

Using Your State's General Curriculum Mandates to Fund Assistive Technology in the Public Schools

Teleconference Training

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I. Introduction

A. Getting around Rowley Efforts

1. Maximization language in IDEA 1997 and 2004
2. Use of some benefit v. meaningful benefit cases
3. Use of access to general curriculum
 - a. IDEA
 - b. 504

B. The *Rowley* Decision

1. The United States Supreme Court determined that the obligation to provide a free appropriate public education (FAPE) did not mean a District was required to "maximize" a student's potential or provide the best education possible.
 - a. 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. *Board of Education v. Rowley*, 458 U.S. 458 at 188, 189.
 - b. However, more than a minimal benefit is required for the program to be appropriate. *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).
 - c. 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 supportive services, the student was receiving an appropriate education. *Rowley* at 203.

- d. 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].” *Id.* at fn. 25, p. 203 (emphasis added).
2. 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.
 - a. The decision of whether a student is still in need of services is to be made by the IEP Team. 34 C.F.R. § 300.101(c).
 - b. OSEP has issued a policy letter based on this regulation.
 - c. They stated that the phrase “adversely affects educational performance” is not limited to academic performance.
 - d. 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.”
 - e. 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.” *Policy Letter to Clarke*, 48 IDELR 77 (OSEP March 8, 2007).
 3. 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. *Yankton School Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996).
 - a. 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. *Id.* at 1374.

- b. 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. *Id.* at 1375.

II. AT Requirements

A. AT Devices and Services

1. Standard

(a) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's—

(1) Special education under §300.36;

(2) Related services under §300.34; or

(3) Supplementary aids and services under §§300.38 and 300.114(a)(2)(ii).

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE. 34 C.F.R. 300.105.

2. Comments

Section 300.320(a)(4) requires the IEP to include a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child. This would include any assistive technology devices and services determined by the IEP Team to be needed by the child in order for the child to receive FAPE. 71 Fed. Reg. 46685.

3. AT Device

a. Definition

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 the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device. 34 C.F.R. 300.5.

b. Comment

Whether an augmentative communication device, playback devices, or other devices could be considered an assistive technology device for a child depends on whether the device is used to increase, maintain, or improve the functional capabilities of a child with a disability, and whether the child's individualized education program (IEP) Team determines that the child needs the device in order to receive a free appropriate public education (FAPE). 71 Fed. Reg. 46547.

c. Personal devices

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 FAPE, the public agency must ensure that the device is provided at no cost to the child's parents. 71 Fed. Reg. 46581.

4. AT Service

a. Definition

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

(a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

(b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

(c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

(f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child. 34 C.F.R. 300.6.

b. Comments

A service to support the use of recordings for the blind and dyslexic on playback devices could be considered an assistive technology service if it assists a child with a disability in the selection, acquisition, or use of the device. If so, and if the child's IEP Team determines it is needed for the child to receive FAPE, the service would be provided. 71 Fed. Reg. 46548.

However, if it was determined that learning to use telephone assisted services, was an important skill for a particular child (e.g., as part of a transition plan), it would be appropriate to conduct an evaluation of that particular child to determine if the child needed specialized instruction in order to use such services. 71 Fed. Reg. 46548.

c. Proper device functioning

Section 300.105(b), as proposed, requires a public agency to ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly. This is a longstanding requirement and was included pursuant to a

House Committee Report on the 1978 appropriations bill (H. Rpt. No. 95-381, p. 67 (1977)) directing the Department to ensure that children with hearing impairments are receiving adequate professional assessment, follow-up, and services. The Department believes that, given the increase in the number of children with disabilities with surgically implanted devices (e.g., cochlear implants, vagus nerve stimulators, electronic muscle stimulators), and rapid advances in new technologies to help children with disabilities, it is important that these regulations clearly address any obligation public agencies have to provide follow-up and services to ensure that such devices are functioning properly. 71 Fed. Reg. 46581.

B. IEP Special Factors

(2) Consideration of special factors. The IEP Team must—

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child needs assistive technology devices and services. 34 C.F.R. 300.324(a)(2).

III. IDEA Requirements Regarding Functional Performance

A. IEP Requirements

1. General standard

- a. "In developing the IEP, the IEP Team must consider ... the academic, developmental, and functional needs of the child." 34 C.F.R. 300.324(a)(1)(iv).
- b. "§ 300.324(a)(1)(iv) requires the IEP Team to consider, for all children with disabilities, the academic, developmental, and functional needs of the child, which could include, as appropriate, the child's need to develop skills in the areas of socialization, independent living, and orientation and mobility." 71 Fed. Reg. 46684.

2. Present levels of performance

"A statement of the child's present levels of academic achievement and functional performance." 34 C.F.R. 300.320(a)(1).

