

R.T. and J.P.: A “Free and Appropriate Education” for the Autistic Student

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Descriptive Context

An Increased “Special” Population

In the last three decades, public education has witnessed a marked increase in the number of children with disabilities receiving special education services. In 1976-77, public schools nationwide provided special education services under the Individuals with Disabilities Education Act (IDEA) to 3,692,000 students—or 8.3 percent of public school enrollments. In 2003-04, over 6.6 million public school students—13.7 percent of total enrollments—received services under IDEA.¹ Nationally, the number of school-aged, autistic children receiving special education services under IDEA has increased over 500 percent in 10 years. In 1993, fewer than 20,000 such students were receiving IDEA services; by 2002, that number had increased to nearly 120,000.²

Autism Defined

Described generally as “a developmental disorder of neurobiological origin that is defined on the basis of behavioral and developmental features,”³ experts actually view autism as a “spectrum of disorders” that may include autistic disorder, pervasive developmental disorder—not otherwise specified (PDD-NOS), Asperger’s disorder, childhood disintegrative disorder, and Rett’s disorder.⁴ Typically detected before the age of three, autism spectrum disorders (ASD) share a variety of traits or deficiencies generally related to verbal as well as nonverbal communication, social interaction, and repetitive behaviors.⁵ While the exact cause of autism spectrum disorders remains a topic of research and debate, it is clear that early identification is essential to help ensure effective interventions.⁶

IDEA and the Autistic Student Generally

Initially enacted in 1975 as the Education for All Handicapped Children Act (P.L. 94-142) in 1975 (EAHCA), renamed the Individuals with Disabilities Education Act (IDEA) in 1990, and restyled in 2004 as the Individuals with Disabilities Education Improvement Act (IDEIA) (the “Act”), the Act pledges federal funds to those states providing a **free and appropriate education** (FAPE) for children with disabilities

¹United States Department of Education, Institute of Educational Sciences, NCES, The Condition of Education, Participation in Education, Children with Disabilities in Public Schools (2006) <<http://nces.ed.gov/programs/coe/2006/section1/indicator08.asp>; Table 8-1, Number and percentage of youth ages 3–21 served under the Individuals with Disabilities Education Act (IDEA): 1976–77 through 2004–05 <<http://nces.ed.gov/programs/coe/2006/section1/table.asp?tableID=557>>

²United States Government Accounting Office, Report to the Chairman and Ranking Minority Member, Subcommittee on Human Rights and Wellness, Committee on Government Reform, House of Representatives, *Special Education: Children with Autism* (January 2005)[hereinafter referred to as *GAO Report*].

³National Research Council, Committee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, *Educating Children with Autism* at 11(2001)[hereinafter referred to as *Educating*].

⁴*Id.* at 11, 12; see also, *GAO Report, supra* note 2, at 8; The ERIC Clearinghouse on Disabilities and Gifted Education (ERIC EC), Council for Exceptional Children, Information Center on Disabilities and Gifted Education, *Autism and Autism Spectrum Disorder (ASD)* (October 1999) <<http://www.ericec.org/digests/e583.html>>. For the purposes of this policy brief, “autism,” “ASD,” and “autism spectrum disorders” shall be used interchangeably, unless the context indicates otherwise.

⁵National Institute of Mental Health, *Autism Spectrum Disorders (Pervasive Developmental Disorders)* (2004) <<http://www.nimh.nih.gov/publicat/autism.cfm>>[hereinafter referred to as NIMH].

⁶See generally, NIMH, *supra*; *GAO Report, supra* note 2, at 10; *Educating, supra* note 3, at 11, 212.

from age 3 through 21, consistent with the Act.⁷ By statute and accompanying regulation, autism is included among those disabilities for which special education and related services—and a FAPE—may be required.⁸ This FAPE is reflected in the **individualized education plan** (IEP), developed jointly by the student's parents, special education teacher, the local education agency (LEA), and, where appropriate, the student. It is the IEP that sets forth not only the student's current academic and functional levels, but also measurable, annual goals crafted to “meet the child's needs that result from the child's disability” and the mechanisms that will be used to measure and report the student's progress toward attaining the goals and the specific special education and related services to be provided.⁹

The Act requires “[t]o the maximum extent appropriate” that the disabled student be educated in the **least restrictive environment** (LRE)—that is, preferably, with those students who are not disabled. Further, the Act clearly dictates that separate schooling, special classes, or other removals from the general student population should occur “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.”¹⁰

The Act and its accompanying regulations define a **child with disabilities** as one who requires special education and related services due to one or more specified disabilities—mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.¹¹ Autism was added to IDEA as a distinct disability category in 1990 amendments.¹²

While not citing the “spectrum” of disorders included in the term “ASD,” IDEA regulations define autism as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance....”¹³

Integral to the realization and protection of the FAPE are detailed **procedural safeguards** the states must enact for the benefit of parents and disabled children. These safeguards must include, among other things, the parent's right to (i) examine student records; (ii) participate in meetings regarding the child's identification, evaluation, placement, and requisite FAPE; and (iii) to have an outside educational evaluation for the child. In addition, these safeguards must also provide for written prior notice to the parents when the school division proposes or refuses to “initiate or change” the child's identification, evaluation, placement, and FAPE. Also required opportunities are for mediation and submission of complaints for an impartial due process hearing, conducted by the local education agency

⁷20 U.S.C.S. § 1412(a)(1)(A)(2006).

