GODFREY & KAHN S.C.

2012 WYOMING ANNUAL EDUCATION LEADERSHIP SYMPOSIUM
INDIVIDUAL ATTORNEY SESSION

Presented by: Thomas N. Shorter, Esq.
Godfrey & Kahn, S.C.
tshorter@gklaw.com

IEP REASONABLY CALCULATED & IMPLEMENTED

The U.S. Supreme Court's 1982 decision in *Board of Education of Hendrick Hudson Central School District v. Rowley* established the standard that an IEP is to present a program that is "*reasonably calculated to enable the child to receive educational benefits*". This standard is at the heart of every IEP and, ultimately, every due process hearing regarding whether a free appropriate public education has been provided. This session will review the most current cases on the "reasonably calculated" expectations and some other holdings that, to meet such a standard, the IEP should: (1) reflect the student's assessments and performance; (2) be administered in the LRE; (3) be developed and implemented by key stakeholders; and (4) be designed to produce positive academic and nonacademic benefits.

Biography of Thomas N. Shorter

Thomas N. Shorter is a shareholder in the Education Practice Group of Godfrey & Kahn, S.C.'s Madison, Wisconsin office. Tom represents educational institutions, providing counsel in special education (IDEA and Section 504), privacy (HIPAA, FERPA), labor and employment, and regulatory matters such as collective bargaining, FMLA compliance, discrimination issues and discipline and discharge. His education clients include public and private K-12 educational institutions.

Publications and Presentations

- "Meeting District Obligations to Private School Students Under IDEA 2004," LRP Publications (2010)
- "From School to Post-School Activities: Understanding the IDEA's Transition Requirements," LRP Publications (2008)
- "On the Move: Serving Intrastate and Interstate Transfer Students Under the IDEA," LRP Publications (2007)
- "Understanding HIPAA: A Guide To School District Privacy Obligations" LRP Publications (2004)
- LRP Special Education School Attorneys Conference, Phoenix, AZ (Speaker 2004)
- LRP 25th National Institute on Legal Issues of Educating Individuals with Disabilities, Orlando, FL (Speaker 2004)
- LRP 28th National Institute on Legal Issues of Educating Individuals with Disabilities, San Diego, CA (Speaker 2007)
- Frequent speaker for groups such as Wisconsin Council of Administrators of Special Services, Education Law Association, Association of Wisconsin School Administrators, Council of Administrators of Special Education ("CASE"), and many other organizations.

Admitted to Practice
Minnesota
Wisconsin

Professional Association Memberships
American College of Healthcare Executives
American Health Lawyers Association, Chair of Labor & Employment Practice Group
American Society for Healthcare Human Resources Administration (ASHHRA)
HIPAA Collaborative of Wisconsin, Board of Directors
Minnesota State Bar Association
NSBA Council of School Attorneys
Society for Human Resource Management
State Bar of Wisconsin (YLD Board of Directors 2001-2002; Health Law Section Board of Directors 2009-Present)
Wisconsin School Attorneys Association (President 2006-2007)

Community Activities
Leadership Greater Madison (LGM 12)
CIVITAS
Board of Directors, Independent Living, Inc.
City of Fitchburg Board of Review

Education
Bachelor of Science, University of Wisconsin-Madison
Juris Doctor, Northeastern University School of Law, Phi Delta Phi

Honors
Selected as one of "40 Under 40" by In Business Magazine in 2006
Listed in Best Lawyers in America- Education & Health Law (2007-2012)
Named a Best Lawyers - Lawyer of the Year for Education Law in 2012
Listed in Who's Who in American Law
Madison Magazine Top Lawyers - Education & Health Law (2007-2009)

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IEP REASONABLY CALCULATED & IMPLEMENTED

I. PROVISION OF FREE APPROPRIATE PUBLIC EDUCATION

A. FAPE means special education and related services that –

1. Are provided at public expense, under public supervision and direction, and without charge;

2. Meet the standards of the SEA;

3. Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

4. Are provided in conformity with an individualized education program (IEP) that meets IDEA's requirements. 34 C.F.R. § 300.17

II. IDEA'S IEP REQUIREMENTS

A. The term IEP means an individualized education program that is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting. 34 C.F.R. § 300.320.