3. Annual goals

"A statement of measurable annual goals, including academic and functional goals designed to ...Meet each of the child's other educational needs that result from the child's disability." 34 C.F.R. 300.320(a)(2)(i)(B).

4. Needed services

The IEP must include a statement of special education and related services and supplemental aids and services to enable the child to "advance appropriately toward meeting the annual goals ... and to participate in extracurricular and nonacademic activities." 34 C.F.R. 300.320(a)(3)(i) and (ii).

B. Definition

"It is not necessary to include a definition of "functional" in these regulations because we believe it is a term that is generally understood to refer to skills or activities that are not considered academic or related to a child's academic achievement. Instead, "functional" is often used in the context of routine activities of everyday living." 71 Fed. Reg. 46661.

C. Evaluation

“However, it should be noted that the evaluation procedures used to measure a child’s functional skills must meet the same standards as all other evaluation procedures, consistent with § 300.304(c)(1).” 71 Fed. Reg. 46661.

D. *Rowley* Rears its Ugly Head

1. School district not required to provide a myoelectric arm for a student with an amputation below her left elbow due to a congenital condition.
2. The court first opined that it fell within the exclusion as a medical device that was surgically implanted, even though it was fabricated and installed by non-physicians.
3. In any event the student could perform *almost* as well without it as with it and therefore she can obtain meaningful educational benefit without it. *J.C. ex rel. C. v. New Fairfield Bd. Of Educ.*, 2011 WL 1322563 (D.Conn. 3/31/2011).

IV. IDEA General Curriculum Mandates

A. Congressional Findings

1. Statute

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

- (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—
 - (i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and
 - (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible. 20 U.S.C. § 1400(c)(5)(A).

2. Regulatory comments

Congress acknowledged, in section 601(c)(5)(A) of the Act, that ensuring access to the general education curriculum in the regular classroom, to

the maximum extent possible, is also effective in preparing children with disabilities to lead productive and independent adult lives. 71 Fed. Reg. 46662.

B. Specially Designed Instruction

1. General obligation

3) Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39(b)(3).

2. That “methodology” thing again

The Department’s longstanding position on including instructional methodologies on IEPs is that it is an IEP Team’s decision. Therefore, if the IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed on the IEP. 71 Fed. Reg. 46665.

C. IEP Requirements

1. General statement—“ensuring that children with disabilities have access to the general curriculum is a major focus of the requirements for developing a child’s IEP.” 71 Fed. Reg. 46577.

2. Present levels of performance

a. The IEP must include how “the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).” 34 C.F.R. 300.320(a)(1)(i).

b. The “general education curriculum means the same curriculum as all other children. Therefore, an IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” 71 Fed. Reg. 46662.

3. Annual goals

- a. The IEP must include a statement of measurable annual goals, designed to meet “the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum.” 34 C.F.R. 300.320(a)(2)(i)(A).
- b. The IEP Team’s determination of how the child’s disability affects the child’s involvement and progress in the general education curriculum is a primary consideration in the development of the child’s annual IEP goals. 71 Fed. Reg. 46662

4. Needed services

The IEP must include a statement of special education and related services and supplemental aids and services to enable the child to “be involved in and make progress in the general education curriculum.” 34 C.F.R. 300.320(a)(4)(ii).

V. Examples of General Curriculum Requirements

A. New York General Standards,
<http://www.emsc.nysed.gov/part100/pages/1001.html#t>

- t. **State learning standards** means the knowledge, skills and understandings that individuals can and do habitually demonstrate over time as a consequence of instruction and experience.
 - 1. State learning standards are organized into **seven general curriculum areas:**
 - i. **English language arts.**
 - a. Students will listen, speak, read and write for information and understanding. As listeners and readers, students will collect data, facts, and ideas; discover relationships, concepts, and generalizations; and use knowledge generated from oral, written and electronically produced texts. As speakers and writers, they will use oral and written language that follows the accepted conventions of the English language to acquire, interpret, apply and transmit information.

- b. Students will read and listen to oral, written and electronically produced texts and performances from American and world literature; relate texts and performances to their own lives; and develop an understanding of the diverse social, historical and cultural dimensions the texts and performances represent. As speakers and writers, students will use oral and written language that follows the accepted conventions of the English language for self-expression and artistic creation.
 - c. Students will listen, speak, read and write for critical analysis and evaluation. As listeners and readers, students will analyze experiences, ideas, information and issues presented by others using a variety of established criteria. As speakers and writers, they will use oral and written language that follows the accepted conventions of the English language to present, from a variety of perspectives, their opinions and judgments on experiences, ideas, information and issues.
 - d. Students will listen, speak, read and write for social interaction. Students will use oral and written language that follows the accepted conventions of the English language for effective social communication with a wide variety of people. As readers and listeners, they will use the social communications of others to enrich their understanding of people and their views.
- ii. **Mathematics, science and technology.**
- a. Students will use mathematical analysis, scientific inquiry and engineering design, as appropriate, to pose questions, seek answers, and develop solutions.
 - b. Students will access, generate, process and transfer information using appropriate technologies.
 - c. Students will, through the integrated study of number sense and operations, algebra, geometry, measurement, and statistics and probability, understand the concepts of and become proficient with the skills of mathematics, communicate and reason mathematically and become problem solvers by using appropriate tools and strategies.
 - d. Students will understand and apply scientific concepts,

principles and theories pertaining to the physical setting and living environment and recognize the historical development of ideas in science.

