

Have the Amendments to the Individuals with Disabilities Education Act Razed *Rowley* and Raised the Substantive Standard for “Free Appropriate Public Education”?

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ABSTRACT

After recapping the substantive standard for free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) first spelled out in *Board of Education v. Rowley*, 458 U.S. 176 (1982), this article traces recent legal commentators’ advocacy for elevating this FAPE standard based on the changed statutory context of the 1997 and—punctuated by the NCLB in 2001—the 2004 reauthorizations of IDEA, followed by the corresponding case law that has largely negated such advocacy in the absence of more specific amendments. The missing link, which the previous commentators and case law have largely failed to address, may be the provision in IDEA 2004 requiring that the IEP statement of special education and related services be based on peer-reviewed research to the extent practicable. After canvassing the initial hearing officer and court applications of PRR, which provide limited support for a heightened standard, the article ends with a discussion of the implications of this new provision for special education practice, litigation, and policymaking.

The Individuals with Disabilities Education Act (IDEA)¹ dates back to 1975, when Congress passed the first version of this funding

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legislation for special education.² IDEA was passed two years after the enactment of Section 504 of the Rehabilitation Act,³ a civil rights statute prohibiting disability discrimination.⁴ The central obligation under IDEA is the provision for “free appropriate public education,”⁵ via an individualized education program,⁶ to each student with a disability.⁷ The adjudicative dispute resolution system under IDEA starts with an impartial due process hearing, provides each state with the option of a second review officer tier, and then provides concurrent jurisdiction for judicial review via state and federal courts.⁸

more recently, for *Teaching Exceptional Children*. Past president of the Education Law Association and co-chair of the Pennsylvania special education appeals panel from 1990 to 2006, he is the author of the two-volume reference *Section 504, the ADA, and the Schools*, and the recent CEC monograph *The Legal Meaning of Specific Learning Disability*.

1. 20 U.S.C. § 1400 (2000).

2. The successive reauthorizations included the 1986 amendments, Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99 §457, 100 Stat. 1145 (1986) (amended 1990), which included attorneys’ fees for prevailing parents; the 1990 amendments, Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101 §476, 104 Stat. 1103 (1990) (amended 1991), which provided, *inter alia*, the IDEA as the new name for the original Education of the Handicapped Act; the 1997 amendments, Individuals with Disabilities Act Amendments of 1997, Pub. L. No. 105 §17, 111 Stat. 37 (1997) (amended 2004), which included major provisions for discipline of students with disabilities; and the most recent 2004 amendments, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108, §446, 118 Stat. 2647 (2004), which included fine-tuning to several provisions of the Act.

3. 20 U.S.C. §§ 705(20), 794, 794a (2000); *see generally* PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004) (a comprehensive reference that includes the interrelated Americans with Disabilities Act).

4. *See generally* Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 EDUC. L. REP. 1 (2007) (a systematic canvassing of the similarities and differences between IDEA and Section 504 of the ADA).

5. 20 U.S.C. § 1401(9) (2008). *See, e.g.*, *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008) (characterized FAPE as “the central pillar of the IDEA statutory structure”).

6. 20 U.S.C. §§ 1401(14), 1414(d) (2005). *See, e.g.*, *Honig v. Doe*, 484 U.S. 305, 311 (1988) (characterizing the IEP as “the primary vehicle” of the IDEA).

7. 20 U.S.C. §§ 1401(3), 1412(a)(1)(A) (2005).

8. 20 U.S.C. § 1415(i)-(l) (2005). The trend at the administrative level of this hierarchy has been a marked increase in single tier systems of full-time administrative law judges, although there continues to be marked variety among the

Special education, akin to the military, is full of specialized terms, including a bewildering array of acronyms. Many of them have legal significance under IDEA. Although this author has endeavored to limit the use of acronyms, here is an introductory glossary as a quick reference of those appearing in this Article:

- AYP (adequate yearly progress): the metric that the NCLB requires for holding schools and school districts accountable in terms of their student populations overall, and four disaggregated subgroups in particular (i.e., students with disabilities, limited English proficient students, economically disadvantaged students, and minority students)
- FAPE (free appropriate public education): the central IDEA obligation of school districts to students with disabilities
- IDEA 97 and IDEA 2004: the 1997 and 2004 amendments to the Individuals with Disabilities Education Act
- IEP (individualized education program): the document that specifies the FAPE for the individual eligible student, including, for example, measurable goals, specially designed instruction, related services, and, for a child sixteen years or more in age, a transition plan for postsecondary employment or education
- LRE (least restrictive environment): the interrelated IDEA mandate that school districts maximize the interaction of each eligible student with nondisabled students
- NCLB (No Child Left Behind Act): the 2001 funding legislation that included a wide variety of K-12 educational reforms, including accountability measures for public schools and school districts
- OSEP (U.S. Office of Special Education Programs): the part of the USDE that administers the IDEA

states. See, e.g., Perry A. Zirkel, Zorka Karanxha & Anastasia D'Angelo, *The Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAALJ 27 (2007).

- PRR (peer-reviewed research): a term used in the prescribed IEP ingredients under IDEA that is associated with research, whether scientifically based or not, that experts have approved as worthy of dissemination
- SBR (scientifically based research): a term defined in the NCLB and imported into IDEA 2004 for specified permissive and mandatory applications
- SEA (state education agency): used in citations herein to designate hearing or review officer decisions
- USDE (U.S. Department of Education): the administrative agency for the various federal education laws

The purpose of this Article is to describe, not prescribe, the evolving answer to the question of whether a new, significantly elevated substantive standard of FAPE applies in place of *Board of Education v. Rowley* as a result of the successive changes in IDEA 97 and—punctuated by the NCLB—IDEA 2004. The analysis is divided into five successive parts. Part I provides an overview of the Supreme Court’s first and foremost IDEA decision, *Rowley*, in terms of its interpretation of the meaning of FAPE, with special attention to its substantive standard. Part II summarizes the pertinent scholarly commentary in the overlapping literatures of special education and education law. Part III canvasses the case law that addresses the broad changes in the language of IDEA 97, the NCLB, and IDEA 2004. Part IV focuses specifically on the PRR provision of IDEA 2004. Part V analyzes the seeming “Y” in the road represented by hearing officer and court decisions in Iowa and California, respectively. The conclusion discusses the implications in terms of practice, litigation, and policymaking.

