

# Reexamining Rowley: A New Focus in Special Education Law

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The Individuals with Disabilities Education Act requires public schools to provide a Free, Appropriate Public Education (FAPE) to students with disabilities. Exactly what FAPE means or requires is an elusive topic.

Twenty years ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, the United States Supreme Court held that FAPE requires services that provide students with "some educational benefit." [2] *Rowley* is undoubtedly the most important and influential case in special education law. The "some educational benefit" standard permeates nearly every aspect of special education because it is the standard against which services are measured. Subsequent courts have expanded on this "some educational benefit" requirement somewhat, but it remains essentially intact today.

Much has been written about *Rowley* and its impact in special education law. [3] This paper presents a new and different perspective by exploring the *Rowley* standard for FAPE against the evolving backdrop of state educational standards and litigation about an adequate education under state constitutional law. Applying these standards to the analysis and reasoning in *Rowley*, this paper concludes that the "some educational benefit" standard no longer accurately reflects the requirements of the Individuals with Disabilities Education Act. Rather, state standards and educational adequacy requirements provide the substantive requirements of FAPE, and these standards exceed the "some educational benefit" benchmark. This conclusion requires a fundamental change in the way courts, school districts, and parents should view special education services.

This paper first lays the background and explains the *Rowley* decision. Next, this paper discusses three important changes since *Rowley* was decided: (1) litigation over what constitutes an adequate education under state constitutional law, (2) state educational standards and The No Child Left Behind Act, and (3) the 1997 amendments to the IDEA, and how these changes render the *Rowley* "some educational benefits" standard invalid. Finally, this paper concludes with a discussion about how to incorporate high educational standards and expectations into special education services, as required by the amended IDEA.

## **I. Background**

The Individuals with Disabilities Education Act (IDEA) requires states and local school districts to provide students with disabilities with a "free and appropriate public education" (FAPE). FAPE is defined by the IDEA as special education and related services that:

- (A) have been provided at public expense...without charge [to the parents];
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the student's individualized education program... [4]

While the statute defines FAPE, it does not describe the substantive requirements of FAPE, nor does it set any requisite standards or levels of learning achievement for students with disabilities.[5] Because of this lack of substance, courts have struggled when asked to determine if a school district has provided a student with FAPE.[6]

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* [7], the United States Supreme Court attempted to determine the substantive standards of FAPE. The plaintiff in *Rowley* argued that FAPE required schools to maximize the potential of handicapped children commensurate with the opportunities provided to other children. The trial court agreed with this proportional maximization standard.[8] The Court of Appeals affirmed the trial court's decision without much comment.[9]

The Supreme Court overturned the Court of Appeals' decision, finding that the IDEA (then known as the EHA - Education Handicapped Act) did not require schools to proportionally maximize the potential of handicapped children. Rather, the Court said, Congress had more modest goals in mind. The Supreme Court relied upon the text and legislative history of the statute to find that Congressional intent was only to provide a "basic floor of opportunity" to students with disabilities by providing them access to public education, as opposed to addressing the quality of education received once in school.[10] The Court stated:

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 ...

Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.[11]

The Court determined, however, that some substantive standard for FAPE was "implicit in the congressional purpose of providing access to a free appropriate public education." [12] The Court found that the substantive standard for FAPE required educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction.[13]

The Court also noted that the statute provided a checklist of requirements for FAPE, including instruction at public expense and under public supervision, instruction that met the State's educational standards and approximated the grade levels used in the State's regular education system, and instruction that comported with the child's IEP.[14] The Court concluded that "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.[15]

The Court stated that when determining whether a student benefited from the services provided, "the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit," because passing grades and grade advancement were methods of monitoring educational progress for students being educated in regular classrooms.[16]

## **II. Post Rowley**

Subsequent court decisions interpreted *Rowley* to mean that the IDEA does not require schools to provide students with the best or optimal education, nor to ensure that students receive services to enable them to maximize their potential.[17] Instead, schools are obligated only to offer services that provide students with "some educational benefit." Courts sometimes refer to this as the Cadillac versus Chevrolet argument, with the student entitled to a serviceable Chevrolet, not a Cadillac.[18]

Some courts further refined the "some educational benefit" standard to require students to achieve "meaningful benefit" or to make "meaningful progress" in the areas where the student's disability affects their education.[19] These courts held that while the IDEA does not require a school to maximize a student's potential, the student's potential and ability must be considered when determining whether he or she progressed and received educational benefit.[20] Moreover, when a student displays considerable intellectual potential, the IDEA requires "a great deal more than a negligible benefit."[21]

Despite a myriad of court decisions on the topic, school districts, parents, and courts still have little guidance on how to assess FAPE or educational benefit. In *Rowley*, the Supreme Court mentioned that grades and advancement from grade to grade were a factor in assessing benefit for mainstreamed students. Post-*Rowley* courts have viewed passing grades and grade advancement as important factors in determining if students received educational benefit.[22] However, schools often modify grades for students with disabilities, so grades lose their validity as a measure of benefit or progress.[23]

Some courts have looked at academic achievement testing, in addition to grades and grade advancement, to measure educational benefit.[24] These courts relied upon "objective" standardized academic tests, such as performance on successive test scores, to measure educational benefit. Courts using this approach, however, produce varying results with similar information.[25] The variance seems to be because courts do not have a substantive standard that defines what the student should know and be able to do at any given point in time. As a result, assessing benefit through improvement in test scores becomes a subjective analysis of whether gain of a certain amount on a particular test is sufficient progress.

The lack of substantive standards for FAPE combined the current Cadillac versus Chevrolet perspective facilitates a minimalist view of the substantive education that students with disabilities are entitled to receive and lowers expectations for students with disabilities. When Congress reauthorized the IDEA in 1997, it expressly noted that low expectations for students with disabilities had impeded implementation of the IDEA.[26] Congress stated that educating students with disabilities could be more effective by "having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible." [27]

### **III. Changes in the Landscape**

Three important events occurred since the *Rowley* decision that impact the validity of the "some educational benefit" standard and change the nature of educational services that schools must provide to students who receive special education services under the IDEA.

