FAPE and "Meaningful Educational Benefit"

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A. HYPOTHETICAL FACT PATTERNS

HYPOTHETICAL FACT PATTERN # 1

Born in 1994, Opie T. was diagnosed with autism at the age of two. When he entered kindergarten at Mayberry Elementary School in Mayberry Valley School District when he was six years old, Opie began receiving special educational and related services from the school district.

Opie's special education teacher at Mayberry Elementary, led the effort in formulating an IEP for Opie and working with him through his kindergarten and first grade years. Opie's IEPs for kindergarten and first grade included objectives relating to communication skills, self care (including toilet training), independence and motor skills, social interaction and play skills, and academic functioning. They also specified that Opie would split time between the general classroom and a special education classroom.

His teacher's evaluations indicate that Opie made significant progress and achieved many of his IEP goals during the time she worked with him. She also reported, however, that Opie, like many other autistic children, had difficulty generalizing skills, or, in other words, "apply[ing] the skill[s] to different people or

different environments," Opie's difficulty in generalizing the skills he learned in school to the home is borne out by discrepancies revealed in an adaptive behavior skills test that was administered to Opie both in the classroom and in his home.

In the Fall of 2002, Opie's family moved to Mount Pilot School District, and Opie enrolled in second grade at Mount Pilot Elementary. In anticipation of the transfer, the special education teacher at Mount Pilot visited Mayberry and communicated with his previous teacher, as well as Opie's parents, in order to make plans for a smooth transition. A new IEP was adapted from the IEPs that had been developed at Mayberry, and Opie continued to make progress on his goals and objectives during his second grade year.

Despite the apparent progress at school during his kindergarten through second grade years, Opie's life away from school during the same time paints a much different picture, as his autism manifested itself in various behavioral problems that were especially severe at home. Opie was unevenly tempered, often displaying inappropriate and sometimes violent behavior at home and in public places such as grocery stores and restaurants. He developed various sleep problems going to bed at odd hours, waking up frequently at night, and refusing to sleep in a bed. Opie also developed a habit of intentionally spreading his nighttime bowel movements around his bedroom. In addition, although Opie became toilet trained at school by the time he was in first grade, he was not able to transfer this skill to the home and other settings away from school.

Understandably, these behaviors took a tremendous toll on Opie's family. Worried that, without intervention, Opie's behavior would become only more dangerous as he continued to grow physically, the family began looking into residential placement options. Through research on the Internet, they discovered the Big Ticket School ("BTS"), which specializes in education of children with autism. Students enrolled in the residential program at BTS live at the Boston campus for 44 weeks out of the year and are supervised 24 hours a day by BTS educators and staff. Opie's family, along with his former teacher , who kept in touch with the family and retained an interest in Opie's education, visited the BTS campus in late Fall 2003 and filled out an application for Opie's admission during the visit.

At around the same time, Opie's family asked an occupational therapist who runs a private day school for autistic children, as well as his previous teacher, to observe and assess Opie while at school. The OT observed Opie at Mount Pilot Elementary for a three hour period, interviewed Opie's parents, and reviewed

charts and video footage of Opie. She reported a number of concerns in the school's work with Opie, including the facts that staff sometimes unknowingly reinforced Opie's unwanted behaviors, that Opie had made little or no progress on many of his goals and objectives, and that Opie had "[g]reat difficulty generalizing skills taught in one environment to natural daily living routines." The OT also expressed concern that Opie had "increase[d] the strength and number of challenging and unwanted behavior[s]" and that, since transferring to Mount Pilot Elementary, Opie had apparently regressed in certain respects. The OT did, however, note many areas in which Opie was improving and stated that "throughout his early education, Opie has made good progress in all areas of development." The OT recommended, among other things, "12 month programming to reduce the risk of regression," increased consistency in training of school staff, and additional parent training. For her part, the previous teacher met with Opie and administered the Autism Diagnostic Observation Schedule test. She reported to Opie's parents that some skills that Opie had previously mastered during his time working with her at Mayberry Elementary were diminished or were no longer present.

On December 16, 2003, Opie's parents met with his teachers and other school officials for an IEP review meeting. At the meeting, the parents presented a list of goals they had developed based on recommendations from the OT and asked that the goals be included in Opie's IEP for 2004. They also stated, however, that they felt the goals were not attainable at Mount Pilot Elementary and that the only appropriate placement for Opie would be a residential program tailored to autistic children, such as that offered by BTS. The school district officials expressed openness to revising Opie's IEP to include the parents' proposed goals and to working with them to improve their special education program. But they also expressed their belief that the proposed goals were attainable at Mount Pilot Elementary and that residential placement was not necessary. At the meeting's conclusion, the school district officials stated that they planned to revise Opie's IEP and then submit a new draft to the parents.

