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Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After *Rowley*?

Lester Aron[†]

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I. INTRODUCTION

The law of special education for pre-kindergarten through high school students has made significant progress in programming opportunities for disabled children in a relatively short period of time. A major issue, however, remains unresolved. Namely, what must a school do to provide a “free appropriate public education” (FAPE), and how should the federal courts define that standard.

II. THE *ROWLEY* DECISION

In 1982, the United States Supreme Court, in an opinion by then Justice Rehnquist, interpreted the requirements imposed on states and school districts under the Education for All Handicapped Children’s Act (the Act).¹ In *Board of Education v. Rowley ex rel. Rowley*,² the Court considered two questions: “[w]hat is meant by the Act’s requirement of a ‘free appropriate public education’?” and “[w]hat is the role of state and federal Courts in exercising the review granted by 20 U.S.C. § 1415?”³ Unfortunately, several Circuit Courts of Appeals have misinterpreted the Supreme Court’s decision in

[†] Lester Aron is a member of Sills Cummis Epstein & Gross P.C., with offices in Newark, New Jersey and New York City. He attended Cornell University and Georgetown University Law Center. Mr. Aron Co-chairs the firm’s Employment and Labor Department, and focuses his practice on representing educational institutions.

1. 20 U.S.C. § 1412(a)(1) (2000). Renamed the Individuals with Disabilities in Education Act (IDEA) in 1990, Congress originally promulgated the Education for All Handicapped Children Act in 1975. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-87).

2. 458 U.S. 176 (1982).

3. *Id.* at 186.

Rowley, thereby leaving the circuits split on the definition of a FAPE.

Rowley involved a kindergarten student named Amy Rowley who, like her parents, was deaf.⁴ Amy completed kindergarten with the assistance of an FM hearing aid.⁵ In preparation for Amy's advancement to first grade, the school district developed an "individualized educational program" (IEP) that placed Amy in a regular classroom with the continued use of her FM hearing aid.⁶ Amy's IEP also provided that she receive instruction from a tutor for the deaf for one hour each day and assistance from a speech therapist for three hours each week.⁷ The Rowleys accepted some of the proposed IEP but insisted that the school district provide a qualified sign language interpreter in all Amy's academic classes in lieu of certain other assistance proposed in the IEP.⁸ Such an interpreter had been placed in Amy's kindergarten class for a two-week experimental period, but the school district found the service to be unnecessary.⁹

The parents challenged the decision, and an independent examination of the school district's denial followed in accordance with New York State administrative procedures.¹⁰ A hearing examiner and the New York Commissioner of Education both held that "Amy was achieving educationally, academically, and socially."¹¹ Consequently, they denied the parents' request for an interpreter.¹² Amy's parents then filed an action in the United States District Court for the Southern District of New York.¹³ The district court acknowledged Amy's success but found that she was denied her rights under the law because the program developed by the school district did not help Amy reach her full potential.¹⁴ The Second Circuit Court of Appeals affirmed.¹⁵

Following the grant of certiorari, Justice Rehnquist writing for a majority of the Court identified the ultimate problem as the absence from the language of the statute of any substantive standard prescribing the level of education to be accorded to children with disabilities.¹⁶ The Supreme Court observed, as did the district court and the appeals court, that the Act fails to clarify "appropriate education," but delegates to courts and hearing officers the responsibility for

4. *Id.* at 184.

5. *Id.*

6. *Rowley*, 458 U.S. at 184.

7. *Id.*

8. *Id.*

9. *Id.* at 184-85.

10. *See* Bd. of Educ. v. *Rowley ex rel. Rowley*, 458 U.S. 176, 185 (1982) (detailing administrative review of school administrators' decision not to provide Amy with a sign-language interpreter).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Rowley*, 458 U.S. at 185-86.

15. *Id.* at 186 (agreeing with district court's conclusions of law).

16. *Id.* at 189.

“giv[ing] content” to the appropriate education requirement.¹⁷

Thus, the uncertainty in the Act derived from the inherent ambiguity in the term “appropriate education.”¹⁸ The Supreme Court defined that term in *Rowley*.¹⁹ Despite the Supreme Court’s efforts to clarify “appropriate education,” a divergence of viewpoints developed among the Circuit Courts of Appeals in their interpretation of the *Rowley* standard.²⁰

In its effort to explain the rights of students under the Act, the Supreme Court made numerous statements all of which help to define the applicable legal standard. An early quote from *Rowley* provides a general description of what a program must entail in order to provide a FAPE. The Court stated, “[t]hus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a ‘free appropriate public education’ as defined by the Act.”²¹

The *Rowley* decision also described the relevant outside parameter of a FAPE. The majority opinion explained that the Act does not require a school district to provide every conceivable service.²² Hence, the Court noted that “the furnishing of every special service necessary to maximize each handicapped child’s potential is, we think, further than Congress intended to go.”²³

Further language from the *Rowley* decision defined a FAPE in minimalist terms. Eventually, the Court concluded that the appropriate parameter is the provision of some educational benefit. Specifically, the majority explained that “[i]mplicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.”²⁴

The *Rowley* court continued to define FAPE by viewing its benefits in terms of opportunity. To that end, the Court explained that “the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”²⁵

In the latter stages of the opinion, the Court reviewed the importance of

17. *Id.* at 187 (alteration in original) (citation omitted).

18. *See* Bd. of Educ. v. *Rowley ex rel. Rowley*, 458 U.S. 176, 188 (1982) (acknowledging statute lacks comprehensive explanation of “appropriate education”).

19. *See id.* at 203 (holding FAPE requires “personalized instruction” combined with “sufficient support services” to produce education benefit).

20. *See infra* Part III (describing circuit split regarding substantive FAPE standard).

21. *Rowley*, 458 U.S. at 189.

22. *See id.* at 198-98 (clarifying statutory meaning of “equal” educational opportunity).

23. *Id.* at 199.

24. Bd. of Educ. v. *Rowley ex rel. Rowley*, 458 U.S. 176, 200 (1982).

25. *Id.* at 201.

satisfying the procedural requirements of the statute and how such requirements relate to the substantive provisions.²⁶ In this section of the decision, the Court states that procedural compliance is virtually all that is necessary in order to satisfy substantive obligations.

We think that the congressional emphasis upon full participation of concerned parties throughout development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.²⁷

The clearest expression of the FAPE standard is contained in Justice Rehnquist's answer to his own rhetorical questions.

Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the state complied with the procedure 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.²⁸

One other statement by the Court appears consistent with those previously cited. It begins with a description of the Act as providing access to education for this disadvantaged group, and proceeds, within the same paragraph, to restrictive language which indicates that a free appropriate public education is determined by the finding that a program is likely to result in success at the time it is proposed, rather than one which is guaranteed to produce a particular result when completed.

