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# Access or Success?: Wyoming Special Education and the Hope of a New Era in Appropriate Education

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COMMENT

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*Mikole Bede Soto**



## I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA), originally adopted as the Education for All Handicapped Children Act (EAHCA), guarantees that each student in a special education program receives Free Appropriate Public Education (FAPE).[1] To comply with IDEA, the Wyoming Department of Education (WDE) must submit a State Performance Plan (SPP) to the U.S. Department of Education every six years.[2] After the WDE submits an initial SPP, the WDE must also submit an Annual Performance Report (APR) every subsequent year.[3] According to the WDE, SPPs are not "merely a vehicle for reporting" but a tool "to move the state from its current level of compliance with statutory and regulatory requirements of the law and to improve the education and functional outcomes for children with disabilities."[4] In particular, the WDE measures state performance in providing

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[1] *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(a), (c)(2), (c)(3) (2015).

[2] WYOMING DEPARTMENT OF EDUCATION, WYOMING STATE PERFORMANCE PLAN FOR SPECIAL EDUCATION, FFY 2005-2012 1 (2014), http://edu.wyoming.gov/downloads/special-ed/SpecEd_SPP_FFY2005-2012_Rev_Submitted_to_OSEP_2-1-12.pdf [hereinafter WDE].

[3] WDE, *supra* note 2.

[4] WDE, *supra* note 2.

FAPE to children with disabilities by analyzing and collecting data on specified indicators.[5] The WDE and the Department of Education believe these indicators show whether special education students are receiving FAPE.[6] Indicators include: the number of youth with Individual Education Programs (IEP) who graduate from high school with a regular diploma, dropout rates, performance of children with disabilities on statewide assessments, suspension rates for children with IEPs, the percent of children with disabilities in regular classrooms and/or special education classrooms, children who have shown improvements in different areas of school and social life, and the percent of parents who indicate the school facilitated parent involvement.[7]

Under each of the indicators, the WDE records statewide improvements over the subsequent years.[8] Although data collected from the indicators shows improvement of FAPE, a disconnect remains between the data and the reality of the classroom.[9] This disconnect is in part due to judicial interpretation creating a low standard of FAPE.[10] A majority of courts continue to implement an interpretation of FAPE that only requires students to receive *some* educational benefit.[11] Even courts that have adopted a slightly higher standard of FAPE, have failed to detail how this higher standard is different from the lower standard.[12] Consequently, there is little difference between the two standards because the courts only impose minimal standards on schools, special education students continue to receive subpar education in comparison to students in the regular

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[5] WDE, *supra* note 2.

[6] WDE, *supra* note 2.

[7] *See* WDE, *supra* note 2.

[8] *See generally* WDE, *supra* note 2.

[9] *See* Wyoming Department of Education, Complaint Decision and Order for Corrective Action C-0122-11 (May 12, 2011), http://edu.wyoming.gov/downloads/special-ed//SpecEd_Complaint_C-0122-11_Redacted_Decision.pdf [hereinafter *Decision C-0122-11*]; Wyoming Department of Education, Complaint Decision and Order for Corrective Action C-0140-11 (Sept. 17, 2011), http://edu.wyoming.gov/downloads/special-ed//SpecEd_Complaint_C-0140-11_Redacted_Decision.pdf [hereinafter *Decision C-0140-11*]; Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 119 PENN ST. L. REV. 485, 488 (2014) (on the national level there was an emergence of two competing theories of IDEA— a rights theory that acknowledged the disabled person's dignity and a utilitarian theory that favored cost effective considerations—and judicial interpretation implemented short-term cost considerations and the result was a unintended gap between the parents' expectations and the school's expectations).

[10] *See infra* Part II.

[11] *See infra* Part II.C.

[12] *See infra* Part II.C.

classrooms.[13] This low standard of FAPE additionally breeds a hostile schism between parents' expectations and the goals of the school district.[14]

Take, for example, the story of L.J. As a student in Wyoming's special education program, L.J. directly encountered the consequences of the low FAPE standard.[15] L.J.'s parents quickly became dismayed with the general sense of complacency the school exhibited towards L.J.'s educational progress.[16] Repeatedly, L.J.'s parents discussed their concerns and provided suggestions on how to change L.J.'s curriculum to better reflect her individual learning needs.[17] Specifically, the special education teachers consistently assigned work to the class as a whole and often completed assignments for L.J.[18] Frustrated, L.J.'s parents did not feel as if the school was challenging their child.[19] After L.J.'s parents presented their concerns, the school cited L.J.'s Individual Education Program (IEP) to deny their requests.[20] The school referenced how L.J. demonstrated some measurable progress indicating that L.J.'s education plan was sufficient.[21] Although L.J.'s IEP suggested that she could perform certain skills, L.J. could not perform these skills outside the classroom.[22] L.J.'s parents thus felt trapped in a vicious cycle.[23] They would bring their concerns to the school and the school would cite L.J.'s IEP as an indication that L.J. had made some measurable progress, which would effectively end the discussion.[24] Alternatively, if the school and L.J.'s parents did reach an

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[13] *See* Mindy LaBrosse, *A FAPE Revolution: Reforming the FAPE Standard under the Individuals with Disabilities Education Act, Rowley, Deaf Education, and No Child Left Behind*, 12 WHITTIER J. CHILD & FAM. ADVOC. 87, 106 (2013) (despite Congress's 1997 and 2004 amendments to IDEA and the passage of NCLB, the courts continue to apply the *Rowley* standard and consequently disabled students do not receive adequate education); *see also infra* notes 166–78 and accompanying text.

[14] Kotler, *supra* note 9, at 498 ("The Court's decision [in *Rowley*] resulted not only in limiting the substantive educational goals of the Act, but also created a schism between parents of disabled children and the educational establishment.").

[15] Telephone Interview with K.M., parent of L.J. (Aug. 15, 2015) [hereinafter *Interview*]. This interview illustrates the struggles a parent and a disabled child encounter in the special education system. The judicial interpretations of FAPE not only creates the standard for schools, but directly impacts students and families. Thus, students and their parents serve as the intersection between judicial interpretation and the classroom reality.

[16] *Interview*, *supra* note 15.

[17] *Interview*, *supra* note 15.

[18] *Interview*, *supra* note 15.

[19] *Interview*, *supra* note 15.

[20] *Interview*, *supra* note 15. IDEA requires schools to create a written IEP for each student. The IEP provides the child's academic and functional goals, and measures the child's progress towards those goals. *See generally* 20 U.S.C. § 1414(d)(1)(A)(i) (2015).

[21] *Interview*, *supra* note 15.

[22] *Interview*, *supra* note 15.

[23] *Interview*, *supra* note 15.

[24] *Interview*, *supra* note 15.

agreement about new techniques for L.J., the school would often not follow through with the plans.[25] The school's inactions had negative effects on both L.J. and her parents.[26]

Unfortunately, this story is all too familiar for families in Wyoming that have children in the special education program.[27] Many parents and children enter into the special education program with the belief that the school will maximize the potential of their child.[28] However, the schools only have to provide services to the extent required by law.[29] Unfortunately, this means that the relationship between the parents and the school disintegrates.[30]

In response to the schism between the school and parent, this comment argues that the judicial interpretation of FAPE, which primarily promotes access over progress, is insufficient for Wyoming parents and special education students.[31] This comment further argues that Wyoming should amend Wyoming Statute section 21-2-501 to impose a standard of FAPE that is more in line with the 1997 and 2004 amendments and the No Child Left Behind Act (NCLB).[32] First, the comment will provide a brief history of special education and the path that led to the creation of IDEA.[33] In particular, this comment will show how the discourse surrounding the creation of IDEA continues to influence courts' interpretations of FAPE.[34] The first section will also detail the amendments to IDEA, as well as discuss the standard of education found in the regular classroom by looking to NCLB.[35] Next, this comment will argue that despite legislation by Congress

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[25] *Interview*, *supra* note 15. At one point, L.J.'s parents began taking L.J.to the Children's Hospital in Denver. The doctors provided L.J.'s parents suggestions on how to improve L.J.'s learning and physical limitations. Although L.J.'s parents informed the school of the doctors' suggestions, the school dismissed the suggestions because they were "unfeasible."