⁸See generally, Virginia Division of Legislative Services, K.G. Harris, *A Legislator's Guide to Public Education in Virginia—Specific Educational Programs* (1993) <<http://dls.state.va.us/pubs/lgpe/welcome.htm>> [hereinafter referred to as DLS]; U.S. Department of Education, *History of the IDEA; Thirty Years of Progress in Educating Children with Disabilities Through IDEA* <<http://www.ed.gov/policy/spced/leg/idea/history30.html>> The Act specifically designates those disabilities for which special education services may be required under IDEA: mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. 20 U.S. C. §§ 1401(3)(a)(i)(2006)(LexisNexis Congressional).

⁹20 U.S. C. §§ 1401(14); 1414 (d)(1)(A)(ii)(aa)(2006) (LexisNexis Congressional).

¹⁰20 U.S. C. § 1412(a)(5)(A)(2006) (LexisNexis Congressional).

¹¹20 U.S. C. § 1401(3)(2006) (LexisNexis Congressional).

¹²E. Muller, *Autism: Challenges Related to Secondary Transition*, National Association of State Directors of Special Education, Incorporated, QTA—A Brief Analysis of a Critical Issue in Special Education (July 2004).

¹³34 C.F.R. § 300.8 (c)(1)(i) (Revised July 1, 2006) <<http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=601526319485+3+0+0&WAISSaction=retrieve>>; see also, United States Department of Education, Institute of Educational Sciences, NCES, *The Condition of Education, Supplemental Notes*, Note 7: International Definitions (2005) <<http://nces.ed.gov/programs/coe/2005/supnotes/n07.asp>>; Federal Register, Vol. 71, No. 156, Part II, Department of Education, 34 CFR Parts 300 and 301 (Monday, August 14, 2006).

(LEA)(in Virginia, the school division) regarding the student's identification, evaluation, placement, and requisite FAPE.¹⁴ Broadening alternative dispute resolution options are the 2004 amendments to the Act (effective July 1, 2005), which added an "early resolution meeting" to the procedural safeguards. This "resolution session" is to be conducted within 15 days of receipt of the parent's due process complaint. In addition, the 2004 amendments provide that mediation shall be available to address "matters arising prior to the filing of a complaint...."¹⁵

Parties aggrieved by the results of the due process hearings—the parents or the school division-- may submit appeal for an impartial review and decision.¹⁶ Also appealable are decisions by the LEA to place a child with an IEP in an alternative educational setting due to the student's breach of the student conduct code.¹⁷

When the school division has made the required FAPE available to the student, the parents choosing instead to enroll their child in a private school or facility are not entitled to **tuition reimbursement** for special education and related services.¹⁸ However, economies of scale, dwindling resources, and other constraints may sometimes preclude a school division from offering the agreed-upon IEP in one of its public schools. Should this be the case, the school division remains responsible for the provision of the FAPE at a private facility.¹⁹ It is this latter requirement that has been the basis for countless due process hearings, mediation, and civil actions across the country. What if the parents and the school division cannot agree on an IEP and the FAPE? What if the parent fails to make his concerns known to the school division at an IEP meeting, and enrolls unilaterally enrolls the student in a private facility? What if various notice provisions are violated? What if the school division, upon learning of the parents' intent to withdraw the child, offers to re-evaluate the student? What if the parents refuse this evaluation? What if the parents unilaterally seek the private enrollment, and a hearing officer or court finds that the school division could not, in fact, provide the required FAPE? Must the child remain in the public school program until the dispute between the division and the parents is resolved?

While the IDEA answers many of these questions in statute and regulation, the judiciary has proved a frequent forum for the resolution of the most basic—yet difficult—questions: has the school division offered a "free and appropriate education" to the student, and have the parties met the various procedural requirements?

The Issue in Practice in the Commonwealth

Virginia's Standards of Quality require school boards to provide for the "early identification of students with disabilities and enrollment of such students in appropriate instructional programs consistent with state and federal law."²⁰ Further bolstering this directive—and reflecting IDEA requirements—is § 22.1-215 of the Code of Virginia, which directs each school division to "provide free and appropriate education, including special education, for the children with disabilities residing within its jurisdiction in accordance with regulations of the Board of Education."²¹ School boards may provide special education services directly or may contract with other school divisions as well as any private nonsectarian school or facility licensed or certified by the Board of Education, or by a licensing authority in the state where the particular facility is located.²² Slightly surpassing the age requirements set by IDEA, Virginia regulations require special education services for children with disabilities aged two to 21, inclusive.²³ Reflecting

¹⁴20 U.S.C.S. § 1415(a),(b),(f)(2006) (LexisNexis Congressional).

¹⁵20 U.S.C.S. § 1415(e)(1),(f)(1)(B)(2006) (LexisNexis Congressional)

¹⁶20 U.S.C.S. § 1415(g)(2006) (LexisNexis Congressional).

¹⁷20 U.S.C.S. § 1415(g), (k)(2006) (LexisNexis Congressional). The school may suspend or place the student in an interim alternative placement for a period not exceed 10 days. 20 U.S.C.S. § 1415 (k)(1)(B) (LexisNexis Congressional).

¹⁸20 U.S.C.S. § 1412(a)(10)(C)(i)(2006)(LexisNexis Congressional).

¹⁹20 U.S.C.S. § 1412(a)(10)(B)(2006) (LexisNexis Congressional).

²⁰Va. Code § 22.1-253.13:1 D 4 (2006).

²¹Va. Code § 22.1-215 (2006); see generally, DLS, *supra* note 8.

²²Va. Code § 22.1-216 (2006). Statute also allows children below the compulsory school attendance age to receive special education services in licensed nonsectarian child-day programs.

²³8 VAC 20-80-40; 8 VAC 20-80-60 (updated through July 24, 2006).