The first event is state litigation over the constitutional requirements to provide an "adequate" education to students, including students with disabilities, under state constitutional law. An adequate education under state constitutional law requires the state to provide students with educational services targeted towards sufficient skills to be successful in society. Some of these requirements are at odds with the *Rowley* "some educational benefit" standard and require a higher level of educational services.

The second event is the education standards movement that established high expectations for all students, including students with disabilities, through generally applicable content and proficiency standards. These standards define academic performance levels and provide specific substantive benchmarks that students should meet at specific points of their academic careers.

The third event occurred when Congress reauthorized the Individuals with Disabilities Act (IDEA) in 1997. At that time, Congress expressly changed the focus of the IDEA from access to education to high expectations and real educational results for children with disabilities. The 1997 changes emphasized that schools must provide students with disabilities with the same quality educational services already provided to students without disabilities, including access to a curriculum that incorporates state educational standards.

These changes require a reevaluation of what the standard for FAPE and *Rowley* mean today.

#### **A. An Adequate Education under State Constitutional Law**

Most states have state constitutional provisions requiring the state to provide educational services to students.[28] Forty-four states have experienced litigation about the educational requirements outlined by their state constitutions.[29] Most of these cases involved challenges to the state's system of financing education. Commentators organize school finance litigation into three "waves." Some contend that the last wave is ending and a potential fourth wave is beginning.[30]

The first two waves of school finance litigation dealt primarily with equal protection or equity arguments surrounding school funding in local school districts.[31] The third wave of school finance litigation focused on whether states have a constitutional obligation to provide students with a certain level or quality of education. This qualitative level of education is often referred to as "an adequate education." [32]

Numerous state supreme courts held that their constitutions require their states to provide students with an adequate education.[33] These court decisions create general state law educational standards and requirements. These standards are subsequently incorporated into the definition of FAPE for students with disabilities by the statutory provision that requires FAPE to "meet state standards" and include "an appropriate preschool, elementary, or secondary school education in the State involved." [34]

Some courts have held that an adequate education is not a minimal education. One of the earliest cases to address the requisite qualitative level of educational services under a state constitution was *Paulley v. Kelly*. [35] In *Paulley*, the West Virginia Supreme Court described the requisite quality of education under the West Virginia Constitution as one that "develops, as best the state of education expertise allows, the minds, bodies[,] and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." [36]

The court further found that the state had an obligation to develop

every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society. [37]

Some years later, in *Alabama Coalition for Equity, Inc. v Hunt*, an Alabama court held that the Alabama constitution required the state to provide students with an education that would ensure:

(viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and

(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential. [38]

State constitutional mandates that require states to develop every child to his or her capacity and encourage each child to live up to his or her full human potential are

directly at odds with the *Rowley* "basic floor of opportunity" standard. *Rowley* rejected the notion that the IDEA required states to maximize a student's potential. In a state where the state's constitution requires such a standard for all students, however, the requirement is incorporated into the IDEA's definition of FAPE as the standard for students with disabilities.[39] Any other approach would run afoul of the IDEA's requirements.[40]

Other state courts developed and applied similar constitutional requirements without express language regarding maximizing student potential, but these resulting standards remain clearly contrary to the minimalist guidelines set by *Rowley*.[41] For example, the Kentucky Supreme Court decision in *Rose v. Council for Better Education* [42] is one of the seminal cases about the requirements of an adequate education. In *Rose*, the court found the state was obligated to provide every child with:

- (i) [S]ufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[43]

Several other state supreme courts adopted the seven criteria set forth in *Rose* as requirements under their state constitutions.[44] These courts held that a constitutionally adequate education is not a minimal education. The New Hampshire Supreme Court stated in *Claremont v. Governor (Claremont II)*:

Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the

critical requirements of the many that it must address. Mere competence in the basics--reading, writing, and arithmetic--is insufficient in the waning days of the twentieth century to insure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.[45]

When states properly incorporate these constitutional requirements into the definition of FAPE, students with disabilities are entitled to more than just a "basic floor of opportunity" or "some educational benefit." These students are entitled to receive an education that allows for meaningful participation in a democratic society, and competition for post-secondary education and employment opportunities.[46]

The IDEA requires incorporation of broad educational adequacy goals set forth in court decisions into Individual Educational Programs (IEPs) that meet the unique needs of each disabled student. Each student with a disability, as defined by the IDEA, is entitled to an IEP under the IDEA.[47] The IEP must be tailored to meet the unique needs of the student.[48] The IEP is the cornerstone of FAPE. Courts look at whether an IEP is appropriate when assessing whether a school district has provided FAPE.[49]

Aligning IEPs with the state's constitutional requirements regarding an adequate education presents challenges for school officials and parents. Educators and families must boil down broad adequacy goals into a personalized and individualized plan for a specific student. An IEP must contain specific goals and objectives to meet the student's unique needs, and must describe the special education and related services the school will provide so the student may meet these goals and objectives.[50]

When state constitutional adequacy requirements are incorporated into the IEP, goals and objectives and the special education and related services must focus on enabling the student to meet educational adequacy requirements. These broad educational adequacy requirements may not be specific enough to enable schools and parents to readily meet this requirement. In this respect, state educational standards can provide specific, measurable standards about what students should know and be able to do at different stages of their academic careers.[51] These standards can be individualized and incorporated into students' IEPs.

### ***B. State Educational Standards***

The definitional checklist of FAPE referenced by the Supreme Court in *Rowley* includes a requirement that the education provided to students with disabilities meet state standards.[52] When the Court decided *Rowley*, this requirement did not have the same meaning it does today. At that time, most state standards did not involve substantive requirements for the educational services provided to students. Instead, standards addressed the process by which services would be provided.[53]

However, since *Rowley*, educational standards have changed. Today, state and federal educational standards address the essential core of what students should know and be able to do. Known in the educational world as "standards-based education reform," state and federal educational standards now include content

standards that specify what students should learn, proficiency standards that set expectations for what students must know and be able to do at specific times and assessment measures to determine if students have achieved these expectations.[54]

Standards based education reform became prominent at the national level with Goals 2000. This federal law proposed national education goals and required states receiving funds under the program to develop strategies for meeting national education standards. These strategies, moreover, must include developing and adopting state education standards and assessment methods.[55]