[26] *Interview*, *supra* note 15.

[27] *See, e.g.*, *Decision C-0122*-11, *supra* note 9; *Decision C-0140-11*, *supra* note 9.

[28] Kotler, *supra* note 9, at 500–01 ("At least upon their initial entry into the world of special education, too many parents believe the school shares their goal of maximizing the potential for their child and too many school districts, for whatever reason—differing expectations, fiscal constraints, fungibility of children and, as an institution, not having to deal with the long term consequences of their decisions—seek to provide the bare minimum allowed by law.").

[29] Scott F. Johnson, *Rowley Forever More? A Call for Clarity and Change*, 41 J.L. & EDUC. 25, 26 (2012).

[30] *See* Kotler, *supra* note 9, at 489 ("In any event, when parents learn, or come to believe that schools are not offering programming designed to meet their expectations, and educators seek to justify their actions by pointing to technical legal requirements, the predictable response is anger and suspicion by the parents and defensiveness by the schools.").

[31] *See infra* Part III.

[32] *See infra* Part III; *see generally* WYO. STAT. ANN. § 21-2-501 (1997).

[33] *See infra* Part II.A.

[34] *See infra* Part II.A.

[35] *See infra* Part II.A.

seemingly imposing a higher standard, the majority of courts continue to apply a lower standard of FAPE.[36] Third, this comment will focus on the minority interpretation of FAPE recognized in Wyoming.[37] Finally, this comment argues that there is little difference between the two interpretations of FAPE; however, Congress's amendments to IDEA and the creation of NCLB suggest a standard of FAPE that emphasizes the success of special education students.[38] Thus, Wyoming should follow in the footsteps of a minority of states that have adopted statutes providing a higher standard.[39]

## II. BACKGROUND

### *A. Developing the Idea of "Appropriate" Education and Education for All Handicapped Children Act (EAHCA)*

Entering into the twentieth century, American society experienced drastic changes as a result of the influx of immigrants and the urbanization of society as part of the industrial revolution.[40] In response to the changing landscape, American society entertained fears of a degenerating society and a national body.[41] Progressives reacted to these changes by looking to the state to remedy social imbalances and to achieve the common good.[42] State run mental institutions and their associated separate schools for "feebleminded" children became the tools to address these social ills.[43] However, with the rise of eugenics and increased admissions, these schools shifted their focus from creating productive individuals to having an asylum only concerned with custodial care of those society deemed

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[36] *See infra* Part II.B; *see also infra* Part II.C.

[37] *See infra* Part II.D.

[38] *See infra* Part II.D.

[39] *See infra* Part III.

[40] *See* KIM E. NIELSEN, A DISABILITY HISTORY OF THE UNITED STATES 98, 100 (2013) ("The solidification of the federal government that developed in this period, along with emerging technologies and urbanization, aided the creation of institutions and the development of policies pertaining to people considered disabled." "The mass immigration of southern and eastern Europeans who provided the cheap labor that fueled the nation's industrial and economic expansion now generated fears about a deteriorating national body . . . .").

[41] NIELSEN, *supra* note 40, at 100. According to Progressives, violence, sexual deviancy, poverty, and other social ills that plagued urban cities were evidence that American society was on the decline. *See* RICHARD HOFSTADTER, THE AGE OF REFORM 212 (1960).

[42] *See* DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA 49 (1908) ("As [Progressives] saw it, the state would have to exercise its authority to correct imbalances, to bring about equality, to realize the common good.").

[43] *See* JAMES W. TRENT JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 26 (1995) ("The goal of education was productivity, and superintendents assumed that educated idiots, freed from inactivity and no longer a burden to their family, would return home to be productive and upright citizens in their communities.").

"disabled."[44] Until deinstitutionalization in the 1970s, the mental institutions and schools physically excluded society's "undesirable" members from the general populace.[45] As such, isolated schools and institutions characterized the treatment of disabled adults and children for the majority of the twentieth century.[46]

However, in the wake of the Civil Rights Movement, parents of children who were in these state schools advocated for deinstitutionalization.[47] Parents were not alone in their desire for deinstitutionalization because society also began to negatively view the institutions.[48] Advocates for children with disabilities relied on the 1954 United States Supreme Court decision of *Brown v. Board of Education* to argue for equal education opportunities for the disabled in the lower courts.[49]

In 1972, two influential district court cases applied *Brown*'s equal protection analysis and due process theory.[50] In *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*, thirteen parents and the PARC brought a class action suit against the Commonwealth of Pennsylvania, claiming that the state statutes that excluded disabled children from the public schools were unconstitutional.[51] Similarly, *Mills v. Board of Education* was another class action suit in which seven parents sought to enjoin the District of Columbia from excluding their children from the public schools.[52] The parents claimed that their

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[44] TRENT, *supra* note 43, at 27, 94.

[45] Dr. Thomas Kirkbride, was an influential figure in establishing the state-sponsored mental institutions during the nineteenth century. Although Kirkbride was not alone in this endeavor, he was the most influential. In particular, Kirkbride is representative of the "moral treatment" era. This era supported the creation of state mental institutions and justified society's perceived need to confine the mentally ill. *See* NANCY TOMES, A GENEROUS CONFIDENCE: THOMAS STORY KIRKBRIDE AND THE ART OF ASYLUM-KEEPING 89, 1840–83 (1984).

[46] The history of mental institutions and institutional schools is beyond the scope of this comment; however, it is important to think of the passage of IDEA within the historical framework. States funded the first mental institutions under the theory of "moral treatment," which eventually gave way to the theory of eugenics and custodial treatment. For more information see HENRI-JACQUES STIKER, A HISTORY OF DISABILITY (William Sayers trans.,1997) (discussing society's innate desire to achieve "sameness" or "identicalness," and society's continuous struggle with this desire); *see also* TRENT, *supra* note 43 (discussing how political and social opinions created the label of "disabled" and fostered a segregated state school system).

[47] NIELSEN, *supra* note 40, at 20 (challenging American history discourse to include how ideas of ableism are prevalent).

[48] TRENT, *supra* note 43, at 1 (showing an increased awareness of what institutional schools were like for children by evidencing that the Chicago Sun-Times received a Pulitzer Prize in 1971 for powerfully disturbing photos of the Lincoln and Dixon schools in Illinois).

[49] Cynthia L. Kelly, *Individuals with Disabilities Education Act—The Right "Idea" for All Childrens' Education*, 75 J. KAN. BUS. ASS'N 24, 25 (2006).

[50] *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 297 (D. Pa. 1972); Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972).

[51] *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 282–84.

