

**HOLOSTIC LEARNING: AMENDING THE ROWLEY TEST TO CLARIFY THE
INCLUSION DEBATE**

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INTRODUCTION

The Individuals with Disabilities Education Act (IDEA)¹ is a federal law that provides financial grants to State Education Agencies (SEA) to be used for the education of children with disabilities. Congressional action was prompted because prior to 1975, “the education needs of millions of children with disabilities were not being fully met.”² Congress recognized that many children with disabilities were being excluded from the education system and thus, were not prepared to participate in or contribute to our society as adults. The general provisions section of the IDEA begins:

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.³

Implicit in this provision is the idea that improving educational results will help children with disabilities grow to become independent, self-sufficient adults.

The IDEA requires that the state provide each child with a “free and appropriate education”⁴ (FAPE) and that the education is offered in the “least restrictive environment”⁵ (LRE) that is “appropriate.” Although “appropriate” is used to describe both FAPE and LRE, the IDEA does not define “appropriate.”

The IDEA does not identify specific education services that must be provided, but

¹ 20 U.S.C.A. §1400 (Originally passed in 1975 as the Education for All Handicapped Children Act, the act was amended and the name changed to Individuals with Disabilities Education Act in 1991).

² 20 U.S.C.A. §1400 (c)(2)

³ 20 U.S.C.A. §1400 (c)(1)

⁴ 20 U.S.C.A. §1412(a)(1)(A)

⁵ 34 CFR §300.550

it is clear that schools are to provide services that will result in academic progress, in an environment “appropriate” for learning social skills. The Supreme Court determined that the lack of substantive provisions was intentional⁶, as Congress left decisions as to the substance of education and the education environment to schools and education professionals.⁷

The IDEA has been successful in gaining access to schools for children with disabilities; all states qualify and receive grants through the act. However, disputes between parents and schools arise regarding both the efficacy of the academic aspect of the education provided and the opportunity for the child with a disability to interact socially with other children, especially non-disabled children. The IDEA does provide a detailed process for parents and schools to follow when they disagree about how the school district is providing for a child’s academic progress and social development.⁸

A disability may impact both a child’s academic achievement and a child’s ability to interact with other children and adults. Social and academic learning are both essential aspects of education. The language and structure of the IDEA treats the relative importance of LRE and FAPE as equal⁹, supporting the notion that social and academic learning are of equal importance. However, as interpreted by the courts, FAPE includes only academic learning. In addition, the

⁶ Board of Education of the Hendrick Hudson Central School District, Westchester County v. Amy Rowley, 458 U.S. 176, 190 (“Noticeably absent from the language of the statute is any substantive standard”)

⁷ Rowley, 458 U.S. 176, 191 (Congress did not impose upon the State any greater substantive educational standard than would be necessary to make such access meaningful.)

⁸ 20 U.S.C.A. § 1415 (The short title of this section is “Procedural Safeguards”)

⁹ For example, §1412 enumerates conditions for state eligibility for IDEA grants. Paragraph (a)(1)(A) says “A free appropriate public education is available to all children with disabilities residing in the state between the ages of 3 and 21”; paragraph (a)(5)(A) says, “To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled.”

FAPE requirement must be met before the LRE requirement is considered, and social learning is considered only in the LRE context.

The Supreme Court has not decided a case in which the LRE requirement was at issue. The circuit courts have devised three different tests designed to analyze and resolve disagreements regarding placement in the least restrictive environment. This paper will argue that the focus on academic achievement, to the exclusion of socialization needs, does not accurately reflect the purpose of Congress in the passage of the IDEA and that the Supreme Court should amend the definition of FAPE to include both academic and social learning as equally important factors with respect to education. Weighing these factors equally will result in decisions that clearly analyze the essential elements of an “appropriate” education and more correctly reflect the purposes of the IDEA.

PURPOSES OF THE IDEA

The IDEA seeks to ensure that children with disabilities have access to a free and appropriate education, and that states have support in providing such education.¹⁰ It does so by making Federal grants available to states and their SAE’s to be used in providing education for students with disabilities. The public policy behind the IDEA is clear. The act says: “Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living and economic self-

¹⁰ 20 U.S.C.A. §1400 (d) (The central purpose (d)(1)(A) is “To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”

sufficiency for individuals with disabilities.”¹¹ Congress hopes that children with disabilities will become independent, self-sufficient adults through appropriate education.

Education for disabled children is provided primarily by the public school systems of American states with grant assistance from the Federal Government.¹² Each state must provide the Secretary of the Department of Education a plan showing how the state will comply with IDEA conditions in order to secure this assistance. The education required by the IDEA for disabled children is described as a “free and appropriate education” wherein the education is offered in the “least restrictive environment” that is “appropriate.”¹³ Specifically, states must assure that 1) a FAPE is available to all eligible children with disabilities between the ages of 3-21, and, 2) “to the maximum extent appropriate, children are educated in the least restrictive environment.”¹⁴ An appropriate education for a child with a disability requires special instruction that may include both Special Education Services¹⁵ and Related Services.¹⁶

The meaning of “appropriate” education is not more clearly defined in the act. The act simply defines FAPE in terms of the services (Special Education Services and Related Services) necessary to meet the educational requirements.