Other federal laws like Title I of the Elementary & Secondary Education Act (as amended by the Improving America's Schools Act of 1994) required states to develop or adopt challenging content, proficiency standards, and assessment mechanisms.[56] Under Title I of the ESEA, schools must make adequate yearly progress (AYP) to ensuring that students who receive Title I services meet these standards.[57] Schools that do not make adequate progress must develop corrective action plans.[58]

In 2001, Congress reauthorized the Elementary and Secondary Education Act and gave the ESEA a new name, The No Child Left Behind Act (NCLB).[59] NCLB greatly expanded the scope of these Title I requirements and reaffirmed the federal government's position that all students should meet high academic standards.[60] In order to obtain funding under Title I, states must develop plans to demonstrate that the state has adopted challenging academic and content standards for all students in the areas of reading or language arts, math and science.[61] These state plans must be developed in coordination with IDEA requirements.[62]

Under NCLB, State content standards must 1) specify what children are expected to know and do; 2) contain rigorous content; and 3) encourage the teaching of advanced skills.[63] State achievement standards must be aligned with content standards and must describe two levels of high achievement: proficient and advanced.[64] These achievement levels determine how well children are mastering the material in the state academic content standards.[65] A third level of achievement called "basic" is required to provide complete information about the progress of students towards meeting the proficient or advanced levels.[66]

NCLB requires that all students, including students with disabilities, be at the proficient or advanced levels by the 2013-2014 school year.[67] All schools must make adequate yearly progress (AYP) towards attaining this goal of all students reaching the proficient or advanced levels.[68] While the specifics of AYP differ from state to state, AYP must be based on student achievement on annual statewide assessment tests that measure the percentage of students who are at the advanced or proficient levels on the state's achievement standards.[69]

Beginning in the 2005-2006 school year, students must be tested every year in grades 3 through 8 in language arts and math and at least once in grades 10-12.[70] Beginning in the 2007-2008 school year, students must be assessed in science at least once in grades 3-5, once in grades 6-9, and once in grades 10-12.[71] Schools must demonstrate that their students are improving at steady and consistent increments each year towards meeting the requirement that 100 percent of students are at the proficient or advanced levels by 2013-2014.[72]



The assessment data for adequate yearly progress (AYP) is disaggregated into subgroups including:

- 1) economically disadvantaged students;
- 2) students of major racial and ethnic groups,
- 3) students with limited English proficiency; and
- 4) students with disabilities.[73]

Each subgroup must make adequate yearly progress. If any subgroup of students at a Title I school does not make adequate yearly progress for two consecutive years, the school will be "a school in need of improvement" and must offer all students in the school the choice of attending another public school that is not in need of improvement (this is called "public school choice").[74]

A school in need of improvement must develop a school improvement plan in consultation with parents, school staff, the local educational agency and other experts.[75] The improvement plan must address how the school will specifically address the issues that prevented it from making adequate yearly progress in the past.[76] The improvement plan must include research based strategies, professional development, and strategies to promote effective parental involvement and mentoring for new teachers.[77]

A Title I school that fails to make AYP for three consecutive years, or is in its second year as a "school in need of improvement," must offer public school choice to all students and must offer supplemental educational services to students from low income families.[78] Supplemental services must be in addition to instruction provided during the school day and must focus on helping students meet state academic achievement standards.[79] For students who receive special education services, supplemental services must also be consistent with the student's IEP.[80]

Other sanctions and corrective actions apply to schools that continue to be "in need of improvement" for more years, including staff restructuring, implementing a new curriculum, and state take over of the school.[81] NCLB makes clear that under federal law, students with disabilities are entitled to and expected to meet high academic standards. [82]

Virtually every state has now adopted content and/or proficiency standards that set forth specific performance standards and establish required outcomes for providing students with an adequate or appropriate education under state law.[83] In addition, several states have developed specific assessment measures that test students' levels of achievement in meeting state standards.[84]

Two important aspects of standards based reform relate to FAPE and the U. S. Supreme Court's decision in *Rowley*. First, education standards establish high expectations for all students, including students with disabilities. Such standards assume that all students can achieve high levels of learning if they receive high expectations, clearly defined standards, and effective teaching to support achievement.[85]The intended result of education standards is that all students, including students with disabilities, will learn more.[86] While some states developed specific standards for students with disabilities, most simply created standards that are the same for all students.[87] These high expectations in state education

standards are at odds with the core holding in *Rowley* that school districts only need to meet the minimalist "some educational benefit" standard.[88]

The second important aspect of educational standards is the shift from process to outcome. Content and proficiency standards focus on what students actually learn, not the process by which students learn.[89] In general, special education focuses on the process of providing services to students, not on outcomes from these services. Education standards redirect the inquiry to the effectiveness of the education actually provided to students.

This focus on student achievement contradicts the *Rowley* finding that the purpose of the IDEA is to provide access to education, not to address the substance or quality of services students receive once they have access.[90]

The state-established Curriculum Frameworks in New Hampshire provide one example of content and proficiency standards.[91] These Frameworks establish content and proficiency standards in various academic areas. In the area of Language Arts, the Framework sets out the following standard for general reading:

Students will demonstrate the interest and ability to read age-appropriate materials fluently, with understanding and appreciation.

The Language Arts framework then sets forth the following broad goals:

- \* Students will read fluently, with understanding and appreciation.
- \* Students will write effectively for a variety of purposes and audiences.
- \* Students will speak purposefully and articulately.
- \* Students will listen and view attentively and critically.
- \* Students will understand, appreciate, interpret, and critically analyze classical and contemporary American and British literature as well as literary works translated into English.
- \* Students will use reading, writing, speaking, listening, and viewing to:
  - gather and organize information; communicate effectively; and succeed in educational, occupational, civic, social, and everyday settings.

While these requirements appear rather basic, this perception changes when the requirements are applied to a student with a disability. The goals become significant and require school districts to provide services that will enable the student to meet these goals. This is likely to be a significant change for some school districts and students. For example, requiring a student with dyslexia to read age-appropriate materials fluently is a goal that some school districts may ordinarily not set because students with dyslexia have difficulty learning to read.[92] Instead, the school district is likely to set a goal to make small improvements in the student's reading ability, even if those improvements result in the student falling even further behind in reading.

