at the local level, for which the procedures are set forth in the IDEA. The failure to address a substantive guarantee under the IDEA set the stage for a decision from the Supreme Court.

B. The Supreme Court Decides Rowley

In 1982, the Supreme Court decided its first case dealing with Congress’s response to what it perceived was the failure to educate disabled children. The Supreme Court granted certiorari to determine what the EHA meant by a “free appropriate public education.” Board of Education v. Rowley concerned the education of Amy Rowley, a deaf

---

33 Id. at §1414(d)(3)(B).
34 Id. at §1414(d)(3)(B)(ii).
35 Id. at §1414(d)(3)(B)(iii).
36 Id. at § 1415(a).
37 Id. at § 1415(b)(6).
38 Id. at § 1415(f).
39 This case deals with the two predecessor statutes to the IDEA: the Education for All Handicapped Children Act of 1975 and the Education of the Handicapped Act of 1976. All references in this section refer to the EHA.
40 Rowley, 458 U.S. at 187.
41 Id. at 186.
elementary school student who had very little residual hearing but excelled at lip-reading.\footnote{Id. at 184.} Amy’s parents agreed to have her placed in a regular kindergarten class to allow the school district to determine the necessary supplemental services.\footnote{Id.} With the use of a wireless receiver that amplified the speech of her teacher and classmates to her FM hearing aid, Amy successfully completed her kindergarten year in the regular classroom.\footnote{Id.} The school district developed an IEP for Amy’s first grade year.\footnote{Id.} Under the IEP, Amy was to remain in a regular classroom, continue using the FM hearing aid, and to receive nine hours of supplemental instruction per week.\footnote{Id.} Amy’s parents agreed with most of the IEP but requested that the school district provide Amy with a sign language interpreter rather than the other services proposed in the IEP.\footnote{Id.} After consulting with the school district’s special education committee, the school district denied the parents’ request.\footnote{Id.}

Amy’s parents appealed the denial and lost before a local hearing officer and before the New York Commissioner of Education.\footnote{Id.} Following their loss at the state level, the parents filed an appeal in the federal district court on the ground that the school district’s refusal to provide a sign

\footnote{Id. at 184.} \footnote{Id.} \footnote{Id.} \footnote{Id.} \footnote{Id.} \footnote{Id.} \footnote{Id.}
language interpreter denied Amy a FAPE. The district court found that Amy performed better than average and advanced from grade to grade. However, the district court concluded that the difference between Amy’s achievement and her potential meant that the school district denied her a FAPE. The Second Circuit affirmed the district court’s ruling on appeal by the school district.

The Court first noted that a school district provided a FAPE if it met the EHA’s requirements and it provided a personalized educational program with sufficient support services that allowed the child to benefit from the educational program. The Court found, however, that the EHA did not contain any language creating a substantive level of education guaranteed to a disabled child. Nor did the Court believe the EHA required a school district to provide an education and related services that maximized the child’s potential. According to the Court, Congress passed the EHA to make the public education system available to disabled children but did not intend to impose any substantive standard greater than that required to offer

48 Id. at 185.
49 Id.
50 Id.
52 Id.
54 Id. at 189.
55 Id.
56 Id.
meaningful access.\textsuperscript{57} However, the Court stated its belief that meaningful access alone would not fulfill the true objective of Congress in passing the EHA, or justify the expenditure of millions of dollars for access. The Court opined that to actually fulfill the mandate from Congress, the education must offer the handicapped child \textit{some educational benefit}.\textsuperscript{58}

This is the only use in the majority opinion of “some” to quantify the educational benefit. In the same paragraph, the Court finds support in the definition of FAPE under the EHA, which spoke in terms of providing support services that allowed the child \textit{to benefit} from the education.\textsuperscript{59} The Court goes on to conclude that the EHA’s minimum guarantee is individually designed and specialized instruction and related services that allow the disabled child to receive an educational benefit.\textsuperscript{60} Given this singular use of “some,” the question could arise whether the Supreme Court actually intended to articulate a substantive standard of “some educational benefit” or to leave the substantive standard open to future consideration, potentially for the higher “meaningful benefit” approach.

\section*{II. The American Approaches Applied}

Five Circuit Courts require the school district to provide an

\begin{itemize}
\item \textsuperscript{57} Id. at 192.
\item \textsuperscript{58} Id. at 200-01 (emphasis added).
\item \textsuperscript{59} Id. at 201 (emphasis added). As discussed \textit{supra}, the IDEA definition of FAPE does not include such a requirement. However, the IDEA does define “related services” as those that a disabled child may need to benefit from special education. \textit{See} 20 U.S.C.A. § 1401(26)(A).
\end{itemize}
education that confers the lower “some” benefit on the disabled child. Six circuit courts apply a “meaningful” benefit standard to the education received by the child under the IEP. The Seventh Circuit applies both the “some” benefit standard and the “meaningful” benefit standard. This section will discuss the differences between the “some” benefit and “meaningful” benefit as applied in cases concerning children not on the autism spectrum.

A. The “Some” Benefit Approach

Recently, a panel in the First Circuit applied the “some” benefit approach to the educational benefit guaranteed by the IDEA in a challenge to the IEP by the child’s parents. In Lessard, the child suffered from several disabilities, including moderate mental retardation.

---

60 458 U.S. at 201, 203.
61 See Lessard v. Wilton-Lyndeborough Cooperative School District, 518 F.3d 18 (1st Cir. 2008); Fort Zumwalt School District v. Clynes, 119 F.3d 607 (8th Cir. 1997); System ex rel. Systema v. Academy School District No. 20, 538 F.3d 1306 (10th Cir. 2008); Devine v. Indian River County School Board, 249 F.3d 1289 (11th Cir. 2001); Schoenbach, 309 F. Supp.2d 71.
63 See Keith H. v. Janesville School District, 305 F. Supp.2d 986 (W.D.Wis. 2003) (finding that the child’s above average grades, the prompt and appropriate responses to the child’s behavioral needs, and lack of regression provided “some” educational benefit); Alex R. by Beth R. v. Forrestville Valley Community Unit School District No. 221, 375 F.3d 603 (7th Cir. 2004) (concluding that providing more of the type of services that previously worked, though they did not work in this instance, satisfied the “meaningful” benefit standard).
64 Lessard, 518 F.3d at 21.
65 Id.
discussion of the IDEA, the court recognized the importance of the IEP in providing disabled children with a FAPE\textsuperscript{66} but that there is no mechanical checklist by which to determine the proper content of an IEP.\textsuperscript{67} Rather, the IEP must offer an education that is more than the general education curriculum and more than a generic program for all disabled students, i.e., the education must be individualized.\textsuperscript{68} According to the court, this means that the education is required to confer only some educational benefit, not the optimal or ideal education or maximum educational benefit possible.\textsuperscript{69}

Applying the some benefit standard to the IEP-proscribed reading program, the court found there was sufficient evidence that the program offered some benefit.\textsuperscript{70} The child’s reading teacher testified at the due process hearing that she made progress and continued to make progress under the IEP-proscribed reading program.\textsuperscript{71} Such testimony is important, according to the court, since the level of progress a child makes in her education can only be judged in relation to her potential.\textsuperscript{72} Therefore, the progress made by this child, though modest for students with greater ability, was reasonable for a child with several learning disabilities and a low IQ.\textsuperscript{73}

\begin{flushleft}
\textsuperscript{66} Id. at 23.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 29.
\textsuperscript{71} Id.
\end{flushleft}
combination of community field trips, pre-vocational instruction, and instruction in transition-related skills, provided the requisite educational benefit.\textsuperscript{74} Describing the inquiry as whether the aggregate of the services specified in the IEP enabled the child to obtain an educational benefit, the court concluded that, although this was not the ideal transition plan, the child did receive some educational benefit from the plan, which is all that is required.\textsuperscript{75} Thus, the some benefit standard appears to be satisfied as long as the child makes minimal progress under the IEP.