[52] *Mills*, 348 F. Supp. at 868.

children's exclusion from the public schools was a violation of their due process rights.[53] Both *PARC* and *Mills* resulted in settlement agreements that recognized a state's obligation to provide public education to disabled children and to ensure parental participation in developing the child's educational plan.[54]

These cases, predicated upon allowing mentally disabled students access to public education, provided the impetus for federal legislation.[55] Although states had monetary and resource concerns, they joined the movement and looked to Congress to "provide consistency in education programming and subsidize the costs of providing special education."[56] Accordingly, Congress passed the Education for All Handicapped Children Act (EAHCA) in 1975.[57] The EAHCA provided money to states that complied with the EAHCA in order to ensure that children with disabilities would gain access to public education.[58] Prior to the passage of the EAHCA, public schools excluded approximately 1.75 million school-age children with disabilities and another 2.2 million did not have programs that met their needs.[59] Based upon these statistics and the legacy of institutional education, Congress's intent with the passage of the EAHCA was to grant *access* to public education as a baseline guarantee.[60] As the EAHCA underwent changes, the amendments to the Act created more in-depth requirements that shifted the focus of EAHCA from that of access to the success of disabled students.[61]

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[53] *Id.*

[54] *See Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 302.

[55] Kelly, *supra* note 49, at 25.

[56] Kelly, *supra* note 49, at 25; *see, e.g.*, *Mills*, 348 F. Supp. at 875; Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1105 (1979) ("Congress authorized large annual appropriations to aid the states in providing expensive new services for the handicapped.").

[57] *See* 20 U.S.C. § 1400(c)(2) (2015).

[58] *See* Therese Craparo, Note, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, 468 (2002-2003).

[59] *See* MARK WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 1:1–1:2 (2002).

[60] The *Rowley* decision states:

> The Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the States any great substantive education standard than is necessary to make such access to public education meaningful. The Act's intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside.

Bd. of Educ. v. Rowley, 458 U.S. 176, 177 (1982). However, given the historical context it is hardly surprising that the focus was on access; yet, despite this focus, there was a sentiment to go even further than just offering access. *See* Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J.L. & EDUC. 95, 110–11 (2012); *see also infra* Part III.

[61] *See infra* Part II.B.

### *B. From the EAHCA to IDEA*

Not only did the EAHCA provide states with a monetary incentive, it also guaranteed "free appropriate public education" (FAPE) to all disabled children.[62] In 1990, Congress reauthorized the EAHCA and although the reauthorization did not drastically alter the substance of the Act or its guarantee of FAPE, Congress renamed the EAHCA to the Individuals with Disabilities Education Act (IDEA).[63] The most drastic changes and amendments to IDEA came in 1997 and 2004.[64]

In 1997, Congress enacted the most extensive amendments to IDEA.[65] The 1997 amendments attempted to shift the legislation's focus from mere public school access towards improving a child's educational achievement and performance.[66] Specific changes included strengthening the role of parents in decision-making, encouraging the use of mediation for dispute resolution, including measures to avoid mislabeling students, and codifying comprehensive disciplinary procedures.[67] Congress noted that the amendments aligned the statute with the national standard "of ensuring equality of opportunity, full participation, independent living and economic self-sufficiency for individuals with disabilities."[68] In 2004, Congress once again amended IDEA.[69]

#### *1. No Child Left Behind Act and IDEA*

In response to the enactment of NCLB, which Congress passed in 2001, the 2004 amendments to IDEA attempted to reflect the initiatives outlined in NCLB.[70] NCLB imposed new educational accountability procedures, such as holding states accountable for students' performance on state-based tests.[71] The 2004 amendments aligned with NCLB's accountability policies by requiring proficiency in reading, math, and science for all disabled students.[72] Thus, these

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[62] *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, §§ 3(a), 601(c), 89 Stat. 773, 774–75 (1991) (introducing FAPE into education law). The guarantee of FAPE is under Part B of the EAHCA. Part B discusses funding and requirements for public schools to offer education to disabled children. *Id.; see also* Kelly, *supra* note 49, at 25.

[63] *See* Education for All Handicapped Children Act, Pub. L. 94-142, 89 Stat. 587 (1991).

[64] Kelly, *supra* note 49, at 26.

[65] Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1103 (1997).

[66] Kelly, *supra* note 49, at 26.

[67] Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1103 (1997).

[68] Individuals with Disabilities Education Act, Pub. L. 105-17, 111 Stat. 37 (1997).

[69] Kelly, *supra* note 49, at 26.

[70] Kelly, *supra* note 49, at 26.

[71] *See* 20 U.S.C. § 6301(6) (2002); 20 U.S.C. § 1414(d)(1)(B) (2010).

[72] Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 372 (2008).

amendments shifted IDEA's focus from bureaucratic compliance with procedures to student outcomes and student achievement.[73]

When Congress passed NCLB with bipartisan approval, it marked a major shift in educational policy.[74] While IDEA serves as the federal legislation that creates standards for the education of disabled children, NCLB provides states with standards for students in the regular classroom of public schools.[75] NCLB holds states accountable by using state tests, based on a state's general curriculum, to measure student performance.[76] Additionally, public schools must provide "adequate yearly progress" reports under NCLB.[77] These reports must measure the schools' progress in achieving academic assessments and providing "continuous and substantial academic improvement for *all* students."[78] As a method of holding schools accountable for student progress, NCLB also requires states to create incentives for schools to demonstrate a higher percentage of student improvement.[79]

NCLB also requires public schools to demonstrate that students with disabilities have substantial improvement.[80] Thus, NCLB is supposed to have wide reaching impact on *every* student in a school district.[81] In particular, one of the purposes of NCLB is to "[close] the achievement gap between high-and low-performing children, minority and nonminority students, and between disadvantaged children and their more advantaged peers."[82] Specifically, NCLB lists children with disabilities as a particular group upon which schools should focus.[83] The purpose of NCLB is to "[help] every child reach his or her academic potential and [aid] each child to self-actualize into smart and effective adults no matter how disadvantaged . . . ."[84] Therefore, NCLB encourages a heightened

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[73] *See* 20 U.S.C. § 1412(a)(15)(2005); Kelly, *supra* note 49, at 26.

[74] *See* Andrea Kayne Kaufman & Evan Blewett, *When Good Enough is No Longer Good Enough: How the High Stake Nature of the No Child Left Behind Act Supplanted the Rowley Definition of a Free Appropriate Public Education*, 41 J.L. & EDUC. 5, 20 (2012).

[75] *See id.* at 16 ("Unlike IDEA, which was a civil rights bill, NCLB created new conditions for federal funding for public schools. While IDEA confers the right to a [F]APE to children with disabilities, NCLB enumerates standards for schools and ties state educational funding to stringent academic results.").

[76] *See* 20 U.S.C. § 6301(6).

[77] *See* 20 U.S.C. § 6311(b)(2) (2006).

[78] 20 U.S.C. § 6311(b)(2)(C)(iii) (emphasis added).

[79] *See* 20 U.S.C. § 6311(b)(2)(A)(iii). Incentives are generally in the form of sanctions or rewards.

[80] *See* 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc).

[81] *See* 20 U.S.C. § 6311(b)(2)(C)(iii); Kaufman & Blewett, *supra* note 74, at 16.

[82] *See* 20 U.S.C. § 6301(3).

[83] *See* 20 U.S.C. § 6301(2).