IDEA requirements, the regulations also include, among other things, provisions addressing IEP, FAPE, LRE, and procedural safeguards.²⁴

Consistent with national trends indicating increases special education services, the Commonwealth provided special education services in school divisions and state-operated programs to 148,368 children in 1997; of these students, 1,333 (approximately 0.9 percent) were characterized as autistic. In 2004, however, 175,577 Virginia students received special education services; of this total, 4,751, or 2.7 percent, were classified as having autism, representing a greater than threefold increase in the number of autistic students receiving state or division services in a seven-year period.²⁵

Deciphering the IDEA: An “Appropriate” Education

While state constitutions, statutes, and regulations typically set standards and curricula for public education generally (in Virginia, the constitutionally-mandated Standards of Quality detailed in state statute, the statutory Standards of Learning, and the regulatory Standards of Accreditation),²⁶ the IDEA offers no such detailed “requirements” for special education services. The FAPE must simply include “special education and related services that...have been provided at public expense, under public supervision and direction, and without charge;...meet the standards of the State educational agency;... include an appropriate preschool, elementary school, or secondary school education in the State involved; and...are provided in conformity with the individualized education program....”²⁷

But what, indeed, is “appropriate”? The Act itself clearly contemplates “individualized” education for the student with disabilities; determining the propriety of the program, however, involves careful examination of the particular student’s disabilities and educational needs. Educational programs and services that are appropriate for one child with a particular disability may not be “appropriate” for another child with the same—even similar degree of--disability. Even the U.S. Supreme Court acknowledged that “[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.”²⁸

Twenty-five years ago, the nation’s high Court made clear in *Board of Education v. Rowley* that the FAPE required by IDEA must be “sufficient to confer some educational benefit upon the handicapped child.”²⁹ Setting a “floor” for the required FAPE, the Court stated that the Act requires “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”³⁰ The Court further held that, if the student is being educated in the general classroom, his individualized program should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”³¹ Significantly, in further exploring the interpretation of “appropriate,” the Court specifically rejected the contention that the Act required programs and services that would “maximize each child’s potential ‘commensurate with the opportunity provided other children.’”³² Thus, the Act did not require equality in educational opportunities—“an entirely unworkable standard”—or only those services available to the general student population; the free and appropriate education did not require “every special service necessary” for the disabled student.³³

²⁴8 VAC 20-80-60; 8 VAC 20-80-62; 8 VAC 20-80-64; 8 VAC 20-80-70 (updated through July 24, 2006).

²⁵Virginia Department of Education, Report of Children and Youth with Disabilities Receiving Special Education, Part B, Individuals with Disabilities Education Act, 1997-1998 School Year: Totals as of December 1, 1997 <http://www.doe.virginia.gov/VDOE/Publications/SPED_child_count/totals.html>; Virginia Department of Education, Totals For Students With Disabilities By Disability and Age, Ages 0 - 22+ State Totals and Individual Division Totals, As of December 1, 2004 <http://www.doe.virginia.gov/VDOE/Publications/SPED_child_count/total04.pdf>

²⁶Va. Const., Art. VIII, §§ 1, 2 (2006); Va. Code §§ 22.1-253.13:1 et. seq. (2006); 8 VAC 20-131-10 et seq. (July 2006).

²⁷20 U.S.C.S. § 1401(9)(2006) (LexisNexis Congressional).

²⁸*Board of Ed. v. Rowley*, 458 U.S. 176 at 189; 102 S. Ct. 3034; 73 L. Ed. 2d 690 at 701 (1982).

²⁹458 U.S. at 189.

³⁰*Id.* at 201.

³¹*Id.* at 204.

³²*Id.* at 198.

³³*Id.* at 198-199.

Finally, acknowledging the broad range of disabilities the Act requires schools to address, the Court specifically declined to “establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act...”³⁴ Yet, the Court did clearly set forth a two-pronged analysis for FAPE disputes: did the state meet the Act’s various procedural requirements, and is the student’s IEP “reasonably calculated to enable the child to receive educational benefits”?³⁵ It is this *Rowley* analysis that continues to guide resolutions of IEP and FAPE disputes today.

Recent Cases: Providing a FAPE for the Autistic Child in Virginia

A pair of Virginia district court rulings--issued only three months apart--may provide a roadmap for the resolution of special education disputes--especially those involving services for autistic children. On May 25, 2006, the United States District Court for the Eastern District of Virginia issued a memorandum opinion potentially resolving a three-year conflict between Henrico County Public Schools and the parents of an autistic student receiving special education services pursuant to IDEA. In August, the same judge issued another memorandum opinion addressing the propriety of special education services for an autistic student in neighboring Hanover County. Critical to both rulings was the Court’s determination that the student’s IEP was “reasonably calculated to provide educational benefit.”³⁶

The Henrico County Ruling

The 2006 resolution of *County School Board of Henrico County, Va. v. R.T.* marked the end of a three-year dispute between the Henrico County School Board and the parents of RT, a child whom the school division identified as “in need of special services” at age 2.³⁷ Having been previously diagnosed as autistic by a pediatric neurologist, the child entered the county’s Pre-School Program for the Developmentally Delayed in fall 2001, where he received group and one-on-one instruction pursuant to several IEPs.

That school year, RT’s mother expressed concerns regarding the child’s progress, and ultimately requested a transfer to an autism program in another public school in the division for the next year (2002-03). The parents then supplemented the child’s public school educational services with a home program of applied behavioral analysis (ABA) therapy during the school year and in summer 2002.