B. The IEP must include –

1. A statement of the child's present levels of academic achievement and functional performance including –

a. How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or

b. For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities.

2. A statement of –

a. Measurable annual goals, including academic and functional goals designed to –

i. Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

ii. Meet each of the child's other educational needs that result from the child's disability.

b. For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, a description of benchmarks or short-term objectives;

3. A description of –

a. How the child's progress toward meeting the annual goals will be measured; and

b. When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

4. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child –

a. To advance appropriately toward attaining the annual goals;

b. To be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and

c. To be educated and participate with other children with disabilities and nondisabled children;

5. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in the IEP.

6. A statement of –

a. Any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments; and

b. If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why –

i. The child cannot participate in the regular assessment; and

ii. The particular alternate assessment selected is appropriate for the child; and

c. The projected date for the beginning of the services and modifications described and the anticipated frequency, location, and duration of those services and modifications.

7. Transition services reflecting –

a. Appropriate measurable postsecondary goals based upon appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

b. The transition services (including courses of study) needed to assist the child in reaching those goals.

8. Age of majority transfer rights are to be included no later than one year before the child reaches the age of majority under State law –

a. Statement indicating that the child has been informed of his/her rights under Part B of the Act if any, that will transfer to the child on reaching the age of majority.

III. CONGRESS' INTENTIONS

A. Nothing in 34 C.F.R. § 300.320 is to be construed to require that additional information be included in a child's IEP beyond what is explicitly required in the Act. 34 C.F.R. § 300.320(d)(1).

IV. DEPARTMENT OF EDUCATION GUIDANCE

A. Developed a model IEP form to help ensure that each IEP includes the components identified in 34 C.F.R. § 300.320. [1]

[1] http://idea.ed.gov/download/modelform1_IEP.pdf

V. MEETING THE "REASONABLY CALCULATED" TEST IN THE PROVISION OF FAPE – A REVIEW OF CASES.

A. **Board of Education of the Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176, 102 S.Ct. 3034 (1982), established the standard that an IEP must be "reasonably calculated" to enable the child to receive educational benefits.

1. Case Background.

a. Amy Rowley, a hearing impaired child, was a student at the Furnace Woods School in Hendrick Hudson Central School District. She had minimal residual hearing and was an excellent lip reader. Before attending kindergarten with Furnace Woods, the administrative team and her parents met and decided to place her in a regular kindergarten class. Several members of the school's administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who were also deaf. At the end of the trial placement, it was determined that Amy should remain in the regular kindergarten class, but that she would be provided with an FM transmitter. She successfully completed her kindergarten year.

b. The IEP that was prepared during the fall of her first grade year provided that Amy should be educated in a regular classroom, should continue to use the FM device, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign-language interpreter in all of her academic classes. Such an interpreter had been placed in Amy's kindergarten class for a two-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators also concluded that Amy did not need such an interpreter in her first-grade classroom. This conclusion was reached after consulting the school district's committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

c. The Rowleys sought an administrative hearing. The hearing examiner agreed with the administrators' determination that an

interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. The hearing examiner's determination was affirmed on appeal by the New York Commission of Education. The District Court for the Southern District of New York concluded that Amy was not receiving a free appropriate public because of a disparity between Amy's achievement and her potential "opportunity to achieve [her] potential commensurate with the opportunity provided to other children." The Second Circuit Court of Appeals affirmed.

2. U.S. Supreme Court's opinion.

   a. A court must first determine whether the State has complied with the statutory procedures; and then

   b. A court must determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits.

   c. "[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." (**Rowley**, p. 192).

   d. "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to public education only to have the handicapped child receive no benefit from that education. The statutory definition of 'free appropriate public education,' in addition to requiring that States provide each child with 'specially designed instruction,' expressly requires the provision of 'such…supportive services…as may be required to assist a handicapped child to benefit from special education.' We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." (**Rowley**, pp. 200-201).

   e. "The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem." (**Rowley**, p. 202.)

f. "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and most comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (**Rowley**, pp. 203-204.)