I. THE *ROWLEY* SUBSTANTIVE STANDARD FOR FAPE

In 1982, the Supreme Court of the United States issued its landmark IDEA decision in *Board of Education v. Rowley*⁹ to interpret the meaning of FAPE. The *Rowley* court concluded that because the primary purpose of the Act was to provide access to public schools generally and special education specifically, the meaning of FAPE was primarily procedural. The Court, however, further held that the residual, substantive standard was that the IEP be “reasonably calculated to enable the child to receive educational benefits.”¹⁰ In reaching this substantive standard, the Court rejected the higher standards of commensurate opportunity,¹¹ self-sufficiency,¹² and maximization.¹³ Moreover, the majority instructed lower courts to apply this standard with deference to school authorities.¹⁴ In dissent, Justice White pointed out that this substantive standard and its deferential application establish a low floor of opportunity. Indeed, in light of Amy Rowley being a child

9. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). See generally, Perry A. Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983) (one of the many proximate analyses).

10. *Rowley*, 458 U.S. at 206.

11. *Id.* at 189-90. As the dissenting opinion in the lower appellate court’s decision pointed out, the commensurate opportunity standard is associated with Section 504, not IDEA. *Rowley v. Bd. of Educ.*, 632 F.2d 945, 947 (2d Cir. 1980). For a brief comparative analysis, see Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?*, 106 EDUC. L. REP. 471 (1996).

12. *Rowley*, 458 U.S. at 201 n.23.

13. *Id.* at 204 n.26. At the same time, however, the majority disclaimed attempting “to establish any one test for determining the adequacy of educational benefits conferred upon all the children covered by the Act,” expressly limiting its analysis to the single situation of “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.” *Id.* at 202.

14. *Id.* at 207 (footnote omitted).

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
Id.

with a hearing impairment, the dissent observed: “[i]t would apparently satisfy the Court's standard of ‘access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child,’ for a deaf child such as Amy to be given [merely] a teacher with a loud voice.”¹⁵

In the next 25 years, the hundreds of court decisions concerning the substantive standard of FAPE¹⁶ have provided varying qualifiers as to the extent of educational benefit,¹⁷ but none of the variations in the *Rowley* progeny came close to the maximization or even commensurate opportunity or self-sufficiency standards that the *Rowley* Court had rejected.¹⁸ Moreover, during the same period, the relatively few states that had adopted in their special education laws a higher substantive standard for FAPE dwindled rather than expanded.¹⁹ For example, Massachusetts eliminated the maximum benefit standard in favor of the IDEA *Rowley* standard, resulting in

15. *Id.* at 215 (White, J., dissenting). The three Justices subscribing to the dissent ignored the majority's narrow boundaries for its substantive holding, perhaps foreseeing the future failure of lower courts to heed the same. *Id.* at 202, 204.

16. Huefner reported that 1,095 lower court decisions have cited the *Rowley* Court's decision, but obviously several of these citations have not been specific to the substantive standard for FAPE. Dixie Snow Huefner, *Updating the FAPE Standard under Rowley*, 37 J.L. & EDUC. 367, 367 (2008).

17. FAPE is the most litigated issue under IDEA. For a broad selection of the long line of post-*Rowley* lower court FAPE decisions, see, for example, the nine successive “Special Education Law Updates” in 206 EDUC. L. REP. 501; 183 EDUC. L. REP. 35 (2004); 160 EDUC. L. REP. 1 (2002); 133 EDUC. L. REP. 323 (1999); 116 EDUC. L. REP. 1 (1997); 98 EDUC. L. REP. 1 (1995); 83 EDUC. L. REP. 543 (1993); 66 EDUC. L. REP. 901 (1991); and 56 EDUC. L. REP. 20 (1990). See also Andrea Blau, *The IDEA and the Right to an “Appropriate” Education*, 2007 BYU EDUC. & L.J. 1, 19-22 (2007), and Philip T.K. Daniel & Jill Meinhardt, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of Free Appropriate Public Education?*, 222 EDUC. L. REP. 515, 519-21 (2007) (providing an overview of the variations of the substantive standard).

18. See *supra* notes 10-13 and accompanying text. For the most part, they also regarded the *Rowley* ruling as much more generalizable than the majority circumscribed. See *supra* note 15.

19. See, e.g., DIXIE SNOW HUEFNER, GETTING COMFORTABLE WITH SPECIAL EDUCATION LAW 250 (2006) (additionally citing Arkansas, Iowa, and New Jersey); MITCHELL YELL, SPECIAL EDUCATION LAW 20 (2006) (reporting that Arkansas and Iowa amended their state laws to conform to the federal standard).

less parent-friendly outcomes in recent case law than under its previous state law.²⁰ Furthermore, although Michigan retained its “maximum potential” standard, the Sixth Circuit Court of Appeals has interpreted it as more hortatory than mandatory, thus not equating to the best possible education.²¹

II.SCHOLARLY COMMENTARY

During the past decade, various commentators in the special education and the legal literatures have advocated a higher substantive standard for FAPE in light of the successive and relatively recent post-*Rowley* developments in federal legislation—specifically, the broad-based references in IDEA 1997 and IDEA 2004 to the goal of self-sufficiency, the increased importance of outcomes, and the emphasis on access to the general curriculum²² as well as the intervening passage of the NCLB in 2001.²³ Yet, at the same time, Congress did not change the definition of FAPE that the *Rowley* Court has used as its framework.

