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A NEW IDEA FOR SPECIAL-EDUCATION LAW: RESOLVING THE "APPROPRIATE" EDUCATIONAL BENEFIT CIRCUIT SPLIT AND ENSURING A MEANINGFUL EDUCATION FOR STUDENTS WITH DISABILITIES

Scott Goldschmidt

In its 1954 landmark decision, *Brown v. Board of Education*, the Supreme Court of the United States unanimously declared that educational opportunities must be equal for all students regardless of race.1 In that opinion, then-Chief-Justice Earl Warren asserted that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."2 Despite this important victory for racial equality, the educational rights of another minority, the disabled, frequently have been overlooked.3 In 1975, of the eight million school-age children with disabilities living in the United States, over one-half did not receive an appropriate education, and more than one million were entirely excluded from the public-education system.4 According to a 1967 statistic, students excluded from the public-education system included about two hundred thousand children with severe disabilities who were confined to state institutions supplying only minimal food and clothing.5 Although *Brown* was a clear victory for educational equality for

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1. J.D. Candidate, May 2012, the Catholic University of America, Columbus School of Law; B.A., 2008, the George Washington University. The author wishes to thank Professor Ted Sky and Mr. Michael Gamel McCormick for their expert guidance and invaluable advice, as well as the entire Catholic University Law Review staff and editorial board for their assistance. Most importantly, the author would like to thank his parents, Donna and Harvey, and his sister, Jaime, for their unwavering love, support, and encouragement.
3. *Id.* at 486, 493.
4. *Allan G. Osborne, Jr. & Charles J. Russo, Special Education and the Law: A Guide for Practitioners* 7 (2d ed. 2006). In the 1800s, legislation and funding for individuals with disabilities were limited to asylums, hospitals, and specialized institutions. *Jim Ysseldyke & Bob Algozzine, The Legal Foundations of Special Education: A Practical Guide for Every Teacher* 10 (2006). Not until the 1950s did legislation begin to focus on "research and training, vocational education, assessment, and special education services." *Id.*
5. *S. Rep. No. 94-168*, at 8 (1975); *see also Ysseldyke & Algozzine, supra* note 3, at 15.
racial minorities, the rights of disabled children to receive the same equal-education benefits had been ignored for decades.⁶

Although education is a right granted and executed by the states,⁷ the federal government can influence state educational policy by placing conditions on the receipt of federal money.⁸ In 1975, Congress recognized that disabled students “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out’”⁹ and passed the Education for All Handicapped Children Act of 1975 (EHCA).¹⁰ The EAHCA attempted to reverse educational discrimination for students with disabilities by mandating that these children receive a “free appropriate public education” (FAPE).¹¹ Congress amended and strengthened the EAHCA—now called the Individuals with Disabilities Education Act (IDEA)—in 1986, 1990,

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6. See Editorial, The Battle over Special Education, N.Y. TIMES, Dec. 12, 2001, at A30 (describing the conditions for students with disabilities who attended schools as “resembl[ing] the Dark Ages”); see also Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(2) (2006) (summarizing the congressional findings regarding the dismal educational opportunities for students with disabilities before the Education for All Handicapped Children Act of 1975 (EHCA)).

7. See Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”).

8. See, e.g., South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress can condition federal highway funds allocated to the states by setting a certain minimum drinking age).


Despite substantial changes to the statute,\textsuperscript{13} Congress has never clarified what constitutes an “appropriate” education under the IDEA.\textsuperscript{14} Ambiguity in the language of the IDEA and its regulations regarding this important term necessitates judicial interpretation of an “appropriate” education.\textsuperscript{15}

A split has emerged among the United States Courts of Appeals over what constitutes an “appropriate” education under the IDEA.\textsuperscript{16} The Supreme Court first addressed the issue in \textit{Board of Education v. Rowley} ex rel. \textit{Rowley} and established that an “appropriate education” provides “some” educational benefit.\textsuperscript{17} Although a minimal or trivial education is not considered “appropriate,”\textsuperscript{18} the courts have split regarding a more specific definition of a FAPE.\textsuperscript{19} A minority of circuits follows \textit{Rowley}’s educational-benefit standard,\textsuperscript{20} but a slight majority interprets the statute as requiring a heightened-educational-benefit standard.\textsuperscript{21} This standard generally requires a “meaningful education benefit” and “significant learning,” as opposed to an educational benefit that is simply more than trivial.\textsuperscript{21} As a result, students with

\begin{footnotesize}
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\item \textsuperscript{12} See, e.g., \textit{Ysseldyke \& Algozzine}, supra note 3, at 24–34 (illustrating the evolution of the IDEA and what each series of amendments added).
\item \textsuperscript{13} For example, major changes in the 1997 amendments to the IDEA included “increase[d] parental participation in the evaluation process” and changes to the statute’s disciplinary policies. \textit{Id.} at 27–29. Major changes in the 2004 reauthorization of the IDEA include a new focus on educational outcomes rather than compliance and that students with disabilities must be “taught by highly qualified teachers who have full certification in special education or who pass a state special education teacher licensing exam and hold a state license.” \textit{Id.} at 31.
\item \textsuperscript{14} See \textit{Osborne \& Russo}, supra note 3, at 25. Although the 2004 IDEA amendments “provide[d] very precise definitions for three dozen lexical terms or phrases used frequently within the [IDEA’s] provisions, such as ‘child with disability,’ ‘core academic subjects,’ [or] ‘highly qualified,’” the amendments fail to define “appropriate” for the phrase “‘appropriate education,’ the very term that provides the basis for compliance with [the IDEA].” Andrea Blau, \textit{The IDEA and the Right to an ‘Appropriate’ Education}, 2007 \textit{BYU Educ. \& L.J.} 1, 4–5 (emphasis omitted).
\item \textsuperscript{15} See \textit{Osborne \& Russo}, supra note 3, at 25.
\item \textsuperscript{16} See infra Part I.B.2.
\item \textsuperscript{17} See Bd. of Educ. v. \textit{Rowley} ex rel. \textit{Rowley}, 458 U.S. 176, 200 (1982); \textit{Osborne \& Russo}, supra note 3, at 26–27.
\item \textsuperscript{18} See \textit{Oberti v. Bd. of Educ.}, 995 F.2d 1204, 1213 (3d Cir. 1993) (citing Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988)) (requiring “the state to offer children with disabilities individualized education programs that provide more than a trivial or de minimis educational benefit”).
\item \textsuperscript{19} \textit{Larry D. Bartlett, Susan Etscheidt \& Greg R. Weisenstein, Special Education Law and Practice in Public Schools} 67 (2d ed. 2007). \textit{Compare Deal v. Hamilton Cnty. Bd. of Educ.}, 392 F.3d 840, 862, 864 (6th Cir. 2004) (interpreting the IDEA to require a “meaningful educational benefit”), \textit{with Doe ex rel. Doe v. Bd. of Educ.}, 9 F.3d 455, 459–60 (6th Cir. 1993) (interpreting the IDEA to require only a basic level of educational benefits for children with disabilities).
\item \textsuperscript{20} Lester Aron, \textit{Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After Rowley?}, 39 \textit{Suffolk U. L. Rev.} 1, 7 (2005).
\item \textsuperscript{21} \textit{Id.} at 7–9; see infra Part I.B.2.
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disabilities receive different levels of education depending on where they live in the United States. To ensure that all students with disabilities receive equal educational opportunities, an “appropriate” education under the IDEA must be defined clearly.