- e. Students will apply technological knowledge and skills to design, construct, use and evaluate products and systems to satisfy human and environmental needs.
 - f. Students will understand the relationships and common themes that connect mathematics, science and technology and apply the themes to these and other areas of learning.
 - g. Students will apply the knowledge and thinking skills of mathematics, science and technology to address real-life problems and make informed decisions.
- iii. **Social studies.**
- a. Students will use a variety of intellectual skills to demonstrate their understanding of major ideas, eras, themes, developments and turning points in the history of the United States and New York.
 - b. Students will use a variety of intellectual skills to demonstrate their understanding of major ideas, eras, themes, developments and turning points in world history and examine the broad sweep of history from a variety of perspectives.
 - c. Students will use a variety of intellectual skills to demonstrate their understanding of the geography of the interdependent world in which we live-local, national and global-including the distribution of people, places and environments over the Earth's surface.
 - d. Students will use a variety of intellectual skills to demonstrate their understanding of how the United States and other societies develop economic systems and associated institutions to allocate scarce resources, how major decision-making units function in the United States and other national economies and how an economy solves the scarcity problem through market and nonmarket mechanisms.
 - e. Students will use a variety of intellectual skills to demonstrate their understanding of the necessity for establishing

governments; the governmental system of the United States and other nations; the United States Constitution; the basic civic values of American constitutional democracy; and the roles, rights and responsibilities of citizenship, including avenues of participation.

iv. **Languages other than English.**

- a. Students will be able to use a language other than English for communication.
- b. Students will develop cross-cultural skills and understandings.

v. **The Arts.**

- a. Students will actively engage in the processes that constitute creation and performance in the arts (visual arts, music, dance and theatre) and participate in various roles in the arts.
- b. Students will be knowledgeable about and make use of the materials and resources available for participation in the arts in various roles.
- c. Students will respond critically to a variety of works in the arts, connecting the individual work to other works and to other aspects of human endeavor and thought.
- d. Students will develop an understanding of the personal and cultural forces that shape artistic communication and how the arts in turn shape the diverse cultures of past and present society.

vi. **Health, physical education and family and consumer sciences.**

- a. Students will have the necessary knowledge and skills to establish and maintain physical fitness, participate in physical activity and maintain personal health.
- b. Students will acquire the knowledge and ability necessary to create and maintain a safe and healthy environment.
- c. Students will understand and be able to manage their personal and community resources.

- vii. **Career development and occupational studies.**
 - a. Students will be knowledgeable about the world of work, explore career options, and relate personal skills, aptitudes, and abilities to future career decisions.
 - b. Students will demonstrate how academic knowledge and skills are applied in the workplace and other settings.
 - c. Students will demonstrate mastery of the foundation skills and competencies essential for success in the workplace.
 - d. Students who choose a career major will acquire the career-specific technical knowledge/skills necessary to progress toward gainful employment, career advancement and success in postsecondary programs.

B. Common Core State Standards Initiative, <http://www.corestandards.org/>

Sixth Grade Language Arts Examples

- 1. Reading: Literature
 - a. Key Ideas and Details
 - (1) Cite textual evidence to support analysis of what the text says explicitly as well as inferences drawn from the text.
 - (2) Determine a theme or central idea of a text and how it is conveyed through particular details; provide a summary of the text distinct from personal opinions or judgments.
 - (3) Describe how a particular story's or drama's plot unfolds in a series of episodes as well as how the characters respond or change as the plot moves toward a resolution.
 - b. Craft and Structure
 - (1) Determine the meaning of words and phrases as they are used in a text, including figurative and connotative meanings; analyze the impact of a specific word choice on meaning and tone.

