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When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education.

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COMMENTS

WHEN PARENTS AND EDUCATORS CLASH: ARE SPECIAL EDUCATION STUDENTS ENTITLED TO A CADILLAC EDUCATION?

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I. INTRODUCTION

"Run, Spot, run!"[1] This sentence appeared in one of the first books many children read during the 1960s.[2] However, during that period many

1. Helen M. Robinson et al., *Here We Go*, *in* FUN WITH OUR FRIENDS 39, 42 (1962).
2. *Id.*

public school districts routinely excluded mentally retarded children from classrooms denying them the opportunity to learn to read this simple sentence.[3] Federal, state, and local statutes and policies that permitted and encouraged the exclusion of handicapped children from admission to the public schools were challenged by two pivotal cases: *Mills v. Board of Education*,[4] and *Pennsylvania Association for Retarded Children v. Pennsylvania*.[5] Plaintiffs in both cases were successful in forcing governmental agencies to extend educational opportunities to mentally retarded and other disabled children.[6] Within a few years, additional federal legislation began to more aggressively address the needs of not only mentally retarded children, but of all children with disabilities.[7]

The Individuals with Disabilities Education Act (IDEA) and its statutory predecessors have ignited considerable litigation since the first of the acts became effective.[8] IDEA mandates that all school districts receiving federal education monies must provide for the education of disabled students.[9] While the goal of IDEA is a noble one, its ambiguous language

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3. *See* Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 296 (E.D. Pa. 1972) (noting that 70,000-80,000 school age children were excluded from public schools due to mental disabilities); S. REP. No. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 (revealing that close to two million handicapped children were totally excluded from public schools, and over half of all handicapped children did not receive an appropriate education).

4. *See* 348 F. Supp. 866, 868 (D.D.C. 1972) (alleging that seven mentally retarded children were denied a publicly supported education).

5. *See* 343 F. Supp. 279, 281 (E.D. Pa. 1972) (claiming that statutes denying mentally retarded children a public school education were unconstitutional).

6. *See* Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (requiring the District of Columbia to provide all school age children "a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment"); *Pa. Ass'n for Retarded Children*, 343 F. Supp. at 307 (providing that no school district could "not deny any mentally retarded child access to a free public program of education and training").

7. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(c), 89 Stat. 773, 775 (1975) (stressing that the purpose of the Act is "to assure that *all* handicapped children" receive an education designed to meet their individual needs) (emphasis added).

8. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 310 (1988) (citing the Senate Report in recounting legal challenges to the Education of the Handicapped Act); Bd. of Educ. v. Rowley, 458 U.S. 176, 180 (1982) (referring to District Court decisions in cases brought prior to 1974); Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341, 346-48 (1999) (reporting the increase in litigation in state and federal courts by category and noting a significant increase in the number of special education cases).

9. *See* 20 U.S.C. § 1411(b)(2)(C) (1994 & Supp. V 2000) (outlining the requirements states must meet in order to receive federal funds); *Honig*, 484 U.S. at 308 (maintaining that states must provide a free appropriate public education to all disabled students in order to receive federal financial assistance under the Education of the Handicapped Act).

leads parents and educators to view IDEA's requirements differently.[10] Section 1400(d)(1)(A) states that the purpose of the Act is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."[11]

While education litigation in general has declined in recent years, lawsuits concerning special education issues have continued to increase rapidly.[12] Regardless of the relief parents seek when they file a suit challenging some aspect of their disabled child's education, the overriding issue usually involves what constitutes a "free appropriate public education" (FAPE) under IDEA.[13] Courts consider whether school districts provide a particular student a FAPE by examining the student's individ-

10. *See Rowley*, 458 U.S. at 215-16 (White, J., dissenting) (considering the different contexts in which the word "appropriate" is used in the Education for All Handicapped Children Act); ROBERTA WEINER, P.L. 94-142: IMPACT ON THE SCHOOLS 63 (1985) (discussing conflicting views regarding the term "appropriate," and noting that some may feel *Rowley* offers sufficient guidelines to determine what an appropriate education is while others consider the term "vague and in need of further clarification").

11. 20 U.S.C. § 1400(d)(1)(A) (1994 & Supp. V 2000).

12. *See* Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341, 346-48 (1999) (showing the increase in lawsuits in special education and a decrease in most other areas of education). The number of state court special education cases grew from forty during the 1970s to an estimated 134 during the 1980s. *Id.* at 346. Likewise, there was an increase from twenty-two cases during the 1970s to an estimated 405 cases in the 1980s in the federal court system. *Id.* at 348. The data indicates decreases in lawsuits involving other student issues and desegregation in both state and federal courts. *Id.* Suits dealing with employee issues increased in the state courts, but decreased in the federal courts. *Id.* at 346, 348. Cases, the author labeled "system-level" also increased in both the state and federal court systems; however, the rate of increase was less than the rate of increase in special education cases. Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341, 348 (1999).

13. *See, e.g.*, *Rowley*, 458 U.S. at 186 (considering the meaning of a "free appropriate public education" in granting certiorari); Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1034 (8th Cir. 2000) (alleging that the district's failure to provide a program using the Lovaas method denied an autistic student a free appropriate public education); Indep. Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 559 (8th Cir. 1996) (describing conflicting findings of free appropriate public education when parents requested the school district to pay for learning disabled child's private school tuition); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986) (noting that extended-year services may be necessary in some instances to provide a free appropriate public education to a disabled student).

ual educational plan (IEP),[14] and the procedural steps followed when developing a student's IEP.[15]

IDEA's provisions allow parental involvement in decisions that affect their disabled child's educational program.[16] However, the Act fails to spell out which decisions are assigned to parents and which are the sole responsibility of educators.[17] As parents demand more services for their disabled children, school districts across the country find they either have insufficient resources to meet the demands, or consider the demands in-

14. *See* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 346 (5th Cir. 2000) (noting that a free appropriate public education is determined by a student's IEP); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 255 (5th Cir. 1997) (looking at a disabled child's IEP to determine whether he received services designed to meet his individual educational needs); Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990) (considering whether the student's IEP provided services necessary to ensure that the student received educational benefits).

15. *See* 20 U.S.C. § 1414(d) (1994 & Supp. V 2000) (detailing the substantive requirements of an IEP, the make-up of the IEP team, and the implementation and review of the IEP); 20 U.S.C. § 1415 (1994 & Supp. V 2000) (setting forth the procedural safeguards and parental rights under the Act, including the right to access records, receive notice prior to evaluation, placement, or development of an IEP for a disabled child, and procedures for dealing with disputes); DIV. OF SPECIAL EDUC., TEX. EDUC. AGENCY, NOTICE OF PROCEDURAL SAFEGUARDS RIGHTS OF PARENTS OF STUDENTS WITH DISABILITIES 3-4, http://www.tea.state.tx.us/special.ed/explansaf/ (last visited Oct. 21, 2002) (restating IDEA's provisions for ensuring that parents receive sufficient notice to enable them to attend and participate in ARD meetings along with information concerning the purpose of the meeting, proposed actions, reasons for any proposed actions, and identifying people who will attend the meeting); John Dayton & Lea M. Arnau, *Special Education Law: A Review and Analysis*, *in* FOCUS ON LEGAL ISSUES FOR SCHOOL ADMINISTRATORS 8 (1999) (discussing procedural safeguards designed to protect the rights of disabled students including: (1) the right of a student's parent to examine all school records concerning his/her child, (2) the right to notice prior to the school's evaluation for or placement of a child in special education, or before any changes are made to a child's educational program).

16. *See* 20 U.S.C. § 1415 (b)(1) (1994 & Supp. V 2000) (mandating procedures that permit parents of handicapped children to participate in meetings where proposed actions concerning their child are discussed); *Denton*, 895 F.2d at 979 (noting that parents have a right to assist educational entities in providing an education to handicapped students); Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 615 (E.D. Pa. 1991) (noting that an IEP is prepared during a meeting which includes the child's parent, teacher, and other education personnel); 34 C.F.R. § 300.345 (2001) (requiring public agencies to follow specific procedures that are designed to ensure parents of disabled children are afforded an opportunity to participate in IEP meetings).

17. *See* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 1000 (1st Cir. 1990) (finding that parents were not entitled to reimbursement for expenses incurred by their unilateral decision to enroll their disabled child in a private school); Doe v. Defendant I, 898 F.2d 1186, 1192 (6th Cir. 1990) (finding that parents who removed their child from the public school before an IEP could be implemented assumed the responsibility for the child's private school tuition).

appropriate.[18] The conflict is often exposed when a school district determines a child does not need a service the parent requests, or when a parent requests a specific commercial program.[19] Thus, when parents challenge their child's educational program, the school district must justify not only the services offered to the disabled student, but also why other services are not provided to the student.[20] School districts are required to provide services that are necessary to supply an individual student with a FAPE.[21] However, school districts must also face the reality that if they provide one student with specific accommodations, other students will want the same benefit.[22] In an effort to control costs, school districts must balance the value and effectiveness of a given service for an individual student against the cost of the service and the likelihood other students may demand the same service.[23]

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18. *See* John Dayton & Lea M. Arnau, *Special Education Law: A Review and Analysis*, *in* FOCUS ON LEGAL ISSUES FOR SCHOOL ADMINISTRATORS 7 (1999) (indicating that the financial and administrative burdens of providing some related services often contribute to disputes between school personnel and parents); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 154 (2d ed. 1995) (explaining reasons why parents and school district personnel disagree over what related services are necessary for a disabled child's educational program).

19. *See* Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1038 (8th Cir. 2000) (denying parent's request for Orton-Gillingham based reading program); Adams v. Oregon, 195 F.3d 1141, 1151 (9th Cir. 1999) (finding that the parents of an autistic pre-schooler were not entitled to reimbursement for the cost of providing in-home Lovaas Program); Russman v. Bd. of Educ., 150 F.3d 219, 222 (2d Cir. 1998) (denying parental demand that special education services of a consulting teacher and a teacher aide, as stipulated in a mentally retarded child's IEP, be provided at the private school where she was voluntarily enrolled).

20. *See* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 890 (1984) (finding that, for a child with spina bifida, clean intermittent catheterization was a necessary related service to permit the child to attend school and benefit from educational opportunities); ROBERTA WEINER, P.L. 94-142: IMPACT ON THE SCHOOLS 71 (1985) (questioning to what lengths school districts will have to go to educate disabled students).

21. 20 U.S.C. § 1400 (d)(1)(A) (1994 & Supp. V 2000).

22. *See* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 6-7 (1997) (implying that the reason requested services may be denied is because districts must decide which students should receive resources beyond those resources available to their nondisabled classmates).

23. *See id.* (alleging that school districts consider which students "would benefit *more* from resource infusions" when making decisions regarding the allocation of resources); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 12 (2d ed. 1995) (stating that special education resources were often unavailable or inadequate due to a lack of funding prior to 1975); H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 16 (3d ed. 1990) (proposing that limited funds and trained personnel, as well as political considerations, influence school districts' decisions relating to the education of handicapped children); Bridget A. Flannagan & Chad J. Graff,

This Comment begins by exploring the historical development of providing a free public education to disabled students. Following this background information, an analysis of the statute and subsequent interpretive case law determining the standards for an "appropriate" individual educational plan takes place. Next, this Comment discusses the apparent conflicts that arise between the requirement of the FAPE and Least Restrictive Environment (LRE). Special attention is given to the factors that have influenced court decisions in requiring school districts to provide frequently requested services such as specific methodologies, extended year services, or private school tuition. Finally, recommendations are given that aid school districts in implementing measures to prevent litigation.

II. BACKGROUND

A. *Early Legislation*

In 1966, an amendment to the Elementary and Secondary Education Act of 1965 addressed the educational needs of disabled students for the first time.[24] Prior to the enactment of the 1966 amendment, Senate Hearings found the availability of educational opportunities for handicapped children lacking.[25] Additionally, the Federal Government offered little assistance to the states for the development or maintenance of programs to educate disabled children.[26]

Federal Mandate to Educate Disabled Students Doesn't Cover Costs, FED. LAW., Sept. 2000, at 22, 23 (recognizing that the demand for special education services has exceeded the funding provided by state and federal governments).

24. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 601, 80 Stat. 1191, 1204 (1966) (Title VI-Education of Handicapped Children); *see* Bd. of Educ. v. Rowley, 458 U.S. 176, 179-80 (1982) (stating that the first time Congress attempted to address the education of handicapped children was when it enacted the 1966 Amendments to the Elementary and Secondary Education Act of 1965); Patricia Demler Deloney, Hearing Officer Interpretations of Free Appropriate Public Education for Children with Disabilities 28-29 (1997) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with the Perry Castañeda Library) (observing that the federal government first addressed the needs of handicapped children in 1966 when Congress adopted amendments to the Elementary and Secondary Education Act, and created the Bureau of Education for the Handicapped).

25. *See* S. REP. NO. 94-168, at 5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1429 (finding that the effectiveness of educational programs for handicapped children was insufficient due to the lack of leadership from an administrative body and limited financial resources).

26. *See id.* (observing that the Bureau of Education for the Handicapped was established with the goal of providing leadership to improve the effectiveness of existing programs for disabled students).

The 1966 Amendment was designed to assist states in increasing and improving educational opportunities for the handicapped by providing Federal grants to state educational agencies.[27] State plans were to provide procedures for evaluating the educational achievement of handicapped students.[28] The 1966 Amendment contained specific requirements for programs established by the states to provide for the educational needs of handicapped children.[29] The Education of the Handicapped Act was passed in 1970 to address the special needs of handicapped children, and was separate from the Elementary and Secondary Education Act.[30] Although substantial progress in the education of handicapped children occurred after the 1966 Amendments to the Elementary and Secondary Education Act, by 1975 over half of the eight million disabled children still received either an inappropriate education or no educational services.[31] Therefore, many parents were forced to obtain educational services for their disabled children through private schools and agencies, often at a substantial cost.[32]

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27. *See* H.R. CONF. REP. NO. 89-2309, pt. F (1966), *reprinted in* 1966 U.S.C.C.A.N. 3891, 3898 (explaining that the purpose of the amendment was to initiate, expand, and improve educational programs for handicapped children, and that the Commissioner of Education could make grants to assist the states in their efforts to provide such services to disabled students).

28. *See* 20 U.S.C. § 1412(a)(6)(B) (1994 & Supp. V 2000) (requiring states to implement procedures that ensure disabled students receive nondiscriminatory evaluations); H.R. CONF. REP. NO. 89-2309, pt. A (1966), *reprinted in* 1966 U.S.C.C.A.N. 3891, 3893 (requiring state education agencies to meet certain requirements to assure that federal funds were used to supplement or increase expenditures made by the states in providing educational services for disabled students); 34 C.F.R. § 300.346(a) (2001) (including a requirement that IEPs include information reflecting the child's current level of educational achievement).

29. *See* Honig v. Doe, 484 U.S. 305, 310 n.1 (1988) (stating that the Act "merely establish[ed] an unenforceable goal requiring all children to be in school") (citing Senator Schweiker's remarks in 121 CONG. REC. 37417 (1975)); H.R. CONF. REP. NO. 89-2309, pt. F, *reprinted in* 1966 U.S.C.C.A.N. 3891, 3898 (listing requirements for state plans to educate handicapped children which include: assurances that funds are spent to improve educational services to disabled students, that children in private schools could participate, programs would be evaluated annually, provisions for the accounting of spent funds to the commissioner, and for teacher training).

30. *See* S. REP. NO. 94-168, at 5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1429 (reciting the historical background of the federal government's efforts to assist the states in developing educational programs to meet the unique needs of handicapped children).

31. *See* S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432. (citing statistics that of the eight million disabled children under the age of twenty-one, only half had access to an appropriate educational program, while 2.5 million received an inappropriate education, and 1.75 million received no educational services).

32. *See* S. REP. NO. 94-168, at 41 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1464 (detailing the lack of educational opportunities for vast numbers of handicapped children

Congress recognized that a lack of financial resources hampered a state government's ability to fully implement programs to meet the needs of disabled students.[33] In an effort to address deficiencies in prior federal statutes, and in response to holdings in federal court cases, Congress enacted the Education for All Handicapped Children Act (EAHCA) of 1975.[34] EAHCA required that schools provide a FAPE to all handicapped students, "regardless of the severity of their handicap."[35] Full educational opportunities required that all handicapped children receive a FAPE, and that all handicapped children receive an education alongside their nondisabled peers to the maximum extent possible.[36] The Act also defined a FAPE and enumerated the elements of an IEP.[37]

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as the basis for the federal government's need to assist states in delivering appropriate educational services to disabled children).

33. *See* S. REP. NO. 94-168, at 7 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1431 (asserting that the states lacked the resources necessary to implement educational programs courts recognize as appropriately meeting the needs of disabled students).

34. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982) (attributing the passage of the Act of 1975 to the impetus created by holdings in federal court cases that proscribed the exclusion of handicapped children receiving a publicly supported education); S. REP. NO. 94-168, at 4-5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1428-29 (noting that the federal government's role was to provide grants to the states for the development of appropriate programs for handicapped children in order to address deficiencies in acts previous to Education for All Handicapped Children Act of 1975).

35. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612(2), 89 Stat. 773, 780-81 (1975) (requiring each state to develop a plan for identifying and providing educational opportunities for all handicapped children between the ages of three and twenty-one who reside in the state "regardless of the severity of their handicap").

36. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 614(C), 89 Stat. 773, 785 (1975) (setting forth the elements required to provide full educational opportunity to disabled students); *see also* S. CONF. REP. NO. 94-455, at 27 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1480, 1483-1508 (discussing differences between the House and Senate bills). The committee agreed that instructional services could be delivered to handicapped children in classrooms, homes, hospitals and institutions. *Id.* at 1483. However, the statute also required that disabled children be educated to the maximum extent possible with their nonhandicapped peers. *Id.* Thus, only when the "nature or severity of the handicap is such that [educating a disabled child] in regular classes" is not appropriate can educational services be delivered in a setting other than the regular classroom. *Id.*

37. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 4(a)(18-19), 89 Stat. 775 (1975) (defining a FAPE and an IEP). Special education and related services constitute a FAPE when it "(A) [has] been provided at public expense, under public supervision and direction, and without charge, (B) meet[s] the standards of the State educational agency, (C) include[s] an appropriate preschool, elementary, or secondary school education in the State involved, and (D) [is] provided in conformity with the individualized education program. . . ." *Id.* § 4(a)(18). An IEP is a written plan for the education of a handicapped child developed in a meeting with the teacher, parents or guardian, and a qualified representative of the education agency or school district. *Id.* § 4(a)(19). The IEP shall contain:

Nevertheless, school districts continued to exclude disabled students.[38] For instance, one school district attempted to exclude a severely multi-handicapped child from the school based on a claim that he was not "capable of benefiting" from an educational program.[39] The EAHCA, however, required that all students have access to a FAPE.[40] This provision has been referred to as a "zero reject" policy, and requires the states to provide educational opportunities for all children.[41] After twenty years of federal legislation and court battles, most disabled children in this country gained access to a FAPE.[42] This Act, with numerous amendments added in 1991 and 1997, is the basis of what is now known as the Individuals with Disabilities Education Act.[43]

(A) a statement of the present levels of educational performance of such child,
(B) a statement of annual goals, including short-term instructional objectives,
(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
(D) the projected date for initiation and anticipated duration of such services, and
(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Id.

38. *See* Timothy W. v. Rochester, N.H. Sch. Dist., 875 F.2d 954, 973 (1st Cir. 1989) (ordering the district court to retain jurisdiction over the case until an appropriate IEP was implemented by the school district). The court noted that IDEA and New Hampshire statutes mandated that *all* handicapped children receive access to programs that meet their needs. *Id.*

39. *See id.* at 956 (relating that the school district decided that due to the severity of the Timothy's multiple disabilities, educational efforts would not benefit the child); RICHARD F. DAUGHERTY, SPECIAL EDUCATION: A SUMMARY OF LEGAL REQUIREMENTS, TERMS, AND TRENDS 37-39 (2001) (detailing Timothy's parents eight year struggle with the New Jersey Department of Education's continuous refusal to secure an educational program for their severely handicapped son).

40. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(b)(8-9), (c), 89 Stat. 775 (1975) (propounding the purpose of the Act is for the federal government to assist the states to provide educational opportunities to *all* handicapped children); S. REP. NO. 94-168, at 3 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427 (indicating that states' eligibility for assistance under P.L. 94-142 were designed to assure that *all* handicapped children would have educational opportunities).

41. *See* RICHARD F. DAUGHERTY, SPECIAL EDUCATION: A SUMMARY OF LEGAL REQUIREMENTS, TERMS, AND TRENDS 39 (2001) (characterizing the provision of the Act that requires that the states provide educational opportunities for all children as the "zero reject" clause).

42. *See* H.R. 3268, 104th Cong. § 601(c)(5) (2d Sess. 1996), WL 1996 CONG US HR 3268 (describing the progress made in the twenty years since the federal government first addressed the needs of handicapped children through legislation).

43. *See* Heldman v. Sobol, 962 F.2d 148, 150 n.1 (2d Cir. 1992) (noting that the Education of All Handicapped Children Act continues as the foundation of IDEA).

B. *IDEA*

IDEA has well defined procedural provisions calculated to ensure that disabled students receive an appropriate education.[44] The Act mandates specific times when school districts must provide a copy of the procedural safeguards to parents.[45] Among other things, the provisions require school districts to notify and invite parent participation in planning an educational program for their disabled child.[46] As a result, the child's parent is required to give permission before a district can evaluate the child.[47] Parent permission is also required before a child is placed in a special education program.[48] The parents may become further involved in the process when the child's IEP is created.[49] Many procedural and substantive conflicts arise between parents and educators over the writing of an IEP.[50]

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44. *See* LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 237-55 (2d ed. 1995) (discussing procedural requirements applicable to each stage of the special education process from initial referral through delivery of services).

45. 20 U.S.C. § 1415(d)(1) (1994 & Supp. V 2000) (requiring districts to make available a copy of the procedural guidelines to parents when a child is first referred for evaluation of a suspected disability, with each notice of an IEP meeting, for any re-evaluation, and when filing a complaint under the provisions of this act).

46. 20 U.S.C. § 1415(a), (b)(3) (1994 & Supp. V 2000) (mandating that parents receive a written notice before an educational entity proposes to evaluate, place, develop an IEP, implement an educational program, or change services provided to a student, to enable the parents to participate in the decisions that affect their disabled child); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985) (observing that mandated procedures are intended to permit the exchange of information and ideas necessary to develop an appropriate IEP for a disabled student).

47. 20 U.S.C. § 1414(a)(1)(C)(i) (1994 & Supp. V 2000); 34 C.F.R. § 300.505(a)(1)(i) (2001).

48. 34 C.F.R. § 300.505(a)(1)(ii) (2001).

49. 20 U.S.C. § 1414(d)(1)(B)(i) (1994 & Supp. V 2000); *see also* Quackenbush v. Johnson City Sch. Dist., 716 F.2d 141, 147 (2d Cir. 1983) (commenting that the procedures mandated by the statute ensure parents an opportunity to participate in the formation of the IEP for their disabled child); 34 C.F.R. § 300.344(a)(1) (2001) (identifying parents as members of IEP committees); 34 C.F.R. § 300.345 (2001) (enumerating the steps school districts must follow to ensure that parents have an opportunity to attend IEP meetings); DIV. OF SPECIAL EDUC., TEX. EDUC. AGENCY, NOTICE OF PROCEDURAL SAFEGUARDS RIGHTS OF PARENTS OF STUDENTS WITH DISABILITIES 3-4, http://www.tea.state.tx.us/special.ed/explansaf/ (last visited Oct. 21, 2002) (identifying parents as members of the ARD committee, if they choose to attend); RICHARD F. DAUGHERTY, SPECIAL EDUCATION: A SUMMARY OF LEGAL REQUIREMENTS, TERMS, AND TRENDS 46 (1980) (recognizing that parents of disabled children must be given an opportunity to participate in the development of their child's IEP, but that decisions regarding the plan are made by the team and no one person can unilaterally decide what services will be provided).