This Comment recommends a resolution to the circuit split regarding what constitutes an “appropriate” education. First, this Comment explores the IDEA and Congress’s intent when it passed the original law and subsequent amendments. Next, it analyzes the Supreme Court’s only holding on the issue and the resulting circuit split. This Comment then describes the role that the Supreme Court and Congress should have in resolving the split and highlights their reluctance to address the issue for more than twenty years. Next, it explores the role that an administrative agency can play in defining an ambiguous term in a federal statute. Finally, this Comment proposes that the U.S. Department of Education, in its role as the agency in charge of monitoring and enforcing the IDEA, should, in the absence of congressional or judicial action, issue a regulation defining the term “appropriate.”

I. THE IDEA AND ITS REQUIREMENT FOR A FREE APPROPRIATE PUBLIC EDUCATION

A. Federal Education Law and the IDEA

The Constitution of the United States creates a federalist system designed to share power between the federal government and the states. Power and control over education policy has traditionally been the purview of state and local governments. Although every state constitution mentions education to some degree, the U.S. Constitution makes no reference to education.
1. Federal Power to Enact Education Law

Because the Constitution does not enumerate federal control over education, this power is reserved to the states. Nevertheless, Congress has passed a number of statutes that affect state educational policy and practice. These statutes remain within constitutional bounds because Congress allocates federal money for specific programs while maintaining conditions on how that money may be spent. Under its taxing and spending power, Congress can condition the receipt of federal funds upon compliance with federal statutory or administrative directives, thereby ensuring the furtherance of broad policy objectives. Although the federal government may incentivize or encourage the states to implement its programs by offering funding, the government may not coerce or compel the states to enact any federal policy. One prominent example of congressional use of this authority is the No Child Left Behind Act (NCLB), which conditions the receipt of federal funding on a state’s acceptance of federal educational policies and objectives.
2. The History of the IDEA and a FAPE

Originally enacted as the EAHCA in 1975, the IDEA “responded to increased awareness of the need to educate children with disabilities, and to judicial decisions requiring that states provide an education for children with disabilities if they provided an education for children without disabilities.” As a federal statute, the IDEA provides additional education funding to states on the condition that recipients implement Congress’s specific policies for students with disabilities. One of the main conditions for states to satisfy to receive IDEA funds is that they must provide a FAPE to every child with a disability between the ages of three and twenty-one. Currently, every state are placed on participating schools that do not demonstrate “adequate progress” as defined by the statute. Id.


35. NANCY LEE JONES & RICHARD N. APLING, CONG. RESEARCH SERV., RS 22138, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): OVERVIEW OF P.L. 108-446 1-2 (2005), available at http://assets.openers.com/rpts/RS22138_20050505.pdf. Congress enacted the EAHCA because numerous students with disabilities were not receiving a proper education in public schools, often causing families to find education services for their children outside the public-school system, and Congress believed that a proper public education was necessary for students with disabilities to “stand a better chance of achieving their potential.” YSSELDYKE & ALGOZZINE, supra note 3, at 15–16. Legislators believed that “it was in the national interest to fund programs to meet the needs of students who were disabled.” Id. at 16.

36. 20 U.S.C. §§ 1411(a), (d), (e), 1412(a) (2006).

37. Id. § 1412(a)(1)(A); RICHARD N. APLING & NANCY LEE JONES, CONG. RESEARCH SERV., RS 20366, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): OVERVIEW OF MAJOR PROVISIONS 1-2 (2002), available at http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS20366_01112002.pdf. To qualify for protection under the statute, an individual must be between the ages of three and twenty-one and must also have a specifically identified disability. 20 U.S.C. §§ 1401(3)(A), 1412(a)(1)(A). Additionally, the individual must need “special education and related services.” Id. § 1401(3)(A)(ii). A student needs “special education and related services” if the student requires a specialized educational
receives federal IDEA funding and, therefore, all states are bound by the conditions of the statute.\textsuperscript{38}

The statute defines a 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 school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program.\textsuperscript{39}

Aside from this definition, Congress has not defined what constitutes an "appropriate" education more specifically\textsuperscript{40} despite having the opportunity to do so in 1990, 1997, and 2004 when it amended the IDEA.\textsuperscript{41} Moreover,
Congress authorized the Department of Education to enforce the IDEA by issuing rules and regulations that have the full force of law. In its IDEA regulations issued to date, the Department of Education has provided no further clarification on the definition of an “appropriate” education. Because of the silence of Congress and the Department of Education, educators must rely on judicial interpretations of an “appropriate” education to understand the meaning of the law.

B. Judicial Decisions Interpreting What Constitutes an “Appropriate” Education

Although Congress sought to ensure that every child with a disability received more than a nominal education, courts have interpreted the FAPE provisions of the IDEA to require varying educational standards. These inconsistent judicial interpretations stem from Congress’s reluctance to provide a clear definition of an “appropriate” education and the Supreme Court’s unwillingness to provide a definitive interpretation. In the absence of clear guidance, some federal courts have concluded that an appropriate education for students with disabilities need only provide “some” minimal educational benefits, while other courts have mandated that an appropriate education provide more substantive “meaningful” educational benefits.

focus on improving educational results for these children through greater access to the general curriculum and inclusion in State and district wide assessments; giving parents more information, including regular reports on their children’s progress, and a greater role in decisions affecting their children’s education; [and] reducing paperwork and increasing administrative flexibility.

Clinton, supra. The most recent amendment to the IDEA occurred in 2004 with the passage of the Individuals with Disabilities Education Improvement Act. RUSSO & OSBORNE, supra, at 13. This legislation “modified the 1997 disciplinary provisions and brought the IDEA in line with other federal legislation.” Id.

42. See 20 U.S.C. § 1221e-3 (authorizing the Secretary of Education and the Department of Education to promulgate rules and regulations); Id. § 1406 (limiting the Secretary of Education’s regulation-issuing authority to situations where such regulations are necessary).


45. See infra Part III.B.2.

46. See OSBORNE & RUSSO, supra note 3, at 26–28.

47. See id. at 25; supra Part I.A.2.


49. See OSBORNE & RUSSO, supra note 3, at 26–28.
1. The Rowley Standard for an Appropriate Education

In 1982, the Supreme Court decided Board of Education v. Rowley ex rel. Rowley in an initial attempt to define the contours of an appropriate education under the 1982 version of the IDEA.\textsuperscript{50} Amy Rowley was a deaf, intelligent, and "well-adjusted" kindergarten student who requested a sign-language interpreter to understand her teachers and classmates better.\textsuperscript{51} The local school district refused the request because Rowley's scholastic progress was similar to, and even exceeded that of, other children in her class.\textsuperscript{52} The district court, however, found that although Rowley performed well in school, an interpreter would allow her to reach her full academic potential because she would be able to understand everything said in class rather than just a fraction.\textsuperscript{53} Thus, the district court interpreted an "appropriate" education to require that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."\textsuperscript{54}

The Supreme Court, however, interpreted the IDEA as an attempt by Congress, primarily, to make public education available for students with disabilities.\textsuperscript{55} In creating the statute, Congress "did not impose upon the States any greater substantive educational standard than would be necessary to make such access [to the school] meaningful."\textsuperscript{56} The Court went on to note that, based on the language and legislative history of the 1982 statute, an appropriate education is one that provides "some" educational benefit to the disabled student.\textsuperscript{57} The Court held that Amy Rowley's education plan provided her with an adequate education even without an interpreter, and therefore complied with the statute.\textsuperscript{58}


\textsuperscript{52} \textit{Id}.