- (2) Analyze how a particular sentence, chapter, scene, or stanza fits into the overall structure of a text and contributes to the development of the theme, setting, or plot.
 - (3) Explain how an author develops the point of view of the narrator or speaker in a text.
 - c. Integration of Knowledge and Ideas
 - (1) Compare and contrast the experience of reading a story, drama, or poem to listening to or viewing an audio, video, or live version of the text, including contrasting what they “see” and “hear” when reading the text to what they perceive when they listen or watch.
 - (2) (Not applicable to literature)
 - (3) Compare and contrast texts in different forms or genres (e.g., stories and poems; historical novels and fantasy stories) in terms of their approaches to similar themes and topics.
 - d. Range of Reading and Level of Text Complexity
 - (1) By the end of the year, read and comprehend literature, including stories, dramas, and poems, in the grades 6–8 text complexity band proficiently, with scaffolding as needed at the high end of the range.
- 2. Reading: Informational Text
 - a. Key Ideas and Details
 - (1) Cite textual evidence to support analysis of what the text says explicitly as well as inferences drawn from the text.
 - (2) Determine a central idea of a text and how it is conveyed through particular details; provide a summary of the text distinct from personal opinions or judgments.

- (3) Analyze in detail how a key individual, event, or idea is introduced, illustrated, and elaborated in a text (e.g., through examples or anecdotes).
 - b. Craft and Structure
 - (1) Determine the meaning of words and phrases as they are used in a text, including figurative, connotative, and technical meanings.
 - (2) Analyze how a particular sentence, paragraph, chapter, or section fits into the overall structure of a text and contributes to the development of the ideas.
 - (3) Determine an author's point of view or purpose in a text and explain how it is conveyed in the text.
 - c. Integration of Knowledge and Ideas
 - (1) Integrate information presented in different media or formats (e.g., visually, quantitatively) as well as in words to develop a coherent understanding of a topic or issue.
 - (2) Trace and evaluate the argument and specific claims in a text, distinguishing claims that are supported by reasons and evidence from claims that are not.
 - (3) Compare and contrast one author's presentation of events with that of another (e.g., a memoir written by and a biography on the same person).
 - d. Range of Reading and Level of Text Complexity
 - (1) By the end of the year, read and comprehend literary nonfiction in the grades 6–8 text complexity band proficiently, with scaffolding as needed at the high end of the range.
- 3. Writing
 - a. Text Types and Purposes
 - (1) Write arguments to support claims with clear reasons and relevant evidence.

- (a) Introduce claim(s) and organize the reasons and evidence clearly.
 - (b) Support claim(s) with clear reasons and relevant evidence, using credible sources and demonstrating an understanding of the topic or text.
 - (c) Use words, phrases, and clauses to clarify the relationships among claim(s) and reasons.
 - (d) Establish and maintain a formal style.
 - (e) Provide a concluding statement or section that follows from the argument presented.
- (2) Write informative/explanatory texts to examine a topic and convey ideas, concepts, and information through the selection, organization, and analysis of relevant content.
- (a) Introduce a topic; organize ideas, concepts, and information, using strategies such as definition, classification, comparison/contrast, and cause/effect; include formatting (e.g., headings), graphics (e.g., charts, tables), and multimedia when useful to aiding comprehension.
 - (b) Develop the topic with relevant facts, definitions, concrete details, quotations, or other information and examples.
 - (c) Use appropriate transitions to clarify the relationships among ideas and concepts.
 - (d) Use precise language and domain-specific vocabulary to inform about or explain the topic.
 - (e) Establish and maintain a formal style.
 - (f) Provide a concluding statement or section that follows from the information or explanation presented.

- (3) Write narratives to develop real or imagined experiences or events using effective technique, relevant descriptive details, and well-structured event sequences.
 - (a) Engage and orient the reader by establishing a context and introducing a narrator and/or characters; organize an event sequence that unfolds naturally and logically.
 - (b) Use narrative techniques, such as dialogue, pacing, and description, to develop experiences, events, and/or characters.
 - (c) Use a variety of transition words, phrases, and clauses to convey sequence and signal shifts from one time frame or setting to another.
 - (d) Use precise words and phrases, relevant descriptive details, and sensory language to convey experiences and events.
 - (e) Provide a conclusion that follows from the narrated experiences or events.

b. Production and Distribution of Writing

- (1) Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience. (Grade-specific expectations for writing types are defined in standards 1–3 above.)
- (2) With some guidance and support from peers and adults, develop and strengthen writing as needed by planning, revising, editing, rewriting, or trying a new approach.
- (3) Use technology, including the Internet, to produce and publish writing as well as to interact and collaborate with others; demonstrate sufficient command of keyboarding skills to type a minimum of three pages in a single sitting.

c. Research to Build and Present Knowledge

- (1) Conduct short research projects to answer a question, drawing on several sources and refocusing the inquiry when appropriate.
- (2) Gather relevant information from multiple print and digital sources; assess the credibility of each source; and quote or paraphrase the data and conclusions of others while avoiding plagiarism and providing basic bibliographic information for sources.
- (3) Draw evidence from literary or informational texts to support analysis, reflection, and research.
 - (a) Apply grade 6 Reading standards to literature (e.g., “Compare and contrast texts in different forms or genres [e.g., stories and poems; historical novels and fantasy stories] in terms of their approaches to similar themes and topics”).
 - (b) Apply grade 6 Reading standards to literary nonfiction (e.g., “Trace and evaluate the argument and specific claims in a text, distinguishing claims that are supported by reasons and evidence from claims that are not”).

d. Range of Writing

- (1) Write routinely over extended time frames (time for research, reflection, and revision) and shorter time frames (a single sitting or a day or two) for a range of discipline-specific tasks, purposes, and ...