\textit{Clynes} provides further clarification of what satisfies the some benefit standard.\textsuperscript{76} The child in \textit{Clynes} was diagnosed with learning disabilities in reading and math in kindergarten and received an IEP.\textsuperscript{77} Under the IEP, the child received individualized instruction in reading and math in a special classroom each day and spent the rest of his time with non-disabled children.\textsuperscript{78} On appeal, the court accepted the district court’s factual findings as to the child’s performance in his third grade year.\textsuperscript{79} These findings suggested the child was not benefiting from the education provided to him, including reading skills at a second grade level, word attack skills at a first grade level, and the inability to write a complete

\footnotesize
\begin{itemize}
  \item \textsuperscript{72} Id. (citing \textit{Polk}, 853 F.2d at 185).
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id. at 30.
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} 119 F.3d 607.
  \item \textsuperscript{77} Id. at 610.
\end{itemize}
The child received three Ds and an F in reading and Cs in almost all other subjects. In addition, the reliance on using Dolch sight lists to teach the child to read led to him being unable to read words he could not recognize on sight. However, a majority of the Eighth Circuit panel hearing the case found that the IEP for the upcoming year based on the prior year’s IEP offered the child an educational benefit. The court found several facts supported its conclusion. First, the child received mostly passing grades in third grade, including Cs in math. There was also evidence the child’s overall reading ability improved. Third, the school district promoted the child to the fourth grade at the end of his third grade year. Finally, the IEP set out goals in word recognition, comprehension, language skills, and math skills. The majority found this minimal level of achievement was of some benefit to the child.

The decisions in Lessard and Clynes set a rather low standard for the education and services that provide a child with some educational benefit. Evidence of any progress, even the most minimal, satisfied courts applying this standard. As Judge Gibson said in his dissent in Clynes, it is

78 Id.
79 Id. at 612.
80 Id.
81 Id.
82 Id.
83 Id. at 613.
84 Id.
85 Id.
86 Id.
improbable that Congress intended an education that provided trivial achievement and progress to satisfy the IDEA.\textsuperscript{88}

\textbf{B. The “Meaningful” Benefit Approach}

Six years after the Supreme Court articulated a standard for the substantive educational benefit, the Third Circuit panel in \textit{Polk} rejected the “some” benefit standard in favor of the higher “meaningful” benefit.\textsuperscript{89} Though applying the IDEA’s predecessor, the EHA, \textit{Polk}’s value is the court’s analysis of why the proper standard is a “meaningful” benefit and not “some” benefit.\textsuperscript{90} Leading to this appeal was the school district’s decision to move from providing the child with direct physical therapy to a consultative method.\textsuperscript{91} Under the consultative method, a physical therapist instructed the child’s teacher on ways to integrate therapy into the child’s education but did not actually provide any therapy to the child.\textsuperscript{92} The court prefaced its discussion of the benefit provided to the child by noting that physical therapy and other related services are essential elements of the education for children whose disabilities interfere with the ability to attend school.\textsuperscript{93} Here, the child’s physical therapy was such an essential part of his

\begin{flushright}
\textsuperscript{87} Id.\textsuperscript{88} Id. at 617. \textsuperscript{89} 853 F.2d at 172. \textsuperscript{90} Id. \textsuperscript{91} Id. at 173. \textsuperscript{92} Id. at 174. \textsuperscript{93} Id. at 176.\end{flushright}
education because the therapy allowed him to learn basic skills.\textsuperscript{94}

The court began its discussion of the substantive standard with the assertion that \textit{Rowley}, though focused on procedures and disclaiming attempts to articulate a substantive standard, nevertheless did not establish a “toothless” standard.\textsuperscript{95} Instead, the court interpreted \textit{Rowley} as requiring the education confer a “meaningful” benefit.\textsuperscript{96} The court supports its conclusion with \textit{Rowley}’s requirement that the access called for by the EHA be “meaningful.”\textsuperscript{97} Since the Supreme Court considered \textit{Rowley} a narrow decision because Amy Rowley was already receiving “substantial” specialized instruction and related services and was performing above average,\textsuperscript{98} the Third Circuit panel here next considered the legislative history of the EHA.\textsuperscript{99} Based on this inquiry, the court concluded that the references contained in those reports to a “full” education\textsuperscript{100} demonstrate an intent to provide more than a “trivial amount of educational benefit.”\textsuperscript{101} The court found additional support for the “meaningful” benefit standard in the emphasis on self-sufficiency, which the court interpreted as requiring

\begin{itemize}
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id. at 179.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id. (citing \textit{Rowley}, 458 U.S. at 192).
\item \textsuperscript{98} \textit{Rowley}, 458 U.S. at 202.
\item \textsuperscript{99} \textit{Polk}, 853 F.3d at 181.
\item \textsuperscript{100} See S. Rep. No. 94-168, at 42 (1975) (must provide the related services that are necessary to provide the child a full benefit from the education); H.R. Rep. No. 94-332, at 11 (1975) (goal of the EHA is to provide a full public education).
\item \textsuperscript{101} \textit{Polk}, 853 F.3d at 181.
\end{itemize}
more than mere access to a public education.\textsuperscript{102} In other words, there must be more than a trivial benefit.\textsuperscript{103} \textit{Rowley}, according to the court, did not alter this interpretation, since the Supreme Court’s use of “meaningful” recognized more than a \textit{de minimis} benefit.\textsuperscript{104} Finally, the court reiterated that the benefit received by a child must be measured in relation to the child’s potential.\textsuperscript{105}

More than ten years latter, the Fifth Circuit applied and expanded on the definition of a “meaningful” educational benefit.\textsuperscript{106} In \textit{Michael F.}, the child suffered from attention deficit hyperactivity disorder and Tourette’s syndrome.\textsuperscript{107} Responding to behavioral difficulties, the school district moved the child to a self-contained classroom for three subjects, kept him in a regular classroom for two subjects, and implemented a behavior management program.\textsuperscript{108} At the IEP team meetings in preparation for the next school year, the IEP team learned that the child made progress toward achieving his goals but had only achieved mastery in science.\textsuperscript{109} Based on this information, the IEP team concluded that the child could be placed in a regular classroom full-time, which lasted until October when his placement

\begin{footnotesize}
\begin{enumerate}
\item[102] Id. at 182.
\item[103] Id.
\item[104] Id.
\item[105] Id. at 185.
\item[106] \textit{Michael F.}, 118. F.3d 245.
\item[107] Id. at 248-49.
\item[108] Id. at 249.
\item[109] Id. at 250.
\end{enumerate}
\end{footnotesize}
was again changed due to behavior problems.\textsuperscript{110} This change resulted in the child being placed in adaptive behavior classes for three subjects, remaining in a regular class for all other subjects, and a modified discipline plan.\textsuperscript{111} At the state review level, the hearing officer determined that the child did not receive any educational benefit from his IEPs.\textsuperscript{112} The hearing officer based this decision on the fact that the child’s new IEP, based on an IEP that was unable to deal with his behavior problems, was inadequate.\textsuperscript{113}

The district court articulated four indicia of an IEP that provided a “meaningful” benefit: an individualized program based on evaluations of the student; education in the least restrictive environment; coordination among key “stakeholders;” and demonstrated positive academic and non-academic benefits.\textsuperscript{114} Since the IEP team developed the IEP with the child’s behavior problems in mind, placed him with non-disabled students for at least half of each school day, and involved his teachers, school district administrators, and counselors, all familiar with his needs, the district court found the first three indicia were present.\textsuperscript{115} The child’s passing grades, ability to attend lunch, and ability to walk through the hallways without an

\textsuperscript{110}Id. at 251 (when this change was made, Michael was passing all but one class and receiving satisfactory conduct marks in all but two classes but was having difficulty turning in homework assignments).

