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### Making an "IDEA" a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act

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## MAKING AN "IDEA" A REALITY: PROVIDING A FREE AND APPROPRIATE PUBLIC EDUCATION FOR CHILDREN WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

### I. INTRODUCTION

Robert, a middle school student, was diagnosed with Autism Spectrum Disorder, a complex neurological disorder that affects the functioning of the brain and impacts development in the areas of social interaction and communication skills.<sup>1</sup> As a result of his disability, Robert often engages in unique behaviors, including self-injurious conduct, head-banging, hand-flapping, and random vocalization, that interfere with his ability to grasp and learn basic concepts in the learning environment. An academic and psychological evaluation determined that, with the proper supplementary services and instruction, Robert would be able to benefit educationally from the instruction.

Before the school year began, Robert's parents, teachers, and school psychologist crafted an individualized education plan ("IEP") designed to meet his unique educational needs. Among the services listed in Robert's IEP were that an autism specialist visit the school twice per week to provide augmentative communication services and that Robert's general education teacher receive state autism training.

A few weeks into the school year, Robert's parents learned that the school never implemented the services enumerated in their child's IEP. As a result, Robert further regressed to abnormal behaviors, lost attained language, and withdrew from others. Consequently, Robert's parents sued the school district for failing to implement Robert's IEP in violation of the Individuals with Disabilities Education Act ("IDEA").

This example sets the stage for a highly contested issue among the United States Circuit Courts of Appeals: whether a school district's failure to implement certain provisions of a student's IEP violates the IDEA. The IDEA ensures that all handicapped children receive a free appropriate public education ("FAPE").<sup>2</sup> The reach of this mandate, however, is far from clear.<sup>3</sup> As a result, the circuit courts have developed

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<sup>1</sup> This hypothetical scenario was created by the author to illustrate the impact of a school district's failure to implement the provisions of a student's individualized education plan.

<sup>2</sup> See *infra* Part II.B (discussing the protections provided to children with disabilities under the IDEA).

<sup>3</sup> See *infra* notes 45-46 and accompanying text (stating that Congress did not explicitly clarify what constitutes an adequate FAPE for students with disabilities).

varying interpretations and standards for evaluating failure to implement cases.<sup>4</sup> This disparity in interpretations has led to different results for similarly situated disabled students across the United States.<sup>5</sup> Thus, to promote consistency and to fully accomplish the goal of educating students with disabilities, the IDEA should mandate that school districts strictly adhere to all provisions of a student's IEP.<sup>6</sup>

First, Part II of this Note discusses the history of the IDEA and the different standards used to evaluate IEP implementation failures.<sup>7</sup> Second, Part III analyzes the problems with the standards adopted by the Third, Fifth, and Ninth Circuits.<sup>8</sup> Finally, Part IV proposes two alternatives to resolving the current inconsistencies surrounding the evaluation of IEP implementation failures.<sup>9</sup>

## II. BACKGROUND

Before discussing the various problems and standards associated with IEP implementation failures, it is important to understand the context of the IDEA's enactment.<sup>10</sup> Part II.A provides the historical and legal background of the education of students with disabilities.<sup>11</sup> Part II.B discusses the enactment of the IDEA as well as the specific requirements mandated in the IDEA.<sup>12</sup> Part II.C considers the Supreme Court's interpretations of the IDEA.<sup>13</sup> Finally, Part II.D sets forth the current debate among the circuits regarding whether a school district's

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<sup>4</sup> See *infra* Part II.D (discussing the different standards developed by the circuit courts to evaluate a school district's failure to implement a student's IEP).

<sup>5</sup> See *infra* Part III (discussing how the various standards used by the circuit courts have led to different results for similarly situated disabled students across the nation).

<sup>6</sup> See *infra* Part IV (recommending that courts adopt a strict compliance standard for evaluating IEP implementation failures).

<sup>7</sup> See *infra* Part II (discussing the history of educating children with disabilities, the enactment of the IDEA, the Supreme Court's involvement in interpreting the IDEA, and the different standards adopted by the circuit courts to evaluate IEP implementation failures).

<sup>8</sup> See *infra* Part III (comparing and evaluating the different standards used by the circuit courts).

<sup>9</sup> See *infra* Part IV (proposing that strict compliance be added to the definition of FAPE in the IDEA or that courts adopt a uniform standard requiring strict compliance with an IEP).

<sup>10</sup> See *infra* Part II.A (discussing the history of educating students with severe mental and physical disabilities).

<sup>11</sup> See *infra* Part II.A (discussing the history of educating students with disabilities).

<sup>12</sup> See *infra* Part II.B (discussing the federal laws protecting students with disabilities including the subsequent reauthorizations of the IDEA).

<sup>13</sup> See *infra* Part II.C (discussing the Supreme Court's interpretation of FAPE under the IDEA).

failure to implement certain provisions of a student's IEP violates the student's right to the FAPE guaranteed under the IDEA.<sup>14</sup>

A. *Educating Students with Disabilities*

Throughout history, children with severe mental and physical disabilities have experienced isolation from society and from educational opportunities.<sup>15</sup> They were generally consigned to the care of their families or forced to attend separate institutions where they were provided little formal education.<sup>16</sup> In the landmark decision of *Brown v. Board of Education*, the Supreme Court of the United States determined that all children must be afforded an equal educational opportunity.<sup>17</sup> While the Court was primarily addressing the inequality of racially segregated public schools, the *Brown* decision provided the foundation

<sup>14</sup> See *infra* Part II.D (discussing the Fifth, Third, Eighth, and Ninth Circuits' approaches to evaluating IEP implementation failures).

<sup>15</sup> See 20 U.S.C. § 1400 (2006) ("[T]he educational needs of millions of children with disabilities were not being fully met because . . . the children were excluded entirely from the public school system and from being educated with their peers . . ."); Dep't of Pub. Welfare v. Haas, 154 N.E.2d 265, 270 (Ill. 1958) (holding that Illinois' compulsory education statute did not mandate the free public education of the "feeble minded or mentally deficient children" who could not benefit from education); see also Emily Rosenblum, *Interpreting the 1997 Amendment to the IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement for Disabled Children?*, 77 FORDHAM L. REV. 2733, 2733 (2009) (stating that "'weak minded,' 'difficult to educate,' and 'moron of a very low type . . . who is incapable of absorbing knowledge'" are merely a few of the rationales proffered by states "attempting to exclude disabled children from public school[ systems] in the late nineteenth and early twentieth century").

<sup>16</sup> See, e.g., U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 18 (1983) ("Fear, shame and lack of understanding led some families to hide or disown their handicapped members or allow them to die."). The first documented attempt to educate special needs students occurred in 1555, when the Spanish monk Pedro Ponce de Leon taught a small group of deaf students to read, write, speak, and to master the basic academic subjects. Robert L. Hughes & Michael A. Rebell, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 527–28 (1996). In the United States, the first American Asylum for the Education of the Deaf and Dumb was established in Hartford, Connecticut by Thomas Hopkins Gallaudet. *Id.* at 528. Children with disabilities were typically dismissed as having discipline problems; thus, some states created special schools to address the needs of students with discipline problems. *Id.* For example, New Haven formed a class for misbehaved students in 1871; New York created a class for "unruly boys" in 1871; and Cleveland established a class for students with discipline problems in the late 1870's. *Id.* In 1896, Rhode Island established the first special classes for the mentally retarded in its public schools. Furthermore, by 1911, a survey published by the United States Bureau of Education found that 99 of 1285 schools had classes for the "mentally defective," and 220 had classes for "backward child[ren]." *Id.* at 528–29 (alteration in original).

<sup>17</sup> 347 U.S. 483, 495 (1954) (holding that the segregation of school children violated the guarantees of equal protection and due process in the Fourteenth Amendment).

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for parents of children with mental and physical disabilities to challenge school districts regarding the segregation of disabled children.<sup>18</sup>

Challenges to the educational inequalities of disabled children first arose in the early 1970s in *Pennsylvania Association for Retarded Children v. Pennsylvania* (“PARC”) and *Mills v. Board of Education*.<sup>19</sup> In PARC, a Pennsylvania federal court found that several Pennsylvania statutes unconstitutionally discriminated against mentally retarded children.<sup>20</sup> Although the parties settled their dispute outside of court, the judge endorsed a consent decree providing that Pennsylvania had an obligation to publicly educate mentally retarded children in a program appropriate for that individual child’s capacity.<sup>21</sup>

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<sup>18</sup> *Id.* at 483. “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” *Id.* at 493; see also Cory L. Shindel, Note, *One Standard Fits All? Defining Achievement Standards for Students with Cognitive Disabilities Within the No Child Left Behind Act’s Standardized Framework*, 12 J.L. & POL’Y 1025, 1034 (2004) (explaining that following *Brown v. Board of Education*, which held that racial segregation of public schools violated the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution, parents of students with disabilities and disability interest groups began modeling their claims after the equal protection arguments asserted in *Brown*).

<sup>19</sup> See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass’n for Retarded Children v. Pennsylvania (PA Ass’n I)*, 334 F. Supp. 1257 (E.D. Pa. 1971); see also Shima Kalaei, *Students with Autism Left Behind: No Child Left Behind and the Individuals with Disabilities Education Act*, 30 T. JEFFERSON L. REV. 723, 727 (2008) (discussing that PARC and *Mills* were the first two federal district court cases to address the issue of educational inequality in segregated facilities for disabled children and both courts ruled in favor of providing students with disabilities access to public education).

<sup>20</sup> *Pa. Ass’n for Retarded Children v. Pennsylvania (PA Ass’n II)*, 343 F. Supp. 279, 283 (E.D. Pa. 1972). The exclusions of retarded children complained of are based upon four state statutes which permitted the State Board of Education to do the following: (1) disallow the education of a child who was deemed “uneducable and untrainable” by a school psychologist; (2) indefinitely postpone the admission to public school of any child who had not attained a “mental age” of five years; (3) exempt from compulsory attendance laws a child whom a psychologist finds unable to profit from a public education; and (4) use the definition of compulsory school age (eight to seventeen years) to postpone admissions of retarded children until age eight or to eliminate them from public schools at the age of seventeen. *Id.* at 282–84. The plaintiffs alleged that the Pennsylvania schools denied these students due process of law because the statutes did not provide for notice and a hearing before the students were placed in special education programs or they denied the students the right to education all together. *Id.* at 283. The plaintiff further alleged that the provisions violated the equal protection clause because the statutes assumed that certain students were uneducable and untrainable, which lacked a rational basis in fact. *Id.* Pennsylvania established a Stipulation and Consent Agreement in which the state agreed to provide due process to students with disabilities and access to a free public program of education and training appropriate to his learning capacities to all individuals between the ages of six and twenty-one. *Id.* at 302–03.

<sup>21</sup> *Pa. Ass’n I*, 334 F. Supp. at 1260 (providing the language of the initial consent decree). The amended consent decree provided the following:

Similarly, *Mills v. Board of Education* further expanded the right of students with disabilities to a public education.<sup>22</sup> In *Mills*, the United States District Court for the District of Columbia held that a school district's practice of expelling, reassigning, and transferring students labeled as learning disabled, emotionally disturbed, or mentally retarded, denied the students a free public appropriate education in violation of the due process clause.<sup>23</sup> Due process of law required a hearing before children were suspended or expelled from regular schooling in publicly supported schools or reassigned for specialized instruction.<sup>24</sup> In ordering the District of Columbia to provide the

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It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the general educational policy that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.

*Pa. Ass'n II*, 343 F. Supp. at 307.

<sup>22</sup> *Mills*, 348 F. Supp. at 875 (holding that the school district's failure to provide disabled students with a publicly supported specialized education violated the due process clause).

<sup>23</sup> *Id.* at 875-78. The court further noted that the defendant's conduct in denying the plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, violated the Due Process Clause. *Id.* at 875. In making this determination, the court looked to *Hobson v. Hansen*, where Judge Skelly Wright stated the following:

the Court has found the due process clause of the Fourteenth Amendment elastic enough to embrace not only the First and Fourteenth Amendments, but the self incrimination clause of the Fifth, the speedy trial, confrontation and assistance of counsel clauses of the Sixth, and the cruel and unusual clause of the Eighth. . . . From these considerations the court draws the conclusion that the doctrine of equal educational opportunity—the equal protection clause in its application to public school education—is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment.

269 F. Supp. 401, 493 (D.D.C. 1967).

<sup>24</sup> *Mills*, 348 F. Supp. at 875; see also *Williams v. Dade Cnty. Sch. Bd.*, 441 F.2d 299, 301 (5th Cir. 1971) (holding that a board of education's regulation that authorized the superintendent of schools to give a thirty-day suspension, in addition to the principal's ten-day suspension, without the benefit of a hearing was an invalid denial of due process); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) (holding that due process required notice and some opportunity for a hearing before a student could be expelled for misconduct); *Vought v. Van Buren Pub. Sch.*, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969) (holding that due process required that the student receive notice containing a statement of specific charges and grounds that would justify expulsion, a hearing affording an opportunity to hear both the student's and school district's side of the events, names of witnesses against the student, and an opportunity to present his own defense); Charlene K. Quade, *A Crystal Clear IDEA: The Court Confounds the Clarity of Rowley and Contorts*

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students with a publicly-supported education, the court rejected the school's claim that it lacked adequate funding to provide all the children with educational services.<sup>25</sup>

In sum, the courts in *PARC* and *Mills* established the principle that students with disabilities are entitled to a FAPE.<sup>26</sup> Despite these critical court decisions, it was not until 1975 that Congress mandated that all children with disabilities be afforded a FAPE.<sup>27</sup>

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*Congressional Intent*, 23 HAMLINE J. PUB. L. & POL'Y 37, 54 (2001) (explaining the IDEA's due process safeguard). The due process safeguards provide parents the opportunity to request an administrative hearing if they disagree with the school district regarding their child's rights under the IDEA. *Id.* If the disagreement is not resolved during the administrative process, parents may pursue legal action against the school board. *Id.* The IDEA empowers courts to review the record of all administrative proceedings, hear additional evidence, and grant relief based on a preponderance of the evidence standard. *Id.*

<sup>25</sup> *Mills*, 348 F. Supp. at 876. The court for the District of Columbia looked to the Supreme Court's decision in *Goldberg v. Kelly*, a case involving the right of a welfare recipient to a hearing before termination of his benefits, which held that constitutional rights must be afforded citizens despite the greater expense involved. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254 (1969)). The court found that the District of Columbia's interest in educating the excluded children clearly outweighed its financial interest. *Id.* The court further stated that if funds were not available to finance all of the services and programs required to educate the children, then the available funds must be spent so that no child was entirely excluded from receiving a publicly supported education consistent with his need and the ability to benefit from the provided services. *Id.*; see also MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE 71 (Vicki Been ed., 2d ed. 2009) (rejecting cost-based objections to providing services and noting that although education is not a constitutionally guaranteed fundamental right, states have made education compulsory up to a certain age or grade level and thus bear the responsibility of creating a mechanism for funding the education of its students from at least kindergarten to high school). *But see* Siobhan Gorman, *Why Special Education Could Spark a Veto*, 33 NAT'L J. 2482, 2482 (2001) (discussing efforts by members of Congress to pass legislation that would fully fund the IDEA); Katherine Kimball, *Insuring A Future: Mandating Medical Insurance Coverage of Autism Related Treatments in Nebraska*, 42 CREIGHTON L. REV. 689, 715-16 (2009) (discussing how the shortfall in the IDEA's funding has caused public schools across the United States to absorb \$381.8 billion dollars in special education costs that are left unfunded by the federal government).