4. Speaking and Listening

a. Comprehension and Collaboration

- (1) Engage effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grade 6 topics, texts, and issues, building on others’ ideas and expressing their own clearly.
 - (a) Come to discussions prepared, having read or

studied required material; explicitly draw on that preparation by referring to evidence on the topic, text, or issue to probe and reflect on ideas under discussion.

- (b) Follow rules for collegial discussions, set specific goals and deadlines, and define individual roles as needed.
 - (c) Pose and respond to specific questions with elaboration and detail by making comments that contribute to the topic, text, or issue under discussion.
 - (d) Review the key ideas expressed and demonstrate understanding of multiple perspectives through reflection and paraphrasing.
- (2) Interpret information presented in diverse media and formats (e.g., visually, quantitatively, orally) and explain how it contributes to a topic, text, or issue under study.
 - (3) Delineate a speaker's argument and specific claims, distinguishing claims that are supported by reasons and evidence from claims that are not.

b. Presentation of Knowledge and Ideas

- (1) Present claims and findings, sequencing ideas logically and using pertinent descriptions, facts, and details to accentuate main ideas or themes; use appropriate eye contact, adequate volume, and clear pronunciation.
- (2) Include multimedia components (e.g., graphics, images, music, sound) and visual displays in presentations to clarify information.
- (3) Adapt speech to a variety of contexts and tasks, demonstrating command of formal English when indicated or appropriate.

5. Language

- a. Conventions of Standard English
 - (1) Demonstrate command of the conventions of standard English grammar and usage when writing or speaking.
 - (a) Ensure that pronouns are in the proper case (subjective, objective, possessive).
 - (b) Use intensive pronouns (e.g., myself, ourselves).
 - (c) Recognize and correct inappropriate shifts in pronoun number and person.*
 - (d) Recognize and correct vague pronouns (i.e., ones with unclear or ambiguous antecedents).*
 - (e) Recognize variations from standard English in their own and others' writing and speaking, and identify and use strategies to improve expression in conventional language.*
 - (2) Demonstrate command of the conventions of standard English capitalization, punctuation, and spelling when writing.
 - (a) Use punctuation (commas, parentheses, dashes) to set off nonrestrictive/parenthetical elements.*
 - (b) Spell correctly.
- b. Knowledge of Language
 - (1) Use knowledge of language and its conventions when writing, speaking, reading, or listening.
 - (a) Vary sentence patterns for meaning, reader/listener interest, and style.*
 - (b) Maintain consistency in style and tone.*
- c. Vocabulary Acquisition and Use

- (1) Determine or clarify the meaning of unknown and multiple-meaning words and phrases based on grade 6 reading and content, choosing flexibly from a range of strategies.
 - (a) Use context (e.g., the overall meaning of a sentence or paragraph; a word's position or function in a sentence) as a clue to the meaning of a word or phrase.
 - (b) Use common, grade-appropriate Greek or Latin affixes and roots as clues to the meaning of a word (e.g., audience, auditory, audible).
 - (c) Consult reference materials (e.g., dictionaries, glossaries, thesauruses), both print and digital, to find the pronunciation of a word or determine or clarify its precise meaning or its part of speech.
 - (d) Verify the preliminary determination of the meaning of a word or phrase (e.g., by checking the inferred meaning in context or in a dictionary).
- (2) Demonstrate understanding of figurative language, word relationships, and nuances in word meanings.
 - (a) Interpret figures of speech (e.g., personification) in context.
 - (b) Use the relationship between particular words (e.g., cause/effect, part/whole, item/category) to better understand each of the words.
 - (c) Distinguish among the connotations (associations) of words with similar denotations (definitions) (e.g., stingy, scrimping, economical, un wasteful, thrifty).
- (3) Acquire and use accurately grade-appropriate general academic and domain-specific words and phrases; gather vocabulary knowledge when considering a word or phrase important to comprehension or expression.