\textsuperscript{53} \textit{Id}; see \textit{Rowley}, 483 F. Supp. at 532 (noting that Rowley performed better on standardized tests administered in sign language and that she could likely understand only fifty-nine percent of what was said in class without an interpreter).

\textsuperscript{54} \textit{Rowley}, 483 F. Supp at 534.

\textsuperscript{55} \textit{Rowley}, 458 U.S. at 192. In \textit{Rowley}, the Supreme Court interpreted the language and intent of the EAHCA, the precursor to the IDEA. \textit{Id} at 179.

\textsuperscript{56} \textit{Id} at 192.

\textsuperscript{57} \textit{Id} at 195.

\textsuperscript{58} \textit{Id} at 209–10. Justice Harry Blackmun stated that the legislative history of the EAHCA indicated a congressional intent to provide children with disabilities an "equal educational
2. The Circuit Court Split: Varying Judicial Standards Have Emerged to Assess the Meaning of "Appropriate Education"

In the years following Rowley, lower federal courts have struggled to define coherently an appropriate standard for judging the education plans of disabled students. A circuit split has emerged as the judiciary has attempted to quantify the level of benefits necessary to satisfy the vague Rowley test, which mandates only that "some" benefit is necessary.59 The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have adopted a heightened, meaningful-educational-benefit standard to determine what constitutes an appropriate education.60 In contrast, the First, Eighth, Tenth, Eleventh, and D.C. Circuits

opportunity." Id. at 210 (Blackmun, J., concurring) (quoting S. REP. NO. 94-168, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433). Applying this standard, Justice Blackmun concluded, as did the majority, that Amy Rowley's education plan satisfied the statutory requirements without the addition of an interpreter. Id. at 211-12. The dissent, authored by Justice Byron White and joined by Justices William J. Brennan, Jr. and Thurgood Marshall, argued that the legislative history of the EAHCA reflected an intent to provide children with disabilities "educational opportunity commensurate" with the education given to children without disabilities. Id. at 214 (White, J., dissenting). Justice White noted that some legislators had gone so far as to state that an appropriate education would allow a student with disabilities "to achieve his or her maximum potential." Id. (quoting H.R. REP. NO. 94-332, at 13, 19 (1975)). Thus, the dissent argued for a more rigorous standard by which to judge what constitutes an "appropriate" education than did the majority and would have upheld the Second Circuit's decision requiring access to an interpreter. Id. at 214-15, 218.

59. See NANCY LEE JONES & CAROL J. TOLAND, CONG. RESEARCH SERV., RL 33444, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): SUPREME COURT DECISIONS 3 (2010), available at http://www.opencrs.com/document/RL33444/2010-01-11/download/1005/ (explaining that lower courts have attempted to adhere to Rowley, but the resulting interpretations have differed vastly). Several circuits have interpreted Rowley narrowly, holding that minimal educational progress is sufficient if the FAPE procedural requirements are satisfied, while other circuits have interpreted the decision expansively, requiring school districts to provide meaningful educational benefits. Id.

apply the less rigorous some-educational-benefit standard. The Seventh circuit applies "a mixture of the two."

a. Meaningful-Educational-Benefit Standard

Polk v. Central Susquehanna Intermediate Unit 16 provides an example of the majority meaningful-educational-benefit standard. The Third Circuit interpreted Rowley as limited to the facts specific to Amy Rowley: an intelligent child who performed comparably to her peers. In Polk, Christopher, a student with mental retardation and encephalopathy, a severe brain disease similar to cerebral palsy, required physical therapy as part of his educational program. Although the Polk family argued that Christopher needed direct "hands on" therapy from a licensed therapist to provide him with an educational benefit, the school district instead provided therapy given by his teacher.

In evaluating how the Rowley decision applied to the case, the Third Circuit held that a "meaningful benefit" was necessary under the IDEA. According to the court, because the holding in Rowley was narrow and limited to its facts, the Supreme Court did not articulate a broad rule regarding educational standards for all cases brought under the IDEA. Due to the narrow holding in


62. Aron, supra note 20, at 7 & n.42; see also infra Part I.B.2.c. (discussing Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603 (7th Cir. 2004)).

63. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 171 (3d Cir. 1988); see Murray, supra note 60, at 274–75 (noting that "the Third Circuit was one of the first appellate courts to explore the ‘meaningful benefit’ standard").

64. Polk, 853 F.2d at 180 (citing Rowley, 458 U.S. at 202).

65. Id. at 173–74. The court also noted that "Christopher Polk is severely developmentally disabled . . . [and] [a]lthough Christopher is fourteen years old, he has the functional and mental capacity of a toddler." Id. at 173.

66. Id. at 173–74.

67. Id. at 184.

68. Id. at 180 ("Rowley was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a ‘mainstreamed’ classroom. The [Supreme] Court self-consciously limited its opinion to the facts before it . . . ."). The Polk Court noted the attention that the Supreme Court gave to the term "meaningful" when describing educational benefit in Rowley, which the court believed reinforced the term's significance. Id. at 179 (quoting Rowley, 458 U.S. at 192). Thus, according to the Third Circuit, the Supreme Court considered the outcome of Rowley to be narrowly tailored for Amy Rowley's situation and not the standard for the benefit that Congress intended for all children with disabilities. Id. at 180 ("[T]he facts of the case (including Amy Rowley's quite substantial benefit from her education)
Rowley, the Third Circuit turned to the statute and legislative history.\textsuperscript{69} In doing so, the court found that Congress, by enacting the statute, espoused an “intent to afford more than a trivial amount of educational benefit” through the Act.\textsuperscript{70} Thus, the Third Circuit adopted a standard in which the educational benefit a student with disabilities receives under the IDEA must be meaningful.\textsuperscript{71}

\textit{b. Some-Educational-Benefit Standard}

A minority of circuits has declined to adopt a heightened-educational-benefit standard, applying instead the some-educational-benefit standard to all educational-benefit cases.\textsuperscript{72} The First Circuit’s decision in Lessard v. Wilton-Lyndeborough Cooperative School District illustrates this standard.\textsuperscript{73} The parents of Stephanie Lessard, a student with “moderate mental retardation . . . and partial paralysis of her left side,” sued the school district over their daughter’s IEP.\textsuperscript{74} The Lessard family argued that the 1997 amendments to the IDEA superseded the some-educational-benefit standard espoused in Rowley.\textsuperscript{75} The court rejected this argument and held that Rowley was still good law despite Congress’s actions.\textsuperscript{76} Under the First Circuit standard, an IEP must
“only supply ‘some educational benefit,’ not an optimal or an ideal level of educational benefit, in order to survive judicial scrutiny.”77 Using this standard, the court held that Lessard’s IEP provided some educational benefit, and, therefore, the school district complied with the IDEA.78

c. Seventh Circuit Standard: A Hybrid Approach

In Alex R. ex rel. Beth R. v. Forrestville Valley Community Unit School District #221, the Seventh Circuit used a mix of the some-educational-benefit and meaningful-educational-benefit standards to determine an appropriate education for Alex R., a student with disabilities.79 Alex’s mother challenged her son’s placement in a special classroom as a denial of a FAPE.80 The Seventh Circuit initially espoused a meaningful-educational-benefit standard with regard to whether Alex received an appropriate education.81 However, in that same decision, the court seemed to use the some-educational-benefit standard as a gauge to determine whether Alex received a FAPE.82 These inconsistencies make it difficult to determine the Seventh Circuit’s position for new cases regarding a FAPE and suggest that the court will use a hybrid of the two standards.83