<sup>26</sup> See Stacey Gordan, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 192 (2006) (claiming that *PARC* and *Mills* "provided the necessary legal authority to include children with disabilities into the public educational system"); see also *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 (1982) (stating that the U.S. Supreme Court, in its decision interpreting the EAHCA, noted that Congress was "spurred by two District Court decisions [*PARC* and *Mills*] holding that handicapped children should be given access to a public education"); Hughes & Rebell, *supra* note 16, at 535 (claiming that *PARC* and *Mills* led to the development of federal legislation aimed at providing a publicly funded education to children with disabilities).

<sup>27</sup> See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C §§ 1400-1482 (2006)) (requiring all public schools accepting federal funds to provide children with physical and mental disabilities equal access to an education).

B. *Federal Laws Protecting Students with Disabilities*

In 1975, Congress passed legislation to protect the rights of disabled children who had previously been excluded from the public school system and denied equal access to the educational opportunities available to non-disabled children.<sup>28</sup> This legislation, originally known as the Education for All Handicapped Children Act of 1975 ("EAHCA"), was amended in 1990 and renamed the Individuals with Disabilities Education Act ("IDEA").<sup>29</sup> Since its enactment, the IDEA has been reauthorized every seven years.<sup>30</sup> The most recent reauthorization in 2004 renamed the Act the Individuals with Disabilities Education Improvement Act ("IDEIA").<sup>31</sup>

The IDEA recognizes the following goals: (1) to provide all handicapped children with a FAPE that emphasizes special education and related services designed to meet their unique needs; (2) to protect the rights of handicapped children and ensure that the families of such children have a meaningful opportunity to participate in the education of their children; (3) to assist the states in providing for the education of all handicapped children; and (4) to assess and ensure the effectiveness of efforts to educate handicapped children.<sup>32</sup> Eligible children include those in need of special education due to mental retardation, hearing

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<sup>28</sup> 20 U.S.C. §§ 1400–1482 (2006); *see also* *Rowley*, 458 U.S. at 179 (stating that Congress enacted this legislation after finding that millions of disabled children were being denied an appropriate education and "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out'").

<sup>29</sup> Individuals with Disabilities Education Act, Pub. L. No. 104–476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–1482)).

<sup>30</sup> Shindel, *supra* note 18, at 1039–40 (discussing the subsequent reauthorizations to the IDEA); *see also* Andrea Valentino, Note, *The Individuals with Disabilities Education Improvement Act: Changing What Constitutes an "Appropriate" Education*, 20 J.L. & HEALTH 139, 141 (2007) (discussing the IDEA's reauthorizations). The IDEA reauthorizes next in 2011.

<sup>31</sup> 20 U.S.C. §§ 1400–1482 (amending the IDEA). Although the 2004 revision officially renamed the legislation the IDEIA, for the sake of internal consistency this Note will refer to it by its most common name, the IDEA. *See* Shindel, *supra* note 18, at 1039–40 (explaining the reauthorization process). Shindel states that reauthorization is required when Congress approves sections of a law for a fixed period of time. At the termination of the fixed period, Congress must affirmatively reapprove the select provisions, or the provisions will expire. . . . Even with regard to those portions of the IDEA that are permanently authorized, the reauthorization process gives Congress an opportunity to reconsider and revise the IDEA generally.

*Id.*

<sup>32</sup> 20 U.S.C. § 1400. According to Senator Harrison Williams, the IDEA's principal drafter, "[t]his measure fulfills the promise of the Constitution that . . . handicapped children no longer will be left out." 121 CONG. REC. 37,413 (1975) (statement of Sen. Williams).



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impairments, serious emotional disturbances, orthopedic impairments, autism, traumatic brain injury, other health impairment, or specific learning disabilities.<sup>33</sup>

In an effort to meet these goals and remedy years of discrimination against children with disabilities, the federal government provides grants to assist states in providing special education and services.<sup>34</sup> In order to qualify for federal funding, states must comply with the requirements of the IDEA and provide all disabled children between the ages of three and twenty-one an opportunity to receive a FAPE that includes an IEP favoring an education in the least restrictive environment ("LRE"), and integrates disabled children into the regular classroom.<sup>35</sup> The IEP and LRE are discussed in turn.<sup>36</sup>

The IDEA's individualized education programs require school districts to provide every disabled child with a written IEP that caters to the child's specific educational needs.<sup>37</sup> A student's IEP is formulated by

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<sup>33</sup> 20 U.S.C. § 1401(3)(a). Specifically, there are fourteen federal terms and definitions that guide how states define disability and who is eligible for a free appropriate public education under special education law: (1) autism; (2) deaf-blindness; (3) deafness; (4) developmental delay; (5) emotional disturbance; (6) hearing impairment; (7) mental retardation; (8) multiple disabilities; (9) orthopedic impairment; (10) other health impairments; (11) specific learning disabilities; (12) speech or language impairment; (13) traumatic brain injury; (14) visual impairment including blindness. See *Categories of Disability Under IDEA Law*, NAT'L DISSEMINATION CENTER FOR CHILD. WITH DISABILITIES, <http://nichcy.org/Disabilities/Categories/Pages/Default.aspx> (last visited Sept. 22, 2010) (defining the above-listed federal terms). Autism is a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. *Id.*

<sup>34</sup> 20 U.S.C. § 1412(a) (granting federal funding for the education of children with disabilities to states that comply with the IDEA's policies and procedures).

<sup>35</sup> *Id.* §§ 1412(a)(1), 1412(a)(4)–(5). Under the IDEA, a FAPE is available "to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." *Id.* §1412(a)(1)(A).

<sup>36</sup> See *infra* note 37 (discussing the IEP requirement); *infra* note 41 (discussing the LRE requirements).

<sup>37</sup> 20 U.S.C § 1414(d)(1)(A). An Individualized Education Plan includes the following:

(I) a statement of the child's present levels of academic achievement and functional performance . . .

....

(II) a statement of measurable annual goals, including academic and functional goals . . .

....

(III) a description of how the child's progress toward meeting the annual goals . . . will be measured . . .

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the

a team of individuals that typically include the child's parents, a general education teacher, a special education teacher, a district representative, an administrator, and a school psychologist or testing specialist.<sup>38</sup> These individuals must collaborate to address matters such as the child's present level of academic achievement, annual goals for the child, how progress toward those goals is to be measured, and the services to be provided to the child.<sup>39</sup> The IDEA also includes safeguards mandating that the child's parents participate in any meetings pertaining to their child's IEP and that they receive written notice of any proposed changes to the IEP.<sup>40</sup>

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child, and a statement of the program modifications or supports for school personnel that will be provided for the child . . .

....

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class . . .

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child . . .

....

(VII) the projected date for the beginning of the services and modification described . . .

*Id.* See generally Dixie Snow Huefner, *Judicial Review of the Special Education Program Requirements Under The Education for Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483 (1991) (asserting that courts should look to the goals of the child's IEP to evaluate whether the student's education is appropriate).

<sup>38</sup> 20 U.S.C. § 1414(d)(1)(B); see also *Honig v. Doe*, 484 U.S. 305, 311 (1988) (explaining the formulation of an IEP); *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 818 (9th Cir. 2007) (discussing the individuals involved in the creation of an IEP).

<sup>39</sup> 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(VIII) (defining the IEP requirements).

<sup>40</sup> *Id.* §§ 1415(b)(1), (3); see also Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 231 (2005) (explaining that the IDEA's safeguards allow parents to challenge a school district in an impartial hearing before a state administrative hearing officer when they believe their child's rights guaranteed under the IDEA have been violated). These safeguards include the right to examine all relevant records pertaining to the identification, evaluation, and educational placement of their child; prior written notice whenever the responsible educational agency proposes (or refuses) to change the child's placement or program; an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education; and an opportunity for an impartial due process hearing with respect to any such complaints. *Id.* at 231-32. See also Daniel Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 183 (2004) (discussing parental involvement in the IEP process); Phillip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 9 (2000) (discussing the significance of parental involvement in the IEP process and congressional intent behind the IDEA's procedural safeguards). "The [IEP] is the backbone of parental safeguards." *Id.* at 10. "[T]he purpose of an IEP meeting is to allow the entire IEP team to come to a collaborative decision, and unilateral decisions by a school district are not within the spirit of the IDEA." *Id.* at 12.

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Moreover, the IDEA guarantees children with disabilities a FAPE in the LRE.<sup>41</sup> This directive requires that disabled students be included in regular educational activities to the maximum extent appropriate.<sup>42</sup> Removal of a handicapped child from the regular classroom is only permissible “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>43</sup>

In sum, the IEP and LRE requirements provide guidance as to the meaning of the IDEA’s FAPE requirement.<sup>44</sup> Congress, however, has never specifically clarified the definition of a FAPE in the IDEA’s subsequent reauthorizations, thus leaving courts with the difficult task of interpreting FAPE.<sup>45</sup> The failure of Congress to clarify the definition of

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<sup>41</sup> 20 U.S.C. § 1412(a)(5)(A). The least restrictive environment (“LRE”) requires: To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

*Id.*; see *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (stating that the IDEA was Congress’s response to children who “were either totally excluded from schools or [were] sitting idly in regular classrooms”) (alteration in original). The maximization of potential standard adopted by the lower courts was further than Congress intended to go. *Id.* at 192. Therefore, the Court held that “the Act impose[d] no clear obligation upon recipient States beyond the requirement [of providing] some form of specialized education.” *Id.* at 195; see also Allan G. Osborne, Jr., *The IDEA’s Least Restrictive Environment Mandate*, 88 EDUC. L. REP. 541, 542 (1994) (discussing the LRE and mainstreaming requirements of the IDEA). The concept of mainstreaming was significantly enhanced by the United States Supreme Court’s 1954 decision in *Brown v. Board of Education*, which held that racial segregation was unconstitutional. *Id.* at 550. Mainstreaming involves the placing of disabled children in regular educational environments with nondisabled children for at least some of their services. *Id.* at 542. The IDEA does not require mainstreaming in all cases but it does require “that each student be educated in an environment that is the least restrictive possible and that removal from general education occurs only when absolutely necessary.” *Id.* Mainstreaming proponents argue that segregated facilities for children with disabilities were unequal and provided inadequate educational resources. *Id.*; see also Note, *Enforcing the Right to an Appropriate Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1120 (1979) (noting that a special education program must be provided in the least restrictive environment to be appropriate).

<sup>42</sup> See 20 U.S.C. § 1412(a)(5)(A) (defining the LRE requirement).

<sup>43</sup> See *id.* (explaining the circumstances under which removal of a child from the classroom is acceptable).

<sup>44</sup> See Rosenblum, *supra* note 15, at 2739 (discussing the IDEA requirements).

<sup>45</sup> See Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After Rowley?*, 39 SUFFOLK U. L. REV. 1, 7 (2005) (providing a detailed breakdown of the circuit courts interpretations of FAPE). Specifically, the Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits employ the “meaningful benefit” test. *Id.*

FAPE is particularly troublesome when determining whether a school district's failure to implement a provision of the student's IEP violates the child's right to a FAPE.<sup>46</sup>

C. *The Supreme Court's Interpretation of FAPE*

While Congress may not have directly stipulated what constitutes an adequate FAPE for students with disabilities, the Supreme Court provided some insight in *Board of Education v. Rowley*.<sup>47</sup> In *Rowley*, the parents of a deaf student unsuccessfully challenged a school district's refusal to provide a sign language interpreter for their daughter in a regular education classroom.<sup>48</sup> Following the grant of certiorari, Justice Rehnquist identified the ultimate problem as the failure of the statute's language to include a substantive standard prescribing the level of education to be provided to children with disabilities.<sup>49</sup>

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The First, Eighth, Tenth, Eleventh, and D.C. Circuits, conversely, apply the "adequate benefit" or "some benefit" test. *Id.* The Seventh Circuit uses a combination of the two tests. *Id.*

<sup>46</sup> See *id.* at 7 (discussing how the courts have interpreted the FAPE requirement); see also, e.g., *Burke Co. Bd. of Educ. v. Denton ex rel. Denton*, 895 F.2d 973, 983 (4th Cir. 1990) (stating that North Carolina's policy was "to ensure every child a fair and full opportunity to reach his full potential"); *Stock v. Mass. Hosp. Sch.*, 467 N.E.2d 448, 453 (Mass. 1984) (noting that Massachusetts' education law requires that special education programs be administered "to assure the maximum possible development of a child with special needs").

