Without Data All We Have Are Assumptions

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I. INTRODUCTION Policy decisions forged from legislation, regulations, and litigation "cast long shadows of influence"1 over the practices that guide the education of students with disabilities. Revisiting the significance of past decisions can help reframe current policies or clear the way for new ones, and such was the purpose of this issue of the Journal of Law and Education. The papers presented in this symposium proceed from a series of events that marked the 25th anniversary of the Rowley decision, beginning with activities initiated by the University of Wisconsin-Milwaukee and culminating in a keynote presentation by several contributing authors at the annual conference of the Education Law Association in November 2007.

The following commentary provides an epilogue to the special issue entitled Rowley Reconsidered: Revisiting Special Education's Landmark Case after 25 Years. Our intention is to weave together the threads of insight offered by guest editors Elise Frattura and John LaNear, and those of the distinguished contributors who readily shared their scholarship and personal perspectives, including Amy Rowley, Philip T. K. Daniel, Dixie Snow Huefner, Julie Mead, and Mark Paige. In the epilogue we place our comments at the nexus of law and education by reflecting on the forces of social policy that drive change in special education, including professional initiatives that influence the practices used by teachers and administrators. We then consider how complex issues of accountability require educators to be more diligent, and parents to be more vigilant, in using student-centered data and scientifically- based instructional practices when designing and assessing an appropriately individualized public education.

II. SOCIAL POLICY AND SPECIAL EDUCATION

Arguably, the policy decision casting the longest shadow over the meaning of an appropriate special education was made by the Supreme Court on June 28, 1982 in the case of Board ofEduc. v. Rowley.2 A fixed standard for a free appropriate public education (FAPE) has never been set by Congress. However, the Rowley court determined that appropriate meant tailored to a child's individual needs, not to the needs of the school system, and that access to public schooling for children with disabilities fell short of requiring schools to provide the very best in programming.3 Some think this vague definition has resulted in costly conflicts and litigation. Others caution that a fixed standard of appropriate would be undesirable and antithetical to the individualized nature of the Individuals with Disabilities Education Act (IDEA).4

The IDEA, originally authorized as The Education for All Handicapped Children Act (EAHCA) in 1975, began as a remedy for the exclusion of millions of children from public instruction based solely on their disabilities. As an educational funding statute, the reach of the IDEA extends beyond civil rights protections by securing an appropriate public education through the collaborative process of ensuring an individualized education program (IEP) for each eligible student. The law's least restrictive environment (LRE) principle guides placement decisions so that students receive specially designed instruction in regular classrooms, to the maximum extent appropriate to their individual needs, and in alternative settings when teams of parents and professionals determine that satisfactory progress cannot be made in regular classes with specialized supports. From its enactment to its most recent reauthorization, special education law has required decisions about FAPE to be team-based and child-centered. In other words, school districts and parents share a mutual obligation in designing a beneficial education for a child who has a disability.

The contributors to this special issue examine the repercussions of the Rowley decision on special education from various perspectives, none more personally than the reflections of Amy Rowley who examines this landmark dispute through the lens of her childhood memories. Rowley comments that her narrative is an unusual entry in a professional journal, and it is. Rarely are readers privy to the reactions of the child at the center of a dispute. Now a professor of American Sign Language, Rowley looks back sometimes in anger at the isolation and absence of communication she experienced in elementary school. Her anecdotes from classroom to playground vividly convey her frustration with the type of accommodations she received as a deaf student in a hearing environment. Rowley's concerns about educating deaf children, in the past and present, are not unfounded; the absence of communication and language for children who are deaf arrests the development of their academic, social, and life skills.5 In advocating for every child, whether deaf or hearing, Rowley's reflections speak to the draining effect of such disputes on both children and their families at the center of a special education conflict.

The impact of a disability on a student's opportunity to learn is a recurring theme for Mead and Paige as they trace the precedential influence of Rowley in special education policy to its influence on other aspects of school law. Mead and Paige

argue for the adoption of a middle ground in defining FAPE that acknowledges the centrality of both equal access and personal potential in developing a student's IEP.6 Amy Rowley was unable to hear and that was the crux of the issue in her case. Had the Court discussed Amy's limited physical access to instruction resulting from her inability to hear, they argue, the decision might have gone differently as Justice White suggested in his dissent.