Two days after the IEP meeting, on December 18, BTS accepted Opie's application for enrollment. The next day, on December 19, counsel for Opie's family sent the school district a letter stating that the family intended to remove Opie from Mount Pilot Elementary, enroll him at BTS, and seek from the school district reimbursement of the costs of Opie's education at BTS. Opie officially enrolled as a residential student at BTS on January 12, 2004.

On January 15, 2004, the school district sent to Opie's family a revised, final IEP for 2004. The IEP proposed by the school district incorporated virtually all of the goals requested by the parents, but it called for continued placement at Mount Pilot Elementary rather than the residential placement requested by the parents. Opie's family rejected the IEP, and Opie remained enrolled at BTS.

HYPOTHETICAL FACT PATTERN #2

Johnny was born in July 1998. Approximately two and a half years later he was diagnosed with autism. As a result of his condition, Johnny has "severely delayed communication skills." This delay manifests itself in several ways, including the fact that "[Johnny is] very much in his own world, [does] not respond to his name, [does] not make eye contact, and [does] not want to be part of any of the groups that [are] around him." Johnny also has a short attention span and is easily distracted by movements outside.

During the period from Johnny's diagnosis until his third birthday, Resources for Young Children and Families provided funding for an in-home program. As part of this in-home program, Johnny received 16.5 hours of one-on-one therapy per week. When Johnny turned three, the responsibility for complying with the IDEA's requirements shifted to his local school district. Pursuant to these requirements, the Home School District (the "District") assessed Johnny's learning skills during a "play-based assessment." This assessment provided the foundation for an individualized education program ("IEP).

Subsequent to the assessment, Johnny's parents met with District employees to review a draft IEP for the 2001-2002 school year ("2001 IEP") in May 2001. The District's director of special education, a special education teacher, an occupational therapist, a social worker, and the District's autism specialist all attended the IEP meeting. The draft IEP documented several items, including: (i) the data gathered during the assessment; (ii) Johnny's levels of functioning, achievement, and performance; (iii) a statement of educational needs; (iv) a statement of goals and objectives; (v) a statement of special education needs and related services; and (vi) a recommended placement. To provide Johnny with a free appropriate public education ("FAPE"), the IEP proposed a total of 10.75 hours of services per week. A significant portion of that total -- 9.5 hours per week -- would occur in an education placement in an integrated preschool classroom, while the remainder -- 1.25 hours per week -- would consist of additional educational services, such as speech and language services.

Johnny's parents rejected the draft IEP's suggested placement due to their concerns about Johnny's educational experience in an integrated classroom. The Parents believed that the suggested placement would not have benefitted Johnny. To support their position, the Parents provided the District with letters from two behavior specialists, a neurologist, and a staff member at the JFK Center for Developmental Disabilities.

The District and the Parents held another meeting on August 2, 2001. This meeting did not constitute an official IEP team meeting because several team members were out of town. At this meeting, the District offered to increase the total service hours to 20 hours per week. The District, however, never formally amended the IEP to reflect this offer. Due to their continued concerns about Johnny's placement, the Parents rejected the draft IEP shortly after the August 2, 2001 meeting. They instead continued Johnny's at-home program at their own expense. The District did not complete a final IEP for Johnny for the 2001-2002 academic year.

The District and the Parents began discussions regarding an IEP for the 2002-2003 school year ("2002 IEP") in October 2002. In preparation for this IEP, the District evaluated Johnny using both the Mullen Scales of Early Learning and the Vineland Adaptive Behavior Scales. The Parents and the District employees on the IEP team met on November 20, 2002, to discuss the 2002 IEP. The 2002 IEP proposed a total of 25 hours of services per week. The plan included 20 hours per week in an integrated classroom, and 5 hours per week of one-on-one discrete trial training.

Unlike the previous year, the District finalized the 2002 IEP and delivered it to the Parents; however, the Parents neither agreed to nor signed the 2002 IEP. Instead, they continued the at-home program that consisted primarily of one-on-one instruction. Beginning in November 2002, Johnny's parents also enrolled him in a private preschool for nine hours per week. Johnny attended the private school with the help of an aide. The Parents paid for both the at-home program and the private school.

On November 15, 2002, the Parents submitted their demand for an Impartial Due Process Hearing.

HYPOTHETICAL FACT PATTERN #3

Jimmy was born on April 15, 2001, and he was diagnosed with autism, among other conditions on October 18, 2003. Jimmy was found to be eligible for special education and related services as a preschool special needs student. He began attending preschool in the school district in approximately December, 2004.

Between January 10, 2005 and March 23, 2005 there were five IEP team meetings for the student. At the January 10 meeting, the school district representatives placed a draft IEP on the table and asked the parents to sign it so that they could get on with the business of educating children. The parents balked and asked to discuss the proposed IEP. The LEA staff agreed to do so although their resentment was palpable. The meeting was not completed because it had been scheduled for twenty minutes and according to the meeting notes, the "pesky questions" from the parents "ruined everything." The meeting was rescheduled for January 17th.