Incorporating state educational content and proficiency standards into the statutory definition of FAPE means high expectations must now be included in disabled students' Individual Educational Programs. Educational standards define performance criteria that school districts and parents must use when developing goals and objectives in a student's Individual Educational Program (IEP). School districts, parents, and courts may also use these standards in assessing whether a school district successfully provided a student FAPE.[93]

### ***C. The 1997 Amendments to the IDEA***

Congress amended the IDEA in 1997. The 1997 amendments show Congress' intent to incorporate state educational standards into special educational programming for disabled students. The statute now explicitly mandates that states establish performance goals for children with disabilities that are consistent with the goals and standards set for all children.[94] The IDEA now requires states to establish performance indicators to assess their progress toward achieving these goals. At a minimum, goals must include the performance of children with disabilities on assessments, drop out rates, and graduation rates.[95]

The IDEA amendments mark a significant change of direction from the Supreme Court's decision in *Rowley*. These amendments establish high expectations for children with disabilities to achieve real educational results. The amendments change the focus of IDEA from merely providing access to an education, as the Court noted in *Rowley*, to requiring improved results and achievement. These changes were made explicit in the House Committee Report that states:

This Committee believes that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education. Educational achievement for children with disabilities, while improving, is still less than satisfactory.

This review and authorization of the IDEA is needed to move to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement.[96]

Similarly, the findings section of the IDEA now states that:

Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by - having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible ...[and] supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them -- to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children."[97]

Whenever possible the general curriculum must now include students with disabilities. Student IEPs must contain goals and objectives that enable disabled

students' involvement and progress in the general curriculum.[98] The general curriculum is the curriculum available to all students.[99] Many states base the general curriculum on content and proficiency standards developed by local agencies.[100]

The amended IDEA focuses on the IEP as the primary tool for ensuring that disabled students are included and make progress in the general curriculum. This is one method of incorporating high educational standards into the special education programs of students with disabilities.[101] The IEP details the special education services that must be provided to disabled students. The definition of special education in the IDEA expressly states that special education is specially designed instruction to ensure access to the general curriculum so that the student can meet "the educational standards within the jurisdiction of the public agency that apply to all children." [102]

States and school districts must now include disabled students in state and local assessments or provide them with alternate assessments.[103] These assessments measure the extent to which the student meets the content or proficiency standards. States and districts must consider the student's performance on these assessments when developing the student's IEP. States and districts may also use these results to measure student progress towards meeting IEP goals and objectives.[104] Results on these tests indicate that programming for students with disabilities is not yet aligned to state educational standards.

For example, New Hampshire's test results show vast differences between students with disabilities and non-disabled students. The New Hampshire test encompasses four levels: novice, basic, proficient, and advanced. In the test administered in 2000, only 32 percent of third grade students with disabilities scored at basic and above in language arts, compared to 83 percent of other students. Moreover, only 5 percent of third grade students with disabilities scored proficient and above in language arts, compared to 43 percent of other students. Overall, only 25 percent of students with disabilities scored at basic or above, compared to 70 percent of other students. Only 4 percent of students with disabilities scored at proficient or above, compared to 31 percent of other students.[105]

The 1997 amendments to the IDEA incorporate the high expectations of state educational standards into the programming for disabled students. These amendments demonstrate that FAPE is now more than access to a "basic floor of opportunity." FAPE is now aligned with the high expectations in state education standards. As a result, these high expectations must be incorporated into the IEPs of students with disabilities.

#### **IV. How to Incorporate High Standards into Individualized Educational Programs (IEPs)**

A student's unique abilities and needs determine how educators incorporate standards into an IEP. As a general matter, the IEP team must assess the student's needs and abilities, then determine how to incorporate specific standards into the student's IEP.[106]

With respect to academics, a student's IEP need only address those areas where the student's disability affects his/her ability to progress in general curriculum.[107]

Therefore, the IEP does not need to address every education standard in every academic area.[108] Rather, the IEP team should assess how the student's disability affects his/her ability to participate in and progress in the general curriculum, and identify the content and proficiency standards that apply to the impacted areas. In some cases, content and proficiency standards may be used directly as goals or objectives in the IEP. In other cases, the IEP team may need to modify content or proficiency standards by individualizing the standard and providing more detail on what the student will accomplish in a specified period.[109]

The IEP Team may determine the student cannot presently meet a content or proficiency standard, and choose to develop its own standard as an IEP goal or objective.[110] In this case, the standard should be linked to the state content or proficiency standard. The standard developed for the student should be challenging, yet achievable. The standard should enable the student to ultimately meet the state standards.[111]

Similarly, the IEP Team must focus on developing access skills needed to satisfy the content and proficiency standards.[112] Direct services and remediation (such as one-on-one tutoring in Orton-Gillingham or Lindamood Bell, etc.) are often needed to help students with disabilities develop the necessary access skills to meet content and proficiency standards. The IEP team must develop additional goals and objectives for these access skills.

The IEP Team must also determine if the student requires accommodations or modifications to meet content and proficiency standards and to participate in state or local assessments.[113]

Consider, for instance, a third grade student with dyslexia who is having difficulty learning to read. The IEP Team should assess how the dyslexia affects the student's involvement and progress in meeting the content and proficiency standards of the general curriculum. In New Hampshire, the IEP Team needs to review the state Curriculum Frameworks in Language Arts that sets out grade specific benchmarks that all students should meet. The Frameworks state that by the end of third grade, students should be able to:

- \* Determine the pronunciation and meaning of words by using phonics (matching letters and combinations of letters with sounds), semantics (language sense and meaning), syntactics (sentence structure), graphics, pictures, and context as well as knowledge of roots, prefixes, and suffixes.
- \* Understand and use the format and conventions of written language to help them read texts (for example, left to right, top to bottom, typeface).
- \* Identify a specific purpose for their reading such as learning, locating information, or enjoyment.
- \* Form an initial understanding of stories and other materials they read by identifying major elements presented in the text including characters, setting, conflict and resolution, plot, theme, main idea, and supporting details.