Most disabilities affect the ways in which students' process information and express themselves, but deafness, say Mead and Paige, requires attention to the mode of communication itself. New provisions in the IDEA 2004 require IEP teams to consider the use of sign language as a special factor in educating deaf students, a provision that might have been helpful to 8-year-old Amy June Rowley. Just as new policy decisions are driving change in special education emerging research is helping teachers and administrators recognize the language characteristics of deaf students, and evaluate the quality and character of classroom communication across a variety of educational settings including special schools and inclusive classes.7

At the center of the current controversy surrounding the meaning of an appropriate special education is the intersection of the IDEA with another partially funded statute, The No Child Left Behind Act (NCLB).8 Both pieces of legislation provide federal education dollars to states, and both attempt to match diminishing resources to higher expectations. In this issue, Daniel examines the relationship between an individually appropriate education for students with disabilities under IDEA, and the concept of an adequate education for all students inherent in NCLB. Adequacy as a funding concept embodied in civil rights legislation addressing equal educational opportunity dates, in spirit, from Brown v. Board of Education.9 Lawsuits challenging how American public schools are funded have been filed in 49 of the 50 states, and since 1989 plaintiffs have overwhelmingly prevailed in funding cases based on adequacy. Such suits claim "that all schools must receive the resources necessary to provide students with the opportunity for a meaningful education that enables them to meet challenging new state standards."10

Both Daniel and Huefner revisit the Rowley decision in light of the broader accountability provisions of NCLB. Considering Rowley's precedent that school officials need only provide some educational benefit, Daniel raises the question of whether NCLB can be interpreted as redefining FAPE by requiring students to meet content and proficiency standards in the general curriculum. Noting that no court to date has determined that a student's failure to show proficiency signals a failure of FAPE, Huefner cautions that failure to meet and implement the requirements of a student's IEP is far more than harmless error.

Huefner traces changes in the IDEA statute and regulations, finding the IEP to remain the proper tool for determining the extent of educational benefit. In her analysis, she argues for revising the standard of FAPE by reviewing evidence that the student has made substantial progress toward at least a significant portion of the goals articulated in the IEP. In honor of the individualization required by the IEP, progress in meeting this standard should be weighed against the child's capacity for growth.

Revisiting the Rowley decision from these various perspectives underscores a central feature of special education as a public policy: disability and impairment raise issues of social justice and practical concern whenever societies pursue the goal of universal education.11 Simply put, children differ widely in how they learn, and a disability represents a significant difference from what most people can do, given their age, opportunities, and instruction.12 It is for this reason that "the IDEA begins from a simple yet profound idea: that of human individuality,"13 an idea articulated in the purpose statement of the Act: "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs, and prepare them for further education, employment and independent living."14 Special education, with its related services and supports, is the vehicle through which the IDEA delivers individualized "in-puts," or "counter-impairment interventions," designed to mitigate the effect of a student's disability.15 As defined in the statute, special education means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings."16 With the aid of specific and intensive special education that addresses their disability-related needs and ensures their access to the general curriculum, more students with disabilities should benefit from the experiences available to typically developing students. When specially designed instruction is guided by research-based techniques, the likelihood is increased that students will benefit and adjust more successfully to the demands of the schoolhouse.17

III. ACCOUNTABILITY AND ASSESSING PROGRESS

Stakeholders might well ask the question, what is the proper measure of educational benefit for special education students in this era of standards-based reform? The basic right to learn is the centerpiece of the accountability-movement, and the proof of learning is now assumed to rest in positive results, not simply correct procedures. Program improvements and educational progress for typically developing students are now assessed against standard measures. However, assessing the progress of special education students is complicated by the nature of disability and the type of assessments used in most states. Accommodations can conflict with the construct validity of tests, and research has yet to provide assurance that these assessments are accurately measuring what students really know and are able to do. There are also major concerns with whether these assessments are broad enough to capture the various ways that special education students demonstrate their capabilities rather than their disabilities.