C. **Rowley Rears Its Ugly Head, Again**

1. *Klein Independent School Dist. v. Hovem*, 745 F.Supp.2d 700 (S.D. Tex. 2010).
 - a. Even though student had been passing his classes the school district denied the student a FAPE.
 - b. The school district never addressed the student's severe reading and writing deficits so that he was performing at the Second to Fifth grade level when in Eleventh Grade.
 - c. The school district did not hold him to the same standard as his regular-education classmates, allowing him to not hand in homework, work on assignments at home with the help of his family, and allow him to answer orally when they could not read his handwriting. He also failed the written portion of the TAKS test.
 - d. The school district could not show he met a FAPE because he did well in areas other than those in which his disability lies.
 - e. District had provided him with a spell checker and access to a computer, which the school district knew he was not using but made no effort to see if they could get him to use them or employ another option for three years.
 - f. The district ignored a teacher's request to obtain a Kurzweil computer program for him and one of his regular education teachers obtained it on her own. It nevertheless proved ineffective.
2. Fifth Circuit Reverses. *Klein Independent School Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012).
 - a. Holds School District Satisfies FAPE When Student Advances from Grade to Grade Even Though the Underlying Disability is Not Addressed
 - b. Per *Hovem* is a very bright student who was readily passing from grade to grade. Nevertheless, he has a learning disability which significantly impairs his written expression.
 - c. Even after he was given access to a Kurzweil computer

software program in his Senior year, it still took him forty minutes to complete a writing assignment it took other students only ten minutes. *Id.* 404.

- d. His mother noted that his writing was so poor that he could not take phone messages at home. *Id.* 393.
- e. The hearing officer ruled in their favor, finding that Per's IEPs were insufficiently tailored to his unique needs because they failed to contain sufficient transition goals to enable him to enter college and failed to address his learning disability. The district court affirmed.
- f. The Fifth Circuit adopted a rather novel approach to *Rowley*. It adopted a "holistic perspective," stating "the whole educational experience, and its adaptation to confer 'benefits' on the child, is the statutory goal." *Id.* 397.
- g. Stated another way, "overall educational benefit, not solely disability remediation, is IDEA's statutory goal." *Id.* 398.
- h. The dissent said this approach, as applied to the facts in this case, would allow a school district to satisfy the IDEA by educating a student with a disability "in the regular classroom and advancing him toward graduation, even if the school did not address his disability and made no effort to do so." *Id.* 406 (emphasis added).
- i. The majority also considers the school's decision to provide accommodations instead of remediation as a choice of educational methodology to which reviewing courts should defer. *Id.* 398.
 - (1) This approach first would have to mean that the decision to use accommodations to minimize the impact of a disability instead of providing any specially designed instruction to remediate the disability is a choice of educational methodology.
 - (2) Second, the position to then defer to the school educator's choice of "methodology," as opposed to the reviewing administrative hearing officer, is completely contrary to the position taken by the Sixth Circuit in *Woods v. Northport Public School, Nos. 11-1493, 11-1567, 2012 WL 2612776* (6th Cir. July 5, 2012)

(unpublished).

- j. As noted by the dissent, "in the face of the stark gulf between Per's academic potential, as reflected in his high IQ score, [142,] and his inability to complete simple sentences on an admissions form, the majority readily embraces [the school district's] argument, in support of doing effectively nothing in the face of Per's enormous challenge, as its own. *Id.* 406.

II. § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794

A. Background

1. Broad Civil rights legislation
2. Legal standard:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by [the U.S. government]. 29 U.S.C. § 794(a).

B. Free Appropriate Public Education (FAPE)

1. Regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non disabled students are met. 34 C.F.R. § 104.33(b)(1).
2. Without cost to the student or to his or her parents, except for those fees that are imposed on non disabled students or their parents. 34 C.F.R. § 104.33(c)(1).

C. OCR's Interpretation of FAPE

1. OCR was asked whether it recognized that the FAPE standard under Section 504 "implicitly incorporates a reasonable accommodation, reasonable modification, or other such cost-conscious limitation." *OCR Policy Letter to Zirkel*, 20 IDELR 134, 135 (August 23, 1993).
2. If not, how does such an interpretation square with the Supreme

Court's decisions in *Davis* and *Alexander*? OCR was urged to read such a limitation into Section 504's FAPE requirements to more accurately reflect Congressional intent "as decided by appropriate judicial authority." *Id.* at 136.

3. OCR's response was a surprise:

The key question in your letter is whether OCR reads into that Section 504 regulatory requirement for a free appropriate public education (FAPE) a "reasonable accommodation" standard, or other similar limitation. The clear and unequivocal answer to that is no. *Id.* (emphasis added).

