



BRIDGES TO BETTER ADVOCACY

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Major Developments in Special Education: Recent Court Decisions, Legislative and Regulatory Developments

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I. Supreme Court Decisions

A. *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Servs.*, 532 U.S. 598 (2001).

1. The “catalyst theory” is not a permissible basis to award attorneys’ fees under the FHAA or the ADA, which award attorneys’ fees to “prevailing parties.”
2. The IDEA includes the right to attorneys’ fees to prevailing parties, so assume the ruling applies to IDEA cases.
3. There must be either some type of judgement on the merits or court-ordered consent decree to qualify as the prevailing party (the judicial imprimatur).
4. Outcome: Attorneys have been seeking some sort of a “so ordered” from ALJs to meet this requirement when settling administrative hearings, with mixed results. The other alternative is to include the right to attorneys’ fees in a settlement agreement.
5. The 5th Circuit has recently adopted about as good as a position you can on attorneys fees in this post-Buckhannon era. *Dearmore v. City of Garland*, No. 06-11007, 2008 WL 6241 (5th Cir. March 10, 2008). The case applies Buckhannon to allow attorneys’ fees where a plaintiff wins a preliminary injunction based on a determination on the likelihood of success on the merits versus a balancing of the equities and, as a result, the defendant then takes steps to moot out the case. The court discusses the approaches adopted by various circuits and then follows the 9th and a few other

circuits.

B. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

1. The IDEA is a Spending Clause statute.
2. Burden of proof, also referred to as the burden of persuasion, in IDEA administrative hearings falls on the party seeking relief, whether it is the parents, as in this case, or the school district.
3. The Court distinguished “burden of persuasion” from “burden of production” and hearings tend to be moving toward assuming the school district has the burden of production.
4. The Court also noted that “IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence.” A good quote if school district attorneys go overboard with technical objections.
5. The Court declined to address whether or not a state may enact a law which would put the burden on the school district in all cases.
6. So far, in the states which do have a statute putting the burden on school districts there have not been any problems. Except for the 8th Circuit. See, *M.M. v. Special Sch. Dist. No. 1*, No. 06-3572, 2008 WL 53265 (8th Cir., Jan. 4, 2008) (even if there is a specific state law provision to the contrary, the burden will still be on the party requesting relief).

C. *Arlington Central Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006).

1. As Spending Clause legislation there must be clear notice of any conditions on the state’s acceptance of funds.
2. Non-attorney expert fees for services rendered to prevailing parents are not “costs” recoverable under the IDEA’s fee-shifting provision.

D. *Winkelman v. Parma City School District*, 127 S.Ct. 1994 (2007).

1. The IDEA grants parents independent, enforceable, rights which are not limited to procedural matters but include the entitlement to a FAPE for their child.

2. Therefore, the parents may proceed *pro se* in an action against the school district for the enforcement of those rights.
3. The decision rests, in part, on the preamble language, 20 U.S.C. § 1400, to the IDEA in support of its conclusion.
4. This is also where the “maximization” language in IDEA 04 is found.

II. Assistive Technology Requirements Under the IDEA

A. History

1. Technology-Related Assistance for Individuals with Disabilities Act of 1988

Interest in AT grew with the passage of the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act).¹ The Tech Act defined both AT “devices” and “services.” In 1998, Congress re-authorized this legislation as the Assistive Technology Act of 1998.²

The term “assistive technology device” means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.³

The term “assistive technology service” means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes—

- (A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;
- (B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;
- (C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;
- (D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing

¹P.L. 100-407, 102 Stat. 1044, former 29 U.S.C. §§ 2201 *et seq.*

²29 U.S.C. §§ 3001 *et seq.*

³*Id.* § 3002(2).

education and rehabilitation plans and programs;
(E) training or technical assistance for an individual with disabilities, or, where appropriate, the family members, guardians, advocates, or authorized representatives of such an individual; and
(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.⁴

The legislative history to the Tech Act indicates the broad range of AT devices that were contemplated:

The Committee includes this broad definition to provide maximum flexibility to enable States to address the varying needs of individuals of all ages with all categories of disabilities and to make it clear that simple adaptations to equipment are included under the definition as are low and high technology items and software.⁵

2. The IDEA Amendments of 1990

The definitions of AT devices and services were added to the IDEA by the Education of the Handicapped Act Amendments of 1990.⁶ This statute adopted, virtually verbatim, the definitions of AT devices and services from the Tech Act.

The legislative history underscored Congress' view of the role AT could play in the education of students with disabilities. Congress noted that advances in AT have provided new opportunities for students with disabilities to participate in educational programs. For many, the provision of AT "will redefine an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity."⁷ AT was added in order:

(1) to clarify the broad range of assistive technology devices and related services that are available, and (2) to increase the awareness of assistive technology as an important component of meeting the special education and related service needs of many students with disabilities, and thus

⁴*Id.* § 2202(3).

⁵Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405 (emphasis added).

⁶P.L. 101-476, 104 Stat. 1103.

⁷House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News, p. 1730.

enable them to participate in, and benefit from, educational programs.⁸

3. IDEA '97

With the passage of IDEA '97, Congress again emphasized AT. The need for AT must now be considered for all students when developing the IEP.⁹ The comments to the 1999 regulations make it clear that it is “mandatory for the IEP team to consider each child’s AT needs.” In doing so, however, the school is not required to document in writing its consideration of AT for each student.¹⁰

The comments to the 1999 regulations also make it clear that AT encompasses the individual student’s own personal needs for AT, such as “electronic notetakers, cassette recorders, etc.,” as well as access to AT devices used by all students. If a student needs accommodations to use an AT device used by all students, the school “must ensure that the necessary accommodation is provided.”¹¹

Orientation and mobility (O&M) services were added to the definition of related services.¹² O&M services can involve, in appropriate cases, the use of AT. O&M services are to be provided to blind or visually impaired students to enable them to “attain systematic orientation to and safe movement within their environments in school, home and community.”¹³

The regulations include “travel training” in the definition of special education.¹⁴ Travel training may be provided, as needed, to any student with a disability to teach the student to move effectively and safely within the student’s environment “(e.g., in school,

⁸*Id.*, p. 1731 (emphasis added).

⁹20 U.S.C. § 1414(d)(3)(B)(v) (emphasis added); 34 C.F.R. § 300.324(a)(2)(v).

¹⁰64 Fed. Reg. 12590-91. Many of the comments to the 1999 regulations and Appendix A were not retained in the 2006 regulations. However, unless the content of the regulation was changed, we believe they are still relevant to an understanding of the meaning of the law. As with opinions from OSEP, they are official interpretations of the agency charged with the enforcement of the law and are therefore entitled to deference.

¹¹*Id.*, p. 12540.

¹²20 U.S.C. § 1401(22).

¹³34 C.F.R. § 300.34(b)(7)(emphasis added).

¹⁴*Id.* § 300.39(a)(2)(ii).

in the home, at work, and in the community)."15

Finally, the regulations note the importance of AT to allow students with disabilities to be transported with their nondisabled peers:

For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles.¹⁶

The comments to the regulations emphasize that it is assumed that most children with disabilities will receive the same transportation provided to nondisabled children. If the child needs transportation to receive a FAPE or needs "accommodations or modifications to participate in integrated transportation with nondisabled children, the child must receive the necessary transportation or accommodations at no cost to the parents."¹⁷

The IDEA defines an assistive technology device¹⁸ and an assistive technology service.¹⁹ In *In the Matter of the Adoption of Amendments to N.J.A.C. 6:28-2.10, 3.6 AND 4.3*,²⁰ the court invalidated New Jersey's AT regulations covering "any specialized equipment and materials" because they failed to define the term to ensure compliance with the definitions in IDEA.

4. IDEA '04

On December 3, 2004, Congress passed the Individuals with Disabilities Education Improvement Act (IDEIA) (IDEA '04). The U.S. Department of Education published final regulations on August 14, 2006, 71 Fed. Reg. 46540, which were effective on October 13, 2006

Assistive technology (AT) devices and services continue to play a very important role in the education of students with disabilities. In fact, the preamble to IDEA 04 notes that "almost 30 years of research and experience has demonstrated that the

¹⁵*Id.* § 300.39(b)(4)(emphasis added).

¹⁶*Id.* Part 300, former App. A, Quest. 33 (emphasis added).

¹⁷64 Fed. Reg. 12551 (emphasis added).

¹⁸20 U.S.C. § 1401(1) and 34 C.F.R. § 300.5.

¹⁹20 U.S.C. § 1401(2) and 34 C.F.R. § 300.6.

²⁰27 IDELR 27 (N.J. Sup. Ct., App. Div. 1997).

education of children with disabilities can be made more effective by ... supporting the development and use of technology, including [AT] devices and [AT] services, to *maximize* accessibility for children with disabilities.” 20 U.S.C. § 1400(c)(5)(H) (emphasis added).

There are several other areas where IDEA '04 increases the reliance on AT. The first is the addition of provisions for “universal design.” The definition is the same as the one in the AT Act and states that universal design "means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are interoperable with assistive technologies." 20 U.S.C. §1401(35); 29 U.S.C. §3002(19).