- \* Reread to confirm their initial understanding of a text and to extend their initial impressions, developing a more complete understanding and interpretation of the text.
- \* Identify and understand the use of simple figurative language including similes, metaphors, and idioms.
- \* Recognize that their knowledge and experiences affect their understanding of materials they read.
- \* Make and confirm simple predictions to increase their level of understanding.
- \* Seek help to clarify and understand information gathered through reading.
- \* Employ techniques, such as previewing a text and skimming, to aid in the selection of books and articles to read.
- \* Demonstrate the ability and interest to read independently for learning, information, communication, and pleasure. [114]

The IEP team should conduct necessary evaluations to determine if the student can meet these standards and which standards are impacted by the student's dyslexia. The IEP team should then develop a program that will enable the student to meet the standards. The team may include the unmet standards as goals and objectives in the student's IEP, or the team may decide to modify or individualize the standards, depending on the student's unique needs. The team may also need to develop linking standards aligned with the unmet standards in the curriculum frameworks. Goals and objectives to develop access skills should also be included in the students' IEP.

The team should evaluate the standards in other academic areas, such as Math, Science, and Social Studies, and determine if the student's dyslexia will inhibit his/her ability to meet these standards. If the student will have difficulty meeting these academic standards, the team should follow the same process in developing goals and objectives to address these issues.

## **V. Conclusion**

The 1997 reauthorization of the IDEA, the emergence of state educational standards as mandated by No Child Left Behind, and constitutional requirements should lead to fundamental changes in how schools write, implement and evaluate Individualized Education Programs (IEPs). This, in turn, should also influence how courts assess FAPE. These changes require a reexamination of *Rowley* and its "some educational benefit" standard.

Reexamining *Rowley* is no small undertaking. *Rowley* has provided the framework for special education services for 20 years. However, the 1997 Amendments to the IDEA make clear that the foundation underlying that reasoning in *Rowley* is no longer present. That is, the IDEA is no longer intended to simply provide students with access to educational services that provide some benefit. The IDEA is intended to go well beyond this by ensuring that students with disabilities receive educational

services that incorporate the high expectations in state educational standards and in state court cases regarding an adequate education.

Once these elements are included in the analysis, much of *Rowley* seems inapplicable to questions about the contours of a free and appropriate public education. State educational standards and adequacy requirements now provide the parameters of FAPE. When determining if a school has provided a student with FAPE, courts need to look to these requirements and the extent to which the school provided an Individualized Educational Program that enabled the student to meet these requirements.

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## Endnotes

[1] Attorney Johnson practices law in Concord, New Hampshire. His practice includes representing parents and students in educational matters. He is co-counsel in [Claremont v. Governor](#), the case establishing that New Hampshire students have a fundamental right to an adequate education. Attorney Johnson is also the founder of [NHedLaw, LLC](#), an entity that publishes the ***New Hampshire Special Education Law Manual*** written by Johnson and provides training, resources and information about education topics including special education and No Child Left Behind. Attorney Johnson frequently writes and speaks nationally on education law topics. He can be reached at [sfjohnson@nhedlaw.com](mailto:sfjohnson@nhedlaw.com). This paper is based upon a presentation originally given at the 2001 Education Law Institute at Franklin Pierce Law Center and a prior version of this paper was recently published in the Brigham Young University Education and Law Journal. I would like to thank Professor Sarah Redfield and Professor Mark C. Weber for their review and comments on this paper and Pamela Wright and Suzanne Heath for their excellent feedback and editing.

[2] [Bd. of Educ. of Hendrick Hudson C. Sch. Dist. v. Rowley](#), 458 U.S. 176, 200 (1982).

[3] A search of the literature shows that *Rowley* is referenced in over 340 law review articles.

[4] 20 U.S.C.A. § 1401(8) (2002).

[5] [Bd. of Educ. of County of Kanawha v. Michael M.](#), 95 F.Supp.2d 600, 607 (S.D.W. Va. 2000).

[6] See Ladonna L. Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 Drake L. Rev. 855, 866-868 (1998).

[7] 458 U.S. 176 (1982).

[8] *Rowley v. Bd. of Educ. of Hendrick Hudson C. Sch. Dist.*, 485 F.Supp. 528, 534 (S.D.N.Y. 1980).

[9] *Rowley v. Bd. of Educ. of Hendrick Hudson C. Sch. Dist.*, 632 F.2d 945 (2d Cir. 1980).

[10] [Rowley](#), 458 U.S. at 192, 200.

[11] [Id.](#) at 192.

[12] [Id.](#) at 200.

[13] [Id.](#) at 201.

[14] [Id.](#) at 189.

[15] [Id.](#)

[16] [Id.](#) at 207, n. 28. The Court in *Rowley* relied upon grades when a student is "mainstreamed" and educated in the regular education classrooms of a public school

system, because it assumed that in that situation "the system itself monitors the educational progress of the child" by administering regular examinations, awarding grades, and permitting yearly advancement to higher grade levels for those children who attain an adequate knowledge of the course material. *Id.* at 202-203. The value of grades for students who are not mainstreamed is not as certain.

[17] See e.g. *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir. 1993).

[18] *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993); *Fayetteville v. Perry Sch. Dist.*, 20 IDELR 1289 (SEA OH 1994).

[19] *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (IDEA requires significant learning and meaningful benefit); *M.C. ex rel. J.C. v. C. Regl. Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996); *Doe*, 9 F.3d at 459; *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) ("Congress indubitably desired effective results and demonstrable improvement" for the Act's beneficiaries); *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985); *Nein v. Greater Clark County Sch. Corp.*, 95 F.Supp.2d 961 (S.D. Ind. 2000); *Ross v. Framingham Sch. Comm.*, 44 F.Supp.2d 104 (D. Mass. 1999).

[20] *Ridgewood*, 172 F.3d at 247 (benefit must be gauged in relation to the child's potential); *Roland M.*, 910 F.2d at 991 (academic potential one factor to be considered when addressing student's needs).

[21] *Ridgewood*, 172 F.3d. at 247.

[22] *Doe ex rel. v. Ala. St. Dept. of Educ.*, 915 F.2d 651, 666 (11th Cir. 1990); *Parent v. Osceola County Sch. Bd.*, 59 F.Supp.2d 1243 (M.D. Fla. 1999).

[23] *R.R. v. Wallingford*, 35 IDELR 32 (D. Conn. 2001).