B. **Cypress-Fairbanks Independent School District v. Michael F. b/n/f/ Mr. and Mrs. Barry F.**, 118 F.3d 245 (5th Circuit, 1997), expanded on the Supreme Court's "reasonably calculated" standard with the identification of additional factors that can be reviewed in determining whether a meaningful educational benefit has been provided under the IDEA.

1. Case Background.

a. Michael F. who was diagnosed with ADHD was classified as "other health impaired" and entitled to receive education services under IDEA. Michael enrolled at Cypress-Fairbanks as a 6th grader. During his 6th grade school year, he was also diagnosed with Tourette's Syndrome. His initial IEP provided that he would attend regular classes and that he had access to a "content mastery class". His IEP was later supplemented with a behavioral plan which allowed for time-out and cooling off periods. Michael's parents approved both the IEP and behavior plan. In an attempt to deal with his Tourette's, his medications were juggled to reduce the severity of the symptoms, only to have his behavior worsen and become more disruptive. Disciplinary intervention was necessary and he was subsequently assigned to a homebound placement for six weeks to allow time for his medication to stabilize.

b. He was later placed in an adaptive behavior program. A subsequent IEP team was informed that, while he was passing every course but one and was receiving satisfactory conduct marks in every class but two, he was having difficulty turning in homework assignments and was still experiencing behavioral problems. His IEP was altered providing for adaptive behavior classes and regular education classes for science, reading,

industrial technology, speech, and physical education. Behavioral issues continued while placement in adaptive behavior classes moved forward. Michael's parents eventually removed him from Cypress-Fairbanks and placed him in a 24-hour residential treatment center.

c. Michael's parents sought tuition reimbursement for the private placement; the school district denied. An independent hearing officer awarded reimbursement for the private school placement. The district appealed to the Southern District of Texas, which reversed the hearing officer's decision. The parents appealed to the 5th Circuit Court of Appeals.

2. The 5th Circuit Court of Appeals' decision reflected on the district court's position that there are four factors that can serve as indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. This is sometimes referred to as the "Michael F. Test" in the 5th Circuit: [2]

   a. The program is individualized on the basis of the student's assessment and performance;

   b. The program is administered in the least restrictive environment;

   c. The services are provided in a coordinated and collaborative manner by the key "stakeholders"; and

   d. Positive academic and non-academic benefits are demonstrated.

3. The 5th Circuit had no difficulty endorsing the first three factors because the most recent IEP:

   a. Was designed with Michael's specific behavioral and academic problems in mind.

   b. Placed Michael in educational settings with non-disabled students for at least half of every school day; and

   c. Involved both Michael's individual teachers, administrators and counselors familiar with his needs in a highly coordinated and collaborative effort.

4. As for the fourth factor, positive academic and non-academic benefits, the 5th Circuit reflected on the district court's criteria to ensure that the most

[2]To date, courts within the 10th Circuit appear to have restricted their analysis to the **Rowley** two-part test.

recent IEP was reasonably calculated to, and in fact did, produce more than a modicum of educational benefit for Michael:

a. Passing grades at the time he left the district; and

b. His ability to attend lunch and pass through the halls between class unaccompanied by school staff.

C. **Polk v. Central Susquehanna Intermediate Unit 16**, 853 F.2d 171 (3rd Cir., 1988) followed on **Rowley's** "some educational benefit" standard and held that it is to mean something more than "de minimus".

1. Christopher Polk was a severely developmentally disabled student. His education consisted of learning basic life skills such as feeding himself, dressing himself, and personal hygiene. At some point, the district had provided Christopher with direct physical therapy from a licensed physical therapist. A new consultative model was later implemented, resulting g in the elimination of directly physical therapy from a physical therapist.

2. His parents acknowledged that, to some degree, the school program had benefitted Christopher, but argue that it was not individually tailored to his specific needs, arguing that he needed one session a week with a licensed physical therapist. Christopher's parents challenged his IEP.

3. The IHO determined that Christopher was benefitting from his education and that his education was appropriate (citing **Rowley**). The IHO's decision was upheld by the Pennsylvania Secretary of Education. The district court of Pennsylvania also concluded that Christopher had received some benefit from his education. The matter was subsequently appealed to the 3rd Circuit Court of Appeals.