<sup>47</sup> 458 U.S. 176, 203 (1982) (holding that the state must comply with the IDEA's procedures and that the IEP developed must be reasonably calculated to enable the child to receive an educational benefit); see also David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=david\\_ferster](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=david_ferster) (explaining the *Rowley* decision).

<sup>48</sup> *Rowley*, 458 U.S. at 184. The student's IEP stated that she would be educated in a general education classroom; however, her parents requested that she also be provided with a qualified sign language interpreter in all of her academic classes in order to benefit more from the general education instruction. *Id.* The school district complied with the parents' request, but after a two week experimental period with an interpreter, the school district decided that the student did not need these services. *Id.* In rejecting the parents' challenge, the Supreme Court concluded that the statute did not aim to maximize the potential of each handicapped child, but rather merely to provide them with access to a free public education. *Id.*

<sup>49</sup> *Id.* at 177. District court Judge Broderick, after noting that the Act did not substantively define what type of education was "appropriate," discussed the possible interpretations of the language. *Rowley v. Bd. of Educ.*, 483 F. Supp. 483, 528, 533 (S.D.N.Y. 1980). He stated:

An "appropriate education" could mean an "adequate" education—that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full

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In an effort to explain the rights of students under the IDEA, the Court set forth a two-part inquiry for determining whether a school district satisfied the FAPE requirement.<sup>50</sup> First, the state must comply with the procedures set forth in the IDEA.<sup>51</sup> Second, the IEP must be reasonably calculated to confer some educational benefit upon the handicapped child.<sup>52</sup> Despite the Supreme Court's effort to clarify the definition of an "appropriate education," the lower courts continue to differ in their interpretations regarding what constitutes an appropriate education, thus making it difficult to evaluate alleged implementation failures.<sup>53</sup>

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potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.

*Id.* at 534. The decision written by Justice Rehnquist rejected the lower courts' interpretation of the IDEA and reversed the Second Circuit. *Rowley*, 458 U.S. at 176-77; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding there is no fundamental constitutional requirement to more than a minimally adequate education). *But see Rowley*, 458 U.S. at 215 (White, J. dissenting) ("The [Act's] basic floor of opportunity is . . . intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible.").

<sup>50</sup> *Rowley*, 458 U.S. at 206.

<sup>51</sup> *Id.* These procedures enable parents of a disabled child to examine school records, participate in meetings, and present complaints. *Id.* at 183. Parents must also be given notice of any proposals to change the educational placement of their child, and they are entitled to an independent educational evaluation. *Id.* at 182. They can initiate an impartial due process hearing for failure to comply with the Act and bring a subsequent civil action challenging an adverse determination at the hearing. *Id.* at 183.

<sup>52</sup> *Id.* at 207. The achievement of passing marks and advancement from grade to grade will be examined to determine whether a handicapped student has received an educational benefit while being educated in a general education classroom of a public school system. *Id.*

<sup>53</sup> See *Falzett v. Pocono Mountain Sch. Dist.*, 152 F. App'x. 117, 120 (3d Cir. 2005) (holding that "substantial evidence exist[ed] in the record to support the finding that [the school] provided [the student] with meaningful educational benefit despite some failures"); *Gillette v. Fairland Bd. of Educ.*, 932 F.2d 551, 554 (6th Cir. 1991) (holding that the school provided the student with a FAPE even though portions of the IEP were not followed because the student was able to achieve satisfactory grades and to advance grade levels); *Wanham v. Everett Pub. Sch.*, 550 F. Supp. 2d 152, 160 (D. Mass. 2008) (holding that the independent hearing officer did not err in requiring the student to show harm where services listed in the IEP were not delivered); *Marc V. v. North East Indep. Sch. Dist.*, 455 F. Supp. 2d 577, 594-95 (W.D. Tx. 2006) (holding that the school district implemented the student's IEP by providing a trained, qualified, and certified teacher aide); *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F. Supp. 2d 991, 996 (S.D. Tx. 2005) (holding that the district did not violate FAPE despite the student's regression in toilet training because the district did provide the student with some benefit); *Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 888-89 (D. Minn. 2003) (holding that a provision providing a specific personal care

D. *Standards Used to Evaluate a School District's Failure to Implement a Student's IEP*

The IDEA and the Supreme Court's failure to adequately define what constitutes an appropriate education led the circuit courts to develop various standards for evaluating alleged IEP implementation failures.<sup>54</sup> The circuits have developed three standards: the *Bobby R.* significant provision standard, the *Melissa S.* standard examining the reasons for the school district's failure to implement the student's IEP, and the *Van Duyn* materiality standard.<sup>55</sup> These standards are discussed in turn.<sup>56</sup>

1. *The Bobby R. Standard: Only Failures to Implement Substantial or Significant Provisions of an IEP Violate the IDEA*

In 2000, the Fifth Circuit Court of Appeals decided *Houston Independent School District v. Bobby R.*<sup>57</sup> In *Bobby R.*, the parents of a learning-disabled student brought suit against the school district for allegedly depriving their child of a FAPE as required by the IDEA.<sup>58</sup> The parents claimed that the school district failed to provide their son with the following services enumerated in his IEP: speech therapy, an alphabetic phonics program, highlighted texts, modified tests, and taped lectures.<sup>59</sup> The court applied the *Rowley* two-fold inquiry to determine whether the school district satisfied the FAPE requirement of the IDEA but quickly dispensed with the first prong because the parents did not assert that the school district failed to comply with the procedures

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attendant was not significant because the other attendants were available to render services of similar quality).

<sup>54</sup> See *infra* Part II.D (discussing the *Bobby R.*, *Melissa S.*, and *Van Duyn* standards).

<sup>55</sup> See *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007) (holding that only material failures to implement IEPs violate the IDEA); *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006) (holding that the school's reasons for failing to provide the educational aide as required by the student's IEP should be examined); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (holding that de minimis failures to implement an IEP do not amount to a violation of the IDEA, but rather the statute is violated only by failures to implement substantial or significant IEP provisions).

<sup>56</sup> See *infra* Part II.D (discussing the *Bobby R.*, *Melissa S.*, and *Van Duyn* standards).

<sup>57</sup> *Bobby R.*, 200 F.3d at 341.

<sup>58</sup> *Id.* at 343.

<sup>59</sup> *Id.* at 344. The IEP plan for the child included seven modifications to his educational program: modified tests, taped texts, highlighted texts, extended time for assignments, shortened assignments, calculator use, and taped assignments. *Id.* The parents alleged that the school district did not provide their son with speech therapy and certain accommodations under the IEP—alphabetic phonics program, highlighted texts, modified tests, and taped lectures. *Id.*

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prescribed by the IDEA.<sup>60</sup> The court then moved to the substantive prong of the *Rowley* inquiry – whether the student’s IEP was reasonably calculated to enable him to receive an educational benefit.<sup>61</sup>

The court determined that the school district’s failure to implement the student’s IEP did not deprive the student of the right to a FAPE because the significant provisions of the student’s IEP were followed and, as a result, the student received an educational benefit.<sup>62</sup> The court, however, did not provide an analysis as to why the provisions of the

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<sup>60</sup> See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (establishing a two-part test to determine whether a violation of the IDEA occurred). First, a court must determine whether the state complied with the procedures set forth in the IDEA. *Id.* Second, a court must determine if the IEP was reasonably calculated to enable the child to receive educational benefits. *Id.* at 206–07. The *Bobby R.* court noted that the issues related to any procedural complaints were withdrawn prior to the beginning of the hearing. *Bobby R.*, 200 F.3d at 347. The evidence also showed that the student’s parents were active participants in the Admissions, Review, and Dismissal (“ARD”) meeting and that the ARD Committee often accepted recommendations and requests in both programming and placements decisions. *Id.* The IEP at issue was a result of the collaborative efforts between the parents and the school; therefore, the district complied with the procedural requirements of the IDEA. *Id.*

<sup>61</sup> *Bobby R.*, 200 F.3d at 347. In determining whether the IEP was reasonably calculated to provide the student with a meaningful educational benefit, the *Bobby R.* court looked to its earlier decision in *Cypress-Fairbanks* where it had previously summarized the standard under *Rowley*. An IEP

need not be the best possible one, nor one that will maximize the child’s educational potential; rather, it need only be an education that is specifically designed to meet the child’s unique needs, supported by services that will permit him “to benefit” from the instruction. In other words, the IDEA guarantees only a “basic floor of opportunity” for every disabled child, consisting of “specialized instruction and related services which are individually designed to provide educational benefit.” Nevertheless, the educational benefit to which an IEP must be geared cannot be mere modicum or de minimis; rather, an IEP must be “likely to produce progress, not regression or trivial educational advancement.” In short, the educational benefit that an IEP is designed to achieve must be “meaningful.”

*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247–48 (5th Cir. 1997) (internal citations omitted). The *Cypress-Fairbanks* court then set forth four factors that serve as an indication of whether the IEP is reasonably calculated to provide a meaningful benefit: “1) [whether] the program is individualized on the basis of the student’s assessment and performance; 2) [whether] the program is administered in the least restrictive environment; 3) [whether] the services are provided in a coordinated and collaborative manner by the key ‘stakeholders’; and 4) [whether] positive academic and non-academic benefits are demonstrated.” *Id.* at 253.

<sup>62</sup> *Bobby R.*, 200 F.3d at 349–50. See generally Michael Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1477 (1986) (discussing the “educational benefit” standard referenced in *Bobby R.*).

student's IEP were insignificant.<sup>63</sup> Nevertheless, the court created a new standard for evaluating a school district's failure to implement a student's IEP: a party challenging the implementation of an IEP must demonstrate that the school board failed to implement substantial or significant provisions of the IEP to prevail under the IDEA.<sup>64</sup> The court explained that this approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child with a meaningful educational benefit.<sup>65</sup>

Following the Fifth Circuit's lead, the Eighth Circuit Court of Appeals took a similar position in *Neosho R-V School District v. Clark*.<sup>66</sup> In *Clark*, the school district sought judicial review of an administrative panel's determination that it had failed to provide an autistic student with a FAPE by not developing and implementing an IEP that properly included a cohesive behavior management plan.<sup>67</sup> The court ruled that

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<sup>63</sup> *Bobby R.*, 200 F.3d at 349. The *Bobby R.* court attempted to define "significant" in a footnote. *Id.* The court stated that "determination[s] of what are 'significant' provisions of an IEP cannot be made from an exclusively *ex ante* perspective. Thus, one factor to consider under an *ex post* analysis would be whether the IEP services were provided actually conferred an educational benefit." *Id.* The district courts have attempted to analyze the term "significant" from *Bobby R.*, but have arrived at different interpretations. David King, Van Duyn v. Baker School District: *A Material Improvement in Evaluating a School District's Failure to Implement Individualized Education Programs*, 4 NW. J. SOC. & POL'Y 457 (2009) (explaining that the district courts have interpreted the *Bobby R.* standard differently); see also, e.g., J.P. *ex rel.* Peterson v. Cnty. Sch. Bd. of Hanover Cnty., 447 F. Supp. 2d 553 (E.D. Va. 2006) (finding that the term "significant" does not refer to the type of failure, but rather to the importance of the provision to the student's IEP, and whether the provision was necessary for the student to receive an educational benefit), *rev'd on other grounds*, 516 F.3d 254 (4th Cir. 2008). But see *Leighty v. Laurel Sch. Dist.*, 457 F. Supp. 2d 546 (W.D. Pa. 2006) (interpreting the *Bobby R.* standard to require analysis as to whether the student received an educational benefit instead of whether the specific provision was "significant").

<sup>64</sup> *Bobby R.*, 200 F.3d at 349; see also King, *supra* note 63, at 457 (arguing that it is not apparent from the opinion whether the court considered "substantial" to mean "many" provisions or whether the court considered "substantial" to be synonymous with "significant").

<sup>65</sup> *Bobby R.*, 200 F.3d at 349. In addition, the IDEA provides that the child shall remain in the current educational placement during the pendency of any proceedings conducted. *Id.* at 350. Moreover, parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. 20 U.S.C. § 1415(e)(3)(A) (2006).

<sup>66</sup> 315 F.3d 1022, 1027 (8th Cir. 2002).

<sup>67</sup> *Id.* at 1022. Robert Clark suffered from Autism-Asperger's Syndrome, which made him prone to inappropriate behavior when unmanaged and prevented him from interacting with his peers in an acceptable manner. *Id.* at 1024. His IEP placed him in a self-contained classroom except for music class, established an IEP team to meet every two weeks to consider the possibility of additional mainstreaming, and called for a full-time paraprofessional to accompany him in all classes. *Id.* at 1025. More importantly, the IEP



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the IDEA was violated when a school district failed to implement an essential element of an IEP that was necessary for the child to receive an educational benefit.<sup>68</sup> In doing so, the Eighth Circuit Court of Appeals stated that the analysis set forth in *Bobby R.* was more accurately suited to the posture of the case, but confined its analysis to the framework of *Rowley* because the parties did not make this argument.<sup>69</sup>

Therefore, the court held that the school district failed to provide the student with an educational benefit by not developing and implementing an appropriate behavior management plan as required by his IEP.<sup>70</sup> However, just like the *Bobby R.* court, the *Clark* court also did not explain why the IEP provision in question was essential to the student's IEP, thus failing to provide an accurate method by which to measure implementation failures.<sup>71</sup> The Third Circuit's *Melissa S.* standard is discussed next.<sup>72</sup>

## 2. The *Melissa S.* Standard: Examining the School District's Reasons for Failing to Implement the Student's IEP

In *Melissa S. v. School District of Pittsburgh*, the parents of a student with Down's Syndrome brought suit alleging that the school violated the

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stated that a behavior plan was attached, but the attachments were merely short-term goals and objectives that did not provide specific interventions and strategies to manage Robert's behavior problems. *Id.* at 1025. There was no contention that the school district failed to follow the procedures set forth in the IDEA, rather the dispute involved whether the IEPs were reasonably calculated to enable Robert to receive an educational benefit. *Id.* at 1027. The court's independent review demonstrated that the IEPs did not appropriately address Robert's behavior problem. *Id.* at 1028. Therefore, the fact that no cohesive plan was in place to meet Robert's behavioral needs supported the court's conclusion that he was not able to obtain a benefit from his education. *Id.* at 1029.