By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such *access meaningful*. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." Thus, the intent of the Act was more to open the door of public education to handicapped

26. See *id.* at 204-08 (addressing debate regarding role of courts when reviewing administrative FAPE decision).

27. *Id.* at 206.

28. *Rowley*, 458 U.S. at 206-07 (emphasis added).

children on appropriate terms than to guarantee any particular level of education once inside.²⁹

The above quotations reflect a series of consistent standards that appear to set the floor in describing a FAPE. In justifying its decision to set a relatively low standard, the *Rowley* court noted the problem that Congress faced when it addressed the need to educate special education children.

Other portions of the statute also shed light upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were “excluded entirely from the public school system” and more than half were receiving an inappropriate education. In addition, as mentioned in Part I, the Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an “inadequate education.” When these express statutory findings and priorities are read together with the Act’s extensive procedural requirements and its definition of “free appropriate public education,” *the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child.*³⁰

In *Rowley*, the Court addressed the absence of statutory language prescribing the precise level of education to be afforded to children with disabilities. Taken as a whole, the *Rowley* court’s decision appears to set a minimal FAPE standard.³¹

In this overall construct, the words “meaningful access” represent one effort by the Court to explain that the FAPE offered had to be reasonably calculated to confer benefit. Nonetheless, certain circuit courts have utilized the singular reference to the word “meaningful” to develop a broader definition of the term FAPE than the *Rowley* court intended, thereby providing for greater educational benefits in those circuits where the broader standard has been followed.³²

These circuits expanded the scope of FAPE even in the face of the Supreme

29. *Id.* at 192. (emphasis added) (alteration in original) (citations omitted).

30. *Id.* at 189 (emphasis added) (citations omitted).

31. *See id.* at 189-90 (rejecting interpretation of FAPE expounded by district court and appeals court). Initially, the Court acknowledged that the Act does specifically establish the level of education a school district must provide to a student with disabilities. *Id.* at 189. Then, the Court explicitly rejected the district and circuit courts’ interpretation of the statute which required each state to “maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’” *Id.* at 189-09.

32. *See infra* Part III (describing circuit split and highlighting potential effect of divergent standards on students with disabilities).

Court's instructions regarding the judiciary's role in reviewing special education determinations. Specifically, the Court cautioned that "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notion of sound educational policy for those of the school authorities which they review."³³ The Court continued, "[t]he fact that § 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings."³⁴ The majority provided further focus for courts in instructing that "[w]e previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'"³⁵ Concluding, the Court stated, "[t]herefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."³⁶

In applying the above legal framework to the facts of the *Rowley*'s case, the Supreme Court concluded that the district court and appeals court did not give the appropriate deference to the administrative decision below and reversed their decisions.³⁷ The Court found that the program offered by the district to Amy Rowley to qualified as a free appropriate public education.³⁸

The primary purpose of this article is to review several circuit court cases decided after *Rowley* in order to compare and contrast the standards that the various circuits have applied. This goal will not be accomplished by reviewing every circuit court case since 1982. The volume of the litigation is such that this approach would be extraordinarily cumbersome. Moreover, a review of every decision by each circuit would make it more difficult to discern the standard ultimately adopted by each circuit. Rather, this article seeks to review the more recent decisions by the circuit courts under *Rowley* in an effort to get a clear "fix" on the FAPE standard adopted in each circuit.

Currently, the circuits are badly split on the definition of a free appropriate public education. Circuit courts have interpreted *Rowley* to require that a student's program provide *some* educational benefit or that it provide a *meaningful* educational benefit. This definitional difference has led to divergent results for students in different parts of the country.³⁹

33. Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 206 (1982).

34. *Id.* at 206 (alteration in original).

35. *Id.* at 208 (citations omitted).

36. *Id.*

37. *Rowley*, 458 U.S. at 209-10.

38. *Id.* at 209-10.

39. The States are within their right to provide a greater benefit to children with disabilities than the benefit adopted by the Supreme Court in *Rowley*. While this is not a matter within the scope of this article, the states which have so acted are Massachusetts and North Carolina. See *Stock v. Mass. Hosp. Sch.*, 467 N.E.2d 448, 453 (Mass. 1984); *Burke County Bd. of Educ. v. Denton ex rel. Denton*, 895 F. 2d 973, 983 (4th Cir. 1990). In *Stock*, the Massachusetts Supreme Judicial Court interpreted the state's education law as requiring

III. FREE APPROPRIATE PUBLIC EDUCATION IN THE CIRCUIT COURTS

A. *The Substantive Split: The Free Appropriate Public Education Standard*

The circuit courts are severely divided on the critical issue of the standard for a FAPE for disabled students. From a purely numerical point of view, six Circuit Courts of Appeals apply the “meaningful benefit” standard, five apply a lesser standard in the nature of “adequate benefit” or “some benefit”, and one appears to apply a mixture of both. Specifically, the Second, Third, Fourth, Fifth, Sixth and Ninth Circuits apply the “meaningful benefit” test.⁴⁰ The First, Eighth, Tenth, Eleventh and D.C. Circuits employ the “adequate benefit” or “some benefit” test.⁴¹ Finally, the Seventh Circuit appears to use a mixture of the two.⁴²

special education programs be administered “to assure the maximum possible development of a child with special needs.” *Stock*, 467 N.E.2d at 453. The *Denton* court observed that the general assembly of North Carolina had provided that “the policy of the state [was] to ensure every child a fair and full opportunity to reach his full potential.” *Denton*, 895 F.2d at 983.

40. *Second Circuit* – See generally *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119 (2d Cir. 1998); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2d Cir. 1997).

Third Circuit – See generally *Shore Reg'l High Sch. Bd. of Educ. v. P.S.* *ex rel. P.S.*, 381 F.3d 194 (3d Cir. 2004); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572 (3d Cir. 2000); *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999).

Fourth Circuit – See generally *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (Feb. 22, 2005) (No. 04-698); *D.B. ex rel. A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004); *Ssgt. R.G. ex rel. G. v. Fort Bragg Dependent Schs.*, 324 F.3d 240 (4th Cir. 2003); *Bd. of Educ. v. Mark Y. ex rel. Brett Y.*, No. 97-1936, 1998 U.S. App. LEXIS 27378 (4th Cir. June 26, 1998).

Fifth Circuit – See generally *Robert J. ex rel. Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

Sixth Circuit – See generally *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004).