4. As support for its position, OCR reviewed the regulatory history and noted that the regulation was subject to Congressional review and received no objections. Accordingly, it is OCR's opinion

that the FAPE requirement in the Section 504 regulation does reflect congressional intent. Since that time there have been no actions by the Congress, the Federal courts, or the agencies and administrative tribunals of the executive branch that would require OCR to modify § 104.33, or its interpretation thereof, to allow for some limitation of the FAPE guarantee. *Id.*

5. OCR then reviewed other sections of this regulation, noting the provisions governing employment, as well as those governing higher education and vocational education, include a "reasonable accommodation" limitation. The provisions governing elementary and secondary education do not. OCR concluded that this was intentional:

We conclude therefore that the regulation writers intended to create a different standard for elementary and secondary students than for employees or postsecondary/vocational students. *Id.*

6. OCR went on to carefully distinguish both the *Davis* and *Alexander* decisions.
 - a. First, it noted that the provisions being interpreted in those cases were not those applicable to elementary and secondary education. And, as noted above, those provisions do not include the reasonable accommodation limitation.
 - b. Second, and more importantly, OCR concluded that the caution in *Davis* that the Section 504 regulations should not "require substantial adjustments to existing programs beyond

those necessary to eliminate discrimination,” (442 U.S. at 410) “has no impact on 34 C.F.R. § 104.33(a) because that section does not require changes beyond those necessary to eliminate discrimination.” *Zirkel* at 137.

c. OCR continued:

If a school district is meeting the needs of children without disabilities to a greater extent than it is meeting the needs of children with disabilities, discrimination is occurring. By meeting the educational needs of children with disabilities as adequately as it meets the needs of other children, the school district is eliminating discrimination, and even substantial modifications required to bring about this result are not suspect under the Davis decision. *Id.* (emphasis added).

7. Similarly, OCR distinguished a series of lower court cases:

Those cases that determine what a school district must provide to an elementary or secondary student with a disability under Section 504 restate the *Davis* interpretation: Section 504 is a statute that prohibits discrimination, rather than requiring affirmative action to overcome a student's disability. If particular educational services requested by the plaintiffs in these cases are denied by the courts, it is almost uniformly because the courts found that discrimination was not occurring; that is, those services requested were not necessary to prevent or eliminate discrimination because the services currently being provided were not discriminatory. This coincides with OCR's interpretation set forth above that the FAPE regulation requires school districts to meet the individual needs of all students to the same extent, though not necessarily by providing the same programs or services. *Id.*

8. Finally, OCR determined that its investigations under Title II of the ADA would be governed by the same standard. Its reasoning is as follows:

Title II's relationship to Section 504 is covered by 28 C.F.R. § 35.103 of the regulation. That section of the regulation states that Title II shall not be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (which includes Section 504) or other regulations issued by Federal agencies pursuant to Title V. “[C]ongress did not intend to displace any of the rights or remedies provided by the other Federal laws (including Section 504). . .that provide greater or equal protection to individuals with disabilities.” 28 C.F.R. § 35.103(b) and 28 C.F.R. ch. 1, pt. 35, app. A., at 430 (1992). Since the Department has developed the specific FAPE standard for compliance for elementary and

secondary schools under Section 504, the Title II regulation in this instance is not intended to be applied to weaken the existing Section 504 standards. *Id.* at 137-38.

D. Analysis of the *Rowley* Decision in Light of this Section 504 Standard

1. How does all of this apply to our analysis of *Rowley*?
2. The district court in *Rowley* ruled in the family's favor. It found that the school district did not provide an appropriate education to Amy. Even though the case was brought under the IDEA, the court relied on the definition of FAPE found in the special education regulations under Section 504.
3. Under Section 504, an appropriate education is defined as:

The provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based on adherence to procedures [under these provisions]. 34 C.F.R. § 104.33(b)(1).

4. This definition is significantly different from the IDEA definition of FAPE because it is drawn from Section 504's anti-discrimination background.
5. The court set up three possible tests to determine whether a student was receiving an appropriate education under this definition.
 - a. The first two tests were:

An "appropriate education" could mean an "adequate" education that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential. *Rowley*, 438 F.Supp. at 534.

- b. Notably, the first standard sounds very similar to the standard ultimately adopted by the Supreme Court under the IDEA.
- c. The district court rejected these two options and found a middle ground:

Between those two extremes, however, is a standard which I conclude is

more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. *Id.*

6. The court went on to note that using this standard would not be easy.

It requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or “shortfall” be compared to the shortfall experienced by non-handicapped children. *Id.*

7. This standard sounds remarkably similar to OCR’s interpretation of the meaning of FAPE under Section 504, discussed above.
8. Applying this standard to Amy’s facts, the court held that the school district had not provided Amy with an appropriate education. The court found that the district had established that while “Amy is receiving an ‘adequate’ education, since she performs better than the average child in her class and is advancing easily from grade to grade,” it established little more. *Id.* at 534.
9. Again, for the Supreme Court, this was enough under the IDEA.
10. However, the district court noted that Amy, who was very bright, understood considerably less of what went on in class than she could if she were not deaf. Accordingly, she was “not learning as much, or performing as well academically, as she would without” her disability. *Id.* at 532.
11. The court went on to note that Amy’s educational shortfall is greater than that of her peers and is inherent in her disability. “It is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education.” *Id.* at 535.
12. Therefore, the court ordered that Amy receive the services of an interpreter.
13. Noting that “this case is about Amy”, the Second Circuit affirmed, but limited its decision to the facts of her case.
 - a. The Second Circuit agreed with the district court that Amy

needed “a sign language interpreter in her classroom to enable her to have the same educational opportunity as her classmates.” *Rowley v. Bd. of Ed. of Hendrick Hudson*, 632 F.2d 945 (2d Cir. 1980).