\textsuperscript{111}Id.

\textsuperscript{112}Id. at 252.

\textsuperscript{113}Id. at 253.

\textsuperscript{114}Id.

\textsuperscript{115}Id.
aid satisfied the fourth factor.\textsuperscript{116} Thus, the district court concluded that the child received a “meaningful” benefit,\textsuperscript{117} a conclusion accepted by the Fifth Circuit panel.\textsuperscript{118} The appellate panel found the testimony of several educators and other professionals who interacted with the child also supported the conclusion that he received a “meaningful” benefit from his IEP.\textsuperscript{119}

The definition of “meaningful” benefit from \textit{Polk} sets a requirement that is more than “some” benefit. Whereas any outcome that was better than where the child started would appear to satisfy the “some” benefit standard, such marginal benefit would not satisfy the “meaningful” benefit standard as set out in \textit{Polk}.\textsuperscript{120} However, the application of this standard in \textit{Michael F.} does not seem to differ much from the application of the “some” benefit standard in \textit{Clynes}, as the court in each case accepted the child’s “passing grades” as academic progress.\textsuperscript{121}

III. THE AMERICAN APPROACHES IN AUTISM CASES

The prior section discussed the application of the “some” and “meaningful” benefit standards to cases brought under the IDEA by children with non-autism spectrum disorders. With the foundation in place,

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 254.
\textsuperscript{119} Id. at 255.
\textsuperscript{120} See supra pp. 10-11.
\textsuperscript{121} See supra pp. 8-9.
this section looks at whether courts alter the application of their chosen standard when dealing with children within the autism spectrum. By way of introduction, it should be noted that the EHA as applied in *Rowley* in 1982 did not include autism in its definition of disabilities that qualified a child for special education.\(^{122}\) In 1990, however, Congress amended the IDEA to include autism as a disorder that under the definition of “children with disabilities.”\(^{123}\) The addition of autism as a specifically identified category was a recognition that some children on the autism spectrum were not a FAPE, even though they required special education.\(^{124}\) Had autism been included in the definition of qualifying disabilities at the time of *Rowley*, it is interesting to consider whether the Supreme Court would have come to a different outcome, especially since educating a child with autism requires an intense instructional method and can be expensive,\(^{125}\) similar to additional services requested by Amy Rowley’s parents.

*A. Autism: A Brief Introduction*

Based on its most recent data, the United States Centers for Disease Control and Prevention (the “CDC”) concluded that about one of every 110

\(^{122}\) 458 U.S. at 181 (citing to 20 U.S.C. § 1401(1) (current version at 20 U.S.C.A. § 1401(3)), which covered mental retardation, hearing impairments, speech impairments, sight impairments, serious emotional disorders, orthopedic impairments, and other health impairments).


\(^{125}\) See e.g., Amanda M. Fairbanks, *Tug of War Over Costs to Educate the Autistic*, N.Y. Times, Apr. 18, 2009, available at
children suffers from some form of autism spectrum disorder (“ASD”). ASDs are developmental disorders that cause the brain to process information differently, leading to social, behavioral, and communication challenges. There are three categories of ASDs. The autistic disorder (also referred to as “classic” autism) typically presents significant language delays, social and communication difficulties, unusual behaviors and interests, and in some cases intellectual disabilities. Asperger’s Syndrome usually presents without language and intellectual disabilities and otherwise milder symptoms than the autistic disorder. Finally, children who present some symptoms of either the autistic disorder or Asperger’s Syndrome are diagnosed with the third form of ASD, the Pervasive Developmental Disorder – Not Otherwise Specified (PDD – NOS) or “atypical” autism.

There is no single best treatment for children with an ASD. However, the CDC does recognize that behavioral and communication treatments that best help children with ASDs are those that stress structure,
direction, and organization. One of the preferred and more widely accepted methods of treatment is Applied Behavioral Analysis (“ABA”).

In a 1999 report, the Surgeon General commented that in the search for an effective treatment for ASDs “[t]hirty years of research demonstrate[s] the efficacy of applied behavioral analysis in reducing inappropriate behavior and in increasing communication, learning, and appropriate social behavior.” ABA therapy is based on rewarding positive behaviors to encourage their repetition and to develop socially important behaviors.

An important element in any ABA therapy program is that it is tailored to the needs of the particular child. Common features of ABA therapy programs include selection of meaningful goals, continuous objective measurement of the child’s progress, skills broken down into small parts or steps and taught from the simple to the complex, an emphasis on skills that foster independence, and the opportunity to practice skills on a daily


Id.

Id.


Id.
basis.\textsuperscript{138} If properly provided, ABA therapy can produce meaningful progress and results in children, though a significant amount of instruction is usually required and results vary from child to child.\textsuperscript{139}

A second popular instructional method is the Treatment and Education of Autistic and Related Communication Handicapped Children, or “TEACCH.”\textsuperscript{140} According to the Surgeon General’s 1999 report, a TEACCH-based approach produced short-term progress for preschoolers with autism who received daily in-home sessions compared to a control group.\textsuperscript{141} The TEACCH method is based on the concept of the “Culture of Autism.”\textsuperscript{142} The “Culture of Autism” refers to a pattern of thinking and behavior that is commonly seen in children diagnosed with an ASD, which includes a strength and preference for visual information, attention to details, communication problems, and attachment to routines.\textsuperscript{143} In the long-term, the TEACCH method’s goal is to foster skill development and to fulfill basic human needs such as engaging in meaningful activities and self-confidence.\textsuperscript{144} These goals are achieved through an approach known as

\begin{itemize}
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} TEACCH Autism Program, University of North Carolina School of Medicine, \textit{What is TEACCH?}, (2006), http://www.teacch.com/whatis.html.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\end{itemize}
“structured teaching.”

“Structured teaching” is based on an understanding of the “Culture of Autism,” an individualized program, a structured environment, and visual supports.

Regardless of whether ABA therapy or the TEACCH method is used, one of the most important difficulties faced by children with an ASD is the inability to generalize skills. Children who are unable to generalize skills cannot take skills learned in one setting and apply those skills to a situation in a different setting. The underlying cause of this inability to generalize is the focus of children with an ASD on details. By focusing on details, a child with an ASD misses the “central principles” which must be understood before a skill learned in one setting can be applied in a different setting. To overcome the inability to generalize, it is recommended to coordinate teaching in school and at home. The more coordination between the two settings, the more likely it is that a child with an ASD will apply skills across settings.

B. “Some” Benefit and Autism

Since autism is such a unique condition requiring specialized and
expensive instructional methods, the question arises whether courts recognize this in deciding a child received the “some” educational benefit required to satisfy the IDEA. In *Devine*, the child attended an elementary school with a special program for autistic students and received an IEP from the school district for each year.\(^{153}\) A dispute arose when the school district rejected the parents’ request for a placement in a residential facility and instead offered a combination of family and in-home behavior counseling, the same services offered in prior years.\(^{154}\) The parents challenged the IEP on the ground that it failed to address the child’s inability to generalize skills across settings and failed to address his behavioral problems at home.\(^{155}\)

The court, in its analysis, began by stating that a child is only guaranteed “some” benefit from his or her education.\(^{156}\) At the prior hearing, one of the child’s teachers testified that he made progress on twenty-six of the twenty-seven goals included in his IEP.\(^{157}\) Other teachers testified that the child, who could not be controlled when he began attending the school, had reached a level where he was able to acquire skills

---

\(^{152}\) Id.