At the January 17th meeting, the parents appeared with an "advocate'" who was another parent who had lost five previous due process hearings against the school district. The advocate was disrespectful of the LEA personnel frequently demanding that they explain their education, experience and other credentials in detail. She frequently referred to the special ed director as "jackass."

After two hours, the meeting was reconvened on January 25th. The meeting was scheduled for the whole school day. The meeting notes reflect that the student's father and the "advocate" "engaged in delaying tactics." The parent spent four hours asking questions concerning the meaning of the goal "manages his clothing." The meeting was contentious and tempers flared many times. The special education teacher, weary of being questioned as to her qualifications told the parent late in the afternoon to "shut up and sit up straight."

The meeting was rescheduled for February 17th. At this meeting, the parent and the "advocate" demanded that the IEP include 30 hours of discrete trial training, a dedicated one-on-one aide and occupational therapy because the research shows that all autistic children require these services. The LEA personnel refused noting that the district has an "eclectic" methodology program that it uses for all autistic children. The impasse was never resolved.

Another IEP team meeting was convened on March 23, 2005. At this meeting, the school district personnel developed an IEP for Jimmy. The IEP featured the school district's eclectic methodology in an inclusion setting. Jimmy

also received a two hours per week of speech-language therapy as a related service. No prior written notice was issued by the school district.

Jimmy made progress toward his 19 of his 24 IEP goals and in the general curriculum during the rest of the 2004-2005 school year. But in the first half of the next school year, he made progress toward only two of his 24 goals.

On July 5, 2005, the student's IEP team met and the parents requested that the student be evaluated for occupational therapy. On August 3, 2005, the schools district's occupational therapist conducted an evaluation of Jimmy. He was able to cut with scissors, zip and unzip a book bag and button and unbutton a large button. He was on age level with fine motor skills and adult daily living skills. The therapist concluded that occupational therapy was not recommended for Jimmy.

On September 15 and 16, 2005, the school's preschool special needs specialist/lead teacher made formal observations of Jimmy in his classroom. She found during said visits that Jimmy's program was appropriate and that he was making educational progress, despite his lack of progress toward his IEP goals.

On September 25, 2005, the IEP team was reconvened at the parents' request. The parents said nothing at all during the entire meeting. The advocate was not present at the meeting. The parents appeared to have been arguing loudly with each other just before the IEP team meeting. The LEA members of the team drafted an IEP that was identical to the previous school years IEP, with no changes even to present levels of performance.

On September 27, 2005, the parents filed a due process complaint.

B. THE LAW – MEANINGFUL EDUCATIONAL BENEFIT

Since the original passage of Public Law 94-142, now known as the Individuals with Disabilities Education Act ("IDEA"), courts and school systems have struggled with the definition of Free Appropriate Public Education ("FAPE") and what constitutes "meaningful educational benefit" under the law. These materials will outline the standards set forth by the law and by the courts asked to interpret the imprecise provisions of the law.

1. The Origin of the Term "Meaningful Educational Benefit: Is it in the IDEA or its Regulations?

a. Definition of FAPE

The Individuals with Disabilities Education Act (IDEA) does not contain the term "meaningful educational benefit." Rather, the 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 an appropriate preschool, elementary or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program (IEP). 20 U.S.C. § 1402(9).

b. Definition of "Special Education"

"Special education," in turn, is defined as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings; and (B) instruction in physical education. 20 U.S.C. § 1402(29).

c. Definition of "Related Services"

"Related services" include transportation and such developmental, corrective and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a FAPE as described in the IEP, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. 20 U.S.C. § 1402(26).

2. The Origin of the Term "Meaningful Educational Benefit: Is it in the Case Law?

a. The Supreme Court's Interpretation of FAPE

Because the law contains no actual standard for the provision of FAPE, courts have been asked to address what level of service actually constitutes FAPE.

Obviously, any discussion of the FAPE standard must begin with an analysis of the seminal Supreme Court decision of Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

i. Relevant background facts

Amy Rowley is deaf and, at the time of the litigation, had minimal residual hearing and was an excellent lip reader. She was placed in a regular kindergarten class, and school administration prepared for her arrival by attending a course in sign language interpretation. In addition, a teletype machine was installed in the principal's office to facilitate communication with her deaf parents and she was provided an FM hearing aid. Amy successfully completed kindergarten and an IEP was developed for first grade, providing for placement in a regular education class, the continued use of the FM hearing aid and instruction from a tutor for the deaf for 1 hour per day and from a speech therapist for 3 hours per week. The parents agreed with the proposed IEP but insisted that the school system provide a qualified sign language interpreter in all of her academic classes.

ii. Lower court holdings

The district court found that Amy was "remarkably well-adjusted," interacted and communicated well with classmates and teachers and performed better than the average child in her class. However, she understood considerably less of what went on in class than she would if she were not deaf and, therefore, the court found that Amy was not learning as much as she would if she were not disabled. The court concluded that Amy was not receiving FAPE because she was not provided "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." 483 F. Supp. 528, 534 (1980). The Second Circuit Court of Appeals affirmed the decision.

iii. The Supreme Court's ruling

In reversing the lower courts and defining a standard for FAPE, the Rowley Court held that by passing the Act, Congress sought primarily to make public education available to children with disabilities. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such ***access meaningful***. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. S. Rep., at 11. Thus, the

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."

