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I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA), widely known as P.L. 94-142 or the Education of the Handicapped Act (EHA), is a federal statute designed to support efforts of state and local agencies to educate children with disabilities. One of IDEA's stated purposes is assuring the availability of a free appropriate public education (FAPE) to all children with disabilities.[1] This free appropriate education is to (1) be provided at public expense, (2) meet State standards, (3) range from preschool through secondary school, and (4) conform with Individualized Education Programs (IEPs).[2] The question of whether or not FAPE is provided is the source of considerable litigation, particularly over the cost of services. The interests of parents and agencies may be best met if parents and educational agencies appreciate the other's interests and constraints and then proceed as partners rather than as adversaries.

II. DETERMINING IF FAPE IS PROVIDED

The Supreme Court took occasion to offer, in *Hudson v. Rowley*,[3] extensive practical interpretation of IDEA. Amy Rowley was a deaf elementary school student who, despite her disability, was an excellent lip reader. Initially the school provided a sign-language interpreter, but when the interpreter

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1. 20 U.S.C.A. § 1400(c).
2. 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, or secondary school education in the State involved, and
   (D) are provided in conformity with the individualized education program.

20 U.S.C.A. § 1401(18).

3. Board of Educ. v. Rowley, 458 U.S. 176 (1982).

reported that Amy did not need him, the school stopped the services. Subsequent requests by the Rowleys for an interpreter were denied, and suit was brought. The lower courts held in favor of the Rowleys, comparing the potential of children with disabilities and those without disabilities. The discrepancy of potential was to be made up by the school. Weighing Amy's potential against the school's responsibility, the Supreme Court found that Amy understood less than her classmates and that her achievement would no doubt accelerate if she understood more. However, as she was performing better than average in her classes and advancing easily from grade to grade, the school was not required to maximize her potential, but simply to provide an educational benefit.

Acknowledging the broad spectrum of disabilities, the Court declined to create any set of educational adequacy criteria, but instead prescribed a flexible two-part query: (1) has the State complied with the procedures of IDEA, and (2) is the IEP reasonably calculated to enable the child to receive educational benefits.[4] This test has important ramifications. First, it suggests that agencies need only provide appropriate opportunities in light of the child's disabilities[5], as opposed to ensuring that some fixed standard of educational achievement is met. Secondly, a detailed analysis of IDEA prompted the Court to conclude (over powerful dissents), that the Act's language "to the maxi-

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4. *Id.* at 206, 208. The Court cited 20 U.S.C.A. § 1415(e)(2) which authorizes trial courts to review the administrative proceedings and additional evidence and base decisions on the preponderance of the evidence. The Court held that *de novo* review was slightly too strong, and that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."

5. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense . . . meet the State's standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act. . . .

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts-that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children."

Id. at 189.

mum extent appropriate"[6] does not require the desirable goal of maximizing a child's potential, but rather to provide maximum access to a public education.[7] In effect, IDEA is to be viewed as a law of process, and not one of outcome.

The decision of the Court reflects a philosophical change from the contemporary perception of educational agencies. Most public schools today operate under an industrial factory mentality.[8] Schools are intended to move all students through the system at the same rate, culminating with a standardized "graduate." A major flaw in this production theory, as applied to public schools, is that schools cannot exercise quality control on the raw materials (students) they are provided. Variations in students and graduates are therefore to be expected, and likewise, the same educational process can not be expected to be successful with each student. Individualization of both process and expectation is warranted. In this analysis, student failure is presumably the fault of an inappropriately individualized process.[9]

Intuitively, the individualization of student educational processes has positive aspects. However, in the case of children with disabilities, compliance with *Rowley* requires more than good intentions.

A. Procedural Compliance

The first prong of the *Rowley* appropriateness test is compliance with procedural requirements. James Jackson, upon release from the East Mississippi State Hospital, where he had

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6. § 1412(5).

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> Desirable though that goal [maximizing the potential of children with disabilities] might be, it is not the standard that Congress imposed upon States . . . Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

Id. at 200.

8. *See* DONNA K. CRAWFORD, THE SCHOOL FOR QUALITY LEARNING: MANAGING THE SCHOOL AND CLASSROOM THE DEMING WAY (1993).

