Not a Bad Idea: The Increasing Need to Clarify Free Appropriate Public Education Provisions Under the Individuals with Disabilities Education Act

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[1]

I. INTRODUCTION

The Supreme Court has long stressed the importance of providing equal education opportunities to children.[2] Additionally, the Court has emphasized that the Due Process Clause prohibits school personnel from removing a student for violating its code of conduct "absent fundamentally fair procedures to determine whether the misconduct has occurred."[3] The rights of disabled children to receive an equal education, including fundamental procedural-due-process rights, have developed considerably in the past three decades.[4]

Efforts to ensure disabled students receive the same opportunities as their nondisabled peers are reflected in both federal and state laws.[5] The first

1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (declaring educational opportunities must be equally available for all students regardless of race).

2. *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 287 (1977) (acknowledging states must provide resources improving equal education); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28-31 (1971) (ordering busing to promote equal education and racial desegregation); Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 233-34 (1964) (holding closing public schools and contributing to privately segregated schools undermined equal education); *Brown*, 347 U.S. at 493-94 (maintaining all students, regardless of race, entitled to equal education). Although *Brown* was an important victory and landmark decision—providing equal-education opportunities to children regardless of their race—these rights were not extended to disabled children until decades later. *See* Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 421 (2011) (acknowledging lack of concern with special-education rights until late in civil-rights era). Congress did not get involved in education-rights matters, and instead left relevant decisions to local authorities or parents. *See id.*

3. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975). The Court in *Goss* concluded that "a student's legitimate entitlement to a public education as a property interest . . . is protected by the Due Process Clause . . . ." *Id.* As such, it set forth a requirement that all long-term suspensions—those ten days or longer—require notice of the charges and an opportunity to be heard. *See id.* at 581.

4. *See* Andrea Blau, *The IDEIA and the Right to an "Appropriate" Education*, 2007 BYU EDUC. & L.J. 1, 2 (2007) (summarizing special-education progression over past three decades). *See generally* Office of Special Educ. & Rehabilitative Servs., *Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. DEP'T OF EDUC. (July 19, 2007), http://www2.ed.gov/policy/speced/leg/idea/history.html (providing history and expected progress of special-education law).

5. *See* Philip T.K. Daniel & Jill Meinhardt, Commentary, *Valuing the Education of Students with*

congressional breakthrough occurred with the passage of the Education for All Handicapped Children Act of 1975 (EHA).[6] Over time, amendments improving the EHA were made, and it is now better known as the Individuals with Disabilities Education Act (IDEA).[7]

The central tenet of the IDEA mandates a "free appropriate public education" (FAPE) for students with disabilities.[8] Under its provisions, the IDEA sets forth both procedural and substantive mandates regarding the rights of both children and parents to receive an individualized education program (IEP), as well as a process for challenging placement changes.[9] While the IDEA is intended to protect disabled students' rights not to be excluded or denied from the benefits of a public education, the litigious nature of its unclear provisions—and lack of Supreme Court guidance—has created continuous controversy.[10] The most notable and frequent disputes arise over two issues: the statute's procedural safeguards, and what constitutes an "appropriate" education.[11] Recently, the Supreme Court declined the opportunity to clarify

Disabilities: Has Government Legislation Caused a Reinterpretation of a Free Appropriate Public Education*?*, 222 EDUC. L. REP. 515, 515-25 (2007) (outlining and comparing federal and state involvement in special-education evolution and progression). Though the language varies from state to state, many states have established the basic right to a public education. *See id.* at 522. Florida, for example, has made it a fundamental right under its state constitution, while other states describe the right with less specificity. *Compare* FLA. CONST. art. IX, § 1(a) ("The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders."), *with* N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.").

6. *See generally* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1401-1491 (2006)). The EHA was passed in 1975 as an attempt to reverse educational discrimination for disabled students. *See id.*; *see also* Blau, *supra* note 4, at 2 (examining enactment of EHA).

7. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2006). The IDEA's findings state that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." *Id.* § 1400(c)(3).

8. *Id.* § 1412(a)(1)(A) (setting forth requirement for states to provide free appropriate public education for disabled students); *see id.* § 1401(9) (providing definition of "free appropriate public education"); *see also* Bd. of Educ. v. Rowley, 458 U.S. 176, 187 (1982) (attempting to define "appropriate" education).

9. *See* 20 U.S.C. § 1415(a) (mandating "children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education"). *See generally* OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM (2000), http://ed.gov/parents/needs/speced/iepguide/iepguide.pdf.

10. *See* Blau, *supra* note 4, at 11-14 (discussing controversy regarding unclear definition of "appropriate" education under IDEA); Romberg, *supra* note 2, at 439-43 (exploring confusion caused by lack of coherent proceduralism under IDEA). The latest amendments to the IDEA alter dispute-resolution procedures to promote settlement and circumscribe parents' rights, as well as make disciplinary procedures somewhat harsher. *See* Romberg, *supra* note 2, at 439-43.

11. *See infra* Part III (analyzing issues with procedural due process and ambiguous FAPE terms under IDEA); *see also* Allan G. Osborne, Jr., *Discipline of Special-Education Students Under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L.J. 513, 529-34 (2001) (recognizing ambiguous "appropriate"

and resolve both major issues by denying certiorari to *Doe ex rel. Doe v. Todd County School District*.[12]

This Note argues that in *Todd County*, the Eighth Circuit erred by holding that disabled students are limited to procedural-due-process rights under the IDEA when they are placed in an alternative setting during a disciplinary suspension.[13] Specifically, by limiting disabled students who seek to challenge a suspension that triggered an interim placement change to the safeguards under the IDEA, the result contradictorily affects their fundamental procedural-due-process rights and guaranteed right to a FAPE.[14] Part II.A of this Note explores the historical development of special education, focusing on the IDEA and its evolution.[15] Part II.B discusses FAPE, as well as the various standards that have been developed to attempt to determine what is an "appropriate" education.[16] Part II.C explores student due-process rights, primarily by looking at those contained in the IDEA and their connection to FAPE, and also provides an overview of the Eighth Circuit's decision in *Todd County*.[17]

Part III analyzes the potential underlying impact of the Eighth Circuit's decision, focusing on how inadequate procedural safeguards correlate to a negative impact on an "appropriate" education.[18] Part III.A analyzes the Eighth Circuit's decision—specifically, whether it incorrectly determined that Doe's procedural-due-process rights were limited to those under the IDEA.[19] Further, Part III.B analyzes the implications of that decision on FAPE.[20] Part III.C highlights the repercussions of the Eighth Circuit's holding, and exposes how the court could have used this case to provide more comprehensive, coherent procedural-due-process rights to students, while simultaneously setting forth a less ambiguous definition of what constitutes an "appropriate" education.[21] Lastly, Part IV concludes by urging the Supreme Court to intervene and resolve these recurring issues by correcting the Eighth Circuit's limitation on procedural-due-process rights and providing a heightened, unambiguous FAPE standard.[22]

standard relating to student discipline).

12. 625 F.3d 459, 465-66 (8th Cir. 2010) (reversing district court's finding that change of placement did not constitute end of suspension), *cert. denied*, 132 S. Ct. 367 (2011).

13. *See infra* Part III (discussing effects of procedural due process on FAPE).

14. *See infra* Part III.

15. *See infra* Part II.A (providing history of special-education law and evolution of IDEA).

16. *See infra* Part II.B (outlining FAPE provision and circuit split on what constitutes "appropriate" education).

17. *See infra* Part II.C (discussing student due-process rights and affect on FAPE).

18. *See infra* Part III (analyzing *Todd County*'s impact and likely repercussions).

19. *See infra* Part III.A (analyzing Eighth Circuit's due-process analysis in *Todd County*).

20. *See infra* Part III.B (examining effect of court's decision in *Todd County*).

21. *See infra* Part III.C.