Additionally, States are now required to better insure access to instructional materials. States are required to adopt the National Instructional Materials Accessibility Standard (NIMAS). Concerned with the fact that individuals with visual impairments or print disabilities often do not receive timely access to text materials, a provision was added to IDEA to ensure proper accessible material will be available to students. 20 U.S.C. § 1412(a)(23). IDEA requires the U.S. Department of Education to establish a "National Instructional Materials Access Center" (Access Center). 20 U.S.C. §1474(e)(1). The purpose of the Access Center is to maintain a catalog of print instructional materials, provide access to the materials including textbooks, and media free of charge to blind individuals and individuals with print disabilities, and publish procedures that protect against copyright violations. *Id.* at (2)(A)-(C). A State Educational Agency is not required to coordinate with the Access Center for materials. However, if the State chooses not to do so they must provide the U.S. Department of Education with assurances that they will provide accessible materials to students in a timely manner. 20 U.S.C. §1412(a)(23). More on this later.

The parents and Local Education Agency can also agree to use video conferences or conference calls as an alternative means to meet for an IEP meeting, placement meeting, or when conducting administrative matters such as scheduling an exchange of witness lists. 20 U.S.C. §1414(f). One reason this provision was added was the hope that it would encourage other agencies (such as Vocational Rehabilitation agencies for transition meetings) to participate since they could do so without leaving their offices. House Report , April 23, 2003. Note, however, that a court held that a school district was not required to provide video conference instruction for a child who missed school often because of a weak immune system. The court determined that the video conference was at times distracting to the other students and did not further the child's IEP goals.²¹

²¹*Eric H by John and Janet H. v. Methacton Sch. Dist.*, 265 F.Supp.2d 513, 39 IDELR 182 (E.D.Pa. 2003).

B. General standards

1. Basic Eligibility Criteria

The first major policy announcement from the U.S. Department of Education's Office of Special Education Programs (OSEP) concerning AT was actually published before the AT definitions were added to IDEA. Over the years, OSEP has issued a number of other policy letters interpreting Districts' obligations to provide AT. A number of them will be summarized here.

As with any other special education service, the need for AT must be determined on case by case basis, considering the unique needs of each child.²² The regulations require that AT devices and services are made available to any student with a disability, "if required."²³ The basic standard to be met is the student needs the AT to receive a FAPE.²⁴

The question to be considered is the relationship between the educational needs of the student and the AT device or service.²⁵ "Supplementary aids and services," can be used to assist a student in nonacademic, educationally-related settings. Therefore, when looking at the AT needs for a student, the "educational" needs must also include these nonacademic settings.²⁶

AT may be considered as either special education and related services, or

²²*OSEP Policy Letter to Anonymous*, 29 IDELR 1089 (11/6/97). IDEA '97 limits the use of opinion letters from the U.S. Department of Education. Policy letters cannot be used to establish rules for compliance. 20 U.S.C. § 1406. Nevertheless, the policy letters, as an official interpretation of the Department of Education, should carry considerable weight as to the proper interpretation of IDEA. Courts and others charged with enforcing the law must give considerable deference to an agency's interpretation of a statute that it administers, and may "not substitute its own reading unless the agency's interpretation is unreasonable." *Skandalis v. Rowe*, 14 F.3d 173, 178 (2d Cir. 1994)(citing *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* 467 U.S. 837, 844 (1984)).

²³34 C.F.R. § 300.105(a).

²⁴*OSEP Policy Letter to S. Goodman*, 16 EHLR 1317 (8/10/90).

²⁵*OSEP Policy Letter to D. Naon*, 22 IDELR 888 (1/26/95).

²⁶See 20 U.S.C. § 1401(29); 34 C.F.R. § 300.107.

“supplementary aids and services” to maintain a student in the LRE.²⁷ A 1997 OSEP Policy Letter had this to say about the decision making process for AT and including AT on the IEP:

The IEP team’s decision about any assistive technology needs is made on a case-by-case basis, taking into consideration the unique needs of each individual child. If the IEP team determines that a student with disabilities requires assistive technology, such as a personal computer, in order to receive FAPE, and designates such assistive technology as either special education or related service, the IEP must include a specific statement describing such service, including the nature and amount of such services.²⁸

Note that because IDEA now defines “supplementary aids and services” and requires that those services also appear on the IEP, the above quote should be modified to indicate that if the AT is considered a supplemental aid or service it still must be included on the IEP.²⁹

2. Evaluations

As with any other component of a student’s program, providing appropriate AT begins with a good, comprehensive assessment. The IEP Team must assess “the student’s functional capabilities and whether they may be increased, maintained, or improved through the use of [AT] devices or services.”³⁰ Hearing, vision, communication and motor abilities are properly included in the District’s AT assessment.³¹ A parent has the right to an independent AT evaluation, at District expense, if the parent disagrees with the evaluation obtained by the District, and the

²⁷34 C.F.R. § 300.107(a). For a student with a disability whose only need is for AT, this distinction is important. The comments to the federal regulations indicate that to be eligible under IDEA, a student must need special education, not just related services (unless the state defines related services as special education). 34 C.F.R. § 300.8(a)(2)(ii). Because AT may be special education, the student needing only AT will meet this standard.

²⁸OSEP Policy Letter to Anonymous, 29 IDELR 1089 (1/6/97). See OSEP Policy Letter to S. Goodman, 16 EHLR 1317 (8/10/90); OSEP Policy Letter to B. Orenich, EHLR 213:166 (8/9/88); OSEP Policy Letter to R. Shelby, 21 IDELR 61 (1/26/95).

²⁹See 20 U.S.C. § 1414(d)(1)(A)(iii).

³⁰OSEP Policy Letter to J. Fisher, 23 IDELR 565 (12/4/95).

³¹OSEP Policy Letter to T. Bachus, 22 IDELR 629 (1/13/95).

District fails to show that its evaluations were appropriate.³²

3. Examples

There is no federal “approved list” of AT devices and services covered by IDEA.³³ AT can be quite simple and inexpensive, such as a calculator,³⁴ large print books, or adapted spoons.³⁵ It can include more sophisticated devices, such as an auditory FM trainer for a student who is hearing impaired,³⁶ or a closed circuit TV for a student who is blind.³⁷ As noted above, IDEA also includes O&M services.³⁸

The comments to the 1999 regulations indicate that it is not appropriate to give examples of covered AT devices in the regulations. However, they note that captioning, computer software, FM systems and hearing aids are appropriate AT devices for students with hearing impairments. The 1999 comments also note other examples of AT devices include electronic notetakers, cassette recorders, word prediction software, adapted keyboards, voice recognition and synthesis software, head pointers, and enlarged print.³⁹

4. Least Restrictive Environment and AT

The IDEA requires that all students receive their educational services in the least restrictive environment (LRE).⁴⁰ Removal from regular education classes is to occur only when the student cannot be successfully educated in that setting even with supplemental aids and services.⁴¹ However, in determining the LRE for a student, the

³²*OSEP Policy Letter to J. Fisher*, 23 IDELR 565 (12/4/95).

³³*OSEP Policy Letter to D. Naon*, 22 IDELR 888 (1/26/95).

³⁴*OSEP Policy Letter to C. Lambert*, 18 IDELR 1039 (4/24/92).

³⁵*OSEP Policy Letter to Hon. W. Teague*, 20 IDELR 1462 (2/15/94).

³⁶*OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92).

³⁷*OSEP Policy Letter to Anonymous*, 18 IDELR 627 (11/21/91).

³⁸*See also OSEP Policy Letter to Anonymous*, 13 EHLR 213:198 (2/13/89).

³⁹64 Fed. Reg. 12540, 12575.

⁴⁰20 U.S.C. § 1412(a)(5).

⁴¹34 C.F.R. § 300.114(a)(2)(ii).

program must still be appropriate to meet the student's individual needs.⁴²

Accordingly, Districts must have available a continuum of alternative placements, ranging from services in regular classes to separate classes, separate schools and even residential programs.⁴³ "These options [of the continuum of services] must be available to the extent necessary to implement the IEP of each child with a disability. The group determining the placement must select the placement option on the continuum in which it determines that the child's IEP can be implemented in the LRE." 71 FR 46587. Moreover, "although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate." 71 FR 46588.

The regulations emphasize that students with disabilities cannot be removed from age-appropriate regular classrooms "solely because of needed modifications in the general curriculum."⁴⁴ Additionally, "the Act presumes that the first option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a child with a disability can be placed outside of the regular educational environment, the full range of supplementary aids and services [which includes AT] that could be provided to facilitate the child's placement in the regular classroom setting must be considered." 71 Fed. Reg. 46588.

Finally, school districts "must not make placement decisions based on a public agencies' needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff." 71 FR 46587. "In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience." 71 FR 46588.