<sup>68</sup> *Id.* at 1027. The court later noted that the requirements of the IDEA are satisfied when a school district provides a disabled student with an individualized education that includes services that allow the student to obtain an educational benefit. *Blackburn v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982)).

<sup>69</sup> See *Bobby R.*, 200 F.3d at 349 (holding that a party challenging the implementation of an IEP must demonstrate that the school authorities failed to implement a substantial or significant provision of the IEP). The court in *Bobby R.* further noted that this standard affords schools some flexibility in implementing the IEPs, but still holds them accountable for material failures and for providing a meaningful educational benefit. *Id.*

<sup>70</sup> *Clark*, 315 F.3d at 1030.

<sup>71</sup> See *King*, *supra* note 63, at 465 n.76 (stating that the student's autism in *Clark* was a possible explanation as to why the court found that the school district's failure to implement the behavior plan deprived him of the opportunity to obtain an educational benefit). The court found that the behavior plan may have been instrumental in the student's educational development. *Id.*

<sup>72</sup> See *infra* Part II.D.2 (discussing the *Melissa S.* standard that examines a school district's reasons for failing to implement IEPs).

student's right to a FAPE by failing to provide the student with an educational aide every day.<sup>73</sup> The court acknowledged that to prevail on a claim that a school district failed to implement an IEP, a plaintiff must show that the school district failed to implement substantial or significant provisions of the IEP, as opposed to a mere de minimis failure, such that the disabled child was denied a meaningful educational benefit.<sup>74</sup> The court deviated from the *Bobby R.* standard by focusing not on the significance of the provision to the student's IEP but rather on the school's reasons for failing to comply with the provisions of the IEP.<sup>75</sup>

The court held that the school district did not violate the IDEA because it was not deliberately indifferent to the student.<sup>76</sup> For example, although the school did not provide the student with an educational aide every day, it either assigned a substitute teacher in the interim or notified the mother to keep the student home for the day.<sup>77</sup> Thus, the Third Circuit appears to have adopted a good faith exception to

<sup>73</sup> 183 F. App'x 184, 186 (3d Cir. 2006). Although the court primarily focused on the school's failure to provide an educational aide, the parents also alleged that the school failed to provide daily homework assignments and implement a behavioral plan. *Id.* at 187.

<sup>74</sup> *Id.* (citing *Bobby R.*, 200 F.3d at 349); see also *T.R. ex rel. N.R. v. Kingwood Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (holding that a school district is accountable for conferring some educational benefit upon the handicapped child under the IDEA). See generally *Bobby R.*, 200 F.3d at 349 (discussing the de minimis standard). The more than de minimis standard comes from the language of *Bobby R.* in which the Fifth Circuit stated that "a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP." *Id.* *Black's Law Dictionary* defines de minimis as something that is "[t]rifling," "minimal," or "so insignificant that a court may overlook it in deciding an issue or case." BLACK'S LAW DICTIONARY 496 (9th ed. 2009).

<sup>75</sup> *Melissa S.*, 183 F. App'x at 187. The court found that the school district did not violate the IDEA by failing to implement a behavioral plan for the student because upon observing the student's outbursts early in the school year, the school district almost immediately began assessing her behavior. *Id.* Furthermore, when it became apparent that the student's behavioral issues went beyond mere problems adjusting to a new school, the school district hired a specialist to examine her behavior, determine its causes, and determine how they could make some adjustments through behavioral shaping. *Id.* at 188-89.

<sup>76</sup> *Id.* at 189; see also *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (holding that only state conduct that is arbitrary, or conscience shocking in a constitutional sense rises to the level of a violation); *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 172 (3d Cir. 2001) (explaining that the substantive component of the Due Process Clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them); *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999) (stating that the exact degree of culpability necessary for governmental action to be considered conscience shocking varies from case to case).

<sup>77</sup> *Melissa S.*, 183 F. App'x at 187. The student was not provided with an aide every day due to the fact that the aide that was assigned to assist her left the position early in the school year. *Id.* A full-time replacement was hired eleven or twelve days later, and a substitute teacher was hired during that gap to act as Melissa's aide. *Id.* Therefore, the court found that because the student was never left alone, the school district met its obligations to provide a full-time aide. *Id.*

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implementation failures when it found that the school district's reasons for failing to comply with the student's IEP were reasonable under the circumstances.<sup>78</sup>

In sharp contrast, the court in *Manalansan v. Board of Education of Baltimore City* directly rejected the use of a good faith exception for IEP implementation.<sup>79</sup> In *Manalansan*, the court noted that the good faith exception reflects the belief that an educator who tries his or her best to help the child should not be penalized if all of the objectives were not reached.<sup>80</sup> Moreover, under state and federal law, the local educational agency had an obligation to implement a student's IEP; thus, failure to provide the related services and supplementary services listed in the IEP deprived the disabled child of a FAPE.<sup>81</sup> Furthermore, the court stated

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<sup>78</sup> King, *supra* note 63, at 468 n.97 (stating that the *Melissa S.* court did not explicitly state that there was a good faith exception, but did so implicitly in its application); *see also* *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) (finding that a school district's failure to follow the IEP requirements to the letter was "excusable under the circumstances" – such circumstances included the speech therapist missing a few sessions, cutting other sessions short because the student's fatigue made the therapy unproductive, and missing sessions altogether due to snow day, school holidays, and the student's absences).

<sup>79</sup> No. Civ. AMD 01-312, 2001 WL 939699, at \*13 (D. Md. Aug. 14, 2001). In *Manalansan*, the mother of a child with cerebral palsy, hydrocephalus, and a seizure disorder alleged that the school district failed to implement his IEP. *Id.* at \*1, \*4. The investigation determined that the student did not receive the speech therapy services he was due; however, it could not be determined if he was provided the services of an aide in accordance with his IEP. *Id.* at \*9.

<sup>80</sup> *Id.* at \*13.

<sup>81</sup> *See* 20 U.S.C. § 1414(d)(1)(A) (2006) (stating an educational agency's responsibilities under the IDEA). The IDEA mandates that IEPs include "a statement of the special education and related services and supplementary aids and services . . . to be provided to the child." *Id.* § 1414(d)(1)(A)(i)(IV); *see also* Haekyoung Suh, *The Need for Consistency in Interpreting the Related Services Provision Under the Individuals with Disabilities Education Act*, 48 RUTGERS L. REV. 1321, 1323 (1996) (discussing the related services requirement of the IDEA). The IDEA defines related services as

transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic or evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

*Id.* at 1323–24; *see also, e.g.,* *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891–95 (1984) (narrowing the definition of related services that must be provided to children with disabilities under the IDEA). In *Tatro*, the Supreme Court stated that for a court to determine whether the services constitute a "supportive service," which is required to assist a handicapped child to benefit from special education and if a service is supportive, a court must ascertain whether it is excluded from coverage because it is a "medical service"

that while the school may have discretion in determining the mode of implementation of the IEP, it was nonetheless bound by the mandate that those services be provided and "best efforts" to provide those services fall short of this requirement.<sup>82</sup>

Currently, the Fifth and Eighth Circuits hold that to prevail on a claim under the IDEA a party must demonstrate that the school board or other authorities failed to implement a substantial or significant provision of the student's IEP.<sup>83</sup> Conversely, the Third Circuit deviates from this standard by focusing on the school district's good faith.<sup>84</sup> The standard adopted by the Ninth Circuit is discussed next.<sup>85</sup>

### 3. The *Van Duyn* Standard: Only Material Failures to Implement an IEP Violate the IDEA

In *Van Duyn v. Baker School District*, the Ninth Circuit became the latest circuit to apply a different standard for evaluating a school district's failure to implement a student's IEP.<sup>86</sup> In *Van Duyn*, the parents of a severely autistic child alleged that the school district had failed to implement certain services described in their son's IEP and that this failure constituted a deprivation of a FAPE.<sup>87</sup> Specifically, the parents

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that serves purposes other than diagnosis or evaluation. *Id.* at 889-90. The Court further stated that if the services are provided by a licensed physician and are not for diagnosis or evaluation, the services are excludable. *Id.* at 892.

<sup>82</sup> *Manalansan*, 2001 WL 939699, at \*13.

<sup>83</sup> See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2002) (holding that a school district violates the IDEA when it fails to implement an essential element of an IEP); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (holding that only failures to implement significant provisions of an IEP violate the IDEA).

<sup>84</sup> See *Melissa S. v. Sch. District of Pittsburgh*, 183 F. App'x 184, 188-89 (3d Cir. 2006) (holding that the school district's reasons for failing to implement an IEP should be examined).

<sup>85</sup> See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007) (holding that only material failures to implement an IEP constitute a deprivation of a FAPE and thus a violation of the IDEA).

<sup>86</sup> *Id.* This case arose as a result of the student's transition from elementary to middle school. *Id.* at 814; see also Elexis Reed, *The Individuals with Disabilities Act – The Ninth Circuit Determines That Only a Material Failure to Implement an Individualized Education Program Violates The Individuals with Disabilities Education Act*, 61 SMU L. REV. 495 (2008) (discussing the *Van Duyn* court's approach to evaluating IEP implementation failures).

<sup>87</sup> *Van Duyn*, 502 F.3d at 815. The child's IEP called for him to work on language arts, reading, and writing for six to seven hours per week, math computation/math computer drills for eight to ten hours per week, and adaptive P.E. gymnastics and swimming for three to four hours per week. *Id.* *Van Duyn's* IEP also included a behavior management plan that was to be implemented full-time. *Id.* at 816. The IEP additionally called for material to be presented at the child's level and for him to be placed in a self-contained special education classroom. *Id.* Finally, other provisions required the regional autism specialist to visit the school twice per week, augmentative communication services to be

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argued that the school district failed to train his teachers and aides, that he was not placed in a self-contained classroom, that he did not receive one-on-one instruction, that the district did not implement a behavioral plan, and that the school district failed to provide daily instruction in oral language, reading, and math skills.<sup>88</sup> After a due process hearing pursuant to 20 U.S.C. § 1415(f), the administrative law judge (“ALJ”) found that the school district failed to implement the IEP with regard to the child’s math goals because he was not given the requisite hours of weekly math instruction indicated in his IEP.<sup>89</sup> Nevertheless, the ALJ ruled in favor of the school district in every other contested area.<sup>90</sup>

On appeal to the Ninth Circuit, the majority first turned to *Rowley*’s interpretation of what constitutes a FAPE under the IDEA.<sup>91</sup> Although the *Rowley* Court was faced with a challenge to an IEP’s content, the Ninth Circuit extended *Rowley* to the IEP implementation context.<sup>92</sup> In particular, the *Rowley* Court found that procedural flaws in an IEP’s formulation did not automatically violate the IDEA, but rather did so only when the resulting IEP was not reasonably calculated to enable the child to receive educational benefits.<sup>93</sup> Therefore, the Ninth Circuit reasoned that minor failures in following the IDEA’s procedural requirements were not automatically treated as violations of the statute.<sup>94</sup>

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provided for two hours per month, Van Duyn’s aide to receive state autism training, and quarterly reports to measure his progress. *Id.*

<sup>88</sup> *Id.* at 816–17.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 816. For example, the ALJ found that Van Duyn’s aide and teachers were properly trained and worked with him on oral language skills. *Id.* at 817. Additionally, Van Duyn was properly placed in a self-contained classroom, received daily instruction in reading, and was sent home each day with a note. *Id.* Although the school district had initially failed to implement these portions of the IEP, the LJ found that these portions were now being followed. *Id.* The Van Duyns appealed the ALJ’s decision to the district court. *Id.* The district court concluded that there had been no failure to implement a substantial provision of the IEP because the school district complied with the ALJ’s order that additional math instruction be provided to the student. *Id.* The parents appealed to the Ninth Circuit. *Id.*

<sup>91</sup> See 20 U.S.C. § 1400 (2006). Procedural flaws in formulation of an IEP do not automatically violate the IDEA; they do so only when the resulting IEP is not reasonably calculated to enable a child to receive an educational benefit. *Id.*; see also *id.* § 1401(9) (defining a free appropriate education as “specialized education and related services that . . . are provided in conformity with the [child’s] individualized education program”).

<sup>92</sup> *Van Duyn*, 502 F.3d at 821.

<sup>93</sup> *Id.* (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)).

<sup>94</sup> *Id.* The court further stated that the Supreme Court’s description of the IDEA’s purpose as providing a “basic floor of opportunity” to disabled students rather than a “potential-maximizing education” also supports granting some flexibility to the school districts. *Id.* (quoting *Rowley*, 458 U.S. at 200).

The Ninth Circuit then turned to the Fifth and Eighth Circuits that had explicitly addressed IEP implementation failures for further support of its reading of the statutory text of the IDEA and *Rowley*.<sup>95</sup> The court concluded that only a material failure to implement an IEP violated the IDEA.<sup>96</sup> According to the majority, a material failure occurred when there was more than a minor discrepancy between the services required by the student's IEP; it did not require that a child suffer demonstrable educational harm in order to prevail.<sup>97</sup> In applying the materiality standard to the parents' claims, the court held that the services provided by the school district were not materially different from what was required by the IEP and that only the school district's failure to provide the requisite math instruction constituted a deprivation of a FAPE under the IDEA.<sup>98</sup>

In his dissenting opinion, Judge Ferguson criticized the majority's materiality standard as being inconsistent with the text of the IDEA, inappropriate for the judiciary, and unworkably vague.<sup>99</sup> First, Judge Ferguson argued that the school district failed to comply with an IEP to which it had expressly assented, violating the language in the IDEA that leaves no room for the courts to make a materiality determination.<sup>100</sup> It

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<sup>95</sup> *Id.* at 821-22.

<sup>96</sup> *Id.* at 822.

