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What Is A FAPE? Have the Substantive Requirements of the IDEA Evolved Since *Rowley*?

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I. **The Rowley Standard**

The Individuals with Disabilities Education Act (“IDEA”) requires a school district to provide a free appropriate public education (FAPE) to its special education students. The United States Supreme Court has formulated a two-part test to analyze whether a FAPE was provided in cases under the IDEA. In order to determine if a school has provided a student a FAPE courts and hearing officers must decide: (1) whether the school district has complied with the procedures set forth in the IDEA; and (2) whether the IEP developed pursuant to the IDEA was reasonably calculated to enable the child to receive some educational benefit. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206-07 (1982).

A. **Procedural Compliance.**

The IDEA’s procedural safeguards are “designed to ensure that the parents or guardian of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to those decisions.” *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 527(4th Cir. 2002). “It is beyond dispute that full parental involvement in the handicapped child’s education is the purpose of many of the [IDEA] procedural requirements.” *Doe v. Alabama State Dep’t of Educ.*, 915 F.2d 651, 661 (11th Cir. 1990).

According to the Office of Special Education Programs (OSEP): “The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child’s need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.” 34 C.F.R. Part 300 Appendix A Question 5 (1999).

B. **Substantive Compliance.**

Rowley: The Supreme Court has held that a FAPE has been provided when a school provides a child with “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” The instruction and services must meet the state’s educational standards, must approximate the grade levels used in the state’s regular education, and must comport with the child’s IEP. Under the *Rowley* analysis, **a school district provides a child with FAPE when it, first, substantially complies with the procedural requirements of the IDEA, and second, creates an IEP that is reasonably calculated to enable the student to receive educational benefit.**

Andrew F. v. Douglas Cnty. Sch. Dist. RE-1: The Supreme Court recently issued a decision regarding the IDEA FAPE standard. While the decision fully embraces the Rowley standard, it provides further guidance on what it means to afford a special education a FAPE. The decision is certain to spark a temporary burst of litigation over the meaning of the FAPE standard.

In *Andrew* the Court was asked to decide whether a public school's educational program which only afforded a student "minimal progress" met the FAPE standard. The Court rejected a lower court's holding that an IEP need only provide "more than *de minimis* progress" in order to provide a FAPE. At the same time it rejected the position of the parents that an IEP must provide "educational opportunities to children with disabilities that are 'substantially equal to the opportunities afforded to children without disabilities.'" Instead, the Court fully embraced its prior holding in Rowley while providing further clarity to long standing precedent.

Clarifying *Rowley*, the Court stated:

Rowley sheds light on what appropriate progress will look like in many cases: For a child fully integrated in the regular classroom, an IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." * * * Rowley did not provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. **A child's IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child's educational program must be appropriately ambitious in light of his circumstances,** just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Citing *Rowley* the Court also stated:

the "reasonably calculated" qualification reflects a recognition that **crafting an appropriate program of education requires a prospective judgment by school officials.** The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Further, the Court reiterated that understanding in *Rowley* that:

the IDEA cannot and **does not promise "any particular [educational] outcome."**

Legal Standards Frequently Asserted by Parents:

Outcome Based: “The objective of the criteria set out in federal law is the achievement of effective results -- demonstrable improvement in the educational and personal skills identified as special needs -- as a consequence of implementing the proposed IEP.” *Independent Sch. Dist. No. 701 v. J.T.*, 45 IDELR 92 (D. Minn. 2006) (citing, *Town of Burlington v. Dept. of Educ. for Com. of Mass.*, 736 F.2d 773, 788 (1st Cir. 1984).

“The IDEA is not simply about “access;” it is focused on “transition services, ... an *outcome-oriented* process, which promotes movement from school to post-school activities ... taking into account the student's preferences and interests.” 20 U.S.C. § 1401(30); 34 CFR § 300.29. This is such a significant departure from the previous legislative scheme that any citation to pre-1997 case law on special education is suspect.” *J.L v. Mercer Island*, 46 IDELR 273 (D. WA 2006).

Meaningful Educational Benefit: “the IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue ... At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit toward the goal of self-sufficiency.” *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862, 864 (6th Cir. 2004).

“We first interpreted the phrase “free appropriate public education” in *Bd. of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986), when we rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA “clearly imposes a higher standard.” *Id.* at 991. Examining the quantum of benefit necessary for an IEP to satisfy IDEA, we held in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), that IDEA “calls for more than a trivial educational benefit” and requires a satisfactory IEP to provide “significant learning,” and confer “meaningful benefit.” We also rejected the notion that what was “appropriate” could be reduced to a single standard, holding the benefit “must be gauged in relation to the child's potential.” When students display considerable intellectual potential, IDEA requires “a great deal more than a negligible [benefit].” *Ridgewood v. N.E.*, 172 F.3d 238.

Legal Standards Frequently Asserted by Schools:

Not Outcome Based: “[T]he measure of appropriateness for an IEP does not lie in the outcomes achieved. . . . While outcomes may shed some light on appropriateness, the proper question is whether the IEP was objectively reasonable at the time it was drafted.” *J.P. ex rel. Popson v. West Clark Comty. Schs.*, 230 F.Supp.2d 910, 919 (S.D.IN 2002)(citing *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir.1999)).