\(^{153}\) 249 F.3d at 1290-91.

\(^{154}\) Id. at 1291.

\(^{155}\) Id. at 1292.

\(^{156}\) Id. (citing *Rowley*, 458 U.S. 176).

\(^{157}\) Id.
and use those skills in different settings.\textsuperscript{158} He developed a close relationship with one teacher in particular and with some of his fellow students.\textsuperscript{159} In addition, the court stated that the ability to generalize skills in various settings is not required for a child to benefit from the education.\textsuperscript{160} Rather, all that is required under the IDEA and \textit{Rowley} is that the child makes “measurable and adequate gains in the classroom.”\textsuperscript{161} Based on these findings, the panel concluded the child received “some” benefit from his IEP and education.\textsuperscript{162}

Following the decision in \textit{Devine}, the Tenth Circuit offered additional guidance on what education and related services provide a child with an ASD “some” educational benefit.\textsuperscript{163} In \textit{Systema}, the child received sixteen-and-one-half-hours of one-to-one therapy in his home from a local service provider.\textsuperscript{164} When the school district became responsible for the child’s education, it proposed only ten-and-three-quarter-hours of services in the IEP, consisting of nine-and-one-half hours per week in an integrated classroom and one-and-one quarter hours per week of additional educational services.\textsuperscript{165} The district eventually increased its offer to twenty-

\begin{footnotesize}
\begin{enumerate}
\item[158] Id.
\item[159] Id.
\item[160] Id. at 1293.
\item[161] Id. (citing J.S.K. by and through J.K. and P.G.K. v. Hendry County School Board, 941 F.2d 1563, 1573 (11th Cir. 1991)).
\item[162] Id.
\item[163] \textit{Systema}, 538 F.3d 1306.
\item[164] Id. at 1309.
\item[165] Id.
\end{enumerate}
\end{footnotesize}
five hours per week, divided between twenty hours per week in an integrated classroom and five hours per week of one-to-one discrete trial training.\(^\text{166}\) Applying the “some” benefit standard, the court stressed two sets of facts.\(^\text{167}\) One important consideration was that the IEP called for the use of several different teaching methods to achieve the specified goals, including the errorless learning method,\(^\text{168}\) discrete trial training, several reinforcement strategies, and shaping procedures.\(^\text{169}\) Even though the errorless learning method proved ineffective in the past, the combination with the other services would have provided “some” educational benefit.\(^\text{170}\) Second, the court found the parents’ significant involvement in their child’s education, knowledge of autism, and the minor generalization problem did not require the school district to address parent training in the IEP.\(^\text{171}\) Thus, the court concluded that the IEP provided “some” educational benefit.\(^\text{172}\)

Applying the “some” benefit standard in a case involving a child with Asperger’s Syndrome, the court in Schoenbach was presented with a

\(^{166}\) Id. at 1310.  
\(^{167}\) Id. at 1317.  
\(^{168}\) According to the court, the errorless teaching method is frequently used with autistic students and is especially helpful for students that are easily frustrated and resistant to demands. However, this method can impede the learning progress for passive children. Children are taught by the teacher using successful experiences and correct answers to reinforce the child’s learning. Id.  
\(^{169}\) Id.  
\(^{170}\) Id. at 1318.  
\(^{171}\) Id.  
\(^{172}\) Id. at 1317.
somewhat unique situation. The court began by discussing the conclusions of the hearing officer based on the evidence presented at the hearing. This included evidence that the child advanced from grade-to-grade and achieved higher than average marks in some classes, which had special significance since the child was attending one of the more competitive schools in the district. In addition, the IEP included goals and objectives relating to the child’s social-emotional problems, organization skills, interpersonal skills, coping skills, and attending skills. Evidence introduced during the hearing demonstrated that the child made progress on achieving the social and emotional goals. An expert testified that the child needed a small classroom and that progress for a child with Asperger’s Syndrome could be misleading, since a child with Asperger’s Syndrome cannot always use the information they appear to master in other settings. Notwithstanding this testimony, the court found the hearing officer’s decision to be appropriate and the “some” benefit standard satisfied. However, the school district developed a new IEP for the child at the end of the school year that recommended the exact placement

---

173 309 F. Supp.2d at 78.
174 Id. at 80.
175 Id.
176 Id. at 81.
177 Id.
178 Id.
179 Id.
Based on this new IEP, the court concluded that the school district failed to meet the “some” benefit standard with the prior IEP.\textsuperscript{180}

In these cases, the courts still focus on the progress the child makes under the services that are provided, or the progress the court believes the child would have made. The amount of this progress or potential progress that must be reached, as in the non-autism cases, is not very high. For example, a child would not be required to be able to apply skills learned in the classroom at home. In addition, using a teaching method that previously did not work would not prevent the child from obtaining “some” benefit if other methods were also included and the parents were well informed about their child’s condition. Such conclusions run counter to the purpose of providing children with “some” benefit from their education. Surely, even “some” benefit cannot be so low a threshold that minimal progress on critical skills suffices. Otherwise there seems to be little purpose in sending the child to school if there is no requirement that the child be able to apply skills learned in school at home or if the school uses an instructional method that is proven ineffective.

\textsuperscript{180} Id. at 82.

\textsuperscript{181} Id.  See also Neosho, 315 F.3d at 1029-30 (concluding the school district did not provide “some” benefit because it failed to include a behavior management plan and the grade reports showing slight progress were misleading because the stress caused by his behavior forced the school district to lower grade level of his work for him to achieve any degree of success).
C. “Meaningful” Benefit and Autism

Given the practice of the courts applying the “some” benefit standard to cases concerning children with an ASD, a logical inquiry is whether courts applying the “meaningful” benefit standard mirror that practice. In Deal, the child was diagnosed with autism when he was three years old and placed in a comprehensive development preschool class.\(^\text{182}\) At the same time, his parents began an in-home instruction program relying heavily on ABA therapy.\(^\text{183}\) Over the next several years, the school district rejected each request made by the parents to include ABA therapy in their child’s IEP.\(^\text{184}\) The parents appealed the denial of their request.\(^\text{185}\)

Beginning its substantive analysis, the court stated that the dispute between the parents and the school district was fundamentally a disagreement about the level of education the school district was required to provide.\(^\text{186}\) The simple solution to this dispute, according to the court, was that the education must be sufficient to provide the child more than a de minimis educational benefit.\(^\text{187}\) However, this simple answer is not always the proper response to this disagreement.\(^\text{188}\) Other courts faced with similar disputes required the school district to provide the more intense and

\(^\text{182}\) 392 F.3d at 845.
\(^\text{183}\) Id.
\(^\text{184}\) Id. at 846.
\(^\text{185}\) Id. at 847.
\(^\text{186}\) Id. at 861.
\(^\text{187}\) Id.
expensive programs, such as ABA therapy. The court opined that there is a line at which the difference between the more intense program and less intense program is so great that the less intense program does not provide much, if any, educational benefit. Thus, the court adopted the Third Circuit’s reasoning that the child must receive a “meaningful” benefit, based on the child’s potential, from the education provided by the school district. The court supported its conclusion by noting that the Rowley decision does not prohibit a higher standard than “some” benefit but in fact could be read to require a higher standard when the difference between teaching methods is so great. Addressing the issue of cost, the court reaffirmed an earlier Sixth Circuit case holding that school districts could consider cost when deciding on the educational program for the child. However, the court cautioned that this does not allow the school district to ignore its primary mandate of providing an education that is individualized and tailored to the child’s needs. The court remanded the case for the district court to determine whether the school district provided the child a