[84] Kaufman & Blewett, *supra* note 74, at 16.

standard for every student in the education system. Creating such standards for the regular classrooms has the potential to impact the definition of FAPE.[85] However, a majority of courts continue to view NCLB separately from IDEA.[86]

### *2. Components of IDEA*

IDEA has various procedural safeguards that provide protection for students and their parents.[87] For example, IDEA requires schools to ensure parent involvement in making decisions for the child.[88] In particular, parent involvement occurs through prior written notice and the creation of Individual Education Programs (IEPs).[89] Prior written notice to the parent is required whenever the school proposes or refuses to initiate or change "the identification, evaluation, or education placement of the child, or the provision of a free appropriate public education to the child."[90] The prior written notice must contain a description of the proposed or refused action and an explanation of why the school has made that decision.[91] Ultimately, these notice requirements provide parents with information necessary to effectively engage in planning their child's education.[92]

Additionally, each child in special education must have a written IEP.[93] Each IEP contains the following information: a statement regarding the student's present academic and functional abilities, a statement of the student's measurable annual goals, a statement of the student's academic and functional goals, a description of how to measure progress towards those goals, a statement detailing the related services and supplementary aids the student requires, an explanation

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[85] Robin Bucaria, *Expanding the Definition of FAPE Under NCLB: Why Courts Give FAPE the Slip and Leave It Swimming in a Sea of Alphabet Soup* 10 J.L. & FAM. STUD. 237, 245 (stating: "NCLB could modify the provision of a FAPE under IDEA in several ways."). *See infra* Part II.D.

[86] *See infra* Part II.C. The effectiveness of NCLB is outside the scope of this comment. Rather, NCLB is used in this framework to understand the impact upon IDEA. Imposing standards on the regular public classroom and the effect that will have on FAPE.

[87] *See* 20 U.S.C. § 1415(b) (2005) (detailing the required procedures for schools, including but not limited to the ability of the parents to examine all of the child's records, medication, written prior notice, planning of IEPs, and the opportunity to present a complaint).

[88] *See* 20 U.S.C. § 1400(c)(5)(B) (2010) ("education of children with disabilities can be made more effective by—(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home . . . .").

[89] Kelly, *supra* note 49, at 28–9.

[90] *See* 20 U.S.C. § 1415(b)(3).

[91] *See* 20 U.S.C. § 1415 (c)(1).

[92] ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 98 (2014) ("The IDEA's notice requirements are designed to provide parents with the information necessary to allow them to participate actively in the educational planning process for their children.").

[93] *See* 20 U.S.C. § 1414(d)(1)(A)(i) (2005).

of the amount of time the student will spend in the regular classroom, and various other explanations and statements relating to the student's educational plan.[94] IDEA requires an IEP team to create the child's IEP and this team must meet at least once per year.[95]

IDEA also provides that all children with disabilities will receive Free Appropriate Public Education (FAPE) in the least restrictive environment (LRE).[96] In particular, IDEA defines FAPE as:

> special education and related services that[:] (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program . . . .[97]

Specifically, special education is educational instruction for handicapped children that is designed to meet the unique needs of the child's disability at no cost to the parents.[98] Related services include "transportation, and such developmental, corrective, and other supportive services . . . as may be [required] to assist a child with disability to benefit from special education."[99] Although IDEA provides this definition of FAPE, it is vague when determining a standard of "appropriateness."[100] Some scholars believe Congress intentionally left the term open for courts to interpret.[101]

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[94] 20 U.S.C. § 1414(d)(1)(A)(i).

[95] 20 U.S.C. §§ 1414(d)(1)(B), (d)(4)(A)(i). The team consists of the child's parents, at least one regular education teacher and one special education teacher, a representative of the school, and any other individuals the parents would like to include who have particular expertise or knowledge of the child's needs.

[96] *See* 20 U.S.C. § 1412(a)(5) (2005). LRE in IDEA refers to the instruction of disabled children in regular classrooms to the "maximum extent appropriate." Because FAPE and LRE are interrelated in IDEA, LRE is often associated with FAPE. *See* Craparo, *supra* note 58, at 469.

[97] *See* 20 U.S.C. § 1401(9) (2010).

[98] 20 U.S.C. § 1401(29) (special education includes physical education as well as instruction conducted "in the classroom, in the home, in hospitals and institutions, and in other settings . . . .").

[99] *See* 20 U.S.C. § 1401(26).

[100] Bd. of Educ. v. Rowley, 458 U.S. 176, 188–89 (1982) ("[n]oticeably absent from the language of the statue is any substantive standard prescribing the level of education to be accorded handicapped children."); *see* Weber, *supra* note 60, at 101 ("[a]lthough special educators used the words 'appropriate education' before passage of the Act, there appears to have been no clear or uniform meaning given to the term when they did so.").

[101] *See* Weber, *supra* note 60, at 107.

### C. *Majority Interpretation of FAPE*

*Board of Education v. Rowley* is the prevailing United States Supreme Court case concerning what constitutes FAPE.[102] Since Amy Rowley had minimal residual hearing, the school prepared an IEP for her.[103] The IEP stated that Amy would remain in the regular classroom, continue using an FM hearing aid, and receive instruction from a tutor one hour each day.[104] However, Amy's parents disagreed with the IEP because they believed she also needed to have a sign language interpreter in the classroom.[105] Amy's parents argued that the school's refusal to have a sign-language interpreter denied their daughter's guarantee of an "appropriate" education because Amy understood fewer words without the interpreter.[106] The district court held that Amy was not receiving FAPE and the court defined the standard "appropriate" to require "that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."[107] The appellate court affirmed the district court.[108]

On appeal, the Court reversed the decision of the appellate court based on an alternative interpretation of FAPE.[109] The Court determined that Congress's intent when passing the EAHCA was not to maximize the opportunity of success for each individual child nor did it require anything more than equal access.[110] According to the Court, FAPE only requires that the school provide the child with access to public education that "confer[s] *some educational benefit* upon the handicapped child."[111] Justices White, Brennan, and Marshall dissented and found that the legislative history of the EAHCA provided a different interpretation which "supports the conclusion that [the EAHCA] intends to give handicapped children an educational opportunity commensurate with that given other children."[112] While the dissent argued FAPE was a means to "eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn," the majority indicated that the "basic floor of opportunity" standard

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[102] *See Rowley*, 458 U.S. at 184–85; *see also* Weber, *supra* note 60, at 95.

[103] *Rowley*, 458 U.S. at 184.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 185.

[107] Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945, 948 (2d Cir. 1980), *rev'd*, 458 U.S. 176, 210 (1982).

[108] *Rowley*, 632 F.2d at 948.

[109] *Rowley,* 458 U.S. at 210.

[110] *Id.* at 196–97.

[111] *Id.* at 200–01 (emphasis added).

[112] *Id.* at 212, 214 (White, J., dissenting).

meant disabled children were only guaranteed *access* to public education.[113] Thus, the *Rowley* Court developed the "basic floor of opportunity" or the "some benefit" standard of FAPE.[114]

Even though Congress adopted amendments to IDEA in 1997 and 2004, in an attempt to shift IDEA's focus to student progress, *Rowley* remains the authority defining FAPE.[115] By interpreting the requirements of FAPE in 1982, the *Rowley* Court restricted the development of other FAPE standards in the lower courts.[116] Consequently, lower courts have hesitated to adopt alternative standards of FAPE based upon proportional maximization or equal opportunity.[117]

One case that indicates *Rowley* is still the controlling precedent, despite legislative changes to IDEA, is *Lt. T.B. v. Warwick School Committee*.[118] In *Warwick,* the parents of an autistic child challenged the adequacy of their child's IEP.[119] In particular, the parents argued that the 1997 amendments to IDEA "changed [the 'some benefit' standard of *Rowley*] to require school districts to provide the 'maximum benefit' to special needs children."[120] The parents argued that the amendments required teachers to be qualified to prepare special education students to "lead productive, independent, adult lives, to the maximum extent possible."[121] Yet, the court held that the 1997 amendments did not increase the standard beyond the "basic floor of opportunity" standard.[122]

In *Kirby v. Cabell County Board of Education*, the court reached a similar conclusion regarding the 2004 amendments.[123] In *Kirby*, the parents of a child

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[113] *Id.* at 200 (majority opinion) ("neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal *access*." (emphasis added)).