[24] For example, in *Houston Independent School District*, the court reviewed the student's scores on the Woodcock Johnson intelligence and achievement test to assess the student's progress and found that the scores showed meaningful progress. As a result, the school had provided the student a FAPE. 200 F.3d at 349-350.

[25] Compare *Houston Independent School District*, where the following grade equivalent scores were found to demonstrate educational benefit:

	2nd/3rd grades	4th/5th grades	5th/6th grades
Math	1.7	3.1	4.4
Written language	1.5	1.9	2.9
Passage comp.	1.7	2.2	3.9
Calculation	1.4	3.3	5.0
Applied problems	2.0	3.0	3.6
Dictation	1.6	1.8	2.8
Writing	1.4	2.6	
Word Identification	1.8	2.1	2.8
Word Attack	0.7	1.8	1.8
Broad Reading		2.1	3.3
Written samples		2.6	3.3
Basic cluster		2.1	2.8



(Id. at 350) with *Hall v. Vance County Bd. of Education* (1983-1984 EHLR DEC. 555:437 (E.D. NC 1983)), aff'd, 774 F.2d 629 (4th. Cir. 1985), where the court found the following test scores were not sufficient progress to provide educational benefit:

	3rd grade	5th grade
Math	4.0	5.7
Reading Comp.	2.2	2.7
Spelling	2.5	3.2
General Info	5.3	7.0

[26] 20 U.S.C.A. §1400(c)(4) (West 2002).

[27] 20 U.S.C.A. §1400(c)(4)-(5)(A) (West 2002).

[28] Paula J. Lundberg, *State Courts and School Funding: A Fifty State Analysis*, 63 Alb. L. Rev. 1101, 1107 (2000).

[29] William H. Clune, *Educational Adequacy: A Theory and its Remedies*, 28 U. Mich. J.L. Ref. 481 (1995); Lundberg, *supra* n. 27; Kevin Randall Mcmillan, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 Ohio St. L.J. 1867 (1998); Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort* 96 Nw. U. L. Rev. 99 (2001). For current events on school funding litigation see

<<http://www.accessednetwork.org/index.html>>.

[30] Clune, *supra* n. 28; William F. Dietz, *Manageable Adequacy Standards in Education Reform Litigation*, 74 Wash. U. L.Q. 1193, 1195-1203 (1996); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 Temp. L. Rev. 1151, 1157-1159 (1995); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & Educ. 219 (1990).

[31] Heise, *supra* n. 29 at 1157-1159; Thro, *supra* n. 29.

[32] Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. Rev. 399, 413-417 (2000); Patricia F. First & Louis F. Miron, *The Meaning of an Adequate Education*, 70 Educ. L. Rep. 735, 737 (1992).

[33] *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *McDuffy v. Sec. of Exec. Off. of Educ.* 615 N.E.2d 516, 548 (1993); *Claremont Sch. Dist. v. Gov.*, 703 A.2d 1353, 1356 (N.H. 1997) (*Claremont II*).

[34] 20 U.S.C.A. § 1401(8)(B)-(C) (West 2002); Natl. Research Council, *Educating One & All: Students with Disabilities and Standards-Based Reform* 51-52 (Lorraine M. McDonnel, Margaret J. McLaughlin & Patricia Morison, eds., Natl. Acad. Press 1997); Michael Dannenberg, *A Derivative Right to Education: How Standards-Based Education Reform Redefines the Individuals with Disabilities Education Act*, 15 Yale L. & Policy Rev. 629, 641 (1997).

[35] *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

[36] *Id.* at 877.

[37] *Id.*

[38] *Ala. Coalition for Equity, Inc. v. Hunt*, No. CV-90-883-R (Ala. Cir. Ct. 1993),

reprinted in *Opinion of the Justices No. 338*, 624 S.2d 107, 166 (Ala. 1993).

[39] National Research Council, *supra* n. 33, at 51-52; Dannenberg, *supra* n. 33, at 639-643. At the time of the *Rowley* decision, litigation over a state's constitutional obligations to provide an adequate education was in its infancy. In *Rowley*, the Court made short shrift of this requirement in its decision and did not address what an appropriate education would be in Amy Rowley's state.

[40] Providing different educational standards for students with disabilities could also raise equal protection concerns. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (educational opportunities must be provided equally to all).

[41] This objective is right in line with the amendments to the IDEA in 1997 discussed *infra*. The purpose of the IDEA is now to prepare students with disabilities for independent living and employment. 20 U.S.C.A. 1400(c)(1), (d)(1)(A) (West 2002). This purpose itself is arguably inconsistent with *Rowley's* minimalist approach.

[42] 790 S.W.2d 186.

[43] *Id.* at 212.

[44] See e.g. *McDuffy*, 615 N.E.2d at 554; *Claremont*, 703 A.2d at 1359.

[45] *Claremont*, 703 A.2d at 1359.

[46] See e.g. *Rose*, 790 S.W.2d at 212; *Claremont*, 703 A.2d at 1359; *Abbott v. Burke*, 693 A.2d 417, 428 (N.J. 1997).

[47] 34 C.F.R. § 300.341(a)(1) (2002).

[48] *Honig v. Doe*, 484 U.S. 305, 311 (1998); *Roland M.*, 910 F.2d at 987.

[49] *Honig*, 484 U.S. at 311; *Pihl v. Mass. Dept. of Educ.* 9 F.3d 184, 187 (1st Cir 1993); *Roland M.*, 910 F.2d at 987; *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 415 (1st Cir. 1985).

[50] 34 C.F.R. § 300.347 (2002).

[51] Mary E. Moran, *Standards and Assessments: The New Measure of Adequacy in School Finance Litigation*, 25 J. of Educ. Fin. 33-80 (1999); Cochran, *supra* n. 31, at 462-464.

[52] 20 U.S.C.A. § 1401(8)(b) (West 2002).

[53] For example, in New Hampshire, the state has had "minimum standards" since roughly 1953. These standards address inputs like the number of credits students must have to graduate, the general course that schools must of students (i.e, math, science, language arts, etc), the size of classrooms, etc. They also address school operational issues like the size of buildings and classrooms, teacher certification, etc. See *New Hampshire Department of Education Minimum Standards*, Ed 300, *et seq.*

[54] National Research Council, *supra* n. 33, at 3, 22, 27-28, 36-40, 113-118; *Leave No Child Behind Act*, 20 U.S.C.A. § 5802 (West 2002); *Goals 2000: Educate America Act*, Pub. L. No. 103-227, § 3, 108 Stat. 125, 129-130 (2002).