22. *See infra* Part IV (reiterating need for FAPE and procedural-due-process clarifications).

II. HISTORY

A. Development of Special Education Law

1. Pre-IDEA

The right to a free public education is not constitutionally guaranteed; rather, it is derived from both evolving case law and state statutes.[23] Important educational victories, such as the landmark decision in *Brown v. Board of Education*, have carved out the states' responsibility to provide equal education for all students.[24] The evolution of special-education law, however, is considered a relatively new concept.[25] Although the development of special-education legislation has given rise to a federal mandate that provides a free public education and procedural safeguards for disabled students, ambiguity surrounding its terms remains a central, litigious issue.[26]

2. Congressional Intent and Evolution of the IDEA

a. The Education for All Handicapped Children Act of 1975

While states are at liberty to grant and execute special education by creating their own public policies, the federal government requires states to comply with

23. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954) (holding educational opportunities must be available to all on equal terms); Pierce v. Soc'y of Sisters, 268 U.S. 510, 530-31 (1925) (setting forth children of proper age required to attend some school). Massachusetts, for example, must provide "a high quality public education to every child." *See* MASS. GEN. LAWS ANN. ch. 69, § 1 (West 2013).

24. *See Brown*, 347 U.S. at 494-95. While the Court in *Brown* held that equal educational opportunities must be available to all students regardless of race, it did not address the rights of disabled students. *See id.*; *see also* Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. LEGAL COMMENT. 675, 683 (2004) (citing exclusion of children with disabilities from public schools as "historical norm"). *Brown* was based on the Fourteenth Amendment's Equal Protection and Due Process clauses, rather than on an inherent right to education. *See* Blau, *supra* note 4, at 8 (noting basis for *Brown* Court's decision).

25. *See* Monserud, *supra* note 24, at 683 (providing history of special-education legislation); Mitchell L. Yell et al., *Reflections on the 25th Anniversary of the U.S. Supreme Court's Decision in* Board of Education v. Rowley, 39 FOCUS ON EXCEPTIONAL CHILD. 1, 9 (2007) (giving overview of developments in special-education law). In both the nineteenth and twentieth centuries, children were excluded from public education solely based on their physical and mental disabilities. *See* Dep't of Pub. Welfare v. Haas, 154 N.E.2d 265, 270 (Ill. 1958) (stating right to common-school education implies one has capacity to receive such training); Watson v. City of Cambridge, 32 N.E. 864, 864 (Mass. 1893) (excluding child as "too weak-minded to derive profit from instruction").

26. *See* Blau, *supra* note 4, at 11-14 (detailing issues resulting from unclear IDEA provisions). *See generally* Philip T.K. Daniel, Commentary, *Discipline and the IDEA Reauthorization: The Need to Resolve Inconsistencies*, 142 EDUC. L. REP. 591 (2000) (analyzing need to address inconsistencies stemming from IDEA). The lack of clarity regarding the IDEA's FAPE and procedural-due-process provisions has raised such questions as when a procedural violation of the IDEA, in the absence of a substantive violation, results in a denial of FAPE. *See id.*

the provisions set forth in the IDEA in order to receive federal funding.[27] Currently, all fifty states receive federal IDEA funding, therefore binding them to the statute's conditions.[28] The legislative mission to ensure that children with disabilities receive equal education opportunities has been shaped over the years by the changing way society views its responsibility to provide educational opportunities to children.[29] As a result, congressional directives have developed substantially over the course of the last three decades to dramatically shift disabled children's access to the benefits of a public education.[30]

This commitment is first reflected in the enactment of the EHA.[31] Congress enacted the EHA to address the issue that many students requiring special education at the time were neglected—or even completely excluded—from any form of public education.[32] A major step for communities was taken under the

27. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a) (2006) (setting forth financial incentives for states to adopt special-education policies); *see also, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 183 (1982) (recognizing states have primary responsibility for developing special education but must follow IDEA mandates); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Epperson*, 393 U.S. at 104 (holding public education under control of state and local authorities); Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130 (2006) (discussing how states bear principal responsibility for education policy).

28. *See Estimated Resident Population Ages 3 Through 21, by State: 2002, 2010 and 2011*, INDIVIDUALS WITH DISABILITIES EDUC. ACT DATA (Sept. 10, 2012), at Tbl.P-1, http://www.ideadata.org/tables35th/P-1.pdf (providing number and percentage change of population and enrollment data of fifty states under IDEA); *see also* Andrea F. Blau & Amy L. Allbright, *50-State Roundup: Ensuring Children with Disabilities a Free Appropriate Public Education*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 11, 11-12 (2006) (outlining and providing table of each state's statutory provisions expounding special-education policy); *cf.* Heise, *supra* note 27, at 136-39 (explaining federal government's power to condition funds and bind states).

29. *See Rowley*, 458 U.S. at 180-81 (discussing Congress's realization society should provide equal education to disabled children). *See generally* Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171 (2005); David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63 (1985).

30. *See* 20 U.S.C. § 1401(9). Access to free public education includes services at the preschool, elementary, and secondary school levels, which are paid for and supervised by the state. *See id.* § 1401(8). These directives have shifted from intending to merely increase the number of disabled children given access to a public education, to providing these children with a challenging curriculum sufficient to prepare them to live independent adult lives. *See* Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 808 (2006) (reviewing progress of IDEA).

31. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1491 (2006)); *see also* Erica Bell, Note, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education for All Handicapped Children Act of 1975*, 51 FORDHAM L. REV. 168, 173-78 (1982) (discussing enactment of EHA and its early limitations); Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1809-14 (2008) (describing EHA motivation to address and impact special education).

32. *See* NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 6 (2000), http://www.ncd.gov/newsroom/publications/2000/Jan252000 (stating prior to EHA only one in five disabled students received public education); Monserud, *supra* note 24, at 683-87 (detailing initial development of special-education law); *see also* 24 PA. CONS. STAT. ANN. § 13-1375 (West 2012) (allowing State Board of Education to exclude children found to be "uneducable" from public-school programs). Prior to the EHA, states like Pennsylvania were at liberty to provide or not provide public education to disabled children whom they deemed "uneducable." *See* 24 PA. CONS. STAT. ANN. § 13-1375. Congress was inspired to draft the EHA in part by

EHA; they were held responsible—for the first time—for educating disabled children in the same way as their nondisabled peers.[33] The EHA thus provided the foundation for today's special-education legislation by mandating that children with disabilities receive FAPE within the Least Restrictive Environment (LRE).[34] Congress also included procedural safeguard provisions within the EHA, as well as a requirement that school officials and parents jointly develop an IEP.[35]

b. The Individuals with Disabilities Education Act

The EHA was subsequently amended and strengthened, and is now better known as the IDEA.[36] The amendments reflect an increasingly proactive mission towards raising the educational standard for disabled students.[37] The IDEA's substantial evolution is evidenced in many of its provisions, including requirements for procedural due process and FAPE within the LRE.[38] The

two district court cases that decided children with disabilities had an equal right to the same education as nondisabled students. *See* Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (holding no eligible child should be denied public education); Pa. Ass'n for Retarded Children v. Pennslyvania, 343 F. Supp. 279, 307 (E.D. Pa. 1972) (requiring state to provide public education to disabled students); *see also Rowley*, 458 U.S. at 180 n.2 (considering impact *Mills* and *Pennsylvania Ass'n for Retarded Children* had on enacting EHA).

33. *See* Individuals with Disabilities Education Act, 20 U.S.C § 1400(c) (2006) (describing responsibilities placed on states); *see also* Blau, *supra* note 4, at 2 (recognizing major impact of EHA on local communities). *See generally* David Kirp et al., *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40 (1974) (reviewing legal reform of special education in years prior to EHA enactment).