In developing the September 2002 IEP, RT’s mother requested use of ABA therapy at the new school. The school division rejected this proposal, instead recommending that the student continue with an IEP not unlike his previous one, but incorporating the new school’s group-based autism program. This plan would continue until RT could be re-evaluated to determine “his present level of performance.” Concurrently with the development of this fall IEP, RT’s parents applied for RT’s admission to a private specialty autism program, and also continued the home ABA therapy.³⁸

Prior to subsequent IEP meetings (one in October, the other in November), dual evaluations of RT were offered by the parents and the division. It was agreed that RT not only had autism, but also “significant cognitive impairment,” the degree of which could not be determined accurately due to the child’s poor communication skills. Again, the mother expressed her wish for one-on-one instruction and ABA therapy, as well as year-round schooling; she presented expert medical testimony indicating a reversal of RT’s autism with ABA therapy.

Reflecting these discussions, a second IEP was offered at the November meeting; however, RT’s mother noted that 17 of the 24 goals were no different from those cited in the spring and September 2002 IEPs. She expressed doubt that her child would progress under this new IEP, as the child had not mastered the prior IEP goals, which were simply restated in the new document with only minor changes.

³⁴ *Id.* at 202.

³⁵ *Id.* at 206-207.

³⁶ *County School Board of Henrico County, Virginia v. R.T.*, 433 F.Supp.2d 657 (E.D. Va. 2006); *J.P. v. County School Board of Hanover County, Virginia*, 447 F.Supp. 2d 553 (2006).

³⁷ 433 F.Supp.2d at 662.

³⁸ *Id.* at 661.

Believing the proffered IEP was not “appropriate” and still advocating for ABA therapy, the parents issued the statutorily-required notice to the division that they would withdraw RT from public school and place him in a private facility. They subsequently filed for a due process hearing.

While RT attended the private facility for the remainder of the 2002-03 school year, it was not until the following school year, in August, 2003, that the due process hearing was held. RT then continued enrollment in the private facility for the 2003-04 school year. In late December, 2003, the hearing officer ruled in favor of RT’s parent, finding that the proffered IEP did not provide the FAPE, and that the private placement would. Although state regulation required the hearing decision to be entered within 45 days of the hearing request (in this case, 45 days from the fall 2002 request; the hearing itself did not occur until mid-August, 2003), the hearing officer’s decision was not issued until December 19, 2003, and was not filed for 10 more days (December 29, 2003).³⁹

Again, procedural deadlines were seemingly discarded. State regulations require judicial appeals of due process hearing decisions within one calendar year of the “issuance of the decision”—in this case, by December 2004. By the beginning of the 2004-05 school year, the school division had not filed an appeal of the hearing officer decision; RT’s private enrollment again continued. The school board ultimately submitted an appeal to the district court days before the one-year expiration date.⁴⁰

The Civil Action

On appeal, the federal district court—Judge Robert E. Payne writing—carefully traced the history of RT’s special education services and determination of autism, various IDEA requirements, and the differences between the ABA therapy requested by the parents and the Treatment and Education of Autistic and related Communication-handicapped Children (TEACCH) program offered in Henrico.⁴¹ Declining to rule on the general propriety of either instructional method, the court instead cited the key aspects of each.

Greatly simplified, the ABA therapy provided more one-on-one instruction, while the TEACHH program featured more group work. While both methods have demonstrated positive results with autistic students, the hearing officer noted RT’s lack of educational progress in the county program and found that it did not provide “educational benefit as measured by progress.” Judge Payne concluded that the record supported the hearing officer’s finding, and, giving it “due weight,” found the due process ruling “persuasive.”⁴²

But the due process finding is certainly not binding for the district court. While the IDEA requires “due weight” be given to the due process findings, the Act—and state regulations—also permit the court to hear new evidence and to “make its own findings based on the preponderance of the evidence.” Indeed, the district court noted that the “appropriateness of an IEP is a question of fact” and cited its authority to make an independent determination of factual findings.⁴³

Questions of procedure, evidence, and burdens of proof. Before examining the FAPE, however, the court was faced with a number of procedural questions. The school board contended that the hearing officer’s ruling was entitled to less weight, as the officer had, among other things, erred in determining RT’s educational progress in light of the IEP team’s understanding of his cognitive abilities at the time the November IEP was being developed. Citing the 2005 U.S. Supreme Court decision in *Schaffer v. Weast*, assigning the burden of proof in due process hearings to the party seeking relief, the board asserted that the hearing officer had improperly assigned it—the school board—rather than the parents—the burden of proving the propriety of the IEP.⁴⁴ The court, however, rejected this argument,

³⁹*Id.* at 663, 664; 8 VAC 20-80-76 (L)(1)(updated through July 24, 2006).

⁴⁰*Id.* at 663, 665; 8 VAC 20-80-76 (O)(1)(updated through July 24, 2006).

⁴¹*Id.* at 665-667.

⁴²*Id.* at 667-670.

⁴³*Id.* at 671-673; 20 U.S.C.S. § 1415(i)(2)(2006); 8 VAC 20-80-76 (O)(2)(updated through July 24, 2006).