The special education law specialists, at least those without legal training in the special education literature have unfortunately,²⁴ but understandably,²⁵ tended toward fusing their professional norms of

20. *Compare* Parents of Danielle v. Mass. Bd. of Educ., 430 F. Supp. 2d 3 (D. Mass. 2006), *with* Frank S. v. Sch. Comm., 26 F. Supp. 2d 219 (D. Mass. 1998).

21. *See, e.g.*, Renner v. Bd. of Educ., 185 F.3d 635 (6th Cir. 1999).

22. The commentators are correct to the notable extent that the *Rowley* Court relied on the preamble, or findings, section of the Act and that Congress changed these introductory provisions in the 1997 and 2004 amendments.

23. 20 U.S.C. § 6301 (2008); *see also* Perry A. Zirkel, *NCLB: What Does It Mean for Students with Disabilities?*, 185 EDUC. L. REP. 805 (2004) (providing the intersections between the NCLB and IDEA).

24. This tendency is unfortunate because special education practitioners tend to rely on the special education literature rather than the overlapping education law literature, thus proliferating confusion between what is the legal minimum and the professional optimum. This confusion may lead to litigation. *See, e.g.*, Perry A. Zirkel & Robert L. Suppa, *Legal-Ethical Conflicts for Educator-Advocates of Handicapped Students*, 35 EDUC. L. REP. 9 (1985).

25. The tendency is understandable because one of the ethical norms of special educators is to engage in advocacy. Yet, while commenting that “special educators have what we consider a duty to champion understanding of individuals with disabilities and provision of beneficial services for them,” Lloyd and Hallahan condition such advocacy on a basis in “empirical evidence.” John Wills Lloyd &

best practice (or what should be) with the more minimum focus of legal requirements (or what shall be). As the leading *Rowley*-related example,²⁶ Yell, Katsiyannis, and Hazelkorn interpreted the “plain meaning” of the intervening changes in IDEA 1997 and IDEA 2004 as leading to “a fundamental alteration in the ways in which the courts view a FAPE.”²⁷

In the legal literature, the commentators have been more careful to separate description from prescription and, for the most part, more tempered in their advocacy. On the less tempered side, Eyer balanced the congressional acquiescence to *Rowley* with the emphasis on outcomes in IDEA 1997, to posit a heightened benefit standard: “reasonably calculated to confer measurable educational progress based on the general education curriculum.”²⁸ Similarly, after the passage of the NCLB, Johnson started with the same premise: “[t]he 1997 amendments to the IDEA make clear that the foundation underlining *Rowley*’s reasoning is no longer present.”²⁹

Daniel P. Hallahan, *Advocacy and Reform of Special Education*, in *ACHIEVING THE RADICAL REFORM OF SPECIAL EDUCATION* 245, 248 & 258 (Jean B. Crockett, et al eds., 2007).

26. For examples of other IDEA contexts, see YELL, *supra* note 19, at 299 (characterizing IDEA IEP provisions as requiring a FBA and a BIP when the student has behavioral problems); Linda L. Meloy, *Minimalist Approach to Manifestation Determination: Possible Compromise of Due Process Rights*, 36 *COMMUNIQUÉ* 8 (March 2008) (proposing that compliance with IDEA was violation of students’ due process rights).

27. Mitchell L. Yell, Antonis Katsiyannis & Michael Hazelkorn, *Reflections of the 25th Anniversary of the U.S. Supreme Court’s Decision in Board of Education v. Rowley*, 39 *FOCUS ON EXCEPTIONAL CHILDREN* 1, 9 (2007). In making their prediction, they also relied on a skewed sample of the relevant commentary and ignored the lengthening line of pertinent court decisions, which already represent their only qualifier—“direct challenge[s] to the *Rowley* standard.” *Id.* at 10. In advocating an elevated standard, in contrast to their fused description of what the courts “will” do, Huefner distinguishably demarcated what the courts “should” do. Dixie Snow Huefner, *Updating the FAPE Standard Under the IDEA*, 37 *J.L. & EDUC.* 367, 377 & 379 (2008); see also HUEFNER, *supra* note 19, at 252-32 (2006) (“speculat[ing]” that courts “may be more inclined” to be more rigorous with regard to FAPE).

28. Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 126 *EDUC. L. REP.* 1, 17 (1998).

29. Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 *BYU EDUC. & L.J.* 561, 586. Johnson is an attorney “representing

More specifically, he prescribed a heightened substantive standard for FAPE based on the shift from mere access to high expectations and from process to standards-based outcomes in: (a) the standards-based movement culminating in the NCLB; (b) the educational adequacy school finance litigation based on state constitutions; and (c) the emphasis on high expectations and standards in the 1997 reauthorization of IDEA.

On the more tempered side, the subsequent legal commentaries have directed their prescriptions to revising IDEA legislation and regulations. First, in the immediate wake of IDEA's 2004 amendments, Blau proposed "a more stringent educational standard for disabled students" for the subsequent regulations.³⁰ She pointed to the preamble of IDEA 2004, which stresses the importance of improved educational outcomes for self-sufficiency of individuals with disabilities and which incorporates the "adequate yearly progress" (AYP) accountability provision of the NCLB. She further argued, "methodological considerations make a substantial difference in the rate or even ability of a child with disabilities to learn what is clearly prerequisite to self-sufficiency as currently mandated within the Act."³¹ At the same time, however, expressly acknowledging that Congress had not changed the definition of FAPE and implicitly recognizing that courts would not do so on their own, she made clear that her advocacy was for the USDE to do so in the final regulations for IDEA 2004. However, her message was too little, too late, because the 2006 regulations left the definition of FAPE unchanged.³²

Calling instead for revisions at the congressional level, rather than the USDE level, Daniel and Meinhardt characterized IDEA 2004 as heightening the outcomes-oriented standard of IDEA 1997 "by incorporating even more language about high expectations in

parents and students in educational matters", available at <http://www.harborouselaw.com/articles/rowley.reexamine.johnson.htm>.

30. Blau, *supra* note 17 and accompanying text.

31. *Id.* at 18.