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77. Lessard, 518 F.3d at 23–24.
78. Id. at 30–31; accord Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 612 (8th Cir. 1997) (citing Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 195, 203 (1982) (stating that the IDEA requires only that a school provide enough service so that the student can benefit from the education). In Clynes, the Eighth Circuit noted that the purpose of IDEA is to provide access and confer some educational benefit to students with disabilities. Id. (citing Rowley, 458 U.S. at 192, 195). Therefore, although Nicolas Clynes’s reading test scores were between the second and ninth percentile, the court held that he was provided a FAPE because he had access to public education and received passing grades in school. Id. at 612–13.
79. See Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603, 612, 615 (7th Cir. 2004).
80. Id. at 609–10.
81. Id. at 612. The court initially stated that Alex R.’s argument that an appropriate education depends on “whether the school district appropriately addressed the child’s needs and provided him with a meaningful educational benefit under the substantive prong of Rowley . . . [was] basically true in cases where the validity of the IEP is in question.” Id.
82. Id. at 615. The court also stated, contrary to the meaningful-educational-benefit standard, that “[u]nder Rowley, ‘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.” Id. (quoting Hall ex rel. Hall v. Vance Cnty. Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985)).
83. See Aron, supra note 20, at 19–20.
3. Further Supreme Court Special-Education Decisions

Although the existence of a circuit split is usually an ideal opportunity for the Supreme Court to offer a definitive interpretation of a statute,84 the Court has not revisited the definition of an appropriate education since Rowley in 1982.85 The reluctance of the Court to return to this issue is not because of a lack of opportunity.86 The Court has heard a number of special-education cases in recent years dealing with the issue of a FAPE.87

The Supreme Court, for example, declined to hear the Alex R. case in 2004, even though the Seventh Circuit's opinion furthered the circuit split by introducing the hybrid standard for analyzing appropriate educational benefits.88 Moreover, in Winkelman ex rel. Winkelman v. Parma City School District, a 2007 special-education case, the Court defined an appropriate education under the IDEA based on the Rowley precedent without acknowledging the ongoing circuit split.89 Other recent Supreme Court cases regarding the IDEA and special education, including Schaffer v. Weast and Forest Grove School District v. T.A., have also provided opportunities for the Court to revisit the definition of an "appropriate" education which the Court has declined.90

Although the Court did not resolve the circuit split in Schaffer, it did reiterate that the structure of the IDEA is one of "cooperative federalism."91 This means that the federal government "imposes significant requirements to be followed [by the states]" but gives the states "the primary responsibility for developing and executing educational programs for handicapped children."92 Under this structure, the states retain the ultimate power to control education in their state.93 However, if a state chooses to accept federal funding for special

84. See H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 251 (1991). A circuit split is "probably the single most important criterion" for the Supreme Court to grant certiorari and hear a case. Id. The Supreme Court has further stated, in a case involving a dispute between the Second and Sixth Circuits, that the "clash of opinion [of the circuit courts] obviously required settlement by this Court." Universal Camera Corp. v. NLRB, 340 U.S. 474, 476 (1951).
86. See cases cited supra note 85.
87. See cases cited supra note 85.
88. See Alex R., 375 F.3d at 612–13, 615.
89. See Winkelman, 550 U.S. at 524–25.
90. See Forest Grove, 129 S. Ct. at 2494–95; Schaffer, 546 U.S. at 53.
91. Schaffer, 546 U.S. at 52 (citing Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999)).
92. Id. (citing Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 183 (1982)).
93. See id.
education under the IDEA, then the federal government may impose requirements and conditions on receipt of federal dollars.\textsuperscript{94}

\section*{C. Administrative Law Concerning the Scope of Agency Regulations}

In passing a statute, such as the IDEA, Congress may delegate some of its legislative authority to an administrative agency to promulgate rules and regulations regarding that statute.\textsuperscript{95} Congress gives agencies this power for a variety of different reasons, including the expertise of the staff and the desire of Congress to fill in any statutory gaps in the legislation by building "upon the legislative infrastructure Congress erected."\textsuperscript{96} Congress will also typically delegate the ability to make major policy determinations to an administrative agency because members of Congress are often unable to agree on a proper outcome for such decisions.\textsuperscript{97}

When Congress delegates this law-making authority, a "reviewing court must accord 'legislative effect' to the standards promulgated by the agency."\textsuperscript{98} Congress has assigned the Department of Education as the administrative agency required to enforce the IDEA.\textsuperscript{99} As a result, the Department of Education has the responsibility to issue rules and regulations for the IDEA.\textsuperscript{100}

In 1984, the Supreme Court addressed how to determine the level of deference that a court must give to an agency's construction of a statute that the agency is charged with administering.\textsuperscript{101} In \textit{Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.}, the Court created a two-step test to determine

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\begin{itemize}
\item \textsuperscript{94} Id. at 52–53.
\item \textsuperscript{95} See Robert J. Gregory, \textit{When a Delegation Is Not a Delegation: Using Legislative Meaning to Define Statutory Gaps}, 39 CATH. U. L. REV. 725, 726 (1990) ("Congress routinely delegates rulemaking power to agencies, thereby inviting agencies to act in a legislative capacity and to promulgate standards when implementing a statutory scheme.").
\item \textsuperscript{96} Id. at 732. Although Congress may delegate some of its power to an agency to fill in the gaps of legislation, Congress "may also specifically indicate what puzzle pieces the agency cannot use and maybe some, or even many, of the pieces the agency must use." Id. at 726.
\item \textsuperscript{97} See KRISTEN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW CASES AND MATERIALS 514 (2010) ("Congress typically delegates the policy decisions inherent in major rulemakings to agencies because a majority of members of the House and Senate are unable to agree with respect to the resolution of those policy disputes.").
\item \textsuperscript{98} Gregory, \textit{supra} note 95, at 725.
\item \textsuperscript{99} 20 U.S.C. § 1406(a) (2006). The statute states that "the Secretary [of Education] shall issue regulations under this chapter [20 U.S.C. §§ 1400–1482] only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter." Id.
\item \textsuperscript{100} See \textit{id.}; Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540 (Aug. 14, 2006) (showing regulations issued under the IDEA). The Secretary of Education is further granted the authority, by Congress, "to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department." 20 U.S.C. § 1221e-3.
\item \textsuperscript{101} See \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 842 (1984).\end{itemize}
if the agency should be given deference. First, the reviewing court must determine whether Congress has spoken on the precise issue at hand. If congressional intent "is clear [regarding that issue], that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." When the will of Congress is clear, it is unnecessary to move onto the second step of the *Chevron* analysis.

If the will of Congress is not clear and the administrative agency has made a determination, then a reviewing court must move to the second step of the analysis. Under this step, "if the statute is silent or ambiguous with respect to the specific issue," the only issue the court must determine is whether the agency's construction is "based on a permissible construction of the statute." Therefore, courts should give significant weight and deference to an agency construction or interpretation of a law that the agency is charged with administering, and courts should only disturb the ruling of an administrative agency if it is evidently contrary to the will of Congress.

This presumption is so strong that, in the case of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court held that deference to an administrative agency's statutory interpretation extends to cases where that interpretation contradicts an earlier judicial precedent. Unless a court expressly states that the statute does not permit an agency to provide such an interpretation or fill a gap, the decision of the agency receives deference. An administrative agency is also free to change its decision or interpretation, if adequately justified.