[55] See Title III, Section 306 of *Goals 2000: Educate American Act*, 108 Stat. at 160-167 (2002) (codified at 20 U.S.C. § 5886 (repealed 1999)).

[56] *Elementary & Secondary Education Act* as amended by the *Improving America's Schools Act* of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1997).

[57] *Id.*

[58] *Id.*

[59] *No Child Left Behind Act of 2001*, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-6777 (2000)).

[60] *No Child Left Behind: A Desktop Reference 2002*, prepared by the undersecretary of the United States Department of Education, begins with a message from President George W. Bush that states:  
"The NCLB Act is designed to help all students meet high academic standards by requiring that states create annual assessments that measure what children know and can do in reading and math in grades 3 through 8. These tests, based on

challenging state standards, will allow parents, educators, administrators, policymakers, and the general public to track the performance of every school in the nation. Data will be disaggregated for students by poverty levels, race, ethnicities, disabilities, and limited English proficiencies to ensure that no child- regardless of his or her background-is left behind. The federal government will provide assistance to help states design and administer these tests. States also must report on school safety on a school-by-school basis."

*No Child Left Behind: A Desktop Reference 2002*, 9-10

(available at <http://www.ed.gov/offices/OESE/reference.html>). The publication goes on to say that "Title I, Part A, is intended to help ensure that all children have the opportunity to obtain a high-quality education and reach proficiency on challenging state academic standards and assessments." *Id.* at 13.

[61] 20 U.S.C. § 6311(a)-(b)(West 2003).

[62] 20 U.S.C. § 6311(a)(West 2003).

[63] 20 U.S.C. § 6311(b)(1)(D)(i)(West 2003).

[64] 20 U.S.C. § 6311(b)(1)(D)(ii)(West 2003).

[65] *Id.*

[66] *Id.*

[67] 20 U.S.C. § 6311(b)(2)(f)(West 2003).

[68] 20 U.S.C. § 6311(b)(2)(B)-(I)(West 2003).

[69] 20 U.S.C. § 6311(b)(2)(A)-(C)(West 2003).

[70] 20 U.S.C. § 6311(b)(3)(C)(West 2003).

[71] *Id.*

[72] 20 U.S.C. § 6311(b)(2)(B)-(I)(West 2003).

[73] 20 U.S.C. § 6311(b)(2)(C)(v)(West 2003).

[74] 20 U.S.C. § 6316(b)(1)(E)(West 2003).

[75] 20 U.S.C. § 6316(b)(West 2003).

[76] 20 U.S.C. § 6316(b)(3)(West 2003).

[77] *Id.*

[78] 20 U.S.C. § 6316(e)(1)(West 2003).

[79] 20 U.S.C. § 6316(e)(12)(C)(West 2003).

[80] 20 U.S.C. § 6316(e)(West 2003).

[81] *Id.*

[82] *The No Child Left Behind: A Desktop Reference 2002*, prepared by the undersecretary of the United States Department of Education, begins with a message from President George W. Bush that states:

" The NCLB Act is designed to help all students meet high academic standards by requiring that states create annual assessments that measure what children know and can do in reading and math in grades 3 through 8. These tests, based on challenging state standards, will allow parents, educators, administrators, policymakers, and the general public to track the performance of every school in the nation. Data will be disaggregated for students by poverty levels, race, ethnicities, disabilities, and limited English proficiencies to ensure that no child- regardless of his or her background-is left behind. The federal government will provide assistance to help states design and administer these tests. States also must report on school safety on a school-by-school basis." *No Child Left Behind: A Desktop Reference 2002*, 9-10 (available at [www.ed.gov/offices/OESE/reference.html](http://www.ed.gov/offices/OESE/reference.html)). The publication says "Title I, Part A, is intended to help ensure that all children have the opportunity to obtain a high-quality education and reach proficiency on challenging state academic standards and assessments." *Id.* at 13.

[83] National Research Council, *supra* n. 33, at 27-29.

[84] *Id.* at 27-29, 154-58.

[85] *Id.* at 22-25, 29-39; Janet R. Vohs, Julia K. Landau & Carolyn A. Romano, *PEER*

*Information Brief: Raising Standards of Learning, Students with Disabilities and Standards-Based Education Reform*, available at <<http://www.fcsn.org/peer/ess/standardsib.html>>.

[86] Vohs, *supra* n. 64.

[87] National Research Council, *supra* n. 33, at 137-138; Vohs, *supra* n. 64.

[88] *Rowley*, 458 U.S. at 189, 200-201.

[89] National Research Council, *supra* n. 33, at 36-39, 114-118; Vohs, *supra* n. 64.

[90] *Rowley*, 458 U.S. at 192.

[91] The *Frameworks* were established as part of a New Hampshire statute, N.H. Rev. Stat. Ann. §193-C (1999). The *Frameworks* are available on the New Hampshire Department of Education Website at <<http://www.ed.state.nh.us/CurriculumFrameworks/curricul.htm>>.

[92] Stanley S. Herr, *Special Education Law and Children with Reading and Other Disabilities*, 28 J.L. & Educ. 337, 343 (1999).

[93] There is a potential risk of using high standards to the detriment of some students with disabilities. For example, requiring a student with a disability to pass a high stakes test in order to receive a high school diploma can be a major obstacle to the student if the student cannot read due to their disability. For a discussion of high stakes testing and students with disabilities see Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & Educ. 185, 186 (2001); Ryan R. West, *The Fallacy Behind Increased Accountability: How Disabled Students' Constitutional Rights Have Been Disregarded In a Rush to Implement High-Stakes Exams*, 2002 B.Y.U. Educ. & L.J. 351 (2002). These problems must be addressed so that students with disabilities are not punished or assessed based upon their disability. Raising the expectations for students with disabilities must include raising the expectations for how we teach and how we assess students with disabilities.

[94] 20 U.S.C.A. § 1412(a)(16) (West 2002).

[95] *Id.*

[96] H.R. Rpt. 105-95, at 83-84 (May 13, 1997).