The Court concluded that the Act's requirement of a "free appropriate public education" is satisfied when the State (or local agency) provides 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 grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as was the case with Amy, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

The Court pointed out that noticeably absent from the statute is any substantive standard prescribing the level of education to be accorded and that, certainly, the language contains no requirement like that imposed by the lower courts—that states maximize the potential of children with disabilities. Implicit in the congressional purpose of providing access to FAPE is the requirement that the education to which access is provided be sufficient to confer "some educational benefit." Based upon this language, then, many have argued that "meaningful" educational benefit is "some" educational benefit.

Finally, the Court noted that while the determination as to whether children are receiving sufficient education benefits to satisfy the Act's requirements "presents a more difficult problem," a court's inquiry in suits brought under IDEA should be analyzed under a two-pronged framework: "First, has the State complied with procedures set forth in the Act? And second, is the [IEP]developed through the Act's procedures *reasonably calculated to enable the child to receive educational benefits*?" The Court noted that, under the second prong, "the achievement of passing marks and the advancement from grade to grade will be one important factor in determining educational benefit."

3. Post-Rowley Interpretations: Is it "Meaningful" or "Some" Educational Benefit and Does it Matter?

a. The Various Circuit Court Standards

Crucial to any case where FAPE is at issue is consideration of the relevant jurisdiction's definition or standard for "educational benefit." While all of the courts have accepted Rowley's conclusion that the IDEA does not require services that will "maximize the potential" of a student with a disability, the slight majority of circuit courts of appeal have interpreted Rowley to require "some" (not de minimis) educational benefit while the minority of them have interpreted Rowley to require "meaningful benefit" that is somewhat relative to or gauged based upon the student's potential.

i. Sample cases adopting the "some educational benefit" standard

Reid v. District of Columbia, 43 IDELR 3, 401 F.3d 516 (D.C. Cir. 2005).

Missouri Dept. of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist., 40 IDELR 204, 358 F.3d 992 (8th Cir. 2004).

A.B. v. Lawson, 40 IDELR 121, 354 F.3d 315 (4th Cir. 2004).

Maine Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 38 IDELR 131, 321 F.3d 9 (1st Cir. 2003).

Todd v. Duneland Sch. Corp., 37 IDELR 151, 299 F.3d 899 (7th Cir. 2002).

O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 28 IDELR 177, 144 F.3d 692 (10th Cir. 1998).

JSK v. Hendry County Sch. Bd., 18 IDELR 143, 941 F.2d 1563 (11th Cir. 1991).

ii. Sample cases adopting the "meaningful educational benefit" standard

Deal v. Hamilton County Bd. of Educ., 42 IDELR 109, 392 F.3d 840 (6th Cir. 2004), cert. denied, 126 S. Ct. 422 (2005).

Shore Reg'l High Sch. Bd. of Educ. v. P.S., 41 IDELR 234, 381 F.3d 194 (3d Cir. 2004).

Adam J. v. Keller Indep. Sch. Dist., 39 IDELR 1, 328 F.3d 804 (5th Cir. 2003).

Adams v. Oregon, 31 IDELR 130, 195 F.3d 1141 (9th Cir. 1999).

Mrs. B. v. Milford Bd. of Educ., 25 IDELR 217, 103 F.3d 1114 (2d Cir. 1997).

b. Might the *Rowley* FAPE Standard Change?

It is important to note that in recent years, arguments have emerged that the Rowley standard for determining "educational benefit" is no longer applicable because of subsequent amendments made to the IDEA or because of certain mandates of the No Child Left Behind Act of 2001 (NCLB). Thus far, these arguments have been rejected by all of the courts that have addressed it, but it is a typical argument that has arisen in recent cases where FAPE is at issue. In addition, it is expected that the new Administration and Congress will experience some pressure to change the Rowley standard as part of the next IDEA reauthorization process.

i. Sample cases challenging the *Rowley* "some educational benefit" standard

J.L. v. Mercer Island Sch. Dist., 52 IDELR 241 (9th Cir. 2009). The district court's determination that Congress superseded the *Rowley* decision in the 1997 IDEA Amendments is reversed. Had Congress sought to change the FAPE "educational benefit" standard—a standard that courts have followed vis-à-vis *Rowley* since 1982—it would have expressed a clear intent to do so. Instead, Congress did not change the definition of free appropriate public education in the law. In addition, Congress did not indicate in its definition of "transition services," or elsewhere, that a disabled student could not receive FAPE absent the attainment of transition goals. Third, Congress did not express disagreement with the "educational benefit" standard or indicate that it sought to supersede *Rowley.* "In fact, Congress did not even mention *Rowley*."

Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist., 49 IDELR 180, 518 F.3d 18 (1st Cir. 2008). The parents' assertion that the 1997 IDEA raised the bar for the provision of IEP transition services and directs that those services must result in actual and substantial progress toward integrating disabled children into society is rejected. The Court refused to defenestrate the *Rowley* standard for FAPE.

K.C. v. Mansfield Indep. Sch. Dist., 52 IDELR 103, 618 F. Supp.2d 568 (N.D. Tex. 2009). The parents' argument that the *Rowley* standard is no longer applicable to IDEA cases because the 1997 IDEA amendments embodied "high expectations for [disabled] children" is rejected. *Rowley* continues to provide the standard for deciding an action brought under the IDEA.

Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 49 IDELR 281, 538 F.Supp.2d 298 (D. Me. 2008). The parents' argument that the 2004 IDEA amendments increased the substantive goals for the education of disabled students (namely in the field of outcome-oriented academic and transition services) so that the goals now go beyond simply opening the door to public education is rejected. Given the ubiquity of Rowley in the context of IDEA proceedings, one would expect Congress (or the Department of Education) to speak clearly if the intent were to supersede it.

Leighty v. Laurel Sch. Dist., 46 IDELR 214 (W.D. Pa. 2006). Parents' contention that the No Child Left Behind Act changed the way that cases brought under the IDEA should be analyzed is rejected. The FAPE determination under IDEA does not depend on how well a particular student performs on standardized tests administered by a participating State. NCLB contains no specific language that purports to alter the IDEA's FAPE and IEP requirements.

School Bd. of Lee County v. M.M., 47 IDELR 220, 2007 WL 983274 (M.D. Fla. 2007). Parent's argument that language in the Florida Constitution referencing "high quality education" elevates the substantive standard for FAPE in Florida is rejected. Given the well-established nature of the federal standard, an intent to impose an enhanced requirement for IDEA purposes would have been more clearly stated. In addition, the existence of a gifted child program in Florida and the provisions of NCLB do not establish a higher state standard that would require that a child's potential be maximized.

c. Relevant Court Decisions and Specific Rulings Regarding "Educational Benefit"

i. No Such Thing as Inability to Benefit

Timothy W. v. Rochester Sch. Dist., 875 F.2d 954 (1st Cir.), cert. denied, 110 S.Ct. 519 (1989). Rowley does not stand for the requirement that there be proof of educational benefit. Rowley provides that while the EHA does not require a school to maximize a child's potential for learning, it does provide a "basic floor of opportunity," consisting of "access to special instruction and related services." Nowhere did Rowley imply that such a "floor" contains a "trapdoor" for the severely disabled.

ii. "Meaningful Benefit" is more than Trivial or De Minimis Benefit

Polk v. Central Susquehanna Intermed. Unit 16, 853 F.2d 171 (3d Cir. 1988). The EHA's legislative history shows clear Congressional intent to provide more than "trivial" or "de minimis" educational benefit. Thus, a program may not be appropriate merely because it provides some minimal amount of benefit. Rather, such benefit must be ***"meaningful."*** Where the severity of disabilities prevents application of the Rowley standard of progression from grade to grade to measure educational benefit, progress should be measured in terms of the educational needs of the individual severely disabled child.

Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999). District court evaluated IEP under wrong standard when it concluded that the IEP only needed to offer the student "more than trivial educational benefit." Clearly, the appropriate standard is whether IEP offered opportunity for "significant learning" and "meaningful educational benefit." In evaluating whether FAPE was furnished, an individual inquiry into the student's potential and educational needs must be made. The court must analyze the type and amount of learning of which the student is capable in determining "meaningful" benefit.

M.C. v. Central Regional Sch. Dist., 81 F.3d 389 (3d Cir. 1996). Basic independent living skills deficits of a 16-year-old student with severe mental retardation demands attention of a residential placement, as the student requires more than de minimums benefit in order to receive an educational benefit. Where student's development slowed at the day school and even regressed in some respects after 2 years there and where student had "untapped potential" in basic life skills such as dressing, eating and communicating, residential placement is required for FAPE.

Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985). Congress did not intend for school to be able to discharge its duty under the Act by providing a program that produces minimal academic achievement. District court properly discounted student's promotions in light of school's policy on social promotions, particularly where student's test scores and independent evaluations indicated that student was "functionally illiterate" and "untestable." "Rowley recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children."

iii. Maximization of Potential and/or the "Best" Program is not Required

Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988). Reliance by a court on a potential-maximizing standard with regard to determining a free appropriate public education is error.