9. Accepting a management theory of education would require significant changes in premises central to the common (public) schools in the United States. The significance of letter grades (which generally reflect only performance in comparison to other students), credit earned on the basis of time in class (and not in relation to any accomplishment or competency), and the notion that children can only receive public education from five to eighteen (not drop out until 16, nor come back after 18) are examples of historical ideas which might need to be sacrificed before a management approach could be implemented in schools.

been evaluated and treated after accosting several classmates, was denied re-entry to his school.[10] James was sixteen when the suit was filed and had been attending special education classes in the school system for five years. The school claimed that James' presence at school would have threatened his and other student's safety. The court, however, held that the exclusion from school was a change in James' educational placement and program, and since it had occurred without prior notice or hearing, it was a per se violation of the Act's procedural requirements. The clear message of this case and others is that failure to meet the procedural requirements of IDEA constitutes FAPE violation.

A case decided after the IDEA's effective date, *W.G. v. Target*,[11] again affirms the importance of procedural requirements. Here a school district convened an IEP meeting without the participation of the student, the parent, the student's teacher, or any representative of the school attended by the student, as required by IDEA.[12] As such, the court found that the student was effectively denied a FAPE.

In *Doe v. Defendant I*[13] however, an IEP which was deficient in several of the same areas as *W.G.* was upheld. In this case, although previously classified as learning disabled, when John Doe entered junior high school, his father requested that John be left without special education or assessment to see how well he adjusted to school. As a result, IEP specified neither what special services were necessary, nor John's current levels of performance. John's parents removed him from public school, enrolled him in a private facility, and sued for the expense, claiming that the school had not complied with IEP requirements. The court did not agree with the parents because of their involvement and requests in the IEP development.

Thus, in *Doe v. Defendant I*, an IEP without performance levels and goals was ruled effective, since the procedural requirements had been followed, although not recorded in the document. In *W.G.*, a complete document had been created, but without the participation of required team members. IEPs are meant to be flexible, and the unique program of John Doe was

10. Jackson v. Franklin County Sch. Bd., 806 F.23 623 (5th Cir. 1986).

11. W.G. v. Board of Trustees of Target Range Sch. Dist., 960 F.2d 1479 (9th Cir. 1992).

12. 20 U.S.C.A. § 1401(a)(20).

13. Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990).

within appropriate parameters.[14] The answer to the first prong of the *Rowley* test, (have IDEA procedures been complied with?) is "yes" in the case where all the formalities have been observed but not recorded in the IEP, and "no" when important substantive elements of the procedural requirements are omitted.

B. Substantive Compliance

Even when procedural requirements of IDEA have been complied with, an IEP which will enable the child to receive educational benefits must also be created. The Court's holding in *Rowley* that children with disabilities need only receive some educational benefit,[15] raises the concern of fiscal abuses. This concern is illustrated in *G.D. v. Westmoreland.*[16] The Westmoreland School District declined to finance the placement of an elementary school child with learning disabilities at a private school, even though several professionals had recommended it. Citing *Rowley* and others, the court concluded that any one FAPE might not be the only choice, the choice of experts, the parent's choice, the first choice, or the best choice. A placement which is reasonably calculated to provide educational benefits, or meets other minimum statutory standards, which the court ruled G.D.'s IEP did, is appropriate.[17] The focus, implies the court, should be on appropriateness of placement and not alternatives preferred by the family.

However, in *Polk v. Susquehanna,*[18] the court, also citing *Rowley*, specifically held that IDEA calls for more than trivial educational benefit. Christopher Polk had several severe developmental disabilities, and was not, as Amy Rowley, advancing easily from grade to grade. This holding was derived from EHA language (substantively unchanged in the IDEA) which requires States to establish a goal of "full educational opportunity"[19] for children with disabilities. The court used this lan-

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14. *Id.*

15. *See supra* text accompanying note 4.

16. G.D. v. Westmoreland Sch. Dist., 930 F.2d 942 (1st Cir. 1991).

17. *G.D.*, 930 F.2d at 948.

18. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988).

19. "[T]here is established [by the State receiving federal assistance] a goal of providing full educational opportunity to all children with disabilities." 20 U.S.C.A. § 1412 (2)(A).

guage to conclude that *Rowley* should be viewed narrowly and that *meaningful benefit* must result from a FAPE.