Using personally relevant outcome data to demonstrate the meaning of an appropriate education has long been advocated by Edwin W. Martin,18 a member of the group that used the term "appropriate" in Grafting PL 94-142 to refer to an education suited to the unique needs of an individual with disabilities. Twenty years after the enactment of PL 94-142, and more than a decade after the Supreme Court's decision in Rowley, Martin called for improving the effectiveness of special education, and assessing appropriate instruction in ways that are meaningful to a student's life. He asked a simple question to drive home his point: "Do our programs meet the test of assisting students to attain post-school success and positive self-regard?"19 Too often special education decisions are based on argument instead of on data, he noted, and "without data all we have are assumptions" about how well students perform and how much they are capable of achieving.20

Using valid assessments with effective instruction has become increasingly critical to making appropriate decisions that constitute FAPE. The notion of how well school personnel communicate the results for students is also significant and holds import for how non-educators-parents, attorneys, judges-interpret the actions of educators.

III. USING DATA AND PEER REVIEWED RESEARCH

Two major areas of the IDEA that will significantly alter the ways in which special education teachers work with their students are requirements that (a) special education services be based on peer-reviewed research, and (b) educators monitor and report on the educational progress of students receiving special education. These requirements may also serve to influence the ways that courts will interpret the FAPE mandate of the IDEA.

The first requirement, added in the reauthorization of 2004, is that the IEPs of students with disabilities must include a statement of the required special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable.21 Although IDEA does not define peer- reviewed research, the 2006 regulations22 defined the term in accordance with NCLB's requirement23 regarding scientifically-based research. According to the language in NCLB, scientifically-based research applies the rigorous, systematic, and objective methods of science to examine and validate instructional procedures.24 This research (a) relies on systematic, empirical methods that draw on observation or experiment, (b) involves rigorous data analysis, (c) relies on measurements or observational methods that provide reliable and valid data, (d) is evaluated using experimental designs, (e) ensures that experimental studies are presented in sufficient detail or clarity to allow for replication, (f) is published in peer-reviewed journals or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review. According to the U.S. Department of Education's comments on the IDEA regulations, "states, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective."25

The inclusion of this terminology may prove to be significant to future courts when interpreting the FAPE mandate because the law directs IEP teams, when developing a student's IEP, to base the special education services to be provided on reliable evidence that the program or service works. To comply with this new requirement, therefore, special education teachers should use interventions that empirical research has proven to be successful in teaching behavioral and academic skills to students with disabilities.

The second major requirement in the IDEA, strongly emphasized in the IDEA Amendments of 1997 and the reauthorization of 2004, is that special education teachers must collect data to monitor student progress toward the goals in their IEPs. By using such data, teachers' educational decisions will be guided by objective information, rather than subjective opinion. If the data show that a student is not learning, the teacher can make instructional changes and continue to collect data to determine if the instructional changes are working. Thus, teachers can adjust their instruction in response to student performance. Moreover, teachers must report to a student's parents the progress that the student is making toward the goals on his or her IEP. These reports must be provided concurrent with the issuance of report cards,26 which in most school districts will be every nine weeks. According to the U.S. Department of Education's comments on the IDEA regulations, "we believe that these requirements will ensure that progress toward achieving a child's annual goals can be objectively monitored and measured."27

The IDEA, therefore, requires that (a) IEPs include annual goals that can be measured, (b) teachers actually measure progress toward these goals, and (c) parents be informed of their child's progress toward the goals. The clear implication of these requirements is that, if a student is not making adequate progress toward his or her annual goals, his or her teacher should make instructional changes and continue collecting data in an effort to improve student performance.

The contributors to this special issue illustrate the powerful influence of the Rowley decision and what it means for special education practice and law. The following principles derived from revisiting this landmark case are offered as a means for restoring the promise of the IEP as the tool for demonstrating the effectiveness of specially designed instruction. These principles also reflect the responsibility shared by educators and parents throughout the IEP process for being vigilant in meeting a child's individual needs, and diligent in using data and peer reviewed research to do so.