Ninth Circuit – See generally *Adams ex rel. Adams v. Oregon*, 195 F.3d 1141 (9th Cir. 1999); *Seattle Sch. Dist., No. 1 v. B.S. ex rel. A.S.*, 82 F.3d 1493 (9th Cir. 1996).

41. *First Circuit* – See generally *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80 (1st Cir. 2004); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991); *John K. ex rel. Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983).

Eighth Circuit – See generally *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8th Cir. 2000); *Fort Zumwalt Sch. Dist. v. Clynes ex rel. Clynes*, 119 F.3d 607 (8th Cir. 1997).

Tenth Circuit – See generally *Logue ex rel. Logue v. Unified Sch. Dist. No. 512, Nos. 97-3087, 97-3112*, 1998 U.S. App. LEXIS 16280 (10th Cir. July 16, 1998); *O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692 (10th Cir. 1998).

Eleventh Circuit – See generally *Sch. Bd. v. K.C. ex rel. S.W.C.*, 285 F.3d 977 (11th Cir. 2002); *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11th Cir. 2001); *Weiss ex rel. Weiss v. Sch. Bd.*, 141 F.3d 990 (11th Cir. 1998).

D.C. Cir. – See generally *Angevine v. Smith*, 959 F.2d 292 (D.C. Cir. 1992); *Kerkam ex rel. Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84 (D.C. Cir. 1991); *Knight ex rel. Knight v. Dist. of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989); *Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577 (D.C. Cir. 1984).

42. *Seventh Circuit* – See generally *Beth R. ex rel. Alex R. v. Forrestville Valley Comm. Unit Sch. Dist. No. 221*, 375 F.3d 603 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 628 (2004).

1. The “Meaningful Benefit” Standard

A case in which the Third Circuit strongly advocates for the “meaningful benefit” standard is *Ridgewood Board of Education v. N.E. ex rel. M.E.*⁴³ In *Ridgewood*, the student, M.E., showed learning difficulties from the time he was in elementary school.⁴⁴ The Ridgewood Child Study Team evaluated him on two occasions but found that his deficits did not meet the definition of perceptual impairment under New Jersey law.⁴⁵ Next, the Bergen Independent Child Study Team performed an independent evaluation that resulted in the child being classified as perceptually impaired. As a result, the school developed an IEP for him for the 1995-1996 school year.⁴⁶ The record reveals that M.E. made minimal improvements under this IEP.⁴⁷

At the end of the eighth grade year, Ridgewood decided that regular education with supportive services was no longer appropriate for M.E. and proposed that he attend his academic classes at a resource center.⁴⁸ In response to this proposal, M.E.’s parents requested a due process hearing, seeking to place their child in the Landmark School in Massachusetts.⁴⁹ The school district refused. The parents, however, placed the child in the Landmark School for the summer session at their own expense.⁵⁰ In an unusual decision, the administrative law judge (ALJ) issued a finding that the school district should finance the tuition costs at the Landmark School, while the parents should bear the residential costs.⁵¹

The board of education appealed the ALJ’s decision regarding the payment of tuition, and the parents counterclaimed seeking compensatory education and the non-tuition costs of attending Landmark.⁵² The district court reversed the administrative finding that Ridgewood had not provided M.E. a free appropriate public education.⁵³ The district court specifically stated that the IDEA requires only that an IEP provide a disabled student with “more than a trivial educational benefit”.⁵⁴ Relying on the testimony of Ridgewood’s witnesses and Dr. Balaban, a member of the Bergen Independent Study Team, the court concluded that Ridgewood’s IEP had done so.⁵⁵ The district court concluded that Dr. Balaban never characterized M.E.’s IEP as “inappropriate”

43. 172 F.3d 238 (3d Cir. 1999).

44. *Id.* at 243.

45. *Id.* at 243.

46. *Id.* at 244.

47. *Ridgewood*, 172 F.3d at 244.

48. *Id.* at 244-45.

49. *Id.* at 245.

50. *Id.*

51. *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 245 (3d Cir. 1999).

52. *Id.*

53. *Id.* at 245-46.

54. *Id.* at 246.

55. *Ridgewood*, 172 F.3d at 245-46.

but rather testified that the IEP would provide M.E. with an “educational benefit.”⁵⁶

The Third Circuit Court of Appeals reversed the district court.⁵⁷ The appeals court believed that the district court did not give adequate consideration to M.E.’s intellectual potential in comparison to his progress under prior IEPs.⁵⁸ The court explained:

IDEA leaves to the courts the task of interpreting “free and appropriate public education.” The Supreme Court began this task in [*Rowley*] holding that while an IEP need not maximize the potential of a disabled student, it must provide “meaningful” access to education and confer “some educational benefit” upon the child for whom it is designed. In determining the quantum of educational benefit necessary to satisfy IDEA, the Court explicitly rejected the bright-line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the potential of the particular disabled student before it.⁵⁹

The Court went on to state that:

[a]s noted, the District Court held that an IEP need only provide “more than trivial educational benefit” in order to be appropriate, equating this minimal amount of benefit with a “meaningful education benefit.” But the standard set forth in *Polk* requires “significant learning” and “meaningful benefit.” The provision of merely “a more than trivial educational benefit” does not meet these standards.⁶⁰

Upon remand, the district court reversed its earlier decision that the school district was providing a FAPE and concluded that, under the new “meaningful benefit” standard, it was not.⁶¹

One of the most compelling opinions applying the “meaningful benefit” standard was issued by the Sixth Circuit Court of Appeals in *Deal ex rel. Deal v. Hamilton County Board of Education*.⁶² The *Deal* story begins with Zachary Deal, a three-year-old child who was diagnosed within the autism spectrum disorder, who was classified as needing special education, and for whom an

56. *Id.*

57. *Id.* at 248.

58. *Id.*

59. *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (citations omitted).

60. *Id.* at 247 (citations omitted).

61. *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, No. 97-02039 (D.N.J. filed Apr. 17, 2000) (opinion on file with author).

62. 392 F.3d 840 (6th Cir. 2004).