Unfortunately *Rowley* remains the only extensive Supreme Court treatment of IDEA. As such, the simple requirement of "some benefit" can be read as a relief from duty for educational agencies. If a major purpose of the IDEA truly is providing an appropriate education for disabled children, the *Polk* requirement of "meaningful benefit," while vague, is the more appropriate standard to be applied in determining if a FAPE meets the substantive requirements of the IDEA.

III. COST

It is unquestioned that financing FAPEs for disabled children is very expensive.[20] To defray great costs, school districts often request parental contributions or may eliminate programs citing lack of funds.

A. Parental Contribution

When a child receives services with no educational purpose, parental contributions may be required. An example of this limitation of the "without charge" clause comes from *Guempel v. State*.[21] In *Guempel*, a young woman was placed into a State-run residential facility. The court held that placement was not for educational purposes, but for provision of basic life care. As such, her family could be required to contribute to incurred costs.

Similarly, federal regulations now state that fees incidental to education, which would be required from children without disabilities, are not waived because of disabilities.[22] However,

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20. Nationally, special education costs exceed $30 billion to serve 5 million students. Joseph P. Shapiro, *Separate and Unequal*, U.S. NEWS AND WORLD REPORT, Dec. 13, 1993 at 46.

21. Guempel v. State, 387 A.2d 399 (N.J. 1978), *cert. granted* 405 A.2d 824 (N.J. 1979), *modified* Lefine v. State Dept. of Institutions and Agencies, 418 A.2d 229 (N.J. 1980).

22. *At no cost* means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

34 C.F.R. § 300.14(b)(1) (1992).

The Guempel's would typically be expected to provide for their child's food, clothing and shelter, and could therefore be expected to continue providing for such care even though their daughter was living in a residential facility. *Guempel* at 408.

the implication in *Guempel* is that were an IEP team to conclude that placement in a public or private residential facility was the appropriate setting for educational purposes, the parents would be shielded from contribution.[23]

B. Availability of Funds

Hand in hand with the question of parental contribution goes the problem of fund availability. This is treated in *Mills v. Board of Education*.[24] A school district which, citing insufficient funds, had cut the educational benefits of "exceptional" children was enjoined from the exclusion. In the decision, the court held that:

> [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. 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 in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the . . . public school system whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the [disabled] child than on [other children].[25]

There is to be no preference between children with, and children without, disabilities. Equitable distribution is the key.

IV. CONCLUSION

Exactly what constitutes FAPE is not clearly defined. This is actually advantageous. Disabilities themselves are not clearly defined, but are so varied that creative FAPEs should be developed which serve the best interests of everyone, especially a unique child with a unique disability. Creative solutions might arise out of Title I of the Americans With Disabilities Act (ADA) which applies to the interaction of employers and employees or applicants. The ADA allows employers and their employees with disabilities to bargain over what reasonable accommodations will be made for the disability. If an employer

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23. *See Guempel* at 410.
24. *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).
25. *Id.* at 876.

cannot afford a specific accommodation, it is appropriate for the employee to contribute to the amount the employer is willing to offer. It follows that children with disabilities, when confronted with the issue of insufficient public funds, would be able to contribute the difference the educational agency was truly and equitably unable to provide.

A practical example of this might be a child with a muscular disability who needs special equipment to write assignments and take notes. Using Title I as a model, the school/child interaction could proceed as follows. At the IEP meeting, the school representative would make clear that the school has the responsibility to make reasonable accommodations for known disabilities of otherwise qualified students. The burden would shift to the child or parent to explain the problems associated with the disability and request special equipment. Although the school has the responsibility to provide reasonable accommodations, it is foreseeable that school and child wishes might not coincide, particularly if appropriate equipment is expensive. After a period of good faith bargaining, the parties could decide that the school can contribute only so much without undue hardship. At this point the child should have the opportunity to make up the difference in cost between what the school is able to offer and the accommodation the child would like to receive.

Both parents and educational agencies have constraints which influence their actions. The main concern of parents of an exceptional child is the child's life. Educational agencies have a derivative concern, that of the child's education. In light of this common concern, if parents and schools will appreciate the constraints under which the other operates, and work together as partners to overcome disabilities, free, appropriate educations will be provided, and children will be best served.

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