[114] *Id.* at 201. *See* Maureen A. MacFarlane, *The Shifting Floor of Educational Opportunity: The Impact of Educational Reform on Rowley*, 41 J.L. & EDUC. 45, 45–8 (2012) (arguing that the 'basic floor of opportunity' or 'some benefit' standard is still good law); Weber, *supra* note 60, at 95–96 (stating that although there may be some competing definitions of "appropriate" in other circuits, the 'basic floor of opportunity' or 'some benefit' standard remains the widely accepted meaning of "appropriate").

[115] *See* MacFarlane, *supra* note 114, at 46–47.

[116] *See* Weber, *supra* note 60, at 100.

[117] *See* Weber, *supra* note 60, at 119.

[118] Lt. T.B. *ex rel.* N.B. v. Warwick Sch. Comm., 361 F.3d 80 (1st Cir. 2004).

[119] *Id.* at 81.

[120] *Id.* at 83.

[121] *Id.* (citing 20 U.S.C. § 1400(c)(5)(E) (2010)).

[122] *Id.* at 83 (holding that the 1997 amendments did not increase the standard of "basic floor of opportunity," found in *Rowley*, to the policy of "maximum benefit"); *see* LaBrosse, *supra* note 13, at 97–98 (discussing how a majority of courts continue to apply the *Rowley* standard).

[123] Kirby v. Cabell Cty. Bd. of Educ., 2006 WL 2691435, at *1–11, *6–8 (S.D. W. Va. Sept. 19, 2006).

with Asperger's Syndrome alleged that the school did not provide an IEP that sufficiently provided "appropriate" education.[124] The parents argued that NCLB, as well as the 2004 amendments to IDEA, obligated schools to provide a higher level of educational benefit.[125] However, the court held that the language in NCLB did not create any obligations that schools must adhere to in their special education programs.[126] Additionally, the court stated that IDEA "does not require providing every available service necessary to maximize a disabled child's potential."[127] Rather, IDEA ensures access to education and that disabled children will have the opportunity to interact with other children in the school.[128]

Even without parents raising the arguments regarding amendments to IDEA and NCLB, a majority of circuit courts continue to apply *Rowley*'s "some benefit" standard.[129] For instance, the United States Court of Appeals for the Tenth Circuit in *Sytsema v. Academy School District No. 20* held that the school district only needed to provide a student with *some* benefit.[130] In *Sytsema*, the school developed an IEP for Nicholas Sytsema, an autistic student, in which the school broke-down the number of hours that he would receive independent instruction and how much time he would spend in the regular classroom.[131] Nicholas's parents rejected the IEP, noting that Nicholas did not do well in an integrated classroom.[132] Instead, Nicholas's parents enrolled him in a private school.[133] Seeking tuition reimbursement, Nicholas's parents argued the district denied him FAPE.[134] However, the court rejected the parents' argument that the integrated classroom method was ineffective for Nicholas, resulting in denying him FAPE.[135] In particular, the court noted that under Nicholas's IEP, he would

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[124] *Id.* at *2, *6–8.

[125] *Id.* at *6.

[126] *Id.*

[127] *Id.* at *2.

[128] *Id.* (citing Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 369 (1985) (stating IDEA "intends that the disabled child will receive an education, where possible, in public schools and by participating as much as possible in the same activities as nondisabled children.")).

[129] Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 ED. LAW REP. 1, 6–17 (2009) (providing a circuit-by-circuit analysis of interpretations of FAPE and detailing that the D.C. Circuit, First Circuit, Fourth Circuit, Seventh Circuit, Eighth Circuit, Tenth Circuit, and Eleventh Circuit apply the "some benefit" standard of FAPE).

[130] Sytsema *ex rel.* Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1317 (10th Cir. 2008) (emphasis added) (holding that under the *Rowley* standard the district only needed to provide Nicholas with some benefit).

[131] *Id.* at 1309–10.

[132] *Id.* at 1310.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 1317.

be exposed to various teaching methods which "would have provided Nicholas with *some* educational benefit."[136] Although *Sytsema* was decided in 2008, the court continued to rely upon *Rowley*'s interpretation of FAPE and did not impose a higher standard of appropriate education.[137]

Thus, despite the 1997 and the 2004 amendments, as well as NCLB, courts continue to apply *Rowley*'s concept of access as the standard required for "appropriate" education.[138] Some courts have even argued that Congress's failure to change the statute's language regarding "appropriate" education demonstrates Congress's ratification of the access standard.[139] However, inconsistencies in the circuit courts suggest that the interpretation of FAPE remains unclear.[140]

### *D. Minority Interpretation of FAPE*

Despite the fact that a majority of circuit courts apply the "some benefit" standard of *Rowley*, there are a minority of courts that determined IDEA requires schools to provide educational access that is more than *de minimus*. This is typically referred to as the "meaningful benefit" standard.[141] *Polk v. Central Susquehanna Intermediate Unit 16* is the leading authority on requiring schools to ensure special educational students receive more than *de minimus* education and show "tangible gain in abilities."[142] In *Polk*, Christopher was eligible for special

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[136] *Id.* (emphasis added).

[137] *Id.* The Tenth Circuit has adopted the "some benefit" standard in three major cases decided after the 1997 and 2004 amendments. *See id.*; *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 699–01 (10th Cir. 1998) (rejecting the parents' argument that Kansas state law imposed a higher standard of FAPE and holding that the court must only determine whether a child received some educational benefit); Thompson R2–J Sch. Dist. v. Luke P. *ex rel.* Jeff P., 540 F.3d 1143, 1154 (2008) (stating "the legal principle outlined there by the Supreme Court [in *Rowley*] controls equally here: a school district is not required to provide every service that would benefit a student if it has a formula that can reasonably be expected to generate some progress on that student's IEP goals.").

[138] *See, e.g.*, Sch. Bd. v. M.M., No. 2:05-CV-5-FtM-29SPC, 1–15, 8–13 (M.D. Fla. Mar. 27, 2007) (holding that plaintiff's argument contending NCLB created a higher standard requiring a school to maximize their child's potential was rejected and the court reiterated the *Rowley* standard of "a basic floor of opportunity"); Leighty *ex rel.* Leighty v. Laurel Sch. Dist., 457 F. Supp. 2d 546, 562 (W.D. Pa. 2006) (rejecting the application of NCLB to increase the level of education provided to special education students).

[139] *See* J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 948 (9th Cir. 2010); Mr. C. v. Maine Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 300–01 (D. Me. 2008); Weber, *supra* note 60, at 116.

[140] Weber, *supra* note 60, at 116.

[141] N.B. v. Hellgate Element. Sch. Dist., 541 F.3d 1202, 1213 (9th Cir. 2008); Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 247 (3d Cir. 1999); J.L. v. Mercer Island Sch. Dist., No. C06-494P, 2006 WL 3628033, at *1–9, *3–4 (W.D. Was. Dec. 8, 2006). *See supra* Part II.D.