4. In its opinion, the 3rd Circuit highlighted an earlier decision issued by the same court wherein the school district argued that it was obliged to provide no more than will be "of benefit" to the child. (See **Board of Education v. Diamond**, 808 F.2d 987 (3rd Cir., 1986)). To the contrary, the 3rd Circuit noted that **Rowley** requires "a plan of instruction under which educational *progress* is likely." (**Polk**, p. 183.)

D. **Thompson R2-J School District v. Luke P, by Jeff and Julie P.**, 540 F.3d 1143 (10th Cir., 2008), presented a student who exhibited severe behavioral problems in noneducational settings but achieved many of the goals and objectives set forth in his IEPs.

1. At age 2, Luke was diagnosed with autism and was provided special education and related services upon starting kindergarten in Niwot Elementary School in Colorado. Luke's IEPs for kindergarten and 1st

grade included objectives relating to communication skills, self care (including toilet training), independence and motor skills, social interaction and play skills, and academic functioning. The IEPs also specified that Luke would split time between the general and special education classrooms. Luke's teacher noted that he made progress and achieved many of his IEP goals during those first two years. Luke's family moved to Colorado's Thompson R2-J School District during 2nd grade. A new IEP was developed and he continued to make progress on his goals and objectives.

2. The transfer from school to life at home was dramatically different. His autism manifested itself and presented various behavioral problems that were especially severe at home. He was unevenly tempered, and often displayed inappropriate behavior at home and in public places. Even though he was toilet trained at school by the time he was in 1st grade, he was not able to transfer this skill to the home and other settings away from school. The parents sought a private assessment of Luke while at school. The evaluator noted that he had regressed in certain respects, but had made good progress in all areas of development. At an IEP review meeting, Luke's parents presented goals that they had developed (based upon the private assessment) and asked for private residential placement. The district expressed a willingness to incorporate the goals that were presented but felt that the goals were attainable at his current placement. Luke's family rejected the IEP, pursued private placement and sought district reimbursement of the costs.

3. The IHO concluded that, because Luke could not generalize his learning experiences at school to home, that the family's proposed private residential placement was necessary and that the district was obligated to pay for the private placement. On appeal before the Colorado Office of Administrative Courts, the ALJ agreed with the IHO. The school district appealed to federal court and the federal district court agreed with the administrative level decisions that Luke's generalization deficiency warranted his placement in a residential program. The school district appealed to the 10th Circuit Court of Appeals.

4. The 10th Circuit Court of Appeals decision addressed the parents' argument that Luke's inability to generalize functional behavior learned at school to the home and other environments blocked his ability to learn and that his education was effectively worthless because he was not able to generalize basic self help and social skills.

    a. "Though one can well argue that generalization is a critical skill for self-sufficiency and independence, we cannot agree with

appellees that IDEA always attaches essential importance to it." (**Thompson**, p. 1150.)

E. **C.B., by B.B. and C.B. v. Special School District No. 1, Minneapolis, Minnesota**, 636 F.3d 981 (8th Cir., 2011), resulted in the Court of Appeals concluding that the school district failed to make FAPE available for a learning disabled student.

1. C.B. was a child with a learning disability who began kindergarten in 2002. Within weeks of his enrollment, his teachers noticed that he did not know many letters and sounds and was making slow progress in reading. His mother also recognized her son's difficulty and expressed concern to his teacher. A special education evaluation was conducted during his first grade school year. He was diagnosed with a learning disability in reading and writing. His first IEP set an annual goal to "increase his reading skills from a readiness level to a first grade level". This was reiterated in his second and third grade IEPs. Periodic progress reports showed that he was making "slight progress". His 3-year re-evaluation noted that he was severely underachieving in reading and writing; a follow-up IEP noted "increase in reading skills". The trend continued and the parents ultimately placed him in a private school.

2. The parents requested an administrative hearing and sought reimbursement for C.B.'s private school placement. The IHO concluded that private placement was appropriate and awarded reimbursement to the parents. An action was then filed by C.B.'s parents in district court, seeking attorney's fees and costs arising from the administrative hearing. The district court concluded that, while C.B. was not provided FAPE, the private placement was not appropriate and his parents were not entitled to reimbursement. The matter was appealed to the 8th Circuit Court of Appeals.