50. *See* Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1032-33 (8th Cir. 2000) (detailing substantive modifications made to an autistic student's IEP); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985) (relating failure of school district to notify parent

Some of the substantive conflicts concern what services or personnel are provided to implement the IEP.[51] Other conflicts arise over the methodology used to provide instruction to the child.[52] Conflicts that arise over instructional methods may also include disagreement about the level of educational benefit the disabled child is entitled to receive.[53] Generally, courts have found that an IEP that is reasonably calculated to provide some educational benefit is sufficient to meet the statutory re-

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of her procedural rights at mandated times, and failure to inform parent of her right to request changes if she disagreed with her son's IEP); Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1354 (5th Cir. 1983) (finding that parents' refusal to participate in the IEP process undermined the provisions of the Education of All Handicapped Children Act); Michael P. v. Corpus Christi Indep. Sch. Dist., No. 387-SE-600, at 5 (Tex. Educ. Agency July 23, 2000), www.tea.state.tx.us/special.ed/hearings/pdf/387600.pdf (last visited Oct. 21, 2002) (determining that parents were given an opportunity to meaningfully participate in the IEP meeting even though the school district failed to provide the parents with the results of their child's evaluation).

51. *See* W.A. v. Pascarella, 153 F. Supp. 2d 144, 155 (D. Conn. 2001) (deciding that the school district did not violate a disabled student's rights by not placing a special education teacher in the regular education classroom to co-teach the curriculum); Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 622 (E.D. Pa. 1991) (ordering the school to provide speech therapy as a necessary related service and reimburse the parents for costs incurred for past private speech therapy); Cothern v. Mallory, 565 F. Supp. 701, 707 (W.D. Mo. 1983) (requesting additional speech and language services).

52. *See* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349-50 (5th Cir. 2000) (deciding on a parent's request that the district include reading instructions using the Alphabetic Phonics Program in a disabled student's IEP); E.S. v. Indep. Sch. Dist. No. 196 Rosemount-Apple Valley, 135 F.3d 566, 569 (8th Cir. 1998) (deciding parents right to demand one-on-one reading instruction using Orton-Gillingham methodology for their disabled child); Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 293 (7th Cir. 1988) (deciding whether parents can require the school district to implement cued speech as part of a hearing impaired child's IEP, rather than the district's offer of a total communication-based program); Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501, 512 (E.D.N.Y. 1996) (deciding whether school district was required to provide reading instruction using Orton-Gillingham methods as requested by the parents of a disabled student).

53. *See* Tucker v. Calloway County Bd. of Educ., 136 F.3d 495, 505 (6th Cir. 1998) (stating that an instructional method employed by a school will be upheld if it is reasonably calculated to provide educational benefit, however, such benefit does not mean potential maximizing); Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 188 (7th Cir. 1983) (ruling, in a case concerning the denial of diploma to special education student who did not pass a minimal competency test, that the Act only requires access to specialized and individualized educational services, not specific results); Indep. Sch. Dist. No. 283 v. S.D., 948 F. Supp. 860, 879 (D. Minn. 1995) (noting that schools are required to offer a basic floor of opportunity that allows the child to progress with his education but does not require that educational benefits maximize the child's potential); Laughlin v. Cent. Bucks Sch. Dist., No. Civ. A. 91-7333, 1994 WL 8114, at *2 (E.D. Pa. Jan. 12, 1994) (mem.) (reiterating that an educational program for a disabled child must provide more than trivial or de minimis educational benefit).

quirement for a FAPE.[54] Thus, the basic IEP requirement is for the district to provide some special education and related services to children with disabilities that will provide an opportunity for the children to benefit from their educational experience.[55] Therefore, whether an IEP provides requisite educational benefit is part of a larger issue of what constitutes a FAPE.[56]

A "free appropriate public education" is defined by statute as an educational opportunity that provides special education and related services.[57] Under IDEA, special education refers to "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.[58] Disagreement over what services a child requires or what specific methodological program should be implemented are substantive issues for which the statute offers limited guidance.[59] Some of the methodologies requested by parents are actually commercial programs that are only

54. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 200-01 (1982) (enunciating the "some educational benefit" standard by which courts decide whether an IEP affords a disabled student a FAPE); *Tucker*, 136 F.3d at 505-06 (applying the "reasonably calculated to provide" a disabled child with an educational benefit standard to an IEP and holding that the school district's proposed placement constituted a FAPE for an autistic child).

55. *See Rowley*, 458 U.S. at 195 (explaining the need for disabled students to receive "some specialized educational services" in order for a proposed educational program to constitute a FAPE); Ahern v. Keene, 593 F. Supp. 902, 915 (D. Del. 1984) (noting that the school district offered a disabled student guidance and counseling services in addition to other special educational opportunities that provided some educational benefit, which thus constituted a FAPE).

56. *See Rowley*, 458 U.S. at 210 (finding that a hearing impaired child who received "personalized instruction and related services" to meet her unique educational needs received some educational benefit and was thus offered a FAPE); Battle v. Pennsylvania, 629 F.2d 269, 287 (3d Cir. 1980) (concluding that a disabled student was denied a FAPE when the state failed to consider the unique needs of the student by arbitrarily limiting instructional services to 180 days each year).

57. 20 U.S.C. § 1401(18) (1994 & Supp. V 2000).

58. 20 U.S.C. § 1401(16) (1994 & Supp. V 2000).

59. *See Rowley*, 458 U.S. at 188-189 (noting that the statutory definition of what constitutes an appropriate education "tends toward the cryptic rather than the comprehensive," and that the statute does not provide a substantive standard for determining what level of education must be provided to the child).

available through the company's certified therapists or technicians,[60] while others may only be provided in private residential schools.[61]

Several IDEA provisions are ambiguous and thus open to different interpretations.[62] Different results in similar cases have contributed to the continued proliferation of litigation.[63] For example, the Eighth Circuit denied a parental request that the school district provide a specific therapeutic regime (Lovaas Program) for their child.[64] However, an earlier decision by a district court required a school district in Pennsylvania to reimburse parents for costs incurred when they provided the home based

60. *See* Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1032 (8th Cir. 2000) (requesting that the school district provide Lovaas therapy for forty hours a week as the instructional method for an autistic child); Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 653 (8th Cir. 1999) (disputing the district's refusal to provide controversial therapy advocated by the Institutes for the Achievement of Human Potential to an autistic child); E.S. v. Indep. Sch. Dist., No. 196 Rosemount-Apple Valley, 135 F.3d 566, 568 (8th Cir. 1998) (relating an allegation that the school district violated IDEA by refusing to provide the Orton-Gillingham method *individually* to a dyslexic student); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 976 (4th Cir. 1990) (noting that a private contractor coordinated an educational program demanded by the parents of an autistic child); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1156 (5th Cir. 1986) (disagreeing over whether extended year services and transportation would be provided to a mentally retarded student).

61. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 363 (1985) (discussing whether a private school is the "least restrictive adequate program" available to meet a disabled child's needs); Doe v. Bd. of Educ., 9 F.3d 455, 456 (6th Cir. 1993) (discussing a parent's claim that Brehm School was the only appropriate educational placement for a neurologically impaired student's needs).

62. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 185 (1982) (determining what services a governmental agency must provide to meet the free appropriate public education requirement); THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 28 (1993) (pointing out that Congress was not specific in defining what determines whether educational opportunities are appropriate); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 109 (2d ed. 1995) (observing that the federal statutes do not adequately define what constitutes an appropriate education for disabled children).

63. *See* LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 21 (2d ed. 1995) (recalling that hundreds of cases have sought to determine what a FAPE requires). *Compare* K.R. v. Anderson Cmty. Sch. Corp., 125 F.3d 1017, 1019 (7th Cir. 1997) (reversing a lower court decision by denying the costs of an instructional assistant to facilitate the implementation of a disabled child's IEP at a private school because there was not an obligation for the state to expend funds to ensure comparable educational opportunities to children who voluntarily enrolled in private schools), *with* Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1438 (10th Cir. 1997) (holding that a hearing impaired student enrolled in private school was entitled to the services of a sign language interpreter on the private school campus to the extent the child would receive the same service at the public school).

64. *See* Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1038 (8th Cir. 2000) (holding that the parents were not entitled to reimbursement for costs incurred when they unilaterally decided to provide the in-home Lovaas Program for their autistic child).

Lovaas Program for their child.[65] Procedural provisions of the Act permit parents to appeal decisions made in Admission, Review, and Dismissal (ARD) meetings through the due process procedures established by each state before they seek a judicial remedy.[66] These procedures include a requirement that states offer parents and school personnel an opportunity to settle their dispute through mediation prior to initiating formal hearings.[67]

Another conflict that often arises when developing an educational program for a disabled student is whether educational and related services are provided in the LRE in order to provide a FAPE.[68] In *John L. v.*

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65. *See* Del. County Intermediate Unit No. 25 v. Martin K., 831 F. Supp. 1206, 1231 (E.D. Pa. 1993) (ordering the school district to provide reimbursement to parents for both past and future Lovaas Program expenses for their handicapped son).

66. *See* 20 U.S.C. § 1415(e-i) (1994 & Supp. V 2000) (outlining sequence of steps parents or school districts must follow to obtain a final decision beginning with mediation when a due process hearing is requested through filing a civil action in state court or a United States District Court); Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L. REV. 35, 51 (1996) (outlining procedure by which parents and school districts may obtain relief from a hearing officer's decision).

67. *See* 20 U.S.C. § 1412(5) (1994 & Supp. V. 2000) (mandating that disabled children be educated to the maximum extent possible with nondisabled children and should be removed from regular education "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"); H.R. REP. NO. 104-614, at 35 (1996), 1996 WL 328569. (demonstrating the committee's belief that litigation is reduced in states that require mediation and encouraging the early resolution of conflicts by requiring all states to offer mediation as a means for parents and school districts to resolve conflicts occurring under IDEA).

68. *See* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 989 (1st Cir. 1990) (reiterating an earlier hearing decision that found a private school did not offer opportunity for mainstreaming and was not, therefore, the LRE); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1051 (5th Cir. 1989) (allowing a disabled child to receive instruction in a regular classroom was not the LRE necessary to confer a FAPE on a Down's syndrome child because the educational experience was not beneficial to the child); Girty v. Sch. Dist., 163 F. Supp. 2d 527, 536-37 (W.D. Pa. 2001) (discussing techniques that could enable a mentally retarded child to receive some educational benefit from instruction in a regular education classroom for a portion of the day); Espino v. Besteiro, 520 F. Supp. 905, 914 (S.D. Tex. 1981) (determining that a child who required an air conditioned environment due to an inability to regulate his body temperature was not provided appropriate services when the district provided an air-conditioned cubicle rather than an air-conditioned classroom because the physical modification prevented the child from interacting with nondisabled peers in his class); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 56 (N.D. Ala. 1981) (ordering a school district to continue to offer educational services to a severely retarded student until age twenty-three in a manner that integrates the student with nonhandicapped students because the district had not offered past educational opportunities in the least restrictive environment); Sylvie M. v. Bd. of Educ., 48 F. Supp. 2d 681, 697 (W.D. Tex. 1999) (finding that an out-of-state residential school was not the LRE); Harrell v. Wilson County Schs., 293 S.E.2d 687, 694 (N.C. Ct. App. 1982) (comparing the educational

Lake Travis Independent School District,[69] the parent of a disabled preschooler objected when the school district placed the child in a classroom with two other handicapped children.[70] The mother unilaterally withdrew the child from the public school and placed him in a private, church affiliated preschool where he would be exposed to nondisabled peers.[71] The school district argued that the private school did not offer an appropriate education in the least restrictive environment because, among other things, the teachers at the private school who were providing special education services were not certified as special education teachers.[72] The Due Process Hearing Officer ordered the school district to reimburse the parents the amount of the private school tuition.[73] However, the district court reversed, finding that the program offered by the public school "satisfied the minimum educational standards set out in the IDEA."[74]

The Texas Education Code provides the statutory foundation for permitting expenditure of public funds for private residential programs and contracts for educational services that a school district cannot supply itself.[75] The Texas statute tracks the federal statute and designates the person or agency responsible for implementing regulations governing the delivery of educational services to disabled students.[76] Disputes in Texas,

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opportunities offered in public school with those offered at a residential school for hearing impaired children, and finding that the public school setting was the LRE).