The legislative history adding AT to IDEA, referred to above, also stresses how AT can assist a student to be educated in the LRE. To ensure meaningful integration with nondisabled peers, a federal court has ruled that a child who could not regulate his body temperature was entitled to a fully air-conditioned classroom, not an air-

⁴²*Id.* § 300.114(a)(2)(i).

⁴³*Id.* § 300.115.

⁴⁴34 C.F.R. § 300.116(e).

conditioned plexiglass cubicle where he would be isolated from his peers.⁴⁵

5. Implementation

The comments to the 1999 regulations, noting that each student's need for AT must be made on an individual basis, indicate that:

[D]eterminations regarding the provision of AT must be made when the child's IEP for the upcoming school year is finalized so that the AT can be implemented with the IEP at the beginning of the next school year.⁴⁶

To support implementation of AT goals, the definition of AT services includes training for the student with a disability, as well as the family, if appropriate.⁴⁷ The regulations strengthen this concept in the definition of "parent counseling and training." The definition includes "[h]elping parents to acquire the necessary skills that will enable them to support implementation of their child's IEP."⁴⁸ The 1999 comments note that this change is consistent with "the more active role acknowledged for parents."⁴⁹ It is hoped that teaching parents the skills to help their children reach their IEP goals will:

[A]ssist in furthering the education of their children, and will aid the schools as it will create opportunities to build reinforcing relationships between each child's educational program and out-of-school learning.⁵⁰

The IEP Team must now include at least one regular education teacher of the child, if the child is or may be participating in "the regular education environment."⁵¹ The purpose of the regular teacher's involvement in the IEP process is, at least in part, to help determine appropriate positive behavioral interventions and supports and other strategies for the student; and supplementary aids and services, program modifications and supports for school personnel.⁵²

⁴⁵*Espino v. Besteiro*, 520 F.Supp. 905 (S.D.Tex. 1981).

⁴⁶64 Fed. Reg. 12591 (emphasis added).

⁴⁷34 C.F.R. § 300.6(e).

⁴⁸*Id.* § 300.34(b)(8)(iii).

⁴⁹64 Fed. Reg. 12549.

⁵⁰*Id.*

⁵¹20 U.S.C. § 1414(d)(1)(B)(ii).

⁵²*Id.* § 1414(d)(3)(C); 34 C.F.R. § 300.324(a)(3).

Any program modifications and supports for the school personnel must be listed on the IEP.⁵³ Prior to this amendment, many parents were told that the IEP was designed to set forth the services and goals for the student and there was simply no spot on the IEP nor any obligation to include services to be provided to the teacher. Many times, because agreed to supports such as in-service training to the teaching staff were not on the IEP, there were problems with implementation.

Because the IEP was silent, parents were also left with less legal safeguards. There is a remedy under the IDEA for the failure to provide a service set out in the IEP.⁵⁴ Section 504 also provides rights to students with disabilities in the school setting. Based on the definition of disability under Section 504, any student classified under the IDEA is also protected by Section 504. The U.S. Education Department's Office for Civil Rights enforces Section 504. It has held that the failure to implement the services agreed to in an IEP under the IDEA is also a violation of Section 504, which it will enforce.⁵⁵ However, if the supports are not included in the IEP, none of these protections will readily apply.

Finally, a copy of the IEP must be accessible to each regular or special education teacher, as well as any others who are responsible for implementing the IEP.⁵⁶ Additionally, everyone providing services must be informed of their specific responsibilities as well as the specific accommodations, modifications and supports for the student.⁵⁷ The parents must also be given a copy of the IEP, at no charge.⁵⁸

A federal court has determined that a school did not provide appropriate AT to a student with multiple disabilities. It was agreed that the student needed a laptop computer with a word prediction program. The court found, however, that the school did not properly implement this recommendation.⁵⁹

To support its conclusion, the court found that the school: (1) took a year to obtain the computer and an additional semester to get the computer up and running; (2)

⁵³*Id.* § 1414(d)(1)(A)(iii) (emphasis added); 34 C.F.R. 300.320(a)(4).

⁵⁴Either a State Complaint pursuant to 34 C.F.R. §§ 300.151-153, or an individual impartial hearing pursuant to 34 C.F.R. § 300.507(a)(1).

⁵⁵*See OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92).

⁵⁶34 C.F.R. § 300.323(d)(1).

⁵⁷*Id.* § 300.323(d)(2).

⁵⁸*Id.* at 300.321(f).

⁵⁹*East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D.Pa. 1999).

took another semester before the teacher and some of the other staff were trained; (3) never trained the aide or the parents; (4) inadequately adapted the keyboarding instruction to the student's physical needs; (5) did not design the use of the AT device so it would permeate the student's day; and (6) chose a software program that would not provide meaningful educational benefit to the student.⁶⁰

C. Special issues

1. Home Use

What if a student using AT needs the device at home. Say an LD high school student uses a computer to do written work. Can the student take the computer home (if it is a laptop) or ask the District to provide a computer or software for home use? The U.S. Department of Education has stated that if the IEP Team determines that an AT device is needed for home use for a student to receive a FAPE, the technology must be provided. The example given by the Department of Education was a closed circuit TV for a student who is blind and needs to use the device at home to complete homework assignments.⁶¹ The regulations state that schools may be responsible for providing AT in the home, or in other settings, if the IEP Team determines, on a case-by-case basis, that the student will need the AT in that setting to receive a FAPE.⁶²

2. Interpreting Services

The 2006 regulations added interpreting services to the definition of related services. The definition is very broad. It includes "oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell" 34 C.F.R. § 300.34(c)(4). Additionally, for children who are deaf-blind, interpreting services includes "special interpreting services." 34 C.F.R. §300.34(c)(4). There is no explanation or further definition of "special interpreting services" for children who are deaf-blind."

3. Personally Prescribed Devices

Historically, the U.S. Department of Education has ruled that Districts are not required to provide a personal device which a student would require whether or not in school. However, because the definition of AT device does not include this limitation, the Department has changed its position. It has stated that a hearing aid is covered

⁶⁰*Id.*

⁶¹*OSEP Policy Letter to Anonymous*, 18 IDELR 627 (11/21/91).

⁶²34 C.F.R. § 300.105(b).

under the definition of “AT device.” Therefore, if the child requires a hearing aid in order to receive a FAPE, the District must provide it at no cost to the child or parents.⁶³ Similarly, if a student requires eyeglasses in order to receive a FAPE, the District must provide the eyeglasses at no cost to the parents.⁶⁴ The same analysis would apply to a pulmonary nebulizer.⁶⁵

The comments to the new regulations confirm this position. As a general matter, public agencies are not responsible for providing personal devices, such as eyeglasses or hearing aids that a child with a disability requires regardless of whether the child is attending school. However, if it is not a surgically implanted device and a child’s IEP Team determines that the child requires a personal device (e.g. eyeglasses) in order to receive a FAPE, the public agency must ensure that the device is provided at no cost to the child’s parents. 71 Fed. Reg. 46581. In a case where the school district was charged with not obtaining an FM system for a student in a timely manner, OCR found that the school district took other steps to ensure that the student’s needs were met in the interim, including providing a set of school-issued hearing aids for the student because he often forgot to wear his and the batteries were at times corroded.⁶⁶

The definition of related services includes transportation in and around school buildings and can involve specialized equipment.⁶⁷ Based on this definition, the Department of Education has issued an opinion that if a wheelchair is required, the District must provide the service at public expense and without charge, regardless of whether the parents possess a wheelchair or can obtain one through private insurance. However, the District is not required to provide the wheelchair for personal use while the student is not in school.⁶⁸

4. Intra- and Inter-State Transfers—34 C.F.R. §§ 300.323(e); 300.323(f) and 300.323(g).

These three sections address the requirements for children who transfer schools within the same state and transfers to another state. The 2006 regulations follow the

⁶³OSEP Policy Letter to P. Seiler, 20 IDELR 1216 (11/19/93); OSEP Policy Letter to J. Galloway, 22 IDELR 373 (12/22/94).

⁶⁴OSEP Policy Letter to T. Bachus, 22 IDELR 629 (1/13/95).

⁶⁵See OSEP Policy Letter to Anonymous, 24 IDELR 388 (1/23/96).

⁶⁶Wake Count (NC) Public Schools, 48 IDELR 52 (OCR February 21, 2007).

⁶⁷34 C.F.R. § 300.34(b)(16).

⁶⁸OSEP Policy Letter to J. Stohrer, 13 EHLR 213:211, 212 (4/20/89).

meaning of the statute at 20 U.S.C. § 1414(d)(2)(C) with some changes to the wording. The interesting part of this regulation is found in the Department's Comments. When a child transfers to a new school, the new public agency must provide the child with services that are "comparable" to the services in the existing IEP. The Department declined to define "comparable" but then goes on to say they interpret "comparable" to have the "plain meaning" of the word, which is "similar" or "equivalent." Therefore, when a child transfers schools, the new public agency must provide services that are similar or equivalent to the services provided by the former school.