Under its authority to enforce and monitor the IDEA, the Department of Education has promulgated a number of rules and

*102. Id. at 842-43.*

*103. Id.*

*104. Id.*

*105. Id. at 842, 843 & n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").*

*106. Id. at 842-43.*

*107. Id. at 843.*

*108. Id. at 844-45.*

*109. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).*

*110. Id. at 982-83. Under this precedent, "[w]here a politically accountable body uses transparent, deliberative means to adopt a reasonable interpretation of a law it administers, the courts should defer to this interpretation, regardless of whether it contradicts judicial precedent." Richard Murphy, *The Brand X Constitution*, 2007 BYU L. REV. 1247, 1251.*

*111. See Brand X Internet Servs., 545 U.S. at 1001.*

*112. See 20 U.S.C. § 1402(a) (2006).*
regulations. Even when the Department of Education’s interpretation of the IDEA was not in a formal regulation, the Court has shown deference. For example, in Honig v. Doe, the Supreme Court resolved a conflict over the meaning of the IDEA term “change in placement,” which Congress had not defined. The Court explained that, given this ambiguity in the IDEA, it would “defer to the construction adopted by the agency charged with monitoring and enforcing the statute.” In this instance, the Department of Education’s construction of a provision in the IDEA was accepted and utilized by the Court.

The Department of Education has also issued rules and regulations for the education of students with disabilities under § 504 of the Rehabilitation Act of 1973. The Rehabilitation Act is a federal civil rights law designed to protect the rights of people with disabilities. Section 504 protects the educational rights of and provides an appropriate education for students with disabilities. Under the Department of Education’s regulations for this statute, the Department defines an appropriate education, in part, as education services “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.”

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115. Id.
116. Id.
117. Id.
118. 34 C.F.R. § 104.1 (2010).
119. See OSBORNE & RUSSO, supra note 3, at 10. The Rehabilitation Act broadly applies to prevent discrimination against persons with disabilities for all programs, including state programs, that receive federal funding, whereas the IDEA focuses on providing an appropriate public education to persons with disabilities. See Mark H. ex rel. Michelle H. v. Lemahieu, 513 F.3d 922, 929 (9th Cir. 2008). Section 504 states that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006). Although the two statutes are similar in application to education for disabled people, there are differences between them. Mark H., 513 F.3d at 933; see also Thomas F. Guernsey, The Education for All Handicapped Children Act, 42 U.S.C. § 1983, and Section 504 of the Rehabilitation Act of 1973: Statutory Interaction Following the Handicapped Children’s Protection Act of 1986, 68 Neb. L. Rev. 564, 565–70 (1989) (discussing the differences between § 504 and the predecessor to the IDEA). In general, § 504 covers a broader class of disabilities than are covered by the IDEA. See Michael L. Perlin, “Simplify You, Classify You”: Stigma, Stereotypes and Civil Rights in Disability Classification Systems, 25 Ga. St. U. L. Rev. 607, 633 n.113 (2009).
120. 29 U.S.C. § 794(a)–(b).
121. 34 C.F.R. § 104.33.
regulations defining an appropriate education with regard to § 504.\textsuperscript{122} For the IDEA, however, the regulations do not provide any guidance on the meaning of “appropriate” education.\textsuperscript{123}

**II. ACTIONS BY CONGRESS OR THE SUPREME COURT COULD RESOLVE THE CIRCUIT SPLIT, BUT NO SUCH ACTION HAS BEEN TAKEN**

Although Congress wrote and passed the provisions of the IDEA\textsuperscript{124} and the Supreme Court is the ultimate arbiter of the meaning of the law,\textsuperscript{125} neither branch has provided a clear and specific definition of an “appropriate” education under the IDEA.\textsuperscript{126} The inaction of Congress and the Court, arguably the most appropriate venues to issue a definitive resolution of the meaning of a FAPE, places the burden of resolving this issue on other shoulders. This void should be filled by the Department of Education, an agency with the authority to promulgate a definition for a FAPE in accordance with congressional intent under the statute.\textsuperscript{127}

**A. Lack of Congressional Action Regarding the Definition of an Appropriate Education**

When Congress passed the EAHCA in 1975, it failed to provide a comprehensive definition for a FAPE, and several amendments since then have failed to correct the deficiency.\textsuperscript{128} Taking into account the differing judicial interpretations of an appropriate education since Rowley, Congress could have resolved the circuit split by clearly articulating its intent in any of the amendments to the IDEA.\textsuperscript{129} The 2004 amendments, for example, addressed a myriad of issues related to special education, such as behavior, the proper identification of children with disabilities, and a reduction in administrative paperwork.\textsuperscript{130} These changes were passed “without ill will, partisan shouting and layers of added pork” and with a vast majority of representatives from both political parties supporting the legislation.\textsuperscript{131} Considering the bipartisan

\textsuperscript{122} See id.
\textsuperscript{124} 20 U.S.C. § 1400.
\textsuperscript{125} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
\textsuperscript{126} See supra Part I.A–B. Congress’s lack of clarity and specificity in defining an “appropriate” education and the Supreme Court’s lack of clarity in its interpretation of the law has led to a plethora of differing interpretations and standards on this issue. See supra Part I.B.
\textsuperscript{127} See supra Part I.C.
\textsuperscript{128} See supra Part I.A.2.
\textsuperscript{129} See supra Part I.B.
\textsuperscript{131} Editorial, Making Progress, WASH. POST, Nov. 19, 2004, at A28. The 2004 amendments passed the House of Representatives by a vote of 397 to 3 and passed the Senate by
support for the amendments, as well as the numerous substantial changes to the IDEA in previous amendments, Congress could have written a more specific definition for a FAPE had it so desired. Congress’s lack of action suggests that the definition of an “appropriate” education will not be addressed in the near future and makes it necessary to examine alternative avenues for ensuring a meaningful education for students with disabilities.

B. Lack of Supreme Court Action Regarding the Definition of an “Appropriate” Education

The role of the judiciary in interpreting the “appropriate” education provision of the IDEA is heightened because both the legislative language and its regulations fail to provide a substantive definition. Although the Supreme Court interpreted “appropriate” education in Rowley, the issue is still subject to debate within the circuits because of the breadth and scope of the Court’s interpretation. This ambiguity has fostered a split with regard to the proper meaning and interpretation of the Rowley decision within the circuits.

Although the Supreme Court had a number of opportunities to resolve the split in the many special-education cases before it in recent years, it has not addressed the issue of “appropriate” education since Rowley. By declining to clarify this issue in the cases decided within in the last twenty years, including Schaffer, Forest Grove School District, and Winkelman, it seems unlikely that the Court will resolve the circuit split in the near future.

C. The Department of Education Has the Potential to Resolve the Circuit Split

Under the IDEA, Congress delegated the power to enforce and monitor the statute to the Department of Education. Under the standard articulated in

a voice vote. Congress Backs Special-Ed Changes, supra note 130. Republican Representative John Boehner, then-Chairman of the Education and Workforce Committee, stated, “We set out with one fundamental goal in mind . . . to improve the educational results for students with disabilities, and I believe we have accomplished that goal with the bill that we have before us today.” Id. Similarly, Democratic Senator Edward Kennedy stated, “In many respects, [the 2004 IDEA amendment is] one of the most important undertakings and success stories of this Congress.” Id.

132. See Osborne & Russo, supra note 3, at 25 (“Since neither the IDEA nor its regulations include a precise definition of the term ‘appropriate,’ it is necessary to turn to judicial interpretation for further guidance on the meaning of FAPE.”).

133. See supra Part I.B.

134. See supra note 59 and accompanying text.

135. See Scott F. Johnson, Reexamining Rowley: A New Focus in Special Education Law, 2003 BYU EDUC. & L.J., 561, 584–85 (“[Rowley] has provided the basic framework for special education services for the last 20 years.”).