Knight v. District of Columbia, 877 F.2d 1025 (D.C. Cir. 1989). While a private school may be a better place than a public school for a child, the Act does not place this comparative question before the court. A school discharges its duty under the Act if it places a student in a program sufficient to confer some educational benefit.

Amann v. Stowe Sch. System, 982 F.2d 644 (1st Cir. 1992). Even though the State adopted a "maximizing" standard that was more stringent than the "floor of opportunity" standard under federal law, such a state standard could not obviate the federal requirement of least restrictive environment. Accordingly, the public school placement of a learning disabled student properly balanced the student's need for a program that maximized academic potential and his need for a placement that afforded him an opportunity for instruction with nondisabled peers.

Doe v. Tullahoma City Schs, 9 F.3d 455 (6th Cir. 1993). The district's proposed IEP for a seventeen-year old student with learning disabilities complied with IDEA's standard of appropriateness, despite the fact that the student's unilateral placement in the private school may have been superior for the purposes of maximizing his educational potential.

iv. Measurement of Benefit Is Made Relative to the Individual Student, Not Others

Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000). While an IEP must be "likely to produce progress, not regression or trivial educational advancement," the progress and development of a child with a disability should be measured not in relation to the rest of the regular education class, but with respect to the individual student. Declining percentile scores on standardized testing does not represent a lack of educational benefit. Rather, declining scores show only that the student's disability prevents the student from maintaining the same level of academic progress achieved by his nondisabled peers. The district court was correct to focus on the fact that the student's test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation,

writing, word identification, broad reading, basis reading cluster and proofing improved during his years with the district.

Ringwood Bd. of Educ. v. K.H.J., 49 IDELR 63 (3d Cir. 2008). Where it is undisputed that student has "above average" intelligence and ALJ made a factual finding that student had the "potential of performing *at least* in the average grade level in reading," this hardly qualifies as "maximizing" the child's potential. When students display considerable intellectual potential, IDEA requires a great deal more than negligible benefit. Because the student made only "negligible progress" in the school district's program and was still one to two years behind grade level, the ALJ properly concluded that the Board had failed to provide FAPE.

v. Grades May or May not Indicate Benefit

D.S. v. Bayonne Bd. of Educ., 54 IDELR 141, 602 F.3d 553 (3d Cir. 2010). District court's rejection of ALJ's findings in favor of student is reversed where student, despite his good grades, performed well below grade level in reading, writing and math on standardized assessments. Although the Supreme Court in Rowley held that a student's ability to earn passing marks and to advance from grade to grade is a strong indicator that the student received meaningful educational benefit, "[o]ur reading of Rowley leads us to believe that when…high grades are achieved in classes with only special education students set apart from the regular classes of a public school system, the grades are of less significance than grades obtained in regular classrooms."

Houston Indep. Sch. Dist. v. V.P., 53 IDELR 1, 582 F.3d 576 (5th Cir. 2009), cert. denied, 130 S. Ct. 1892 (2010). District failed to provide FAPE because student's IEP was not reasonably calculated to provide meaningful educational benefit under the IDEA. Evidence of modifications made by the classroom teacher that were not part of the IEP but resulted in academic progress may not be presented. "[B]efore acceptable test scores and advancement in class grade can be seen as supporting that educational benefits are being received, those indicia must arise from compliance and not deviation from the IEP."

vi. Performance at Home/Generalization of Benefit not Required

Devine v. Indian River County Sch. Bd., 249 F.3d 1289 (11th Cir. 2001). Autistic student does not require residential placement to benefit from education. Generalization of skills across settings is not required to show an educational

benefit under IDEA. In addition, IDEA does not require the provision of respite care. See also, J.S.K. v. Hendry County Sch. Bd., 941 F.2d 1563 (11th Cir. 1991).

Gonzalez v. Puerto Rico Dept. of Educ., 254 F.3d 350 (1st Cir. 2001). District not required to fund residential placement for autistic student where IEP is found appropriate. Even though student's behaviors presented safety concerns to her parents should she return home, that is an insufficient ground to justify a residential educational placement. In addition, district's IEP expanded to include services and training for student's parents to assist them in managing behaviors at home were sufficient.