The Department states in its comments that when a child transfers from one state to a new state and the new state determines an evaluation of a child is necessary, the purpose of that evaluation is to determine eligibility. Because the purpose is to determine eligibility the testing should be considered an initial evaluation requiring parental consent. However, the school district must provide FAPE to the child until the evaluation is conducted. If the parent and the school disagree with "comparability of services" during the evaluation time "stay-put" does not apply.

5. Private Insurance and Medicaid

IDEA specifically authorizes the use of public insurance, such as Medicaid, as well as a parent's private insurance.⁶⁹ However, this use must be voluntary. A District cannot deny services if parents refuse to authorize the use of Medicaid or private insurance. Moreover, such use must not result in any cost to the parents, such as: copayment, deductible, or reduction of an annual or lifetime cap on coverage.⁷⁰

The District can eliminate the possibility of cost to the parents by paying for the deductible, copayment, or other cost.⁷¹ Nevertheless, there may be circumstances where parents will still not want to use the private insurance policy, or Medicaid. For some students with significant needs, even a very substantial lifetime cap could be quickly used up, requiring the family to be very careful about when the insurance policy is used. Both Medicaid and private insurance companies may limit how frequently they will pay for an item. Therefore, a parent's use of insurance or Medicaid is voluntary. If the parent refuses to consent to their use, special education services cannot be denied.⁷²

⁶⁹34 C.F.R. § 300.154(d) and (e).

⁷⁰OSERS Policy Letter to Rose, 18 IDELR 531 (4/19/91).

⁷¹34 C.F.R. § 300.154(f)(2).

⁷²OSEP Policy Letter to Dr. O. Spann, 20 IDELR 627 (9/10/93); OSEP Policy Letter to W. Cohen, 19 IDELR 278 (7/9/92); OSEP Policy Letter to DuRant, 39 IDELR 130 (11/6/02); 34 C.F.R. § 300.154(d)(2)(iv)(B) and (e)(2)(ii).

Additionally, a school may use parents' private insurance only with the parents' informed consent, each time the school seeks to use their insurance.⁷³ Like private insurance, a school is also required to obtain advance consent each time it uses a public insurance program, such as Medicaid.⁷⁴ OSEP clarified that consent after "each use" does not mean every single time a student receives a service that is funded by Medicaid. It means that consent must be "obtained one time for the specific services and duration of services" set out in the IEP. If the amount of services are to be increased or the duration extended, then new consent must be obtained.⁷⁵

But, a school may not require parents to sign up for public insurance. Nor can the school require the parents to use public insurance where there is "financial cost." Financial cost includes: (1) out-of-pocket expenses such as deductibles or copayments; (2) a decrease in available lifetime coverage or any other benefit, including the family paying for services that would otherwise have been covered; (3) risk of loss of eligibility for home and community-based waiver programs; and (4) an increase in premiums or the discontinuation of the insurance.⁷⁶

A school may pay the costs of accessing the private or public insurance for parents who would otherwise have consented to the use of the insurance.⁷⁷ However, as with private insurance, a child's right to a FAPE is not dependent upon whether parents consent to the use of public insurance, such as Medicaid.⁷⁸ If the parents refuse to give consent to using Medicaid, the school is still responsible for providing the recommended services.

6. AT Used with School Health Services

The IDEA allows for the provision of "medical services," but they are limited to diagnosis and evaluation.⁷⁹ The regulations define "medical services" as those "provided by a licensed physician to determine a child's medically related disability."⁸⁰

⁷³34 C.F.R. § 300.154(e)(2).

⁷⁴34 C.F.R. § 300.154(d)(2)(iv)(A).

⁷⁵*Policy Letter to Hill*, 107 LRP 13113 (OSEP March 15, 2007).

⁷⁶34 C.F.R. § 300.154(d)(2)(i) - (iii).

⁷⁷*Id.* § 300.142(g)(2).

⁷⁸64 Fed. Reg. 12569.

⁷⁹20 U.S.C. § 1401(22).

⁸⁰34 C.F.R. § 300.34(b)(5).

The regulations also include “School health services and school nurse services:” School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child’s IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. 34 C.F.R. § 300.34(c)(13). Therefore, according to the regulations, the services a physician is authorized to perform are limited to evaluations and diagnoses. On the other hand, direct medical types of services by non-physicians, such as nurses and trained laypersons are permitted.

In *Irving Independent Sch. Dist. v. Tatro*,⁸¹ the Supreme Court held that clean intermittent catheterization (CIC) is a permissible related service for students with disabilities. The Supreme Court reaffirmed its decision in *Tatro* in *Cedar Rapids Community Sch. Dist. v. Garret F.* The Court adopted a “bright line” test for determining whether health services are required under IDEA and ordered a school district to provide a ventilator-dependent student with one-to-one school health services.⁸²

The 2006 regulations have essentially codified the *Garret F.* case. School districts must now perform routine checks of the external components of a device, monitor and maintain medical devices that are necessary for health and safety of a child (including breathing, nutrition, or operation of other bodily functions). The school is responsible while the child is being transported to and from school, and when child is at school. 34 C.F.R. §300.34(b)(2). Additionally, school districts must also ensure that the external components of surgically implanted medical devices are functioning properly. However, the public agency is “not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).” 34 C.F.R. §300.113.

7. Mapping of a Cochlear Implant

Relying on the reasoning in *Garett F.*, the court in *Stratham Sch. Dist. v. Beth & David P.*,⁸³ held that programming the speech processor, called “mapping,” following a cochlear implant, was a related service under the IDEA. The court's decision will not be reported, but its reasoning is very helpful. The court found that mapping services fit within the definition of audiological services. It also found that mapping was required for the student to enable him to have meaningful access to his education. Citing the Supreme Court's decision in *Rowley*, the court noted that

⁸¹468 U.S. 883 (1984).

⁸²526 U.S. 66 (1999).

⁸³2003 WL 260728, 38 IDELR 121 (D.N.H. 2003).

... the educational method to be used in each case is left “to state and local educational agencies in cooperation with the parents.” ... The IEP provides the mechanism for determining the appropriate educational methods and goals to achieve a free appropriate public education and requires that the parents are included in the process. ... There is no dispute that, at present, Hunter's mode of communication involves the use of his cochlear implant and that the cochlear implant must be mapped for him to benefit from the instruction provided by the District.⁸⁴

Although the decision did not mention AT, there is no question that mapping the cochlear implant would also fit within the definition of an AT service.

IDEA '04 has undercut this decision. Both the definition of related services and the definition of AT devices have been changed, by adding this exclusion: "a medical device that is surgically implanted, or the replacement of such device."⁸⁵ A cochlear implant is an example of a "surgically implanted" device. Because an AT service can only be for an AT device, it would no longer be possible to argue that the mapping would be covered as an AT service. However, nothing in the language of IDEA '04 itself would preclude mapping as a related service. Nevertheless, the regulations do just that. The regulations explicitly exclude “a medical device that is surgically implanted, the optimization of that device’s functioning (e.g. mapping), maintenance of that device, or the replacement of that device.” 34 C.F.R. § 300.34(b)(1).

D. Interplay Between Obligation to Provide Accessible Materials and Copyright Provisions

1. The Problem

Pursuant to IDEA 04, States are required to ensure that “blind persons or persons with print disabilities” receive instructional materials in accessible formats in a timely manner. 20 U.S.C. § 1412(a)(23). IDEA 04 does not define the phrase, “blind persons or other persons with print disabilities.” However, the “Act to provide books for the adult blind,” 2 U.S.C. § 135a, does. The final 2006 regulations implementing IDEA 04 make it clear that the definition from 2 U.S.C. §135a applies to the IDEA 04 requirement. 34 C.F.R. § 300.172(e)(1)(I).

IDEA 04 also amends a provision of the Federal Copyright Law which provides an exception to the Copyright provisions, by adding a section that specifies that it is not a violation of Copyright Law to comply with the above-referenced provision of IDEA 04 for “blind or other persons with disabilities.” IDEA 04, Title III, Section 306. At first

⁸⁴ *Id.* at *5.

⁸⁵ 20 U.S.C. §1401(26)(B) (related service); *Id.* at § 1401(1)(B) (AT device).

read, this sounds like a broader exception under the Copyright Law than is contained in 2 U.S.C. § 135a. However, the Copyright Law provisions that were not amended by IDEA 04 already defined “blind or other persons with disabilities” as those who are eligible under 2 U.S.C. § 135a, “blind persons or other persons with print disabilities.” 17 U.S.C. §121(d)(2).

Assuming that all students with disabilities who need instructional materials in alternate formats meet this definition there would be no problem, because every student needing an alternate format would also fall within the exception under the Copyright Law. The problem arises because the final special education regulations explicitly state that even if students are not “blind or other persons with print disabilities,” they are still entitled to instructional materials in alternate formats if they need them. 34 C.F.R. § 300.172(b). The potential problem for States or school districts who provide alternate instructional materials to this group of students (if there are any in this category) is that they are not explicitly covered by the Copyright exception.

2. Possible Resolution

a. Fit the student within the definition of “blind or other person with print disabilities.”

