

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

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# National AT Advocacy Project Services

- Technical assistance
- Training
- Written materials (newsletters, longer articles, “Did You Know” series)
- Resource library (hearing decisions, court briefs)
- List service

All services geared to help obtain funding for AT.

# Logistics for Training

- Will go for 90 minutes (1.5 CLE credits)
- Seeking CLE, Certificate of Attendance (CEUs)
  - Must complete evaluation form
  - Secret phrase given twice during presentation
- Questions
  - By email only to Lynn ([lurquhart@nls.org](mailto:lurquhart@nls.org))
  - At least 2 Q&A segments
  - After session, send questions to Ron (Ron.Hager@ndrn.org)

# INTRODUCTION

# Getting Around *Rowley* Efforts

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

# The *Rowley* Decision

- Obligation to provide FAPE did not mean District required to “maximize” student’s potential or provide best education possible
  - program must be based on student’s unique individual needs and designed to enable student to benefit from education
  - student must be making progress
  - more than a minimal benefit is required

# The *Rowley* Decision

- For students in regular classes, in most cases if student is advancing from grade to grade with supportive services student is receiving FAPE
- Court cautioned that not every child advancing from grade to grade automatically receiving FAPE



# OSEP Guidance

- Regulations state schools not relieved of FAPE obligation even though students advancing from grade to grade
- Policy letter
  - “adversely affects education” not limited to academics
  - Decisions not only based on discrepancies in age or grades in academic subjects
  - Student may be eligible even though never failed a course or grade

# Yankton School District Case

- Student with orthopedic impairment, desired transition services for independent living at college, still eligible even though an “A” student
  - student received shortened and modified writing assignments, instruction on how to type, class notes, related services to address slowness in walking and hand strength, transportation on a lift bus and mobility assistance within the school

# AT Requirements

# General Standard

- AT devices and services must be made available as required as:
  - Special education
  - Related services
  - Supplemental aids and services for LRE
- Basic standard—needed for FAPE
- AT may be used at home or other settings if needed for FAPE

# AT Device

- Any item, piece of equipment, or product system
- Whether acquired commercially off the shelf, modified, or customized
- Used to increase, maintain, or improve functional capabilities
- Does not include medical device that is surgically implanted, or replacement of such device

# AT Device

- Whether augmentative communication device, playback devices, or other devices could be considered AT device depends on whether used to increase, maintain, or improve functional capabilities
- And whether IEP Team determines child needs the device to receive FAPE

# Personal Devices

- Generally public agencies not responsible for personal devices, such as eyeglasses or hearing aids that a child requires, regardless of whether attending school.
- However, if not a surgically implanted device and IEP Team determines child requires a personal device (e.g., eyeglasses) to receive FAPE, public agency must ensure device is provided at no cost to parents

# AT Service

- Selection, acquisition or use of AT device
- Evaluation
- Purchasing, leasing or otherwise acquiring
- Selecting, designing, customizing, adapting
- Maintaining, repairing or replacing
- Coordinating and using other services
- Training to child, family and those working with child



# Proper Device Functioning

- Given increase in number of children with surgically implanted devices (e.g., cochlear implants, vagus nerve stimulators, electronic muscle stimulators), and rapid advances in new technologies regulations must clearly address obligations of public agencies to provide follow-up and services to ensure that such devices are functioning properly

# IEP Special Factors

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

# IEP Special Factors

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

# IEP Special Factors

- For all students, consider whether student needs AT devices and services

# IDEA Requirements Regarding Functional Performance

# IEP Requirements

- Definition

- not necessary to include definition of “functional” because we believe it is a term 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 context of routine activities of everyday living

# IEP Requirements

- Evaluation
  - the evaluation procedures used to measure a child's functional skills must meet the same standards as all other evaluation procedures

# IEP Requirements

- General Standard
  - IEP Team must consider academic, developmental, and functional needs of child
  - Could include child's need to develop skills in areas of socialization, independent living and orientation and mobility
- Present levels of performance
  - IEP must include present levels of academic and functional performance



# IEP Requirements

- Annual goals
  - Measurable annual goals, including academic and functional goals designed to meet each of the educational needs resulting from the disability
- Needed services
  - Statement of special education, related services and supplemental aids and services to enable child to advance appropriately toward meeting annual goals and participate in extracurricular and nonacademic activities