69. No. 315-SE-699 (Tex. Educ. Agency Apr. 26, 2000), www.tea.state.tx.us/special.ed/hearings/pd315699.pdf (last visited Oct. 21, 2002).

70. *See* John L. v. Lake Travis Indep. Sch. Dist., No. 315-SE-699, at 1-2 (Tex. Educ. Agency Apr. 26, 2000), www.tea.state.tx.us/special.ed/hearings/pd315699.pdf (last visited Oct. 21, 2002) (detailing the parent's efforts to establish that the program offered by the school district was not appropriate and was not offered in the LRE, and as such, her disabled son was not offered a FAPE).

71. *See id.* at 14 (stating that the mother unilaterally withdrew the child from the public school's early childhood special education class and placed him in Lakeway Christian School).

72. *See id.* at 15 (referring to the school district's argument that the personnel at the private school were not as well qualified as those employed by the public school to deliver specialized services).

73. *See id.* at 16 (ordering the school district to reimburse Julieanne L. $3,055 for private school tuition).

74. *See id.* (holding that it was not necessary to remove John from the public school in order to provide a FAPE in the LRE because the district's IEP was sufficient).

75. TEX. EDUC. CODE ANN. § 29.008(a), (d) (Vernon Supp. 2000) (providing procedures by which public funds may be used to contract for private services and residential programs for disabled students).

76. 20 U.S.C. § 1412(a)(10)(C) (1994 & Supp. V 2000) (stating that local educational agencies are generally not responsible for the cost of private school tuition when the parent has unilaterally enrolled their child in private school when the public school offered a FAPE).

arising under both state and federal statutes, raise the same issues addressed in courts throughout the country.[77] Administrative hearing officers and courts examine both procedural requirements and substantive requirements when deciding whether to require a school district to provide a specific program, service, or residential placement requested by a parent.[78] However, even when some procedural requirement is lacking, a court may deny relief if it finds the educational services offered provide the handicapped child with a FAPE.[79] This may happen when a student fails to avail himself or herself of the educational opportunities offered by a school, the parents unilaterally withdraw their child from a public school, or the parents refuse to participate in a meaningful way in Admission, Review, and Dismissal Committee Meetings.[80]

IDEA's requirement to provide a free appropriate public education in the least restrictive environment is subject to differing interpretations by

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77. *Compare* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247 (5th Cir. 1997) (affirming a lower court's decision denying a parental request for tuition reimbursement for private school tuition after unilaterally placing a disabled child in an out-of-state residential treatment facility), *with* Indep. Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 559 (8th Cir. 1996) (discussing a parent's claim that the school district should pay private school tuition for a learning disabled child).

78. *See* Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242, 1256, 1258 (D. Vt. 1996) (granting reimbursement for residential placement based upon the school district's failure to provide an IEP that was reasonably calculated to provide educational benefit to a disabled child).

79. *See* Doe v. Defendant I, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (finding that the school district did offer a disabled student a FAPE even though the IEP lacked current academic levels and provisions for measuring achievement by objective methods because the parents participated in the creation of the IEP, and the IEP was deemed likely to confer educational benefit upon the child).

80. *See* 20 U.S.C. § 1412(a)(10)(C)(i) (1994 & Supp. V 2000) (stating that the public schools are not required to pay private school tuition if they offer a disabled student a FAPE); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 1000 (1st Cir. 1990) (failing to grant petitioners' request for private school tuition reimbursement when the parents had unilaterally enrolled their son in a private school, and failed to show the public school's IEP was inappropriate); Scokin v. Texas, 723 F.2d 432, 438 (5th Cir. 1984) (reiterating previous opinions holding that parents are not entitled to reimbursement for private school tuition when they unilaterally withdraw their children from public schools, and enroll them in private educational facilities); Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1353 (5th Cir. 1983) (denying a parent's claim for reimbursement for private counseling sessions and private school tuition when parents refused the services offered by the school district that would have provided a FAPE); Brett v. Goshen Cmty. Sch. Corp., 161 F. Supp. 2d 930, 947 (N.D. Ind. 2001) (denying relief to an emotionally disturbed former student because he failed to take advantage of numerous services and instructional opportunities offered by the defendant school district, including counseling and out-of-state residential schooling of his choice).

parents, educators, school districts, state education agencies, and courts.[81] The LRE requirement is often an issue when parents demand private therapists or private residential placement for a child with a disability because the placement precludes the child from contact with his or her nondisabled peers.[82] On the other hand, conflicts may also arise when districts attempt to provide special education services for disabled children in self-contained classes or on separate campuses where contact with nondisabled students is minimal or nonexistent.[83] Thus, educators and parents must balance a child's individual, specialized needs against the laudable goal of educating disabled and nondisabled students together.[84]

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81. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 210 (1982) (holding that the lower court erred in ordering the school district to provide a sign language interpreter in the regular classroom for all academic subjects as a required related service for a hearing impaired child to receive a FAPE).

82. *See* Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 661 (8th Cir. 1999) (explaining that the private educational program sought by a disabled student's parents failed to meet the requirement that disabled children be educated with nondisabled children "to the maximum extent possible"); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 614 (8th Cir. 1997) (finding that it was unnecessary for a learning disabled student to be segregated from nondisabled students to receive a FAPE, that the child's behavior problems were due to difficulties with his academic classes rather than his interactions with nondisabled classmates, and denying the parent's request for private school tuition reimbursement for that reason); Scanlon v. San Francisco Unified Sch. Dist., No. C 91-2559 FMS, 1994 WL 860768, at *7 (N.D. Cal. Apr. 14, 1994) (order granting summary judgment and denying motion to enforce settlement) (discussing the lack of mainstreaming opportunity when a disabled child is the *only* student at a private educational facility and thus totally isolated from her peers, and holding that the public school offered a FAPE).

83. *See* Oberti v. Bd. of Educ., 995 F.2d 1204, 1223 (3d Cir. 1993) (finding a separate special education program did not meet the LRE requirement, and that a Down's syndrome child could receive a FAPE in a regular classroom setting); Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 878 (4th Cir. 1989) (recognizing parents' desire to have autistic child educated on high school campus with nondisabled students, but finding that such a placement would not be the LRE available that would confer appropriate educational benefits on the child); Beth B. v. Van Clay, 211 F. Supp. 2d 1020, 1034 (N.D. Ill. 2001) (finding that a curriculum substantially different from the regular education curriculum provided in a regular education setting was not appropriate, and a more restrictive setting was appropriate), *aff'd*, 282 F.3d 493 (7th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3129 (July 2, 2002) (No. 02-172).

84. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1052 (5th Cir. 1989) (confirming that schools must consider the needs of a disabled child *and* the needs of nondisabled students when determining the appropriate placement for the disabled child); *Scanlon*, 1994 WL 860768, at *7, 10 (recognizing that the school district's IEP included an aide who was available to assist the physically disabled student and allowed her to receive an appropriate education in a mainstream setting, rather than in the isolated, segregated setting requested by her guardians).

III. ANALYSIS

Parents initiate the majority of administrative hearings; however, they do not prevail as frequently as school districts.[85] When disputes become the subject of judicial proceedings school districts are favored in about half the cases, parents in 41% of the cases, and a split decision is rendered in the remainder of the cases.[86] Hearing officers and courts consider procedural and substantive requirements when determining whether a disabled child's educational needs are met by a school district.[87] In some cases, parents are granted or denied relief based solely on a school district's compliance with procedural requirements.[88] Other times, when a school district has not complied with procedural requirements, a parent may still face denial of relief if the adjudicator finds that substantive requirements were met and the disabled child received a specialized educational program tailored to the child's individual needs.[89] Thus, when parents challenge a school district's proposed plan for educating a dis-

85. *See* James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD 469, 474 (1999) (noting that in 60% of administrative due process hearings school districts were favored, while parents prevailed in 32% of the cases); Patricia Demler Deloney, Hearing Officer Interpretations of Free Appropriate Public Education for Children with Disabilities, 113, 149 (1997) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with the Perry Castañeda Library) (reporting that parents prevailed in about only 25% of the cases heard by Texas hearing officers between 1978 and 1995).

86. *See* James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD 469, 474 (1999) (providing statistics that indicate prevalence of decisions in school districts' favor in 52% of the cases at the trial level in federal courts, 60% of cases appealed in the federal system, 53% of the cases in state courts, and a total of 49% for all cases in state and federal courts).

87. *See Daniel R.R.*, 874 F.2d at 1041-51 (examining alleged procedural violations and substantive inadequacies alleged by the parents of a Down's syndrome child to determine whether he was offered a FAPE); W.A. v. Pascarella, 153 F. Supp. 2d 144, 150-51 (D. Conn. 2001) (noting that procedural requirements are considered equally important as substantive rights under IDEA, and finding that the disabled student had received a FAPE); Gerstmyer v. Howard County Pub. Sch., 850 F. Supp. 361, 364-65 (D. Md. 1994) (noting that the defendant school district failed to provide a FAPE because they did not formulate an IEP that was reasonably calculated to confer educational benefit on a disabled child, and they had violated the procedural safeguards of IDEA).

88. *See* Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242, 1256 (D. Vt. 1996) (finding that the IEP developed by the school district was not likely to confer educational benefits on a disabled child because it: (1) did not indicate specific levels of functioning; (2) contained no annual goals; (3) did not detail services to be offered; (4) had no provision for the use of objective evaluation in academic areas; and (5) did not address the child's severe language disorder).

89. *See* Doe v. Defendant I, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (deciding that an IEP that lacked some of the required elements was, nonetheless, calculated to confer educational benefit on the student, and thus constituted a FAPE).

abled child, adjudicators first determine whether procedural requirements of IDEA have been followed, and then determine whether a proposed IEP is "reasonably calculated" to afford the child education benefits.[90]

A. *Procedural Due Process*

IDEA has several provisions requiring school districts to follow specified procedures when developing and implementing an educational program for a disabled student.[91] These procedures identify persons who are required or permitted to participate in planning a student's special education program.[92] Additionally, statutes set forth evaluation guidelines, mandate what topics must be addressed in the IEP, and require an annual review of the student's program.[93] These measures are designed to ensure that the individual needs of each disabled student are met.[94]

Parents who challenge the sufficiency of their disabled child's educational program may attain relief for egregious violations of procedural due process.[95] However, procedural flaws alone do not automatically in-

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90. *See Gerstmyer*, 850 F. Supp. at 364-65 (relating that there are two sets of circumstances under which a child is considered to be denied access to a FAPE). If a school system violates the procedural requirements of IDEA to the detriment of the "child's right to a free public education," or an IEP is not "reasonably calculated" to confer educational benefits on a disabled child then an adjudicator may find that the child has been denied a FAPE. *Id.*

91. *See* 20 U.S.C. § 1414(a) (1994 & Supp. V 2000) (mandating that parents receive written notice before the school district takes any action that involves the evaluation or identification of a child for special education, and that parental permission is required prior to the administration of any assessment or placement into special education); 20 U.S.C. § 1414(d) (1994 & Supp. V 2000) (listing the elements that must be included in an IEP, and the people who are members of the IEP team); 34 C.F.R. § 300.504(b)(iii) (2001) (requiring parental consent before a child is admitted into a special education program).