The regulations defining this term include: (1) blind persons; (2) persons whose visual disability, with correction, “prevents the reading of standard print material;” (3) persons “unable to read or unable to use standard printed materials as a result of physical limitations” (some persons with cerebral palsy, for example, may fit into this category); and (4) “persons certified by a competent authority as having a reading disability resulting from *organic* dysfunction and of sufficient severity to prevent their reading printed materials in a normal manner.” 36 C.F.R. §701.6(b)(1). Virtually any student needing an alternative format should be able to fit within this category, especially as we increasingly find organic components to disabilities. If it is not organic, then what causes a learning disability or ADD/ADHD? It is not emotional. To emphasize this point, OSEP refused to remove the term “minimal brain dysfunction” from the definition of learning disability. 71 FR 46551. The comments to the final regulations even indicate that “bipolar disorders and other neurologic disorders” fit within the definition of other health impaired. 71 FR 46550.

All four categories listed above require that a persons eligibility be certified by “competent authority.” For our purposes, “competent authority” for this fourth category is defined as “doctors of medicine who may consult with colleagues in associated disciplines.” 36 C.F.R. § 701.6(b)(2)(ii). Under the definition of related services, physicians are permitted to do evaluations to “determine a child’s medically related disability that results in the child’s need for special education and related services. 34 C.F.R. § 300.34(c)(5). The determination of whether or not a child has an organic

condition that requires alternate instructional materials would seem to meet this definition. Therefore, as part of the evaluation of a student, a physician could assess a student with reading difficulties, which could include a review of other evaluations, and, where appropriate, “certify” the student. In such a case, the district would be protected by the Copyright exception. It would also be easier for the district to provide the materials to the student, as it could now utilize the NIMAC, which would also provide better protections for the student.

b. Fair Use Exception

Another possible protection for schools from Copyright concerns is the “fair use” exception also written into the Copyright Law. 17 U.S.C. § 107. There is a very interesting case which would provide excellent (but not perfect) precedent for a district which provided instructional materials in an alternate format to a student with a disability as determined necessary by the IEP Team (this could very well apply in Section 504 cases as well). *Newport-Mesa Unified School District v. State of California Department of Education*, 371 F.Supp.2d 1170 (C.D.Cal. 2005).

The case arose because California law requires that parents of special education students be provided with a copy of the test protocol used for the student, which is copyrighted material. A school district brought the case for a declaration of its rights in relation to the Copyright Law. The district felt that it was faced with the problem of either violating a provision of California special education law or a provision of Federal Copyright Law. The court found that providing the parents with a copy of the copyrighted test protocol, even if it amounted tot he entire text of the copyrighted material, did not violate the Copyright Law. The court found that it fit within the fair use exception. This same analysis should apply to districts providing instructional materials in alternate formats to students with disabilities in order to meet their obligations under State and Federal special education laws.

c. U.S. Dept. of Ed. Policy Letters

OSEP has opined that both the NIMAC and the agencies that convert the NIMAS files into specialized formats, called accessible media producers (AMPs) should be protected from copyright actions. The NIMAC should be protected by a provision in the IDEA itself, 20 U.S.C. § 1474(e)(5), even though it only explicitly protects the Secretary of Education.⁸⁶ The AMPs should be protected by the Chaffee Amendment to the Copyright Act, which provides immunity to nonprofit and governmental agencies “that exist primarily to develop or provide specialized educational materials for individuals with disabilities.”⁸⁷

⁸⁶*Policy Letter to Tinsley*, 49 IDELR 17 (OSEP May 7, 2007).

⁸⁷*Policy Letter to Kelly*, 48 IDELR 223 (OSEP March 16, 2007).

OSERS also published a Q&A on NIMAS. In it, OSERS noted that SEAs and LEAs should be careful that only “eligible students” receive the specialized formats developed from the NIMAS files, even though other students may benefit from them. In this way they will be protected from copyright actions. OSERS went through the criteria and procedures for determining eligibility discussed above. It also noted that the LEA would have to pay the costs for obtaining the appropriate certification.⁸⁸

E. State-wide and District-wide Assessments and Accommodations

1. NCLB requirements

Students with disabilities may take all state-wide and district-wide assessments, including “high stakes” tests, in one of five ways. The determination of which assessment to use and any needed accommodations is to be made by the IEP Team.

Students may: (1) Take the regular assessment in the same manner as other students. (2) Take the regular assessment with approved accommodations or modifications. (3) Take an alternate assessment that is based on the same educational standards as the regular assessment. There is nothing that requires a state to have only one alternate assessment, and since students have unique needs, it only makes sense to have more than one alternate assessment. (4) Take the alternate assessment based on different educational standards (e.g. a life skills rather than academic curriculum). This is intended for students with significant cognitive disabilities. Only the “proficient scores” of a certain percentage (1%) of students who meet the criteria for this form of assessment may be counted toward a school's Adequate Yearly Progress (AYP) determination (i.e. the method for deciding whether or not the school “needs improvement”). However, there is no restriction on the number of students who may take the assessment this way. (5) Take an assessment based on modified achievement standards. DOE’s final regulations on what is referred to as the “2%” rule released on April 9, 2007 and went into effect on May 9, 2007. 72 Fed. Reg. 11748.

The modified achievement standards must provide access to grade-level curriculum; be aligned with the State's academic content standards for the grade in which the student is enrolled; only the academic achievement standards for students are to be modified, not the content standards on which those modified academic achievement standards are based; may not preclude a student from earning a regular high-school diploma. There is no limit on the number of students who can take this alternate assessment (as long as the IEP team determines its necessary). However there is a 2% cap on the number of proficient and advanced scores that may be counted towards a LEA's and SEA's AYP. Schools may use the test scores of more than 2% of students if they test less than 1% of students with significant cognitive

⁸⁸ *Questions and Answers on the National Instructional Materials Accessibility Standards (NIMAS)*, 47 IDELR 226 (OSERS January 1, 2007).

disabilities. However the total number cannot be more than 3%.

2. IDEA requirements

The IEP is to list any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on any State- and district-wide assessments. If the IEP Team determines that the student needs to take an alternate assessment, the IEP Team must indicate what alternate assessment is appropriate and why. 34 C.F.R. § 300.320(a)(6).

However, the final regulations implementing the 2% rule under NCLB, noted above, also made some significant amendments to the options available to IEP Teams when selecting “appropriate” accommodations. They add to the IDEA regulations a new section 300.160. 72 Fed. Reg. 17781. Most of the provisions are straightforward and noncontroversial. First, state- and district-wide assessments must, to the extent possible, be developed and administered using “universal design” principles. 34 C.F.R. § 300.160(g). Second, it adopts the five options for assessments under NCLB, discussed above. Moreover, when selecting an alternate assessment that is not aligned to the state’s academic content standards, either the modified assessment or the alternate assessment, the IEP Team must be aware of any possible effects resulting from taking such an assessment, including whether the student will qualify for a regular high school diploma. 34 C.F.R. § 300.160(d).

Third, and certainly most controversial for AT users, the State and school districts must develop guidelines for the provision of accommodations. The guidelines must identify only those accommodations that do not “invalidate the score,” and require the IEP Team to select, for each assessment, only those accommodations which do not invalidate the score. 34 C.F.R. § 300.160(b). What does it mean that the accommodation invalidates the score? That is not clear, but the Arizona State Department of Education has taken the position that this would prohibit providing a calculator to a student. They believe this interpretation is required by the regulation.

In its comments to the regulations, the U.S. Education Department justifies its position by noting that students with disabilities are to be included in assessments and students would not be participating in assessment if the accommodations resulted in invalid scores. 72 Fed. Reg. 17770. Moreover, it notes that tests administered with accommodations that invalidate test validity are not measuring academic achievement and functional performance. 72 Fed. Reg. 17771. Finally, they say this is consistent with the rest of IDEA because the legislative history in both the Senate and the House included comments that accommodations should not invalidate test validity. 72 Fed. Reg. 17772.

This has long been a contentious issue. In the past, OSEP has waffled, leaving it up to the states to determine what, if any, effect accommodations had on the validity of a high stakes test. On the other hand, OCR has held that a state may restrict the

use of an AT device on a high stakes test, namely an Arkenstone scanner to read text during a state reading exam, in part based on a finding that such use would invalidate the test. *Alabama Dept. of Ed.*, 29 IDELR 249 (OCR 4/10/98). So, in essence, OSEP's position is now consistent with that of OCR.

This continues to be OCR's position. OCR upheld the position of the North Carolina Department of Public Instruction that students who had a scribe dictate answers on state writing tests would not be scored for "conventions"—grammar, punctuation, spelling—on the state's writing tests. They could still receive a passing score, however, if they scored high enough on the content portion of the test, which was more heavily weighted than the conventions portion. Moreover, the state provided for an alternate assessment if the IEP Team determined the student was unable to access the standard test even with accommodations. Finally, the test was not the sole factor in determining whether the student advanced to the next grade.