IEP was developed.⁶³ The school district proposed a comprehensive development class at its local elementary school.⁶⁴ The Deals were informed by school district representatives that several teaching methodologies would be used, including discreet trial training, incidental teaching, activity-based learning and structured teaching.⁶⁵

While this IEP was being developed, Zachary's parents were already participating in a program developed by the Center for Autism and Related Disorders (CARD).⁶⁶ This program treated children with one-on-one Applied Behavioral Analysis (ABA), a technique developed by Dr. Ivar Lovass at the University of California at Los Angeles.⁶⁷ Based upon their experience with the ABA system, the parents requested that the school system fund a forty hour per week home based program for the summer and provide year round speech therapy.⁶⁸ Over time, several IEP meetings were held between representatives of the school district and the parents during which the parties disagreed over the appropriate methodologies to use with Zachary and the structure of his school day.⁶⁹

Although the IEP ultimately developed by the school district included, among other techniques, one-on-one discreet trial teaching, the parents placed Zachary in the Primrose School on September 2, 1999.⁷⁰ "The Deals' disagreement with the IEP stemmed from their belief that Zachary would spend more time in a regular education classroom, as well as their desire to have the [s]chool [s]ystem pay for the CARD program or offer similar ABA therapy."⁷¹

A hearing was held before an ALJ who found several procedural and substantive violations of the IDEA by the school district and ordered reimbursement where appropriate.⁷² The Deals then appealed certain aspects of the ALJ's decision to the district court, and the school system counterclaimed. Specifically, the school system sought a "reversal of the ALJ's determinations that the failure to offer Zachary a 'Lovass style' program violated Zachary's right to a FAPE and that the Deals were entitled to reimbursement for privately obtained related services."⁷³ Eventually, the court ruled that the school system had not violated the IDEA and that the Deals were not entitled to any reimbursement relief.⁷⁴ In reviewing the district court's decision, the Sixth

63. *Id.* at 845-46 n.1.

64. *Id.* at 845.

65. *Id.* at 846 n.3.

66. *Deal*, 392 F.3d at 845.

67. *Id.* at 845-46.

68. *Id.* at 846.

69. *Id.*

70. *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 846 (6th Cir. 2004).

71. *Id.* at 846-47.

72. *Id.* at 847-48.

73. *Id.* at 848.

74. *Deal*, 392 F.3d at 849.

Circuit first looked at the standard to be applied where the administrative law judge and the district court disagreed on basic elements of the case.⁷⁵

The amount of weight due to administrative findings depends on whether the finding is based on educational expertise. “Less weight is due to an agency’s determinations on matters for which educational expertise is not relevant because a federal court is just as well suited to evaluate the situation. More weight however is due to an agency’s determinations on matters for which educational expertise is relevant.”⁷⁶

The court went on to acknowledge that it must also accord due deference to the state administrative hearing officer.⁷⁷ Consequently, the court stated that it would apply a clearly erroneous standard to review the district court’s findings of fact and a *de novo* standard of review to its conclusions of law.⁷⁸ Because the question of whether a child is denied a FAPE is a mixed question of fact and law, the court concluded that it had the authority to review the matter *de novo*.⁷⁹

The *Deal* court cited *Rowley* for the proposition that it had to determine both the possibility of procedural violations under the IDEA as well as whether the district provided a free appropriate public education.⁸⁰ The first procedural question the court addressed was whether the school district had made a predetermination not to consider the parents’ request for a “Lovass style” program.⁸¹ The court cited testimony from various school district representatives stating that “the powers that be’ were not implementing ABA programs” and that the district representative “wished people would pay their taxes so that HCDE could provide ABA for Zachary.”⁸²

The district court concluded that because the Deals were present at every IEP meeting and had the opportunity to forcefully advocate their position, there was no predetermination.⁸³ The circuit court, however, disagreed with this view.⁸⁴ The court concluded that “[t]his predetermination amounted to a

75. *Id.*

76. *Id.* (citations omitted).

77. *See id.* at 849-50 (discussing standard of review applicable to judicial consideration of administrative decision under IDEA).

78. *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 849-50 (6th Cir. 2004) (identifying various standards of review that apply to district court’s decisions).

79. *Id.*

80. *Id.* at 853-54.

81. *Id.* at 855-59.

82. *Deal*, 392 F.3d at 856.

83. *Id.* at 856 (determining parents’ presence and opportunity to speak at meeting evidenced adequate opportunity to participate).

84. *See id.* at 856 (concluding school system pre-decided not to provide ABA services). The court noted that “there was no way that anything the Deals said, or any data the Deals produced, could have changed the School System’s determination of appropriate services, their participation was no more than after the fact

procedural violation of the IDEA. Because it effectively deprived Zachary's parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived Zachary of a FAPE.⁸⁵ In furtherance of its view, the Sixth Circuit noted that "[t]he court held that in order to fulfill the goal of parental participation in the IEP process, the school district was required to conduct, not just an IEP meeting, but a *meaningful* IEP meeting."⁸⁶

The second procedural violation addressed by the court concerned the absence of a regular education teacher from an IEP meeting.⁸⁷ While the district court found this to be a *de minimis* procedural violation that had no substantive impact, the court of appeals again disagreed.⁸⁸

The rationale for requiring the attendance of a regular education teacher is closely tied to Congress' "least restrictive environment" mandate. The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within that classroom.⁸⁹

In disagreeing with the ALJ's conclusion, the Sixth Circuit pointed out that:

[t]he district court found that it could not conclude that the private school placement and ABA services provided by the Deals were inappropriate, but that the proper focus was on the program offered by the [s]chool [s]ystem. The court determined that there are a number of effective ways to deal with autism, and that the [s]chool [s]ystem's program utilized an acceptable methodology.⁹⁰

The Sixth Circuit evaluated the different views expressed by the ALJ and the district court. In doing so, the court noted that "[t]he facile answer to the question raised by this disagreement is that a school district is only required to provide educational programming that is reasonably calculated to enable the child to derive more than *de minimis* educational benefit."⁹¹ The court went on

involvement." *Id.* at 858.

85. *Id.* at 857.

86. *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004) (citations omitted).

87. *Id.* at 859-61 (summarizing ALJ's findings of fact and criticizing district court's decision regarding regular education teacher's absence). Regulations promulgated by the Department of Education mandate that every IEP team include a regular education teacher. 32 C.F.R. § 300.344(a)(2) (2005).

88. *Id.* at 860 (highlighting school system's violations of regulation-based obligations and district court's failure to consider violations).

89. *Id.*

90. *Deal*, 392 F.3d at 861.

91. *Id.*

to acknowledge that:

[a]t some point, however, this facile answer becomes insufficient. Indeed, there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of a FAPE. A school district clearly is not required to “maximize each child’s potential commensurate with the opportunity provided other children,” i.e., to provide all children with equal educational opportunity. The Third Circuit, however, has held that an IEP must confer a “*meaningful* educational benefit.” Further that benefit “must be gauged in relation to a child’s potential.” Based on the analysis set forth below, we agree that the IDEA requires an IEP to confer a “meaningful educational benefit” gauged in relation to the potential of the child at issue.⁹²

The court continued:

[n]othing in *Rowley* precludes the setting of a higher standard than the provision of “some” or “any” educational benefit; indeed, the legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self sufficiency and a life of dependence. As noted by the Third Circuit, “*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a ‘mainstreamed’ classroom.”⁹³

The court further concluded:

[a]t the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child. Indeed, states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress. In evaluating whether an educational benefit is meaningful, logic dictates that the benefit “must be gauged in relation to a child’s potential.”⁹⁴

In summarizing the reasoning behind its reversal of the district court’s decision, the court stated:

92. *Id.* at 861-62 (citations omitted).