- b. Again, this standard is very similar to the interpretation of Section 504 by OCR.
14. Holding that the IDEA had its own definition of appropriate, the Supreme Court reversed.
- a. The Supreme Court refused to follow the analysis of appropriate based on Section 504, which was established by the lower courts, and set out its own test for appropriate based on the language found in the IDEA, outlined above.
 - b. However, why wouldn't the lower courts' interpretation of the Section 504 definition of FAPE still be good law in a case brought under Section 504 instead of the IDEA?
15. Given the similarities between the standard established by the district court and the Second Circuit, based on their interpretation of the Section 504 regulation, and that established by OCR, it is very likely that Amy would be entitled to her interpreter under Section 504.
- a. The test established under Section 504 is to eliminate discrimination, which is defined as equalizing educational opportunity based on one's disability.
 - b. In such cases, even substantial modifications to a program may be required.
 - c. For a student such as Amy, therefore, who is missing a significant amount of material each day because of her disability, whether she is receiving passing grades would be irrelevant to whether she was receiving a FAPE under Section 504.

E. *Rowley* Does Not Rear Its Ugly Head, Yet

- 1. Interpreting Services
 - a. The 2006 regulations added interpreting services to the definition of related services.

- b. 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).
- 2. Three recent court decisions relying on *Rowley* to find students did not need CART services.
 - a. ALJ had found that word-for-word transcription would provide a greater benefit than the district’s meaning-for-meaning transcription. However, this is the wrong standard. So long as the meaning-for-meaning transcription provides some educational benefit, it complies with the IDEA. Case remanded for application of proper standard. *Poway Unified School Dist. V. Cheng ex rel. Cheng*, 2011 WL 4479033 (S.D.Cal. 9/26/11).
 - b. Student with a cochlear implant and using lip-reading was provided with closed-captioned videos, preferential seating, copies of notes and repetition of students’ comments.. Although she frequently had trouble hearing student conversations, her grades were average or above, teachers spoke highly of her and her notebook showed she had no problem taking notes. Therefore, district met its obligation to provide meaningful educational benefit without CART. *K.M. ex rel. Bright v. Tustin Unified School Dist.*, 2001 WL 2633673 (C.D.Cal. 7/5/2011).
 - c. Student with a cochlear implant and hearing aid received mainly A’s and some B’s with use of FM system, pass-around microphone for class discussions and close-captioning for video presentations. Therefore, student was able to benefit from her education without the CART service. *D.H. v. Poway Unified School Dist.*, 2011 WL 883003 (S.D.Cal. 3/14/11).
- 3. Ninth Circuit Reverses!
 - a. Two of the cases were consolidated for argument and, in *K.M. v. Tustin Unif. Sch. Dist.* and *D.H. v. Poway Unif. Sch. Dist.*, ___F.3d___, 2013 WL 3988677 (9th Cir. Aug. 6, 2013), the Ninth Circuit held that on a question of first impression, the school district’s compliance with its obligations to a deaf

or hard-of-hearing child under IDEA did not necessarily establish compliance with its effective communication obligations to the child under Title II of the Americans with Disabilities Act (ADA). *Id.* at *9-12

- b. The Circuit Court remanded the cases to the district courts for further proceedings. *Id.* at *12.
- c. In analyzing the case, the court noted that the IDEA, the ADA, and Section 504 of the Rehabilitation Act have different structures, goals, and standards
 - (1) The IDEA primarily provides parents with various procedural safeguards and contains a fairly modest substantive component, providing that the IEP developed through the required procedures must be “reasonably calculated to enable the child to received educational benefits” and “does not require the states to provide disabled children with “a potential-maximizing education” (citations *Rowley* omitted). *Id.* at *4-5.
 - (2) In contrast, Title II of the ADA does establish more substantive requirements and the Department of Justice (DOJ) effective communication regulation provides that public entities “furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity,” 28 CFR 35.160(b)(1), subject to an fundamental alteration defense. 2013 WL 3988677 at *5-6.
- d. The Court also noted that the ADA’s Title II effective communication regulation requires that the public entity “give primary consideration to the requests of the individual with disabilities, ... which has no direct counterpart in the IDEA.” *Id.* at *10.
- e. In light of the differences between the IDEA and ADA and how they would interact in particular cases, the court concluded it must reject the argument adopted by the district courts that success or failure of an IDEA claim dictates, as a matter of law, the success or failure of the ADA Title II claim. *Id.* at *11.