34. *See* 20 U.S.C. § 1412(a) (setting forth conditional requirements as foundation for state accountability). Amongst other conditions, a state must establish a goal of providing full educational opportunities to disabled children and must create an IEP for each eligible child. *See id.*

35. *See id.* § 1415(b) (outlining procedural safeguards). Procedural-due-process rights under the EHA include extending parents the right to view educational records, affording them the opportunity to present complaints, and requiring written notice be presented to them before a placement change occurs. *See id.* IEP requirements include a statement of the student's current education level and performance ability, measurable long-term and short-term goals, as well as an explanation of the extent to which the student is able to perform in a regular classroom. *See id.* § 1414(d).

36. *See* Individuals with Disabilities Education Act, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C. §§ 1400-1491 (2006)); *see also* Paolo Annino, *The Revised IDEA: Will It Help Children with Disabilities?*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 11, 11-14 (2005) (providing discussion of IDEA amendments); Perry A. Zirkel, Commentary, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 EDUC. L. REP. 1, 1-2 (2007) (comparing amended versions of IDEA with Americans with Disabilities Act).

37. *See* 111 Stat. 37 (codified as amended 20 U.S.C. §§ 1400-1491 (2006)) (amending disciplinary policies and increasing parental-evaluation process); Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1491 (2006)) (amending to focus on educational outcome rather than compliance); *see also* Charlene K. Quade, *A Crystal Clear IDEA: The Court Confounds the Clarity of* Rowley *and Contorts Congressional Intent*, 23 HAMLINE J. PUB. L. & POL'Y 37, 37-38 (2001) (describing special-education progress over last twenty-five years).

38. *See* 20 U.S.C. § 1415 (providing most recently amended IDEA procedural safeguards). One of the major refinements, included as an attempt to reduce litigation, is a provision encouraging mediation to settle disputes. *See id.* § 1415(e). Updated refinements also include higher qualification requirements for teachers

central purpose of the statute remains to ensure a free appropriate public education be provided, and is now designed to prepare disabled children for further education, employment, and independent living.[39] The IDEA requires that this education be tailored to the student's unique needs by means of an IEP, a process that requires collaboration between schools and parents to create a tailored educational plan.[40] Despite the inclusion of precise definitions for many lexical terms frequently used within its provisions, the IDEA fails to adequately define what is an "appropriate" education.[41]

In conjunction with the controversy surrounding the term "appropriate" within the meaning of FAPE, procedural safeguards under the IDEA have given rise to frequent litigation.[42] With regard to student due process, schools are prohibited from suspending a student "absent fundamentally fair procedures to determine whether the misconduct has occurred."[43] The IDEA entitles a disabled student to receive an "appropriate" education while a suspension hearing is pending.[44] Even when misconduct is found to have occurred, the IDEA gives disabled students the right to receive a FAPE during a long-term suspension or expulsion.[45]

In formulating and further developing the IDEA, the legislature was aware of the adversarial process building over time, in regard to both whether children

and more substantial parental involvement in IEP development. *See id.* §§ 1401(10), 1414.

39. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2006). The IDEA is meant to ensure that the rights of disabled children and their parents are protected, to improve educational results, and to assess and ensure effective efforts to educate children. *See id.* § 1400(d)(1)(B)-(C).

40. *See id.* § 1414(d)(1). State educational authorities must identify and evaluate disabled children. *Id.* § 1414(a)-(c). An IEP must be reviewed at least once a year. *Id.* § 1414(d)(4). Each IEP must articulate measurable educational goals, specify the nature of the special services that the school will provide, and include an assessment of the child's current educational performance. *Id.* § 1414(d)(1)(A).

41. *See id.* § 1401(3)-(4), (10), (14), (26), (29) (defining such frequently used terms as individualized education program). *See generally* Nat'l Educ. Ass'n, *Paraeducators and IDEA 2004: Understanding IDEA Terminology*, NEA, http://www.nea.org/home/29347.htm (last visited Feb. 20, 2013). Despite the increased sophistication of the IDEA, it contains virtually the same definition of an appropriate education as the EHA. *Compare* 20 U.S.C. § 1401(9) (defining free appropriate public education), *with* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 4(18), 89 Stat. 773, 775 (codified as amended at 20 U.S.C. §§ 1401-1491 (2006)) (adding term free appropriate public education to law). Additionally, the Department of Education's regulations do not assist in clarifying the term. *See* 34 C.F.R. § 300.17 (2012). Thus, neither the legislature nor its administrative agency provides parameters sufficient to determine what "appropriate" means in terms of FAPE under the IDEA. *See id*.

42. 20 U.S.C. § 1415(f) (providing impartial due-process hearing safeguards). Under this provision, a student who has a complaint regarding his or her IEP or FAPE has a right to an impartial due-process hearing. *See id.* A hearing is also required where the student is removed from his or her current placement to an alternative setting. *See id.*

43. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (setting forth requirement of student due-process rights); *see also* Romberg, *supra* note 2, at 438-42.

44. *See* 20 U.S.C. § 1415(f) (outlining procedural safeguards for special-education students).

45. *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1412(a)(1)(A), 1415(k) (2006). Various provisions under the IDEA establish procedural safeguards to ensure that disabled students who have been disciplined through suspension or expulsion receive FAPE while excluded from their regular school setting. *Id.* § 1415(k).

were receiving an appropriate education, and the costly litigation accompanying student hearings.[46] Despite this awareness, disagreements continue to arise between school boards and parents in determining the best environment for achieving FAPE.[47] The Supreme Court has not addressed the issue of appropriateness since its decision in *Board of Education v. Rowley*.[48]

B. Judicial Interpretation of an "Appropriate" Education

1. An Attempt to Define FAPE: The Rowley *Standard*

In 1982, the Supreme Court set forth the initial interpretation of FAPE in its landmark *Rowley* decision.[49] The primary issue in the case focused on whether the local school district was required to provide Rowley, a deaf first-grade student, with a sign-language interpreter in order to provide her with FAPE.[50] The district court found that although Rowley performed well in school, an interpreter would allow her to reach full academic potential.[51]

The Supreme Court disagreed.[52] It interpreted the IDEA as an attempt to make public education available to disabled students, not as requiring schools to meet a greater substantive educational standard to make such access meaningful.[53] Rejecting the higher standard of providing a commensurate opportunity, the Court determined FAPE to be met when sufficient personalized instruction allowed "some educational benefit."[54]

46. *See, e.g.*, Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 Amendments to the Individuals with Disabilities Education Act*, 47 AM. U. L. REV. 487, 503-26 (1998) (examining Congress's acknowledgement of tension between pro-expulsion and pro-special-education sentiments); Sheila K. Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 4-24 (1981); Kirp et al., *supra* note 33, at 115-50; Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 102-17 (2009) (highlighting various IDEA disputes).

47. *See* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free Appropriate Public Education?"*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 397, 401-09 (2008) (advocating heightened FAPE standard to education received while excluded from regular setting); Judith DeBerry, Comment, *When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. 503, 505-06 (2003) (discussing disagreements between parents and schools over appropriate placement for disabled students).

48. *See* 458 U.S. 176 (1982); *see also* Philip T.K. Daniel, *"Some Benefit" or "Maximum Benefit": Does the No Child Left Behind Act Render Greater Educational Entitlement to Students with Disabilities*, 37 J.L. & EDUC. 347, 348 (2008) (discussing *Rowley* decision as definitive case for what constitutes FAPE).

49. *Rowley*, 458 U.S. at 186-87.

50. *See id.* at 184-85. The local school district refused, arguing that Rowley's progress was similar to that of other children in her class. *See id.*

51. Rowley v. Bd. of Educ., 483 F. Supp. 528, 532 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982). The court concluded that the primary purpose of the IDEA was procedural; thus, the school district's refusal to provide the interpreter violated FAPE in not allowing the student to perform to her best ability. *See id.* at 534 (interpreting "appropriate" education to require "each handicapped child be given an opportunity to achieve his full potential").