92. *See* 20 U.S.C. § 1414(d)(1)(B) (1994 & Supp. V 2000) (explaining that the IEP team must include: (1) the parent of a disabled child; (2) the child's regular education teacher; (3) a special education teacher; (4) a school district representative with knowledge of curriculum, resources, and the needs of disabled children; and (5) a person who can interpret evaluation results).

93. *See* 20 U.S.C. § 1414(d) (1994 & Supp. V 2000) (enumerating documentation that is required in the IEP, including but not limited to: (1) a statement of the disabled child's current education achievement; (2) goals and objectives with objective standards by which the child's progress will be measured; (3) identified special education services, related services, and modifications proposed to meet the child's individual needs; and (4) assurance that the student is offered educational opportunities in the least restrictive environment).

94. *See* 20 U.S.C. § 1415(a) (1994 & Supp. V 2000) (emphasizing that the Act's procedural safeguards are designed to guarantee a FAPE to disabled students).

95. *See* Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (finding an autistic child was denied a FAPE because parents were not given access to all the child's records as they had requested, were not told the child might be autistic, and were

dicate that a disabled child was deprived of a FAPE.[96] The Sixth Circuit held that even though an IEP lacked several required elements, it nonetheless conformed to statutory requirements because the parents were involved in its formation.[97] Therefore, a court or hearing officer may find a child's program appropriate even though procedural violations have occurred.[98]

B. *Substantive Requirements and Standards*

Substantive due process examines the educational program actually offered to a handicapped child to decide whether IDEA mandates are met.[99] The court, in examining a student's IEP, does not compare educa-

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thus not able to meaningfully participate in the creation of an IEP for their child); Wolfe v. Taconic-Hills Cent. Sch. Dist., 167 F. Supp. 530, 535 (N.D.N.Y. 2001) (finding that gross procedural violations constituted a failure on the part of the defendant school district to assure a FAPE to a learning disabled student); Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242, 1255-56 (D. Vt. 1996) (declaring that IDEA does not permit "transitional" IEPs, thus there was a procedural flaw that contributed to a finding that the IEP lacked the necessary requirements to render it capable of conferring educational benefits on a disabled student who was not offered a FAPE).

96. *See* Heather S. v. Wisconsin, 125 F.3d 1045, 1059 (7th Cir. 1997) (noting that a disabled student is not automatically denied a FAPE when procedural requirements have not been met); W. G. v. Bd. of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992) (finding that a FAPE is not provided only when procedural violations prevent the parents from an opportunity to be involved in the development of their child's IEP or where the violation "result in the loss of educational opportunity").

97. *See* Doe v. Defendant I, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (finding the IEP of a disabled student complied with statutory requirements even though there was no statement of the child's academic achievement, instructional objectives, or methods by which achievement is assessed); *see also* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990) (recognizing that "procedural flaws do not automatically render an IEP legally defective"). In considering the legitimacy of an IEP the court considered whether (1) the parents participated in the IEP formation; (2) the IEP was likely to confer educational benefit on the student; and (3) procedural errors affected the student's right to a FAPE. *Id.*

98. *See* Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 156 F. Supp. 2d 1213, 1236 (D. Or. 2001) (finding that an autistic child received an FAPE even though key district professionals did not attend the ARD, and the school district did not implement the parent's preferred training program because the procedural violation did not "result[ ] in the loss of educational opportunity" to the disabled child, nor did it infringe "on the parents' opportunity to participate in the IEP formulation process").

99. *See* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997) (enunciating a four factor test to evaluate the substantive requirements of an IEP). The four factors that are considered when determining whether an IEP is reasonably calculated to confer some educational benefit are: (1) whether the child's evaluation and performance were used as the basis for developing an individualized educational program; (2) whether the child is educated in the least restrictive environment possible; (3) whether the special education and related services "are provided in a coordinated and collaborative

tional services offered with other possible programs or services.[100] Rather, courts tend to focus on the services provided in a child's IEP, while considering the extent to which the child is educated along side his or her nondisabled peers.[101]

1. Free Appropriate Public Education and the Individual Educational Plan

Board of Education v. Rowley[102] serves as the basis for most decisions that determine what level of benefit a disabled child must receive from their IEP to meet the requirement of an appropriate education.[103] In *Rowley*, the Court was asked to decide whether a school district was obli-

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manner"; and (4) whether the student demonstrates academic and nonacademic progress. *Id.* Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 620 (E.D. Pa. 1991) (noting that the school district failed to consider the nature of the child's disability when determining the level of speech and language therapy he would receive; thus, the school district failed to develop an IEP that offered a FAPE).

100. *See* Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 794 (Iowa 1982) (opining that one educational program did not fail to offer a FAPE just because another program was considered better, or because a student made more progress when a different program was implemented).

101. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 202 (1982) (declaring that when determining whether a proposed educational program is appropriate, the court must consider whether services provided to the disabled child in a regular classroom, with supplemental aids and services, are likely to enable the child to receive educational benefits); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 614 (8th Cir. 1997) (weighing the benefit a disabled student would receive from an IEP that would allow him to interact with nondisabled students against the likely benefits from a private school setting where there would be no opportunity to be around nondisabled students); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 54 (N.D. Ala. 1981) (noting that the court had to consider whether a severely retarded child had been educated alongside his nondisabled peers to the extent appropriate).

102. 458 U.S. 176 (1982).

103. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 181-82 (1982) (noting that the IEP is the instrument by which a child's education is tailored to their individual needs, and the elements contained in the IEP include: present levels of educational achievement, educational goals and objectives, objective criteria by which to measure progress toward and achievement of the goals and objectives, specific services that will be provided to the child, the portions of the regular education program in which the disabled child will participate, and inclusive dates for which services will be provided); Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1290 (5th Cir. 1991) (applying the *Rowley* standard to determine the appropriateness of an IEP that provides for a four-hour school day for a multihandicapped child); Leonard v. McKenzie, 869 F.2d 1558, 1562 (D.C. Cir. 1989) (referring to the *Rowley* standard when determining that a disabled student's parents failed to demonstrate that a school could not implement an IEP that was "reasonably calculated to enable [the student] to receive educational benefits").

gated to provide a sign-language interpreter for a deaf child.[104] The district court decided that, although the child was above average in her class, she was denied an opportunity to achieve her maximum potential.[105] In overturning the lower court's decision, the Supreme Court considered legislative intent and the explicit language of IDEA, and concluded that the FAPE requirement is met when a school district provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[106] Several cases that followed *Rowley* attempted to refine the lingering imprecision of this landmark case.[107]

A FAPE, as interpreted by the Supreme Court, simply requires school districts to provide educational services that deliver a "basic floor of opportunity" to disabled students in their quest for an education.[108] The Court further stated that "some educational benefit" was required to establish that a district had provided a FAPE to a disabled student.[109] The "some educational benefit" standard requires that the benefit be more than trivial or de minimis in order for a court to find that an IEP provides sufficient services to constitute an appropriate education for a disabled child.[110] Whether a given IEP meets the substantive IDEA requirements

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104. *See* Rowley v. Bd. of Educ., 483 F. Supp. 528, 529 (S.D.N.Y 1980) (considering a parental request that a sign-language interpreter be available in all their daughter's academic classes).

105. *See id.* at 534 (holding that the correct standard for deciding whether a child receives a FAPE is one that "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by non-handicapped children").

106. *See Rowley*, 485 U.S. at 203 (holding that a FAPE is available when the school district provides personalized instruction and related services sufficient for a disabled child to receive some educational benefit).

107. *See* Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989) (holding that schools must provide educational benefits that are more than de minimis in order for a special educational program to be considered "appropriate"); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180-85 (3d Cir. 1988) (refining the some educational benefit standard to require an IEP to provide more than de minimis educational benefit to a disabled student in order to be considered appropriate); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985) (maintaining that an IEP must be likely to result in more than trivial advancement toward IEP goals and objectives in order to confer a FAPE on a handicapped student).

108. *See Rowley*, 458 U.S. at 201 (concluding that the federal statute required access to a "basic floor of opportunity" through special education and related services, and that there is no guarantee that a disabled child will achieve any specified level of educational benefit).

109. *See id.* at 203 (holding that when a child receives educational benefit from an educational program, the requirement of a FAPE is met).

110. *See Polk*, 853 F.2d at 180 (holding that the educational benefit a handicapped child receives from an educational program must amount to more than a trivial benefit).

of providing an appropriate education is often determined by the amount of educational benefit the child receives from his or her individual program.[111] Historically, the standard was that the disabled child must receive some educational benefit from the program offered by the school system.[112] An adequate education, however, does not necessarily mean an appropriate education if a disabled child is denied full educational opportunities.[113]

Some state legislatures have enacted statutes that appear to set higher standards than the federal law requires. Parents, and indeed even some adjudicators, have attempted to uphold these higher standards when evaluating the effectiveness of an IEP. For example, one standard necessitates that a child's IEP be reasonably calculated to help the child reach his or her maximum potential.[114] Yet, when a maximum potential standard is articulated in a state's statute it may be overruled on appeal.[115] A few states have instituted a higher standard when determining whether an IEP provides a FAPE.[116] Some courts have managed to avoid addressing

111. *See Rowley*, 458 U.S. at 209-10 (pointing out that Amy Rowley was achieving academically at a level at or above that of her classmates without the services of a sign language interpreter in her academic classes); Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1037 (8th Cir. 2000) (finding the program offered by the public school provided a FAPE in part because the child made progress, and though progress in language skills was greater in the program urged by his parents, progress in the acquisition of social skills suffered when the child was removed from the public school program); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990) (reporting that Mathew made good academic progress prior to his removal from the public school).

112. *See Rowley*, 458 U.S. at 200-01 (enunciating the "some educational benefit" standard to determine whether a proposed special education program, including related services and supplementary aids and services, offers a disabled child a FAPE).

113. *See* Espino v. Besteiro, 520 F. Supp. 905, 913 (S.D. Tex. 1981) (finding that a child, who required an air conditioned environment due to a medical condition that prevented him from regulating his body temperature was denied educational benefits when the school placed him in an air conditioned cubical in a regular classroom rather than air conditioning the entire classroom, which limited his contact with other students).

114. *See* Pink v. Mt. Diablo Unified Sch. Dist., 738 F. Supp. 345, 347 (N.D. Cal. 1990) (opining that California's statute that requires an "opportunity for each handicapped child to reach his or her highest level of educational achievement commensurate with the opportunity provided to other pupils" is not "unduly high nor hopelessly unattainable"); Harrell v. Wilson County Schs., 293 S.E.2d 687, 690-91 (N.C. Ct. App. 1982) (noting that the higher state standard aimed at giving handicapped children an educational opportunity that would allow them to reach their full potential did not mean school districts had to provide a "utopian educational program").

115. *See Rowley*, 458 U.S. at 189 (asserting that IDEA does not require a maximum potential standard).

116. *See, e.g.*, IOWA CODE ANN. § 256B.2(3) (West 1996) (aspiring to provide special education students with "education commensurate with the level provided" children who do not receive special education services); MD. CODE ANN., EDUC. § 8-401(a) (2000) (pro-

the issue of a higher standard.[117] Others have found that an IEP providing a FAPE based on the federal standard complies with a state standard that appears to require more than some educational benefit.[118]

In *Cypress-Fairbanks Independent School District v. Michael F.*,[119] the court was asked to decide whether parents would receive reimbursement for expenses incurred when they unilaterally decided to enroll their child in an out-of-state, private, residential treatment facility.[120] The Fifth Circuit adopted a four-factor test, articulated from testimony by Dr. Christine Salisbury, to assess whether a student receives educational benefit from a particular educational program.[121] One of the elements of Dr. Salisbury's test requires that the specialized educational program is deliv-

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viding that disabled children are entitled to educational opportunities designed to help them achieve their potential).

117. *See* Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 659 (8th Cir. 1999) (refusing to consider an argument that the state statute required special education services designed to "maximize the capabilities of disabled children" because the parents raised the argument for the first time on appeal); Cothern v. Mallory, 565 F. Supp. 701, 708 (W.D. Mo. 1983) (finding that a proposed IEP met a disabled child's needs and maximized his capabilities, the court declined to consider the relationship between the state's standard, which requires a program that "maximize[s] the capabilities" of disabled children, and the federal "appropriate" standard that requires only some educational benefit).