¹¹ 20 U.S.C.A. §1400 (c)(1)

¹² 20 U.S.C.A. §1400 (d)(C) “The purposes of this title are (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.”

¹³ 20 U.S.C.A. §1400 (d) (1)(A) “The purposes of this title are (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”

¹⁴ 20 U.S.C.A. §1412 (a)(5)(A)

¹⁵ 20 U.S.C.A. §1401 (29) (The term ‘special education’ means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including...)”)

¹⁶ 20 U.S.C.A. §1401 (26) (For example, related services includes, “transportation and such developmental, corrective, and other supported services...”)

It also specifies conditions that must be met when a FAPE is provided including: 1) special education and related services must be provided at public expense and under public supervision and direction, 2) the services must meet the standard of the State Educational Agency, and 3) the services must conform to the child's individualized education program.¹⁷ Similarly, the description of LRE¹⁸ is wanting. The act does not explain whether "appropriate" LRE is simply an aspect of "appropriate" education or if it serves some other purpose. Rather, the provision requires that education of children with disabilities take place with non-disabled students as much as is "appropriate."¹⁹ Because the purpose of the act is to assure that children with disabilities become independent, self-sufficient adults and because this cannot be achieved through academic learning alone, "education" in the IDEA must involve both academic learning and social learning as the latter is also important to self-sufficiency. Generally, FAPE is defined by the courts to refer to academic learning,²⁰ implying that academic progress is the purpose of "appropriate" education, while the purpose of LRE is viewed by the courts as social development.²¹ From a compliance perspective, FAPE and LRE

¹⁷ 20 U.S.C.A. §1402(a)(9)

¹⁸ 20 U.S.C.A. §1412(a)(5)(A) "To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

¹⁹ 20 U.S.C.A. §1412(a)(5)(A)

²⁰ See for example, Daniel R.R. v. Bd. of Educ., 874 F.2d 1036, footnote 8 (5th Cir. 1989) ("As we use the term 'educational benefits' here, we, like the hearing officer and the district court, refer to the academic benefits available through education-as opposed to the overall growth and development benefits gained from education.")

²¹ See for example, Oberti v. Board of Education 995 F.2d 1204, 1217, FN 23 (1993) (The court says, "Learning to associate, communicate and cooperate with nondisabled persons is essential to the personal independence of children with disabilities. The Act's mainstreaming [LRE] directive stems from Congress's concern that the states, through public education, work to develop such independence for disabled children.")

are both critical to IDEA because failure either to provide any child a FAPE or a LRE is a failure to comply with the Act.²² Achieving the purpose of the IDEA requires giving meaning to these terms that supports both social and academic learning; since both are essential elements of an “appropriate” education that will help children with disabilities become independent adults.

Development of Children with Disabilities into Independent Adults

Congress passed the IDEA to help children with cognitive disabilities as earlier legislation helped those with physical disabilities. Much has been done to remove barriers so that physically disabled people are better able to fully participate in society. The IDEA supports education for school age children with disabilities that affect the child’s ability to learn.²³ This requires more than removal of barriers. Special services designed to overcome learning difficulties²⁴ are required so that children with disabilities are better able to achieve the twin goals of independent living and economic self-sufficiency.

Employment is essential for economic self-sufficiency in our society. Although there is a wide variation in the skills and knowledge required for various jobs, nearly all jobs today require basic academic knowledge including reading, writing and arithmetic. Different disabilities affect learning these skills in different ways. Two examples will illustrate some of the variations. One, a blind child will need help learning to read Braille and, perhaps, access to special audio recording equipment. These special services make it possible for the blind child

²² Three common reasons for finding violation of the IDEA are: 1) Failure to follow the procedural requirements of the IDEA, 2) Failure to meet the requirements of FAPE as defined in Rowley, and 3) Failure to meet the requirements for LRE.

²³ 34 C.F.R. §300.7 (Definition of a child with a disability)

²⁴ 34 C.F.R. §300.26 (Definition of special education)

to learn academic information and, at the same time, learn to use tools that will allow her to perform a variety of jobs as an adult. A second example, autism, is another disability that affects a child's ability to learn. Many children with autism are non-verbal making it difficult to determine their academic understanding. New forms of communication have been developed to allow communication with some non-verbal children. As with a blind child, special services may help the child with autism acquire academic knowledge and develop into an employable adult.