⁴⁴*Id.* at 672; see generally, *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 163, 163 L.Ed. 2d 387 (2005); see also, *CEPI Policy Brief* by Leslie R. Stellman, Esq., *Special Education and the Burdens of Proof*:

noting the record was less than clear regarding any assignment of burden, and that, at any rate, the board had not objected at the time. The court stated that the hearing officer had simply found the parents' argument persuasive, and had concluded that the IEP "decisively inappropriate."⁴⁵

On judicial appeal, however, the burden of proof did indeed rest with the school division, which also contended that the hearing officer based his decision on evidence of RT's abilities that was not available at the time the contested IEP was developed. Again, the court rejected this argument, noting that although the IDEA itself was silent regarding the admissibility of particular evidence, state regulations clearly contemplated the admissibility of evidence not previously available to the IEP team at a due process hearing. Similarly, the court found that, in its own independent review of the facts, it, too, could consider information in the record that was not known to the IEP team at the time the contested plan was developed. The court stated that, even though the contested IEP was never implemented (as RT's parents placed him in the private facility), RT's "substantial progress" at the private facility supported the finding that "the School Board had grossly miscalculated both RT's ability to learn and the mode of learning that RT needed to make progress...and thereby designed an IEP that both underestimated and inappropriately served him."⁴⁶

The court also found that the hearing officer's failure to assess RT's "exact cognitive capacity" did not invalidate the hearing decision; although an IEP's educational benefit must be calculated in view of the student's potential, RT's capacity at the time of the November IEP "far exceeded what the School Board believed it to be." The hearing officer had properly considered RT's marked progress in the private placement as evidence of cognitive ability that had not been "recognized or planned for by the November, 2002 IEP."⁴⁷ Similarly rejected were the school board's arguments that its assessment of RT's cognitive abilities had been reasonable at the time; indeed, the school board itself had changed its primary classification of RT from "developmentally delayed" to "autism" in October 2002.⁴⁸

Also assailed by the school board was the hearing officer's alleged lack of deference to the opinions of board's educators and experts; the school board argued that less weight be given to the officer's decision. In response, the court cited the difference between deference to experts—whether presented by the parents or the board—and issues of witness credibility. "Due weight" must be granted the administrative findings, or the hearing process is rendered meaningless. Further, in matters of witness credibility, the court should defer to the hearing officer's judgment.⁴⁹

After setting forth further findings of fact regarding RT's evaluation, behavior, and instruction, Judge Payne concluded that, consistent with *Rowley* standards, the 2002 IEP was "not reasonably calculated to provide RT with the requisite benefit." The court criticized the board's "obdurate refusal" to consider ABA therapy and its lack of explanation for its reasoning in the IEP. In addition, the court also dismissed the board's argument that its group-instruction program offered the least restrictive environment for RT when compared to the ABA one-on-one focus. The court firmly stated that "[w]here, as in this case, it is known that a different educational method has enabled a child...to make real educational progress [emphasis added], the School Board may not dismiss that method with merely conclusory remarks in an IEP."⁵⁰

Reimbursement for private placement. Having affirmed the hearing officer's finding that the IEP was indeed deficient, the court then turned to the issue of tuition reimbursement for RT's private placement. Authorized by the Act to "grant such relief as...[i]t deems appropriate,"⁵¹ the court is also empowered to require tuition reimbursement even when the school division has not consented to the private placement if, in the opinion of the court, the division has failed to provide the FAPE. The court

The Legacy of Schaffer ex rel. Schaffer v. Weast (2006) <<http://www.cepi.vcu.edu/pdf/Policy%20Briefs/Les%20Stellman--Schaffer%20v.%20Weast.pdf>>

⁴⁵433 F.Supp.2d at 674; 8 VAC 20-80-76(J)(15)(updated July 26, 2006).

⁴⁶*Id.* at 675, 676; 8 VAC 20-80-76(F)2(a)(updated July 26, 2006).

⁴⁷433 F.Supp.2d at 677.

⁴⁸*Id.* at 677-678.

⁴⁹*Id.* at 679, 680.

⁵⁰*Id.* at 688-691.

⁵¹*Id.* at 691; 20 U.S.C.S. § 1415(i)(2)(C)(iii)(2006) (LexisNexis Congressional).

awarded RT's parents tuition for the 2002-03 enrollment in the private school (including a summer term).⁵²

Complicating the complete resolution of the relief issue, however, was the reimbursement claim for subsequent years—particularly, for the period during which the hearing officer was to have issued his decision (originally, October 3, 2003—45 days after the issue was submitted) through March 20, 2006, when the parties finally reached an agreement regarding RT's placement. Although the parents had received a favorable ruling from the hearing officer for the 2002-03 year, based on the November 2002 IEP (albeit not until late December, 2003—over two months after the date the officer should have issued his decision), the school board argued that the parents had not exhausted administrative remedies for any school years following the one addressed in the hearing. The parents countered that the school division had failed to offer a subsequent IEP nor requested an additional administrative hearing to determine its validity.⁵³

The Act clearly provides that, with the exception of certain alternative settings required by student misconduct, students are to maintain the then-current educational placement—that is, “stay put”—during the pendency of any administrative or judicial proceedings.⁵⁴ The court, however, declined to address the parties' various contentions regarding RT's subsequent private school enrollments, and instead requested they submit additional materials regarding reimbursement for the contested reimbursement periods. The submissions revealed very different perspectives regarding not only when, but if, additional IEPs had been proposed. Interestingly, the court ordered counsel to resolve the matter between the parties, as further delays were “simply not acceptable.” Finally, the court admonished counsel that, should the issue require additional judicial intervention, the court would require losing counsel to pay personally for litigation costs.⁵⁵ Interestingly, in spring 2006, RT began attending Henrico County Public Schools again, now with the benefit of a one-on-one aide trained in the ABA methods employed by the \$50,000-per-year Faison School—the private facility RT previously attended.⁵⁶

The Hanover County Decision

Three months after the *R.T.* opinion was issued, Judge Payne again addressed the propriety of an IEP for an autistic student—“JP”—enrolled in Hanover County Public Schools. JP's parents sought to overturn an October 2005 due process ruling supporting JP's 2005-06 IEP.⁵⁷ Again, critical to the court's analysis would be the basic requirements of IDEA, the requisite FAPE, and the *Rowley* decision. Judge Payne echoed his prior opinion, stating that school divisions cannot satisfy IDEA by “providing a program that produces some *minimal* [emphasis added] academic advancement, no matter how trivial.”⁵⁸