“The goal of the IDEA is to provide access to public education for all handicapped students. . . . The statute only requires that a public school provide sufficient specialized services so that the student benefits from his education . . . IDEA’s goal is ‘more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular benefit of education once inside.’” *Fort Zumwalt*, 119 F.3d at 612.

“The federal regulations limit the accountability and liability of teachers and administrators under the IDEA for those who made good faith efforts to assist the child in achieving the goals and objectives listed in the IEP.” *McGraw v Bd. of Educ. of Montgomery Cnty.*, 952 F.Supp.2d. 248, 252 (D. Md. 1997).

Not a Maximization Standard: “Generally speaking, a school district is required to show only that the proposed IEP would provide a meaningful educational benefit and not that it would be the best possible education. . . . This requires more than just a de minimis educational benefit and mandates the undertaking of a student-by-student analysis that carefully considers the individual student’s abilities”. *Travis G. v. New Hope-Solebury Sch. Dist.*, 49 IDELR 248 (E.D. Pa. 2008).

IEP Implementation: “[W]hen a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have *materially failed* to implement the child’s IEP. A material failure occurs when the services provided to a disabled child fall *significantly short* of those required by the IEP.” *Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770, 780 (9th Cir. 2007)(emphasis added); *See also Slama*, 259 F.Supp.2d at 888 (holding that a school district is not required to strictly adhere to a student’s IEP and requiring a showing of substantial or significant failure to implement in order to prove a denial of FAPE).”

Progress for Student with Social and Emotional Needs: *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 38 IDELR 208 (8th Cir. 2003). Case involved student who received services under the label of EBD and who continued to engage in frequent violent behaviors that required frequent restraints, police involvement and hospitalization for a period. The District was able to show that the Student made academic gains, however, the parents alleged that continued behavioral difficulties demonstrated a denial of FAPE. In finding the Student was provided a FAPE the Court held:

[T]hat the student’s IEP must be responsive to the student’s specific disabilities, whether academic or behavioral. . . . Academic and behavioral matters, however, are not always independent of each other. As we noted in *A.C.*, 258 F.3d at 776-77, “social and emotional problems are not ipso facto separable from the learning process.” Where, as here, the record indicates that a student’s behavioral problems, if unattended, might significantly curtail his ability to learn, the fact that he is learning is significant evidence that his behavioral problems have, at least in part, been attended to. Of course, we wish that CJN had made more behavioral progress, but the IDEA does not require that schools

attempt to maximize a child's potential, or, as a matter of fact, guarantee that the student actually make any progress at all. It requires only that the student be provided with an IEP that is reasonably calculated to provide educational benefit and we conclude that that happened here.

II. Showing Provision of a FAPE Through Educational Progress.

The following may provide evidence of educational progress:

1. Advancement from Grade-to-Grade. The Supreme Court has found that advancement from grade to grade is strong evidence that a child is receiving a meaningful educational experience, although it has refused to hold “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.’” *See Rowley*, 458 U.S. at 203, n.25.
2. Passing Grades. The fact that a student received passing grades in special education and general education classes can be relied on to show that a student received an appropriate educational program. *See Leighty v. Laurel Sch. Dist.* 46 IDELR 214 (W.D. Penn. 2006)(Court concluded school provided student a FAPE when student received passing grades even though SLD (reading) student didn’t show progress on achievement test scores in the area of reading). However, passing grades may not always be enough to show that a FAPE has been provided. The federal regulations provide: “[e]ach State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.” 34 CFR 300.101(c)(1)(2004)(emphasis added).
3. Progress on IEP Goals and Objectives. Progress on goals and objectives in the special education environment in most cases will be strong evidence that the Student was provided an appropriate educational program. *See Devine v. Indian River Sch. Bd.*, 249 F.3d 1289, 34 IDELR 243 (11th Cir. 2001). (Court rejecting argument that progress on goals and objectives must be shown in a generalized manner across settings and stating that “generalization across settings is not required to show an educational benefit”). However, failure to make progress on goals and objectives does not necessarily mean that a student has been denied a FAPE. *See Portland Pub. Schs.*, 20 IDELR 596 (SEA ME 1993), (failure to meet the majority of goals in the IEP was not cause for finding the IEP inappropriate).
4. Progress on Achievement Testing and High Stake Tests (i.e. BST). Progress on standard scores or raw scores from standardized tests can provide strong empirical evidence of educational progress and the provision of a FAPE. However, a decline in standardized test scores may not be determinative in some cases. *See Houston v. Caius*, 30 IDELR 578 (S.D. Tex. 1998)(stating

progress must be measured with respect to the individual student “not his peers” and holding that declining percentile scores do not necessarily represent a lack of educational progress).