93. *Id.* at 863.

94. *Deal ex rel. Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (footnote omitted).

The obvious objection to the meaningful benefit standard is the expense involved. As the Supreme Court has noted, however, “[t]here is no doubt that Congress imposed a significant financial burden on States and school districts that participate in the IDEA.” School districts are permitted to consider cost in devising an appropriate educational program. A case such as *Zachary Deal*’s, however, is precisely the sort of situation where judicial intervention is necessary to fulfill congressional intent and serve the public interest. 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.⁹⁵

The *Deal* case clearly perverts *Rowley*. It relies on the *Ridgewood* case to hold that an IEP must provide a “meaningful benefit.” As explained *infra*, this distorts the overall tenor and holding in *Rowley*.

Nonetheless, *Deal* is compiling a case on its own terms. The Sixth Circuit describes the “adequate benefit” standard as “facile” and therefore “insufficient.”⁹⁶ These are strong and conclusory words that lack substance behind them. The *Deal* court argues that *Rowley* permits the requirement of a high standard and that the difference between the “adequate benefit” and “meaningful benefit” standards is one of money.⁹⁷ The Sixth Circuit goes on to claim that when money affects the development of an IEP for someone with *Zachary Deal*’s disabilities, only judicial intervention will serve the public interest.⁹⁸ While the *Deal* court may believe it acted in the public interest, it exceeded congressional intent as identified and established in *Rowley*.

2. The “Adequate Benefit” or “Some Benefit” Standard

Contrary to the cases cited above, other Circuit Courts of Appeals have steadfastly refused to apply the “meaningful benefit” standard. Early on, in *G.D. v. West Moreland School District*,⁹⁹ the First Circuit Court of Appeals set lower expectations. In *G.D.*, the First Circuit described its standard at length:

Since *Rowley*’s construction of the [the Act], a FAPE has been defined as one guaranteeing a reasonable probability of educational benefits with sufficient supportive services at public expense. Following *Rowley*, courts have concluded that a FAPE may not be the *only* appropriate choice, or the choice of certain selected experts, or the child’s parents’ *first* choice, or even the *best*

95. *Id.* at 864-65 (citation omitted).

96. *Id.* at 861 (criticizing standard requiring only educational programming reasonably calculated to provide more than *de minimis* benefit).

97. *Id.* at 863-64 (rationalizing application of “meaningful benefit” standard and addressing primary objection to higher standard)

98. *Deal*, 392 F.3d at 864-65 (stressing important of realizing child’s individual potential even where program involves significant financial expenses).

99. 930 F.2d 942 (1st Cir. 1991).

choice. Barring higher state standards for the handicapped, a FAPE is simply one which fulfills the minimum federal statutory requirements.¹⁰⁰

Another First Circuit case, which follows the standard in *G.D.*, is very instructive as the factual pattern is somewhat analogous to the *Deal* case yet the court reached an opposite conclusion. In *Lt. T.B. ex rel. N.B. v. Warwick School Committee*,¹⁰¹ the B. family moved from Georgia to Warwick, Rhode Island. The child, N.B., suffered from autism and had already been placed in a special needs kindergarten in Georgia.¹⁰² The school district's IEP "would have kept N.B. in a self-contained Warwick classroom that had been recently established for autistic children of his age and that used a modified version of educational techniques known as Treatment and Education of Autistic and Communication-Handicapped Children (TEACCH)."¹⁰³ N.B.'s parents rejected the IEP and eventually enrolled N.B. in a private school, the Pathways Strategic Learning Center, which employed a different technique known as Discrete Trial Training ("DTT").¹⁰⁴ Following a twenty-day evidentiary hearing, the hearing officer found in favor of the B.'s, concluding that Warwick had predetermined N.B.'s placement and that the school district lacked sufficient knowledge to determine that non-DTT techniques would work for the student.¹⁰⁵ The district court reversed and found that the proposed IEP did not substantively deny the child a FAPE.¹⁰⁶

The First Circuit described the district court's decision as "careful" and well analyzed.¹⁰⁷ The court recognized that "[a]utism is very difficult for parents, as well as teachers, to handle, and there are divergent theories as to the best treatment."¹⁰⁸ In presenting its reasoning, the court explained that:

[t]he B.'s argue that the 1997 amendments to IDEA changed this standard to require school districts to provide the "maximum benefit" to special needs children. They point out that the IDEA now contains legislative findings emphasizing the importance of training teachers to help special needs children "meet . . ., to the maximum extent possible, those challenging expectations that have been established for all children" and prepare them to "lead productive, independent, adult lives, to the maximum extent possible." We do not interpret this statutory language, which simply articulates the importance of teacher training, as overruling *Rowley*. This court has continued to apply the *Rowley*

100. *Id.* at 948-49 (citations and internal quotations omitted).

101. 361 F.3d 80 (1st Cir. 2004).

102. *Id.* at 81.

103. *Id.*

104. *Id.*

105. *Lt. T.B.*, 361 F.3d at 82.

106. *Id.*

107. *Id.*

108. *Id.* at 83.

standard in cases following the 1997 amendments. The *Rowley* standard recognizes that Courts are ill-equipped to second guess reasonable choices that school districts have made among appropriate instructional methods.¹⁰⁹

In this case, as in *Deal*, the court was asked to analyze whether a school district was providing a FAPE to an autistic child through a multi-modality approach or whether the law required a system of discreet trial training as advocated by the parents.

A major theme of the plaintiffs' oral argument was that the IEP proposed by Warwick was not significantly different from a pre-school program that N.B. had attended in Georgia (a "multimodality eclectic classroom," according to Mrs. B), which had not worked. That experience, they say, taught N.B.'s parents that he needs constant one-on-one attention.¹¹⁰

In response, the Warwick school district noted that the proposed IEP differed from the failed program in Georgia.¹¹¹ Furthermore, Warwick explained that if the proposed IEP did not work, it would have made adjustments, had it been provided the opportunity to do so.¹¹²

In considering the similarities of the Warwick and Georgia programs, the Circuit Court found that:

[f]rom the materials available to us, it is far from clear that the programs were the same. The Georgia class was twice as large as the class in Warwick's proposed IEP. In addition, unlike Warwick's program, the Georgia class was not specifically structured to address the needs of autistic children. Moreover, there is no evidence that the teachers in the failed Georgia program had the same extensive experience and training in working with autistic children that the Warwick teachers have.¹¹³

Although it came to a different conclusion here, as in *Deal*, the court found that discreet child training would be a part of the multi-modality class.¹¹⁴

The district court also found that many elements of DTT, the method that the B.'s advocated, would be available through the Warwick program's use of the TEACCH techniques, including a considerable amount of one-on-one instruction. There was no clear error in the district court's finding that the IEP

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

110. *Id.* at 85.