# *Rowley* Rears its Ugly Head

- District not required to provide myoelectric arm for student with amputation below left elbow due to a congenital condition
- It fell within exclusion as medical device that was surgically implanted, even though fabricated and installed by non-physicians
- Student could perform *almost* as well without it as with it and therefore she can obtain meaningful educational benefit without it

# IDEA General Curriculum Mandates

# Congressional Findings

- Statute
  - education of children with disabilities can be made more effective by having high expectations and ensuring access to general education curriculum in regular classroom, to maximum extent possible
- Regulatory comment
  - ensuring access to general education curriculum in regular classroom, to maximum extent possible, is also effective in preparing students to lead productive and independent adult lives

# Specially Designed Instruction

- Means adapting, as appropriate to the needs of child, the content, methodology, or delivery of instruction
- To address the unique needs of the child that result from the disability; and
- To ensure access to the general curriculum, so the child can meet the educational standards that apply to all children

# Methodology

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

# IEP Requirements

- Ensuring children with disabilities have access to general curriculum is a major focus of requirements for developing child's IEP
- Present levels of performance
  - IEP must include how child's disability affects involvement and progress in general education curriculum
  - General education curriculum means same curriculum as all other children

# IEP Requirements

- Annual goals
  - IEP must include statement of measurable annual goals designed to meet child's needs that result from the disability to enable child to be involved in and make progress in general education curriculum
  - IEP Team's determination of how child's disability affects involvement and progress in general education curriculum is a primary consideration in developing the child's annual goals



# IEP Requirements

- 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

# Examples of General Curriculum Requirements

# New York General Standards

- English language arts
  - 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.

# New York General Standards

- English language arts
  - 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
  - Students will listen, speak, read and write for critical analysis and evaluation
  - Students will listen, speak, read and write for social interaction

# New York General Standards

- Mathematics, science and technology
  - 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

# New York General Standards

- Mathematics, science and technology
  - Students will use mathematical analysis, scientific inquiry and engineering design, as appropriate, to pose questions, seek answers, and develop solutions
  - Students will apply technological knowledge and skills to design, construct, use and evaluate products and systems to satisfy human and environmental needs

# New York General Standards

- Social studies
  - 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 and world history
- Languages other than English

# New York General Standards

- The Arts
  - 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
  - Students will be knowledgeable about and make use of the materials and resources available for participation in the arts in various roles



# New York General Standards

- Health, physical education and family and consumer sciences
  - Students will have the necessary knowledge and skills to establish and maintain physical fitness, participate in physical activity and maintain personal health
  - Students will understand and be able to manage their personal and community resources

# New York General Standards

- Career development and occupational skills
  - Students will be knowledgeable about the world of work, explore career options, and relate personal skills, aptitudes, and abilities to future career decisions
  - Students will demonstrate mastery of the foundation skills and competencies essential for success in the workplace
  - 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

# Common Core Sixth Grade LA

- Reading: Literature
  - 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
  - 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

# Common Core Sixth Grade LA

- Reading: Literature
  - 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
- Reading: Informational Text

# Common Core Sixth Grade LA

- Writing
  - Write arguments to support claims with clear reasons and relevant evidence
  - 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

# Common Core Sixth Grade LA

- Writing
  - Use appropriate transitions to clarify the relationships among ideas and concepts
  - Establish and maintain a formal style
  - Write narratives to develop real or imagined experiences or events using effective technique, relevant descriptive details, and well-structured event sequences

# Common Core Sixth Grade LA

- Writing
  - Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience
  - 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

# Common Core Sixth Grade LA

- Speaking and Listening
  - 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
  - Come to discussions prepared
  - Follow rules for collegial discussions
  - Pose and respond to specific questions



# Common Core Sixth Grade LA

- Language
  - Demonstrate command of the conventions of standard English grammar and usage when writing or speaking
  - Demonstrate command of the conventions of standard English capitalization, punctuation, and spelling when writing

# Common Core Sixth Grade LA

- Vocabulary Acquisition and Use
  - 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