52. *See Rowley*, 458 U.S. at 209-10 (reversing lower courts' decisions).

53. *See id.* at 192 (interpreting language and congressional intent of IDEA).

54. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982) (interpreting FAPE standard). The Court held that

The *Rowley* decision ultimately set forth a two-prong test to determine whether FAPE has been met.[55] The holding specified that states must first comply with all procedural requirements of the IDEA, such as creating an IEP in conformity with the Act's provisions.[56] Once this has been met, the court's role is to then evaluate whether the child's IEP is "reasonably calculated to enable the child to receive educational benefits."[57]

2. *Post*-Rowley *Decisions*

Special-education cases post-*Rowley* have struggled with determining how much of an educational benefit is enough to constitute "some educational benefit."[58] There is an increasing need for Congress—or the Supreme Court—to further clarify the definition of FAPE.[59] This will not only adequately address students' due-process concerns, but also will provide a more coherent standard for courts to follow.[60]

a. "Meaningful Benefit" Standard

The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have adopted the heightened "meaningful benefit" standard.[61] In evaluating the *Rowley* decision and interpreting the FAPE review set forth therein, the Third Circuit determined that the legislative history of the IDEA indicated "intent to afford more than a trivial amount of educational benefit."[62] Subsequent decisions

Congress, in passing the IDEA, intended to require a "basic floor of opportunity," fostering sufficient services for disabled children to provide them "some educational benefit." *Id.* at 200-01.

55. *See id.* at 203-04 (providing two-prong FAPE test).

56. *See id.*; *see also* Individuals with Disabilities Education Act, 20 U.S.C. § 1415 (2006) (listing procedural requirements for special-education programs).

57. *See Rowley*, 458 U.S. at 207 (laying foundation for FAPE determination); *see also id.* at 207 n.28 (evaluating criteria for what constitutes educational benefit).

58. *See* JSK *ex rel.* JK v. Hendry Cnty. Sch. Bd., 941 F.2d 1563, 1572 (11th Cir. 1991) (noting confusion over proper application of *Rowley* "some educational benefit" standard); *see also* Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After* Rowley*?*, 39 SUFFOLK U. L. REV. 1, 7-24 (2005) (highlighting circuit split resulting from *Rowley* decision); Daniel & Meinhardt, *supra* note 5, at 519-21 (providing overview of variations of FAPE standard following *Rowley*).

59. *See* Daniel, *supra* note 48, at 357-59 (describing various post-*Rowley* FAPE evaluation standards and need for clarification).

60. *See id.*

61. *See, e.g.*, D.S. *ex rel.* D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010); P. *ex rel.* P. v. Newington Bd. of Educ., 546 F.3d 111, 119 (2d Cir. 2008); N.B. *ex rel.* C.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1212-13 (9th Cir. 2008); Deal *ex rel.* Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 861 (6th Cir. 2004); A.B. *ex rel.* D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. *ex rel.* Barry F., 118 F.3d 245, 248 (5th Cir. 1997); Polk *ex rel.* Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 181-82 (3d Cir. 1988); *see also* Daniel & Meinhardt, *supra* note 5, at 519 (discussing various standards for evaluating FAPE).

62. *See Polk*, 853 F.2d at 181. *Polk* involved a mentally retarded student who required physical therapy as part of his IEP. *See id.* at 173. While the school district provided him only with therapy given by his teacher, the court found in order to receive a meaningful educational benefit, he was entitled to a licensed therapist. *See id.* at 173-74. The court also noted that it did "not attempt . . . to establish any one test for

have continued to follow this heightened standard.[63]

Moreover, the Sixth Circuit has analyzed Congress's intent behind enacting the IDEA to find that "[n]othing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit . . . ."[64] The court stated that in evaluating whether an educational benefit is meaningful, logic dictates that the benefit be gauged in relation to the child's potential.[65] Other circuits, such as the Fourth, have been less clear about adopting the "meaningful benefit" standard.[66]

b. "Some Educational Benefit" Standard

A minority of circuit courts has declined to adopt a heightened standard, interpreting *Rowley* instead to require only "some" educational benefit, and holding FAPE to be fulfilled by the minimum statutory requirements.[67] The First Circuit has concluded that, under *Rowley*, an IEP "need only supply 'some educational benefit,' not an optimal or an ideal level of educational benefit, in order to survive judicial scrutiny."[68] The Eighth Circuit has also applied the lesser standard set forth in *Rowley*, stating "the IDEA does not require [schools] to provide . . . the best possible education or to achieve outstanding results."[69]

determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 180 (internal citation omitted). Furthermore, it stated that the IDEA's notion of benefit must be examined by applying a standard "that is faithful to congressional intent and consistent with *Rowley*." *Id.*

63. *See, e.g.*, L.E. *ex rel.* M.S. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006); Shore Reg'l High Sch. Bd. of Educ. v. P.S. *ex rel.* P.S., 381 F.3d 194, 198-99 (3d Cir. 2004); T.R. *ex rel.* N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000).

64. *See Deal*, 392 F.3d at 863 (reasoning educational benefit must be measured according to each child's potential). The court found that Congress intended to require, at the very least, a meaningful educational benefit for a child's self-sufficiency. *Id.* at 864.

65. *See id.* The court recognized that "states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress." *Id.* Moreover, it reasoned that courts should not set unduly low expectations for children with disabilities when inquiring whether an educational benefit was provided. *See id.*

66. *See Lawson*, 354 F.3d at 319 (maintaining state must provide children with "meaningful access" to education under IDEA). The court then went on to cite *Rowley*, however, concluding that FAPE must only be "calculated to confer *some* educational benefit." *Id.* (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982)). Additionally, the court noted that "FAPE standards are far more modest than to require that a child excel or thrive." *Id.*

67. *See infra* notes 68-69 and accompanying text (discussing circuits that apply "some benefit" standard); *see also* A.B. *ex rel.* D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004); Fayette Cnty. Bd. of Educ. v. M.R.D. *ex rel.* K.D., 158 S.W.3d 195, 202 (Ky. 2005); *cf.* Amy J. Goetz et al., *The Devolution of the* Rowley *Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLINE L. REV. 503, 511 (2011) (acknowledging "meaningful benefit" standard required in majority of circuits).

68. *See* Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 23-24 (1st Cir. 2008) (quoting Me. Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R., 321 F.3d 9, 11 (1st Cir. 2003)) (affirming *Rowley* standard and adopting its application); *see also* G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 948 (1st Cir. 1991) (adopting "some educational benefit" standard).

69. *See* E.S. v. Indep. Sch. Dist. No. 196, 135 F.3d 566, 569 (8th Cir. 1998) (applying liberal application

c. The Seventh Circuit's Mixed-Education-Benefit Approach

In *Alex R. ex rel. Beth R. v. Forrestville Valley Community Unit School District No. 221*,[70] the Seventh Circuit declined to follow either the "meaningful benefit" standard or the "some educational benefit" standard, instead choosing to use a mix of both.[71] The court initially applied the "meaningful benefit" standard, but later pointed to the lesser "some benefit" standard in its discussion of whether FAPE had been provided, making it difficult to decipher the circuit's position.[72] The inconsistency appears to suggest that the court will adopt a standard on a case-by-case basis, using a hybrid of the two standards.[73]

C. Student Due Process Under the IDEA

1. Procedural Safeguards

As previously noted, the Due Process Clause requires school administrators to provide fundamentally fair procedures to determine whether or not a school violation has occurred before suspending a student for violating the school's code of conduct.[74] The landmark decision of *Goss v. Lopez* set forth the basic framework for due-process requirements related to school suspensions.[75] The case involved Ohio public high school students who were suspended for ten days for their misconduct, without having any type of hearing afforded to them.[76] The Supreme Court determined that an Ohio statute created a property interest in public education.[77] The Court also addressed the harms caused by school suspensions, concluding that for suspension periods of more than ten days, procedural due process is required.[78]

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of *Rowley* standard). Additionally, the court reasoned that so long as a student benefits from his or her education, it is left to educators to determine the most appropriate method for that education. *Id.*

70. 375 F.3d 603 (7th Cir. 2004).