111. *Id.*

112. *Id.*

113. *Lt. T.B.*, 361 F.3d at 85.

114. *Id.*

was adequate. Once the determination is made that the IEP was adequate, that ends the inquiry. We need not consider whether other programs would be better.¹¹⁵

Another instructive case, which comes from the Tenth Circuit, is *O'Toole ex rel. O'Toole v. Olathe District Schools Unified School District Number 233*.¹¹⁶ Molly O'Toole was a hearing impaired student.¹¹⁷ The dispute in the case revolved around an IEP developed for Molly on February 23, 1993 and amended subsequently on August 23, 1993.¹¹⁸ The original IEP meeting resulted in an agreement to keep Molly at the Scarborough Elementary School (SEC), the school she already attended.¹¹⁹ Subsequent to the IEP meeting, monitoring reports were provided to the parents that indicated that Molly made adequate progress toward some objectives, some progress towards other objectives, and made inadequate progress toward other objectives.¹²⁰ As a result, Molly's parents had her tested by the Central Institute for the Deaf (CID) which made a series of recommendations.¹²¹ The district court found that, at the August IEP meeting, the IEP team discussed and agreed to follow the CID recommendations.¹²² The parents challenged this finding.¹²³ Ultimately, the parents placed Molly at the CID.¹²⁴

In commencing its review of the school district's actions, the court stated that:

... if we are evaluating an IEP prospectively only, we agree with the Third Circuit which has said that "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of the child's placement." However, an IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the prospective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such.¹²⁵

115. *Id.* at 86.

116. 144 F.3d 692 (10th Cir. 1998).

117. *Id.* at 695.

118. *Id.* at 695-96.

119. *Id.* at 695.

120. *O'Toole*, 144 F.3d at 696.

121. *Id.*

122. *Id.*

123. *Id.* at 969-97.

124. *O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 696-97 (10th Cir. 1998).

125. *Id.* at 701-02 (citations omitted).

The court went on to find that while the O'Tooles claimed that Molly was making no progress and actually regressing, the monitoring forms showed that she was making adequate progress toward her short term objectives.¹²⁶ First, the court noted that the monitoring forms showed progress even at the time that Molly's biological mother passed away, an event that could understandably have adversely affected Molly's performance.¹²⁷ Second, the court cited the fact that the school district worked with the parents at the August IEP conference to address some of their concerns.¹²⁸ The court stated, "[i]n sum, our review of the record in this case convinces us that Molly's IEPs, even if 'not optimal,' were calculated to, and did, confer some educational benefits, as required by the IDEA and Kansas law."¹²⁹ Next, the court noted that:

... the fact that she made more progress, and by her parents' account was happier, at the CID, does not compel the conclusion that the CID was the appropriate placement for her under the IDEA and Kansas Law, and that her IEP as implemented at SEC was inappropriate. As we have said, "the 'appropriate' education required by the Act is not one which is guaranteed to maximize the child's potential."¹³⁰

Finally, the court explained that "[t]he IDEA does not require the best possible education or superior results."¹³¹

A final case supporting the "adequate education" standard which includes particularly strong language is *Devine v. Indian River County School Board*,¹³² a decision of the Eleventh Circuit. In *Devine*, an appeals court again addressed the needs of an autistic child whose parents disagreed with a school district's proposed IEP.¹³³ The disagreement focused on the parent's belief that the child required a residential placement in order to receive educational benefits.¹³⁴

After reviewing the conflict among the circuits on the burden of proof issue, the Eleventh Circuit determined that the burden of proving that the insufficiency of an IEP rested with the parents as the parties challenging the

126. *Id.* at 707 n.20.

127. *Id.*

128. *O'Toole*, 144 F.3d at 707.

129. *Id.* at 708 (citation omitted).

130. *Id.*

131. *Id.*

132. 249 F.3d 1289 (11th Cir. 2001).

133. *See id.* at 1290-91 (providing chronology of school board's efforts to provide John Devine with a FAPE).

134. *See id.* at 1291 (discussing school board's proposed alternatives to residential placement). Although the school board declined to authorize residential placement, it did offer to continue the counseling services it had provided to the Devines in the past. *Id.*

IEP.¹³⁵ After resolving the burden of proof issue, the court considered whether the “. . . IEP was reasonably calculated to confer the basic floor of educational benefits.”¹³⁶ In determining that the IEP met the applicable legal requirements, the Eleventh Circuit acknowledged the *Rowley* court’s conclusions that “a student is only entitled to some educational benefit” and that “the benefit need not be maximized to be adequate.”¹³⁷ The *Devine* court also stated that the Eleventh Circuit “has specifically held that generalization across settings is not required to show an educational benefit. If ‘meaningful gains’ across settings means more than making measurable and adequate gains in the classroom, they are not required by [IDEA] or *Rowley*.”¹³⁸

3. *The Seventh Circuit’s Mixed Standard*

In the decision *Beth R. ex rel. Alex R. v. Forrestville Valley Community United School District Number 221*,¹³⁹ the Seventh Circuit Court of Appeals issued a decision which sends a mixed message as to the legal standard for a FAPE. The *Beth R.* court faced a difficult fact pattern. Alex, the student, suffered from “a variant of Landau-Kleffner Syndrome, a rare neurological disorder that begins in childhood and affects parts of the brain that control speech and comprehension. Children afflicted with the disorder may display symptoms that include hyperactivity, poor attention, depression and irritability.”¹⁴⁰ Over several years, Alex had varying IEPs, but at a certain point, his behavior became an enormous problem.¹⁴¹ Over time, he would cause significant physical injuries to students and teachers and would leave the school premises creating frightening situations for extended periods of time.¹⁴² In response to these various incidents, the school district changed both his IEP and his physical classroom placement.¹⁴³

Alex’s mother challenged the school district’s decision to assign the student to a special classroom.¹⁴⁴ Although the hearing officer found that the school district did not provide a FAPE, the district court disagreed and reversed the administrative decision.¹⁴⁵ On appeal, Alex argued that the appropriateness of education “depends not on ‘what the child did or did not do wrong, but rather [it depends] on whether the school district appropriately addressed the child’s needs and provided him with a meaningful education[al] benefit under the

135. *Id.* at 1291-92.