32. Additionally, missing the intervening pertinent case law, she also failed to acknowledge the limited scope of authority of the USDE in adopting regulations and entirely missed the only statutory basis for a heightened standard, which was the new statutory standard for specially designed instruction in the IEP provision. See *infra* notes 54-63 and accompanying text.

state educational standards into the programming for students with disabilities.”³³ Recognizing that intervening court decisions³⁴ have rejected such NCLB-based claims, they called for future IDEA amendments to revise the *Rowley* Court’s “minimalist interpretation.”³⁵ In contrast to Eyer and Johnson, respectively, Daniel and Meinhardt only went so far as to conclude that the *Rowley* standard “may be outdated” and cautioned that “the extent . . . remains ambiguous and should be addressed in future legislation.”³⁶

III. RESULTING CASE LAW

It is the courts’ interpretation, however, not the commentators’ interpretation of IDEA’s language that ultimately counts, and with limited exception, the long and wide line of court decisions has continued to apply *Rowley*’s substantive standard for FAPE, most of them without even acknowledging, much less accepting, the aforementioned arguments.

The first limited exception³⁷ is the federal district court’s decision, currently on appeal to the Ninth Circuit,³⁸ in *J.L. v. Mercer Island School District*.³⁹ The court did not rely on the NCLB or IDEA 2004. Instead, in this case, which concerned three successive IEPs before the effective date of IDEA 2004, the court based its analysis on selected aspects of IDEA 1997 and its 1999 regulations. More specifically, the court concluded that the emphasis on self-sufficiency in IDEA 1997’s preamble and legislative history in combination with its outcomes-oriented definition of transition

33. Daniel & Meinhardt, *supra* note 17, at 531.

34. They identified the *Fisher* and *Leighty* decisions. For an overview of these decisions, *see infra* notes 46-47 and accompanying text.

35. Daniel & Meinhardt, *supra* note 17, at 531.

36. *Id.* at 535.

37. The additional, more recent limited exception arose in the wake of other IDEA language. *See infra* notes 64-78 and accompanying text.

38. *C. v. Me. Sch. Admin. Unit No. 6*, 538 F. Supp. 2d 298, 300 n.4 (D. Me. 2008).

39. 46 IDELR ¶ 273 (W.D. Wash. 2006), *further proceedings*, 47 IDELR ¶ 120 (W.D. Wash. 2007). In the subsequent proceeding, after remand to the hearing officer, the court awarded the parents three years of tuition reimbursement, with the third year being in the form of compensatory education.

services represented a significant shift upward in the *Rowley* benefit standard. Alternatively, referring to “statutory and regulatory language,”⁴⁰ the court viewed the absence of a specified methodology in the IEPs’ statement of specially designed instruction as an additional failure to provide FAPE.

For several reasons, the *J.L.* exception thus far, subject to its appeal, appears to be an isolated outlier. First, this federal trial court decision in the state of Washington was not officially published, and it has not been cited or followed in subsequent court decisions. The second reason is that the court’s reasoning is readily criticizable. More specifically, it failed to take into account that the *Rowley* Court had rejected the substantive standard of self-sufficiency despite corresponding evidence of congressional intent, observing: “[b]ecause many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, ‘self-sufficiency’ as a substantive standard is at once an inadequate protection and an overly demanding one.”⁴¹ The court’s reasoning in *J.L.* also failed to recognize the prevailing judicial view that if it intended to change the substantive standard, Congress should have been clear and specific in doing so in the FAPE provisions of IDEA, given: (a) its awareness of *Rowley* and its extensive lower court progeny, and (b) the funding, or Constitutional spending clause, nature of IDEA. Similarly, the *J.L.* court’s alternate methodology rationale was based on the 2006 IDEA regulations’ commentary, which does not equate to regulatory language and is not entitled to the binding force of the legislation or regulations.⁴² Moreover, the court treated the cited agency interpretation as if it were an unqualified requirement, whereas the 2006 commentary reiterated “the Department’s longstanding position on including instructional methodologies in a child’s IEP,” which is that this matter is within the IEP team’s discretion.⁴³

40. 46 IDELR at *1188.

41. *Rowley*, 176 U.S. at 200 n.23.

42. See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?*, 171 EDUC. L. REP. 391 (2003).

43. IDEA Final Regulations Commentary, 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300 and 301) (stating “if an IEP Team

On the other hand, the prevailing side of authority is a lengthening line of court decisions before and after the July 1, 2005 effective date of IDEA 2004 that have expressly rejected similar claims, including those based on tie-ins with the NCLB.

One strand of these cases disposed of the NCLB-based argument. In the first case, the parents' claimed, on behalf of their child with a specific learning disability, that the IEP failed to include a research-based reading program.⁴⁴ The federal trial court in Pennsylvania made short shrift of this claim, pointing out that—unlike the NCLB—IDEA and the precedents at that time lacked any such requirement. Next, in a 2006 decision, the federal district court in West Virginia summarily rejected the parents' contention that the NCLB's provisions for states to adopt "challenging academic content standards and challenging student achievement standards" applied to IDEA's requirement for school districts to provide FAPE to individually eligible children.⁴⁵ Soon thereafter, in a federal district court decision in Pennsylvania, the parents asserted that NCLB's provisions for AYP changed the IDEA standard for FAPE to focus on the child's results on the statewide standardized testing for AYP.⁴⁶ Citing the preceding decision in West Virginia, the court disagreed, concluding that neither the NCLB's provisions for state coordination with IDEA nor IDEA's provisions for assessments provided the requisite unambiguous change in the standard for FAPE warranted by statutes enacted under the Constitution's spending clause. In a subsequent decision in New Jersey, the federal district court similarly rejected a parallel NCLB-based IDEA claim, additionally pointing out the continuing consistent line of case law concerning the substantive standard of FAPE between the passage of the NCLB and IDEA 2004.⁴⁷ Next, a federal district court in Florida summarily rejected the argument that the NCLB elevated the standard for FAPE under IDEA.⁴⁸ Finally, the Seventh Circuit Court of Appeals' ruling

determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP").