[142] Polk v. Cent. Susquehanna Intermed. Unit 16, 853 F.2d 171 (3d Cir. 1988); *see Decision C-0122-1*, *supra* note 9.

educational services because he was severely developmentally disabled.[143] As part of his special education, Christopher was entitled to receive related services.[144] Christopher's parents believed that his education benefited from receiving direct physical therapy from a licensed physical therapist.[145] The school district remained unwilling to provide Christopher with direct physical therapy even though it aided him in school.[146] Instead, the school district only allowed a physical therapist to consult the teachers on how to provide physical therapy.[147] Christopher's parents argued that the school district did not individually tailor Christopher's education as required by law.[148] The district court relied on *Rowley* and held that Christopher had received some benefit from his education; as such, the school district had met its requirements.[149]

On appeal, the circuit court reversed the decision of the district court and held that the school district must provide an education that is more than *de minimus*.[150] Ultimately, the circuit court held that there is not a blanket standard that is applicable to every student, but rather it "must be gauged in relation to the child's potential."[151] The school district therefore must consider the individual student's capabilities in determining what education is appropriate for him or her.[152] Considering the capabilities and needs of Christopher individually, the court found that he was entitled to direct physical therapy as part of his appropriate education.[153]

Similarly, in *Ridgewood Board of Education v. N.E. ex rel. M.E.*, M.E. was eligible for special education services and was held back in first grade because the school determined his skills were inferior to his classmates'.[154] Since M.E. struggled to improve in school, his parents sought an independent evaluation.[155] The evaluation concluded that M.E.'s intelligence was in the ninety-fifth percentile and his reading skills were in the second percentile.[156] Consequently,

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[143] *Polk*, 853 F.2d at 173.

[144] *Id.*

[145] *Id.* at 174.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 175.

[150] *Id.* at 184–85.

[151] *Id.* at 185.

[152] *Id.*

[153] *Id.*

[154] Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 243 (3d Cir. 1999).

[155] *Id.* at 243.

[156] *Id.*

M.E.'s parents took him out of the public school system and placed him in a private school.[157] Seeking reimbursement for the tuition of the private school, M.E.'s parents brought legal action against the school district for denying M.E. FAPE under the 1997 IDEA.[158]

On appeal, the United States Court of Appeals for the Third Circuit held that IDEA imposed a higher standard than a "trivial educational benefit."[159] In particular, the court noted that *Rowley* rejects "a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities."[160] The court held that there should be more focus upon the student's capabilities as opposed to focusing upon the contents of the IEP.[161]

Although the "meaningful education benefit" standard encourages courts to look at each child individually and determine their capabilities, some scholars and attorneys question the impact of this standard.[162] Minority courts have yet to draw a distinction between the "meaningful education benefit" and *Rowley*'s "some benefit" standard. Commenting upon the ambiguity and the inconsistency of the two standards, Judge Samuel P. King questioned the differences in *Blake v. Department of Education, State of Hawaii*.[163] Judge King noted that "[v]arious opinions have left it ambiguous as to what the precise difference, if any, is between 'meaningful' benefit and 'some' benefit."[164] Despite these inconsistencies, the "meaningful benefit" standard is still used by a minority of jurisdictions including Wyoming.[165]

Wyoming Statute section 21-2-501 states that "[e]very child of school age in the state of Wyoming having a mental, physical or psychological disability which impairs learning, shall be entitled to and shall receive a free and appropriate education in accordance with his capabilities."[166] Chapter Seven of the Wyoming

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[157] *Id.* at 244–45.

[158] *Id.* at 245.

[159] *Id.* at 247.

[160] *Id.*

[161] LaBrosse, *supra* note 13, at 100; *see, e.g.*, Dennis Fan, *No Idea What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1505 (stating "federal courts should treat 'retrospective evidence' in deciding whether the IEP is substantively adequate."). Retrospective evidence is evidence that is beyond the four corners of the IEP, including evidence of the child's success and failure in the classroom. *Id.* at 1503.

[162] *See* Kaufman & Blewett, *supra* note 74, at 20–21; Wenkart, *supra* note 129, at 29.

[163] Blake C. *ex rel.* Tina F. v. Dep't of Educ., 593 F. Supp. 2d 1199 (D. Haw. 2009).

[164] *Id.* at 1206–07.

[165] *See infra* notes 166–78 and accompanying text.

[166] WYO. STAT. ANN. § 21-2-501 (2015).

Education Rules, promulgated by the WDE, also discusses FAPE; however, the rule remains vague.[167] The rule states:

> School districts and public agencies shall ensure that a Free Appropriate Public Education (FAPE) is available to all children with disabilities residing in Wyoming no later than the child's third (3rd) birthday through the completion of the school year the child turns twenty-one (21), including those children who have been suspended or expelled from school.[168]

In interpreting FAPE, Wyoming cases primarily deal with the age limit for students to remain in the program.[169] However, Wyoming does publish final complaint decisions.[170] These complaint decisions stem from IDEA's dispute resolution mechanisms for parents, which allow for resolution of their concerns outside the courts.[171] After a parent submits a complaint to the WDE, mediation may occur between the parents and the school, or a hearing officer may be appointed to hear both parties and make a decision.[172]

The Wyoming complaint decisions reveal that Wyoming inconsistently uses the "some benefit" standard and the "meaningful benefit" standard.[173] For instance Wyoming complaint decision C-0122-11 cites *Thompson RJ-2 School District v. Luke P.* and states that the United States Court of Appeals for the Tenth Circuit "reiterated that a school district is providing a student with appropriate special education program if the services are reasonably calculated to allow the student to make 'some progress' in the IEP."[174] However, the complaint additionally cites *Polk* and states that IDEA requires more than a trivial educational benefit.[175]

Similarly, in Wyoming complaint decisions C-0175-11 and C-0176-11 the WDE concluded that "a child's education benefit must be more than *de*

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[167] *See* CHAPTER 7 SERVICES FOR CHILDREN WITH DISABILITIES, WYOMING DEPARTMENT OF EDUCATION § 5(a)(i) (2010), http://soswy.state.wy.us/Rules/RULES/7767.pdf.

[168] *Id.*

[169] *See, e.g.*, Natrona Cty. Sch. Dist. No. 1 v. Ryan, 764 P.2d 1019, 1035 (Wyo. 1988) (holding the State Board of Education's rule that provided education until age twenty-two invalid because state law only requires the local school district to provide education to handicapped students between the ages of five and twenty-one); Natrona Cty. Sch. Dist. No. 1 v. McKnight, 764 P.2d 1039, 1050–53 (Wyo. 1988); State v. Cochran, 764 P.2d 1037 (Wyo. 1988).

[170] *See* WDE, *supra* note 2.

[171] *See* 20 U.S.C. § 1415 (2005).

[172] *See* 20 U.S.C. § 1415.

[173] *See Decision C-0122-1*, *supra* note 9.

[174] *See Decision C-0122-1*, *supra* note 9, at 16.

[175] *See Decision C-0122-1*, *supra* note 9, at 16.