136. See cases cited supra note 85.

137. See 20 U.S.C. § 1402(a) (2006) (creating an Office of Special Education Programs within the Department of Education tasked with administering and carrying out the statute and other functions related to the education of children with disabilities); id. § 1406(d) (defining the scope of the Department of Education’s power to issue regulations under the IDEA); 34 C.F.R.
Chevron, a court must defer to a reasonable interpretation of an administrative agency if Congress has not precisely spoken on the issue and the statute is silent or ambiguous on that issue. Therefore, an interpretation from the Department of Education will be given deference by the courts in future adjudications, provided it meets the Chevron requirements.

Under the first step of Chevron, the language of the IDEA reveals that Congress has not defined “appropriate” education precisely. Congress provided only four vague provisions for an appropriate education, but did not actually define the term “appropriate.” Thus, under the Chevron analysis, the language used regarding a FAPE is ambiguous. The lower courts that have arrived at numerous interpretations construing the same provisions simply prove the ambiguity of the term in the IDEA. Therefore, a reasonable interpretation of the term “appropriate” by the Department of Education should be given deference.

Even if courts have arrived at a different interpretation of a statute, an agency’s construction of a statute is still entitled to deference as long as judicial precedent has not held that the statute can only be interpreted in one way. Under the Brand X decision, because there is no judicial precedent finding the IDEA to be unambiguous, courts must give deference to a Department of Education regulation or interpretation regarding a FAPE regardless of prior precedent. Using this power and authority, the Department of Education could interpret the FAPE provision of the IDEA to

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139. See, e.g., Honig v. Doe, 484 U.S. 305, 325 n.8 (1988) (deferring to a Department of Education policy that a short-term student suspension does not constitute a “change of placement” when the statute had not defined “change of placement”).
140. See 20 U.S.C. § 1401(9); Murray, supra note 60, at 271 (noting that the statute addresses the procedural elements of a FAPE but does not define “appropriate”).
141. 20 U.S.C. § 1401(9).
142. See supra Part I.B.
143. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) (“A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).
144. See, e.g., Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 27-28 (1st Cir. 2008) (providing an example of a circuit court decision that relied on precedent but did not explicitly preclude a Department of Education regulation); Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001) (providing another example of a circuit court decision that did not preclude a Department of Education regulation). Moreover, the Supreme Court has not only held that the Department of Education has the authority to issue interpretations under the IDEA, but has deferred to the Department’s explanation for such interpretations. Honig v. Doe, 484 U.S. 305, 325 n.8 (1988).
promulgate a uniform standard for an “appropriate” education, which would be
given deference in courts throughout the country when deciding IDEA cases.

III. THE APPROPRIATE-EDUCATION STANDARD UNDER THE IDEA SHOULD BE
A MEANINGFUL-EDUCATIONAL-BENEFIT STANDARD AS DEFINED BY THE
DEPARTMENT OF EDUCATION

The varying circuit court interpretations of what constitutes an appropriate
education under the IDEA means that divergent standards of education exist
for students depending on their geographic location.145 Along with claims of
unfairness and inequity, differing educational standards encourage costly
litigation146 and frustrate the legislative purpose of the IDEA.147 Therefore,
because a national standard is superior to a circuit split, the Department of
Education should define “appropriate” education as one that provides a
meaningful education to students with disabilities, which is the interpretation
that most closely aligns with Congressional intent.

A. A National Standard for an Appropriate Education Is More Beneficial Than
   the Current Split

Although education policy has traditionally remained the sole province of
individual states, and has continued to remain the responsibility of the states,
all fifty states have chosen to accept the conditions imposed by the IDEA in
return for federal special-education funding.148 If states decide to accept
federal money for special education, which is likely since they always need
more resources for special education,149 the states must abide by
congressionally imposed conditions.150 As the Supreme Court stated in
Schaffer, the IDEA is a “model of cooperative federalism” because the federal
government sets the conditions—here an unclear definition of an appropriate
education—with which the states must comply in order to be eligible for
funding.151 In this way, a state choosing to be bound by federal legislation
should have the benefit of a single standard instead of having to comply with

145. See supra Part I.B.
146. Blau, supra note 14, at 6 (noting that the money and energy funneled into IDEA
litigation would be better spent on the education itself).
throughout the United States as having the same FAPE standard when it declared that one of the
purposes of the IDEA was “to ensure that all children with disabilities have available to them a
free appropriate public education.” Id. § 1400(d)(1)(A).
148. See Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999) (explaining that
a state is free to participate in the IDEA and accept its conditions or decline participation); 34
C.F.R. § 104.3 (2010) (requiring states that receive federal education funding to provide a FAPE
under the Rehabilitation Act of 1973); U.S. DEPARTMENT OF EDUCATION FUNDING, supra note
38 (showing that all fifty states receive IDEA funding).
149. See U.S. DEPARTMENT OF EDUCATION FUNDING, supra note 38.
151. Id. (quoting Mauney, 183 F.3d at 830) (internal quotations omitted).
the decisions of the different circuit courts. Along with the procedural and substantive requirements of the IDEA, states must comply with oversight requirements to ensure that the federal money is spent properly.152 These oversight requirements provide an additional reason why a national standard should be instituted—so that the federal government may properly perform its oversight duties and ensure that states are actually providing an appropriate education.153 Without a clear national standard, federal oversight responsibilities are made increasingly difficult or even impossible to perform adequately.

While states'-rights advocates would argue that individual states should control their own educational policy, this argument does not apply to the IDEA. Under the IDEA, an individual state still retains the ultimate control over its educational system when it chooses to opt into the federal requirements to receive IDEA funding.154 Even if states choose to accept IDEA funding, however, those states still continue to control the day-to-day implementation of education within the confines of broad federal policies.155

Another disadvantage fostered by the uncertainty of the current circuit split is increased litigation by parents and school systems.156 Without a clear standard for an “appropriate” education, there will be continuous litigation regarding what constitutes the correct standard.157 These court actions are costly, both in terms of money and energy, and their frequency can be at least partially blamed on a lack of clarity in the meaning of an “appropriate” education.158

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152. See 20 U.S.C. § 1416 (describing the Secretary of Education’s oversight requirements).
153. See id. § 1416(a)(3)(A) (noting that the first state-monitoring priority for the Secretary of Education is to ensure that students with disabilities are provided “a free appropriate public education in the least restrictive environment”).
154. See ANN LORDEMAN, CONG. RESEARCH SERV., RL 32085, INDIVIDUALS WITH DISABILITIES ACT (IDEA): CURRENT FUNDING TRENDS 1 (2008), available at http://stuff.mit.edu/afs/sipb/contrib/wikileaks-crs/wikileaks-crs-reports/RL32085.pdf (“As a condition of accepting IDEA funding, the act requires that states and local educational agencies (LEAs) provide a free appropriate public education (FAPE) to each eligible child with a disability.”); Individuals with Disabilities Education Act Overview, NEW AM. FOUND., http://frep.newamerica.net/background-analysis/individuals-disabilities-education-act-overview (last visited Mar. 28, 2011) (“States that receive federal funds are required to provide a ‘free, appropriate public education’ to all children with disabilities in the ‘least restrictive environment.’”).
155. Mauney, 183 F.3d at 830 (“[A]uthority is vested in state and local bodies to effectuate the [IDEA’s] substantive and procedural guarantees.”).
156. Blau, supra note 14, at 6, 11.
157. Id. at 6.
158. Id.
B. In the Absence of Congressional or Supreme Court Action, the Department of Education Should Define an “Appropriate” Education with a Heightened Standard

Aside from Congress or the Supreme Court, the Department of Education is in the best position to promulgate a national standard for an “appropriate” education. The Department has already issued numerous rules and regulations for the IDEA, including providing definitions for other terms left ambiguous by the statute.