OCR rested its decision upon the assertion by the state that the use of the scribe would invalidate the conventions portion of the test and that this portion of the writing skills test was an essential part of its educational program.⁸⁹ On the other hand, OCR affirmed the use of extensive accommodations in another case where the state took the position that they were valid accommodations for the Maryland writing test. The accommodations included unlimited time over multiple sessions, the use of a Dyna Vox to spell and to access words and symbols, the use of a scribe to take dictation from the Dyna Vox, and the scribe would review the work for punctuation and capitalization and make changes as indicated by the student.⁹⁰

Where does this leave students with disabilities whose very disability will prevent them from performing certain parts of a test, especially a high stakes test which must be passed for the student to graduate? For example the student with a language based learning disability that significantly impairs the student's ability to read, write or listen. With AT, such as text-to-speech software or voice dictation software, the student is able to perform extremely well. Will this requirement prohibit the student from using these accommodations? How does this requirement fit with the principles of universal design? Shouldn't the test be designed to minimize the effect of the disability on student performance and can't the use of AT be part of a test which is universally designed? When confronted by the possibility that a student will not be allowed to use an accommodation on a test, especially a high stakes test, because of this restriction, the only alternative may be to push for an alternate assessment that is aligned to the State's academic content standards, option (3) above.

⁸⁹*North Carolina Department of Public Instruction*, 43 IDELR 229 (OCR March 14, 2005).

⁹⁰*Prince George's County (MD) Pub. Schs.*, 33 IDELR 279 and 34 IDELR 95 (OCR July 28, 2000).

F. “Newer” AT Court Decisions

1. ***Vega v. Department of Ed.*, 2000-100-002 33 IDELR 246 (P.R. Cir. Ct. of App. October 19, 2000).**

Student sought the use of a wheelchair, with at least some special fitting to maintain good posture and prevent further spinal deterioration. The school district had recommended an evaluation for an appropriate wheelchair and the Department of Education, after a hearing, said educational agencies need not provide wheelchairs for students with disabilities, especially when they will not be used exclusively at school. The Court of Appeals reversed, holding that a wheelchair was contemplated by the IDEA both for transportation and as a technological assistance. The court found that she needed the wheelchair “to facilitate her education,” and there is no legal reason why a wheelchair should be denied her. That she would use it for purposes other than attending school was “not a grounds for denying it to her as part of her integral rehabilitation.”

2. ***Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87, 39 IDELR 181 (2nd Cir. 2003).**

Student and his parents sought the use of an advanced calculator (TI-92) for use in math class and on exams. The Student had access to a less advanced calculator known as the TI-82. The school argued that the TI-92 did not require the student to go through any of the mathematical steps to come up with the answer to a math problem, whereas the TI-82 did. The school also argued that the Student was capable of processing the problems step-by-step with the TI-82 calculator and that the student would not gain educational benefit from the TI-92. The District Court agreed with the parents, but the Circuit Court found in favor of the school system. The Second Circuit found that even-though failing grades (the Student had failed his math class) is typically indicative of a denial of educational benefit, in this case the student did not make sufficient effort by refusing to take exams without the TI-92 and failing to turn in a make-up test. The court found a school is not required to pass a student with a disability when they seek more assistive technology than is needed.

3. ***Grant v. Independent School District, No. Civ. 02-795 ADM/AJB*, 2005 WL 1539805, 43 IDELR 219 (D.Minn. June 30, 2005)**

The Hearing Officer and State Review Officer found that the student Victor Grant was not entitled to an AT evaluation. At an IEP meeting on May 1, the school determined the Student required a spell checker and calculator. On May 18th the Student requested an AT evaluation to consider the need for a spell checker and computer. The court found the child was not entitled to an AT evaluation because an evaluation is only necessary if AT is needed to provide FAPE. Therefore, an evaluation

is only needed when the student's particular circumstances show that technology might be necessary. The court found that the record was "replete with evidence" showing the Student was receiving meaningful benefit from his education without Assistive Technology. The court based this on the fact that the Student was receiving As and Bs in reading and English, showed improvement on testing and received Bs and Cs in math. The court found that because the Student was making progress, the IEP team considered his need for a computer and determined he did not need one and because a school district is not required to maximize a student's educational benefit, the Student was not entitled to an AT evaluation.

4. *A.S. and W.S. v. Trumbull Bd. of Ed.*, 414 F.Supp.2d 152 (D.Conn. 2006).

Case involving two children with similar but not identical needs. The question involved whether the school district offered an appropriate program, and if not, were the parents entitled to reimbursement for a unilateral private school placement. A good part of the case involved whether or not the school properly accommodated for their allergies and asthma. But, the issues involved whether or not the school provided appropriate AT and whether the students needed a particular reading methodology—the Lindamood-Bell program. While there was plenty of bad blood between the parties and plenty of bad acting, the court ultimately agreed with the hearing officer that the school district offered an appropriate program and, therefore, the parents were not entitled to reimbursement. The court cited to Second Circuit cases discussing the standard for whether the district was offering an appropriate education—the IEP must be likely to produce more than trivial progress, and not regression. There was no discussion of any possible change in the standard based on IDEA '97 or '04.

Regarding the methodology, the hearing decision pre-dates the IDEA 04 requirement that the IEP select services that are researched based, to the extent practicable, and the court decision does not mention this issue at all. The court deferred to the hearing officer which agreed with the district's experts that they would utilize the Lindamood-Bell program for the students, but that they did not want to be locked in to one methodology. Ultimately, the fact that the students were progressing under the district's program clinched it.

Regarding AT, based on the recommendations of an AT consultant hired by the district, it had already agreed to provide the students with access to a computer at school and at home, together with three software programs—CoWriter 4000, IntelliTalk Two and Inspiration, as well as books on tape. The consultant had recommended a Kurzweil 3000 as an "optional" program and the district declined to agree to it, pending a discussion with the consultant about what was meant by "optional." The consultant also recommended against voice-recognition software, which she believed isolated the student. The court again agreed with the hearing officer that the AT recommended was appropriate, again based in large part on the students' progress. The court also noted, with approval, the AT consultant's preference for low tech AT as preferred over high

tech AT based on the LRE. The bottom line—the parents could not point to any evidence in the record that absent the additional AT they sought their children “would have been unable to make the sort of educational progress the IDEA requires.”

5. *Howell v. Dist. of Columbia*, 07-1066 (RMU), 49 IDELR 5 (D.D.C. November 6, 2007).

This case is in somewhat of a unique procedural posture. The real issue is whether or not the school district violated a settlement agreement. The agreement called for the district to provide the student with a laptop computer, software programs and a digital voice recorder, as well as individual tutoring. The parents said they agreed that this would be provided within 90 days and the district said they never agreed to that—they said it would take at least 90 days. The court agreed with the district that the settlement agreement did not support the parents. Still, the court acknowledged that the five month delay in getting the AT to the student harmed the student. The court denied the parent’s motion for a preliminary injunction, however, in part because the student had now received the AT and graduated from high school.

III. MAXIMIZATION OF A STUDENT’S POTENTIAL

As with any other specialized services a student with a disability will receive under IDEA, the basic question will always be: is this AT device or service necessary to enable the student to receive a FAPE? Therefore, the definition of appropriate is critical in determining the availability of AT. What, if any, arguments can be made to limit the impact of the *Rowley* case when looking at the AT needs of a student?

A. The *Rowley* Decision

As stated above, in 1982 the United States Supreme Court determined that the obligation to provide a FAPE did not mean a District was required to “maximize” a student’s potential or provide the best education possible. The Court noted that the program must be based on the student’s unique individual needs and be designed to enable the student to benefit from an education. In other words, the student must be making progress.⁹¹ However, more than a minimal benefit is required for the program to be appropriate.⁹²

In the case of a student being educated in regular classes, the Court determined that in most cases, if the student was advancing from grade to grade with the benefit of

⁹¹*Rowley* at 188, 189.

⁹²*Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3rd Cir. 1988), cert. denied, 109 S. Ct. 838 (1989); See *Ridgewood Board of Ed. v. N.E.*, 30 IDELR 41 (3rd Cir. 1999).

supportive services, the student was receiving an appropriate education.⁹³ The Court cautioned, however, that not “every child who is advancing from grade to grade in a regular public school system is automatically receiving a [FAPE].”⁹⁴

Consistent with this comment, the regulations make clear that schools are not relieved of their obligation to provide a FAPE to students even though they are advancing from grade to grade. The decision of whether a student is still in need of services is to be made by the IEP Team.⁹⁵ OSEP has issued a policy letter based on this regulation. They held that the phrase “adversely affects educational performance” is not limited to academic performance. Whether a student’s disability adversely affects educational performance is to be determined on a case-by-case basis, and not based “only on discrepancies in age or grade performance in academic subject areas.” A student may be eligible for special education services even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”⁹⁶

Accordingly, one court has found that a student with an orthopedic impairment, who desired transition services to assist her move from high school to independent living at college, was still eligible for services even though she was an “A” student.⁹⁷ The court stressed that the student received shortened and modified writing assignments, instruction on how to type, copies of class notes, related services to address her slowness in walking and hand strength, special transportation to school on a lift bus and mobility assistance within the school building.⁹⁸ In reaching its conclusion, the court noted that all of these services were necessary because of her impairment and that but for this specialized instruction and services, her educational performance would be adversely affected.⁹⁹

B. LRE and Uses of AT

IDEA requires that students are educated in the LRE to the “maximum” extent appropriate. Here, we are looking at maximizing something—the placement of a student in the regular education environment. Accordingly, the *Rowley* test for determining

⁹³*Rowley* at 203.