---

188 Id.
189 Id.
190 Id. at 862.
192 Id. at 863.
193 Id. at 864 (citing Clevenger v. Oak Ridge School Board, 744 F.2d 514, 516-17 (6th Cir. 1984)).
194 Id. at 864-65.
“meaningful” benefit.\textsuperscript{195}

Applying the “meaningful” benefit standard, the court in \textit{A.Y.} noted that a satisfactory IEP had to provide more than \textit{de minimis} educational benefit.\textsuperscript{196} The child began attending a full-time autistic support program in the school district during kindergarten and did well until his teacher was forced to retire.\textsuperscript{197} Unable to recover from this change, his parents placed him in a private school, where he was assigned a tutor with thirty years of experience working with autistic children\textsuperscript{198} and provided an individualized behavior management plan and letter and phonemic awareness instruction program based on his passion for dinosaurs.\textsuperscript{199} At the next IEP development meeting, the school district recommended its autism program as the placement for the child.\textsuperscript{200} The parents rejected this plan and requested a hearing.\textsuperscript{201}

The court relied on the factual findings of the hearing officer.\textsuperscript{202}

The hearing officer began by reviewing the evaluation report, reasoning that

\begin{footnotesize}
\begin{enumerate}
\item Id. at 865. On remand, the district court concluded that the education provided the child a “meaningful” benefit because the child’s abilities and the program differences did not raise the concerns about the lesser program addressed above. Deal \textit{ex rel.} Deal v. Hamilton County Department of Education, No. 1:01-cv-295, 2006 WL 5667836, at *27 (E.D. Tenn. April 3, 2006), \textit{aff’d}, 258 F. App’x 863 (6th Cir. 2008).
\item 569 F. Supp.2d at 500.
\item Id. at 502.
\item Id.
\item Id. at 503.
\item Id.
\item Id. at 504.
\end{enumerate}
\end{footnotesize}
this report formed the foundation for the child’s IEP.\textsuperscript{203} Though the school district did attempt to compile a complete file, by visiting the private school, observing the child, and interviewing the parents, the evaluation report contained significant portions of boilerplate language.\textsuperscript{204} For example, the report included principles to guide goal development that were taken from the interview form used by the school district, not the answers given during the interviews.\textsuperscript{205} Therefore, these principles could apply to any child requiring special education.\textsuperscript{206} In addition, the report recommends the use of ABA therapy but since this recommendation was nothing more than a mere assertion to use ABA therapy, the hearing officer concluded this too was boilerplate.\textsuperscript{207} According to the hearing officer, there were several recommendations in the evaluation report that were included because they were appropriate for some children with autism but not this child.\textsuperscript{208} Based on the use of boilerplate language throughout the report, the hearing officer determined the report was not tailored to the specific needs of the child.\textsuperscript{209} Therefore, the evaluation report was inappropriate, as was the IEP developed from the report.\textsuperscript{210} The IEP also

\begin{footnotesize}
\begin{enumerate}
\item Id. at 508.
\item Id.
\item Id.
\item Id. at 508-509.
\item Id. at 509.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
contained several goals that were unclear, unspecific, and incomplete, providing further support for the hearing officer’s conclusion that the IEP was incomplete. The court accepted the hearing officer’s conclusion that the IEP was inappropriate and therefore could not provide the child a “meaningful” educational benefit.

The Ninth Circuit officially adopted the “meaningful” benefit standard in Hellgate. Blake C. followed the Hellgate decision and involved the district court revisiting its earlier decision to apply the “lesser ‘some’ benefit standard.” Recognizing the existence of several definitions of “meaningful” benefit, the court determined that such a standard requires an IEP that is individualized to the child’s unique needs and provides more than de minimis benefits in relation to the child’s potential. Applying the “meaningful” benefit standard, the court addressed the findings of the hearing officer that the child made progress under the IEP. Based on the reports filed by the child’s home-school

---

211 Id.
212 Id. at 510.
213 541 F.3d at 1212-13 (“Under the 1997 amendments to the IDEA, a school must provide a student with a “meaningful benefit” in order to satisfy the substantive requirements of the IDEA”). But see L.t. T.B., 361 F.3d at 83 (rejecting the argument that the 1997 amendments to the IDEA change the standard from “some” benefit).
214 593 F. Supp.2d at 1205.
215 The court discusses possible definitions of “some” and “meaningful.” According to the court, “If ‘some’ means ‘more than minimal’ but real progress, then there might be no difference. If ‘some’ means only ‘any at all’ then a ‘meaningful benefit’ is indeed a heightened standard.” Id. n. 7.
216 Id. at 1206.
217 Id. at 1209.
teacher and evidence produced by the school, the hearing officer concluded that the child made progress on eight of his goals. 218 Thus, the IEP provided the child with educational benefit. 219

According to the court, this conclusion was erroneous because the hearing officer determined the child made progress based on documents that were determined to be irrelevant to the challenged IEP. 220 In addition, the court stressed the evidence showing the child was at the same reading level two years after leaving the private school and receiving instruction under the challenged IEP, and that the child made significant progress in two academic areas, developed his social skills, and displayed good behaviors after returning to the private school. 221 Therefore, the challenged IEP did not provide the child with a “meaningful” educational benefit. 222

In these cases, the general application of the “meaningful” benefit standard does not differ much from the application in cases dealing with non-autistic children, though there is an increased focus and stress that the educational benefit provided to an autistic child exceed a de minimis level. There is also more emphasis on the different programs available for children with an autism spectrum disorder. This includes, to some degree, an assumption that certain instructional methods and programs are better
than others. However, a court should not make such an assumption. There are several instructional methods used to teach children with an ASD, though not every method is appropriate for every child. An assumption that some methods are better than others ignores this fact and the goal of the IDEA to have individualized education for children with disabilities. When dealing with autism, this assumption is even more problematic given the breadth and variance of the autism spectrum. Rather, the instructional method for a particular child should be determined by the educational and medical professionals with the appropriate knowledge to do so.

IV. THE ENGLISH STATUTORY SCHEME

Compared to the IDEA, a major difference in the English statute and regulations is the substantive standard of appropriate educational and non-educational provisions. In addition, the regulations provide some detail not found in the IDEA on how the school is to determine whether a child is making progress in their education.

Part I of the Education Act 1996 states that for a local education authority (“LEA”) to maintain schools that are sufficient to provide primary and secondary education, there must be schools that in quantity, character, and equipment offer all students an opportunity for an appropriate education. An appropriate education is defined as the desirable

---

222 Id.
223 Education Act, 1996, c. 56, at § 14(2).
instruction and training in light of the child’s age, ability, and aptitude.\textsuperscript{224}