1. The Meaningful-Educational-Benefit Standard Is Consistent with Prior Department of Education FAPE Regulations

The Department of Education has already defined an “appropriate” education in its regulations implementing § 504 of the Rehabilitation Act of 1973. Section 504, which prohibits discrimination based on disability under programs or activities that receive federal funding, does not define an appropriate education. The Department of Education, however, interpreted an appropriate education under § 504 as "meet[ing] [the] individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons." This construction is designed both to provide a meaningful benefit to and meet the potential of students with disabilities. The Department of Education regulation is also in line with Congress's national education policy that "every citizen is entitled to an education to meet his or her full potential.

By providing that the needs of students with disabilities must be met as adequately as those of students without disabilities, the Department of Education regulation essentially means that all students must be educated to their full potential under § 504. Consequentially, this construction of an appropriate education under § 504 is most analogous to the meaningful-educational-benefit standard followed by the majority of circuits in

159. See supra Part II.C.


161. 34 C.F.R. § 104.33 (2010).


163. 34 C.F.R. § 104.33.


interpreting the IDEA.\textsuperscript{166} Promulgating similar regulations for the FAPE provisions of the IDEA would be appropriate and consistent with Department of Education precedent and would clarify the proper standard under the IDEA.

2. Recent Amendments to the IDEA and Other Education Laws Demonstrate Congress's Desire for a Heightened Educational Benefit Under the IDEA

The recent amendments to the IDEA further demonstrate that Congress intended an appropriate education to be one of meaningful educational benefit.\textsuperscript{167} Congress's intent has apparently evolved from the original EAHCA, where it aimed simply to increase access to a public education for students with disabilities,\textsuperscript{168} to now aiming to provide "children with disabilities cognitive access to the challenging public education curriculum, as provided to all children, in preparation to live adult independent lives."\textsuperscript{169}

The legislative history\textsuperscript{170} of the 2004 amendments shows the intent of legislators to provide increased educational opportunities.\textsuperscript{171} In a Senate Health, Education, Pension and Labor Committee hearing, for example, several

\begin{itemize}
  \item \textsuperscript{166} See, e.g. Molly L. ex rel. B.L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 428 (E.D. Pa. 2002) (holding that the FAPE provisions in § 504 of the Rehabilitation Act of 1973 should be analyzed similarly to the Third Circuit's analysis of a FAPE under the IDEA and "must provide significant learning and confer meaningful benefit" to the student (quoting T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2010) (internal quotation marks omitted)).
  \item \textsuperscript{167} See Andrea Valentino, Note, The Individuals with Disabilities Improvement Act: Changing What Constitutes an "Appropriate" Education, 20 J.L. & HEALTH 139, 167 (2006) ("The amendments made in the IDEA exhibit intent to implement a heightened substantive meaning of the word 'appropriate' [and demonstrate] a desire to provide a quality education to students with disabilities."). The enactment of federal education laws, such as NCLB, has affected one of the main requirements of a FAPE in the IDEA: that the education services meet state standards. Daniel & Meinhardt, supra note 164, at 529–30. Current state standards now include substantive requirements that did not exist at the time of the Rowley decision. Id. at 529–31. Therefore, the IDEA's state-standards requirement now has a different meaning than it did when the Court decided Rowley. Id.
  \item \textsuperscript{168} See Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 192 (1982) (explaining that by passing the EAHCA, "Congress sought primarily to make public education available to handicapped children").
  \item \textsuperscript{169} Blau, supra note 14, at 2.
  \item \textsuperscript{170} Although a majority of the Supreme Court believes that legislative history is an appropriate means to determine congressional intent, some Justices, most noticeably Justice Antonin Scalia, believe that the "use of legislative history is illegitimate and ill advised in the interpretation of any statute." Zeiner v. United States, 547 U.S. 489, 509–11 (2006) (Scalia, J., concurring). Justice Scalia further stated that "the only language that constitutes 'a Law' within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute." Id. at 509–10.
  \item \textsuperscript{171} Blau, supra note 14, at 3 ("Congressional intent in enacting the [2004 IDEA amendments] reflects a powerful and proactive mission in raising the educational standard and achievement level for disabled students. Providing children with disabilities entry into the educational system is no longer the primary motivation.").
\end{itemize}
senators spoke about providing increased educational opportunities for students with disabilities, including the chance to attend college.\textsuperscript{172} Providing college preparation indicates an intention to maximize the potential of students with disabilities.\textsuperscript{173} Moreover, in a hearing before the House Subcommittee on Education Reform, the committee chairman stated, "No longer is it simply enough to provide our children with disabilities access to public schools. Now more than ever, we must see that children with disabilities are given access to an education that maximizes their unique abilities and provides them with the tools for later success."\textsuperscript{174} These statements demonstrate a clear intent to provide increased educational opportunity for children with disabilities and maximize their potential.

The text of the amendments also demonstrates congressional intent to provide more than just nominal educational benefits.\textsuperscript{175} The new language of the Act requires postsecondary goals including preparation for future education, employment, or independent living skills.\textsuperscript{176} The IDEA amendments also declare that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."\textsuperscript{177}

In addition to the recent amendments to the IDEA, other federal education statutes provide evidence of congressional intent regarding the proper level of

\textsuperscript{172} IDEA: What's Good for Kids? What Works for Schools?: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions, 107th Cong. 1–2, 4–5, 26–27 (2002) [hereinafter IDEA: What's Good for Kids?], available at http://www.access.gpo.gov/congress/senate/senate15shl07.html. (statements of Sen. Edward M. Kennedy, Chairman, S. Comm. on Health, Educ., Labor & Pensions; Sen. Barbara A. Mikulski, and Sen. James M. Jeffords). Senator Kennedy explained, "We know that children with disabilities should have the same opportunities as every American to fulfill their hopes and dreams of living independent and productive lives. This important law provides that opportunity in our public schools." \textit{Id.} at 1. Senator Mikulski stated that one of the goals of the IDEA is to provide students with disabilities the opportunity "to live full, productive lives." \textit{Id.} at 26. Senator Jeffords remarked that the "percentage of college freshmen with a disability has almost tripled." \textit{Id.} at 4.


\textsuperscript{175} Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.


education for students with disabilities.\textsuperscript{178} As part of Congress's enacted statement of national education policy, it "reaffirm[ed], as a matter of high priority, the Nation's goal of equal educational opportunity" in which students reach their full potential.\textsuperscript{179} This statement asserts Congress's intention for each and every student, regardless of disability, to be afforded an equal opportunity for a meaningful education.\textsuperscript{180} Similar congressional sentiment appears in NCLB, in which Congress endeavored "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education," which can be accomplished by meeting the needs of "children with disabilities."\textsuperscript{181} Taken together, this language demonstrates that Congress intended to provide all students, with or without disabilities, an equal educational opportunity designed to realize their full academic potential.\textsuperscript{182}

Although Congress never formally provided a clear definition for an "appropriate" education under the IDEA,\textsuperscript{183} evidence of congressional intent demonstrates that the IDEA amendments and other federal education statutes espouse a heightened-benefit standard.\textsuperscript{184} Thus, Congress has made a policy decision regarding the sufficiency of education for students with disabilities, but left a gap in the IDEA regarding an "appropriate" education. By defining an "appropriate" education via regulation as providing a meaningful educational benefit, the Department of Education would realize congressional intent and correct the oversight in the IDEA.\textsuperscript{185}

\textsuperscript{178} See, e.g., 20 U.S.C. § 1221-1 ("[E]very citizen is entitled to an education to meet his or her full potential without financial barriers."); 20 U.S.C. § 6301 ("[A]ll children have a [right to] a fair, equal, and significant opportunity to obtain a high-quality education . . . .").