71. *See id.* at 615 (choosing to apply mixed standards as opposed to one or other). Alex's mother challenged his placement in a special-education setting as a denial of FAPE. *See id.* at 609-10.

72. *See id.* at 612-15 (applying both "meaningful benefit" and subsequently "some benefit" standards).

73. *See id.*

74. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) ("[A school] . . . may not withdraw [a student from school] on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred."). Under *Goss*, the key question in determining whether a student is entitled to due process is whether the suspension lasts beyond ten school days. *See id.* at 574-75. *See generally* Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1 (2011) (exploring issues regarding student due-process rights).

75. *See Goss*, 419 U.S. at 574 (mandating due-process requirements be afforded to students).

76. *See id.* at 565-67.

77. *Id.* at 574. The Court noted that Ohio was not compelled to create a property interest in education, but that it nonetheless did. *Id.* ("Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend.").

78. *See id.* at 583. The Court declared:

The IDEA includes its own procedural safeguards for disabled students in its provisions.[79] Under the Act's procedural-safeguard provisions, a fair administrative-hearing process is available to resolve disputes over a disabled student's assessment, educational plan, or placement.[80] Parents and school personnel are included as members of the IEP team, and in turn make a determination regarding behavioral strategies, classroom placement, and evaluation.[81] If parents are dissatisfied with the IEP determination, they may challenge it by initiating the administrative-hearing process.[82] The IDEA contains a provision stating that "during the pendency of any proceedings," the child shall remain in his or her "then-current educational placement."[83]

When school personnel seek to exclude any student with a disability for misconduct, they must first determine whether the behavior at issue was a result of the child's disability.[84] If no manifestation is found to exist between the student's behavior and the disability, he or she is then subject to the same

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

Id. at 581.

79. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1415 (2006). Procedural safeguards under the IDEA include an impartial due-process hearing when a complaint is received regarding a student's IEP or his or her placement in an alternative setting. *Id.* § 1415(f). The IDEA includes "a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." Honig v. Doe, 484 U.S. 305, 308 (1988) (highlighting safeguards under IDEA's predecessor); *see also* § 1415(f) (requiring impartial due-process hearing afforded when exclusion occurs); Romberg, *supra* note 2, at 446-49 (reviewing stages of due process within IDEA).

80. *See* 20 U.S.C. § 1414 (outlining IDEA dispute-resolution procedures). The IEP team includes the child's parents, a regular education teacher if the child may participate in a regular classroom, a special-education instructor or provider, a knowledgeable and supervisory representative of the school district, and other persons with knowledge or special expertise regarding the child. *Id.* § 1414(d)(1)(B).

81. *See id.* § 1415(k). The IDEA provides that the IEP's specification of specially designed instruction must be based on peer-reviewed research to the extent that this is possible. *See id.* § 1414(d)(1)(A)(i)(IV).

82. *Id.* § 1415(f). Procedural safeguards state, in relevant part, that "the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." *Id.* § 1415(f)(1)(A).

83. *See id.* § 1415(j) ("[D]uring the pendency of any proceedings conducted . . . the child shall remain in the then-current educational placement . . . or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.").

84. *See* 20 U.S.C. § 1415(k)(E). The IEP team must conduct a manifestation determination hearing and review all relevant information within ten school days of any decision to change a child's placement. *Id.* After the IEP team makes this determination, a manifestation review is conducted to determine whether the child's IEP and placement are appropriate. *Id.* Comprehensive discipline provisions were not included under the IDEA until it was amended in 1997. *See* Individuals with Disabilities Education Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C. §§ 1400-1491 (2006)).

exclusion or removal from school as a nondisabled student.[85] When this occurs, and the student is subsequently removed from school for longer than ten days, parents are entitled to request a due-process hearing if they disagree with the change of placement.[86]

Under *Honig v. Doe*,[87] a change of placement occurs when a suspension or removal from school lasts more than ten days.[88] The *Honig* Court made clear that school officials could implement short-term suspensions of less than ten days without requiring formal due process so long as a placement change is not involved.[89] By ruling this way, the Court created a presumption in favor of a disabled student's current placement.[90] A placement change can be proposed for either disciplinary or purely education reasons, but may only occur after the child's parents have been provided written notice of—and are in agreement with—the placement.[91]

2. Todd County

In *Todd County*, a case that dealt with a disabled student who was suspended and excluded from his South Dakota high school for thirty-eight days, the Eighth Circuit determined that Doe's disciplinary suspension ended when it became a change of placement under the IDEA.[92] On September 8, 2005, Jonathan Doe, a public-school student with a reading disability, was suspended for fighting and bringing a knife to school.[93] After determining his misconduct

85. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(C) (2006) (stating disciplinary procedures applicable to nondisabled children apply where misconduct not disability manifestation). There is a potential constitutional conflict regarding manifestation review that is beyond the scope of this Note: Where there is a factual dispute as to whether the student did or did not engage in the misconduct at hand, the issue should be determined prior to the manifestation review, rather than assuming the student has in fact engaged in such behavior. *See id.* § 1415(k)(E) (stating manifestation determination must be conducted within ten days *after* placement-change decision).

86. *See id.* § 1415(f). Under *Goss*, when a student is suspended for more than ten consecutive days, that student is entitled to a formal appeal before the school board. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975).

87. 484 U.S. 305 (1988).

88. *See id.* at 326. Under *Honig*, any removal from school for less than ten days is not considered a change in placement requiring an IEP assessment. *Id.*

89. *Id.* at 325 n.8; *cf.* Osborne, *supra* note 11, at 520-22 (exploring *Honig* decision).

90. *See Honig*, 484 U.S. at 328 (IDEA "creates a presumption in favor of the child's current educational placement").

91. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1) (2006) (mandating placement change may be considered for any unique circumstance). If parents believe an IEP is not appropriate, they may seek an administrative hearing. *Id.* § 1415(f)(1)(B)(ii). After the hearing, any aggrieved party may bring a civil action in state or federal court. *Id* § 1415(i)(1).

92. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 465 (8th Cir. 2010) (holding placement change ended suspension and declining to afford state procedural-due-process rights).

93. *Id.* at 461. On September 12, the Assistant Principal gave written notice to Doe's grandparents confirming he was suspended from September 8 until a hearing with the board could be arranged. *See id.* The school board conceded that the Assistant Principal intended for Doe's suspension to be a long-term one. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., No. CIV. 07-3029, 2008 WL 5069367, ¶ 17 (D.S.D. Nov. 24, 2008), *rev'd*, 625 F.3d 459 (8th Cir. 2010).

was not a manifestation of his disability, the IEP team held a meeting in which they decided to change his placement during the suspension period to an after-school program where he would receive two hours of combined regular and special education per day.[94]

On September 21, after being suspended for ten days, Doe's grandmother requested a hearing before the school board.[95] The Assistant Principal denied the request, insisting there was no long-term suspension, and claiming the suspension ended on September 13 when the IEP team changed Doe's placement.[96] Subsequently, on October 11, Doe's grandmother wrote to the district's Special Education Director, asserting that two hours of daily education at the alternative setting denied Doe of his right to FAPE, and requesting his placement be changed back to the high school.[97] After reiterating that Doe was not suspended, the Director told her that her grandson would be transitioned back to Todd County on or around October 31.[98]

The Does brought a claim against the Todd County School District, arguing school personnel violated Doe's procedural-due-process rights when they removed him from his high-school setting for thirty-eight days without affording him a hearing.[99] The district court rejected the school district's argument that a disciplinary suspension ends when it becomes a change of placement under the IDEA, finding that this was a long-term suspension entitling Doe to formal due process under South Dakota law.[100] The Eighth Circuit reversed this decision, insisting that by changing his placement from the school that suspended him to an alternative setting, he was limited to the IEP team's—and not the school board's—decision on a placement back to his

94. *See Todd Cnty.*, 625 F.3d at 462. Previously, Doe received five hours of general education and one hour of special education per day at Todd County High School. *Id.* No members of the school indicated to Doe's grandmother that Doe would no longer be on suspension from school while in the alternative setting. Petition for Writ of Certiorari at 9, Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459 (8th Cir. 2010) (No. 10-1411), 2011 WL 1896917, at *9. The IEP stated only that Doe would be placed in the alternative setting during the suspension period. *Id.*

95. *See Todd Cnty.*, 625 F.3d at 462. Doe's grandmother advised the Assistant Principal that because Doe had been suspended for ten days, she wanted a hearing before the school board if he was not able to return to school the next day. *Id.*

96. *Id.* The school board claimed that because Doe was attending school in a different setting—the after-school program—that he was no longer suspended. *See Todd Cnty.*, 2008 WL 5069367, ¶ 18.