⁹⁴*Id.* at fn. 25, p. 203 (emphasis added).

⁹⁵34 C.F.R. § 300.101(c).

⁹⁶*Policy Letter to Clarke*, 48 IDELR 77 (OSEP March 8, 2007).

⁹⁷*Yankton School Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996).

⁹⁸*Id.* at 1374.

⁹⁹*Id.* at 1375.

whether a program is appropriate is not particularly helpful when LRE is at issue.¹⁰⁰

This is even more true when the issue is LRE combined with AT. The legislative history adding AT to IDEA emphatically recognized the role AT might play in implementing the LRE requirement: AT “will redefine an ‘appropriate placement in the least restrictive environment’ and allow greater independence and productivity.”¹⁰¹ In LRE cases, therefore, the question to be answered is, again, not the degree of academic progress being made, but the need for the AT for the student to be successful in the regular education setting. Recall that in *Espino v. Besteiro*,¹⁰² the court ordered the school to provide an air conditioned classroom for a student to enable him to interact with his peers in the classroom.

C. Students in Transition

1. General Requirements

Transition planning requirements were first added to IDEA in 1990. Transition services are to begin no later than age 16.¹⁰³ Transition services are defined in the IDEA as a coordinated set of activities for a student, designed within a *results-oriented* process, “that is focused on improving the academic and *functional* achievement of the child” to facilitate the child’s movement from school to post-school activities. The areas of adult living to be considered include preparation for postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, and community participation. Services are to be based on the individual student’s needs, taking into account the student’s strengths, preferences and interests.¹⁰⁴

The specific services to be offered in a transition plan include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills and a functional vocational evaluation.¹⁰⁵ The list of activities is not intended to be

¹⁰⁰ See *Daniel R.R.* at 1045 (“The *Rowley* test thus assumes the answer to the question presented in a mainstreaming case.”).

¹⁰¹ House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News, p. 1730.

¹⁰² 520 F.Supp. 905 (S.D.Tex. 1981).

¹⁰³ *Id.* § 1414(d)(1)(A)(vii)(II).

¹⁰⁴ 20 U.S.C. § 1401(30); 34 C.F.R. § 300.43(a).

¹⁰⁵ 20 U.S.C. § 1401(30); 34 C.F.R. § 300.43(a)(2).

exhaustive.¹⁰⁶ One court noted that specially designed instruction in driver's education, self-advocacy, and independent living skills such as cooking and cleaning were appropriate transition services for a student with an orthopedic impairment who wanted to attend college.¹⁰⁷

Therefore, since 1990, when considering transition services for students, the question to be answered should not have been limited solely to issues of academic progress when considering whether a student is receiving an appropriate education. Rather, the issue should have been what will the goal be for this student as an adult, where is the student now in reaching that goal, and what will the student need between now and when the student ages out to be ready to meet that goal. That is what an "outcome oriented approach" means.

2. Transition and maximization

At least one court has held that amendments to the IDEA that strengthened the transition requirements have resulted in a higher standard for "educational benefit" than the Rowley Court required.

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... This is such a significant departure from the previous legislative scheme that any citation to pre-1997 case law on special education is suspect. ... These are not the standards of the 1997 IDEA, which is not concerned merely with "access to specialized education," making annual progress that is "more than de minimis" or whether the benefit is simply "measurable." In focusing on *Rowley* and the pre-IDEA measures of successful specialized education, the District and the ALJ have set the bar too low.

J.L. and M.L. vs. Mercer Island School District, 2006 WL 3628033, 1, 5 (W.D.Wash. 2006).

The *J.L.* court was interpreting *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir.2004), which states:

At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of

¹⁰⁶See, comments to the 1999 special education regulations at 64 Fed. Reg. 12553.

¹⁰⁷*Yankton School Dist. v. Schramm*, 93 F.3d 1369,1374 (8th Cir. 1996).

self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child.FN17 Indeed, states providing no more than some educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress. In evaluating whether an educational benefit is meaningful, logic dictates that the benefit "must be gauged in relation to a child's potential." Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children.

FN17. The implication from these manifestations of congressional intent might be that, where self-sufficiency is a realistic goal for a child, a program that maximizes the possibility of self-sufficiency could be required.

So, the court must consider both an individual child's capabilities and potentialities when determining whether or not an educational benefit was provided, but also the specific role of transition service needs for that child. However, not all circuits agree with the premise that later IDEA amendments have resulted in a higher standard due to the individual student's academic potential¹⁰⁸ or the IDEA's heightened transition requirements.¹⁰⁹

¹⁰⁸Positing a higher standard in the 3rd and 9th circuits than in the 11th: "...While the court acknowledged that adequacy was determined in light of the child's individual needs, it stressed that the IEP must provide only a "basic floor of opportunity" to a disabled child who, before the passage of the IDEA, "might otherwise have been excluded from any educational opportunity." ... This continues to be the standard in the Eleventh Circuit for determining whether a student's IEP complies with the requirements of the IDEA. ... Thus, despite the Plaintiffs' exhaustive referencing of A.C.'s high I.Q. ranking, ... this Court must conclude from Eleventh Circuit precedent that a student's above average I.Q. does not mandate a higher measure of adequacy." *K.C. v. Fulton County School Dist.*, Not Reported in F.Supp.2d, 2006 WL 1868348 (N.D.Ga.,2006.)

¹⁰⁹See *Lessard v Wilton-Lyndeborough Cooperative School Dist.*, 2008 WL 484042, *1 (1st Cir. 2008). "...The appellants contend that Congress, in 1997, raised the bar for IEP transition services, directing that those services must result in actual and substantial progress toward integrating disabled children into society. Existing precedent forecloses this contention. In *Lt. T.B.*, the parents advanced a similar though slightly more ambitious thesis; they posited that, given Congress's statement of goals, the 1997 amendments must have replaced the *Rowley* standard across the board with a requirement that an IEP furnish a disabled child with the "maximum benefit" available. ... We flatly rejected that thesis, noting that it had no support in the text of the amendments and that no other court of appeals, post-1997, had exhibited a willingness

D. More on the Effect of IDEA '97 and IDEA '04

When passing IDEA '97, Congress did not specifically modify the definition of FAPE itself.¹¹⁰ However, Congress did make some profound statements which undercut the Supreme Court's analysis in *Rowley*. First, in its statement of findings, Congress found that the education of students with disabilities can be made more effective by supporting professional development of those working with them to ensure that students with disabilities:

[H]ave the skills and knowledge necessary to enable them—

(i) [T]o meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) [T]o be prepared to lead productive, independent, adult lives, to the maximum extent possible ...¹¹¹

IDEA '04 continues the undercutting of *Rowley* that began with IDEA '97. The preamble now states, without reference to teacher training, 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, to the maximum extent possible, in order to ... meet developmental goals, and to the

to scuttle the *Rowley* standard. *Id.* For aught that appears, the decision in *Lt. T.B.* remains good law. To the interpretive mix presented in *Lt. T.B.*, the appellants add only an allusion to the amendments' definition of "transition services." In relevant part, the amendments defined that term to mean "a coordinated set of activities for a student with a disability that is designed within an outcome-oriented process, which promotes movement from school to post-school activities." 20 U.S.C. § 1401(30)(A). The appellants theorize that an "outcome-oriented process" must mean a process that actually achieves substantial progress toward that outcome and, thus, the 1997 amendments must to this extent have superseded the *Rowley* standard. The appellants read far too much into Congress's 1997 definition of transition services. It seems obvious to us that the word "process" denotes a praxis or procedure; it does not imply a substantive standard or a particular measure of progress. The adjectival phrase "outcome-oriented" is similarly agnostic with respect to ultimate results; it specifies the perspective that participants in the process should strive to attain but does not establish a standard for evaluating the fruits of that process. For these reasons, we decline the appellants' invitation to defenestrate the *Rowley* standard..."

¹¹⁰ See 20 U.S.C. § 1401(8).

¹¹¹ *Id.* § 1400(c)(5)(E) (emphasis added).

maximum extent possible, the challenging expectations that have been established for all children; and ... to be prepared to lead productive and independent lives, to the *maximum* extent possible.” 20 U.S.C. § 1400(c)(5)(A) (emphasis added). At least one court has specifically rejected this argument. See *Lt. T.B. ex rel. N.B. v. Warwick School Committee*, 361 F.3d 80 (1st Cir. 2004).