5. Improving Behaviors. Many courts have recognized that educational progress includes not only academic progress. Progress can also be demonstrated through a student’s social, emotional and behavioral progress. Conversely, continuing problematic behavior or decreasing behavior may not constitute a denial of FAPE, particularly, if the Student’s behavior is controlled in a manner that permits the Student to make academic progress despite impeding behavioral issues. *See CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 38 IDELR 208 (8th Cir. 2003).
6. Increasing Functional Skills. Many Courts have recognized that the nature of a student’s disabling condition may not lend itself to significant gains academically or behaviorally. Instead, the appropriateness of an IEP “must be gauged in relation to a child’s potential.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999). “Some children, due to the extent of their handicaps, will never be able to perform at grade level and will require several years to achieve what would be to a non-handicapped child a year’s worth of progress.” *Conklin v. Anne Arundel Cnty. Bd. of Educ.*, 946 F.2d 306, 316 (4th Cir. 1991). Therefore, a student with a significant disabling condition may demonstrate progress through functional qualitative gains as opposed to measurable academic gains.
7. Teacher Report and Observation. Teacher reports and testimony indicating that a student made progress are often times relied on as evidence to support a conclusion that a student received a FAPE. However, if such reports or testimony are not supported by other evidence, they will not carry the same weight.
8. Totality of the Circumstances. Courts will look at the student’s “entire academic record” when determining the existence of educational benefit. *See Houston v. Caius*, 30 IDELR 578 (S.D. Tex. 1998). As one court has stated “[t]he educational benefits flowing from the IEP must be determined from the combination of offerings, rather than the single components viewed apart from the whole.” *Karl v. Bd. of Educ. of Genesco*, 736 F.2d 873, 877 (2nd Cir. 1984); *see also Lenn v. Portland Sch. Committee*, 998 F.2d 1083 (1st Cir. 1993)(indicating that courts should consider “the IEP’s offerings as a unitary whole” in FAPE determination); *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F.Supp.2d 991, 995 (S.D.Tex. 2005)(holding “[a] child need not improve in every area to obtain an educational benefit from his IEP.”).

III. What Do You Do When Student Is Not Making Notable or Measurable Progress?

Both State and federal law mandate review and revision of a student’s IEP when the student is not making anticipated progress towards IEP goals and objectives.

A. Minnesota Law. Minnesota law provides:

The district shall ensure that the IEP team reviews the pupil's IEP periodically, but not less than annually to determine whether the annual goals for the pupil are being achieved, and revises the IEP as appropriate to address:

- (1) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;
- (2) the results of any reevaluation conducted;
- (3) information about the pupil provided to, or by, the parents; or
- (4) the pupil's anticipated needs and other matters.

Minn. R. 3525.2810 Subp. 3.

B. Federal Law.

The Individuals with Disabilities Education Act states:

- (4) Review and revision of IEP: (A) In general: The local educational agency shall ensure that, ... the IEP Team -- (i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and (ii) revises the IEP as appropriate to address -- (I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate; (II) the results of any reevaluation conducted under this section; (III) information about the child provided to, or by, the parents ... ; (IV) the child's anticipated needs; or (V) other matters.

20 U.S.C. § 1414(d)(4).

IV. Applicable Case Law.

1. Indep. Sch. Dist. No. 701 v. J.T., 45 IDELR 92 (D. Minn. 2006).

Facts: Student re-enrolled in resident school district after being open enrolled at a neighboring school district for approximately one year. Just before re-enrolling in the resident district the Student was assessed by the neighboring school district. The evaluation completed by the neighboring school district was deficient in several respects. (i.e. inadequate review of prior evaluations, marginal observational data and insufficient assessment of Student under SLD criteria). Nonetheless, the resident district relied on the recent evaluation to develop a new IEP after the Student's re-enrollment.

The new IEP that the parent consented to contained two goals. First, the IEP contained a behavioral goal, which indicated that the Student "will increase the ability to express anger and frustration in socially acceptable ways from arguing, confronting, and refusing to work to calmly discussing solutions to problems with others." Three short-

term objectives supported the behavioral goal: (1) “given a school setting, [the Student] will increase his behavior of expressing his anger calmly from becoming physically aggressive to verbalizing his anger clearly and calmly as measured by teacher observational records”; (2) given a school setting, [the Student] will increase his behavior of making positive and constructive statements from saying negative things and refusing to work to keeping his comments positive and constructive as measured by teacher observational records”; and (3) “when given an instructional task that may be confusing or difficult, [the Student] will appropriately ask for help and clarification at least 80% of the time for 3 consecutive marking periods as documented by teacher records.” The IEP also contained an academic goal that stated the Student “will improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write and do basic math skills independently.” Three short-term objectives supported the academic goal: (1) “given a reading assignment at his level, [the Student] will complete the assignment with 80% accuracy average as measured by teacher grade book”; (2) “given a functional math assignment, [the Student] will complete the task with at least an 80% accuracy average as measured by teacher grade book”; and (3) “given functional spelling and language assignments, [the Student] will complete the assignments with at least an 80% accuracy average as measured by teacher grade book.”

The Parents repeatedly questioned the teachers about the lack of academic progress that the student was making in the resident district’s program in the intervening school year. The Parents also complained that the Students program was not sufficiently rigorous to address the Students academic needs. Approximately, five months after returning to the district the parents requested a due process hearing against the district and claimed that it had denied the student a FAPE.