The primary portion of the Education Act 1996 addressing special education is Part IV.\textsuperscript{225} Section 312(4) defines the “special educational provision” that is required for a child who is eligible to receive special education.\textsuperscript{226} For children at least two years of age, a special educational provision is any educational provision that is different from, or additional, to the educational provision generally provided by the LEA to students.\textsuperscript{227} Any educational provision for children younger than two years old is considered to be special educational.\textsuperscript{228} If the LEA determines, based on an assessment of the child under Section 323, that the child has special educational needs, the LEA is required to create a statement of special educational needs.\textsuperscript{229} The statement created for the child must contain a detailed description of the assessment performed by the LEA\textsuperscript{230} and the special educational provision required to meet the child’s needs.\textsuperscript{231} In the statement, the LEA must specify the placement it considers appropriate for the child.\textsuperscript{232} Unless the child’s parents make their own arrangements, a LEA that maintains a statement must arrange for the special educational

\begin{itemize}
\item \textsuperscript{224} Id. at § 14(3)(a).
\item \textsuperscript{225} Id. at §§ 312-349.
\item \textsuperscript{226} Id. at § 312(4)(a).
\item \textsuperscript{228} Id. at § 312(4)(b).
\item \textsuperscript{229} Id. at § 324(3)(a).
\item \textsuperscript{230} Id. at § 324(3)(b).
\item \textsuperscript{231} Id. at § 324(3)(b).
\item \textsuperscript{232} Id. at § 324(3)(a).
\end{itemize}
provision set forth in the statement to be provided to the child.\textsuperscript{233} In addition, the Education Act 1996 allows but does not require the LEA to arrange for the appropriate non-educational provision set forth in the statement to be provided.\textsuperscript{234}

The regulations based on the Education Act 1996 provide more detailed guidance as to the special education a LEA is required to provide children with special educational needs.\textsuperscript{235} Under the regulations, a LEA can obtain advice from various individuals and organizations while making its assessment of a child.\textsuperscript{236} This article includes a catchall that allows the LEA to obtain any advice it considers appropriate to the completion of the assessment.\textsuperscript{237} Such advice is intended to assist the LEA determine the appropriate provision for the child and the best combination of educational and non-educational provisions.\textsuperscript{238} A similar article allows the head teacher to seek advice when reviewing a child’s existing statement.\textsuperscript{239} Much of the focus of this advice is on the progress the child is making, for example the progress toward meeting the statement’s objectives,\textsuperscript{240} on attaining the

\begin{itemize}
\item \textsuperscript{233} Id. at § 324(5)(a)(i).
\item \textsuperscript{234} Id. at § 324(5)(a)(ii).
\item \textsuperscript{235} The Educational (Special Educational Needs) (England) (Consolidation) Regulations, 2001, S.I. 2001/3455.
\item \textsuperscript{236} Id. at art. 7, ¶ 1.
\item \textsuperscript{237} Id. at art 7, ¶ 1(f).
\item \textsuperscript{238} Id. at art. 7, ¶ 2(c).
\item \textsuperscript{239} Id. at art. 20, ¶ 20(5).
\item \textsuperscript{240} Id. at art. 20, ¶ 20(5)(a).
\end{itemize}
targets\textsuperscript{241} established for the objectives,\textsuperscript{242} and on the progress since the last review.\textsuperscript{243} Advice is also allowed as to whether the statement continues to be appropriate for the child.\textsuperscript{244}

V. English Law in Practice

The detail of the Education Act 1996 as to the required level of education and of the regulations on how to determine progress removes the ambiguity of different approaches to the educational benefit required under the IDEA in the United States. In Miss H. v. East Sussex County Council and Others, the child’s statement called for placement in a special day school.\textsuperscript{245} The child’s mother filed an appeal with the Special Educational Needs and Disability Tribunal (“SENDIST”) arguing that the child required a residential placement to meet his needs.\textsuperscript{246} Before the SENDIST, the child’s mother offered expert testimony that the child could only succeed in a structured environment that offered a consistent routine and little variation in teachers.\textsuperscript{247} In addition, the child needed to learn how to generalize skills so that she could become independent, learn to eat healthy foods, and overcome her anxiety issues, which she could not learn in the home.

\textsuperscript{241} Article 2, Paragraph 1 defines “targets” as “the knowledge, skills and understanding, which a child is expected to have by the end of a particular period.”
\textsuperscript{242} Id. at art. 20, ¶ 20(5)(b).
\textsuperscript{243} Id. at art. 20, ¶ 20(5)(e).
\textsuperscript{244} Id. at art. 20, ¶ 20(5)(g).
\textsuperscript{245} [2009] EWCA (Civ) 249, [2] (Eng.).
\textsuperscript{246} Id. at [3].
\textsuperscript{247} Id. at [35].
setting.\textsuperscript{248} A representative from the LEA informed the SENDIST of an after school program that offered group activities and field trips that it believed would provide the appropriate provision for the child.\textsuperscript{249} As part of its provision, the LEA also offered in-home therapy with psychologists, speech and language therapists, and special social workers.\textsuperscript{250} The final part of the LEA’s plan was continued support from an independent special service provider and fifty-two nights per year of residential respite care in which the child would stay with another family.\textsuperscript{251} The SENDIST dismissed the appeal, finding the package of services offered by the LEA in combination with the day school placement offered an appropriate education.\textsuperscript{252}

Describing the requirements of a valid statement, Lord Justice Waller began by stating that in Part III of the statement, the LEA must provide for all special educational provisions that are necessary to meet the child’s needs.\textsuperscript{253} If the child requires provision outside the day school setting, this must also be “specified and quantified” in Part III.\textsuperscript{254} In his review of the SENDIST’s decision, Lord Justice Waller concluded that the SENDIST weighed the evidence and determined that a residential setting

\textsuperscript{248} Id.
\textsuperscript{249} Id. at [36].
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id. at [45].
\textsuperscript{253} Id. at [23].
was not necessary to meet the child’s special educational needs, at least when compared to the support available at home outside the school day.\textsuperscript{255} Finding no error with the decision of the SENDIST,\textsuperscript{256} the Court of Appeal affirmed the dismissal of the mother’s appeal.\textsuperscript{257}

A similar appeal by a child’s parents regarding the appropriate placement for the child was the subject of \textit{H.W. and W. v. Bedfordshire County Council and Another}.\textsuperscript{258} Unlike Miss H, however, the child in \textit{H.W.} already attended a residential school.\textsuperscript{259} At this school, the child received educational provision during normal school hours and outside normal school hours on three days a week.\textsuperscript{260} The parents contended that the child’s needs required provision outside the normal school hours, and offered evidence of the improvement the child made while at the residential school\textsuperscript{261} to support their claim he should remain at the residential school.\textsuperscript{262} The LEA conceded that the child required provision outside of normal school hours but maintained that it could make such provision.\textsuperscript{263} Notwithstanding the admission of the LEA-recommended school’s head master that the school would be unable to provide the necessary provision

\begin{footnotes}
254 Id.
255 Id. at [41].
256 Id. at [42].
257 Id. at [43], [50].
259 Id.
260 Id.
261 Id. at [8].
262 Id. at [10].
\end{footnotes}
to meet the child’s needs and that the residential school could provide the provision, the SENDIST concluded the LEA recommended school was appropriate.\textsuperscript{264}

The court began its discussion by noting that the “package of care” discussed in the child’s statement and by the SENDIST was to be provided in an educational setting, i.e. a school.\textsuperscript{265} At the time the LEA developed the statement, the LEA and parents agreed that the appropriate setting for the child was a residential school, which would mean the provision encompassed by the “package of care” would meet the child’s needs.\textsuperscript{266} Since the SENDIST concluded a residential setting was not necessary,\textsuperscript{267} it should have reviewed the “package of care” to make sure it was still appropriate in a non-residential setting.\textsuperscript{268} The court found the SENDIST failed to address the potential effect the change of educational setting had on the appropriateness of the statement and to order a more specific statement of the provision to be made outside normal school hours.\textsuperscript{269} In addition, the court found that the LEA recommended school could not provide the same provision the child received at the residential school.\textsuperscript{270} Therefore, the decision of the SENDIST was erroneous and the court

\textsuperscript{263} Id. at [11].
\textsuperscript{264} Id. at [12].
\textsuperscript{265} Id. at [15].
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{268} Id. at [16].
remitted the matter for further consideration.\footnote{271}