In addition, at least one circuit has defined educational performance for the purposes of IDEA eligibility more broadly than just academic achievement, which may make it easier to expand the definition of educational benefit when analyzing services provided to students already eligible, especially in the areas of AT and transition. This decision means that a student may receive services under the IDEA even if he or she is meeting grade level expectations.

...[It] does not follow, as the hearing officer wrongly concluded, that a child without "academic needs" is per se ineligible for IDEA benefits, especially when the state has conditioned eligibility on a standard that explicitly takes "non-academic areas" into account... In other words, as the district admits, "educational performance in Maine is more than just academics." In light of Maine's broad notion of "educational performance" as the standard of IDEA eligibility, we see no basis for restricting that standard to "areas of performance actually being measured and assessed by the local unit." Indeed, "there is nothing in IDEA or its legislative history that supports the conclusion that ... 'educational performance' is limited only to performance that is graded...

Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55, 480 F.3d 1 (1st Cir. 2007).

To summarize, by adding that the purpose of the IDEA is to prepare students for employment and independent living, Congress simply took what already applied to students during the transition years and applied it to students of all ages. IDEA '97 and IDEA '04 expand the question of what the purpose of an education is. Therefore, if a student will need AT to prepare for adult living, even if he or she is making academic progress, the AT should be provided.

The Second Circuit acknowledged that the IDEA now requires school districts to look beyond academics in a case dealing with exhaustion of administrative remedies. The parents brought a federal law suit under the ADA and Section 504 because the school district would not let their son bring a service animal to school. Even though he was doing well academically, the parents wanted their son to use the service animal to foster independence in preparation for post-school activities. The Second Circuit ruled that the parents should have exhausted their administrative remedies under IDEA, because the IDEA is not just about academics. It also includes services designed to prepare students for further education, employment and independent living. So, according to the court, a request by a student with a disability for a service animal as an “independent life tool” is “not entirely beyond the bounds of the IDEA’s educational

scheme.”¹¹²

IV. EDUCATIONAL METHODOLOGY

A. Implications of the *Rowley* Decision

In *Rowley*, the Supreme Court also stated that courts should not substitute their judgement about particular types of educational methodology for that of education officials. The Court commented that “*courts* must be careful to avoid imposing their view of preferable educational methods upon the States.”¹¹³ The Supreme Court concluded that “once a *court* determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.”¹¹⁴

Citing this language, school districts across the country have rejected, at IEP Team meetings, parents’ requests for a particular educational methodology. Looking at this same language, advocates have acquiesced and looked for ways around this apparent restriction. What was ignored in this analysis, however, was the Supreme Court’s actual wording of where the restriction lay. By its express terms, it did not apply at IEP Team meetings, but only to reviewing courts. But, many assumed that if you could not ask for a particular educational methodology from a reviewing court, you could not ask at the IEP Team meeting.

However, this assumption ignores the Supreme Court’s view of the role of the parents at IEP Team meetings. The Supreme Court made it clear that their participation is critical:

It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage or the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon *full participation* of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive

¹¹²*Cave v. East Meadow Union Free School Dist.*, No. 07-1120-cv, 2008 WL 183632 (2nd Cir. Jan. 23, 2008).

¹¹³*Rowley* at 207 (emphasis added).

¹¹⁴*Id.* at 208 (emphasis added).

content in an IEP.¹¹⁵

Yet, how far does “full participation” go? Does it extend to discussions of appropriate methodology at IEP Team meetings?

The answer the Supreme Court gave is a resounding yes! Buried between the two quotes discussed above, that *courts* must be careful about imposing educational methodology on states, is a clear statement about how educational methodology is to be determined at IEP Team meetings:

The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method *most suitable* to the child’s needs, was left by the Act to state and local educational agencies *in cooperation with the parents* or guardians of the child.¹¹⁶

This means that at the IEP Team meeting the goals and objectives are to be established for the student. Once those goals have been developed, the IEP Team is to select the best possible method to achieve those goals. The parents are to be joint participants, with the other IEP Team members, in discussing and deciding what that educational method should be. Moreover, since this is an IEP Team decision, it is subject to review at an impartial hearing and, if available, state level review. It is only when the case gets to *court* that *Rowley’s* discussion of the reviewing court’s deference to the decision of the local and state educational agencies comes into play.

In addition, Districts must still ensure that the IEP is appropriate for the student.¹¹⁷ The warning to courts not to second guess a District’s choice of educational methodology does not mean that the court should ignore its obligation to enforce the IDEA.¹¹⁸ Moreover, there is nothing to prohibit including an instructional method on an IEP.¹¹⁹

B. IDEA ‘97 and IDEA ‘04

¹¹⁵*Id.* at 205 -206 (emphasis added).

¹¹⁶*Id.* at 207 (emphasis added).

¹¹⁷*Id.*

¹¹⁸*Oberti v. Board of Education*, 995 F.2d 1204, 1214 (3rd Cir. 1993).

¹¹⁹*Ridgewood Board of Ed. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999) (IEPs included Orton-Gillingham and Wilson reading methods).

The regulations implementing IDEA '97 amended the definition of special education to include a definition of "specially-designed instruction." Specially-designed instruction includes adapting "the content, *methodology* or delivery of instruction" to meet the unique needs of a student with a disability and to ensure access to the general curriculum.¹²⁰ The comments to the 2006 regulations indicate that nothing requires an IEP to include specific instructional methodology. However, "the Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP." 71 FR 46665.

Another change with IDEA 2004 is that schools must determine the special education and related services as well as the supplementary aids and services a child needs, based on peer-reviewed research to the extent practicable. 20 U.S.C. §1414 (d)(1)(A)(IV); 34 C.F.R. § 300.320(a)(4). It is not clear in the statute what "to the extent practicable" means, but what is clear is that the Department is moving towards an education approach that encourages States to use research-based interventions along with peer-reviewed methodologies. This may provide a parent an additional avenue for participation in discussions of methodology, especially if a parent proposes a type of program or service that is different from the approach proposed by the school. The school should provide the parent with information that shows what research-based approaches were used and in what professional journals the information was peer-reviewed. Requiring schools to provide such information is a good way to begin the methodology discussion during the IEP meeting.

C. *Rowley* Revisited

The discussion of educational methodology in the *Rowley* case arose in the context of the appropriate method for teaching a student who was deaf.¹²¹ At issue in the case was whether Amy Rowley needed a full-time sign language interpreter. As noted above, IDEA now requires that the IEP Team consider the use of Braille for blind and visually impaired students and the use of and instruction in the child's language and mode of communication for deaf or hard of hearing students.¹²²

The comments to the 1999 regulations make it clear that this requirement effectively overrules the *Rowley* decision. They note that if the IEP Team determines that a student who is deaf needs a sign language interpreter in order to participate in the general curriculum, those needs must be addressed in the IEP. The comments go

¹²⁰34 C.F.R. § 300.39(b)(3)(emphasis added).

¹²¹*Rowley*, 458 U.S. at 207, fn. 29.

¹²²20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2).

on to add that if the student needs to expand his or her vocabulary in sign language, that need must be addressed, and that the IEP Team may want to consider training family members in sign language, if needed for the student to receive a FAPE.¹²³

D. Methodology and AT

The IDEA defines AT devices and services as either special education, related services or supplementary aids and services.¹²⁴ As noted above, IDEA requires that the IEP include the special education, related services and supplementary aids and services the student will receive.¹²⁵ Accordingly, as with any other special services a student may receive, the IEP must include a specific statement describing such service, including the nature and amount of such services.¹²⁶

What about a student's need for computer software? Will the choice of software be akin to educational methodology and be limited by the *Rowley* decision? As noted above, the AT definitions under IDEA were taken from the Tech Act. The legislative history to the Tech Act noted that computer software is included in the definition of an AT device.¹²⁷ As noted above, the comments to the 1999 regulations also include computer software in the examples of AT devices.¹²⁸ Therefore, computer software would also be included in the definition of an AT device under IDEA, to be included in the IEP as would any other AT device or service.

This is not to say that schools have no discretion in selecting a particular brand of AT hardware or software. However, the AT selected by the school must be appropriate to the needs of the student, and the parents are entitled to pursue an impartial hearing to appeal the school's choice. For example, in *East Penn School District v. Scott B.*,¹²⁹ it was agreed that the student needed a laptop computer with a word prediction program. The school selected a word prediction program called Telepathic. The parents appealed and the court found that this program was not appropriate because it would not provide meaningful educational benefit to the student.

¹²³Former 34 C.F.R. Part 300, App. A, Quest. 2.

¹²⁴34 C.F.R. § 300.105(a).

¹²⁵20 U.S.C. § 1414(d)(1)(A)(iii).

¹²⁶*OSEP Policy Letter to Anonymous*, 29 IDELR 1089 (1/6/97).

¹²⁷Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405.

¹²⁸64 FR 12540, 12575.

¹²⁹1999 WL 178363, 29 IDELR 1058 (E.D.Pa. 1999), *aff'd* 213 F.3d 628 (3rd Cir. 2000).

The court found that the student needed a program which would also provide word recognition and grammar prediction, such as Co:Writer.