Holding: The Hearing Officer found that the student had made progress on his behavioral goals and objectives. However, he concluded the District denied the Student a FAPE because it did not demonstrate that the Student made any academic progress. The Hearing Officer stated that “simply because there is more than one criterion [i.e. goal] does not mean that a school district can provide services to achieve one of the [goals] and then completely ignore the rest.” He held that “each criterion must be examined and a determination made as to whether the services as a whole were sufficient to reasonably result in educational benefit.” He stated that it is not “acceptable for there to be no academic progress at all” simply because the behavioral goals were reasonably calculated to result in educational benefit. The Hearing Officer also concluded that the IEP goals “were so vague and general as to fail to demonstrate that the IEP was reasonably calculated to result in educational benefit.” He determined that the IEP team must create an IEP that “contain[s] academic goals and objectives that are specific and able to be measured.”

The District appealed the decision to federal court. The federal district court affirmed the Hearing Officer’s decision. With respect to the issue of the IEP goals the court stated: “The wording of each goal and the three short-term objectives that follow each goal could define a broad range of conduct. For example, it is unclear what reading,

writing, and math skills are required for independence. Further, although the short-term objectives provide that the academic goal will be met according to certain percentages, the short-term objectives do not provide objective criteria against which achievement can be measured. The Court finds that the goals and objectives are vague and immeasurable.”

2. Devine v. Indian River Sch. Bd., 249 F.3d 1289, 34 IDELR 243 (11th Cir. 2001).

Facts: Autistic student with serious impairments in all areas of functioning attended a school district’s autism program for 3 school years. The parents eventually rejected the district’s proposal to continue the student’s placement in the district’s autism program and requested that it place their child in a residential facility. The parents argued that their son could not generalize learned skills across environment. They asserted that their son demonstrated serious behavioral problems at home and that the school district failed to make an effort to address the student’s educational needs in the home environment. They also argued that the IEP was inadequate because it failed to provide respite care for the family (i.e. “to provide for people---other than the family---to care for the student at home.”) When the district would not fund a residential program, the parents requested an IDEA hearing against the District. After an administrative hearing, the hearing officer found that the school district’s proposed IEP did not offer a FAPE but he denied the parents request for a residential placement. The parents appealed the decision.

Holding: The federal district court reversed the hearing officer’s determination that the district’s proposed IEP denied the student a FAPE and he affirmed the hearing officer’s rejection of the parents’ request for residential placement. The Court held that the district had demonstrated the appropriateness of continued placement in its autism program by showing that the student had made progress in the program. The Court found that:

One of [the student’s] teachers . . . testified that during the 1992/1993 school year, [student] made progress in 26 out of 27 education goals. The testimony of [the] teachers also reflected that [student] was in large part uncontrollable when he first arrived [in the autism program] but that, over the school year, he reached a level where he acquired skills, which he could display across settings. [Student] was also able to establish relationships with his peers and formed an especially close bond to one of his teachers . . .

The Court also rejected the argument that the district was required to provide “respite care” in order for the student to benefit educationally.

3. Bradley v. Arkansas Dep’t of Ed., 443 F.3d 965, 45 IDELR 149 (8th Cir. 2006).

Facts: Parent requested six due process hearings against school district in a 3 year period. In the appeal of the 6th case the Parent claimed that his child had not made educational progress. However, a federal district court that had a bench trial on the Parent’s claims held that the district showed that the Student had made educational progress. The Court relied heavily on the fact that the Student’s standardized test scores

in number of academic areas remained consistent over the course of several years. The Parent appealed the decision to the 8th Circuit and claimed that the district's failure to bring about an increase in standardized test scores showed a lack of progress.

Holding: The Court of Appeals rejected the Parent's argument and found that the Student's standardized test scores showed progress. In reference to the Student's standardized achievement test scores the Court wrote: "[i]ndeed, he did not perform well, but he did perform consistently. That is, as the School District's expert pointed out, the scores on these tests are not based on the raw number of correct answers. Instead, [the Student's] correct answers were compared with the answers of students across the country who took the same test at the same age. As the expert explained, for [the Student] to be performing consistently, he had to be learning at the same pace as his peers, that is, he was making academic progress.

4. Susquenita Sch. Dist. v. Raelee S., 25 IDELR 120 (M.D. Penn. 1996).

Facts: Parents of a student with dyslexia and a deficient short term memory brought a hearing against a school district requesting private school reimbursement. The student received mostly A's and B's in her classes and she was reported to be doing well socially and behaviorally in the district's program. However, standardized achievement scores indicated that the student was significantly lagging behind her peers in reading, written language and math. The District provided special education instruction to the student that included intensive reading instruction of nearly 2 hours per day using different reading methodologies (i.e. "Foxy Phonics and "Project Read"). The district also provided 1 to 1 instruction and specially drafted study guides to assist the student with her progress in regular core classes. (i.e. social studies and science). Despite the district's efforts, the parents pulled their daughter from the public school and placed her in a private school after the district continued to offer the program that was resulting in minimal progress.