<sup>97</sup> *Id.* Due to the parties' debate over whether the child's skills and behavior improved or deteriorated during the school year, the court felt it was essential to clarify that its materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. *Id.*

<sup>98</sup> *Id.* at 826.

<sup>99</sup> *Id.* (Ferguson, J., dissenting). Judge Ferguson stated that given the extensive process and expertise involved in the crafting an IEP, the failure to implement any portion of the IEP to which the school has agreed is necessarily material. *Id.*; see also Samuel R. Bagenstos, *The Judiciary's Now-Limited Role in Special Education*, in FROM SCHOOLHOUSE TO COURTHOUSE 121, 122 (Joshua M. Dunn & Martin R. West, eds., 2009) (discussing the judiciary's role in special education litigation).

There are two possible ways the courts might affect education when they implement the IDEA. They might do so directly, by ordering schools to take or refrain from certain actions as a remedy for a proven violation of the statute. Or they might do so indirectly, as their legal rulings cast a shadow over the actions of educators, students, and parents.

In view of the limited number of cases brought under the IDEA, the courts have likely had a far greater indirect effect than a direct one on school practices.

*Id.* at 122.

<sup>100</sup> *Van Duyn*, 502 F.3d at 827 (Ferguson, J., dissenting); see also 20 U.S.C. § 1401(9)(D) (2006) ("The term 'free appropriate public education' means special education and related services that . . . are provided in conformity with the individualized education program."); 34 C.F.R. § 300.323(c)(2) (2010) ("Each public agency must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP.");

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would be inappropriate for the judiciary to determine what parts of an agreed-upon IEP were not material.<sup>101</sup> He reasoned that IEP teams, consisting of experts, teachers, parents, and the student, were in the best position to determine the needs of a special education student.<sup>102</sup> Finally, he argued that the majority standard was too vague because it provided little guidance as to what constituted a minor discrepancy.<sup>103</sup> Therefore, Judge Ferguson determined that the materiality standard was an inappropriate method by which to evaluate implementation failures.<sup>104</sup>

In summary, the view shared by both the Fifth and the Eighth Circuits contradicts the view of the Third Circuit and the Ninth Circuit concerning whether a school district's failure to implement a provision of the student's IEP violates the student's rights under the IDEA.<sup>105</sup> The circuits have developed different interpretations of what constitutes a FAPE, which has led to divergent standards among the courts for evaluating IEP failures.<sup>106</sup>

## III. ANALYSIS

While the IDEA has generated considerable litigation regarding what constitutes a FAPE, it is undisputed that the IEP is the centerpiece

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M.L. v. Fed. Way Sch. Dist. 394 F.3d 634, 642 (9th Cir. 2005) (quoting the statutory definition of FAPE).

<sup>101</sup> *Van Duyn*, 502 F.3d at 827 (Ferguson, J., dissenting). Judicial review of the content of an IEP would be appropriate when the student or the student's parents challenge the sufficiency of the IEP. *Id.* (citing *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d at 642).

<sup>102</sup> *Id.* Judge Ferguson further stated that if after implementing the IEP, the school district believes that portions of the program are not essential to providing FAPE, it is free to amend the IEP through the required channels, including a reconvening of the IEP team. *Id.* at 828. Allowing the school district to disregard already agreed-upon portions of the IEP would essentially give the school district a license to unilaterally redefine the content of the student's plan by default. *Id.* Moreover, such unilateral action by the school district ignores the parental participation provision of the IDEA. *See* 20 U.S.C. § 1414(d)(3)(A)(ii) (2006) (requiring that IEP teams consider the parents' concerns in the progress of their child's education).

<sup>103</sup> *Van Duyn*, 502 F.3d at 828 (Ferguson, J., dissenting). Specifically, he stated that most IEPs contain quantitative requirements for special education services, thus the majority's standard will provide little guidance in resolving implementation issues. *Id.*

<sup>104</sup> *Id.* at 829. In his dissenting opinion, Judge Ferguson adopted a *per se* approach to implementation failures by suggesting that the school district's failure to fully implement the IEP violated the IDEA. *See id.* at 828; *see also* Reed, *supra* note 86, at 499 (arguing that the *Van Duyn* court established the incorrect standard for assessing IEP implementation failures and that it further diminishes the educational rights of disabled children).

<sup>105</sup> *See supra* Part II.D (discussing the conflicting standards used by the Third, Fifth, Eighth, and Ninth Circuits).

<sup>106</sup> *See supra* Part II.D (discussing the different outcomes of the standards the Third, Fifth, Eighth, and Ninth Circuits have applied when evaluating IEP failures).

of the IDEA.<sup>107</sup> As a result, IEPs are imperative to the education of children with disabilities, and the failure to implement a provision of an IEP can result in harm to the child.<sup>108</sup> Part III analyzes why the approaches adopted by the Third, Fifth, and Ninth Circuits for evaluating IEP implementation failures are ill-founded and inconsistent with the purpose of the IDEA, and it examines why the alternative approach supported by the *Manalansan* court and the *Van Duyn* dissent is more appropriate.<sup>109</sup> Specifically, Part III.A analyzes why the *Bobby R.* standard is an ill-founded and impractical approach for evaluating IEP implementation failures.<sup>110</sup> Second, Part III.B analyzes the reasons why the *Melissa S.* court's approach is a dangerous standard by which to evaluate a school district's failure to implement an IEP.<sup>111</sup> Finally, Part III.C analyzes why the *Van Duyn* standard is flawed and inconsistent with congressional intent.<sup>112</sup>

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<sup>107</sup> See *Honig v. Doe*, 484 U.S. 305, 311 (1988) (noting that the IEP is the "primary vehicle" and "centerpiece of [IDEA's] education delivery system"); *Manalansan v. Bd. of Educ.*, No. Civ. AMD 01-312, 2001 WL 939699, at \*8 (D. Md. Aug. 14, 2001) (describing the importance of the IEP in fulfilling the FAPE requirement of the IDEA); Caruso, *supra* note 40, at 176 (describing IEPs as educational entitlements conferred by law to each eligible child on the basis of stated criteria and with due process guarantees); Seligmann, *supra* note 40, at 223 (describing the IEP as the central document defining the special education and services that are to be provided to a child with a disability); see also Kalaei, *supra* note 19, at 728-40 (stating that Congress concluded that the achievement of IEP goals directly determines a student's academic progress and arguing that the IEP is an essential method of ensuring equality of opportunity, full participation, independent living, and economic self sufficiency for individuals with disabilities); Valentino, *supra* note 30, at 157 (stating that an IEP serves as a measure of whether a child is receiving a free appropriate public education).

<sup>108</sup> See, e.g., *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1030 (8th Cir. 2002) (holding that a school district's failure to develop and implement a behavioral plan for a student with Autism-Asperger's Syndrome prevented him from making educational progress); *Manalansan*, 2001 WL 939699, at \*5 (noting that a seven-year-old with cerebral palsy made little progress in gross and fine motor skills as they appeared to have remained at the age level of three and a half years). See generally Kalaei, *supra* note 19, at 738-40 (explaining the importance of IEP evaluations especially for children with autism because such students often regress to abnormal behaviors, lose attained language, and withdraw from others).

<sup>109</sup> See *infra* Part III (examining why the Third, Fifth, and Ninth Circuits' stances regarding IEP implementation failures—that only significant, material, or non-good faith failures violate the IDEA—are illogical and inconsistent with the IDEA).

<sup>110</sup> See *infra* Part III.A (discussing how the *Bobby R.* standard excessively burdens a student's right to FAPE, is ambiguous, and undermines the congressional intent of the IDEA).

<sup>111</sup> See *infra* Part III.B (discussing how the *Melissa S.* standard creates a dangerous precedent and increases the potential for abuse by school districts).

<sup>112</sup> See *infra* Part III.C (discussing how the *Van Duyn* standard is inconsistent with the mandates of the IDEA).



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A. *Why the Bobby R. Standard Is an Inappropriate Method of Evaluating IEP Implementation Failures*

The Fifth Circuit's approach to evaluating IEP implementation failures—that only failures to implement a substantial or significant portion of an IEP violate the IDEA—is ill-founded and impractical.<sup>113</sup> Such an approach excessively burdens a student's right to a FAPE, is ambiguous, and undermines the intent of Congress.<sup>114</sup>

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<sup>113</sup> See, e.g., *Manalansan*, 2001 WL 939699, \*13. The *Manalansan* court explained that “[s]uch a holding would seem to reflect a belief that the IDEA serves a deterrent function and creates substantive rights that can be enforced even if a child has been lucky enough to make progress despite a school district's failure to comply with federal law.” *Id.* at \*14. The *Manalansan* court also criticized the approach adopted by *Bobby R.*, finding that “[i]t is hard to see how such services [enumerated in the IEP] could be anything but substantial and material.” *Id.* at \*12. Moreover, the *Catalan* court explained:

[T]he Fifth Circuit's language [in *Bobby R.*] easily could be misread as contemplating an abstract inquiry into the significance of the various “provisions” of the IEP, rather than a contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP requirements. This is a subtle distinction, but, in this court's view, an important one. Very few, if any “provisions” of an IEP will be insignificant or insubstantial, and the *Bobby R.* standard should not be read to allow educators to distinguish in the abstract between important and unimportant IEP requirements. To the contrary, all the requirements in an IEP are significant, and educators should strive to satisfy them. It is in the contextual, *ex post* analysis—i.e., whether the requirements are feasible and in the best interest of the child as she progresses—that questions of substantiality and significance arise.

*Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) (internal citations omitted) (parentheticals omitted). *But see id.* at 75 (acknowledging that the consensus approach to failure-to-implement cases among the federal courts that have addressed it has been to adopt the Fifth Circuit's approach in *Bobby R.*).

<sup>114</sup> See generally *King*, *supra* note 63, at 463–67. The ambiguity behind the *Bobby R.* standard arises from the fact that the court did not engage in discussion about whether the IEP provisions were significant; it merely stated that “the significant provisions of [the student's] IEP were followed, and as a result, he received an educational benefit.” *Id.* (quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)) (alteration in original). Moreover, *King* also points out that the phrase “substantial portion” only appears three times in the *Bobby R.* court's opinion, most notably when the court analyzed the school district's failure to provide a speech therapist to the student. *Id.* at 464 n.68 As a result, not all courts have strictly interpreted the *Bobby R.* standard in the same manner. See, e.g., *J.P. Peterson v. Cnty. Sch. Bd. of Hanover Cnty.*, 516 F.2d 254 (4th Cir. 2008) (applying the significant requirement to the specific provision of the student's IEP in question; thus the term “significant” applies not to the type of failure, but rather to how important the provision was to the student's IEP, and whether the provision was required for the student to receive an educational benefit); *Mr. C. v. Main Sch. Admin. Dist. No. 6*, No. 06-198-P-H, 2007 WL 4206166, at \*24–25 (D. Me. Nov. 28, 2007) (evaluating the significance of a student's behavioral plan in relation to other provisions).

First, in *Bobby R.*, the Fifth Circuit held that only failures to implement a substantial or significant portion of an IEP violate the IDEA.<sup>115</sup> Under this standard, a court looks to whether the IEP services that were provided actually conferred an educational benefit upon the student.<sup>116</sup> Therefore, in determining that the school district did not violate the IDEA, the *Bobby R.* court focused on the fact that the student's test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basic reading cluster, and proofing improved during the course of the school year.<sup>117</sup>

<sup>115</sup> *Bobby R.*, 200 F.3d at 349. The court's holding is grounded on its interpretation of *Rowley* as conferring no additional requirement that the services provided be sufficient to maximize the each child's potential. *Id.* at 346. The court also reasoned that the "basic floor of opportunity" provided by the IDEA grants access to specialized instruction and related services which are individually designed to provide educational benefits to handicapped children. *Id.*

<sup>116</sup> *Id.* at 349. The court noted that the achievement of passing marks and advancement from grade to grade will be one important factor in determining whether the student derived an educational benefit. *Id.*; see also *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 11 (1993) (noting that the measure of an appropriate education is "progress from grade to grade."). *But see* *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 978 (10th Cir. 2004) (finding that the student benefited significantly from her private mainstream preschool because her performance at her private preschool far exceeded the legal measure of an appropriate education, which was progress from grade to grade); *Scorah v. District of Columbia*, 322 F. Supp. 2d 12, 20-21 (D.D.C. 2004) (holding that a student who transferred from a public special education program to a private school and showed marked improvement was denied FAPE in the public school); *Fisher v. Bd. of Educ.*, 856 A.2d 552, 558-59 (Del. 2004) (finding that a student who made progress under IEP and later regressed was denied FAPE).

<sup>117</sup> *Bobby R.*, 200 F.3d at 349. The school district employed the widely utilized and accepted Woodcock-Johnson intelligence and achievement test to indicate the child's academic progress. *Id.* at 349 n.3.

[The child's] test scores showed the following changes from 1993 to 1995: (1) math scores improved from the 1.7 grade level to 3.1; (2) written language improved from the 1.5 grade level to 1.9; (3) passage comprehension went from 1.7 to 2.2; (4) calculation rose from 1.4 to 3.3; (5) applied problems improved from 2.0 to 3.0; (6) dictation went from 1.6 to 1.8; (7) writing improved from 1.4 to 2.6; (8) word identification, basic reading skills, and letter identification rose from 1.8 to 2.1; and (9) word attack rose from the level of a seven-month kindergarten student to grade level 1.8.

From 1995 to 1996, [the child] showed the following improvements: (1) Broad reading increased from 2.1 to 3.3; (2) word identification from 2.1 to 2.8; (3) passage comprehension from 2.2 to 3.9; (4) math from 3.1 to 4.4; (5) calculation from 3.3 to 5.0; (6) applied problems from 3.0 to 3.6; (7) written language from 1.9 to 2.9; (8) dictation from 1.8 to 2.8; (9) writing samples from 2.6 to 3.3; (10) basic reading cluster from 2.1 to 2.8; and (11) proofing from 2.3 to 2.6. Only word attack remained the same, at the 1.8 grade level.