Thompson R2-J Sch. Dist. v. Luke P., 50 IDELR 212, 540 F.3d 1143 (10th Cir. 2008). As a general rule, generalization of skills across settings is not necessary to establish educational benefit under the IDEA. As long as the student is making some progress in the classroom, the school district does not need to ensure that the autistic student is able to apply his newly learned skills outside of school.

vii. Regression in Skills when Private Therapies/Services Cease

Johnson v. Lancaster-Lebanon Intermed. Unit 13, 757 F. Supp. 606 (E.D. Pa. 1991). Fact that student's speech and language ability regressed when his private therapy was halted by his parents is sufficient evidence that the school district was not providing him with meaningful education.

viii. LRE and the "Meaningful Educational Benefit" Standard

Beth B. v. Van Clay, 282 F.3d 493, 36 IDELR 121 (7th Cir. 2002). The LRE for severely disabled student with Rett Syndrome is Educational Life Skills (ELS) program, which includes reverse mainstreaming and provides participation in certain regular education nonacademic classes. Court rejected parents' argument that so long as the regular classroom confers "some educational benefit" to student, the school district cannot remove her from that setting. The language of Rowley only apples to the school district's responsibility to provide a FAPE—a requirement that analyzes the appropriateness of the district's placement, not the appropriateness of alternatives to it, including the regular classroom. The parents' reliance on language from Rowley is misplaced when they argue that as long as Beth was receiving *any* benefit—improvement in eye contact or progress in responding to a request to "look" or "touch"—her removal would constitute a violation of the LRE requirement. Rather, the LRE question is whether Beth was receiving a "satisfactory" education in the regular classroom. The Court agreed

that the school district's decision that a "modicum of developmental achievement does not constitute a satisfactory education."

A.S. v. Norwalk Bd. of Educ., 183 F.Supp.2d 534 (D. Conn. 2002). Board is incorrect in arguing that Rowley stands for the fundamental principle that a child must be provided with an educational program that is sufficient to confer some educational benefit and that once the hearing officer determined that student was not meeting the goals of her IEP in the regular classroom, and, therefore, not receiving FAPE, it was error for the hearing officer to require additional supplementary services in the regular classroom. Clearly, the Rowley standard is ill-suited to determining compliance with the Act's mainstreaming requirement. Thus, the analysis applied by the hearing officer using Oberti/Daniel R.R. supported hearing officer's conclusion.

McLaughlin v. Board of Educ. of Holt Pub. Schs., 133 F.Supp.2d 994 (W.D. Mich. 2001). The LRE for 9 year-old student with Down's Syndrome is in general education classroom at her home school. What may be "best" for the student is not the appropriate determination. Rather, the Sixth Circuit's LRE standard in Roncker leads to conclusion that the special education services could feasibly be provided to the student in the general education classroom at the neighborhood school with the delivery of special education services in the elementary level resource room, rather than a TMH classroom.

ix. "Meaningful Educational Benefit" and Actual Showing of Progress

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. , 118 F.3d 245 (5th Cir. 1997). In looking at whether an IEP is reasonably calculated to provide a meaningful educational benefit, four factors must be considered: (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the LRE; (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and (4) ***positive academic and nonacademic benefits are demonstrated.*** Where student with Tourette's Syndrome made passing grades, was able to eat lunch and travel around the school without a chaperone, educational benefit was provided. In addition, several witnesses testified that student was attempting to control his own inappropriate behavior and his disruptive behaviors decreased while in the district's program.

Barber v. Bogalusa City Sch. Bd., 34 IDELR 285 (E.D. La. 2001). Determining whether student received academic benefit from the district's IEP was difficult

where scores on tests performed by the Louisiana School for the Visually Impaired indicated that visually impaired student had not progress academically and, in certain areas, showed she may have regressed. However, given the student's disability, it is difficult to know how to evaluate this information where many of the tests were visually administered. In addition, the student's teachers believe that she functions on a higher level in the classroom setting than her test scores indicate. Finally, student received considerable positive nonacademic benefits from the IEP where she made tremendous improvement in navigating the school and its grounds, which was clearly an immensely significant goal for this student with profoundly diminished vision.

School Bd. of Collier County v. K.C., 34 IDELR 89 (M.D. Fla. 2000), aff'd, 285 F.3d 977 (11th Cir. 2002) (expressly refusing to adopt Cypress-Fairbanks standard as standard for the 11th Circuit). School system's IEP provided meaningful educational benefit under the first 3 factors of Cypress-Fairbanks. However, there can be no definitive answer for the fourth consideration because "[s]imply put, one cannot derive any meaningful measure of academic progress for this short period of time" (16 days in the Fall). In addition, there is no way to determine what effect K.C.'s mother's actions had on K.C.'s progress in the program with her evident disrespect for K.C.'s teachers and their efforts, which precluded meaningful instruction of K.C. by her teachers.

Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990). Court can not find the IEP incapable of providing educational benefit because "[a]lthough willing to implement the IEP, the teachers were frustrated in this endeavor by the frequent absences of the child and by the lack of coordination due to the restrictions placed by the parents…." In short, the IEP was never given a chance to succeed. Thus, the school's IEP was "calculated" to allow the student to receive educational benefit, though the student experienced no academic success.

x. "Meaningful Educational Benefit" in Light of Procedural Violations

Even where a district can show that the student could reasonably be expected to benefit meaningfully from its program or may have even received demonstrated meaningful educational benefit from the school district's program, it may not matter. Indeed, there are many years worth of judicial decisions regarding the impact of significant procedural violations on a finding of FAPE.