Social interaction, in addition to employment, is an essential element of independence and self-sufficiency. Basic social understanding, the ability to interact with others, is required for many jobs as well as other daily aspects of living in American society. Like basic academic skills, different disabilities affect learning social skills in different ways. However, unlike academic skills, social interaction requires at least two people. Because of this, social interaction may be influenced by the non-disabled person's perception and understanding of the disabled person's disability. The two examples above illustrate these differences also. The limitations caused by blindness are usually understood by sighted people. Effective social interaction between a sighted and a blind person can easily be learned by both. In addition, society provides a variety of devices, such as white canes, to help blind persons interact with society and help to signal sighted individuals that the person carrying the cane is blind. The experience of a child with autism is often very different. A child with autism may exhibit a wide range of unusual behaviors, for example, apparently random vocalization by a

non-verbal child. Such behavior is often not understood by people who encounter a child with autism. If the child with autism cannot communicate in a way that a nondisabled person understands, the lack of understanding may become a complete barrier to social interaction. Such a barrier may preclude employment or even simple interaction such as buying a snack at a convenience store. A child with autism who does not develop some ability to successfully interact with nondisabled children in school may become an adult with little independence.

Free Appropriate Public Education²⁵

The IDEA says that:

“The term ‘free appropriate public education’ means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 614(d).

The Act does not further define “appropriate” education. Education in the context of school commonly refers to gaining knowledge and understanding of academic subjects. Webster’s dictionary defines education as, “The process of training and developing the knowledge, skill, mind, character, etc., especially by formal

²⁵ 20 U.S.C.A. §1402 (9)

schooling; teaching; training.”²⁶ Thomas Jefferson, an early proponent of public education said, “The whole scheme of education would be the teaching all the children of the State reading, writing, and common arithmetic.”²⁷ This definition of education, predominant in education today, limits education to academic learning.

Students’ understanding of the academic material is measured by testing, and students who fail may not be allowed to progress to the next grade level. Some children fail because the child has a disability that negatively affects the child’s ability to learn. The IDEA requires schools to implement procedures to identify students who have such disabilities²⁸ and to provide special education and related services designed to help the individual child overcome, or compensate for, her specific learning difficulty.²⁹ Educators have found that many children who some years ago would have been labeled “slow” or “retarded” can learn academic subjects when they are given additional attention or taught with a different method. Today, the disabilities that result in a learning difficulty are better understood, and schools are more often able to tailor special services to match the needs of the individual child, allowing the child to acquire academic skills essential for employment. Thus, the special education and related services that support academic learning are an essential element of FAPE. However, limiting the scope of “appropriate” education in this way would not fulfill the purposes of the IDEA.

²⁶ Webster’s New World Dictionary (3rd College Edition, 1988

²⁷ The Life and Selected Writings of Thomas Jefferson 263 (Adrienne Koch and William Peden eds., Random House, Inc. 1944)

²⁸ 20 U.S.C.A. §1412(a)(3) (Child Find requirement)

²⁹ 20 U.S.C.A. §1412(a)(4) (Individualized Education Program requirement)

As noted, the purpose of the IDEA is to prepare children for employment and independent living through education. Although understanding of academic subjects is an essential element of this purpose, so too is understanding of social interaction. Generally, social development is treated as a natural, almost inevitable outcome of children attending school together. Extracurricular activities such as sports and music as well as school sponsored social events support the social development of students.

However, a child with a disability that inhibits the child's ability to learn social skills from simply interacting with others may not learn appropriate social interaction simply by attending school. A child's disability can affect her ability to interact with other children in at least two ways. First, poor academic performance may cause a child to feel different, not part of the class. Special services directed toward academic learning may also result in improved social interaction for such a child. Second, some disabilities, notably autism, directly inhibit the child's ability to develop social skills. Children with autism often do not imitate others and, so, do not learn from imitation in the way that typical children do.³⁰ For children whose disability affects social learning, special education and related services directed toward social learning are an essential element of education.

The IDEA charges schools with supporting children with disabilities to become independent adults through "appropriate" education. The requirement to provide a FAPE means providing special education and related services that

³⁰ Serving Students With Autism, 9 (LRP Publications, Patricia Grzywacz and Lisa Lombardo, eds. 1999)

support both social and academic learning since both are essential elements for becoming independent adults.

The Role of the LRE Requirement

The IDEA, in addition to the requirement of FAPE, requires that education of children with disabilities take place with non-disabled students as much as is “appropriate.”³¹ The term LRE has been interpreted to embody a range of possible placements, including the regular education classroom (least restrictive), part time in a special education classroom, or full time care in a separate institution or at home (most restrictive).³² In addition to the more general requirement for “appropriate” placement, the act specifies a strong preference for placement in the regular classroom. One of the required elements of the child’s Individualized Education Program (IEP)³³ is “An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.”³⁴

The purpose of the LRE requirement, with its focus on education in the regular education classroom, is not further addressed in the Act. Since the purpose of the IDEA is to ensure that children with disabilities have access to a free and appropriate education, the LRE requirement must be intended to support that purpose in some way. The presence of children with disabilities in

³¹ 20 U.S.C.A. §1412(a)(5)(A)

³² 34 C.F.R. 300.551(a) The regulation states: “Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.”