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This interpretation to implementation failure is impractical and creates dangerous implications because it finds that an IEP is not significant if the student received an educational benefit.<sup>118</sup> As both *Bobby R.* and *Leighty v. Laurel School District* have demonstrated, a school district could completely fail to implement a significant element of an IEP and yet not violate the IDEA if the student received even the most minimal educational benefit.<sup>119</sup> This result is inconsistent with the IDEA's goal of assuring the effectiveness of efforts to educate handicapped children because it allows school districts to escape liability when it is otherwise clear that the IDEA was violated, merely because the child was fortunate enough to make some educational progress.<sup>120</sup>

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*Id.*

<sup>118</sup> See *King*, *supra* note 63, at 461–62 (discussing the criticisms of focusing on the student's educational benefit); Seligmann, *supra* note 40, at 228 (stating the educational benefit standard has acquired some judicial gloss). "The most colorful metaphor speaks of the child as entitled to a 'serviceable Chevrolet' as opposed to a Cadillac." *Id.* (quoting *Doe v. Bd. of Educ.*, 9 F.3d 455, 459 (6th Cir. 1993)); see also *Nein v. Greater Clark Cnty. Sch. Corp.*, 95 F. Supp. 961, 977 (S.D. Ind. 2000) (finding the district's plan was a "Chevrolet without a transmission—even if the engine might run, no power ever reached the wheels").

<sup>119</sup> See, e.g., *Leighty v. Laurel Sch. Dist.*, 457 F. Supp. 2d 546, 555–56 (W.D. Pa. 2006) (explaining the signs of progress made by the child led to a determination that the school district did not violate the right to FAPE). In *Leighty*, the parents of a learning-disabled child alleged that the school district failed to implement a learning-disabled student's IEP by not placing specific emphasis on the skill-related goals contained in the student's IEP. *Id.* at 555. The district court held that the school district did not violate the student's right to FAPE because the student's teacher testified that she made "meaningful progress" and "remarkable improvement," and an assessment showed "mixed progress." *Id.* at 555–56; see also *Falzett v. Pocono Mountain Sch. Dist.*, 152 F. App'x 117, 120 (3d Cir. 2005) (holding that "substantial evidence exists in the record to support the finding that [the school] provided [the student] with meaningful educational benefit despite some failures"); *Gillette v. Fairland Bd. of Educ.*, 932 F.2d 551 (6th Cir. 1991) (holding that the school provided the student with a FAPE despite the fact that the portions of the FAPE were not followed because the student was able to achieve satisfactory grades and to advance grade levels); *Wanham v. Everett Pub. Sch.*, 550 F. Supp. 2d 152, 160 (D. Mass. 2008) (holding that the independent hearing officer did not err in requiring the student to show harm where services listed in the IEP were not delivered); *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F. Supp. 2d 991, 996 (S.D. TX. 2005) (holding that the district did not violate FAPE despite the student's regression in toilet training because the district did provide the student with "some benefit"); *Burke v. Amherst Sch. Dist.*, No. 08-cv-0140-SM, 2008 WL 5382270, \*11–12 (D.N.H. Dec. 18, 2008) (holding that "here, as in *Bobby R.*, the record demonstrates academic achievement" and therefore "the District's failure to implement the videotaping objective did not deprive [the student] of a FAPE") (internal citations omitted).

<sup>120</sup> See 20 U.S.C. § 1400(d)(4) (2006). Congress amended the purpose of the IDEA to "ensure the effectiveness of efforts to educate children with disabilities." *Id.* The IDEA further states "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1).

Second, after announcing its new standard for evaluating IEP failures, the Fifth Circuit did not explain the meaning of the word "substantial" as used in its test for evaluating IEP failures.<sup>121</sup> As a result, it is not apparent from the opinion whether the court considered "substantial" to mean "many" provisions or whether the court considered "substantial" to be synonymous with "significant."<sup>122</sup> The court's failure to make this distinction renders the Fifth Circuit's standard an unworkable method by which to evaluate IEP implementation failures.<sup>123</sup>

Finally, the Fifth Circuit's standard is also ill-founded and frustrates the congressional intent of the IDEA.<sup>124</sup> The IDEA provides children a

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<sup>121</sup> See *Bobby R.*, 200 F.3d at 349. The court only stated that "the significant provisions of [the student's] IEP were followed, and, as a result, he received an educational benefit." *Id.*

<sup>122</sup> King, *supra* note 63, at 464; see also, e.g., *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) (illustrating the ambiguity created by the *Bobby R.* court's failure to define or distinguish between a "significant" provision and a "substantial" provision of an IEP). The *Catalan* court stated that a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant;" in other words, whether the deviations from the IEP's stated requirements were "material." *Id.* at 75–76. The court further observed that the Fifth Circuit's language easily could be misread as contemplating an abstract inquiry into the significance of various "provisions" (however that term may be defined) of the IEP, rather than a contextual inquiry into the materiality (in terms of impact on the child's education) of the failures to meet the IEP's requirements. *Id.* at 76.

<sup>123</sup> See *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (holding that a regulation is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning or if it fails to give adequate warning of the conduct which is to be prohibited and does not set out explicit standards for those who apply it); see also *Rebell*, *supra* note 62, at 1477 (arguing that the "educational benefit" standard is inherently ambiguous and unworkable). Aside from its inherent ambiguity the "educational benefit" standard does not provide substantive content for the balancing process and looks only to one side of the equation. *Id.* But see Judith Welch Wegner, *Variations on a Theme – The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS., 169, 190–91 (1985) (concluding that the adoption of the "educational benefits" standard was sound and perhaps inevitable because it avoids justiciability concerns).

<sup>124</sup> See *Quade*, *supra* note 24, at 57–58 (stating that Congress did not intend for school districts to be able to discharge their duties under the IDEA by only providing a program that produces some minimal academic advancement). Congress crafted amendments to the IDEA with the intent of providing children with disabilities with educational opportunities, but congressional review of the IDEA in 1997 found that that the promise of the law had not been fulfilled. *Id.* at 38. Consequently, Congress amended the IDEA to raise the substantive requirements of the IDEA to include the development of a child's IEP. *Id.* at 39. Congressional intent thus clearly indicates that the purpose of the IDEA was to ensure that children with disabilities receive a quality education, preparing them to be productive, independent, and employed adults. *Id.* Therefore, the "educational benefits" standard can no longer be complacent with merely "opening the door" to an educational opportunity for children with disabilities because doing so effectively erodes the civil rights of children with disabilities and frustrates the congressional intent of the IDEA. *Id.*

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right to a FAPE.<sup>125</sup> For a child with disabilities, making this right a reality includes providing supplemental and assistive services that allow the child to be placed in a position to receive the same benefits as a child without disabilities.<sup>126</sup> Exactly what services must be provided is a task specifically delegated to IEP teams.<sup>127</sup> However, if a school later determines that some lesser assistance is appropriate and would like to modify the student's IEP to reflect these changes, the school district must follow the procedures enumerated in the IDEA.<sup>128</sup> The inclusion of these procedural safeguards suggests that Congress did not intend for school districts to unilaterally alter or refuse to implement IEPs; therefore, doing so violates the student's right to a FAPE.<sup>129</sup> Unlike the Fifth

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at 41; *see also* Valentino, *supra* note 30, at 157 (arguing that the "educational benefit" standard does not coincide with the recent standards set forth by the IDEA and congressional intent). Congressional intent, in addition to the language of the IDEA, demands a more rigorous substantive standard in educating students with disabilities. *Id.* at 162. Therefore, the some "educational benefit" standard does not effectuate Congress's goal to ensure substantive results and does not pass muster under the standards Congress sought with the issuance of the IDEA. *Id.* at 163.

<sup>125</sup> *See supra* Part II.B (detailing the IDEA's requirements).

<sup>126</sup> *See* Suh, *supra* note 81, at 1323–24 (explaining the related services provision of the IDEA and the benefits such services provide children with disabilities); *see also, e.g.*, Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 893–94 (1984) (clarifying the definition of related services that must be provided to children with disabilities under the IDEA in order to provide the child with the same benefits as non-handicapped children).

<sup>127</sup> 20 U.S.C. § 1414(d)(1)(B) (2006); *see, e.g.*, Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 827 (9th Cir. 2007) (stating that under the IDEA, once a school district identifies or assesses a student as learning disabled, it must convene an IEP team to determine the special needs of the child); *see also* Manalansan v. Bd. of Educ., No. Civ. AMD 01-312, 2001 WL 939699, at \*14 (D. Md. Aug. 14, 2001) (stating that a school district does not have the discretion to decline to implement the services listed in the IEP or decide unilaterally, without initiating an IEP meeting to institute a change, that a service listed in the IEP need not be provided).

<sup>128</sup> 20 U.S.C. § 1414(d)(3)(F); *see Van Duyn*, 502 F.3d at 828 (stating that if after implementing the IEP the school district believes that portions of the program are not essential to providing FAPE, the school district is free to amend the IEP through the required channels, including a reconvening of the IEP team); *see also* 34 C.F.R. § 300.324(a)(4) (2009) (stating that IEPs may also be amended informally without an IEP team meeting). The regulations explain that in making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. *Id.* § 300.324(a)(4)(i). If changes are made to the child's IEP the public agency must ensure that the child's IEP team is informed of those changes. *Id.* § 300.324(a)(4)(ii).

<sup>129</sup> *See* Rosenblum, *supra* note 15, at 2739. An IEP is to be produced by a team of parents, educators, and administrators working cooperatively to develop a comprehensive statement of the educational needs of children with disabilities. *Id.* Congress tried to ensure the full participation of all parties in the formulation of IEPs and the IDEA process as a whole by incorporating an elaborate set of procedural safeguards into the statute. *Id.* Moreover, the IDEA gives parents the right to examine all records relating to the child and

Circuit, the Third Circuit, avoided making decisions regarding the significance of a particular provision of the IEP and it is discussed next.<sup>130</sup>

*B. The Implications of the Melissa S. Standard*

In *Melissa S.*, the Third Circuit's standard for assessing IEP implementation failures did not focus on how significant or material a particular provision was to the student's IEP but instead focused on the school district's reasons for not implementing the student's IEP.<sup>131</sup> The Third Circuit was correct in not examining the educational significance of a particular IEP provision because, as the *Van Duyn* dissent and *Manalansan* court correctly pointed out, such determinations are the responsibility of the IEP teams.<sup>132</sup> Following this logic, the court found that the school district's reasons for failing to provide the child with an aide were in good faith or reasonable and therefore did not violate the student's right to a FAPE.<sup>133</sup>

The court's line of reasoning improperly grants school districts a "good faith effort" excuse to implementation failures. Such a defense creates a dangerous precedent and increases the potential for abuse by school districts.<sup>134</sup> To illustrate, a school district may escape liability, even after completely disregarding certain provisions of an IEP, merely by arguing that the services required by the IEP were too burdensome or

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to participate in meetings with respect to the identification, evaluation, and educational placement of the child and to obtain an independent educational evaluation of the child. *Id.*; see *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (noting that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrate 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); see also *Daniel*, *supra* note 40, at 10–11 (discussing the significance of parental involvement in the IEP process and congressional intent behind the IDEA's procedural safeguards).

<sup>130</sup> See *infra* Part III.B (analyzing the Third Circuit's approach to evaluating IEP implementation failures).

<sup>131</sup> See *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 187 (3d Cir. 2006).

<sup>132</sup> See *supra* text accompanying note 127 (explaining that Congress specifically delegated the task of determining the services that must be provided to students with disabilities to IEP teams).

<sup>133</sup> *Melissa S.*, 183 F. App'x at 187.

<sup>134</sup> See *Manalansan v. Bd. of Educ.*, No. Civ. AMD 01-312, 2001 WL 939699, at \*15 (D. Md. Aug. 14, 2001) (arguing that the a "best efforts" standard makes the agreement reached by the IEP team mean little in terms of a guarantee of services for children with special needs and sets a dangerous precedent).

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complex for the school district to implement.<sup>135</sup> As the *Manalansan* court pointed out, a “good faith effort” excuse should not be permitted when school districts fail to implement the services in a student’s IEP because a good faith effort does not meet the statutory and regulatory commands of the IDEA.<sup>136</sup> Therefore, allowing school districts to escape liability frustrates the IDEA’s goal of assuring the effectiveness of efforts to educate handicapped children.<sup>137</sup> Likewise, the Ninth Circuit’s standard suffers from similar defects and is discussed in turn.<sup>138</sup>

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<sup>135</sup> See, e.g., *Bd. of Educ. v. Michael R.*, No. 02 Civ. 6098, 2005 WL 2008919, at \*12 (N.D. Ill. Aug. 15, 2005). The court found the school district not liable for failing to implement a behavioral plan for a student with Rett’s syndrome because the “root of the problem in implementing the plan was not the staff, but the complexity of [the student’s] plan and the difficulties of carrying it out in a large, regular education high school.” *Id.*; see also, e.g., *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) (finding that the failure to implement the therapy provision of a student’s IEP was excusable under the circumstances because the student’s fatigue made it difficult for the school district to implement). But see, e.g., *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999) (rejecting cost-based objections to providing special needs student with health aide as a related service); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (noting that if sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably); KAUFMAN & KAUFMAN, *supra* note 25, at 71 (noting that by guaranteeing free public education, states have rejected cost-based objections to providing services). But see *Kimball*, *supra* note 25, at 716 (discussing the implications of the shortfall in the IDEA’s funding on schools); *Gorman*, *supra* note 25, at 2482 (discussing federal funding per pupil expenditures for special education).

<sup>136</sup> *Manalansan*, 2001 WL 939699, at \*13. The *Manalansan* court stated that the “good faith” defense is grounded on a misinterpretation of the IDEA regulations. *Id.* The court acknowledges that the IDEA regulations do mention “good faith,” but argues that a “good faith effort” standard is ill-founded. *Id.* Specifically, the regulations mandate that services be provided in accordance with the IEP and that a “good faith effort” be made to help the child meet his IEP objectives. *Id.* Therefore, in the court’s opinion, the regulations plainly demonstrated that these are two separate requirements that cannot be merged and encompassed by a “good faith effort” standard. *Id.* The regulations require as follows, in pertinent part:

- (a) Provision of services. Subject to paragraph (b) of this section, each public agency must—
  - (1) Provide special education and related services to a child with a disability in accordance with the child’s IEP; and
  - (2) Make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

34 C.F.R. § 300.350 (2000) (emphasis added).

<sup>137</sup> See 20 U.S.C. § 1400 (2006) (discussing the IDEA’s goals).