Holding: A state appeals panel determined that the district's proposed program did not provide the student a FAPE and ordered the district to reimburse the parents for a private school program that specialized in reading instruction. The district appealed and the federal district court affirmed the panel's decision. The court held that despite the student's passing grades she did not make meaningful educational progress in the areas of reading and written language. The court was critical of the district's reading program because it utilized methods and strategies typically employed for cognitively impaired students. The Court also criticized the district because it failed to close the gap between her ability and achievement over time. The court stated that even though "in absolute terms [the student] had gained new skills and knowledge," "in practical terms . . . [she] was not catching up to her peers." The Court also found that the district's proposed IEP, "failed to include meaningful educational goals, to establish meaningful and quantifiable short-term objectives or criteria for measuring the [student's] progress, and failed to include examples of specific instruction methods useful for teaching the [student]."

5. CJN v. Minneapolis Pub. Schs., 38 IDELR 208 (8th Cir. 2003).

Facts: Student with brain lesions and long history of psychiatric illness demonstrated a long history of behavioral difficulties at school but still managed to progress academically at an average rate in the school district's educational program. In 3rd grade the student was placed in a highly structured classroom, received modified homework assignments and was provided a "token economy" behavior plan to address his behaviors. However, the student continued to demonstrate violent behaviors that included assaulting peers and staff, property destruction and self harm. His behavior required multiple timeouts and physical restraints, a police intervention and a period of hospitalization. To address the Student's behavior, the school team conducted an educational evaluation and then proposed an IEP that offered a partial day placement in an elementary school program with 1 to 1 paraprofessional support and a partial day day-treatment program. The student attended the new program for a period of 7 days before he had an episode that required hospitalization. The school and parent agreed to home bound services for an interim period but a day after the home instruction began the parent placed the student at Calvin Academy, a private school program. The parent requested a hearing to obtain reimbursement from the district for the student's private placement. The Hearing Officer found that the district had denied the student a FAPE during his 3rd grade predominantly based on the fact the student's IEP lacked sufficient positive interventions and because of the high level of physical restraint employed by the school during the year. The Hearing Officer ordered reimbursement for Calvin Academy. A State Hearing Review Officer reversed the Hearing Officer's decision and the case was appealed to the federal district court.

Holding: The federal district court affirmed the Hearing Review Officer's decision and denied the parent's request for private school reimbursement. The Court stated that "academic and behavioral matters . . . are not always independent of each other" and that "social and emotional problems are not [necessarily] separable from the learning process." It noted that the student's academic progress provided strong evidence that student made overall educational progress. While the Court recognized that a failure to make social and emotional progress may provide evidence for a denial of FAPE claim, it noted that the student's notable academic progress along with the behavioral interventions employed by the district showed that the school had "attended" to the student's social and emotional problems in a manner that permitted him to make academic progress.

6. Southern York Cnty. Sch. Dist., 43 IDELR 248 (Penn. 2005).

Facts: Student was misidentified by the district as "mentally retarded" for a number of school years. Outside evaluations later determined that the Student had a verbal learning disability that impacted her overall performance on standard IQ testing. The parents claimed that the student failed to make appropriate educational progress in the school's special education program. They requested a hearing seeking reimbursement for a private placement and compensatory education. Even though the evidence supported that the student at a minimum made 2 years of progress in terms of grade level over a three

year period, the Hearing Officer found that the student did not make sufficient progress and awarded 230 hours of compensatory education. The private tuition reimbursement request was denied. The case was appealed by the district and a Hearing Review Panel affirmed the lower decision but awarded additional compensatory services. (i.e. a total of 540 hours). The Hearing Panel found that the student did not make “satisfactory progress” in reading and that the student’s current IEP needed more specific objectives. The district appealed the denial of FAPE determination and the award of compensatory services.

Holding: The Pennsylvania Court on appeal reversed the Hearing Review Panel’s decision. It concluded that two years of reading progress over a two or three year period met the minimum FAPE requirements of the IDEA. Further the Court rejected the rationale employed by the Hearing Panel to justify its award of 540 hours of compensatory services. The Panel awarded a high amount of compensatory services because it believed the student needed to “catch up” for years of insufficient educational programming. However, the Court held that it was an error for the Hearing Panel to consider the Student’s allegedly insufficient programming for school years outside the state’s one year statute of limitations.

7. Leighty v. Laurel Sch. Dist., 46 IDELR 214 (W.D. Penn. 2006).

Facts: A middle school student eligible for special education services under SLD and Speech/Language received special education services that included speech therapy and “learning support” in her regular education classes. In the fall of the student’s 7th grade, the student was assessed by an outside evaluator. The evaluator determined that the student did not make “reasonable educational progress” and that she should be placed in a private SLD school. During 7th grade the student received A’s and B’s in her regular education classes and B’s and C’s in English. Prior to 8th grade the student was again reevaluated by the outside evaluator, who found that the student received slightly lower standard scores on the Woodcock Johnson Achievement Test. She again recommended that the student be placed at the private school. The parents requested a hearing seeking compensatory education and a private school placement. The Hearing Officer found that the district provided the student a FAPE and denied the request for compensatory education and tuition reimbursement.