³³ 20 U.S.C.A. § 1414(d)(A) (The IEP, developed by the school and the parents together, includes a number of elements detailing the services that will be provided the child as well as the progress expected of the child.)

³⁴ 20 U.S.C.A. § 1414(d)(A)(i)(V)

the regular classroom influences the quality³⁵ of the educational experience for nondisabled children as well as the children with disabilities.

The LRE requirement is included in the act to assure that, to the extent possible, the unique quality of the educational experience resulting from the inclusion of disabled children, is added to the regular classroom. The LRE requirement goes directly to the social learning aspect of FAPE. The nature of learning social interaction requires experience with a variety of types of interaction³⁶ with a number of individuals.³⁷ Attendance in the regular classroom provides opportunity for interaction between disabled and nondisabled children in the formal environment of a classroom, supporting social learning for both.³⁸ The LRE requirement furthers the IDEA purpose of developing self-sufficient, independent adults by using the regular classroom experience to support social learning. Courts resolving IDEA disputes have defined both FAPE and LRE. An analysis of the key decisions reveals an incomplete definition of FAPE, limiting “appropriate” education to academic learning. The decisions also demonstrate an inconsistent analysis of the purpose of LRE as well as a failure to consider the interrelated nature of FAPE and LRE, instead treating the two requirements as separate.

³⁵ Note: Quality here refers to the basic nature of the educational experience. It does not imply superiority or excellence.

³⁶ Examples include asking for help, group discussion, social chat etc.

³⁷ Examples include people one knows well, hardly know at all, friends, bullies, etc.

³⁸ Although the IDEA concerns children with disabilities, the independent living the act seeks requires the ability to interact with nondisabled persons. In addition, at least one court considers the experience for nondisabled children supportive of the purpose of the act. The Oberti court said, “Courts should also consider the reciprocal benefits of inclusion to the nondisabled students in the class.” Oberti v. Board of Education 995 F.2d 1204, at FN 24

COURT INTERPRETATIONS OF THE IDEA

The Supreme Court Rowley Decision – Academic Learning Required

The U.S. Supreme Court, in Board of Education v. Amy Rowley,³⁹ provides the definition of FAPE as it is used in IDEA cases today.

The Court established a two pronged test to be used to decide whether a child has been denied a FAPE. “First, has the State complied with the procedures set forth in the Act?⁴⁰ And, second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?”⁴¹

The Rowley case concerned a deaf child (Amy Rowley) with limited residual hearing who was an excellent lip reader. The school provided a hearing aid system to amplify the teacher’s voice and to allow Amy to hear partially but considerably less than if she were not deaf.⁴² Amy was able to pass from grade to grade but was learning less than she would have if she did not have this disability.⁴³ The parents were not satisfied with this level of academic performance and wanted the school to provide a sign-language interpreter for all academic classes instead of the amplification system.⁴⁴ The dispute in Rowley concerned only the issue of academic performance, and the court, when using the term “education,” is referring only to the academic aspect of education. The

³⁹ Board of Education of the Hendrick Hudson Central School District, Westchester County v. Amy Rowley, 458 U.S. 176, 206

⁴⁰ Rowley, 458 U.S. 176, 206 (For some time lower courts applied this prong so that any procedural deviation, no matter how minor, required a judgment of denial of FAPE. This is now limited to procedural errors that negatively impact the child’s education. See for example, J. K. v. Metropolitan School District 2005 WL 2406046,13, “Only those procedural flaws that result in loss of educational opportunity can be held to deny a student a FAPE.”)

⁴¹ Id. at 207

⁴² Id. at 185

⁴³ Id.

⁴⁴ Id. at 184

court acknowledged that Amy Rowley is receiving her education in a regular classroom and limits its analysis to the specific situation presented in the case.⁴⁵ Courts have continued to use the Rowley analysis to decide whether a FAPE has been provided, adding, wrongly, that FAPE⁴⁶ includes only academic learning. As a result, courts deciding cases that involve a dispute regarding LRE first decide whether the “educational benefits” (meaning academic learning) required for FAPE have been provided and, secondarily, whether education is being offered in the least restrictive environment.⁴⁷

Appellate Court LRE Decisions – Social Learning Achieved Through LRE Requirement – Secondary to Academic Learning

Following the Rowley definition of FAPE, disputes about LRE have used the LRE requirement as the basis for argument that social learning may be as important as academic learning. Appellate courts have treated the LRE requirement as separate from and secondary to the FAPE requirement. The Rowley court did not address the LRE requirement and the Supreme Court has not addressed the issue. Because there is no Supreme Court precedent resolving an LRE dispute, analysis of this issue has been left to the appellate courts. Courts have found this analysis especially thorny, because the IDEA “embodies an express tension between its two substantive commitments to the

⁴⁵ Id. at 202 (The court said: “We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.”)

⁴⁶ Note: The terms FAPE and “appropriate” education are often used interchangeably in the cases. Also, both, most often, refer to academic learning only.