*minimus*—there must be some tangible gain in abilities."[176] In a subsequent paragraph, the complaint states that "[i]t is the obligation of the [school] [d]istrict to provide special education and related services reasonably calculated to result in *some* educational benefit as measured by progress toward IEP goals, or to take steps to address the lack of progress."[177] Therefore, while Wyoming acknowledges the heightened meaningful education benefit, the WDE has tempered it by holding that school districts "are not required to maximize a student's educational performance."[178] Additionally, the WDE further complicates the interpretation of FAPE by relying upon both the *Rowley* "some benefit" standard and the "meaningful benefit" standard.[179]

### *E. Alternative Approaches*

With the inconsistencies both in the courts and at the state level regarding FAPE, scholar Maureen MacFarlane provides two potential options: individual states should embrace a higher standard, or Congress should expressly amend or reject the *Rowley* standard.[180]

Michigan, for example, adopted a state mandate with a heightened standard of FAPE.[181] The mandate reads, "[t]he board of a local school district shall provide special education programs and services designed to develop the maximum potential of every handicapped person."[182] Although this maximum potential standard in Michigan does not require the best education possible, Michigan adopted a higher standard than required at the federal level.[183] However, Michigan has yet to define what "maximum potential" requires in the context of IDEA.[184] Despite not having a clear definition of how the standard differs

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[176] Wyoming Department of Education, Complaint Decision and Order for Corrective Action C-0175-11 and C-0176-11 14 (Jan. 6, 2011), http://edu.wyoming.gov/downloads/special-ed//SpecEd_Complaint_C-0175-11_and_C-0176-11_Redacted_Decision.pdf (citation omitted) [hereinafter *Decision C-0175-11 and C-0176-11*].

[177] *Decision C-0175-11 and C-0176-11*, *supra* note 176, at 15 (emphasis added).

[178] *Decision C-0122-1*, *supra* note 9, at 16 (citation omitted).

[179] *See Decision C-0122-1*, *supra* note 9; *Decision C-0175-11 and C-0176-11*, *supra* note 176.

[180] MacFarlane, *supra* note 114, at 59.

[181] Gary L. Monserud, Comment, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 J. C.R. & ECON. DEV. 675, 833–34 (2004).

[182] MICH. COMP. LAWS ANN. § 380.1751(1) (2015).

[183] Dick-Friedman *ex rel.* Friedman v. Bd. of Educ., 427 F. Supp. 2d 768, 778 (E.D. Mich. 2006) ("The substantive requirement of the IDEA . . . incorporates Michigan's higher standard requiring that the IEP be designed to 'develop the maximum potential' of the child." (citation omitted)); Renner v. Bd. of Educ., 185 F.3d 635, 645 (6th Cir. 1999) ("Michigan has chosen to enhance IDEA's requirements . . . it does not necessarily require the best education possible." (citation omitted)).

[184] *Renner*, 185 F.3d at 645.

from federal legislation, the continued application of the heightened standard remains important.[185]

## III. ANALYSIS

Whether states adopt the "meaningful benefit" standard espoused by a minority of courts or adopt a higher standard of FAPE, states need to specifically distinguish the standard from the *Rowley* standard. Without defining these higher standards explicitly, the impact of the standards, like the "meaningful benefit" standard, is lessened because there is no distinction between the heightened standard and the *Rowley* "some benefit" standard.[186] While Wyoming acknowledges the "meaningful benefit" standard, in practice, this standard does little to expand the opportunities provided to special education students.[187] Since neither the Court nor Congress has expressly rejected the *Rowley* "some benefit" standard, the risk is that the "meaningful benefit" standard cannot stand on its own, nor can any other heightened standard.[188]

Even with slightly higher standards, courts continue to look to *Rowley* for guidance and ultimately fail to interpret a greater obligation to students with disabilities.[189] The result is that the higher standards have no chance of creating an impact or change when defining FAPE. The *Rowley* standard restricts courts to a narrow application despite the 1997 and 2004 amendments to IDEA and the implementation of NCLB.[190] Although a direct congressional rejection of *Rowley* would be effective, Wyoming should take steps towards reframing FAPE to align with IDEA's amendments and NCLB.[191] Thus, Wyoming should amend its statutes in order to clearly define FAPE in the context of the IDEA amendments and NCLB.

### *A. Wyoming Should Adopt a Heightened Standard*

The Wyoming State Legislature and the WDE should re-evaluate the standard of "appropriate" education for all disabled children in light of the heightened standards developed by NCLB and the amendments to IDEA. This does not mean that students in special education programs should receive superior services than those offered to other students.[192] Rather, NCLB requires *all* students

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[185] *See* Monserud, *supra* note 181, at 834.

[186] *See supra* notes 166–78 and accompanying text; *see also* Wenkart, *supra* note 129, at 29.

[187] *See supra* Part II.D; Wenkart, *supra* note 129, at 29; Kaufman & Blewett, *supra* note 74, at 20–21.

[188] *See supra* Part II.C.

[189] *See supra* Part II.C.

[190] *See supra* Part II.C.

[191] *See supra* Part II.D.

[192] *See* Weber, *supra* note 60, at 103–04.

in a school district, no matter their background, to achieve a certain level of proficiency.[193] NCLB also requires Wyoming to have academic standards that challenge *all* students in academic subjects and achievement.[194] If *all* students are to achieve these standards, the standards should extend to special education students as well.[195]

As discussed earlier, NCLB also requires Wyoming to show students with disabilities have made substantial improvement.[196] Thus, NCLB should have a wide-reaching impact on *every* student in a school district. Although the specific accountability requirements of NCLB have not always been popular in Wyoming, the goal of improving student education is indisputable.[197]

Developing a standard of education that encompasses disabled children and their peers is not without challenges.[198] It is difficult to determine whether a student is receiving an education comparable to other students in the regular classroom; however this difficulty should not be a deterrent in achieving this standard.[199] Quality of education can be determined in various ways including: "qualification of teachers, depth and innovativeness of teaching technique, research support behind the curriculum, consistency in the application of professional best practices, conformity to state rules, responsiveness of the administration, and other indicators."[200] This approach would also require schools and Wyoming to undergo changes. For instance, schools would need stricter standards for special education students, teachers would need to be willing to dedicate more time to individual students, and schools would need to make sure that special education teachers and paraprofessionals have qualified experience. In contrast, Wyoming would need to navigate the transition by taking into consideration the concerns of all of those involved, including parents, educators, and school districts. These changes will not occur over a short period of time, but this approach will have positive impacts on schools and disabled students.

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[193] *See supra* notes 70–86 and accompanying text.

[194] *See* 20 U.S.C. § 6311(b)(1)(C) (2006).

[195] Weber, *supra* note 60, at 103–04 ("If the children without disabilities in a given school district receive excellent services in comparison to students throughout the nation, then so should the children with disabilities. This standard does not entail maximizing education opportunities of children with disabilities, but rather treating all children equitably.").

[196] *See* 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc).

[197] *See* Heather Richards, *Committee Takes on No Child Left Behind*, CASPER STAR TRIBUNE A1 (Nov. 19, 2015). This comment does not argue the effectiveness of NCLB, but rather uses it as a framework to demonstrate the changing political environment regarding education and disabled students.

[198] *See supra* Part II.D.

[199] *See* Weber, *supra* note 60, at 103.

[200] Weber, *supra* note 60, at 103.