[97] 20 U.S.C.A. 1400(c)(5)(A),(E)(i) (West 2002).

[98] 34 C.F.R. § 300.347(2)(i) (2002).

[99] *Id.*

[100] For example, the *New Hampshire Curriculum Frameworks* provide content and proficiency standards for local school districts to use in developing curriculum. The *Frameworks* are available on the New Hampshire Department of Education Website at <<http://www.ed.state.nh.us/CurriculumFrameworks/curricul.htm>>.

[101] H.R. Rpt. 105-95, at 99-100. 20 U.S.C.A. §1451(a)(5)-( 6)(A)-(B) (West 2002) ("Findings and Purpose" to Part A (National Activities to Improve Education of Children with Disabilities) of IDEA.). See also 20 U.S.C.A. §1400(c)(5)(A).

[102] 34 C.F.R. § 300.26(b)(3)(ii) (2002).

[103] Approximately half of all students with disabilities are currently excluded from state and district-wide assessments. The new 1997 amendments to the IDEA specifically require:

(1) [T]he development of state performance goals for children with disabilities that must address certain key indicators of the success of educational efforts for these children - including, at a minimum, performance on assessments, dropout rates, and graduation rates, and regular reports to the public on progress toward meeting the goals; (2) that children with disabilities be included in general state and district-wide assessments, with appropriate accommodations, if necessary[;] and (3) that schools report to parents on the progress of the disabled child as often as such reports are provided to parents of non-disabled children. See 62 Fed. Reg. 55026, 55029 (October 22, 1997).

[104] 34 C.F.R. § 300.346(a)(1) (2002).

[105] See [New Hampshire Educational Improvement and Assessment Program Education Assessment Report](#) (2001), available at <<http://www.ed.state.nh.us/Assessment/results2000.htm>>.

[106] 34 C.F.R. §§ 300.340 - 300.350 (2002).

[107] 34 C.F.R. at § 300.347; [Appendix A to Part 300](#), Questions 2, 4. School districts must, however, address more than just academic needs. Lenn, 998 F.2d at 1089.

[108] See [Appendix A to Part 300](#), Questions 2, 4. The House Committee report on the reauthorization of the IDEA states:

"The new emphasis on participation in the general education curriculum is not intended by the Committee to result in major expansions in the size of the IEP of dozens of pages of detailed goals and benchmarks or objectives in every curricular content standard or skill. The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general education curriculum and the special services which may be necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability. Specific day to day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP Team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, or short term objectives, or in any of the services or program modifications, or other components described in the child's IEP, the LEA must ensure that the child's IEP Team is reconvened in a timely manner to address those changes." H.R. Rpt. 105-95, at 100.

[109] National Research Council, *supra* n. 33, at 140-151.

[110] The issue of whether the student is capable of attaining certain standards at certain grade levels is one that will have to be carefully assessed for each student. In some cases, the student's impairment maybe so severe that the proficiency standard is unrealistic. However, these situations will likely be rare. Research has demonstrated that children with disabilities are capable of attaining high learning standards when they are provided with educational services that enable them to do so. This is true even when the student has a history of low academic achievement. John Bruer, *Schools for Thought*, 77-79 (Massachusetts Institute of Technology Press 1992); Sally E. Shaywitz, *Dislexia*, 275 Sci. Am. 98, 102 (Nov 1996).

[111] The Committee on Goals 2000 and the Inclusion of Students with Disabilities made a number of recommendations regarding students with disabilities and standards including the following:

1. States and localities that decide to implement standards-based reforms should design their common content standards, performance standards, and assessments to maximize participation of students with disabilities.

2. The presumption should be that each student with a disability will participate in the state or local standards; however, participation for any given student may require alterations to the common standards and assessments. Decisions to make such alterations must have compelling educational justification and must be made on an individual basis.

3. When content and performance standards or assessments are altered for a student with a disability:

- the alternate standards should be challenging yet potentially achievable;
- they should reflect the full range of knowledge and skills that the student needs to live a full, productive life; and
- the school system should inform parents and the student of any consequences of these alterations.

4. Assessment accommodations should be provided, but they should be used only to offset the impact of disabilities unrelated to the knowledge and skills being measured. They also should be justified on a case-by-case basis, but individual decisions should be guided by a uniform set of criteria.

National Research Council, *supra* n. 33, at 197-209.

[112] Access skills are simply skills that are aligned with the content and proficiency standards and that enable the student to meet these standards. See Patricia Burgess & Sarah Kennedy, *What Gets Tested, Gets Taught; Who Gets Tested, Gets Taught: Curriculum Framework Development Process* (Mid-South Regional Resource Center 1998) (available at <http://www.ihdi.uky.edu/MSRRC/Publications/whatgets.htm>>).

[113] 34 C.F.R. at § 300.347.

[114] *Language Arts Framework* (available at <<http://www.ed.state.nh.us/CurriculumFrameworks/curricul.htm>>)

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## **About Scott Johnson**

Attorney Johnson practices law in Concord, New Hampshire. His practice includes representing parents and students in educational matters. He is co-counsel in *Claremont v. Governor*, the case establishing that New Hampshire students have a fundamental right to an adequate education.

Attorney Johnson is also the founder of [NHedLaw, LLC](#), an entity that publishes the ***New Hampshire Special Education Law Manual*** written by Johnson and provides training, resources and information about education topics including special education and NCLB. Attorney Johnson frequently writes and speaks nationally on education law topics. He can be reached at [sfjohnson@nhedlaw.com](mailto:sfjohnson@nhedlaw.com).

Attorney Scott F. Johnson represented the parents on appeal to the First Circuit Court of Appeals in *Maroni v. Pemi-Baker Regional School District*, a case that involved parents who appealed special education administrative due process decisions to federal court without an attorney. The Federal District Court in New Hampshire ruled that the parent could not proceed with the claims without an attorney and dismissed the case.

The First Circuit reversed the district court finding that parents could proceed in federal court without an attorney because parents were "aggrieved parties" under the IDEA and have a right to proceed in federal court with or without an attorney. The case is significant because it is the first in the nation to allow parents to pursue claims under the IDEA without an attorney. A number of other circuit courts of appeal had ruled that parents could not proceed in IDEA claims in federal court without an attorney.

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