44. *Robert B. v. West Chester Area Sch. Dist.*, 44 IDELR ¶ 123 (E.D. Pa. 2005).

45. *Kirby v. Cabell County Bd. of Educ.*, 46 IDELR ¶ 156 (S.D. W. Va. 2006).

46. *Leighty v. Laurel Sch. Dist.*, 457 F. Supp. 2d 546 (W.D. Pa. 2006).

47. *Fisher v. Stafford Twp. Bd. of Educ.*, 47 IDELR ¶ 134 (D. N.J. 2007).

48. *Sch. Bd. v. M.M.*, 47 IDELR ¶ 220 (M.D. Fla. 2007).

that the NCLB supersedes IDEA to any extent that it conflicts with IDEA's pre-existing FAPE requirement provides only tangential support.⁴⁹ The reason, as the court explained, is, "Plaintiffs do not contend that any of the amendments made in 2004 supersedes any aspect of the [NCLB] that matters to this litigation. To the contrary, the 2004 amendments were designed in part to conform the [IDEA] to the 2001 Act, not to displace it."⁵⁰

The other strand of cases, standing in contrast to *J.L.*, disposed of the IDEA-based arguments and adhered to the *Rowley* standard. The first and much longer segment of this strand roundly rejected the argument that various broad provisions in IDEA 1997 supplanted the *Rowley* standard.⁵¹ Within the smaller window of cases based on triggering facts after July 1, 2005, a recent published federal district court decision similarly rebuffed the argument that the new and more ambitious preamble of IDEA 2004 heightened the *Rowley* standard.⁵² The court reasoned that "given the ubiquity of *Rowley*," Congress' failure to amend the statutory definition of FAPE outweighed the purported effect of the "commendable language" in the preamble.⁵³

IV. PRR: THE MISSING STATUTORY LINK?

49. Bd. of Educ. v. Spellings, 517 F.3d 922 (7th Cir. 2008).

50. *Id.* at 926.

51. Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149-51 (10th Cir. 2008) (self-sufficiency); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 27-28 (1st Cir. 2008) (transition); Lt. T.B. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004) (teacher training); San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office, 482 F. Supp. 2d 1152, 1156 (N.D. Cal. 2007) (transition and teacher training). In the more recent of the two First Circuit decisions, the court specifically rejected the *J.L.* reasoning as "unconvincing." *Lessard*, 518 F.3d at 28 n.5. Moreover, the court unusually reasoned as follows:

School districts, like parents and children, have legal rights with respect to special education. In demanding more than the IDEA requires, the appellants frustrated the operation of a collaborative process and put the School District in an untenable position.

Id. at 30.

52. Mr. C. v. Me. Sch. Admin. Unit No. 6, 538 F. Supp. 2d 298, 301 (D. Me. 2008).

53. *Id.*

In contrast with most of the commentary⁵⁴ and the foregoing case law, the more likely lever already available for a judicially construed elevation of the substantive standard for FAPE is the particularly pertinent⁵⁵ but conditional requirement in IDEA 2004, that the IEP's specification of specially designed instruction and related services be based on "peer-reviewed research to the extent practicable."⁵⁶ As explained in a recent analysis,⁵⁷ SBR and PRR in IDEA are like two overlapping ovals; SBR must be, among other things, PRR, but PRR need not be SBR.⁵⁸ More specifically, in this context PRR refers to one element in the NCLB definition of SBR, which the IDEA regulations incorporate by reference.⁵⁹ The specific element provides that the study "has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review."⁶⁰ In its commentary

54. Yell, Katsiyannis & Hazelkorn, *supra* note 27, at 9, were among the few commentators who mentioned the PRR provision in IDEA 2004, but they categorically concluded that this "new requirement will result and stronger and more effective programs for students with disabilities in special education." For a more legally tempered view, see Barbara Bateman, *Law and the Conceptual Foundations of Special Education Practice*, in *ACHIEVING THE RADICAL REFORM OF SPECIAL EDUCATION* 95, 102 (Jean B. Crockett, Michael M. Gerber & Timothy Landrum eds., 2007) (commenting on PRR that "[i]t remains to be seen whether this legal provision will be enthusiastically implemented and/or rigorously enforced"); see also BARBARA BATEMAN & MARY ANNE LINDEN, *BETTER IEPS* 63 (2006) (characterizing PRR as "one of the potentially most significant changes made to IDEA").

55. This language is particularly pertinent because, unlike the preamble, it directly defines FAPE in terms of its integral and central element of special education or specially designed instruction.

56. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (LEXIS 2008).

57. Perry A. Zirkel & Tessie Rose, *SBR and PRR under the IDEA: Legal Definitions, Applications, and Implications* (2008) (manuscript under review for publication, on file with the author).

58. As shown in a recent simplifying piece, which includes a Venn diagram, SBR includes PRR as one element along with more restrictive criteria oriented to experimental and quasi-experimental research. PRR extends beyond PRR to various other forms of research, including correlational and qualitative research, which has successfully passed through this expert-panel process. Perry A. Zirkel, *A Legal Roadmap of SBR, PRR, and Related Terms under the IDEA*, 40 *FOCUS ON EXCEPTIONAL CHILDREN* 1 (Jan. 2008).

59. 34 C.F.R. § 300.35 (2007).

60. 20 U.S.C. § 7801(37) (2002).

accompanying the regulations, the USDE explained its decision not to include a specific definition of PRR in the final regulations, reasoning that although PRR

generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published . . . there is no single definition of “Peer Reviewed Research” because the review process varies depending on the type of information to be reviewed.⁶¹

Additionally, USDE rejected suggestions to accept other terms as PRR, explaining: “[t]he Act does not refer to ‘evidence-based practices’ or ‘emerging best practices,’ which are generally terms of art that may or may not be based on [PRR].”⁶² Finally, the qualifying, or conditional, language of “to the extent practicable,” in the circumspect interpretation of USDE, “means that services and supports should be based on [PRR] to the extent that it is possible, given the availability of [PRR].”⁶³

V. PRR CASE LAW

Thus far, the emerging case law is largely limited to two opposing interpretations, first at the hearing officer level, and then at the federal district court level in California and Iowa, respectively.