Considering NCLB in conjunction with the amendments to IDEA furthers the argument that federal legislation, as it is written, requires a heightened standard of FAPE.[201] The 2004 amendments to IDEA aligned IDEA more closely to NCLB.[202] After 2004, similar to NCLB, IDEA required teachers to be "highly qualified" and special education assessments came under the accountability provisions of NCLB.[203] With these changes to IDEA, federal legislation focused more on a disabled student's results and achievements as opposed to bureaucratic compliance.[204] Since the original special education law of EAHCA, there have been dramatic changes in the political context of the United States as well as in IDEA itself.[205]

With the enactment of EAHCA in 1975, access to public education for disabled children was the primary concern because school districts actively excluded disabled children from the education system.[206] Thirty plus years after *Rowley*, disabled children are not denied access to a public education, but rather the concern is with the quality of education that disabled children receive in the classroom. IDEA has not remained stagnant over these years, both the 1997 and the 2004 amendments attempted to shift the focus of the act to a more quality based standard.[207] Yet, the courts continue to look to *Rowley* for guidance and fail to interpret a greater obligation to students with disabilities despite advancements in understanding disabilities as well as the amendments to IDEA and the enactment of NCLB.[208] The definition of FAPE should reflect these changes and greater understandings.

As Justice Rehnquist stated in *Rowley*, the original intent of EAHCA "was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[209] Although that may have been the original intent of EAHCA, public schools are well beyond this consideration.[210] In the immediate aftermath of deinstitutionalization, a law focused on "some educational benefit" was an improvement for children. However, today the political context is very different. Congress passed the Americans with Disabilities Act (ADA) in 1990, the NCLB in 2004 which addresses the education of *every* child, and the amendments

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[201] *See supra* Part II.D.

[202] Kaufman & Blewett, *supra* note 74, at 18.

[203] *See* 20 U.S.C. § 1401(10)(B) (2015); Kaufman & Blewett, *supra* note 74, at 18.

[204] *See supra* Part II.B.

[205] *See supra* Part II.A.; *see also supra* Part II.B.

[206] *See supra* Part II.A.; *see also supra* Part II.B; Weber, *supra* note 60, at 103.

[207] *See supra* Part II.B.

[208] *See supra* Part II.C.

[209] Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982).

[210] *See supra* Part II.A.; *see also supra* Part II.B.

to IDEA.[211] All of these acts exemplify how far the United States has come in recognizing the basic rights of individuals with disabilities. The issue is no longer whether a disabled child has access to a public education, but rather whether the U.S. and the individual states are prepared to take the next step to ensure quality education for special education students, requiring more than just "some benefit."

A starting point for change is for Wyoming to adopt its own definition of FAPE because the current court interpretation is insufficient. Wyoming complaint decisions reveal some of the practical problems of FAPE. Hearing officers who oversee complaint decisions use two standards to determine if a school district has denied a special education student FAPE.[212] While simultaneously applying the "some benefit" standard of *Rowley* and the "meaningful benefit" standard of *Polk*, the WDE has convoluted the definition of FAPE.[213] This confusion has made the interpretation of FAPE uncertain. On the one hand, the uncertainty of what FAPE requires denies parents the ability to know which standard Wyoming follows. Thus, parents who are frustrated with the system assume schools ought to do more.[214] Additionally, schools do not know how to provide FAPE to each individual student and what constitutes a denial of FAPE. When neither party understands the requirements of FAPE, the chance of an amicable relationship is significantly decreased.

This uncertainty frustrates the complaint process for parents and causes hostility between parents and schools. A hearing officer—without specific guidance from the state—may implement either the "some benefit" or "meaningful benefit" standard.[215] Thus, submitting a complaint to the WDE is risky. Parents might submit a complaint believing that the school has denied their child of FAPE, but without knowing the FAPE standard parents will not know what the WDE will conclude. Without any certainty as to the interpretation of FAPE, parents might be deterred from utilizing the complaint process. Unfortunately, those who suffer the most from these inconsistencies are the special education students.

The Wyoming legislature needs to explicitly define FAPE because of the changing political context, the frustrated system, and the desire for a clear understanding of FAPE. Moreover, Wyoming needs to provide a definition that focuses on the success of special education students.

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[211] *See* Americans with Disabilities Act, Pub. L. 101-336, 104 Stat. 327 (1990); Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1103 (1997); No Child Left Behind Act, Pub. L. 107-10, 115 Stat. 1425 (2002).

[212] *See supra* notes 166–78 and accompanying text.

[213] *See supra* notes 166–78 and accompanying text.

[214] *See supra* Part I.

[215] *See supra* notes 166–78 and accompanying text.

### *B. Where to Go from Here*

Wyoming has the ability to provide a clear definition of FAPE that better reflects the intention of IDEA and NCLB. Scholars that encourage a revamp of FAPE provide several suggestions including higher state standards, IDEA's express rejection of *Rowley*, and higher qualification standards for teachers.[216] Scholar, Martin A. Kotler, suggests that the law should impose a stricter requirement for schools to disclose information to parents.[217] A higher disclosure obligation may lead to open communication between parents, and help schools and parents find common ground.[218] If parents understood why their child was not improving, the likelihood for hostility would decrease.[219] Scholars, Kaufman and Blewet, also suggest amending the definition of FAPE in IDEA to effectively overrule *Rowley*.[220]

States have the ability to provide their own standards for FAPE; thus, the best solution for Wyoming is to amend its definition of FAPE in Wyoming Statute section 21-2-501. The definition should state that FAPE not only requires students to have access to public education, but that the students should receive a meaningful education to the best of the schools' ability. Similar to NCLB's stringent reporting and achievement standards, Wyoming should also incorporate stringent achievement and reporting standards in special education classrooms.[221]

To begin, section 21-2-501 should first include language of success. For example, the statute could say: "A local school district shall provide a meaningful education to an individual in the special education program. Meaningful education is defined as an education that encourages the improvement of a child's capabilities. Improvement shall be based upon an assessment of the individual child's capabilities in accordance to his or her strengths and weaknesses." This language suggests one way for Wyoming to achieve a clear and higher standard of FAPE. Ultimately, the Wyoming legislature should provide a forum for interested parties to converse. Specifically, Wyoming will need to determine how to hold schools accountable and how the language of FAPE should emphasize success over access. This could require schools to hire more qualified special education teachers, encourage open communication between parents and school districts, or focus on each individual child's abilities as opposed to the special education class as a whole. Defining FAPE to encourage success over access is not a quick and easy

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[216] *See* Kotler, *supra* note 9, at 488; Kaufman & Blewett, *supra* note 74, at 20.

[217] *See* Kotler, *supra* note 9, at 552.

[218] *See* Kotler, *supra* note 9, at 552.

[219] *See* Kotler, *supra* note 9, at 552.

[220] *See* Kaufman & Blewett, *supra* note 74, at 20–21.

[221] *See supra* notes 70–86 and accompanying text.

task that will happen without difficulties. However, in order to provide a better education to disabled students, Wyoming needs to address these issues.

## V. CONCLUSION

L.J. graduated high school after she turned twenty-one years old.[222] Although she technically graduated from her school, she does not have proficiency in reading, math, or other core subjects.[223] Looking back on her high school experience, L.J.'s parents believe that if the school was more concerned with improving L.J.'s skills, her transition into adulthood would have been different.[224] Wyoming needs to reconsider its present definition of FAPE because of L.J. and those students similarly situated. With the enactment of NCLB and the 1997 and 2004 amendments, IDEA has changed its focus from that of access to that of improvements and results. Moreover, the definition of FAPE should not be stagnant and remain reliant upon an interpretation from over thirty years ago, but should better reflect the changes in how the U.S. views disability. Wyoming can make a difference by taking the lead and defining FAPE in terms of success as opposed to access.

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[222] *See Interview*, *supra* note 15.

[223] *See Interview*, *supra* note 15.

[224] *See Interview*, *supra* note 15.