3. The 8th Circuit concluded that C.B.'s IEPs were not reasonably calculated to assist C.B in making progress:

   a. "There may be instances in which an educational program that results in such slight progress is sufficient to comply with the statute in light of the student's disability, but this is not such a case. C.B.'s intellectual ability consistently measured in the average range, and evaluations concluded that he was socialized, well behaved, and persistent when confronted with difficult tasks. During the summer between the third and fourth grades, after working with a teacher for only nine hours with a new teaching method, C.B.'s reading scores improved significantly. Yet despite C.B.'s average intellectual ability, positive attitude, and

willingness to work, the School District's educational program was not reasonably calculated to assist C.B. in making progress in reading during fourth and fifth grade." (p. 990) (citations omitted).

F. **J.W. by Ward v. Unified School District Johnson County, State of Kansas**, 2012 WL 628181 (D. Kan., 2012), the Court explained that the IDEA does not require a district to eliminate behaviors that interfere with a child's learning. Rather, the district must "consider the use" of positive behavioral interventions and supports.

1. J.W. was born in 2001 and was diagnosed with autism in 2003. He received special education services continuously from the District between 2004 and 2008 at which time his parents placed him in a private setting.

2. J.W.'s IEP for the 2006-07 school year was initially developed in mid-September, 2006 and contained 20 goals and a BIP for dealing with his aggression. During the 2006-07 school year, the District conducted IEP meetings on a monthly basis to review J.W.'s progress. During the December 2006 meeting, his IEP was revised with the addition of a crisis procedure for handling "rage incidents". In the spring of 2007, J.W.'s parents raised concerns about his behavior that was documented on two videos. His IEP was revised again in May, 2007. At that time, the parents requested the District retain a consultant and/or placing J.W. outside the District. The parents did not agree to the May, 2007 BIP that was developed by the IEP team. J.W. did not participate in ESY with the District during the summer of 2007 and he returned for the 2007-08 school year having regressed in some skills. Development of the 2007-08 IEP led to disagreements.

3. The District did retain an autism consultant to observe and report on J.W.'s behaviors at the beginning of the 2007-08 school year. Further IEP revisions were made throughout the school year. The parents ultimately enrolled J.W. at a private facility in the summer of 2008.

4. Parents filed a due process claim. The hearing officer denied the parents' claim; appeal to the Kansas Department of Education resulted in the same determination. The parents appealed to the district court of Kansas alleging that J.W.'s IEPs developed and implemented during the 2006-07 and 2007-08 school years denied him a FAPE.

5. The Kansas District Court addressed whether the services provided to J.W. were: (1) reasonably calculated to enable him to receive educational benefits; and (2) whether J.W. made meaningful educational progress and concluded that J.W. was not denied a FAPE.

6. As to the parents argument that the IEPs were not properly implemented because J.W.'s self-injurious behavior increased and a new type of self-injury presented itself, the Court stated:

    a. "The court understands plaintiffs to argue that J.W.'s programming failed to provide him an educational benefit because it did not prevent his behaviors from substantially interfering with his learning. … However, this is not the standard by which the court evaluates compliance with the IDEA. In fact, the IDEA contemplates that some children will have behaviors that impede or interfere with their learning. The IDEA does not require a school district to eliminate interfering behaviors. It requires only that the school district 'consider the use' of positive behavioral interventions and supports to address the behavior." (**Johnson County**, p. 15) (citations omitted).

7. As to the parents' "no meaningful educational progress" argument, the Court stated:

    a. "However, at this stage in the analysis, the court asks whether the IEP was 'reasonably calculated' to provide 'educational benefit." (**Johnson County,** p. 16.)

    b. "The Tenth Circuit employs the **'some benefit**' standard rather than the '**meaningful benefit standard**' although the difference between these standards is difficult to distinguish". (**Johnson County**, p. 16) (**emphasis added**).

    c. "The educational benefit must be more than de minimum." (**Johnson County**, p. 16.)

    d. "… there is no requirement that a child in fact make 'meaningful educational progress' in order for the IDEA to be satisfied." (**Johnson County**, p. 16.)