The limited California case law represents the conservative legal view. Specifically, in a California case concerning whether a particular district had provided FAPE to a six-year-old with autism,

61. 71 Fed. Reg. at 46,664.

62. *Id.* at 46,664.

63. *Id.* at 46,665. OSEP added:

States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on [PRR] are available. This does not mean that the service with the greatest body of research is . . . necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a [district] to provide services based on [PRR] would automatically result in a denial of FAPE. *Id.*

the pertinent issue was whether the district's eclectic approach, which included applied behavioral analysis (ABA), was appropriate as compared with the parents' proposed ABA-only method.⁶⁴ Providing an extensive citation of the IDEA Final Regulations Commentary, the hearing officer, who is a full-time administrative law judge, upheld the district's IEP with the following pertinent reasoning:

[I]f the component parts of a plan are peer-reviewed, then it follows that the sum of those parts should be considered as peer-reviewed as well, particularly in light of the moral, legal and ethical constraints that prevent the truest form of scientific study from being conducted. The ultimate test is not the degree to which a methodology has been peer-reviewed, but rather, whether the methodology chosen was believed by the IEP team to be appropriate to meet the individual needs of the child.⁶⁵

Notably, the hearing officer did not cite peer-reviewed studies supporting the component parts of the district's proposed TEACCH method,⁶⁶ instead deferring to the testimony of the district's personnel that this approach was research-based and finding that the

64. The autism field is marked by controversy as to which methodologies are appropriate, and ABA is one of the strict behavioralist approaches that autism advocates appear to favor. *See, e.g.*, ELENA GALLEGOS & JILL SCHALLENBERGER, *AUTISM METHODOLOGY CASES TO LIVE BY: LEGAL GUIDANCE FOR PRACTICAL PROGRAM STRATEGIES* (LRP Publications, 2008); *see also* Claire Choutka, Patricia Doloughy, & Perry Zirkel, *The "Discrete Trials" of ABA for Children with Autism: The Outcome-Related Factors in the Case Law*, 38 J. SPECIAL EDUC. 95 (2004); Susan Etscheidt, *An Analysis of Legal Hearings and Cases Related to IEPs for Children with Autism*, 28 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 51 (2003); Catherine Nelson & Dixie Snow Huefner, *Young Children with Autism: Judicial Responses to the Lovaas and Discrete Trial Training Debates*, 26 J. EARLY INTERVENTION 1 (2003).

65. *Rocklin Unified Sch. Dist. v. Student*, 48 IDELR ¶ 234, at *1036 (Cal. SEA 2007). Interestingly, the hearing officer attributed this reasoning to the expert testimony of the school district's school psychologist. *Id.*

66. Project TEACCH is an eclectic, school-based model developed and disseminated by the University of North Carolina. For an overview of the case law concerning TEACCH and competing methodologies, *see, e.g.*, GALLEGOS & SCHALLENBERGER, *supra* note 64.

three studies relied on by the parents' experts represented a narrow, minority point of view in the current, inconclusive literature. Without additionally resorting to the precedents regarding the need for clear notice for enforcement of changes in legislation under the Constitution's spending clause, the hearing officer also rejected the parents' reliance on the *J.L. v. Mercer Island School District* decision, reasoning: "The judicial interpretation given to a phrase is presumed correct where Congress, with full knowledge of the judicial interpretation, reenacts the phrase without changing it. . . . If Congress had intended to overturn *Rowley*, it would have said so."⁶⁷ While this case was on appeal, three other hearing officer decisions in California upheld the district's eclectic programs for other individual students with autism.⁶⁸ The hearing officers—who are part of the same system of full-time administrative law judges—cited *Rocklin* or, in the most recent of the two cases, the IDEA Final Regulations Commentary, for the proposition that the IDEA's PRR provision does not necessarily require a particular program or service. Then, in an unpublished decision, the federal district court sided with the *Rocklin* hearing officer, reasoning much more concisely as follows:

It does not appear that Congress intended that the service with the greatest body of research be used in order to provide FAPE. Likewise there is nothing in the Act to suggest that the failure of a public agency to provide services based on [PRR] would automatically result in a denial of FAPE. As other Ninth Circuit courts have noted, if Congress intended to modify the *Rowley* standard, it would have said so.⁶⁹

An Iowa case represents, at least at the hearing officer stage, a dramatically different approach. In *Waukee Community School*

67. *Rocklin Unified Sch. Dist. v. Student*, 48 IDELR at *1034.

68. *Long Beach Unified Sch. Dist.*, 49 IDELR ¶ 210 (Cal. SEA 2008); *Fremont Unified Sch. Dist.*, 49 IDELR 114 (Cal. SEA 2007); *San Juan Unified Sch. Dist.*, 48 IDELR ¶ 201 (Cal. SEA 2007).

69. *Joshua A. v. Rocklin Unified Sch. Dist.*, 49 IDELR ¶ 249, at *1142 (E.D. Cal. 2008) (citing *San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office*, 482 F. Supp. 2d 1152, 1156 (N.D. Cal. 2007)).

District, a hearing officer in Iowa, who is a special education professor, concluded in relevant part of this decision, that the district's behavioral interventions with the child, an eight-year-old with autism, violated the IDEA IEP requirement with regard to PRR.⁷⁰ This part of her decision is remarkable in several respects. First, the hearing started with the SBR-like conclusion that "[p]rovisions in the IDEA 2004 require research-based interventions;"⁷¹ yet, all of the IDEA's references to SBR and its variants—with the limited exception of the conditional PRR requirement—do not apply to LEAs.⁷² Second, the hearing officer cited IDEA's legislative history to reach the interpretation that the PRR provision requires empirical validation whenever possible, whereas her cited support was the IDEA Regulations Commentary, which is less specific than her interpretation and less strong than legislative history. Third, as a responsible and knowledgeable academician, the hearing officer cited various articles in the professional literature that question the assumptions underlying PRR.⁷³ Fourth, the hearing officer determined the substantive violation of FAPE by citing a whole host of studies published in peer-reviewed journals such that the written opinion, in relevant part, was more like a literature review article than a traditional legal decision. Finally, according to the defendants' attorney,⁷⁴ one of the bases of the appeal is that—despite the more than 1500 pages of education research that the parties provided as exhibits in this ten-session hearing—the hearing officer's citations included articles not within the record of the case.