118. *See* Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982-83 (4th Cir. 1990) (recognizing that the state statute that mandates special education programs offer disabled children an opportunity to reach their full potential does set a higher educational standard than the federal statute, but concluding that the school was not required to provide the in-home services requested by the parents); *Harrell*, 293 S.E.2d at 690 (applying the federal standard to determine that the FAPE requirement is satisfied when an IEP provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction").

119. 118 F.3d 245 (5th Cir. 1997).

120. *See* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 245 (5th Cir. 1997) (deciding whether parents could receive reimbursement for educational costs incurred when they unilaterally decided to enroll their disabled child in an out-of-state residential treatment facility).

121. *See id.* at 253 (proposing a method by which parents, educators, and adjudicators could assess the educational benefit of a proposed or operating special education program for a particular student). The four factors the court considered were: (1) that the IEP is based on an assessment of the student's achievement and demonstrated performance; (2) that the specialized program is provided in the least restrictive environment to meet the student's demonstrated needs; (3) specialized services are provided to the student "in a coordinated and collaborative manner by the key 'stakeholders'"; and (4) academic and nonacademic benefits are demonstrated. *Id.* In order to consider that services are provided in a "coordinated and collaborative" fashion key stakeholders must work together to develop a student's IEP and all educators and support staff must work together to implement the IEP. *Id.* n.29 (referring to a team approach).

ered in the "least restrictive environment," which is a requirement also mandated in IDEA.[122]

2. Free Appropriate Public Education and the Least Restrictive Environment

IDEA requires that disabled children are educated to the extent possible with their nondisabled peers.[123] This mandate, considered an element of a FAPE, is often at the crux of a controversy over not only what services are appropriate for a particular student, but also where the services are provided.[124] While some services are provided with relative ease in a regular education classroom, others are provided in a self-contained setting preventing disabled children from being in contact with their nondisabled peers.[125] In one case, the court found that a regular classroom

122. *See* 20 U.S.C. § 1412(a)(5) (1994 & Supp. V 2000) (mandating that disabled students be educated to the extent possible with nondisabled students); *Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 253 (listing as the second factor a requirement that an appropriate educational program be delivered in the least restrictive educational setting, and finding that the IEP placed the disabled student in educational settings for half of each day with nonhandicapped students).

123. *See* 20 U.S.C. § 1412(a)(5)(A) (1994 & Supp. V 2000) (mandating that children with disabilities are educated to the "maximum extent appropriate" with nondisabled children, and that a disabled child should only be removed from the regular educational setting "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"); Bd. of Educ. v. Rowley, 458 U.S. 176, 202-03 (1982) (reiterating the requirement that a disabled child be educated to the maximum extent possible with his or her nondisabled peers in order for an IEP to be appropriate under IDEA); 34 C.F.R. § 300.552(e) (2001) (mandating that educational agencies ensure that children with disabilities are not educated outside an "age-appropriate regular classrooms solely because of needed modifications in the general curriculum").

124. *See* Oberti v. Bd. of Educ., 995 F.2d 1204, 1223-24 (3d Cir. 1993) (holding that a school violated the LRE requirement by failing to provide educational services for a Down's syndrome child in a regular classroom setting with supplementary aids and services, and ordering the school district to write a more inclusive IEP); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990) (noting that a residential school for disabled students did not offer students opportunities to interact with nondisabled peers, but that the IEP provided by the public school included specific provisions that enabled a learning disabled student to interact with nondisabled students); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 55-56 (N.D. Ala. 1981) (finding that a separate educational facility for disabled students did not offer an educational opportunity in the LRE since the severely mentally retarded child had no contact with nondisabled students except for a limited time during lunch, and ordering the school district to write a new IEP that would provide the child with additional opportunities for contact with nondisabled peers).

125. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (recognizing that some children with disabilities will require segregated educational facilities because they would disrupt the regular education setting or because the benefits of a segregated educational

setting supplemented by only one hour per week of specialized intervention and related services was appropriate for a learning disabled student who was only slightly behind his peers academically.[126]

Parents have challenged a district's decision to provide specialized instruction and modifications in a regular classroom.[127] School districts generally maintain that they are obligated to educate disabled students to the maximum extent possible along side their nondisabled peers.[128] Parents, on the other hand, may seek a more intensive program to meet their child's individual needs, often a home-based program or a residential treatment center.[129] One commentator notes that residential placement

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placement outweigh marginal benefits the child would receive in a more inclusive setting); Pinkerton v. Moye, 509 F. Supp. 107, 114 (W.D. Va. 1981) (rejecting a parent's argument that a self-contained educational program for a learning disabled student must be established at the child's home school, and recognizing that due to limited funding, specialized services may not be available in every school).

126. *See* Robert M. v. Hickok, No. Civ. A.98-4682, 2000 WL 565238, at *2-3 (E.D. Pa. Apr. 27, 2000) (mem.) (observing that the IEP for a minimally disabled student provided thirty minutes per week of itinerant intervention, thirty minutes per week of consultation with a regular classroom teacher, and thirty minutes per week of speech therapy which included consultation to determine whether skills covered in therapy were transferred to the classroom).

127. *See* Scanlon v. San Francisco Unified Sch. Dist., No. C 91-2559 FMS, 1994 WL 860768, at *7 (N.D. Cal. Apr. 14, 1994) (order granting summary judgment and denying motion to enforce settlement) (considering the parents' allegations that educational opportunities at private facility where the multihandicapped child was the *only* student, rather than the public school, was the appropriate placement because the class size was smaller, the student would not have to move from class to class, and the public school program did not provide approved college admission credits); Laughlin v. Cent. Bucks Sch. Dist., Civ. A. No. 91-7333, 1994 WL 8114, at *26 (E.D. Pa. Jan. 12, 1994) (mem.) (finding that the private residential school in which the parents had enrolled their son who was diagnosed with Attention Deficit Hyperactivity Disorder offered no mainstreaming possibility and did not specialize in educating students with this type of disability).

128. *See* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 255 (5th Cir. 1997) (presenting testimony of a disabled student's psychiatrist emphasizing the advantages of a public school placement over a private, residential school because the child would have an opportunity to interact with nondisabled students during part of the school day, thereby acquiring social skills at the public school; an equivalent opportunity would not be available at the private school); *Robert M.*, 2000 WL 565238, at *1-2 (relating the objections of a learning disabled child's parents to the school's proposed IEP in which the majority of instructional services were delivered in the regular classroom); Indep. Sch. Dist. No. 283 v. S.D., 948 F. Supp. 860, 874 (D. Minn. 1995) (outlining the school district's efforts to provide an appropriate educational opportunity for a dyslexic child in the LRE that included special education services delivered in a regular classroom, an extended school year, and home instruction).

129. *See Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 251 (describing parents' unilateral decision to enroll their disabled child in an out-of-state, private residential treatment facility due to escalating behavior problems and requesting that the school district reimburse them for the tuition they had paid to the school); *Roland M.*, 910 F.2d at 991

is an extremely restrictive arrangement that provides few opportunities for disabled students to interact with their nondisabled peers.[130] Consequently, courts rarely require that school districts provide educational programs in segregated settings where disabled students have no contact with students in regular education classrooms.[131]

In contrast, other parents demand that their disabled child receive more time in regular classrooms.[132] These parents may request that the

(rejecting parents' contention that a private, residential school met the state's requirement that the educational program offered and "assure[d] the maximum possible development"); *Scanlon*, 1994 WL 860768, at *5 (relating parent's argument that a private educational program, where the disabled child was the only student in the facility, would be the most appropriate because of alleged deficiencies in the public school's proposed educational program).

130. Patricia Demler Deloney, Hearing Officer Interpretations of Free Appropriate Public Education for Children with Disabilities 172 (1997) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with the Perry Castañeda Library).

131. *See Cypress-Fairbanks Indep. Sch. Dist.*, 118 F.3d at 258 (denying parents' request for reimbursement of private, residential school tuition because the IEP developed by the school district was reasonably calculated to confer educational benefit in a less restrictive environment, and was therefore appropriate); Oberti v. Bd. of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993) (declaring that IDEA requires that disabled students be educated in the regular classroom to the maximum extent possible, and rejecting the school's proposed placement of a Down's syndrome child in a segregated classroom); *Roland M.*, 910 F.2d at 994, 1000 (refusing to order a school district to reimburse the parents of a disabled child the costs incurred from their unilateral decision to place the child in a private, residential school in part because the public school program had specific provisions for the development of social skills in an inclusive program); McLaughlin v. Bd. of Educ., 133 F. Supp. 2d 994, 1009 (W.D. Mich. 2001) (granting the request of the parents of a disabled student and ordering the school district to provide a free appropriate education, with supplementary aids and services, in a general education setting); *Scanlon*, 1994 WL 860768, at *7 (noting that IDEA prefers mainstreaming students when it does not interfere with the disabled students ability to learn).

132. *See Oberti*, 995 F.2d at 1209 (relating a parental request that their Down's syndrome child be provided educational services in a regular education classroom at his neighborhood elementary school because he had no opportunity to interact with nondisabled students); Girty v. Sch. Dist., 163 F. Supp. 2d 527, 529 (W.D. Pa. 2001) (discussing a parental request to continue an educational program in an inclusive setting for their mentally retarded son rather than a school district proposal to place the child part-time in a life-skills class at a different school); Beth B. v. Van Clay, 211 F. Supp. 2d 1020, 1024 (N.D. Ill. 2001) (considering the request from the parent of a child with Rett syndrome that she continue to receive special education and related services in a regular education classroom rather than in a self-contained classroom with other children who have severe disabilities), *aff'd*, 282 F.3d 493 (7th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3129 (July 2, 2002) (No. 02-172); *McLaughlin*, 133 F. Supp. 2d at 997 (detailing the allegations of the parents of a Down's syndrome child that the school's proposed placement of their daughter in a self-contained classroom at a school other than her home school rather than a resource room setting at her home school violated IDEA's requirement that disabled children be educated in the least restrictive environment commensurate with the child's needs).

district provide teachers or aides to assist the child when the instructional setting is the regular classroom, or in a private school.[133] School districts are often reluctant to offer services in this manner because it imposes excessive costs on the district when child specific aides or other supplementary aids and services are required for the child to receive some educational benefit.[134] Even if costs are not an issue, a regular classroom may not provide the structured environment necessary for some disabled students to benefit from the instruction offered.[135]

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133. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 184 (1982) (relating parental insistence that a sign language interpreter be placed in a hearing impaired student's regular education classroom for all academic subjects); K.R. v. Anderson Cmty. Sch. Corp., 81 F.3d 673, 676 (7th Cir. 1997) (discussing a parental request that the local school district provide a full-time instructional assistant in a regular education class at a private school so that their multihandicapped daughter would receive an educational program comparable to the one she was offered at the public school); Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1433 (10th Cir. 1997) (considering the request of a hearing impaired student's parents that the local school district pay the entire cost of providing interpretive services to their child at a private school rather than "an amount up to, but not more than, the average cost to the District to provide that same service to hearing-impaired students in the public school setting").

134. *See* Cefalu v. E. Baton Rouge Parish Sch. Bd., 103 F.3d 393, 397 (5th Cir. 1997) (observing that school districts have discretion to "design special programs in the light of the finite funds that are available"); Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991) (proposing that a district can consider the cost of educating a disabled child in the regular classroom when determining whether such an instructional arrangement is appropriate); Ronker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (recognizing that a school district may consider cost as a factor because excessive spending on one disabled child may ultimately deprive other disabled children of educational opportunities); Mills v. Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972) (proposing that states expend available funds in a manner that ensures that all children are offered educational opportunities that meet the child's needs and his or her ability to benefit from such educational services); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 233 (2d ed. 1995) (suggesting that court decisions may allow an educational agency to limit the type of educational services available to disabled students due to the excessive expenditure required to provide the service even though courts closely scrutinize such claims); Bridget A. Flannagan & Chad J. Graff, *Federal Mandate to Educate Disabled Students Doesn't Cover Costs*, FED. LAW., Sept. 2000, at 22, 23 (asserting that local school districts often have to divert resources allocated to regular educational programs to fund special education services that they are required to provide to disabled students but which are not fully funded by either federal or state lawmakers).

135. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-49 (5th Cir. 1989) (stating that when evaluating to determine whether a regular education classroom is an appropriate placement for a disabled student the court considers: (1) the extent to which the child will benefit from the curriculum in the regular class; (2) whether the school has attempted to accommodate the disabled student in a regular class; (3) whether the child will receive greater benefit from placement in a regular class or in a special education class; and (4) whether the disabled child's presence in the regular classroom has a detrimental effect on other children in the classroom); Devries v. Fairfax County Sch. Bd., 882 F.2d

3. Related Services as an Element of a Free Appropriate Public Education

IDEA states that a FAPE "emphasizes special education and related services designed to meet [the] unique needs" of disabled students.[136] "Supplementary aids and services" are closely related but distinguishable from "related services."[137] Supplementary aids and services are implemented in the regular education classroom to enable a disabled child to be educated alongside nondisabled peers.[138] Both types of services are often the subject of disputes between parents and school districts.[139]

876, 880 (4th Cir. 1989) (finding that a vocational training center offered an appropriate education in the LRE because the educational needs of the seventeen year old autistic student could not be met at a high school campus); *Beth B.*, 211 F. Supp. 2d at 1033-34 (finding that a regular classroom was not the appropriate educational setting for a child with severe cognitive disabilities because she would not benefit academically, nonacademic benefits would be limited, and the child would take time away from other students).

136. 20 U.S.C. § 1400(d)(1)(A) (1994 & Supp. V 2000).

137. 20 U.S.C. § 1401(22) (1994 & Supp. V 2000) (defining related services).

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and 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.; *see also* 20 U.S.C. § 1401(29) (1994 & Supp. V 2000) (defining supplementary aides and services as "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate").

138. 20 U.S.C. § 1401(29) (1994 & Supp. V 2000).

139. *See* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 70-71 (1999) (determining whether a school district must provide continuous nursing services, under the related services provision of IDEA, that were necessary to allow a ventilator dependent paralyzed child to attend regular education classes, or whether such services fall under the medical services exclusion provision); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 894-95 (1984) (upholding the court of appeals' decision that clean intermittent catheterization constitutes a related service under EHA because the procedure was necessary so that Amber could attend school, and the procedure could be performed by a layperson with minimal training); Oberti v. Bd. of Educ., 995 F.2d 1204, 1223 (3d Cir. 1993) (deciding whether a school district had employed the necessary supplementary aids and services, necessary to permit a mentally retarded child with behavior problems to be educated in a regular classroom, rather than in a self-contained special education unit); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180-85 (3d Cir. 1988) (considering whether direct physical therapy services were a necessary related service for a severely mentally and physically disabled child to receive educational benefit from his IEP, and thus receive a FAPE); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1156 (5th Cir. 1986) (considering whether bus transportation after school to a location one mile outside the

Related services include, but are not limited to: physical therapy, occupational therapy, speech therapy, nursing services, psychological services, recreation, and transportation.[140] Parents often request services not specifically listed in the statute.[141] The test used by courts to determine whether to require a school district to provide a requested service is whether the related service is necessary for the student to receive some educational benefit from a proposed instructional program.[142] The statute specifies that medical services must be either diagnostic or evaluative in nature.[143] Following this distinction courts have held that if trained school personnel or a school nurse can perform the medically related service, the district may be required to provide the service if it is necessary for the disabled child to attend school and to receive some educational benefit.[144] Likewise, courts make distinctions between psychological ser-

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school district's boundary was a related service that the school district was required to make available to a multihandicapped child); Dep't of Educ. v. Katherine D., 727 F.2d 809, 813, 817-18 (9th Cir. 1984) (finding that the maintenance of a tracheotomy tube fell within the definition of related services as an included school health service that could be performed by a school personnel, and its maintenance was necessary to enable a child suffering from cystic fibrosis to attend a regular education class at a public school); Girty v. Sch. Dist., 163 F. Supp. 2d 527, 537 (W.D. Pa. 2001) (requiring a school district to consider the full "range of available supplementary aids and services" available to assist a mentally retarded student in a regular classroom rather than placing the child in a life skills class for part of the school day); Johnson v. Lancaster-Lebanon Intermediate Unit 13, 757 F. Supp. 606, 619 (E.D. Pa. 1991) (deciding whether speech therapy was a necessary related service for a hearing impaired child that would allow the child to benefit from educational opportunities under his IEP).

140. *See* 20 U.S.C. § 1401(22) (1994 & Supp. V 2000) (specifying some programs that are considered related services under IDEA).

141. *See Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 73-75 (discussing what the general term "medical services," as used in the statute encompasses, and whether the local school district was required to provide the continuous nursing care necessary for Garrett to attend school and receive educational opportunities).

142. *See Tatro*, 468 U.S. at 890 (basing the determination of whether a specific service qualifies as a related service or whether it is a service that a handicapped child requires in order to benefit from the educational opportunity offered and whether, in the case of a medical procedure, such service is for a diagnostic or evaluative purpose).

143. 20 U.S.C. § 1401(a)(22) (1994 & Supp. V 2000) (specifying that "medical services shall be for diagnostic and evaluation purposes only").

144. *See Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 66, 69 n.3, 79 (upholding an appellate court's judgment that continuous nursing services, which include the suctioning of a tracheotomy tube, urinary bladder catheterization, assistance with meals, and ambu bagging when the ventilator is not working, are a related service that the school district must provide in order for Garret to remain in school); *Tatro*, 468 U.S. at 891 (deciding whether clean intermittent catheterization was a related service that the school district was required to make available to a Amber, who was born with spina bifida, in order for her to benefit from special education); Dep't of Educ. v. Katherine D., 727 F.2d 809, 813, 815-16 (9th Cir. 1984) (holding that the Department of Education had failed to provide a FAPE when it

vices necessary to confer educational benefit, and similar services that are unrelated to a child's ability to benefit from an educational program.[145] Whether a related service is required depends on the individual needs of the disabled student.[146] Thus, while a sign-language interpreter might be necessary for one deaf student to benefit from a proposed educational program, another deaf student might obtain education benefit from his or her educational program without the assistance of an interpreter.[147]

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determined that it could not provide the medical services Katherine required to maintain her tracheotomy tube, which could be provided by trained school personnel or a school nurse, and that would have allowed her to attend school with nondisabled students rather than receive home-bound services).

145. *See* Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 693 (3d Cir. 1981) (pointing out that the court had to determine whether placement in a residential treatment facility was necessary for a disabled child to benefit from educational opportunities, or whether it was in "response to medical, social or emotional problems that [were] segregable from the learning process"); Max M. v. Ill. State Bd. of Educ., 629 F. Supp. 1504, 1518-19 (N.D. Ill. 1986) (ordering the school district to reimburse the parents of a disabled child for psychotherapy because it had failed to offer the therapy Max needed to progress socially, emotionally, and academically as recommended by the district's psychologist); Ahern v. Keene, 593 F. Supp. 902, 914 (D. Del. 1984) (finding that the psychological services provided at a residential treatment facility addressed the emotional problems a disabled child exhibited due to a stressful home situation, and were unrelated to the child's ability to derive educational benefit from her special education program).

146. *See* 20 U.S.C. § 1412(a)(4) (1994 & Supp. V 2000) (requiring educational entities to develop an *individual* educational plan for *each* disabled child); Oberti v. Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993) (explaining that the entire range of supplemental aids and services should be considered by a school to determine which are necessary to meet the unique needs of a particular disabled child); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986) (discussing the requirement that the school develop an IEP to meet the unique needs of a handicapped child that ensures the child receives some educational benefit); Battle v. Pennsylvania, 629 F.2d 269, 275 (3d Cir. 1980) (recognizing that the educational programs of disabled students is based "on the individual abilities of each child"); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302-03 (E.D. Pa. 1972) (ordering the state to provide all school-age mentally retarded children "access to a free public program of education and training appropriate to his learning capacities").

147. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 209-10 (1982) (holding that the school district was providing a individualized educational program, that Amy Rowley was receiving educational benefits from the program as evidenced by the fact that she was performing "better than the average child in her class," and that the school district was not required to provide a sign-language interpreter for Amy's academic subjects); Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1437-38 (10th Cir. 1997) (holding that the public school must contribute a "proportionate amount of Federal funds" to help defray the cost of a sign-language interpreter for a hearing impaired student enrolled in a private school because the related service was necessary for the child to benefit from the instruction in a regular classroom).

4. Application of FAPE Standards to Parental Requests for Specific Programs and Methods

Parents have sought to obtain specific related services, specific methodologies, extended year services, and reimbursement for private school tuition by alleging that the public school failed to provide an appropriate education for their disabled student.[148] Courts have held that parents do not have the right to demand that school districts employ specific methodologies or programs when educating a disabled child.[149] School dis-

148. *See Rowley*, 458 U.S. at 184 (discussing the necessity of a request by parents to provide a sign-language interpreter in all regular education academic classes to assist their hearing impaired daughter); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 344-45 (5th Cir. 2000) (deliberating the merits of a parent's allegation that her son was denied a FAPE because the school district failed to provide the alphabetic phonics reading instruction program, and was therefore entitled to reimbursement for private school tuition); Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 653 (8th Cir. 1999) (taking up the question of whether a school district was required to pay the cost of educating an autistic child at the Institutes for the Achievement of Human Potential which employed controversial methodology in its training program); E.S. v. Indep. Sch. Dist., No. 196 Rosemount-Apple Valley, 135 F.3d 566, 568 (8th Cir. 1998) (considering the issue of whether a school district was required to instruct a dyslexic child using the Orton-Gillingham method in a one-on-one instructional setting); Indep. Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 559 (8th Cir. 1996) (deciding whether a school district was responsible for expenses incurred by a parent who unilaterally enrolled their learning disabled daughter in a private school); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 976 & n.3 (4th Cir. 1990) (determining whether a local education entity was required to educate an autistic and moderately mentally retarded child using the "Treatment and Education of Autistic and Communications-Handicapped Children" method, assign an aide to work with the child one-on-one, provide transportation to a state run facility, and contribute to the cost of a person who would provide in home services); Leonard v. McKenzie, 869 F.2d 1558, 1560 (D.C. Cir. 1989) (confronting the issue of whether a school district was required to pay the tuition of a learning disabled and emotionally disturbed teenager at a private school of the parents choosing); Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1225-26 (D. Or. 2001) (discussing parental request that the Lovaas method be initiated as part of their autistic child's IEP); John L. v. Lake Travis Indep. Sch. Dist., No. 315-SE-699, 18 (Tex. Educ. Agency Apr. 26, 2000), www.tea.state.tx.us/special.ed/hearings/pd315699.pdf (last visited Oct. 21, 2002) (denying parental request for reimbursement when parent unilaterally placed child in church preschool so that he would have contact with nondisabled students).