Principle #1: Ensure that special education teachers and administrators understand the IEP requirements of the IDEA, as amended in 1997 and 2004.

To ensure that public schools fulfill their obligations under the IDEA, school-based teams must be able to develop and implement legally correct and educationally meaningful IEPs. Huefner asserts that the IEP is the proper tool for determining the benefit required for FAPE. To develop meaningful IEPs, special educators must: (a) conduct relevant assessments of students that provide information to teachers on a student's unique academic and functional needs and how best to address those needs; (b) develop meaningful educational programs for students based on the assessment, which consists of special education and related services grounded in research-based practices; (c) generate measurable annual goals that will be used to monitor students' academic and functional progress; and (d) monitor the student's progress by collecting data on his or her growth toward those goals, and make instructional changes when necessary. As Huefner notes, "the (IEP) requirements are the substantive heart of the FAPE."

Principle #2: Ensure that special education teachers and administrators understand and use research-based procedures.

The importance of using research-based educational procedures was stressed in both NCLB and IDEA 2004. Given the IDEA requirement that special education programs deliver meaningful benefit, it should be noted that this level of benefit likely will not be realized when ineffective instructional strategies are used. Thus, teachers must understand and properly implement educational practices based on the latest research. The way that teachers and administrators can ensure that their programs deliver FAPE is to use educational procedures that show evidence of producing meaningful outcomes. Principle #3: Ensure that special education teachers know how to collect and use formative data to monitor student progress.

The IDEA, as amended in 1997 and 2004, increases the federal mandate that requires teachers to monitor student progress. To ensure that special education programs confer meaningful benefit, special education teachers must be able to collect data to determine if their instructional and behavioral programs are working and that their students are making progress toward meeting their measurable annual goals. By using such data, teachers' educational decisions will be guided by objective data. If the data show that a student is not learning, the teacher can make instructional changes and continue to collect data to determine if the instructional changes are working. By adjusting their instruction in response to student performance, teachers are more likely to develop and implement progress that leads to increased academic achievement and functional performance.

IV. CONCLUSION

In the Congressional findings section of IDEA 2004, Congress wrote that "improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."28 Recognizing that the IDEA had been successful in ensuring that children with disabilities and their families have access to a free appropriate public education,29 Congress nonetheless stated that implementation of the IDEA had been "impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities."30 The primary purposes of Congress in the reauthorizations of the IDEA in 1997 and 2004 were to "ensure that educators and parents have the necessary tools to improve educational results for children with disabilities"31 and "to assess, and ensure the effectiveness of, efforts to educate children with disabilities."32

A report from the House Committee on the Reauthorization of the IDEA 1997 stated that "the Committee believes that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education."33 The Committee further noted that the reauthorization of the IDEA was intended "to move to the next step of providing special education and related services to children with disabilities; to improve and increase their educational achievement."34 The language in this House Committee report, and the language in the IDEA, seem to have shifted the major purpose of the IDEA from providing access to educational services, a purpose that had been demonstrably successful, to providing meaningful and measurable special education programs that result in improved results for students with disabilities. As Huefner aptly states in this issue "the expectation of academic and functional progress calls for more than a floor. Although IDEA does not expect, let alone guarantee, any certain standard, it expects meaningful or substantive progress."

According to Mead and Paige, for the past 25 years, the Rowley decision has provided the framework for courts to determine whether students were provided with a FAPE. An analysis of the IDEA reauthorizations of 1997 and 2004, however, indicates that IDEA is no longer about merely providing access to education, nor is it just about affording students a basic floor of opportunity. The law now embraces research, progress monitoring, and real results for students with disabilities. Clearly, this will require changes in the ways that school-based teams develop IEPs, and may influence courts on how they view and assess FAPE. As Huefner concludes "after thirty years of experience with the IDEA, and considering its 1997 and 2004 amendments, it is time for an authoritative, persuasive judicial decision clearly enunciating the updated expectations of FAPE."