Holding: The Parents appealed to federal district court. On appeal, the parent argued that the District did not monitor the Student’s progress based on her IEP and it did not demonstrate the development of concrete skills. The Court stated that “the arguments raised by [the parents] are results-oriented, and they do not rely on any facial deficiencies in the IEP itself. The [parents] contend that the IEP is not reasonably calculated to close (or narrow) the gap between [the student’s] level of achievement and her level of ability. . . . The IDEA, however, does not require the district to eliminate the very discrepancy that renders [the student] disabled in the first place. . . . A learning disability, by its very nature, renders it difficult for a child to learn on a level consistent with his or her intellectual potential.

The Court held that the student made notable progress that was supported by the fact that the Student advanced from one grade to the next, despite her severe learning disability. The Court also rejected the parents claim that the district failed to appropriately implement the student's IEP. The court stated:

Generally speaking, in order to defeat an IDEA-based claim alleging that it has failed to properly implement an IEP, a school district must demonstrate that: (1) the failure to implement was not a "complete" failure; (2) the variance from the special education and related services specified in the IEP did not deprive the student of a FAPE; and (3) the provision of special education and related services made meaningful progress toward the achievement of the specific goals stated in the IEP.

The Court determined that the district did not fail to implement the student's entire IEP and that the student made measurable progress towards several of the IEP goals and objectives. As a result it rejected the parents request for private school reimbursement or compensatory education.

8. Houston v. Caius, 30 IDELR 578 (D. Tex. 1998).

Facts: The special education evaluation of an elementary school student revealed deficiencies in academic achievement in the areas of reading and oral and written language, and he qualified for special education on the basis of a learning disability. Pursuant to his IEP, the student was to receive a reading and language resource placement as well as speech therapy and several modifications to his educational program including the following: modified tests, taped texts, highlighted texts, extended time for assignments, shortened assignments, calculator use, and taped assignments. The student's parents contended that the student was not making sufficient progress under the IEP and that the teachers were not implementing these IEP modifications. A hearing officer found the student's IEP satisfactory, but found that the district failed to consistently implement various aspects of the student's special education program thereby denying FAPE. The matter came before a district court on appeal with both parties asserting claims for relief.

Holding: The district court found that the school district "experienced difficulties" in implementing the student's IEP and kept "exceedingly poor" records documenting periods when the student was deprived of services for brief periods; nonetheless, it concluded that all services specified in this IEP were provided without undue delay. When delays occurred, the district offered to provide services as soon as possible and offered to compensate the student for lost services. In one instance, the student actually received a greater amount of compensatory speech services than were actually called for in his IEP. According to the court, when educational agencies are unable to locate sufficient personnel to provide services as was the justification for the delays in the case before it, an educational agency's efforts to comply with the IDEA should not be questioned, particularly in instances where compensatory services are offered. Moreover, all IEP modifications were provided. Next, the court concluded that the educational program provided to the student did offer the student an academic benefit in accordance with the

IDEA's standard. The court rejected the parent's argument that evidence of a student's declining percentile scores indicated otherwise, pointing out that such measurements were a measure of the student's performance as compared with other students, and not a measure of his own individual progress---the latter of which was the IDEA's focus. As such, percentile scores were not appropriately considered under the IDEA. The student's "individual" progress was apparent through an increase in grade equivalent scores in most of the areas tested, teacher testimony that the student was making progress, and evidence of his passing grades. Thus, the court entered summary judgment in favor of the school district and denied the parents reimbursement to cover the period the student attended a private school.

9. Kuszewski v. Chippewa Valley Schs., 34 IDELR 59 (E.D. Mich. 2001).

Facts: Parents of a disabled student brought a hearing request seeking reimbursement for a private school placement. The parents challenged the district's IEP and claimed that the goals and objectives from the IEP were not measurable. The Hearing Officer rejected the parent's claims and found the District's IEPs were appropriate.

Holding: The Court rejected the parents' claim that the IEP goals and objectives were not legally sufficient. The Court agreed that "IDEA requires that the IEP provide legally measurable goals." However, it found that the student's IEP contained "a series of tables divided into each academic subject area that contains the 'short term objectives,' 'performance criteria,' 'evaluation procedures,' and 'schedules for evaluation.'" . . . and "the IEP address[ed] each subject area and [went] on to discuss how improvements will be evaluated and at what intervals. The Court rejected the parents' position that the IDEA required the district to provide *quantitative* numerical goals and held that the district's goals and objectives met the requirements of the IDEA.

10. Alexis v. Bd. of Educ. for Baltimore, 40 IDELR 7 (D. Md. 2003).

Facts: Student with above average IQ possessed a learning disability in the area of reading. Student had made progress on several goals and objectives on his IEPs over several years but did not make progress on his decoding and phonics skills over a two year period. Because of his lack of progress in phonics the parent obtained private tutoring in phonics and speech and language. The district also increased the student's direct one-to-one instruction in a multi-sensory reading approach. The district also proposed additional evaluation to further determine the extent of the student's needs. The parent consented to and then revoked their consent to further evaluation. They then removed the student from the district, placed him in a private school and requested a due process hearing to obtain reimbursement. The Hearing Officer decided that the district provided the student a FAPE and denied the request for reimbursement. The parent appealed to federal court.