\textsuperscript{179} 20 U.S.C. §1221-1.

\textsuperscript{180} See id.


\textsuperscript{182} See Maria Glod, Law Opens Opportunities for the Disabled, WASH. POST., Mar. 17, 2008, at B1 (describing the many positive effects of NCLB for students with disabilities). NCLB’s "requirement to raise student achievement across the board has forced schools to pay attention as never before to special-needs children who too often had been written off as incapable of handling the same lessons as peers in mainstream classrooms." Id. NCLB states that "the same high standards of academic achievement [must be applied] to all public elementary school and secondary school students in the State . . . [and include] separate measurable annual objectives for continuous and substantial improvement for . . . students with disabilities." 20 U.S.C. § 6311(b)(2)(C) (2006).

\textsuperscript{183} See 20 U.S.C. § 1401(9).

\textsuperscript{184} See supra notes 167–182 and accompanying text.

3. The Meaningful-Educational-Benefit Standard Is Most Appropriate Based on Fairness and Equality for Persons with Disabilities

The meaningful-educational-benefit standard, consistent with past Department of Education definitions of an “appropriate” education and indicators of congressional intent, is also the fairest standard. As Congress explained in the IDEA, “Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.”186 With this language, Congress essentially has stated that disability is no excuse for educating some individuals to a lower standard than others. The meaningful-educational-benefit standard accomplishes this goal by ensuring that all students, regardless of disability, are given the opportunity to meet their full potential.

In addition to treating all students similarly, the education of students with disabilities also has the practical effect of maximizing their potential later in life and therefore “lessening the burden on taxpayers [that would have] to support nonproductive persons.”187 Senator James M. Jeffords further articulated this point in a committee hearing, stating that the “IDEA has helped individuals with disabilities become independent, wage-earning, tax-paying contributors to the Nation.”188 Thus, by maximizing the potential for persons with disabilities, the nation will reap the benefits of additional productive, well educated, and self-sufficient members of society and therefore will have fewer individuals to support through welfare programs.189

187. JONES, supra note 34, at 1–2. As a Senate report for the EAHCA stated, “[i]t is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. S. REP. NO. 94-168, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433. The Senate report also stated, “[w]ith proper education services, many [individuals with disabilities] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.” Id.
188. IDEA: What’s Good for Kids?, supra note 172, at 4 (statement of Sen. James M. Jeffords). Partially due to federal legislation, such as IDEA and NCLB, “[t]est scores and classroom grades of disabled students are rising, and their high-school graduation rate increased to 54% in 2004 from 42% in 1996.” John Hechinger & Daniel Golden, Extra Help: When Special Education Goes Too Easy on Students, WALL ST. J., Aug. 21, 2007, at A1 (describing the gains made by students with disabilities but questioning how those gains were achieved).
189. See 20 U.S.C. § 1400(c)(5)(A) (stating that Congress found that “30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible,” which will allow the children “to lead productive and independent adult lives”).
While the costs of increasing the educational level to a meaningful benefit may cause school districts to incur additional expenses, recent legislation passed by the federal government will help ease these funding burdens significantly. In the American Recovery and Reinvestment Act of 2009, the federal government allocated over $12 billion in increased IDEA funding. The billions of dollars of increased federal funding will help to defray costs for those states that may potentially incur additional expenses in implementing the IDEA. Additionally, a majority of circuits, cognizant of the funding requirements, already follow a heightened educational-benefit-standard. These circuits provide evidence that the meaningful-educational-benefit standard is not an untenable financial burden on the states. For these reasons, the cost of increasing the educational-benefit standard is not an impediment to raising the standard.

4. Proposed Department of Education Regulation

As part of its rulemaking procedure, the Department of Education is required to hold a public-comment period of no less than seventy-five days. This comment period will ensure that the public and interested groups have an

190. In passing the EAHCA in 1975, Congress promised to fund 40 percent of the costs for implementing the new law by fiscal year 1982, with the states funding the remainder. See Valentino, supra note 167, at 166. The federal government, however, has never promised to pay for all the costs of a FAPE, nor has it paid the aforementioned 40 percent, so the IDEA has continuously remained underfunded. Id.; Lisa Fine, UPDATED: With Harkin’s Move, Full Funding for IDEA Gains Momentum, EDUC. WEEK Sept. 10, 2009 (10:43 AM), http://blogs.edweek.org/edweek/speced/2009/09/updated_with_harkins_move_full.html. To remedy this, legislation has been introduced for the federal government to fully fund the IDEA up to 40 percent. Fine, supra. As a lead sponsor of the legislation, Senator Tom Harkin stated, “It is time for the federal government to make good on its promise to students with disabilities in this country” by providing full funding. Id. There is a similar proposal in the House of Representatives to provide federal funding at 40 percent of the total costs. Id.

191. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, tit VIII, 123 Stat. 115, 182 (“For an additional amount for ‘Special Education’ for carrying out parts B and C of the Individuals with Disabilities Education Act (‘IDEA’), $12,200,000,000, of which $11,300,000,000 shall be available for section 611 of the IDEA . . . .”).


193. See American Recovery and Reinvestment Act of 2009: IDEA Recovery Funds for Services to Children and Youths with Disabilities, U.S. DEP’T OF EDUC. (Apr. 1, 2009) http://www2.ed.gov/policy/gen/leg/recovery/factsheet/idea.html (describing the impact and potential uses for the IDEA stimulus money for states). These funds “will provide an unprecedented opportunity for states, [local educational agencies], and early intervention service providers to implement innovative strategies to improve outcomes for infants, toddlers, children, and youths with disabilities while stimulating the economy.” Id. Including the stimulus money, the federal share of funding for the IDEA increased to thirty-four percent. Fine, supra note 190. The stimulus, however, is only a one-time investment. Id.

194. See supra Part I.B.2.

opportunity to voice any concerns about the regulation and its effects as well as provide input on the best language to use. At the end of the process, the written regulation should be similar to the Department of Education’s definition of an “appropriate” education under § 504. By mandating that students with disabilities are educated similarly to students without disabilities, such a rule would ensure that congressional intent is realized. Consequently, a proper Department of Education regulation, which adheres to congressional intent, might state: “an appropriate education is one that is designed to meet the educational needs of students with disabilities as adequately as students without disabilities to enable every child to receive the meaningful benefit from his education and meet his full potential.”

IV. CONCLUSION

Because Congress has clearly indicated its intent for all students, regardless of disability, to realize their full potential, the educational standard for students with disabilities should be one that provides a meaningful educational benefit rather than merely “some” educational benefit. Because it is in the best position to establish a nationwide definition, the Department of Education should define an “appropriate” education under the IDEA. This definition should ensure a meaningful education for students with disabilities and clearly enunciate Congress’s desire to educate students with disabilities in a manner similar to all other students. Ultimately, providing this definition will help realize congressional intent, empower students with disabilities to lead more productive lives, and increase the fairness and equity of the nation’s special-education laws.

197. See supra Part III.B.2.