Like RT, JP was diagnosed with autism at an early age. He enrolled in Hanover County Public Schools' special education program in January, 2001, and remained there until May, 2003, when his parents placed him in a private specialty school for autistic students. Like the Faison School in the *R.T.* case, Spiritos School also employed the one-on-one instructional practices of ABA therapy.⁵⁹ While testing indicated that JP's “significant gains” at Spiritos, his parents sought to re-enroll him in Hanover's public schools. Consequently, an IEP team, appropriately including JP's parents, created an IEP in August, 2004, which would place JP in a Hanover elementary school other than one in which he had previously been enrolled. Noting JP's lack of success at the initial public elementary school—as well as his progress at the private facility—the parents sought to incorporate ABA techniques in the IEP at the second elementary school. The 2004 IEP incorporated the settlement agreement resolving a previous due process dispute brought by JP's parents during JP's initial tenure in Hanover Public Schools. The

⁵²20 U.S.C.S. § 1412(a)(10)(C)(ii)(2006)(LexisNexis Congressional).

⁵³433 F.Supp.2d at 691-692.

⁵⁴20 U.S.C.S. § 1415(j)(2006).

⁵⁵433 F.Supp.2d at 693.

⁵⁶Richmond Times-Dispatch, “School system loses autism case—Judge faults Henrico for not taking child; ruling may cost hundreds of thousands” (May 27, 2006).

⁵⁷*J.P. v. County School Board of Hanover County, Virginia*, 447 F.Supp. 2d 553 (2006).

⁵⁸447 F.Supp. 2d at 556-558, quoting *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629,636 (4th Cir. 1985).

⁵⁹447 F.Supp. 2d at 558.

agreement included not only a monetary award (presumably for reimbursement for the private school tuition), but also specific terms that became a primary focus of the judicial case.⁶⁰

The IEP featured placement in some general classrooms as well as in a self-contained special education setting. It also incorporated settlement agreement provisions addressing a one-on-one aide and particular learning areas and tools. Subsequent reworkings adjusted various goals, set forth JP's current performance level, and described certain accommodations.⁶¹

In October 2004, the team met to review JP's behavioral problems and to adjust goals. Subsequently, a functional behavioral assessment, a school division psychologist evaluation, and speech therapist evaluations were conducted. The IEP was then amended in December to reflect some of these assessments. Additional IEP meetings followed.⁶² The remainder of the 2004-05 school year was marked by parental requests for additional tests and clear dissatisfaction with JP's progress.

Critical to the determination of the propriety of the contested 2005-06 IEP was, of course, an assessment of JP's actual progress for the previous school year (2004-05). The parents and the school division held diametrically opposing views; the parents felt JP had, in reality, regressed during 2004-05, while the school division maintained that the child had made "sufficient progress." A summer IEP was developed, but JP spent much of the summer on vacation with family and participated for only seven days, which were consumed by skills testing requested by the parents.⁶³

Development of the 2005-06 IEP began in June 2005. The parents requested increased one-on-one instruction, similar to the Spiritos program, and contended that the school division had failed to meet certain settlement agreement terms in the 2004-05 IEP. Hanover countered that JP had indeed progressed and could continue to do so in 2005-06, and that ABA therapy was not needed. JP's parents then requested private schooling—but not necessarily at Spiritos. Upon the school division's refusal to accede to this request, the parents rejected the proposed 2005-06 IEP and requested a due process hearing in late June, 2005.⁶⁴ Issued in October, the hearing officer's decision stated that JP had made "more than minimal progress" in 2004-05, and that both the 2004-05 and the 2005-06 IEPs were "appropriate."⁶⁵

Not unlike RT's parents, JP's parents also enrolled their child in a private setting while the administrative hearing process unfolded. Like Spiritos, this new private setting, Dominion School, also employed ABA therapy. In January 2006, JP's parents sought a civil appeal of the due process ruling. In refining the challenge, ultimately the parties agreed that the core questions were (i) whether the 2005-06 IEP satisfied IDEA requirements and (ii) whether the parents were entitled to tuition reimbursement for the 2005-06 school year.⁶⁶

In addressing these issues, Judge Payne followed the *J.T.* decision model. Again, issues of "due weight" granted to the hearing officer's decision, hearing witness credibility, and the court's authority to make independent findings of an IEP's appropriateness received intense focus. Denouncing the hearing officer's decision as "so inadequate as to be of little use," Judge Payne criticized the decision's "conclusory" language, "complete lack of analysis," and "distorted representation of what the witness actually said." In addition, the hearing officer made no determinations of witness credibility (literally stating that each expert was entitled to his opinion), thereby rendering valueless the decision itself. Finally, Judge Payne disagreed with the hearing officer's statement that there had been "no real conflict on relevant facts." Ultimately, the court noted that the decision's findings of fact were not "regularly made"; the decision would be granted no weight, and the court would be forced to review the record and testimony itself.⁶⁷

⁶⁰ *Id.* at 558-559.

⁶¹ *Id.* at 559; 560-561.

⁶² *Id.* at 560-561.

⁶³ *Id.* at 561-562.

⁶⁴ *Id.* at 562.

⁶⁵ *Id.* at 562.

⁶⁶ *Id.* at 562, 563.

⁶⁷ *Id.* at 564-566.