# *Rowley* Rears Its Ugly Head, Again

- *Klein Independent School Dist. v. Hovem*
  - Even though student had been passing classes district denied student a FAPE
  - District never addressed student's severe reading and writing deficits so he was performing at Second to Fifth grade level when in Eleventh Grade
  - District did not hold him to same standard as regular-education classmates, allowing him to not hand in homework, work on assignments at home with help of his family, and allow him to answer orally when they could not read his handwriting

# *Rowley* Rears its Ugly Head, Again

- *Klein*, District Court
  - He also failed the written portion of the TAKS test
  - District could not show he received FAPE because he did well in areas other than those in which his disability lies
  - District had provided him with spell checker and access to computer, which 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

# *Rowley* Rears its Ugly Head, Again

- *Klein*, District Court
  - 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

# *Rowley* Rears its Ugly Head, Again

- Fifth Circuit Reverses
  - Holds school district satisfies FAPE when student advances from grade to grade even though underlying disability not addressed
  - 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

# *Rowley* Rears its Ugly Head, Again

- Fifth Circuit Reverses
  - Even after given access to Kurzweil computer software program in Senior year, still took him forty minutes to complete writing assignment it took other students only ten minutes
  - Mother noted that writing so poor he could not take phone messages
  - Fifth Circuit adopted adopted "holistic perspective," stating "the whole educational experience, and its adaptation to confer 'benefits' on the child, is the statutory goal"

# *Rowley* Rears its Ugly Head, Again

- Fifth Circuit Reverses
  - “Overall educational benefit, not solely disability remediation, is IDEA's statutory goal“
  - The dissent said this approach would allow a district to satisfy IDEA by educating student with 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"



# *Rowley* Rears its Ugly Head, Again

- Fifth Circuit Reverses
  - Majority considers decision to provide accommodations instead of remediation choice of educational methodology to which reviewing courts defer
  - Yet, position to defer to school educator's choice of "methodology," as opposed to reviewing administrative hearing officer, is contrary to position taken by *Rowley* itself

# *Rowley* Rears its Ugly Head, Again

- Fifth Circuit Reverses
  - 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 admission's 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"

# Section 504

# Background

- Broad civil rights legislation and basis for ADA
- No otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by [the U.S. government]

# FAPE

- 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
- 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

# OCR's Interpretation of FAPE

- OCR asked whether it recognized FAPE standard under Section 504 “implicitly incorporates a reasonable accommodation, reasonable modification, or other such cost-conscious limitation”
- If not, how does such an interpretation square with the Supreme Court's decisions in *Davis* and *Alexander*? OCR urged to read such a limitation into Section 504's FAPE requirements

# OCR's Interpretation of FAPE

- Does OCR read into regulatory requirement for FAPE a “reasonable accommodation” standard, or other similar limitation. The clear and unequivocal answer to that is no
- OCR reviewed the regulatory history and noted the regulation was subject to Congressional review and received no objections

# OCR's Interpretation of FAPE

- OCR reviewed other sections of this regulation, noting provisions governing employment, as well as those governing higher education and vocational education, include a “reasonable accommodation” limitation. Provisions governing elementary and secondary education do not
- OCR concluded that this was intentional



# OCR's Interpretation of FAPE

- OCR carefully distinguished *Davis* and *Choate*
  - Provisions in those cases not applicable to elementary and secondary education. And, those provisions do not include reasonable accommodation limitation
  - *Davis* caution that Section 504 should not “require substantial adjustments to existing programs beyond those necessary to eliminate discrimination,” “has no impact on FAPE because that section does not require changes beyond those necessary to eliminate discrimination”

# OCR Interpretation of FAPE

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

# OCR's Interpretation of FAPE

- OCR distinguished lower court cases
  - Cases that determine what district must provide under 504 restate the *Davis* interpretation
  - 504 prohibits discrimination, rather than requiring affirmative action to overcome student's disability
  - If particular services requested in these cases are denied, it is almost uniformly because courts found discrimination was not occurring
  - Services requested were not necessary to prevent or eliminate discrimination because the services currently being provided were not discriminatory

# OCR's Interpretation of FAPE

- OCR would use same standard under ADA
  - ADA regulations state that ADA shall not be construed to apply lesser standard than 504
  - Since 504 regulations include specific FAPE standard, ADA regulations not intended to weaken existing 504 standards