⁴⁷ See, for example, Beth B. v. Van Clay, 211 F.Supp2d 1020, 1031 “our foremost consideration is assuring educational benefits to the child...and then on whether the child could have greater exposure to non-disabled students.”

appropriate education and to the least restrictive alternative.”⁴⁸ Circuit courts have developed three different tests, the Roncker⁴⁹ test, the Daniel R.R.⁵⁰ test and the Rachel H.⁵¹ test, to analyze LRE decisions.

The Roncker test first requires a decision regarding what special education services will be provided; it then asks whether it is feasible to deliver the same services in the regular classroom.⁵² This “feasibility” test has been criticized because it suggests that courts should make decisions regarding which educational methods are feasible in the regular classroom. For example, the Daniel R.R. court says “Whether a particular service feasibly can be provided in a regular or special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.”⁵³ The “two-part” test developed by the Daniel R. R. court replaces the Roncker feasibility question” with the question whether education “can be satisfactorily achieved” in the regular classroom.⁵⁴ The Rachel H. court adopts the “satisfactorily achieved” approach from Daniel R. R. changing some of the

⁴⁸ Oberti v. Board of Education 995 F.2d 1204, 1214 (1993) (Quoting Professor Martha Minow)

⁴⁹ Roncker on Behalf of Roncker v. Walter, 700 F.2d, 1058 (C.A. Ohio, 1983)

⁵⁰ Daniel R.R. 874 F.2d at 1048

⁵¹ Sacramento City Unified Sch. Dist. V. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994)

⁵² Roncker 700 F.2d at 1063 (“[i]n a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.”)

⁵³ Daniel R.R. 874 F.2d at 1046

⁵⁴ Daniel R.R. 874 F.2d at 1048 (The question for part one is, “Whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.” Part two is reached only if the answer to part one is no and the child is to be removed from the regular classroom. If so the question is, “Whether the school has mainstreamed the child to the maximum extent appropriate.”)

factors to be considered when deciding whether education can be satisfactorily achieved in the regular classroom.⁵⁵

Appellate courts recognize that the Supreme Court explicitly limited the scope of the Rowley decision to the facts in that case and that LRE was not an issue before the court.⁵⁶ However, none of the LRE decisions offers an analysis of how the Rowley definition of FAPE is affected, if at all, by the LRE requirement. Instead, the courts view the LRE issue as separate from FAPE, treating the Rowley definition of FAPE as complete and final. As a result, courts treat FAPE (academic learning) and LRE (social learning) as conflicting requirements.⁵⁷ Furthermore, the nature of the conflict is seen as a zero sum equation, where a decision favorable to LRE subtracts from FAPE.⁵⁸ The basis of the perceived conflict between social and academic learning in special education is found, not in the substantive provisions of the act, but rather, in the adoption of the narrow definition of “appropriate” education from Rowley for subsequent IDEA analysis by the appellate courts.

⁵⁵ Rachel H., 14 F.3d 1398, 1401 (Four factors are considered: 1) Educational Benefits 2) Non-academic Benefits 3) Effect on the Teacher and Children in the Regular Class 4) Cost. The Daniel R.R. court considered the overall educational experience rather than non-academic benefits and did not consider cost.)

⁵⁶ Daniel R.R. 874 F.2d 1036, 1045

⁵⁷ Oberti v. Board of Education 995 F.2d 1204, 1214 (1993) There is “tension within the Act between the strong preference for mainstreaming, and the requirement that schools provide individualized programs tailored to the specific [academic] needs of each disabled child.”

⁵⁸ See for example, Ronker 700 F.2d 1058, 1063 (The court suggests that the academic benefit lost by placement in the regular classroom may be offset to some extent by providing additional services in the regular classroom.)

IDEA Requires Academic Learning and Social Learning in Balance – both Secondary and Separate Treatment are Incorrect

Treatment of social learning as secondary to academic learning is not consistent with the purpose of the IDEA, may deny both disabled and nondisabled children social learning benefits, and may cause loss of services for those with a disability that directly impedes social learning. In addition, analysis of the social and academic learning needs of a particular child under IDEA as independent of each other is contrary to actual educational experience of nondisabled as well as disabled children and may lead to less than optimal decisions regarding services provided and placement of students with disabilities.

Education that offers both social learning and academic learning should not be seen as necessarily involving an inherent conflict. Rather, for most students, these two aspects of learning are simply parts of a single educational experience. A goal of the IDEA is for children with disabilities to have an education experience similar to the experience of a nondisabled child. Accordingly, “appropriate” education requires balancing the social and academic learning needs of each child concurrently. For example, children learn to ask permission to answer a question posed by the teacher, showing academic understanding as well as appropriate social conduct. A determination of the supplemental services required, in conjunction with the placement decision, must be made in a way that balances social and academic learning based on the needs identified for a particular child with a disability, to provide an educational experience similar to the experience of nondisabled classmates.