Holding: The Court affirmed the Hearing Officer's decision. The Court found that even though the district did not strictly comply with the technical requirements of the IDEA by making progress reports available at IEP meetings the district included objectives in the

student's IEP with criteria that allowed his teachers to evaluate his progress. The Court also determined that the district made an effort to provide the parents with "all the information required." The Court held that "adequate parental involvement and participation in formulating the IEP and not an adherence to a laundry list [of procedural requirements]" is the critical factor in determining compliance with the IDEA's procedural requirements. The Court also rejected the parents' argument that the student was denied a FAPE because he did not make progress on certain IEP goals and objectives. The Court stated that the fact that the student did not make progress in one area of his IEP for half of a school year did not show that the student was denied a FAPE.

11. KE v. ISD No. 15 (St. Francis), 57 IDELR 61, 647 F.3d 795 (8th Cir. 2011).

Facts: A fifth-grade student, who had been in the District since kindergarten, was diagnosed with ADHD, bipolar disorder, disruptive behavior disorder, and forms of cognitive disorder and mood disorder. The District found the student eligible for special education services after her first grade year, and developed an IEP with various goals and adaptations. Over the course of the next few years, the District continued to revise the IEP. For instance, after receiving the results of an outside evaluation, the District incorporated some additional accommodations, including access to a paraprofessional. The District reevaluated the student near the end of her fourth grade, and as a result developed a BIP to address the student's behavior difficulties, and continued to modify the IEP to address her low-average academic performance, particularly with respect to her language-based learning abilities.

In fifth grade, the student began seeing a psychiatric psychologist, who made several recommendations to the District based on the student's allegedly worsening mood symptoms, including a shortened school day and home treatment. School staff had not observed the issues that the doctor was describing, and asked for further explanation regarding the doctor's conclusions. The doctor and the Parent failed to attend a series of scheduled IEP meetings, but the IEP team nevertheless revised the IEP to incorporate additional accommodations – but not the shortened school day. The Parent filed a due process complaint, and the ALJ held that the District had denied the student a FAPE. The district court reversed on appeal, and the Parent appealed to the Eighth Circuit.

Holding: The Court affirmed the district court and held that the District did not deny the student a FAPE. Procedurally, the Court found that the District adequately "considered" the outside evaluations when developing the student's IEPs. Although the District did not adopt all of the doctor's recommendations, the record showed that the IEP team discussed them in depth and attempted unsuccessfully to correspond with the doctor for further explanation. The Court found that the Parent's absence at meetings was the Parent's fault, and not the result of any failure on the part of the District to involve her.

With respect to the substantive FAPE requirement, the Court noted that the student's progress reports and standardized tests showed significant progress in reading, spelling, and math. Although the student did fail to meet some of her IEP goals and did not demonstrate the level of growth typical of children her age, "these shortcomings do not in

any way negate the substantial progress that she was able to achieve.” The IEP thus was reasonably calculated to, and *did* provide, an educational benefit, and the Court affirmed the district court’s holding that the District provided a FAPE.

12. K.M. by and through Markham v. Tehachapi Unified Sch. Dist., 117 LRP 13249, 2017 WL 1348807 (E.D. Cal. Apr. 5, 2017).

Facts: A student with autism received special education services in the District. In her kindergarten year, the District developed an IEP with a number of goals, including following instructions, verbalizing, reading, math, and social/emotional behavior. Following increases in challenging behaviors, the District conducted an FBA as well as a speech and language evaluation in November of the student’s second grade. Based on the results of these evaluations, the District implemented a BIP and also proposed a placement in a special day class at another elementary school, led by a teacher with an autism specialty. The Parents did not agree to the placement, and later obtained IEEs which concurred that the placement was not appropriate. They brought a due process hearing arguing, in part, that the proposed placement was not the IRE and that the goals in the student’s IEPs were insufficient because they did not specifically address “maintaining attention and staying on task.” The ALJ found that the District failed to provide a FAPE for a limited time period when it was not providing behavioral supports, but otherwise denied the parents’ claims.

Holding: The district court affirmed the ALJ’s findings. The IEP as a whole adequately addressed the student’s goals with respect to attention, even though it did not call that out specifically. “The IEP annual goals must meet a student’s needs, but the IDEA does not require that they have a one-to-one correspondence with specific needs. So long as the goals, as a whole, address the student’s needs and enable progress appropriate in light of the student’s circumstances, the IEP is appropriate.” The IEP was reasonably calculated to enable appropriate progress. Although the ALJ’s decision as issued prior to *Andrew*, the IEP nevertheless met the standard. The court also affirmed the ALJ’s finding that the proposed placement was consistent with the least restrictive environment requirement.

13. E.D., by and through her parents, T.D. and C.D. v. Colonial Sch. Dist., 109 LRP 56323, 2017 WL 1207919 (E.D. Penn. 2017).