<sup>138</sup> See *infra* Part III.C (analyzing the Ninth Circuit’s standard for evaluating IEP implementation failures).

C. *The Van Duyn Standard Materially Fails to Educate Children with Disabilities*

The Ninth Circuit's approach to evaluating IEP implementation failures further contradicts the purpose of the IDEA.<sup>139</sup> In *Van Duyn*, after looking to both the text of the IDEA and the decisions of other courts, the Ninth Circuit held that a school district does not violate the IDEA when it fails to perform exactly as called for by the IEP, unless its failure was material.<sup>140</sup> "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."<sup>141</sup> Moreover, the materiality standard "does not require that the [student] suffer demonstrable educational harm in order to prevail. However, the [student's] educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided."<sup>142</sup>

Unlike the Fifth Circuit, the Ninth Circuit's standard does not focus on the importance of the provision within the IEP and instead applies a more rigorous *de minimis* standard.<sup>143</sup> The Ninth Circuit's standard strikes a better balance between deference to educational authorities and maintaining protections for students with disabilities as required by the

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<sup>139</sup> See *supra* note 124 (discussing Congress's purpose and intent in drafting the IDEA).

<sup>140</sup> *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). Specifically, the *Van Duyn* court looked to the Fifth Circuit's decision in *Bobby R.* where the court addressed the issue of IEP implementation failure and holding that

to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all the elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.

*Id.* at 821 (quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). The court then analyzed the Eighth Circuit's decision in *Clark*, which held that the IDEA is violated "if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit." *Id.* at 822 (quoting *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2002)).

<sup>141</sup> *Id.* To illustrate, the court stated that if a child is not provided the reading instruction called for, and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *King, supra* note 63, at 476; see also *Termine v. William S. Hart Union High Sch. Dist.*, 249 F. App'x 583, 586 (9th Cir. 2007) (providing an example of a more rigorous *de minimis* standard). In *Termine*, the court found that a denial of FAPE is a material failure to implement a student's existing IEP when the school proposed an interim placement for the student in general education thirty-two percent of the time, despite the fact that the student's IEP provided that the student spend no time in general education. *Id.*



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IDEA.<sup>144</sup> Additionally, by not requiring that the child suffer demonstrable educational harm in order to prevail, the materiality standard shifts the focus towards the nature of the failure itself, rather than the student's educational performance.<sup>145</sup> Thus, the Ninth Circuit's standard requires school districts to comply with the agreed-upon IEP provisions and holds school districts accountable for their failure to do so.<sup>146</sup>

Although the Ninth Circuit's materiality standard provides a better approach to examining IEP implementation failures than the Fifth Circuit, the Ninth Circuit's standard is not without flaws as it also raises several concerns.<sup>147</sup> First, the Ninth Circuit misinterpreted the text of the IDEA.<sup>148</sup> For example, to determine the standard for assessing an IEP's implementation, the court looked to the text of the IDEA, which defines a free appropriate public education as "special education and related services that . . . are provided in conformity with the [child's] individualized education program."<sup>149</sup> The court interpreted the "in conformity with" language as counseling "against making minor

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<sup>144</sup> See King, *supra* note 63, at 483 (arguing that the materiality standard used by the *Van Duyn* court is an important legal development and creates a better balance between the deference given to school districts and maintaining protections for students with disabilities). Moreover, the most significant legal shift is the court's explicit language regarding examining the student's educational benefit. *Id.* But see Reed, *supra* note 86, at 499 (discussing how the *Van Duyn* standard diminished the educational rights of disabled children).

<sup>145</sup> See Ferster, *supra* note 47, at 29. Ferster continues on by stating that [w]hile the Fifth Circuit's standard suggests a school offers a FAPE despite an implementation failure as long as the implemented portions of the IEP convey an educational benefit, the Ninth Circuit appears to find a denial of FAPE wherever the implementation failure in and of itself constitutes a "significant shortfall in services provided," even if the IEP, as implemented, would otherwise meet the *Rowley* standard.

*Id.*

<sup>146</sup> *Van Duyn*, 502 F.3d at 822. The court stressed that nothing in the opinion is intended to weaken schools' obligations to provide services in conformity with students' IEPs. *Id.* IEPs are clearly binding under the IDEA, and the proper course for a school district that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute—not to decide on its own no longer to implement part or all of the IEP. *Id.*

<sup>147</sup> See *supra* notes 101-04 (introducing criticisms of the Ninth Circuit's materiality standard which argue that it is an incorrect standard for assessing IEP implementation failures).

<sup>148</sup> See Reed, *supra* note 86, at 499 (noting that the majority's conclusion regarding the meaning of "'in conformity with' somehow 'counsel[ing] against making minor implementation failures actionable' is unsupported by the text of the IDEA and incorrect based on the plain meaning of the word 'conformity.'" *Id.*; see also King, *supra* note 63, at 481 ("One commentator argues that the 'in conformity with' clause of Section 1401(9)(D) 'does not suggest flexibility . . . but rather its definition connotes strict compliance.'").

<sup>149</sup> See 20 U.S.C. § 1401(9) (2000).

implementation failures actionable."<sup>150</sup> Based upon this reading, the Ninth Circuit concluded that the statute did not require perfect adherence to an IEP, nor did it require a court to find that minor implementation failures were a denial of a FAPE.<sup>151</sup>

The majority's interpretation of the "in conformity" language in the IDEA is unsupported by the text of the IDEA. The language "in conformity with" and the use of the phrase "in accordance with the child's IEP" in the federal regulations do not suggest flexibility as the majority advocates, but rather its definition requires strict compliance.<sup>152</sup> Therefore, the dissent was correct when it concluded that a failure to implement any portion of an IEP is not "in conformity with" the IEP as required by the statutory text, thus making it a denial of a FAPE and a violation of the IDEA.<sup>153</sup>

Second, the majority improperly relied on the Supreme Court's decision in *Rowley* in its evaluation of IEP implementation failures.<sup>154</sup> The *Van Duyn* majority found that the Supreme Court's description in *Rowley* of the IDEA's purpose, as "providing a 'basic floor of opportunity' to disabled students rather than a 'potential maximizing

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<sup>150</sup> *Van Duyn*, 502 F.3d at 821.

<sup>151</sup> *Id.*

<sup>152</sup> See Reed, *supra* note 86, at 499. "The majority's finding that 'in conformity with' somehow 'counsels against making minor implementation failures actionable' is unsupported by the text of the IDEA and incorrect based on the plain meaning of the word 'conformity.'" *Id.*; see also Ferster, *supra* note 47 (describing the ambiguity in the FAPE definition calling for services to be provided "in conformity with" an IEP). "Conformity" is defined as "correspondence in form, manner, or character" or "agreement." *Conformity Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/conformity> (last visited Dec. 23, 2010). But see King, *supra* note 63, at 481 (discussing the *Van Duyn* court's interpretation of the phrase "in conformity with"). "To surmount this criticism, the court's textual argument would have been stronger had it defined the word 'conformity.' For example, several dictionaries define 'conformity' as 'similarity' and 'likeness.' These words do not imply 'exact' or 'perfect' adherence." *Id.*

<sup>153</sup> See *Van Duyn*, 502 F.3d at 827 (Ferguson, J., dissenting) ("A school district's failure to comply with the specific measures in an IEP to which it has assented is, by definition, a denial of FAPE, and hence, a violation of the IDEA."); see also Reed, *supra* note 86, at 499 (arguing that a failure to implement any portion of an IEP is not "in conformity with" the IEP as required by the IDEA and a direct violation of the IDEA).

<sup>154</sup> See King, *supra* note 63, at 481. The majority substantially relied on *Rowley* and applied its "appropriate education" holding to the context of IEP implementation challenges, despite the fact that *Rowley* dealt with a challenge to an IEP's content and not its implementation. *Id.* The majority cited and rejected the standards used in *Bobby R.* and *Clark*, but did not discuss why it chose not to adopt the standards used by these courts. *Id.* at 482. Moreover, the majority's analysis is incomplete because it omitted the standards employed by other courts, such as the *Melissa S.* standard that examines the school district's reason for the implementation failure. *Id.* at 483; see *supra* note 24 (discussing the due process safeguards of the IDEA); *supra* note 40 (discussing parental involvement in the IEP process and the IDEA's due process safeguards).

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education' also support[ed] granting some flexibility to school districts charged with implementing IEPs."<sup>155</sup> While the *Rowley* court held that an IEP's content must only confer "'some' educational benefit upon the disabled child," the majority in *Van Duyn* incorrectly interpreted this as granting "flexibility" to school districts charged with implementing IEPs.<sup>156</sup> Allowing this flexibility regarding IEP content and implementation undermines the very reason Congress created the IDEA and further diminishes the only educational rights disabled children have—the rights granted to them by the IDEA.<sup>157</sup>

Third, just like the Fifth Circuit's standard, the Ninth Circuit's materiality standard is inconsistent with the mandates of the IDEA because it allows the judiciary to completely disregard the IEP teams' determinations and substitute its own notions of educational policy.<sup>158</sup> The IDEA confers upon IEP teams the responsibility of addressing matters such as the child's present level of academic achievement, annual goals for the child, how progress toward those goals is to be measured, and the services to be provided to the child.<sup>159</sup> Therefore, judges are not in a position to determine which parts of an IEP are or are not material.<sup>160</sup> Rather than focusing on how material a failure is, courts should assume that an IEP team settled on specific educational services for a reason, especially because each IEP team chooses certain services for the purpose of providing the student with a FAPE.<sup>161</sup> "If the IEP

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<sup>155</sup> *Van Duyn*, 502 F.3d at 821.

<sup>156</sup> *Reed*, *supra* note 86, at 499; *see also, e.g., Bd. of Educ. v. Rowley*, 458 U.S. 176, 189, 215 (1982) (White, J., dissenting) (arguing that the IDEA announced an intent to provide a full educational opportunity to all handicapped children and that Congress intended the IDEA to identify and evaluate handicapped children and provide them with an equal opportunity to learn). The IDEA intended to provide a basic floor of opportunity to eliminate the effects of a handicap, at least to the extent that the child will be given an equal and reasonably possible opportunity to learn. *Id.* Justice White further argues that despite the majority's reliance on the use of "appropriate" in the definition of the IDEA, the majority's decision falls short of what the IDEA intended. *Id.* at 215-18.

<sup>157</sup> *See supra* note 124 (discussing Congress's intent in drafting the IDEA).

<sup>158</sup> *See Van Duyn*, 502 F.3d at 826; *see also supra* note 40 (discussing the role of IEP teams and the procedural safeguards created by Congress to prevent unilateral amendments to IEPs).

<sup>159</sup> *See* 20 U.S.C. § 1414(d)(1)(A) (2006) (discussing the implementation of IEPs); *see also supra* note 37 (providing a description of the IEP).

<sup>160</sup> *See Rowley*, 458 U.S. at 206-07, 216 (1982) (stating that the role of the judiciary is, first, to determine whether the state has complied with the IDEA's procedural safeguards, and second, to determine whether the IEP is reasonably calculated to enable the child to receive educational benefits); *see also* Bagenstos, *supra* note 99, at 122-26 (discussing the judiciary's role in special education litigation under the IDEA).

<sup>161</sup> *See Van Duyn*, 502 F.3d at 827-28 (Ferguson, J., dissenting); Jean B. Crockett & Mitchell Yell, *Without Data All We Have Are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education*, 37 J.L. & EDUC. 381, 388 (2008) (noting that the IDEA directs IEP teams,

team had thought another, lesser service would be sufficient to provide FAPE, it would have included that service in the IEP."<sup>162</sup> Enabling school districts to disregard portions of the IEP that the IEP team has already agreed upon would essentially give them a license to single-handedly change the content of the IEP and disregard both the IEP and the parental participation provisions of the IDEA.<sup>163</sup>

Finally, the materiality standard, like the Fifth Circuit's standard for evaluating IEP implementation failures, is vague.<sup>164</sup> The Ninth Circuit held that a material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.<sup>165</sup> The majority, however, provided little guidance as to what constituted a minor discrepancy.<sup>166</sup> To illustrate the lack of clarity, Judge Ferguson stated, "If an IEP requires ten hours per week of math tutoring, would the provision of only nine hours be 'more than a minor discrepancy'? Eight hours? Seven hours?"<sup>167</sup> Therefore, because most IEPs contain quantitative requirements for special education services, the Ninth Circuit's materiality standard is flawed because it provides little guidance in resolving implementation issues.<sup>168</sup>

In summary, the Ninth Circuit in *Van Duyn* determined the incorrect standard for assessing IEP implementation failures by holding that only

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when developing a student's IEP, to base the special education services to be provided on reliable evidence that the program or service works); Reed, *supra* note 86, at 500 (arguing that IEP teams design the IEP to provide a specific student with a FAPE, thus any subsequent deviation from the IEP is necessarily material and a violation of the IDEA).

<sup>162</sup> See *Van Duyn*, 502 F.3d at 828 (Ferguson, J., dissenting) (recognizing that IEP teams are in the best position to determine the services required to provide the student with an appropriate education).

<sup>163</sup> See 20 U.S.C. § 1414 (d)(3)(A)(ii) (requiring an IEP team to consider parental concerns in the development of an IEP for their child); *Van Duyn*, 502 F.3d at 828 (Ferguson, J., dissenting) (arguing that the IEP team chooses specific services with specific quantities and durations for the purpose of providing the student with a FAPE, thus allowing school districts to ignore the IEP provisions grants them authority to redefine the content of the student's plan by default); see also *supra* note 24 (discussing the IDEA's due process safeguard); *supra* note 40 (discussing due process and parental involvement in the IEP process).