The importance of social development benefits that result from the placement of children with disabilities in the regular classroom has been acknowledged by the courts. For example, the court in A.S. v. Norwalk Board of Education,⁵⁹ acknowledged that a child may obtain unique benefits; “From integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with non-disabled peers.” The Oberti court⁶⁰ court adds that Congress intended social learning to be considered important:

“In passing the IDEA, Congress recognized the importance of teaching skills that would foster personal independence and dignity for handicapped children. Learning to associate, communicate and cooperate with nondisabled persons is essential to the personal independence of children with disabilities.”⁶¹

These aspects of learning are not a secondary consideration. Rather, they are essential for self-sufficiency and required elements of an “appropriate” education.

The court in Oberti also noted that, in addition to the social learning benefit that placement in the regular classroom provides for the child with a disability, the nondisabled children in that classroom may also receive added social learning.⁶²

The court said:

“Courts should also consider the reciprocal benefits of inclusion to the nondisabled students in the class. Teaching nondisabled children to work and communicate with children with disabilities may do much to eliminate the stigma, mistrust and hostility that have traditionally been harbored against persons with disabilities.”⁶³

⁵⁹ A.S. v. Norwalk Board of Educ., 183 F.Supp.2d 534, 546 (D.Conn., 2002)

⁶⁰ Oberti v. Board of Education 995 F.2d 1204 (1993)

⁶¹ Id. at 547

⁶² Oberti v. Board of Education 995 F.2d 1204

⁶³ Oberti v. Board of Education 995 F.2d 1204, at FN 24

Although the IDEA is not intended to benefit nondisabled children, awareness and understanding of individuals with disabilities supports the act's purpose. Children who have the experience of interacting with a child with a disability may have greater understanding, be more accepting and be more willing and able to work with adults with disabilities.

Children with disabilities that negatively impact social learning may need supplemental services that specifically address aspects of social learning. For example, autism inhibits a child's ability to interact with others. "Social dysfunction is perhaps the most central defining feature of autism and related conditions."⁶⁴ Many children with autism are non-verbal and lack any form of understandable and appropriate communication, a key element for social interaction. Although communication may be considered an aspect of social learning, the ability to communicate with others is not of secondary importance for independent living.

The lack of verbal communication also exemplifies the intertwined nature of social and academic learning because verbal communication is a primary element of both. Treating the two aspects of learning separately adds confusion to the analysis of a child's educational needs and may result in failure to properly assess those needs. Sue Rubin's description of learning to communicate illustrates this. During the first 13 years of her life, Sue didn't communicate at all except by using behaviors. "I was locked in autism," she says.

"It was only after I began to type that my brain became organized enough to understand what was going on in the world around me ...

⁶⁴ Serving Students With Autism, 9 (LRP Publications, Patricia Grzywacz and Lisa Lombardo, eds. 1999)

I became aware of people and their killer personal lives.” As a child Sue used to beat her head against the concrete floor at her school, and regularly bit, kicked and pinched her parents, she was considered severely mentally retarded with an IQ of 24.”

Today, since learning to communicate through typing, she has graduated from high school and is a junior at Whittier College.⁶⁵ Sue Rubin’s autism was considered the cause of both mental retardation and her aggressive behavior. Her story demonstrates how the inability to communicate can dramatically affect both academic performance and social learning.

Appellate courts have adopted an understanding of FAPE, based on the Rowley decision, limiting “appropriate” education to academic learning. As a result, the importance of social learning is diminished. The courts’ treatment of LRE as the method for providing social learning, rather than a requirement that the quality of the educational experience for children with disabilities is similar to that of nondisabled children, leads to a perception that social and academic learning are separate and conflicting aspects of education. Instead, they are both essential and, in many ways, intertwined elements of an education that will prepare children to become independent adults. The analysis of FAPE should include consideration of whether sufficient supports and services have been provided so that the child achieves meaningful education benefit in both areas of learning. To that end, a new test is proposed.

PROPOSED HOLISTIC LEARNING TEST

The proposed test is an extension of Rowley to a social learning setting. It would explicitly define FAPE to include both academic and social learning and

⁶⁵ Melinda Henneberger, *My Mind Began to Wake Up*, Newsweek Feb. 28, 2005

recognize that the later LRE analysis requires consideration of the quality of the entire educational experience anticipated in the proposed environment.

The Rowley court developed a two prong test addressing procedural errors and FAPE. The first prong of Rowley is a threshold test asking whether the “State complied with the procedures set forth in the Act?”⁶⁶ If the state has not complied with the procedural requirements, they are in violation of the Act and no further analysis is needed. This first prong remains unchanged in the proposed test. A failure to comply with procedures resulting in loss of educational opportunity is a denial of FAPE.

The second prong of Rowley should be modified to include social as well as academic learning, correcting the current perception that educational benefit is limited to academic learning. The question is whether “The individualized educational program developed through the Act’s procedures [is] reasonably calculated to enable the child to receive” [academic and social] educational benefit.⁶⁷ Compliance with FAPE requires a showing that consideration is given to both social and academic learning, finding the combination of the two that will best achieve educational benefit for the child.