136. *Devine*, 249 F.3d at 1292-93 (citations omitted).

137. *Id.* at 1292.

138. *Id.* at 1293 (alteration in original).

139. 375 F.3d 603 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 628 (2004).

140. *Id.* at 606.

141. *Id.* at 606-09.

142. *Id.*

143. *Beth R.*, 375 F.3d at 606-09.

144. *Id.* at 609.

145. *Id.* at 609-10.

substantive prong of *Rowley*.”¹⁴⁶ The court agreed in part and stated, “[t]hat premise . . . is basically true where the validity of the IEP is in question; however, it does not lead to the conclusion that the district court should not have considered Alex’s disruptive impact on the classroom.”¹⁴⁷

The Seventh Circuit recognized the “meaningful benefit” standard as the appropriate consideration when determining whether the local school district provided a FAPE.¹⁴⁸ Later in the decision, the court proceeded to determine whether the school district provided a FAPE to Alex.¹⁴⁹

An IEP passes muster provided that it is “reasonably calculated to enable the child to receive educational benefits” or, in other words, when it is “likely to produce progress, not regression or trivial educational advancement.” The requisite degree of reasonable, likely progress varies, depending on the students’ abilities. Under *Rowley*, “while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children.” Objective factors, such as regular advancement from grade to grade, and achievement of passing grades, usually show satisfactory progress. Whether an IEP was “reasonably calculated to enable the child to receive educational benefits” is a question of fact that we review for clear error.¹⁵⁰

B. The Procedural Split: The Burden of Proof in Administrative Cases

In addition to addressing how the circuit courts have interpreted the substantive standard in *Rowley*, it is necessary to analyze one procedural aspect of special education which has also resulted in conflicting decisions by the Circuit Courts of Appeals. In 1997, the Education for All Handicapped Children’s Act was replaced by the IDEA.¹⁵¹ The new law clarified and revised many of the substantive sections of the statute but did not specifically address the FAPE standard as determined in *Rowley*. The new IDEA, similar to its predecessor statute, permitted parents who believed that the IIEP that was developed for their child did not provide a FAPE to challenge the IEP in an administrative proceeding (referred to as a Due Process Hearing).¹⁵²

Currently, the circuit courts disagree over *which party has the burden of*

146. *Id.* at 612 (alteration in original).

147. *Beth R. ex rel. Alex R. v. Forrestville Valley Comm. Unit Sch. Dist. No. 221*, 375 F.3d 603 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 628, 612 (2004).

148. *Id.*

149. *Id.* at 615-16 (evaluating multiple IEPs provided to Alex between April and November 2001).

150. *Id.* (citations omitted). Hence, this language appears to contradict the court’s earlier reference to the “meaningful benefit” standard. *See* text accompanying note 149.

151. 20 U.S.C. §§ 1400-87 (2000).

152. 20 U.S.C. § 1415(f) (2000).

proof at the administrative hearing. While either the parents or the school district may initiate such a hearing, the vast majority of reported cases are those in which the parents challenged an IEP or a placement proposed by the school district. The question then becomes whether the parents as the party challenging the proposed IEP or placement have the burden of proving that the district is not providing a free appropriate public education or whether the school district has the burden of proving that it is providing such an education. In FAPE cases, the allocation of the burden of proof can have the effect of determining which party succeeds on the merits. Thus, in circuits where the burden shifts to the school district when the parents are the moving party, the parents receive an important procedural advantage.

The circuit courts appear evenly split on the procedural issue. In *Cordrey ex rel. Cordrey v. Euckert*,¹⁵³ the Sixth Circuit considered the burden of proof question. The court stated that “[t]he Cordreys and amicus Advocacy, Inc., a public advocacy group for the developmentally disabled, urge that the burden of proof of procedural compliance is properly on the school District. Advocacy emphasizes that the Act affirmatively obliges the states to comply with its comprehensive procedures.”¹⁵⁴ The court continued its analysis by noting that:

[o]n the other hand, nothing in the Act indicates that alleged violations should be treated differently from alleged violations of any other federal statute imposing affirmative obligations on the states and their subsidiaries. Absent more definitive authorization or compelling justification, we decline to go beyond strict review to reverse the traditional burden of proof.¹⁵⁵

The Fifth Circuit Court of Appeals in *Alamo Heights Independent School District v. State Board of Education*¹⁵⁶ and the Tenth Circuit in *Johnson ex rel. Johnson v. Independent School District No. Four*,¹⁵⁷ also concluded that the burden of proof should remain with the moving party. Both circuits followed this rule with specific rationale. Directly quoting the Fifth Circuit, the *Johnson* court recognized that:

... the burden of proof in these matters rests with the party attacking the child’s individual educational plan. In [*Alamo Heights*], the Fifth Circuit reiterated that the Act “placed primary responsibility for formulating handicapped children’s education in the hands of state and local school agencies in cooperation with each child’s parents.” In deference to this statutory scheme and the reliance it places on the expertise of local education

153. 917 F.2d 1460 (6th Cir. 1990).

154. *Id.* at 1466.

155. *Id.*

156. 790 F.2d 1153 (5th Cir. 1986).

157. 921 F.2d 1022, 1026 (10th Cir. 1990).

authorities, . . . the Act creates a “presumption in favor of the education placement established by [a child’s individualized educational plan],” and “the party attacking its terms should bare the burden of showing why the educational setting established by the [individual educational plan] is not appropriate.”¹⁵⁸

The most recent case in which the parents retained the burden of proof is *Weast v. Schaffer ex rel. Schaffer*.¹⁵⁹ This decision analyses in much more detail which party should bear the burden of proof. In *Weast*, the court explained:

[t]he parents argue that because the IDEA is a remedial statute that places the obligation on a school system to provide a free appropriate public education for disabled children, the school system should bear the burden of proving that its IEP meets that obligation. This brings to mind other remedial federal statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act. These statutes impose on employers (or others) the obligation not to discriminate against an individual because of characteristics such as race, sex, disability, or age. Like the IDEA, these statutes are silent about the burden of proof, yet we assign it to the plaintiff who seeks the statutory protection of benefit; the burden is not assigned to the party with the statutory obligation. . . . A “favored group,” in other words, is not relieved of the burden of proof “merely because a statute confers substantive rights on [it].”¹⁶⁰

The parents also claimed that the school district should have the burden of proof because it has greater expertise and resources.¹⁶¹ Although the court believed that the school district was the party with the “bigger guns”, it cited the substantial procedural safeguards that protect parents under the IDEA.¹⁶²

These procedural safeguards and other provisions in the IDEA are all designed to inform parents and to involve them in the development of the IEP for their child. The Act involves parents at all stages, making them members of the in child’s IEP team and enabling them to advocate for their position if a dispute arises. Parents have the right to examine all records, materials, assessments, and other information the school system uses to develop an IEP, and they have the right to participate fully in meetings relating to the IEP and the evaluation of their child. Parents have the right to request an independent evaluation of

158. *Id.* at 1026 (alteration in original).