Although parents were seeking tuition reimbursement for the 2005-06 school year, a finding regarding the failed implementation of the IEP for the previous year (2004-05) was critical. Because the 2004 and 2005 IEPs were so similar, a finding that the 2004 IEP was “failed” would be relevant in determining the propriety of the 2005 IEP. The court noted that, absent school division assurances or new accommodations, the parents “reasonably could expect another year of failed implementation.”⁶⁸

Because that the 4th Circuit had not addressed whether incomplete or failed IEP implementation constituted a denial of the required FAPE, Judge Payne turned to a 5th Circuit precedent indicating that “more than a de minimis failure to implement all elements of that IEP” would be required. The successful challenge must show that “substantial or significant provisions” were not implemented. Significantly, evidence indicating actual educational benefit—despite failures in implementation—would be admissible.⁶⁹

The parents specifically complained about (i) a requested but tardy oral motor assessment, the findings of which were never implemented; (ii) inadequate implementation of a particular aspect of ABA therapy by “an undertrained education aide”; and (iii) the school division’s forbidding JP’s parents from video taping JP’s speech therapy sessions, thereby discouraging the “parental involvement” espoused in the 2004 IEP. The school division countered that its implementation was proper, or, if not, was either justified or had not impeded JP’s progress.⁷⁰

Extensively reviewing the record to resolve the individual claims, the court found that although the requested oral motor assessment was indeed delayed and its exercises not implemented, this failure was “not material”—nor did it involve a “substantial or significant provision” of the IEP.⁷¹ However, based on the IEP language, the parents’ clear intent that JP receive the particular aspect of ABA therapy (the “discrete trial method”) as a condition of JP’s re-enrollment in the school system, the aide’s lack of training, and the school division’s improper and irregular use of the discrete trial method constituted a substantial failure in IEP implementation. The requested method, if properly executed, would have provided invaluable tools in determining JP’s progress and in making curriculum decisions.⁷² Finally, turning to claim of restricted parental involvement and a resulting denial of FAPE, Judge Payne noted that while the IDEA clearly promotes parental involvement in various significant ways, it does not confer a parental right to videotape the student.⁷³

JP’s Disputed Educational Progress. Building on their argument of a failed IEP implementation, the parents also sought to prove JP’s lack of progress in the school division, contrasted by his performance in the private school setting. Lack of educational progress under the 2004-05 IEP—coupled with the fact that the 2005-06 IEP reflected little or no change—both parties agreed, would indeed support a finding that JP’s IEP was not “reasonably calculated” to provide a FAPE.⁷⁴

In determining JP’s educational progress, the court conducted a lengthy review of benchmark scores for goals stated in JP’s 2004 IEP as well as test scores, teacher logs, and anecdotal information. These resources not only varied in utility, but yielded a range of results. The court found the IEP record of progress toward goals of little use; the recorded scores included no accompanying explanations, and the parents and the school division disagreed as to JP’s actual progress on various goals. Tests conducted by the school division indicated “significant regression in speech and language” in every category but one. Entries in teachers’ logs, though inexact, indicated some progress, but were not clearly linked to IEP goals and were at times contradicted by teacher testimony. Testing procured by JP’s parents for JP’s 2003-2005 progress indicated a mix of growth and regression; Judge Payne summarized

⁶⁸*Id.* at 566.

⁶⁹*Id.* at 567, quoting *Houston Indep. Sch. Dist. V. Bobby R.*, 200 F.3d 341 (5th Cir. 2000) *cert. denied*, 531 U.S. 817, 121 S.Ct. 55, 148 L.Ed. 2d 23 (2001).

⁷⁰*Id.* at 568.

⁷¹*Id.* at 569.

⁷²*Id.* at 571-572.

⁷³*Id.* at 572-573.

⁷⁴*Id.* at 574.

the progress indicated by these assessments as “at best, minimal.”⁷⁵ Finally, JP’s medical specialists also noted mixed impressions of no progress as well as regression.⁷⁶

Having sifted through a flawed hearing record and a tangle of sometimes conflicting or inclusive expert testimony, the court again relied on *Rowley* to reach its holding. Concluding that JP did not demonstrate progress under the 2004 IEP, the court found that the 2005 IEP, as essentially identical to its predecessor, was not “reasonably calculated to provide JP with education benefit” and did not provide the necessary free and appropriate education.⁷⁷

Reimbursement wrangle. But simply showing the IEP’s failure to confer educational benefit would not guarantee reimbursement for JP’s private placement; his parents must prove the propriety of the private education under IDEA. Like RT’s private placement at Faison, JP’s placement at Dominion incorporated ABA therapy, board-challenged as failing the LRE requirement to. Again, as in *R.T.*, Judge Payne rejected this contention, and, citing detailed Dominion records supporting JP’s progress during the placement, found that the Dominion School had indeed provided an educational benefit. The parents were entitled to reimbursement for tuition for the 2005-06 school year as well as attorney’s fees.⁷⁸

However, JP’s legal saga has continued. Despite the clarity of the August ruling, Hanover County Public Schools indicated it would not fund JP’s 2006-07 tuition at Dominion, but would instead pay tuition for JP to attend the more-than-twice-as-expensive Faison School. For now, JP remains enrolled at Dominion.⁷⁹

CEPI Summary

While school divisions and parents certainly share the same goal—that of ensuring the provision of an appropriate education program for the special needs child—both parties can “reasonably differ” as to preferred programming and services for the student. As the numbers of public school students in special education—and, more particularly—autism—increase, it is likely disputes over IEPs may increase as well. However, the *R.T.* and *J.P.* decisions offer lessons for Virginia school divisions as well as parents of students with disabilities—particularly those autistic students who may benefit from certain instructional methodologies.