In a recent decision, a federal district court affirmed the hearing officer's decision but largely ducked the PRR issue by folding it into

70. Waukeem Cmty. Sch. Dist., 48 IDELR ¶ 26 (Iowa SEA 2007). The hearing officer also decided in the parents' favor on the grounds of least restrictive environment and multiple prejudicial procedural violations. *Id.* The facts of the case and the hearing officer's decision received national attention in a *Wall Street Journal* article, but the article focused on the behavioral methods, not the PRR provision. The article also reported that the parents had moved to California. Robert Tomsho, *When Discipline Starts a Fight*, WALL ST. J., July 9, 2007, at A1.

71. Waukeem Cmty. Sch. Dist., 48 IDELR at *136.

72. Zirkel & Rose, *supra* note 57.

73. *Waukeem*, at *143 nn. 16, 18 & 19.

74. Telephone interview with Ronald L. Peeler, Partner, Ahlers & Cooney (July 10, 2007).

the *Rowley* standard.⁷⁵ Specifically, the court concluded that the hearing officer's delineation of criteria for behavioral interventions as substantive rights constituted legal error, but that it was permissible for her to "consider" these factors in applying *Rowley*.⁷⁶ Subordinate to this conclusion, the court responded to the parents' citation of IDEA's PRR provision as follows: "[a]n IEP which relies on behavioral interventions which are not supported by, or are contrary to, the relevant research may be such that it is not 'reasonably calculated' to provide an educational benefit."⁷⁷ Applying this merged use of PRR, the court concluded that the preponderance of the evidence, with notable reliance on expert testimony and no mention of the cited peer-reviewed studies, supported the hearing officer's decision that the formulation and implementation of the behavioral interventions fell short of the *Rowley* standard.⁷⁸

VI. CONCLUSION

The interpretation and application of the qualified, or conditional, PRR requirement in IDEA 2004 has implications for practice, litigation, and policymaking in special education. As for practice, school districts will need to train their members of the IEP team in the qualified legal meaning and importance of PRR in specifying the specially designed instruction and IEP for the eligible child. First, although not precisely defining PRR, the aforementioned⁷⁹ IDEA regulations' commentary made relatively clear that this term is more rigorous than "evidence-based"⁸⁰ and yet less rigorous than SBR.

75. *D. L. v. Waukee Cmty. Sch. Dist.*, 51 IDELR ¶ 15 (S.D. Iowa 2008).

76. *Id.* at *90 n.20. Interestingly, the court reached this conclusion as a harmonizing compromise in relation to the Seventh Circuit's treatment of a pre-PRR decision by this same hearing officer. Compare *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603 (7th Cr. 2004), with *Mason City Cmty. Sch.*, 36 IDELR ¶ 50 (Iowa SEA 2001).

77. *Id.*

78. *Id.* at 25. The court also relied on LRE and one procedural violation for its ultimate affirmance. *Id.* at *30-31.

79. See *supra* note 61 and accompanying text.

80. Most of the special education literature to date has not clearly differentiated between PRR, SBR, and related terms such as "evidence based." See, e.g., YELL, *supra* note 19, at 456 (characterizing PRR as SBR); Jean B. Crockett & Mitchell L. Yell, *Without Data All We Have Are Assumptions:*

However, as the promotion and tenure process in higher education reveals, neither “peer reviewed” nor “research” necessarily means objective and selective high quality. Second, if two competing methodologies each have support in terms of PRR, this standard does not necessarily mean that the better or best methodology is required. Third, the individualization mandate of IDEA dictates against a one-size-fits-all PRR selection of methodology or other FAPE options. Finally and most significant legally, the applicable interpretation of the PRR provision, including its thus far untested “to the extent practicable” qualifier,⁸¹ will ultimately depend on the courts.

As for litigation, one of the possible significant contributing factors to the applicable interpretation appears to be the professional orientation of the adjudicator. The research to date is too limited to determine the effect of this factor,⁸² especially in light of the recency and particularity of the PRR provision. Unlike the indirect language in the prefatory findings or other broad-based features of IDEA, PRR serves as a potential bridge for incorporating best practice into the legal standard for FAPE. Hearing officers who have the training and orientation in favor of best practice, as represented by research in peer-reviewed periodicals and proceedings, may serve as the drivers across this bridge. Whether the hearing officers with a strictly legal training and orientation, which are increasingly the norm under the “judicializing” trend of hearings under the IDEA,⁸³ dominate the initial traffic and whether the reviewing courts ultimately give a green or red light to a FAPE-optimizing application of PRR, including its “extent practicable” limitation, are open questions at this point. The small sample thus far, which is limited to the hearing officer and federal district court decisions in California and Iowa, seem to suggest a conditional skew toward the minimizing effect of

Revisiting the Meaning of a Free Appropriate Public Education, 37 J.L. & EDUC. 381, 387 (2008) (similarly confused PRR with SBR); cf. John W. Maag & Antonis Katsiyannis, *Pick and Choose*, 3 PRINCIPAL LEADERSHIP 35 (Oct. 2003) (relying without clear differentiation between statutory and professional standards at a time after NCLB SBR but before IDEA PRR).

81. BATEMAN & LINDEN, *supra* note 54, at 63, predicted that this phrase “will undoubtedly be at the center of many disputes.”

82. See, e.g., James R. Newcomer, Perry A. Zirkel & Ralph J. Tarola, *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 EDUC. L. REP. 449 (1998).