In an unusual situation, the SENDIST found both the independent school preferred by the parents and the LEA recommended school capable of providing for the child’s special educational needs and therefore appropriate in \textit{R. (M.) v. Brighton and Hove City Council and Special Educational Needs and Disability Tribunal}.\footnote{272} The parents offered evidence that the independent school was appropriate for the child because it offered instruction from teachers specializing in learning disorders and small classes.\footnote{273} The school recommended by the LEA offered a special facility limited to twenty students in a mainstream setting with teachers trained in supporting learning disorders.\footnote{274} Additionally, the LEA-recommended school offered programs, such as a school day concentrated in the morning and a homework club during lunch, that were suited to the child’s disabilities.\footnote{275} Since the SENDIST considered both placements appropriate, it ordered the child to attend the LEA recommended placement, as that was the least costly of the two programs.\footnote{276}

On appeal, the parents argued that the LEA recommended school was not in fact appropriate because it did not comply with the statement’s

\footnotesize{\begin{itemize}
  \item \footnote{269} Id.
  \item \footnote{270} Id. at [17].
  \item \footnote{271} Id. at [18].
  \item \footnote{272} [2003] EWHC (Admin) 1722, [15] (Eng.).
  \item \footnote{273} Id. at [10].
  \item \footnote{274} Id. at [13].
\end{itemize}}
requirement that the child receive instruction from “specialist teachers.”²⁷⁷ Responding to this contention, the court looked at the description of the school in its informational literature, which described students attending class in the regular classroom with instruction from regular classroom teachers and receiving support from the special facility teachers.²⁷⁸ Before the SENDIST, the LEA offered evidence that two of the special facility teachers had training and qualifications for teaching special needs children and a third teacher was receiving instruction under an in-house training program.²⁷⁹ In addition, the head of the special facility testified in terms of “support” from its teachers and “supplements” to the curriculum.²⁸⁰ The LEA conceded, before the court, that the specialist teachers did not teach the curriculum offered by the special facility but argued that if such a requirement existed, the SENDIST would not have concluded the special facility met the child’s needs and was appropriate.²⁸¹

The court recognized the ambiguity in the requirement that the instruction be made by specialist teachers,²⁸² which the court defined as teachers specifically trained to teach children with learning disabilities.²⁸³

---

²⁷⁵ Id.
²⁷⁶ Id. at [10].
²⁷⁷ Id. at [18]-[19].
²⁷⁸ Id.
²⁷⁹ Id. at [20].
²⁸⁰ Id. at [21].
²⁸¹ Id. at [22].
²⁸² Id. at [23].
²⁸³ Id. at [22].
Such instruction could refer to the entire curriculum or part of the curriculum.\textsuperscript{284} It was also unclear whether instruction from a regular classroom teacher with support from a specialist teacher would be sufficient to be considered instruction by a specialist teacher.\textsuperscript{285} Based on the lack of clarity as to the sufficiency of the specialist teaching (i.e., whether the teaching was required to be by a specialist teacher or by a mainstream teacher with support from specialist teacher), the court remitted the case back to the SENDIST to resolve this open question and to determine if the LEA recommended school was still appropriate.\textsuperscript{286} In the court’s opinion, the answer to this question was essential to determine the appropriate placement for the child.\textsuperscript{287}

In practice, the concept of an appropriate statement and provision is an ambiguous concept. The courts determining whether the statement is appropriate do not discuss why the statement is appropriate but only that the statement is or is not appropriate. This may be traceable to the fact that the statute and regulations addressing statements only use the term “appropriate” in describing the statements and its elements. One aspect where these courts are not ambiguous is the fact that the statement must ultimately be appropriate and that some specificity is necessary for a

\textsuperscript{284} Id. at [23].
\textsuperscript{285} Id.
\textsuperscript{286} Id. at [26].
\textsuperscript{287} Id.
VI. ENGLISH LAW IN AUTISM CASES

With the foundation of English courts applying the portions of the Education Act 1996 that cover special education, this section will look at how English courts approach cases with children suffering from an ASD. Generally, the non-autism and autism cases in England mirror the way such cases are handled in the US under either the “some” benefit or “meaningful” benefit standard. That is, the standard is applied in the same manner but the court chooses to focus more in the autism cases on certain indicia of an educational benefit.

In London Borough of Wandsworth v. Miss K and the Special Needs and Disability Tribunal, the LEA appealed the decision of the SENDIST requiring the LEA to include ABA therapy in Part III of the child’s statement.\textsuperscript{288} When the LEA initially prepared the statement for the child, a placement in a special classroom in a regular school was unavailable.\textsuperscript{289} As a substitution, in Part IV of the statement, the LEA agreed to pay for the ABA therapy program arranged by the parents.\textsuperscript{290} Based on the 2001 Regulations discussed \textit{supra}, the SENDIST ordered the ABA therapy provision be included in Part III of the statement.\textsuperscript{291} On appeal, the LEA

\textsuperscript{288} [2003] EWHC (Admin) 424, [1].
\textsuperscript{289} Id. at [7].
\textsuperscript{290} Id.
\textsuperscript{291} Id. at [9].
argued that including ABA therapy in Part III of the statement provided the child more than what was appropriate to meet his needs.\textsuperscript{292}

The court recognized that a LEA is not required to include more than the appropriate provision in Part III of the statement, partly due to limited resources.\textsuperscript{293} Based on the evidence, the court acknowledged that the ABA therapy program would be more expensive for the LEA than the special school placement.\textsuperscript{294} However, the ABA therapy program was the only available program as there were no open seats in the special school.\textsuperscript{295} Here, then, the ABA therapy program was not more than what was appropriate to meet the child’s needs.\textsuperscript{296} If a seat became available in the special school, the court acknowledged the possibility that then the ABA therapy program would be more than what was appropriate.\textsuperscript{297} Thus, the court concluded the SENDIST did not err by including ABA therapy in Part III of the statement as the appropriate program, facility, and staffing arrangements.\textsuperscript{298}

In another case, the LEA appealed the ruling and order of the SENDIST that the child be placed in a private school rather than the LEA’s

\textsuperscript{292} Id. at [10].  
\textsuperscript{293} Id.  
\textsuperscript{294} See supra pp. 24-25.  
\textsuperscript{295} Id. at [11].  
\textsuperscript{296} Id.  
\textsuperscript{297} Id.  
\textsuperscript{298} Id. at [13].
suggested a special autism school. According to the SENDIST, the child required ABA therapy and an education that did not include ABA therapy was unsuitable for the child. Therefore, the LEA’s school was unsuitable because it did not use ABA therapy in its program.

On appeal, the court noted the substantial volume of written evidence produced for the SENDIST. This included a report from the LEA school’s deputy head teacher stating that the child was making progress in expressive and receptive language, beginning to make verbal sounds that approximated words, and started to use the Picture Exchange Communication System (“PECS”) to request items, among other accomplishments. The report from the LEA’s educational psychologist provided similar examples of the child’s progress and also stated that the child was able to learn in a variety of settings (i.e., in a group, one-to-one,

---

300 After the child was initially diagnosed, he began to receive ABA therapy for at least thirty hours per week. Following his family’s move to London, the child enrolled in the LEA’s school. In mid-2005, the parents and the LEA agreed to a plan in which the child would leave school early three days per week to receive at-home ABA therapy. Id. at [4]. This prior history of ABA therapy may have influenced the opinion of the SENDIST.
301 Id. at [3].
302 Id.
303 Id. at [8].
304 PECS uses pictures and symbols to teach communication skills by having the child use the pictures and symbols to ask and answer questions and to have a conversation. United States Centers for Disease Control and Prevention, Treatment, (2009) http://www.cdc.gov/ncbddd/autism/treatment.html.
and independently). The LEA’s speech and language therapist reported similar progress in the child’s speech.