The third prong, a two step analysis, is reached in those cases involving a dispute regarding LRE. The first step, addressing the statutory presumption in favor of placement in the regular classroom, asks whether the child will be placed full time in the regular classroom and, if not, whether adequate consideration has been given to providing the needed services in the regular classroom. Step two,

⁶⁶ Rowley at 207

⁶⁷ Id.

in the case of a child who will not be placed at all in the regular classroom, asks whether adequate provisions have been made for the child to experience interaction with non-disabled peers in environments outside the classroom.

Analysis of two decided cases with the proposed test will illustrate changes that could result. A summary of the facts and the courts' analysis of each case is followed by an analysis using the proposed Holistic Learning test. The first prong is not at issue in any of the cases and will be ignored in the analysis.

First Example: Katharine G. ⁶⁸

Synopsis of the Analysis of the Court

When she was three years old Katherine G. was diagnosed with a language disorder and found eligible for special education services under the IDEA. She was placed in a special day care and taught by a speech a language pathologist during two preschool years. When she reached kindergarten age her parents requested that she be placed in a regular kindergarten class. According to her teacher's assessment, "Katherine's language ability improved during the past year but, she was not quite ready for participation in a full inclusion placement."⁶⁹ The school district determined that placement in the regular class would not be appropriate and offered placement in a kindergarten special day class with placement in the regular classroom form 12:00 PM to 2:15 PM each

⁶⁸ Katherine G. v. Kentfield School District, 261 F.Supp.2d 1159 (N.D. Ca. 2003)

⁶⁹ Id. at 1163

day.⁷⁰ No agreement on placement was reached and both the school and Katherine's parents asked for a due process hearing.⁷¹

The Hearing Officer found "That a full inclusion placement, the alternative urged by Katherine's parents, even supplemented with appropriate aides and services, would provide Katherine with no educational benefit," therefore, the district placement was appropriate.⁷² Katherine's parents appealed and the District Court affirmed the Hearing Officer's decision saying that Katherine, "will have to show that...as a matter of law it is more likely than not that a full inclusion setting would have provided her with educational benefit."⁷³ The court used the Rachel H. four factor balancing test to determine whether Katherine will receive educational benefit. The court applies the four factors as follows:⁷⁴

1. Katherine "Would not receive any educational (i.e., academic) benefits from a full inclusion placement."
2. Katherine "Would likely receive some non-educational benefits from a full inclusion placement."
3. "Katherine's presence in a regular classroom would likely have minimal effect on the teacher and other students."
4. The school district conceded that cost was not a factor.

Based on these findings the Court decides "That the first factor effectively 'trumps' its findings regarding the other three factors and compels it to conclude that a full inclusion placement would not result in Katherine's being provided a

⁷⁰ Id. at 1163

⁷¹ Id. at 1164

⁷² Id.

⁷³ Id. at 1175

⁷⁴ Id. at 1182-1183

FAPE.⁷⁵ Said another way, the court cannot consider social learning benefits unless academic learning benefits are shown first.

Holistic Learning Analysis

The Holistic Learning Analysis requires consideration of social and academic learning together as elements of FAPE. Katherine's social learning needs are identified and balanced with her academic learning needs to determine the services needed to provide her a FAPE. This approach allows for the possibility that, even though Katherine receives less academic learning, the importance of the social learning is the more important factor for this child, with this disability, at this stage in her education.

Katherine's language disorder is a disability that directly affects her ability to interact with others, including her teachers and classmates, and may affect her academic performance as well. Using the Holistic Learning analysis, services and aids needed to provide Katherine both social and academic learning are identified to meet the FAPE requirement, prior to consideration of placement.

After the FAPE determination is made, the role of placement in providing Katherine the anticipated education experience is considered. A determination is made as to whether all of the services Katharine needs can reasonably be provided in the regular classroom. If so, placement in the regular classroom is presumed. If not, it may be that placement in the regular classroom is essential to provide some of the services identified as necessary and placement in the regular classroom remains the most appropriate. Finally, the court would also consider the effects, both positive and negative, of Katherine's presence in the

⁷⁵ Id. at 1183

regular classroom. For example, if Katherine’s behavior is disruptive and cannot be controlled with behavior supports, placement in the regular classroom may not be appropriate.