149. *See Rowley*, 458 U.S. at 207 (reiterating the Court's position that judges do not have the necessary expertise to resolve educational policy questions); Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1037 (8th Cir. 2000) (stating that courts' questions of educational policy should be decided by educators, not by courts, if the court finds the proposed IEP offers a disabled child "a program of specialized services reasonably calculated to enable a child to receive educational benefit"); Dong v. Bd. of Educ., 197 F.3d 793, 803 (6th Cir. 1999) (finding that the school district's decision to utilize a mixture of instructional arrangements rather that the one-on-one Lovaas method the child's parents requested provided a FAPE); Tucker v. Calloway County Bd. of Educ., 136 F.3d 495, 506 (6th Cir. 1998) (referring to case law, the court declared that "the Tuckers are not entitled to dictate edu-

tricts often refuse parental requests for a specific instructional program.[150] Courts have generally held that school districts are not required to provide a specified program even if it may offer superior results.[151] In determining whether an IEP is appropriate within the meaning of IDEA, the court determines whether the program is likely to confer some educational benefit.[152] Thus, the court does not compare different programs by measuring the results achieved through their use in instruction, or by comparing the achievement of a disabled child to the achievement of his or her nondisabled peers.[153]

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cational methodology or to compel a school district to supply a specific program for their disabled child"); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 614 (8th Cir. 1997) (noting that it is the educators responsibility "to determine the appropriate educational methodology" for delivering educational services); Lachman v. Ill. State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988) (finding that parents do not have the right under IDEA to compel a school district to provide specific methodology to a disabled child); Beth B. v. Van Clay, 211 F. Supp. 2d 1020, 1035 (N.D. Ill. 2001) (declaring that pedagogical decisions are best left to educators, and finding that the regular classroom was not an appropriate educational placement for multi-handicapped child), *aff'd*, 282 F.3d 493 (7th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3129 (July 2, 2002) (No. 02-172); Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501, 512 (E.D.N.Y. 1996) (asserting that "accommodating a parent's ideal educational program is beyond the scope of IDEA" when rejecting a parents claim that her dyslexic son had not been offered a FAPE because the district declined to teach the child using only the Orton-Gillingham method of reading instruction).

150. *See Dong*, 197 F.3d at 798 (reciting school district's rejection on an in-home therapy program requested by an autistic child's parents); *Blackmon*, 198 F.3d at 661 (denying parent's request that a program provided the Institutes for the Achievement of Human Potential failed to provide an educational opportunity for the disabled student to be educated with nondisabled peers to the extent possible); *E.S.*, 135 F.3d at 568 (citing school district's refusal to provide Orton-Gillingham method in dyslexic student's IEP as requested by parent).

151. *See Clynes*, 119 F.3d at 613 (recognizing that the best possible education is not requisite of IDEA); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987) (declaring that an appropriate education does not mean a school district must provide the absolutely best educational program); *Pitchford*, 155 F. Supp. 2d at 1238 (recognizing that no duty has been imposed on school districts to maximize a child's potential because such a goal is unreasonable due to "the broad services schools are obligated to provide," and that the school is only required to provide a "basic floor of opportunity"); Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982) (asserting that school districts are not required to provide the best educational program possible to meet the needs of each disabled child).

152. *See Rowley*, 458 U.S. at 192, 203 (announcing that the standard by which a FAPE should be evaluated is whether a school offers "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction," and recognizing that a special education program does not guarantee specific outcomes).

153. *See* Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) (directing courts to judge an IEP's "goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer" meaningful educational benefits upon a disabled child, and not to evaluate the IEP in hindsight); Roland M.

IV. PROPOSAL

School districts are constantly faced with requests for expensive, time-consuming, and often inappropriate requests from parents of disabled children. How districts implement procedural requirements, and how they handle parental requests often determines whether parents pursue administrative and judicial channels in an effort to secure a desired service, program, or educational opportunity for their disabled child. Both school districts and state education agencies can implement procedures to reduce the likelihood that misunderstandings will occur. In addition, state legislatures can enact legislation that promotes uniformity among the states.

A. *Recommendations for State Educational Agencies*

Educating parents when they initially seek services for their disabled child could prevent unrealistic expectations and future conflicts. The manner in which state education agencies disseminate information delineating the rights and responsibilities of parents, students, and school districts should facilitate parental involvement in the decision making process. In addition to providing written information, states should provide personnel, or require that school districts provide personnel, to counsel parents of disabled children regarding their rights and responsibilities under applicable federal and state statutes. Further, a uniform approach to services throughout the state would provide more consistent services to disabled students. Thus, state education agencies should initiate statewide training programs that provide local school district personnel with the knowledge and skill necessary to implement special education services that meet federal and state guidelines and programs that teach the parents of disabled students how to appropriately advocate for their child.

B. *Measures School Districts Should Implement*

School districts should adhere strictly to IDEA's procedural requirements. Documentation of all procedural requirements is essential in order to prevail in hearings and judicial proceedings, or to avoid such

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v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990) (rejecting the parents' claim that a school district's IEP did not offer a FAPE simply because their disabled child achieved greater academic progress when he participated in a private school program, and noting that the IEP should be evaluated from the perspective of whether it was reasonably calculated to confer educational benefits on a disabled student); *Clynes*, 119 F.3d at 613 (noting that an educational program should be not be evaluated based on a comparison between the achievement of a disabled student and nondisabled students in order to determine whether a disabled child was offered or received a FAPE).

proceedings altogether. School personnel should ensure that necessary stakeholders have the opportunity to attend and participate in IEP or Admission, Review, and Dismissal (ARD) meetings. Further, if a parent is unable to participate and permits school personnel to write an IEP when the parent is not present, the school should provide an opportunity for the parent to voice his or her opinions prior to the meeting. Allowing parents to take part via electronic media or telephone offers another alternative for parental input into the development of their child's IEP when they are unable to attend an ARD meeting. This could facilitate parental participation and enhance communication between the parent and school district personnel. Following a meeting that a parent was unable to attend, school personnel should carefully document that all issues discussed and decisions made at the meeting are timely reviewed with the parent.

IDEA requires the ARD committee to develop specific, measurable, and realistic IEP goals and objectives.[154] Lofty goals that are not realistic for a given child may cause parents to become disillusioned when they are not met. When educators assess a child's achievement and progress toward IEP goals prior to an annual IEP or ARD meeting, they should document factors that contribute to a child's failure to meet current goals (excessive absences, failure to turn in assignments, etc.). This information can then be used to write future goals that adequately address the student's needs. Additionally, discussion concerning a child's need for related services should occur during the meeting when the IEP is developed. If no additional services are required to support the student, the reasons for determining that such services are not needed should be documented in the IEP and/or the ARD committee report.

Both regular and special education teachers should receive training that will allow them to work together to meet the needs of disabled students. Often regular education teachers need additional training in order to carry out the modifications necessary for a disabled student to participate in the regular curriculum. Devising procedures that permit both regular education and special education teachers to document modifications in a manner that is precise, yet not overly burdensome, will help ensure compliance with IDEA mandates.

When a parent expresses concerns or dissatisfaction with the educational services offered to their disabled child, the school should immediately respond to the parent's concerns. By responding promptly, the district may avoid further conflict. If parental concerns are not alleviated during an ARD meeting then districts should provide parents with an

154. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 4(a)(19), 89 Stat. 775 (1975).

opportunity to mediate their dispute.[155] Mediation should be undertaken soon after a conflict arises and should be conducted by a disinterested mediator.[156] This process may provide all parties with an opportunity to express their differences, create solutions, and maintain a relationship that will facilitate the education of the disabled child.[157]

C. *State Legislatures Should Help Eliminate Inconsistencies*

State legislatures should revisit their state statutes to determine whether providing a higher standard than required under IDEA is contributing to litigation.[158] State statutes that articulate the standard by which a FAPE is evaluated may offer more guidance to school districts, parents, administrative hearing officers, and courts. To avoid hearings and judicial proceedings, states may find it advantageous to adopt the *Rowley* standard requiring an individual program that is designed to confer some educational benefit on the disabled student. Adopting the *Rowley* standard will provide a uniform standard among the states that is in line with federal legislation and court decisions.

Although parents, educators, and legislators share a desire to deliver the best possible education available to disabled students, the reality is that such a goal is often thwarted by the limited resources available to schools. Obtaining the personnel necessary to deliver special education services to students is often difficult and costly. School districts and state education agencies must distribute resources in an equitable manner to ensure that all children receive sufficient educational opportunities. Further, state legislatures should provide financial incentives to encourage college students and current teachers to obtain the training necessary to enter special education and related fields where there is a shortage of

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155. *See* E-mail from Susan Sellars, Program Administrator, Texas Education Agency, to Judith DeBerry, Student, St. Mary's University School of Law (Nov. 20, 2002, 09:46:00 CST) (on file with the *St. Mary's Law Journal*) (noting that parties who request mediation services in Texas have approximately a 75-80% success rate in obtaining a favorable judgment for both parties).

156. *See* DIV. OF SPECIAL EDUC., TEX. EDUC. AGENCY, SPECIAL EDUCATION IN TEXAS MEDIATION PROCESS, http://www.tea.state.tx.us/special.ed/medcom/medinfo.html (last visited Nov. 20, 2002) (offering mediation services upon written request by either parents or school districts).

157. *See* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 454-56 (2001) (discussing numerous benefits of mediation); KIMBERLY K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 14 (2d ed. 2000) (noting that maintaining a relationship between the parties to a mediation is often an important factor).

158. *Compare* MASS. ANN. LAWS ch. 71B, § 2 (Law. Co-op. 1991) (assuring an education that affords the "maximum possible development" of a disabled child), *with* MASS. ANN. LAWS ch. 71B, § 2 (Lexis 2002) (changing the wording of the previous statute to make available to each disabled student a "free and appropriate public education").

personnel. Stipends, signing bonuses, or tuition credits could encourage students and teachers to obtain the additional education needed to fill positions where there is a shortage of qualified applicants.[159] This would assist local school districts to provide a higher level of service to disabled students and to better meet their needs.

V. CONCLUSION

Much progress has been made since Congress first recognized the need for legislation to address the lack of educational opportunities for handicapped children. All children now have a legal right to educational opportunities that meet their unique needs, regardless of the severity of any disability. However, imprecise and vague language in legislation has resulted in an increase in special education litigation in both state and federal courts. While parents want the best possible education for their disabled children, school districts struggle to balance the requirements of IDEA against the reality of providing educational programs that are often costly or require personnel with specialized training.

As parents continue to try to push schools into providing Cadillac educations for disabled children, the majority of courts have applied the some educational benefit standard when deciding whether an IEP offers an FAPE. Thus, when courts find egregious procedural violations, or when an IEP lacks the substantive requirements they may order corrective measures or reimbursement for expenses parents have incurred providing for the educational needs of their disabled children. Complicating the determination of what constitutes a FAPE is the IDEA requirement that disabled children be educated to the maximum extent possible with their nondisabled peers.

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159. *See, e.g.*, 17 GUAM CODE ANN. § 18202 (2002) (providing monthly allowances for participating special education majors ranging from $250 per month for freshmen to $625 per month for seniors in addition to tuition and ancillary fees assessed by the University of Guam); HOUSTON INDEP. SCH. DIST., *Informed Source: Board Approves Salary Increases for Next Year*, http://www.houstonisd.org/hisd/portal/article/front/0.2435.20856_12363_7922.00.html (last visited Nov. 20, 2002) (announcing a $5,000 sign on bonus for new special education teachers). PFLUGERVILLE INDEP. SCH. DIST., *Teacher Salary Schedule*, http://www.pflugervilleisd.net/hrlforms/salaryscale_02.pdf (last visited Dec. 5, 2002) (on file with the *St. Mary's Law Journal*) (providing Certified Special Education Teachers with a $500 per year stipend); Samuel Southworth, *Wanted: Two Million Teachers*, http://teacher.scholastic.com/professional/teachertoteacher/2MillionTeachers.htm (last visited Dec. 5, 2002) (on file with the *St. Mary's Law Journal*) (explaining that a shortage of special education teachers has prompted some school districts to provide sign-on bonuses); WACO INDEP. SCH. DIST., *Salary Schedule 2002-2003*, http://www.wacoisd.org/administration/hr_salary.html (last visited Dec. 5, 2002) (on file with the *St. Mary's Law Journal*) (showing that Special Education teachers are entitled to a $1,000 annual stipend).

State legislatures, state education agencies, and school districts can take steps to alleviate some of the conflicts and avoid the possibility of litigation. Perhaps the most effective measures in staying future administrative or judicial proceedings are employed by those school personnel who deal directly with the child and parent. By maintaining accurate records of the school district's attempts to provide an appropriate educational experience for disabled students, and by responding to parental concerns promptly, local school districts and parents may solve conflicts in a manner that promotes a cooperative effort that is in the best interest of public school students as a whole.