# Analysis of *Rowley* in Light of 504

- District Court Decision
  - Provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of persons with disabilities as adequately as needs of persons without disabilities are met and (ii) are based on adherence to procedures
  - 504 FAPE definition significantly different from IDEA because drawn from 504's anti-discrimination background

# Analysis of *Rowley* in Light of 504

- District Court Decision
  - 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

# Analysis of *Rowley* in Light of 504

- District Court Decision
  - Between those two extremes, is a standard which is more in keeping with regulations, with Equal Protection decisions which motivated passage of the Act, and with common sense
  - This standard would require that each child with disability be given opportunity to achieve full potential commensurate with opportunity provided other children

# Analysis of *Rowley* in Light of 504

- District Court Decision
  - Requires potential of child with disability be measured and compared to performance, and resulting differential or “shortfall” be compared to shortfall experienced by non-disabled children
  - District had not provided Amy with an appropriate education
  - District 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



# Analysis of *Rowley* in Light of 504

- District Court Decision
  - 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

# Analysis of *Rowley* in Light of 504

- District Court Decision
  - 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”
  - Therefore, court found that Amy required services of interpreter

# Analysis of *Rowley* in Light of 504

- Second Circuit Affirmed
  - Amy needed “a sign language interpreter in her classroom to enable her to have the same educational opportunity as her classmates”
  - As with district court, this standard is very similar to OCR’s interpretation under 504

# Analysis of *Rowley* in Light of 504

- Supreme Court Reversed
  - Supreme Court refused to follow analysis of appropriate based on Section 504, established by lower courts, and set out its own test for appropriate based on language found in IDEA
  - However, why wouldn't the lower courts' interpretation of Section 504 definition of FAPE still be good law in a case brought under Section 504 instead of the IDEA

# Analysis of *Rowley* in Light of 504

- Given similarities between standard established by lower courts, based on their interpretation of the Section 504, and that established by OCR, very likely that Amy would be entitled to interpreter under 504
- Test established under 504 is to eliminate discrimination, defined as equalizing educational opportunity based on one's disability
- In such cases even substantial modifications may be required

# Analysis of *Rowley* in Light of 504

- 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

# *Rowley* Does Not Rear its Ugly Head

- Interpreting Services
  - Added to regulations in 2006
  - 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”

# *Rowley* Does Not Rear its Ugly Head

- Three recent court decisions relying on *Rowley* find students did not need CART services
- *Poway I*
  - ALJ found word-for-word transcription would provide greater benefit than district's meaning-for-meaning transcription
  - Wrong standard
  - So long as meaning-for-meaning transcription provides some educational benefit, it complies with IDEA



# *Rowley* Does Not Rear its Ugly Head

- *Tustin*
  - Student with cochlear implant and using lip-reading provided with closed-captioned videos, preferential seating, copies of notes and repetition of students' comments
  - Although frequently had trouble hearing student conversations, grades were average or above, teachers spoke highly of her and notebook showed no problem taking notes
  - Therefore, district met obligation to provide meaningful educational benefit without CART

# *Rowley* Does Not Rear its Ugly Head

- *Poway II*
  - Student with 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 CART

# *Rowley* Does Not Rear its Ugly Head

- Ninth Circuit Reverses
  - District’s compliance with its obligations to 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 ADA
  - IDEA, ADA, and Section 504 have different structures, goals, and standards

# *Rowley* Does Not Rear its Ugly Head

- Ninth Circuit Reverses
  - IDEA primarily provides various procedural safeguards and contains fairly modest substantive component, providing IEP developed through required procedures 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”

# *Rowley* Does Not Rear its Ugly Head

- Ninth Circuit Reverses
  - Title II establishes more substantive requirements and DOJ effective communication regulation requires 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,” subject to fundamental alteration defense

# *Rowley* Does Not Rear its Ugly Head

- Ninth Circuit Reverses
  - Court noted that ADA’s Title II effective communication regulation requires public entity “give primary consideration to the requests of the individual with disabilities, ... which has no direct counterpart in the IDEA”
  - In light of differences between IDEA and ADA and how they would interact in particular cases, court concluded it must reject district courts’ argument that success or failure of IDEA claim dictates, as matter of law, success or failure of ADA Title II claim