1. See JAMES J. GALLAGHER, DRIVING CHANGE IN SPECIAL EDUCATION (Brookes 2006) for an extended discussion of the ways in which legislation, litigation, administrative rules and regulations, and professional initiatives have influenced decision-making in special education. From 1967-1970 James J. Gallagher, Ph.D., served as the first director of the Bureau for the Education of the Handicapped, now the Office of Special Education Programs in the U.S. Department of Education, a position which required him to implement new federal legislation addressing special education for children with disabilities.

2. 458 U.S. 176 (1982).

3.Id.

4. The Individuals with Disabilities Education Improvement Act of 2004, P. L. 108-446 (codified at 20 U.S.C. [section] 1400, et seq.

5. Lawrence Siegel, The Argument for a Constitutional Right to Communication and Language, Sign Language Studies, Vol. 6, No. 3 (Spring 2006) at 255-272. Siegel argues for a constitutional right to communication and language for deaf citizens as an essential complement to the right to free speech.

6. This middle ground approach in effect combines the comparability standard of FAPE ensuring equal access to educational opportunities under Sec. 504, with the personalized standard of educational benefit guiding special education under the IDEA.

7. Stephanie W Cawthon, Hidden Benefits and Unintended Consequences of No Child Left Behind Policies for Students Who Are Deaf or Hard of Hearing, AM. EDUC. RES. J., Vol. 44, No. 3 (Sept. 2007) at 460-492. Cawthon studies how large scale reforms affect students with low incidence disabilities and those with diverse linguistic backgrounds, especially students who are deaf or hard of hearing.

8. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. [section][section]6301 etseq.

9. 347 U. S. 483 (1954).

10. Michael A. Rebell, Equal Opportunity and the Courts, PHI DELTA KAPPAN, 89.6 (Feb. 2008) at 432-439.

11. MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 120 (Harvard University Press 2006).

12. JAMES M. KAUFFMAN & DANIEL P. HALLAHAN, SPECIAL EDUCATION: WHAT Is IT AND WHY WE NEED IT (Allyn & Bacon 2005).

13. Nussbaum, supra note 11, at 205.

14. 20 U.S.C. [section] 1400(d)(1)(A) (emphasis added).

15. H. RUTHERFORD TURNBULL & ANN P. TURNBULL, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 52 (2000).

16. 20 U.S.C. [section] 1401(29)(A) (emphasis added).

17. Jean B. Crockett, Taking stock of science in the schoolhouse: Four ideas to foster effective instruction for students with learning disabilities, J. LEARNING DISABILITIES, Vol. 37, Issue 3 (May/Jun 2004) at 189-199.

18. Edwin W. Martin, Ph.D. succeeded James J. Gallagher as the second Chief of the Bureau for the Education of the Handicapped and served as Deputy Commissioner of Education in the United States Office of Education from 1969-1980.

19. Edwin W. Martin, case studies on inclusion: Worst fears realized, J. SPECIAL EDUC., Vol. 29, Issue 2 (Summer, 1995) at 192- 199).

20. CROCKETT & KAUFFMAN, THE LEAST RESTRICTIVE ENVIRONMENT: ITS ORIGINS AND INTERPRETATIONS IN SPECIAL EDUCATION 187 (1999). (Personal communication from Edwin Martin to Jean Crockett, April, 1996.)

21. 20 U.S.C. [section] 1414(d)(1)(A)(i)(IV).

22. 34 C.F.R. i 300315 et seq.

23. 34 C.F.R. [section] 300.25.

24. 20 U.S.C. [section] 9101(37).

25. Federal Register, Vol. 71, no. 156, Monday, August 14, 2006, p. 46665.

26. 20 U.S.C. [section] 1414(d)(1)(A)(III).

27. Federal Register, Vol. 71, no. 156, Monday, August 14, 2006, p. 46664.

28. 20 U.S.C. [section] 1401(C)(1).

29. 20 U.S.C. [section] 1401(c)(3).

30. 20 U.S.C. [section] 1401(c)(4).

31.20 U.S.C. [section] 1401(d)(3).

32. 20 U.S.C. [section] 1401(d)(4).

33. H.R. Report 105-95, at 83-84 (May 13, 1997).

34. Id.

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