In contrast, the parents’ expert submitted a report stating that the child had a weakness in his ability to use language. The expert’s report also asserted that the child made much better progress even with small amounts of ABA therapy but that, the child suffered a significant decrease in his rate of learning and progress without ABA therapy. Without an intense, one-to-one ABA-based educational program, the expert opined that the child would fall further behind his expected rate of learning. Thus, the expert concluded the child required an ABA-based educational program.

The court began its discussion by framing the question before the SENDIST as whether the LEA’s school was appropriate for the child (or suitable for the child’s needs, ability, or aptitude). The focus was on the adequacy of the education, not on the better education. Looking at the decision of the SENDIST, the court contended that an ABA-based program would be preferable due to the progress made with such a program but that this did not automatically mean that other educational programs were

---

306 Id. at [13].
307 Id. at [14].
308 Id. at [33].
309 Id.
310 Id.
311 Id.
The court was also skeptical of the SENDIST’s conclusion that a decline in the rate of progress correlated to an inappropriate educational provision. The court pointed out that a decline in the rate of progress does not mean the child is making no progress. Notwithstanding these problems, the court determined that the SENDIST’s decision was based on a permissible weighing of the facts and was entitled to find as it did, even though the court was not convinced of the outcome.

Finally, the court, looking at the second decision from the SENDIST, stated that letting the child leave school early three days a week because he would benefit from the in-home ABA therapy was not an admission by the LEA that its program was inappropriate. Holding that the SENDIST applied the correct standard, the court, again with some reluctance, dismissed the appeal.

A relatively recent decision from the Court of Appeal sheds further light on how the Education Act 1996 is intended to provide a special education provision that meets the needs of the child. The child’s autism caused severe disabilities in several areas, including behavioral problems.

---

312 Id. at [51].
313 Id.
314 Id. at [52].
315 Id.
316 Id.
317 Id. at [53].
318 Id. at [57].
319 Id. at [59].
320 Id. at [61].
with a tendency to injure himself.\textsuperscript{322} Beginning in January 2006, the child received home schooling under an ABA therapy program.\textsuperscript{323} The LEA funded the ABA therapy program between May 2006 and May 2007 before issuing a statement for the child.\textsuperscript{324} This statement proposed to place the child in a special school and did not contain a provision for continuing the ABA therapy program.\textsuperscript{325} On the parents’ appeal, the SENDIST determined that there was no need for the ABA therapy program because the special school could meet the child’s educational and behavioral need.\textsuperscript{326} The Administrative Court of the High Court agreed with the SENDIST.\textsuperscript{327}

The issue on appeal, according to Lord Justice Aikens, was whether a conclusion the child’s needs could be met in a school meant that such an education is appropriate and made Section 319 of the Education Act 1996 inapplicable.\textsuperscript{328} Walking through the Education Act 1996, the court noted that Section 324 requires the LEA to set out the special educational provision required to meet the child’s needs and to name the school it

\textsuperscript{322} Id. at [2].
\textsuperscript{323} Id.
\textsuperscript{324} Id.
\textsuperscript{325} Id. at [3].
\textsuperscript{326} Id. at [7].
\textsuperscript{327} Id. at [8].
\textsuperscript{328} Id. at [10]. Section 319 of the Education Act 1996 states that if a LEA determines it would be inappropriate to provide any part or the whole of the special educational provision in a school, the LEA may arrange to provide that provision outside a school.
considers appropriate for the child’s needs.\textsuperscript{329} It is at this point, when the LEA is deciding on the special educational provision, that the LEA must also determine whether it would be inappropriate for the child to receive the special educational provision to be made in a school (i.e., whether Section 319 should apply).\textsuperscript{330} In addressing this question, the court stated that is not enough to ask if the school “can” meet the needs in the child’s statement.\textsuperscript{331} For a school to be inappropriate, the LEA must determine that the school is either unsuitable or not proper, based on all of the circumstances, including the child’s background, particular education needs, and available facilities from both the LEA and the other placement.\textsuperscript{332} Because the SENDIST and Administrative Court applied the wrong standard, the Court of Appeal remitted the matter to the SENDIST.\textsuperscript{333}

These cases offer more information on what constitutes an appropriate education under the Education Act 1996 and the 2001 Regulations. This determination must be made in light of all the circumstances. A program that would be more expensive and intensive than other programs can be appropriate, provided that an equally appropriate but less expensive education is not available. The appropriate education is education that is adequate or suitable to meet the child’s needs.

\textsuperscript{329} Id. at [21].
\textsuperscript{330} Id. at [24].
\textsuperscript{331} Id. at [26].
\textsuperscript{332} Id.
Determining whether the education meets this standard requires the SENDIST or court to look at the progress made by the child. However, the presence of progress does not mean there is only one appropriate program, just as a decline in progress does not mean the child is not making any progress. These distinctions allow for more precise future determinations by removing the ambiguity created by the statute.

CONCLUSION

The use of the “some” benefit standard is the most accurate in terms of the Supreme Court’s interpretation of the IDEA in *Rowley*. Though only used once to quantify the educational benefit guaranteed under the IDEA, at no point did the Supreme Court determine the proper standard is a “meaningful” benefit. In practice, however, this “some” benefit standard has developed into an extremely low guarantee. Arguably, even a child who attends school and fails every class has received “some” benefit just from being in the school setting. In the context of children on the autism spectrum, a child could receive “some” benefit without learning to generalize skills across a variety of settings.

This cannot be what Congress intended when it passed the IDEA. Congress explicitly stated that its purpose in passing first the EHA and then the IDEA was to provide a free appropriate public education to disabled

---

333 Id. at [30].
children who were denied this level of education. Particular emphasis was placed on the requirement that the education provided be individualized to the child and put into writing. The IDEA set forth detailed procedures and guidelines for school districts to determine this individualized education. Furthermore, amendments were made to the IDEA’s list of qualifying conditions to specifically include autism, a recognition of the uniqueness of this condition.

Thus, though not the standard adopted by the Supreme Court, the best outcome would be to adopt the “meaningful” benefit standard. Under this standard, the purpose of the IDEA will be fulfilled, as disabled students will receive an education they would not otherwise and would gain from more than just their mere presence in a classroom or school building. For children on the autism spectrum, this would include the critical ability to generalize skills learned in one setting, such as the school, to a variety of other settings, such as the home. In determining what a “meaningful” benefit actually is, the four elements set forth in by the Fifth Circuit in Michael F. are useful. Included in these elements is that evidence of a child receiving positive academic and non-academic benefits is evidence of a child receiving a “meaningful” benefit. This element can be easily combined with the English approach stressing the progress of the child under the statement or, in the United States, the IEP. The concept of a child
progressing implies that the child is benefitting from the education provided, and a positive benefit connotes a benefit that is more than a *de minimis* benefit.

It should be recognized that there are several instructional methods for children with disabilities, whether they be deaf like Amy Rowley or suffer from an ASD. Any assumption, though, that one method is better than another in all cases must be avoided. The IDEA recognizes that each child is unique by requiring an individualized education. In addition, cost should not be a dispositive factor. A school district may choose to invest in a particular instructional method. However, if this method is not appropriate to a particular child, this investment should not allow the school district to avoid providing an appropriate, though more expensive, instructional method. Such an approach is especially important for children with ASDs, given the uniqueness of these disorders, and will truly allow a child to receive the education Congress intended when it enacted the IDEA.