159. 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (Feb. 22, 2005) (No. 04-698).

160. *Id.* at 453 (alteration in original) (citations omitted).

161. *Id.*

162. *Id.* (discussing advantages school systems have in IEP disputes and congressional efforts to protect parents).

their child at school system expense. The school system must give parents written notice of their rights at key intervals: when their child is initially referred for evaluation, when they are notified about each IEP meeting, when their child is reevaluated, and when they register any complaint about the school system's effort to provide a free appropriate public education for their child.¹⁶³

In *Weast*, the Fourth Circuit recognized these procedural safeguards, the fact that the legislation itself did not shift the burden of proof when it could have easily done so, and the fact that Congress expected there to be reliance upon the expertise of local educators.¹⁶⁴ For all of these reasons, it concluded that the burden of proof should remain with the parents.¹⁶⁵

In juxtaposition to the above-referenced cases, the Second, Third, Eighth, and Ninth Circuits have all held that the burden of proof in a due process hearing initiated by the parents falls on the school district to show that its proposed program and placement are in accordance with the statute.¹⁶⁶ These cases shift the burden of proof from the norm with little or no explanation. The implied assumption seems to be that the school district must prove the adequacy of its own proposed IEP.¹⁶⁷

The Third Circuit has held not only that the school district carries the burden at the administrative level, but also that school districts continue to bear the burden of proof before the district court.¹⁶⁸ In *Oberti*, the district court placed the burden of proof on the school district. On appeal, the school board argued that the district court improperly placed the burden upon it because the burden should have shifted to the parents following administrative determination in the school district's favor.¹⁶⁹ The school district further argued that *Rowley* required the court to give due weight to the administrative proceedings.¹⁷⁰ Based upon that obligation, the school district contended that the burden should then shift to the parents in their effort to overturn the administrative decision.¹⁷¹ The Third Circuit disagreed and concluded that:

163. *Weast*, 377 at 453-54 (alteration in original) (citations omitted).

164. *Id.* at 456.

165. *Id.*

166. See, e.g., *Carlisle Area Sch. v. Bess P. ex rel. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 134 (2d Cir. 1998); *E.S. v. Independence Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998).

167. See *Bess P.*, 62 F.3d at 533 (addressing parents' argument regarding misallocation of burden of proof to demonstrate appropriateness of IEP). The *Bess P.* court concluded that school districts carry the burden of proving the appropriateness of the educational plans they proffer. *Id.* The court stressed that school districts are not, however, required to prove the inappropriateness of any alternative plans promoted by the parents. *Id.*

168. See *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1218-20 (3d Cir. 1993) (concluding statutory purpose behind IDEA and practical considerations suggest school should carry burden of proof).

169. *Id.* at 1218.

170. *Id.* (citation omitted).

171. *Id.*

[the] IDEA instructs district courts and state trial courts reviewing the decisions of state educational agencies to “receive the records of the administrative proceedings . . . hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, . . . grant such relief as the Court determines appropriate.” As construed by the Supreme Court in *Rowley*, Section 1415(e)(2) requires courts to give “due weight” to the agency proceedings. However, neither *Rowley* nor the Act itself specifically addresses which party bears the burden of proof at the district court level, an issue which we believe is quite different from the District Courts obligation to afford due weight to the administrative proceedings.¹⁷²

As the above cases indicate, this split among the circuits on the procedural issue of who bears the burden of proof in an administrative hearing may also affect the substantive result of a due process case. A review of the positions taken by the various circuits on the substantive issue of “meaningful” versus “adequate” educational benefit and the procedural issue regarding the placement of the burden of proof on the “parents” versus the “district” shows no singular pattern. What can be discerned is that the Tenth Circuit would be most favorable to school districts as it places the procedural burden on the parents *and* applies the lesser “adequate” educational benefit test. In contrast, the Second, Third and Ninth Circuits would be most favorable to parents because they place the procedural burden on the school district and apply the “meaningful” educational benefit test to the merits.

IV. THE FUTURE OF FREE APPROPRIATE PUBLIC EDUCATION: CERTIORARI GRANTED IN *WEAST*

On February 22, 2005, the United States Supreme Court granted certiorari in a petition involving the *Weast* case.¹⁷³ In the Petition, the students’ parents ask the Court to address an issue discussed in this article. Specifically, the petitioners inquire, “[u]nder the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child’s individualized education program either side has the right to bring a dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof – the parents or the school district?”¹⁷⁴ The Supreme Court has now recognized the importance of the conflict between the circuits regarding the burden of proof in an administrative hearing. Through *Weast*, the Court can adopt a uniform procedure. All interested parties should look forward to the Supreme Court’s decision in

172. *Oberti*, 995 F. 2d at 1218.

173. *Schaffer v. Weast*, 125 S. Ct. 1300 (2005).

174. Petition for Writ of Certiorari, *Schaffer*, 125 S. Ct. 1300 (No. 04-698).

Weast to familiarize themselves with the appropriate burden of proof in litigation of an administrative due process hearing.

V. CONCLUSION

The cases described in this Article, along with the others referenced herein, exhibit an unfortunate dichotomy of both procedural and substantive standards amongst the Circuit Courts of Appeals. Because several circuit courts have misconstrued the intentions of the Supreme Court in *Rowley*, it can reasonably be assumed that district court judges and state hearing officers are struggling with the existing circuit split. This leaves states, school districts, advocates, and parents of special education children with great uncertainty as they assess their respective rights and the potential value of engaging in litigation.

It is the view of this author that the appropriate standard of “some educational benefit” in the *Rowley* decision is sufficiently clear. Parties and their counsel obviously will have their own points of view. What is certain, however, is that all parties involved in the special education process will be better served if they understand in a clear and consistent fashion what standard they are to apply. In a nation such as ours, governed by a uniform federal special education statute, it is unacceptable for a child who lives in one part of the country to receive certain educational benefits while another similarly situated student located elsewhere is not entitled to those same benefits. The time is ripe for the United States Supreme Court to take another special education case in order to clarify its decision in *Rowley*. Only then can a uniform standard emerge to be applied across the country that will guarantee the same benefits of a free appropriate public education irrespective of the state or jurisdiction wherein a child resides.