97. *Todd Cnty.*, 625 F.3d at 462.

98. Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 462 (8th Cir. 2010). Doe did not return to Todd County High School until November 3, 2005, resulting in a removal from his regular placement lasting thirty-eight days. *See id.*

99. *Id.* Previously, he received five hours of general education and one hour of special education per day at Todd County. *Id.*

100. Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., No. CIV. 07-3029, 2008 WL 5069367, ¶ 20 (D.S.D. Nov. 24, 2008), *rev'd*, 625 F.3d 459 (8th Cir. 2010). The court recognized that the eight hours per week Doe was receiving in the alternative setting, when compared to the thirty hours he received in high school, created at the very least a constructive suspension entitling him to due process. *See id.* ¶ 19. Under South Dakota law, a pupil suspended for more than ten days may appeal the suspension to the school board. S.D. CODIFIED LAWS § 13-32-4.2 (2013).

regular setting.[101]

In urging the Supreme Court to grant certiorari, the petitioner validly pointed out that the Eighth Circuit's decision "strips children with disabilities of their constitutional and statutory due process rights to appeal long-term disciplinary suspensions and expulsions."[102] Moreover, petitioner noted that despite the large disparity between the educational instruction in Doe's regular setting and that provided in his alternative placement, the Eighth Circuit declined to address the impact sustained to his guaranteed right to FAPE.[103] While this would have been a clear opportunity for the Supreme Court to grant certiorari and address these recurring issues, the Court declined to do so.[104]

III. ANALYSIS

In *Todd County*, the Eighth Circuit Court of Appeals reached a decision that negatively impacts the ability of children with disabilities to appeal long-term disciplinary exclusions, as well as taints their fundamental right to FAPE.[105] The court incorrectly analyzed the Supreme Court's holding in *Honig v. Doe*, concluding that a disciplinary suspension ends when a student's placement is temporarily changed during the suspension.[106] As a result of this determination, the court wrongfully determined that Doe was not entitled to a hearing before the school board to contest his removal from school under state procedural-due-process rights.[107] Moreover, the court failed to evaluate the large disparity between the hours of education received in the alternative

101. *See Todd Cnty.*, 625 F.3d at 463-64. The court stated that the other option would have been to let school officials apply disciplinary procedures in the same manner as to those without disabilities. *Id.* at 463. The court also rejected the district court's alternative assertion that Doe's removal from school constituted a constructive suspension, and did not take into account "the proper analysis [of examining] the quality and quantity of classroom instruction given . . . while . . . removed from regular high school classes." *See Todd Cnty.*, 2008 WL 5069367, ¶ 18.

102. *See* Petition for Writ of Certiorari, *supra* note 94, at 18. The petitioner proffers that the Eighth Circuit's decision presents a conflict in principle with the holding in *Honig*: that a suspension does not end when the IEP team places a disabled child in a temporary, alternative setting during a suspension; that the ruling abrogates a key provision of the IDEA; that it nullifies state statues that do not offend federal law; and that the injuries sustained could not have been remedied by an IDEA hearing officer. *See id.* at 18-30.

103. *See generally Todd Cnty.*, 625 F.3d 459 (avoiding discussing effect of placement change on FAPE).

104. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459 (8th Cir. 2010), *cert. denied*, 132 S. Ct. 367 (2011); *see also infra* Part III (analyzing effects of Eighth Circuit's decision and implications of Supreme Court denying certiorari).

105. *See Todd Cnty.*, 625 F.3d at 464-65 (analyzing how placement change in lieu of disciplinary suspension limited due process under IDEA); *see also supra* Part II.C.2 (discussing Eighth Circuit's opinion in *Todd County*).

106. *See Todd Cnty.*, 625 F.3d at 464-65 (reviewing *Honig* and concluding suspension ends upon placement change); *see also* Petition for Writ of Certiorari, *supra* note 94, at 19-20 (arguing Eighth Circuit's ruling presents a conflict in principle with Court's holding in *Honig*).

107. *See Todd Cnty.*, 625 F.3d at 463-65. The court determined that the district court erred in focusing its due-process analysis on the days Doe was removed from regular classes at the high school, concluding that the total number of days he was technically "suspended" was not thirty-eight, but four. *See id.* at 463-64; *see also infra* Part III.A (scrutinizing court's due-process analysis).

placement with those received during the student's high-school setting, and what effect this had on his right to FAPE.[108]

The Supreme Court declined the opportunity to correct the Eighth Circuit's mistaken analysis and application of *Honig v. Doe*, as well as the chance to provide a long-awaited, clear definition of what constitutes an "appropriate" education under FAPE.[109] As a result, the decision in *Todd County* provides lower courts with an erroneous framework to limit procedural-due-process rights to disabled students.[110] Moreover, the failure to correct this limitation on procedural due process—and raise the low standard that currently exists for meeting FAPE—will only further frustrate the purpose of the IDEA.[111]

A. The Eighth Circuit's Procedural-Due-Process Analysis

The Eighth Circuit Court of Appeals, in *Todd County*, held that a refusal to convene a school board hearing to challenge a disabled student's disciplinary suspension did not violate his federal constitutional right to procedural due process.[112] Although Doe's grandmother did not believe she could veto decisions made by the IEP team—leading her to feel compelled to agree to a placement change while Doe was excluded from school—the court nonetheless determined that because she demanded what they saw as the "wrong procedural remedy," Doe was not entitled to a hearing before the school board.[113] While the court correctly recognized that the IEP team's educational decision must be reviewed in accordance with the procedural safeguards of the IDEA, it incorrectly limited Doe to this sole means of procedural relief, denying him an opportunity to appeal the disciplinary suspension that triggered the IEP placement change.[114]

108. *See Todd Cnty.*, 625 F.3d at 463 (failing to address disparity in educational time). The Eighth Circuit mentioned the district court's conclusion that the quality of classroom instruction Doe received in the alternative setting resulted in a long-term suspension, but failed to provide its own analysis. *See id.*

109. *See Todd Cnty.*, 625 F.3d 459, *cert. denied*, 132 S. Ct. 367 (2011).

110. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 463 (8th Cir. 2010).

111. *See infra* part III.B (discussing circuit split regarding FAPE definition and deference given to states).

112. *See Todd Cnty.*, 625 F.3d at 464 (concluding Doe had no procedural-due-process rights under South Dakota law).

113. *See id.* at 465 (determining no entitlement to hearing). Doe's grandmother met with the IEP team after she was told Doe could not return to his regular classes. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., No. CIV. 07-3029, 2008 WL 5069367, ¶ 9 (D.S.D. Nov. 24, 2008), *rev'd*, 625 F.3d 459 (8th Cir. 2010). Because the school told her that Doe's placement needed to be changed during his suspension, she met with the IEP team to find an interim setting. *See id.* ¶ 10. Although the IEP team implemented the placement change, it was the school that initially triggered it. *See id.* Once this placement change exceeded ten days, Doe was entitled to due-process standards applicable to long-term suspensions, including a hearing to challenge his removal from his regular classes in front of the school board. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(C) (2006).