<sup>164</sup> See *Van Duyn*, 502 F.3d at 828 (Ferguson, J., dissenting) (explaining that the materiality standard adopted by the majority does not provide an explanation of what constitutes a minor discrepancy and provides little guidance in resolving IEP implementation failures).

<sup>165</sup> *Id.* at 822; see also *supra* Part II.D.3 (discussing the *Van Duyn* materiality standard).

<sup>166</sup> *Van Duyn*, 502 F.3d at 828 (Ferguson, J., dissenting) (arguing that the *Van Duyn* materiality standard does not provide an appropriate way of determining when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 827-28.

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material failures to implement IEPs violate the IDEA.<sup>169</sup> Similarly, the Third and Fifth Circuits have also adopted standards that undermine the purpose of the IDEA and further diminish the educational rights of disabled children.<sup>170</sup> Instead, the circuit courts should have found, as the dissent in *Van Duyn* and the *Manalansan* court did, that failure to implement any portion of an IEP violates the IDEA.<sup>171</sup>

## IV. CONTRIBUTION

The IDEA requires school districts receiving federal funding to provide disabled students with a FAPE.<sup>172</sup> An IEP is critical to this requirement because it establishes the special education and related services that will be provided to each disabled student.<sup>173</sup> The standards adopted by the circuits illustrate that there is an inherent difficulty in evaluating whether a school district's failure to implement provisions in an IEP constitutes a deprivation of a FAPE, in violation of the IDEA.<sup>174</sup> To promote consistency and to fully accomplish the goal of educating students with disabilities, the IDEA should mandate that school districts strictly adhere to all provisions of a student's IEP.<sup>175</sup> Accordingly, Part IV proposes two alternatives to accomplish this: (1) adding strict compliance to the existing definition of a FAPE in the IDEA, or (2) adopting a uniform standard for evaluating IEP implementation failures.

## A. Proposed Amendment to the IDEA

The lack of clarity in the IDEA regarding the amount of compliance with a student's IEP that a school district must provide to satisfy the FAPE requirement has created differing interpretations among the courts.<sup>176</sup> This approach would resolve the disparity in interpretation

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<sup>169</sup> See *supra* Part III.C (discussing the *Van Duyn* materiality standard).

<sup>170</sup> See *supra* Part II.B (discussing the goals and rights granted to children with disabilities by the IDEA).

<sup>171</sup> See *supra* notes 79–82 and accompanying text (discussing the *Manalansan* court's view rejecting the use of the "good faith effort" defense for IEP implementation failures and interpreting the IDEA as mandating that all services enumerated in an IEP be provided); see also *supra* notes 99–104 and accompanying text (discussing the *Van Duyn* dissent's view as requiring strict compliance with an IEP).

<sup>172</sup> See *supra* Part II.B (discussing the protections provided to children with disabilities under the IDEA).

<sup>173</sup> See *supra* note 61 (discussing the IEP).

<sup>174</sup> See *supra* Part II.D (discussing the standards used by the courts to evaluate a school district's failure to implement a student's IEP).

<sup>175</sup> See *infra* Part IV (discussing two options for evaluating IEP implementation failures).

<sup>176</sup> See *supra* Part II.B (introducing the IDEA and discussing that Congress never clarified the definition of FAPE in the IDEA's subsequent reauthorizations).

and the inconsistencies surrounding IEP implementation failures. The IDEA's definition of a FAPE with proposed language requiring school districts to strictly adhere with all provisions of a disabled student's IEP is as follows:

The term "free appropriate public education" means special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in *strict compliance* ~~conformity~~ with the individualized educational program required under section 1414(d) of this title.<sup>177</sup>

#### *Commentary*

This approach, which is most consistent with the congressional intent of the IDEA, provides students with disabilities an individualized and appropriate education while also balancing school districts' interest in preserving their limited resources.<sup>178</sup> The IDEA was not intended to maximize the potential of each handicapped child, but rather designed to meet the unique needs of handicapped students and to provide services that will permit them to benefit from the instruction.<sup>179</sup> The IEP teams carefully draft IEPs to include the services that best suit the educational needs of each individual child.<sup>180</sup> Therefore, requiring school districts to strictly adhere to a student's IEP ensures that students with disabilities are provided an appropriate education.

Moreover, requiring school districts to strictly adhere to all of the provisions of an IEP does not impose a heavy burden on school districts. This is because school districts are free to amend a student's IEP through the required channels if they determine that portions of the program are

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<sup>177</sup> Italics indicate the Notewriter's proposed language improving the IDEA definition of FAPE.

<sup>178</sup> See *supra* Part II.B (discussing the IDEA's goal of ensuring that all handicapped children have available to them a FAPE).

<sup>179</sup> See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189, 203–04 (1982) (finding that the IDEA does not require that schools maximize the child's educational potential, but it must provide an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction).

<sup>180</sup> See Rosenblum, *supra* note 15, at 2739 (discussing the role of IEP teams).

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not essential to providing a FAPE.<sup>181</sup> Because school administrators are actively involved in the IEP process, including the selection of the services and accommodations to be provided, they typically include only those services that the school is capable and willing to provide.<sup>182</sup> The IDEA does not require school districts to satisfy all parents' requests for services as long as the school offers a FAPE.<sup>183</sup> Thus, school districts retain a significant amount of control over the allocation of their resources. Furthermore, once a school district evaluates the services it believes are required to provide the student with a FAPE and incorporates those services into the student's IEP, it is bound by its agreement.<sup>184</sup>

Likewise, if the parents of a disabled child feel that the services and accommodations provided in the IEP are not sufficient to provide their child with a FAPE, they can also amend the student's IEP through the required channels.<sup>185</sup> For example, the IDEA's safeguards allow the parents to challenge a school district in an impartial hearing before a state administrative hearing officer when parents believe their child's rights have been violated.<sup>186</sup> Thus, the proposed amendment requiring school districts to strictly comply with all provisions of an agreed-upon IEP would not impose a heavy burden on either party.

The proposed amendment is also consistent with the congressional intent of the IDEA. To illustrate, the stated purpose of the IDEA is no longer just to ensure educational access, but rather "to assess, and ensure the effectiveness of, efforts to educate children with disabilities."<sup>187</sup> Adding the proposed language would effectively provide guidance to the courts and school districts as to the amount of compliance with a student's IEP that a school district must provide to satisfy the FAPE requirement. It would also absolve the problem of courts applying different standards to evaluate IEP implementation failures.<sup>188</sup> This is

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<sup>181</sup> See *supra* note 128 (discussing the procedures that both school districts and parents must follow in order to modify an IEP).

<sup>182</sup> See *supra* notes 37-40 and accompanying text (discussing the individuals involved in the drafting of the IEP).

<sup>183</sup> See *supra* Part II.B-C (discussing the IDEA's FAPE requirement and the Supreme Court's interpretation of that requirement).

<sup>184</sup> See *supra* note 102 (stating in dissent that once all parties have agreed that the content of the IEP provides a FAPE, the school district must provide the services).

<sup>185</sup> See *supra* note 128 (discussing the procedures that both school districts and parents must follow in order to modify an IEP).

<sup>186</sup> See 20 U.S.C. § 1415(b)(1)-(2) (2006); see also *supra* note 40 (discussing the rights of parents under the IDEA to challenge the IEP).

<sup>187</sup> See 20 U.S.C. § 1400(d)(4).

<sup>188</sup> See *supra* Part III (discussing how the various standards used by the circuit courts have led to different results for similarly situated disabled students across the nation).

the desired outcome because there is currently no uniform method of assessing school districts' failure to comply with the mandates of the IDEA. Thus, requiring strict compliance with an IEP would ensure that children with disabilities receive an appropriate education.<sup>189</sup> The proposed amendment to the IDEA, however, is not the only option available to resolve the current problem of assessing IEP implementation failures.<sup>190</sup>

*B. Uniform Standard for Evaluating IEP Implementation Failures*

Adopting a uniform standard for evaluating IEP implementation failures is another viable method for resolving the current disparity in interpretations among the circuit courts. Under this approach, school districts would be required to strictly comply with all provisions in a student's IEP. An ideal standard, modeled after the *Van Duyn* dissent and the *Manalansan* court, for evaluating IEP implementation failures would state the following:

*The failure to implement any portion of a student's IEP to which the school has assented is a denial of FAPE per se and hence, a violation of the IDEA.*<sup>191</sup>

The proposed standard addresses the following considerations: (1) congressional intent; (2) judicial inappropriateness; and (3) the burden on school districts.

First, this standard fits squarely within congressional intent and is therefore a more appropriate approach to evaluating IEP implementation failures.<sup>192</sup> Congress specifically delegated to IEP teams the task of determining the required services that are necessary for the student to receive a FAPE.<sup>193</sup> An IEP is the product of an extensive process and represents the reasoned conclusion of the IEP team that specific measures are necessary for the student to receive an educational benefit.<sup>194</sup> Therefore, a school district's failure to fully comply with these

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<sup>189</sup> See *supra* notes 79–82 and accompanying text (discussing the *Manalansan* opinion); *supra* notes 99–104 and accompanying text (discussing the *Van Duyn* dissent in support of this standard).

<sup>190</sup> See *infra* Part IV.B (discussing the use of a uniform standard for evaluating IEP implementation failures).

<sup>191</sup> This proposed standard was adapted from the opinions of the *Van Duyn* dissent and *Manalansan* court.

<sup>192</sup> See *supra* note 124 (discussing the congressional intent of the IDEA).

<sup>193</sup> See 20 U.S.C. § 1414(d)(1)(B) (2006) (defining an IEP team).

<sup>194</sup> See *supra* note 107 (discussing the role of the IEP in fulfilling the IDEA's FAPE requirement).



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specific services is a denial of FAPE.<sup>195</sup> Requiring that school districts fully implement all services in an IEP ensures the effectiveness of efforts to educate disabled students, as required by the IDEA.<sup>196</sup> Furthermore, this standard would rectify the problem of school districts failing to provide disabled students with the supplemental and assistive services to which they are legally entitled.

Second, this standard appropriately addresses the issue of judges interpreting the materiality or significance of an IEP.<sup>197</sup> The *Van Duyn* dissent and *Manalansan* court found that such determinations are inappropriate for the judiciary.<sup>198</sup> Specifically, the *Van Duyn* dissent stated that judges were not in a position to determine which parts of an IEP are or are not material to the student's education.<sup>199</sup> This standard rectifies the problem of judges disregarding the IEP teams' determinations and substituting their own notions of educational policy.<sup>200</sup> Under this standard, the courts would no longer focus on the materiality or significance of an IEP's provisions, but rather on the school district's compliance with the required services and accommodations enumerated in the IEP. Furthermore, a uniform standard ensures that the educational needs of students with disabilities are fully met.

Third, this standard adequately addresses the interests of school districts and children with disabilities. As previously discussed, school districts and parents of children with disabilities can modify the IEP through established procedures if they determine that the IEP is no longer appropriate.<sup>201</sup> Thus, requiring strict compliance with an IEP would not impose an excessive burden on any one party because the option to modify the IEP preserves a great deal of flexibility. More importantly, neither this standard nor the IDEA requires school districts to adhere to every demand presented by the parents of the disabled

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<sup>195</sup> See *supra* note 99 (discussing the *Van Duyn* dissent's view that the failure to implement any portion of a student's IEP is a violation of the IDEA); see also Reed, *supra* note 86, at 499 (arguing that a failure to implement any portion of an IEP is not "in conformity with" the IEP as required by the IDEA and a direct violation of the IDEA).

<sup>196</sup> See 20 U.S.C. § 1401(d)(4).

<sup>197</sup> See *supra* Part II.D.1, 3 (discussing the 'significant provision' standard used by the Fifth Circuit and the Ninth Circuit's 'material failures' standard).

<sup>198</sup> See *supra* notes 99-104 and accompanying text (discussing the dissent in *Van Duyn*'s reasoning for rejecting the significant provision and materiality standards).

<sup>199</sup> *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 827 (9th Cir. 2007) (Ferguson, J., dissenting). Rather, the dissent asserts that IEP teams are in the best position to determine the needs of special education students. *Id.*

<sup>200</sup> See *supra* note 99 (discussing judiciary's role in special education).

<sup>201</sup> See 20 U.S.C. § 1415(b)(1)-(2); see also *supra* note 40 (discussing the rights of parents under the IDEA to challenge the IEP).

child.<sup>202</sup> It simply requires school districts to meet the agreed-upon provisions in the IEP and holds them accountable for their failure to abide by the agreement.

In sum, the proposed alternatives provide a clear and consistent method for evaluating a school district's failure to implement a student's IEP. Additionally, they promote the IDEA's goal of educating children with disabilities while balancing the interests of school districts and students.

#### V. CONCLUSION

Throughout history, children with disabilities were routinely excluded from public schools and denied the educational opportunities available to children without mental or physical disabilities. The IDEA has made substantial progress over the last few decades to alleviate this severe discrepancy in educational opportunities. Congress's failure to clarify the definition of FAPE in the IDEA, however, has left the courts with the difficult task of interpreting the amount of compliance with a student's IEP that is required to adequately provide the child with a FAPE. The different standards developed by the circuits to evaluate IEP implementation failures have resulted in a significant departure from the IDEA's goal of ensuring the effectiveness of efforts to educate children with disabilities.

To resolve the current struggle among the circuits, Part IV proposed that strict compliance be added to the definition of a FAPE in the IDEA or that courts adopt a uniform standard requiring strict compliance with a student's IEP. The proposed methods promote uniformity and provide a clear and consistent way of evaluating IEP implementation failures. Furthermore, the adoption of either approach would also guarantee that students receive the educational services and accommodations that best cater to their needs. Thus, under this approach, Robert is entitled to the services enumerated in his IEP and the school district is accountable for its failure to provide such services. Only then will the IDEA truly provide children with disabilities equal access to a public education.

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<sup>202</sup> See *supra* Part II.B-C (discussing the IDEA's FAPE requirement).

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