VI. MEETING THE "REASONABLY CALCULATED" TEST IN THE PROVISION OF FAPE – KEY TOPICS GLEANED FROM THESE CASES

A. **Passage from grade to grade** – an indicator if placed in a regular classroom setting.

1. "We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education.' In this case, however, we find Amy's academic progress, when considered with the special services

and professional consideration accorded by the furnace Woods school administrators, to be dispositive." (**Rowley**, Footnote 25, p. 203.)

2. "When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." (**Rowley**, Footnote 28, p. 207.)

3. In **Cypress**, Michael had presented passing grades at the time that he left the district.

4. How should this factor be assessed for a student's special education classroom placement?

B. **Present a certain degree of independence and self-sufficiency** – how much is required?

1. "With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." (**Rowley**, Footnote 23, p. 201.)

2. "Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive standard which Congress imposed upon the States. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, 'self-sufficiency' as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap." (**Rowley**, Footnote 23, p. 201).

3. In **Polk**, the Court noted that "self-sufficiency cannot serve as a substantive standard by which to measure the appropriateness of a child's education under the Act" and that the "heavy emphasis in the legislative history on self-sufficiency as one goal of education, where possible, suggests that the 'benefit' conferred by the [IDEA] and interpreted by Rowley must be more than de minimis." (**Polk**, p.182).

4. In **Cypress**, the district successfully demonstrated that Michael had acquired the ability to attend lunch and pass through the halls between class unaccompanied by school staff.

5. The 10th Circuit's opinion in **Thompson R2-J School District** reflected on the parents' desire for guaranteed self-sufficiency, noting that such was not provided in IDEA.

C. **Educational benefit is proven to be rooted within the child's unique needs**.

1. "The only substantive standard which can be implied from these cases comports with the standard implicit in the Act. PARC states that each child must receive 'access to a free public program of education and training appropriate to his learning capacities, and that further state action is required when it appears that 'the needs of the mentally retarded child are not being adequately service." (**Rowley**, Footnote 15, 194.)

D. **Do not have to "maximize" the benefits nor provide every service**.

1. "Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." (**Rowley**, Footnote 21, p. 197.)

2. "But the legal principal outlined there by the Supreme Court [reflecting on Rowley] controls equally here: a school district is not required to provide every service that would benefit a student if it has found a formula that can reasonably be expected to generate some progress on that student's IEP goals". (**Johnson County**, p. 16.)

E. **You still need a plan that contemplates that *progress* will be made**.

1. "[w]hen the Supreme Court said 'some benefit' in *Rowley*, it did not mean 'some' as opposed to 'none.' Rather, 'some' connotes an amount of benefit greater than mere trivial advancement." (**Polk**, p. 183.)

F. **The program is individualized on the basis of the student's assessment and performance** (from the Michael F. Test).

1. Tailored to the student's individual needs.

2. "Rather, [IDEA] much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program." (**Thompson R2-J School District**, p. 1155).

G. **The program is administered in the least restrictive environmen**t (from the Michael F. Test) .

H. **The services are provided in a coordinated and collaborative manner by the key "stakeholders"** (from the Michael F. Test).

1. Key district personnel – reflect on those identified in Cypress.

2. Would the stakeholders include the student's parents? Note that, in **Thompson**, virtually every one of the substantive goals recommended by Luke's parents and their experts were incorporated into the new IEP.

3. "JW.'s parents had a full opportunity to participate in the IEP development process, and the services provided by the IEPs, including the behavioral components, were reasonably calculated to provide J.W. with educational benefits." (**Johnson County**, p. 16.)

4. "Even [the parents' autism consultant] agreed the team was using a number of behavioral supports to deal with [the child's] behaviors." (**Johnson County**, p. 16.)

I. **Positive academic and non-academic benefits are demonstrated** (from the Michael F Test) .

1. In **Cypress**, the 5th Circuit acknowledged that the educational benefit for Michael that was presented by numerous district personnel – his classroom teachers, the assistant principal who implemented the behavior and discipline plans, and outside consultants presented individuals who had direct and frequent contact with Michael both in and outside the school setting.

J. **One size does not fit all … do not rely on any one test**.

1. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." (**Rowley**, p. 202.)

2. There is no generic formula that can be applied.

VII. DISCUSSION & QUESTIONS