114. *See Todd Cnty.*, 625 F.3d at 465-66 (stating IEP decision must be reviewed under IDEA procedures, not school board procedures). Although the Act states that an IDEA-hearing officer has the authority to review appealed placement changes, Doe was seeking to appeal his initial suspension, not merely the placement change that took place as a result. *See id.*

After both parties agreed that Doe was excluded for thirty-eight school days without formal due process, the district court properly ruled that although his placement was changed in light of his misconduct, the disciplinary suspension did not end when this change occurred.[115] The district court adequately reasoned that his exclusion was based on disciplinary, not educational, reasons.[116] Because it was determined that Doe's suspension was long-term, the court found he was entitled to the procedures set forth in the state code, including a hearing before the school board.[117]

Instead of affirming the decision of the district court, the Eighth Circuit incorrectly analyzed the procedural choices set forth under the IDEA for dealing with suspension of a special-education student whose misconduct was not a manifestation of his or her disability.[118] Reasoning that because the IEP team acted to remove Doe to an alternative setting while he was suspended, the court erroneously determined that this change in placement ended his suspension, and thus his procedural-due-process rights, under *Goss* and South Dakota law.[119] Accordingly, the Eighth Circuit failed to address how an IDEA administrative-hearing officer would be able to provide a remedy to a complaint lodged not against the IDEA, but against school administrators.[120]

The Eighth Circuit should have recognized that the hearing officer would not have provided a suitable remedy.[121] While the court correctly set forth the

115. *See Todd Cnty.*, 2008 WL 5069367, ¶ 12 (discussing Doe's removal for behavioral reasons resulting in exclusion for thirty-eight days).

116. *See id.* ¶ 20 (stating reasoning of trial court). The court based its ruling largely on the fact that he was excluded for conduct that violated the school disciplinary code, not because his IEP was insufficient to provide educational benefits. *See id.* Further, the school district admitted in its answers to interrogatories that his suspension was intended to be long-term. *See id.* ¶ 17.

117. *See id.* ¶ 22 (determining Doe entitled to South Dakota procedural law). Under the South Dakota statute, a school is required to give notice of a student's due-process rights to the parent at the time of the suspension. *See* S.D. CODIFIED LAWS § 13-32-4 (2013). The statute states that "[e]ach school district board shall provide a procedural due process hearing, if requested, for a student . . . if the suspension or expulsion of the student extends into the eleventh school day." *Id.* The Does were not provided any notice regarding the suspension; they received a letter stating only that Doe had violated school policy, but not notice of their right to request a hearing. *See Todd Cnty.*, 2008 WL 5069367, ¶ 23.

118. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 463-64 (8th Cir. 2010); *cf. supra* Part II.C.1 (outlining procedural-due-process options available under IDEA).

119. *See Todd Cnty.*, 625 F.3d at 464-65 (failing to recognize change in placement continued suspension).

120. *See id.* (dismissing complaint and declining to provide appropriate remedy).

121. *See* Petition for Writ of Certiorari, *supra* note 94, at 32-35 (arguing Doe could not have been remedied by IDEA hearing officer). The petitioners argued:

> The IDEA does not give a hearing officer free-ranging authority to second-guess a principal's determination to suspend a student with a disability for violating the school's code of conduct. Nor does the IDEA give a hearing officer any authority to determine whether a disabled student's constitutional rights have been violated. The IDEA authorizes an administrative hearing officer to decide whether a disabled student has been denied FAPE. . . .
>
> If every fact stated in the petitioner's §1983 complaint were assumed to be true, the complaint does not state a denial of FAPE or any violation of the IDEA. Since an IDEA administrative hearing officer is only authorized to remedy violations of a complainant's IDEA rights, resort to IDEA

different procedural alternatives that the IEP team could have chosen for Doe, the court did not recognize these alternatives as able to work in conjunction with—and not exclusive of—one another.[122] Despite the IEP team acting affirmatively in changing Doe's placement from the school that suspended him, disciplinary procedures applicable to students without disabilities were still applicable to him in the same manner, including student–due-process procedures set forth in state statutes.[123] Rather than broadening the essential procedural-due-process rights of disabled students under the IDEA, the Eighth Circuit's decision limited available remedies, creating further confusion for parents who already are unnecessarily unaware of what rights they possess regarding their child's education and removal from school.[124]

The crux of the Eighth Circuit's decision was based on the determination that Doe's suspension ended when it became a change in placement; the Supreme Court should have stepped in and reversed this decision.[125] Under the Supreme Court's holding in *Honig v. Doe*, there can be no reasonable interpretation that would find "suspension" and "change of placement" to be mutually exclusive; that is, when a disciplinary suspension becomes a change of placement, the suspension does not necessarily end.[126] Rather, both social policy and the underpinnings of the IDEA point toward a proposition that the disciplinary suspension constitutes both—not merely one or the other.[127]

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administrative remedies would have been futile.

Id. at 33-34.

122. *See Todd Cnty.*, 625 F.3d at 464 (stating once placement changed, suspension ended); *see also* Petition for Writ of Certiorari, *supra* note 94, at 35 (contesting Eighth Circuit's holding and urging adequate relief not available through IDEA administrative procedures).

123. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., No. CIV. 07-3029, 2008 WL 5069367, ¶ 22 (D.S.D. Nov. 24, 2008), *rev'd*, 625 F.3d 459 (8th Cir. 2010) (recognizing placement change not end of long-term suspension).

124. *See* Petition for Writ of Certiorari, *supra* note 94, at 39-41 ("The issues raised in this case are recurring issues of vital importance that are potentially present whenever school personnel suspend or expel a student with a disability for serious disciplinary misconduct."); *see also* Brief of Amicus Curiae in Support of Jonathan Doe and of Affirmance of the United States District Court at 16, Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459 (8th Cir. 2010) (No. 09-3221), 2010 WL 543427 [hereinafter Amicus Brief for Jonathan Doe] (urging affirmance of district court).

125. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 464-65 (8th Cir. 2010), *cert. denied*, 132 S. Ct. 367 (2011). The court relied on IDEA language, stating that during a suspension any interim, alternative educational setting "shall be determined by the IEP Team." *See id.*; Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(2) (2006). The Supreme Court should have stepped in to overturn this ruling because it abrogates the provision of the IDEA providing that if misconduct is not a manifestation of a student's disability, relevant disciplinary procedures applicable to children without disabilities apply. *See* § 1415(k)(1)(C).

126. *See Todd Cnty.*, 625 F.3d at 464-65 (applying *Honig* to *Todd County*). In *Honig*, the Court held that when a school suspends a disabled student for more than ten days, the suspension constitutes a change of placement. *See* Honig v. Doe, 484 U.S. 305, 328-29 (1988).

127. *See generally* Petition for Writ of Certiorari, *supra* note 94 (evaluating recurring issues and urging placement change does not end suspension).