Second example: Michael J.⁷⁶

Synopsis of the Analysis of the Court

Patrick J. was diagnosed with autism before his second birthday.⁷⁷ He was found to be moderately mentally retarded with a serious impairment in communication ability.⁷⁸ His evaluation indicated that he would need speech/language therapy and occupational therapy as well as academic support.⁷⁹ His parents arranged for intensive (40 hours per week) Applied Behavioral Analysis (ABA) training in their home from the time Patrick was age 3 to age 6.⁸⁰ The school district offered placement in the school’s autistic support classroom but Patrick’s parents felt that the school district personnel were not adequately trained and enrolled him in a private school.⁸¹ Parents then requested a due process hearing seeking reimbursement for the private school tuition.⁸²

Although the case is a dispute regarding placement, the court provides little analysis of LRE considerations related to placement. The parents argued that “offering a child education within the least restrictive environment is not a substitute for offering FAPE,” and the court agrees saying, “The School District

⁷⁶ Michael J. and Deirdre J. as Parents and Nearest Friends of Patrick J., v. Derry township School District, Slip Copy, 2006 WL 148882 (M.D. PA. 2006)

⁷⁷ Id. at 2

⁷⁸ Id. at 4

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id. at 11

⁸² Id. at 12

must first prove that the IEP will provide a meaningful educational benefit.”⁸³ The court’s finding that the program offered by the school is “reasonably designed to assist Patrick succeed in an educational environment,” appears to be based solely on considerations of academic learning.⁸⁴ Consideration of social learning is limited to the court noting that it is “relevant” that the District’s proposed placement will “provide an appropriate education for Patrick in the least restrictive environment possible, where Patrick would have the opportunity to interact with non-disabled peers in controlled settings.”⁸⁵ This court, like the Katherine G. court, finds that social learning is not part of FAPE.

Holistic Learning Analysis

The program proposed by the District was designed to “provide for communication and socialization skill development.”⁸⁶ The court finds that “the strategies the District contemplated...were meaningful, sufficiently intense, and reasonably designed to assist Patrick [to] succeed in an educational environment.”⁸⁷ Although referred to by the court in the LRE context, it appears that the school has offered supports and services that address both academic and social learning, satisfying the FAPE requirement as defined in the proposed Holistic Learning test.

⁸³ Id.

⁸⁴ Id. at 25

⁸⁵ Id. at 26

⁸⁶ Id. at 24

⁸⁷ Id. at 25

The first step in the third prong of the test considers whether the proposed placement is in the regular classroom.⁸⁸ However, since placement in the regular classroom is not considered in this case, the analysis proceeds to the second step; whether adequate provisions are made for the child to interact with nondisabled peers. The private school placement the parents have chosen does not include any opportunity for interaction with nondisabled peers. However, the placement proposed by the school includes the opportunity for Patrick to interact with nondisabled peers in controlled settings.⁸⁹ Using this analysis, the court would determine that the school's proposal is the more appropriate because it will provide Patrick the services and supports he needs for both social and academic learning in the least restrictive environment.

CONCLUSION

Congress passed the IDEA to assure children with disabilities access to education, helping them to become independent, self-sufficient adults. Special education services are provided so that children with disabilities learn the knowledge they need to become self-sufficient.

Traditionally, education has referred to acquiring academic knowledge, and courts, deciding whether a particular child has been denied a "free and appropriate education," have adopted the traditional meaning, equating "appropriate" education with academic learning. Courts treat the requirement for FAPE (academic learning) a threshold requirement that must be met before LRE

⁸⁸ In this case, neither party proposed placement in the regular classroom. It should be noted that the school is still obligated to provide a statement explaining the reasons that Patrick cannot be placed in the regular classroom.

⁸⁹ Michael J. at 26

is considered. As a result, social learning is treated as separate from, and secondary to, academic learning and is addressed indirectly through the LRE requirement.

Because courts equate FAPE exclusively with academic learning, parties use the LRE requirement to include social learning as an essential element of education. The cases show that attempts to use LRE as a vehicle to require interaction with non-disabled peers to benefit social learning are successful only in those cases where academic learning can be achieved in the regular classroom. This incorrect interpretation results in a failure to acknowledge social learning as an essential element of “appropriate” education required for FAPE, inconsistent analysis of the LRE requirement among the courts, and interpretations of the LRE requirement that are inconsistent with the IDEA purpose. Since basic social skills are necessary for independent adults, the IDEA goal of promoting self-sufficiency among adults with disabilities is impeded by this misinterpretation.

This approach also leads to the incorrect conclusion that the FAPE and LRE requirements conflict in a way that can only be resolved by favoring one at the expense of the other. Analysis of the Katherine G. and Michael J. cases using the proposed Holistic Learning Test demonstrates that this approach clarifies the meaning of “appropriate” education for a particular child and focuses the role of LRE on the interaction between the child with a disability and his nondisabled peers and the effect of that interaction on the quality of the educational experience.

The LRE requirement reflects an understanding that self sufficiency requires the ability to interact successfully with nondisabled people. The Holistic Learning Test will eliminate the use of LRE as the only avenue for inclusion of social learning as an element of a child's educational needs. The role of the LRE requirement is to assure that, in addition to special services to support both academic and social learning, schools provide an education environment that offers opportunities for learning from interaction between children with disabilities and their nondisabled peers. This approach is consistent with the LRE provisions of the Act, reduces confusion regarding LRE decisions, and requires schools to address the social learning needs of children with disabilities so that they are more likely to become self-sufficient adults.