- The *Rowley* decision continues to set the standard for the determining the propriety of an IEP and the necessary FAPE; the student’s special education program must be “reasonably calculated to provide educational benefit.” Further, this benefit must be more than minimal.
- School divisions would be well-advised to ensure that teachers maintain clear, accurate, and regular records of evaluations, assessments, and observations of special education students. Of great significance in the *J.T.* decision was the lack of clear or consistent teacher records regarding JT’s educational progress. Failure to document student performance accurately—coupled with inconsistent or contradictory teacher recollections—may render school records of little use in ascertaining the “educational benefit” of a special education program.
- Similarly, hearing officers must issue decisions that offer clarity in reasoning as well as sufficient detail in the assessment of witness/expert credibility and in the evaluation of educational benefit. While given “due weight” in a civil action, hearing decisions are not dispositive and may be discarded as “conclusory,” as in the *J.T.* ruling.

⁷⁵*Id.* at 574-580.

⁷⁶*Id.* at 582.

⁷⁷*Id.* at 587.

⁷⁸*Id.* at 588-590.

⁷⁹Richmond Times-Dispatch, “Parents fight plan for autistic son’s education—Say Hanover seeks to deny future funds for current school” (September 17, 2006).

- Virginia special education regulations authorize hearing officers to review “post-IEP evidence”—in *R.T.*, evidence of “actual progress” not available at the time an IEP was developed—for certain limited purposes. In the Henrico decision, evidence of RT’s progress under ABA therapy—realized within months of the contested IEP—was admissible simply to indicate the county’s erroneous understanding of RT’s abilities.
- The use of applied behavioral analysis (ABA) therapy, with its emphasis on one-on-one instruction and potential limitation on social interaction with other students, need not be violative of IDEA’s preferred least restrictive environment. Judge Payne noted in both decisions that central to the propriety of the IEP and FAPE is the educational benefit conferred; a more restrictive environment may be necessary in certain cases to effectuate that benefit.
- Although the various procedural delays so evident Henrico case chronology received little judicial scrutiny, school divisions and parents should exercise care in compliance with timetables required by IDEA and Virginia regulation.
- School divisions—and parents—should consider seriously the various alternative dispute resolution options—such as the early resolution session or mediation—rather than often-time-consuming—and sometimes costly—due process hearings and litigation.
- While IDEA allows the judiciary to provide appropriate relief to parents—including tuition reimbursement for enrollments initiated before dispute resolution—parents should nonetheless remain aware of the statute’s “stay put” provision and that they risk responsibility for these payments absent a favorable ruling.

Recent and Differing Perspectives

Potential Legislative Action in the Commonwealth

Potentially offering a bypassing to IDEA placement determination processes, legislation introduced during the 2006 Session of the General Assembly would have provided scholarships for students with an IEP prepared as required by Board of Education (and IDEA) regulations to attend “a private school of choice.” **Senate Bill 545** would have created the “Scholarships for Disabled Children Program” to fund tuition at certain eligible nonsectarian private schools upon parental request for disabled students who have attended a Virginia public school for at least one year upon (i) parental dissatisfaction with the student’s academic progress; (ii) the student’s admission to the eligible private school; and (iii) parental notification to the school division at least 60 days before the first scholarship payment. The measure also contains another public school choice option: the parent may select a school in another division. Scholarships would be funded as provided in the appropriation act, but would not exceed \$10,000 per pupil annually. The measure was carried over by the Senate Committee on Education and Health.⁸⁰

Subsequently, a special subcommittee of the full Senate Committee has met twice to review the measure and propose changes in response to public input. On September 20, 2006, the subcommittee recommended that the full committee consider the measure with amendments clarifying that (i) parents, not the school divisions, must provide the student’s transportation; and (ii) parents include in their grant acknowledgement that the public school has offered or implemented an IEP that is “reasonably calculated to provide educational benefit to the student.”⁸¹ The last day for committees to act on 2006 carryover bills is December 8, 2006. As the Senate Committee on Education and Health failed to take SB 545 by that date, the 2006 version is deemed “failed.” However, legislators are not precluded from introducing similar or identical measures for the 2007 Session.⁸²

⁸⁰2006 Virginia General Assembly, SB 545 <<http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+SB545>>

⁸¹Virginia Division of Legislative Services, Legislative Record, SB 545: Scholarships for Disabled Students <<http://dls.state.va.us/pubs/legisrec/2006/sb545a.htm#sept20>>

⁸²Virginia Division of Legislative Services, 2007 Session Calendar <http://dls.state.va.us/pubs/calendar/cal2007_1.pdf>

Resources

Federal Authority

20 U.S. C. §§ 1401; 1412; 1414; 1415 (2006)(LexisNexis Congressional)

34 C.F.R. § 300.8 (c)(1)(i) (Revised July 1, 2006) <<http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAIISdocID=601526319485+3+0+0&WAIISaction=retrieve>>

Federal Register, Vol. 71. No. 156, Part II, Department of Education, 34 CFR Parts 300 and 301 (Monday, August 14, 2006)

Virginia Legislative and Regulatory Authority

Va. Const., Art. VIII, §§ 1, 2 (2006)

Va. Code §§ 22.1-215; Va. Code § 22.1-216; 22.1-253.13:1 et seq. (2006)

2006 General Assembly, SB 545.

8 VAC 20-80-40; 8 VAC 20-80-60; 8 VAC 20-80-62; 8 VAC 20-80-64; 8 VAC 20-80-70; 8 VAC 20-80-76 (updated through July 24, 2006); 8 VAC 20-131-10 et seq. (updated through July 24, 2006)

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