B. Disciplinary Action and the Effect on FAPE

The IDEA expressly states that a disabled student has a right to receive FAPE, even when that student is suspended or excluded from his or her regular school setting.[128] Entangled in this provision, however, is the reality that what constitutes an "appropriate" education is ambiguous and unclearly defined.[129] Without a clear definition, it remains difficult for parents and schools to find common ground to properly meet this standard, especially in situations where a student is disciplined and excluded from school.[130]

While the Supreme Court has not addressed the issue of "appropriateness" since the *Rowley* decision, some courts have interpreted a more substantial, heightened-benefit standard that substantiates the growing emphasis on education and the rights of the disabled.[131] The most recent IDEA reauthorization has gone much further than its predecessors, emphasizing more comprehensive requirements to meet the unique needs of disabled children.[132]

The large chasm between the *Rowley* "basic floor of opportunity" standard, and the most recent updates to the IDEA, convey that more significant attributes must be included in an educational plan in order to be deemed "appropriate" for a disabled child.[133] While the Eighth Circuit could have stepped in to bridge this gap, greater progress would have resulted if the Supreme Court granted certiorari to provide a uniform definition of "appropriateness" in order to resolve the circuit split.[134] Additionally, the

128. 20 U.S.C. §§ 1412(a)(1), 1415(k)(1)(D)(i); *see also supra* Part II.C.2 (providing overview of IDEA procedural-due-process rights).

129. *See supra* Part II.B (discussing IDEA's history and surrounding confusion of "appropriate" definition); *see also* Osborne, *supra* note 11, at 528-33 (recognizing ambiguous "appropriate" standard in relation to student discipline).

130. *See* Daniel, *supra* note 26, at 593-600 (discussing inconsistencies preventing adequate resolution of discipline issues for schools and parents); *supra* Part II.B (exploring confusion resulting from circuit split); *see also* Zirkel, *supra* note 47, at 401-09 (advocating heightened FAPE standard to education while excluded from regular setting).

131. *See supra* Part II.B.2.a (reviewing courts using "meaningful benefit" standard). The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have adopted the heightened "meaningful benefit" standard. *See supra* note 61 and accompanying text.

132. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006). The 2004 amendments resolve what consequences follow procedural violations and define what circumstances under a procedural violation warrant a finding that FAPE has been denied. *See id.* § 1415(f)(3)(E). Congress explicitly found that shortcomings of the pre-amended act, the EHA, included low expectations for disabled students and an "insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Id.* § 1400(c)(4).

133. *See* Yell et al., *supra* note 25, at 9 (reflecting on increased IDEA requirements set forth since *Rowley*); Tara L. Eyer, Commentary, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 126 EDUC. L. REP. 1, 17 (1998) (highlighting post-*Rowley* IDEA amendments); *see also supra* Part II.A (providing history and evolution of IDEA amendments). *See generally* Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367 (2008) (exploring recent updates and emphasizing new wide-ranging requirements).

134. *See supra* Part II.B (providing discussion of litigation resulting from ambiguous FAPE definition). State, district, and circuit courts attempting to define "appropriate" have done so inconsistently. *See* Blau,

Court could have, at the same time, relieved the substantial litigation that has continued to develop over the years between school systems and parents of disabled children.[135] Without a clear definition of FAPE, states are free to follow the minimal standards set forth in *Rowley*, and have no solid guidelines requiring them to ensure students receive the same level of "appropriate" education while excluded from their regular setting.[136]

The district court in *Todd County* adequately compared the eight hours per week of class time that Doe received in the alternative placement with the thirty hours per week he received in the high school.[137] The Eighth Circuit, on the other hand, failed to take into account this large disparity, declining to recognize that this substantial gap in educational hours has a negative impact on Doe's right to an "appropriate" education.[138] As a result, and despite the remarkable evolution in the statute's legislative purpose, the narrow interpretation of the *Rowley* standard continues to remain the only vague application lower courts must use.[139]

C. Possible Repercussions of Todd County

The Eighth Circuit's opinion in *Todd County* may have numerous negative implications.[140] By holding that a disciplinary suspension ends when it becomes a change in placement, the Eighth Circuit is at odds with the Supreme Court's decision in *Honig*, as well as the underlying progressive intent of the IDEA.[141] Despite the court's recognition of an available procedural remedy by filing a complaint with the IDEA, it erroneously precluded the student from

supra note 4, at 12 (outlining both broad and narrow interpretations of *Rowley* standard). The ability of courts to restrict state educational accountability to minimal benefit goals undermines the purpose of the IDEA, as well as the evolution of education law in general. *See id.*

135. *See supra* Part II.B (studying case law created by FAPE ambiguities).

136. *See* Blau, *supra* note 4, at 11-13 (discussing deference given to applying limited *Rowley* standard by states). Because courts give great deference to state educators in determining if an IEP is appropriate, states have not been required to provide the best education, or even one commensurate with nondisabled peers. *See id.* Although the IDEA mandates that FAPE be given to students even while excluded from their regular class setting, states are free to alter what constitutes "appropriate" education when placed in this alternative setting. *See id*. Thus, the level of appropriateness may not be uniform in both settings. *See id.* Doe, for example, received twenty-two hours' less instruction per week as a result of his placement change. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., No. CIV. 07-3029, 2008 WL 5069367, ¶ 10 (D.S.D. Nov. 24, 2008), *rev'd*, 625 F.3d 459 (8th Cir. 2010).

137. *See Todd Cnty.*, 2008 WL 5069367, at ¶ 18. The court looked at the quality and quantity of classroom instruction given while removed from regular classes. *See id.*

138. *See* Doe *ex rel.* Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 464-65 (8th Cir. 2010).

139. *See supra* Part II.B (describing narrow *Rowley* holding and outlining various subsequent standards).

140. *See Todd Cnty.*, 625 F.3d at 465 ("Because the school board lacked authority to overrule educational decisions of the IEP team, . . . the District's refusal to convene a school board hearing did not violate Jonathan Doe's federal constitutional right to procedural due process.").

141. *See* Petition for Writ of Certiorari, *supra* note 94, at 19-20 (arguing Eighth Circuit's ruling presents conflict in principle with Court's holding in *Honig*).

state-due-process procedures to which he was entitled.[142]

Furthermore, the Eighth Circuit now leans even further toward applying the least stringent standard for what constitutes an "appropriate" education.[143] Congress should articulate a clearer meaning of FAPE through amendments to the IDEA; however, it is unlikely to do so.[144] The inaction of Congress leaves the arbiter of the law's interpretation, the Supreme Court, with the responsibility to resolve this issue.[145] By granting certiorari, the Court had the chance not only to correct the Eighth Circuit's misunderstood procedural-due-process application, but also to resolve the long-standing issue of what FAPE standard is "appropriate," both in relation to a child's regular setting as well as an alternative, interim placement.[146] The Eighth Circuit's decision in *Todd County* could have a drastic impact on both the procedural-due-process rights of disabled students, as well as their guaranteed right to FAPE.[147]

IV. CONCLUSION

The Eighth Circuit failed to accurately assess procedural due process in the context of challenging a long-term suspension for a disabled student, and avoided the inherent negative impact on FAPE that results from such a long-term removal. As a result, the court's decision deprives disabled children of a meaningful opportunity to challenge long-term disciplinary suspensions, and fails to follow the logical trend toward a heightened standard for an "appropriate" education. Additionally, the decision creates further confusion in an area where there is recurring litigation pertaining to FAPE standards and procedural-due-process requirements. Moreover, by declining to grant certiorari, the Supreme Court continued to dodge the need to provide an updated precedent for lower courts to follow, leaving Congress's intent not fully realized.

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142. *See id.* (arguing court did not afford proper procedures).

143. *See supra* Part II.B.2 (comparing varying levels of judicial FAPE standards). The Eighth Circuit applies the less rigorous standard of only requiring "some" educational benefit. *See supra* Part II.B.2; *cf.* Goetz et al., *supra* note 67, at 515 (describing devolution of *Rowley* standard in Eighth Circuit).

144. *See* Blau, *supra* note 4, at 14-19 (discussing unlikelihood of FAPE clarification).

145. *See id.* (urging Supreme Court to revisit *Rowley*).

146. *See generally* Petition for Writ of Certiorari, *supra* note 94 (outlining vital reasons for Court to grant certiorari); Amicus Brief for Jonathan Doe, *supra* note 124 (providing negative implications of Eighth Circuit's decision).

147. *See supra* note 146 and accompanying text (exposing negative impact of *Todd County* decision).