Facts: During the latter half of the student’s kindergarten year, the District conducted an evaluation and identified the student as eligible for special education services due to a speech and language impairment. The District prepared and implemented an IEP which included several modifications, and the student showed some progress toward the end of the year, but her social and academic struggles continued through the student’s first grade, and the parents ultimately enrolled her in a private school and brought a due process hearing, claiming that the student was denied a FAPE. The ALJ denied the plaintiffs’ claims.

Holding: The Court affirmed the ALJ’s decision. With respect to the parents’ claim that the student was denied a FAPE during kindergarten because the District waited too long

to conduct an evaluation, the court affirmed that the student was not denied a FAPE because the District was not ignoring the student's struggles, and in fact she made significant progress. The court noted that "the standards employed by the Hearing Officer do not differ substantively from the standards adopted by the Supreme Court in *Andrew F.*" The hearing officer applied a sufficiently rigorous standard, and concluded that the child made appropriate progress, although she was not on par with her same age peers. With respect to the subsequent school years, the evidence showed numerous strategies implemented by the District to address the student's needs, and the court affirmed that these strategies were reasonably calculated to assure appropriate progress in light of the student's needs.

14. RMM v. Minneapolis Pub. Schs., 67 IDELR 65, 2016 WL 475171 (D. Minn. 2016).

Facts: The student in this case was voluntarily enrolled in a private school. The student struggled, particularly with reading, and was referred to the District for a special education evaluation in the fifth grade. It was determined that the student was eligible for special education services, and District developed an individual service plan ("ISP") for two hours per week or direct instruction at a District school. The student enrolled in the District to receive those services, but the parents declined further services after four sessions. The private school subsequently encouraged the parents to enroll full-time in the District, and the parents did so. Thereafter, the parents filed a complaint with MDE alleging child find violations and a denial of FAPE. The ALJ dismissed the child find claims as moot, but found a denial of FAPE with respect to the proposed ISP and ordered compensatory education. Both parties filed suit to appeal.

Holding: The court first analyzed both federal and state law with respect to a District's FAPE obligations for parentally-placed private school students. The court held that under federal law, the IDEA requires a FAPE be *available* to all students, but only requires districts to provide services proportional to those provided to public-school students. But, under state law, all students, whether publicly or privately enrolled, must be provided an individualized FAPE, with the exception that the school district may determine the location at which to provide the special instruction and services. Parents are also entitled to a due process hearing on that issue, so the ALJ properly had jurisdiction.

With respect to the compensatory education ordered by the ALJ, the District argued that there was no denial of FAPE because it was not afforded an opportunity to revise the ISP, and there was no demonstration of loss of educational benefit because the student quickly ceased the services. The court concluded that the District had demonstrated an unwillingness to revise the ISP, and that the services offered in the ISP would have been insufficient to provide a FAPE even if the student had continued receiving them. Thus, the award was affirmed. Finally, the Court reversed the ALJ's dismissal of the child find claims. The Parents were entitled to a hearing with respect to the identification and provision of FAPE prior to the time when the student was eventually identified.

15. Fry v. Napoleon Comty. Schs., 137 S. Ct. 743 (2017).

Facts: E.F., a child with cerebral palsy, utilized a service dog and sought permission to have the dog join her in kindergarten. The School District denied the request after concluding that all of the student's needs were being met with the existing supports and accommodations, including one-on-one paraprofessional support throughout the day. As a result, the parents removed E.F. and began homeschooling her. The Parents then filed an OCR complaint, alleging that the District violated the ADA and Section 504. OCR agreed, and found that even if the District's services provided a FAPE, they violated the ADA and 504's ban on disability discrimination. Following OCR's decision, the District agreed to let the student bring the dog to school, but the parents chose to enroll her in a different district. They then filed suit in federal court alleging violations of the ADA and Section 504. The District brought a motion to dismiss for failure to first exhaust IDEA's administrative procedures, which the district court granted, and the Sixth Circuit Court of Appeals affirmed.

Holding: The IDEA requires that a plaintiff exhaust IDEA's procedures before filing an action under other laws when the suit seeks relief that is also available under the IDEA. But the Court held that, to fall within the exhaustion requirement, a suit must seek relief for a denial of FAPE. If a lawsuit alleges such a denial, a plaintiff cannot escape the IDEA procedures by bringing a different lawsuit. But if the remedy sought is *not* for the denial of FAPE, then IDEA exhaustion is not required.

In making the determination of whether a plaintiff is actually seeking relief for the denial of FAPE, the Court held that it is the substance or "gravamen" or a complaint that matters, not the labels and terms. The Court provided a test for making this determination: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?" If the answer to those questions is yes, then it is unlikely the Complaint is alleging a FAPE violation. If no, then the complaint probably does concern FAPE, because the FAPE requirement is all that would explain why only a child in the school setting would have a viable claim. The Court also suggested that the history of the proceedings—whether, for instance, the plaintiff began the dispute by invoking IDEA's procedures—could be significant.

In this case, the suit did not suggest a focus on the adequacy of the student's education, but the Court remanded to the lower court to review the history of the proceedings in the event that they showed something different.