83. See *supra* note 8 and accompanying text.

PRR, depending on whether the hearing officer exhibited the academic and advocacy orientation of special education professionals. Even in the Iowa case, however, the court melded the hearing officer's rigorous view of PRR into a potentially but not necessarily outcome-determinative consideration of the still-overriding *Rowley* standard.⁸⁴ One of the important conditional factors in the Iowa case was the role of expert witnesses. The PRR provision appears to be at tension with two of the Supreme Court's latest decisions that interpreted IDEA to put the burden of proof on parents in FAPE cases⁸⁵ and—even more so given the court's Iowa decision—to not provide the cost of experts to prevailing parents.⁸⁶ To the extent that parents use experts to prudently and efficiently provide a record of PRR to counter the specially designed instruction in the child's IEP or to cross examine the district's witnesses' knowledge of PRR first as a concept distinguishable from SBR, or other overlapping professional terminology, such as “evidence-based” and second in its specific application to the FAPE in the IEP, they are more likely to prevail, thereby stretching, if not superseding, the *Rowley* standard.

However, depending on the parents' sophistication and the hearing officer's orientation, there is enough latitude in the PRR provision—as the district-deferential analysis of the cluster of California hearing officer decisions, along with their single, unpublished judicial appeal, tentatively illustrate—to leave the landscape largely unchanged in terms of the substantive standard for FAPE. For the exacting law-oriented adjudicator, an additional legal factor that may contribute to the status quo is considering whether the new PRR provision is sufficiently clear to meet the spending clause limitation that the Supreme Court recognized in *Rowley*, “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously,”⁸⁷ that the Court reinforced in its IDEA expert-fees opinion.⁸⁸

84. In the *Waukee* case, the court relied on a series of cumulative PRR considerations plus a procedural FAPE violation and an LRE violation. See *supra* notes 71-74 and accompanying text.

85. *Schaffer v. Weast*, 546 U.S. 49 (2005).

86. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

87. *Rowley*, 458 U.S. at 204 n.26.

88. *Arlington Cent. Sch. Dist.*, 548 U.S. at 296.

Finally, if the courts do not establish the predicted fundamental elevation of the substantive standard for FAPE, the issue will revert back to the policymaking branch of federal and state governments.⁸⁹ Congress and state legislatures have the ultimate choice to change the standard from “the educational equivalent of a serviceable Chevrolet”⁹⁰ to a Cadillac or to an even more sophisticated, research-based vehicle, while considering the trade-offs not specific to the more restricted scope of the judicial process, including resource allocation for the corresponding costs to the public fisc.⁹¹

Thus, whether the PRR provision realizes its potential of fusing best practice—at least to the extent that it has the support of research studies in peer-reviewed journals—with legal requirements, thereby elevating the substantive standard of FAPE, is largely subject to scholarly speculation. Based on comprehensive canvassing of the lengthening line of pertinent court decisions to date, such scholarly commentary warrants clearly tempered circumspection. At this preliminary point, the answer would appear that any change is more likely than not to be within the current range of the *Rowley* progeny rather than the significant, or superseding, elevation that some commentators have advocated. Among the sub-questions that abound are: (a) whether hearing officers and courts will confuse PRR with the more rigorous legal definition of SBR; (b) whether, instead, the “extent practicable” exception will dilute the substance of the standard; (c) whether, if the new provision is indeed the missing link

89. The focus here has been on the substantive side of FAPE. During the same period, however, the *Rowley* progeny has largely taken a restrictive view of its procedural measure of FAPE. In IDEA 2004 Congress codified this harmless-error standard for procedural violation, with the limited exception of “[s]ignificantly imped[ing] the parent’s opportunity to participate in the decision-making process regarding the provision of a [FAPE].” 20 U.S.C. § 1415(f)(3)(E). The result, which seems to be a rather minimalist interpretation of the *Rowley* rationale regarding the procedural aside of FAPE, has reinforced the importance of the substantive standard for FAPE. Indeed, an alternate way for adjudicative minimization of the PRR provision is to consider it a procedural ingredient of the IEP.

90. *Doe v. Bd. of Educ.*, 9 F.3d 455, 459 (6th Cir. 1993).

91. Special education costs, on average, approximate twice that of regular education; yet, Congress provides IDEA only about one-fifth of that differential. *See, e.g.*, Jay G. Chambers, Jenifer J. Harr & Arynah Dhanani, *What Are We Spending on Special Education Services in the United States, 1999-2000?* (June 2004), available at <http://CSEF-air.org/publications/seepnational/AdvRpt1.pdf>.

for a heightened FAPE standard, peer review provides the high standard of quality associated with the sciences and medicine;⁹² and (d) whether hearing officers and courts will require parents to provide the same PRR support for their advocated methodologies and unilateral placements.⁹³

During this period of judicial settling, further USDE guidance, in the form of policy letters, and—much more determinatively—the next Congressional reauthorization may also enter the equation. In the meantime, the PRR provision warrants the heightened attention of commentators and practitioners well beyond the largely missing consideration to date. Unless and until the next reauthorization addresses the *Rowley* standard via refinement of the PRR provision or the FAPE definition, hearing officers will be playing a fundamental role in answering the question as to whether the IDEA has already been amended to raze *Rowley* and its progeny with a raised substantive standard.

92. For example, methodology for students with autism is one of the leading sources of litigation relying on the substantive standard for FAPE; yet, the study committee appointed by the National Research Council concluded that “[t]here is no outcome study published in a peer-reviewed journal that supports comparative statements of the superiority of one model or approach over another.” NAT’L RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM 166 (2001).

93. Strictly speaking, the IDEA requirement for PRR is specific to the school district’s IEP, not the parents’ proposal or, in tuition reimbursement cases (at step 2 of the *Burlington-Carter* analysis, which focuses on the appropriateness of the parents’ unilateral placement), actual alternative. However, school districts will likely argue that the substantive standard should be a two-way street. Such an argument was largely unsuccessful in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), but the specific application to PRR is an open question.