Berry v. Las Virgenes Unif. Sch. Dist., 54 IDELR 73 (9th Cir. 2010) (unpublished). District court's determination that district personnel predetermined placement is affirmed. Based upon the superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school, the district court had found that the district determined the student's placement prior to the meeting.

J.N. v. District of Columbia, 53 IDELR 326 (D. D.C. 2010). Where the parties never agreed to a final IEP meeting date and there was no evidence that, had the district contacted the parent, it could not have persuaded her to attend the third scheduled meeting, a denial of FAPE occurred when the district proceeded with the IEP meeting in the parent's absence. After receiving no response to two notices for meeting provided to the parent, the district sent a third notice that explained that the meeting would be held three days later. On each of the following three days, the parent called the district to propose alternative dates but the district did not respond and held the meeting without her.

Drobnicki v. Poway Unif. Sch. Dist., 109 LRP 73255 (9th Cir. 2009) (unpublished). Where the district scheduled an IEP meeting without asking the parents about their availability and did not contact them to arrange an alternative date when the parents informed the district that they were unavailable on the scheduled date, the district denied FAPE. Though the district offered to let the parents participate by speakerphone, the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time and place. "The use of [a phone conference] to ensure parent participation is available only 'if neither parent can attend an IEP meeting.'" Further, the fact that the student's mother asked the district to reschedule the meeting undermined claims that the parents affirmatively refused to participate--a circumstance that would allow the district to proceed in the parents' absence. Although the mother attended two other IEP meetings that year, the student's IEP was developed in the parents' absence. As such, the district's procedural violation deprived the parents of the opportunity to participate in the IEP process and, therefore, denied the student FAPE.

N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had been privately diagnosed with autism but school district suggested that the parents arrange for an evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

Melodee H. v. Dept. of Educ., 50 IDELR 94, 2008 WL 2051757 (D. Haw. 2008). Where the school district had no one at the pivotal IEP meeting that knew the child, except for the parents; there was no discussion of where the student was going to school; and the parents were not given any information about the proposed elementary school, these were sufficient procedural violations to find a denial of FAPE. The ALJ also erred in discounting the uncontroverted testimony regarding an appropriate setting for the student provided by the parents' expert, who testified about the harmful effect on the child if placed at the elementary school. In fact, the district erred in not inviting this expert to the IEP meeting, where she could have given the IEP Team psychological information relevant to determining the appropriate physical location of the student's placement.

S.B. v. Pomona Unified Sch. Dist., 50 IDELR 72, 2008 WL 1766953 (C.D. Cal. 2008). The district's failure to include the student's private preschool teacher (the regular education teacher) was a procedural violation that resulted in a loss of educational opportunity for the student. Had the teacher been at the important IEP meeting, she could have shared her observations of the student's abilities and special needs from the year that the student was in her classroom. "At the very least, she could have elaborated on what she had told the transdisciplinary assessment team." A preponderance of the evidence shows that the teacher's participation at the November 2004 IEP meeting, as mandated by the IDEA, "would have assisted the IEP team in devising a program that was better tailored to Student's abilities and special needs. Accordingly, the District's procedural violation of the IDEA resulted in Student's loss of an educational opportunity and his denial of FAPE."

Amanda J. v. Clark County Sch. Dist., 267 F.3d 877 (9th Cir. 2001). Because of the district's "egregious" procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the student's time within the district. Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

Jaynes v. Newport News, 35 IDELR 1, 2001 WL 788643 (4th Cir. 2001). Parents

entitled to reimbursement for Lovaas program due to district's repeated failure to notify them of their right to a due process hearing. Where the failure to comply with IDEA's notice requirements led to a finding of denial of FAPE, court may award reimbursement for substantial educational expenses incurred by parents because they were not notified of their right to challenge the appropriateness of the district's program.

Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the "equivalent of providing the parents a meaningful role in the process of formulating an IEP." Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents' refusal to agree with the district's placement recommendations did not excuse the district's failure to conduct an IEP conference.

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."

Justin G. v. Board of Educ. of Montgomery County, 148 F.Supp.2d 576 (D. Md. 2001). Where no IEP is developed prior to the beginning of the school year, even where the school district contends it was parents' fault, such a violation goes to the heart of the district's ability to provide FAPE and, therefore, resulted in a denial of FAPE.

Glendale Unified Sch. Dist. v. Almasi, 122 F.Supp.2d 1093 (C.D. Cal. 2000). Where district offered four possible placements to student, three of which were district programs and one was continued placement at private school at parents'

expense, offer of several placements was a procedural violation that denied FAPE. District must make a formal, specific offer of placement.

C. RESOLUTION OF HYPOTHETICAL FACT PATTERNS

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