

## ARTICLES

### “ALL AREAS OF SUSPECTED DISABILITY”

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#### ABSTRACT

*The Individuals with Disabilities Education Act (IDEA) requires school districts to assess children “in all areas of suspected disability.” It further provides that each child’s individualized education program (IEP) must contain measurable annual goals designed to “meet each of the child’s . . . educational needs that result from the child’s disability,” and a statement of special education and related services that will be provided for the child “to advance appropriately toward attaining annual goals.”*

*Courts have strictly enforced these requirements in the last several years, remedying violations of IDEA when school districts fail to assess in all areas of suspected disability or do not establish goals and services to meet each of the child’s needs resulting from the disability. This Article offers three interpretations of this recent development. First, what the courts are doing may represent an effort to enforce provisions of IDEA that stand apart from the limited reading that a 1982 Supreme Court case placed on the requirement in the statute to provide a free, appropriate public education. Second, the development may signify a different way of looking at special education obligations under the law, one well adapted to the ever-increasing importance attached to providing services in settings that maximize the inclusion of students with disabilities with nondisabled students. Third, the cases might simply be a reaction to cutbacks on evaluations and services that school districts have imposed because of financial strains brought about by the Great Recession. This Article will not try to declare which of these interpretations is the correct one,*

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*and in fact all three may be true. But the Article will conclude that enforcement of these provisions furthers the underlying purposes Congress had in enacting IDEA.*

“ALL AREAS OF SUSPECTED DISABILITY” .....	290
I. IDEA ENTITLEMENTS, PROCEDURES, AND STANDARDS.....	293
II. EVALUATION IN ALL AREAS AND GOALS AND SERVICES TO MEET ALL NEEDS .....	295
A. ASSESSMENT IN “ALL AREAS OF SUSPECTED DISABILITY”.....	295
B. GOALS AND SERVICES TO MEET EACH OF THE CHILD’S EDUCATIONAL NEEDS .....	297
C. ORIGINS OF THE ALL AREAS AND MEET EACH NEED PROVISIONS.....	299
III. JUDICIAL APPLICATIONS OF THE ALL AREAS AND EACH NEED PROVISIONS .....	300
A. ASSESSMENT IN ALL AREAS .....	301
B. GOALS AND SERVICES TO MEET ALL NEEDS .....	304
IV. THREE INTERPRETATIONS OF THE DEVELOPMENTS CONCERNING THE ALL AREAS AND EACH NEED PROVISIONS .....	307
A. ENFORCEMENT OF IDEA BEYOND <i>ROWLEY</i> .....	307
B. A NEW APPROACH FOR AN ERA OF INCLUSION.....	313
C. A RESPONSE TO RECESSION-ERA CUTBACKS .....	319
CONCLUSION .....	321

### “ALL AREAS OF SUSPECTED DISABILITY”

The Individuals with Disabilities Education Act (IDEA) requires school districts to assess children “in all areas of suspected disability.”<sup>1</sup> It further provides that each child’s individualized education program (IEP) must contain measurable annual goals designed to “meet each of the child’s . . . educational needs that result from the child’s disability,”<sup>2</sup> and a statement of special education and related services that will be provided for the child “to advance appropriately toward attaining the annual

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1. 20 U.S.C. § 1414(b)(3)(B) (2006).

2. *Id.* § 1414(d)(1)(A)(i)(II)(bb).

2013] **All Areas of Suspected Disability** 291

goals.”<sup>3</sup>

This Article observes that courts have rigorously enforced these requirements in recent years, finding violations of IDEA when school districts fail to assess in all areas of suspected disability or do not establish goals and services to meet each of the child’s needs resulting from the disability. The Article tries to put this case law development into perspective by offering three interpretations. First, what the courts are doing may represent an effort to enforce provisions of IDEA that stand apart from the limited reading that a 1982 Supreme Court case placed on the requirement in the statute to provide a free, appropriate public education.<sup>4</sup> Under a second interpretation, the development may signify a different way of looking at special education obligations, one well adapted to the ever-increasing importance attached to providing services in settings that maximize the inclusion of students with disabilities with nondisabled students.<sup>5</sup> As a third way of looking at the development, the cases might simply be a reaction to cutbacks on evaluations and services that school districts have imposed because of financial strains brought about by the Great Recession.

This Article will not try to determine which of these interpretations is the correct one, and all three may be true. But the Article will conclude that emphasis on the all areas and each need provisions has provided many parents with the ability to prevail in disputes over educational programs that might otherwise offer their children less than fully adequate services, or services not well adapted to success in mainstream settings. Enforcement of these provisions therefore furthers the underlying purposes Congress had in enacting IDEA.

The all areas and each need provisions have so far received little attention in the legal literature. Scholars have devoted much thought to the issue of appropriate education for children with disabilities and the long career of the first and only case the Supreme Court decided on the issue many years ago.<sup>6</sup> Recently,

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3. 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(aa).

4. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 203-04 (1982) (discussed *infra* notes 22-27).

5. *See* 20 U.S.C. § 1412(a)(5) (2006).

6. *See infra* note 83 and accompanying text. Numerous early articles criticize the *Rowley* decision. *See, e.g.*, Katharine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, LAW & CONTEMP. PROBS., Spring 1985,

significant writing has appeared on the topic of eligibility for services under IDEA.<sup>7</sup> But insufficient attention has been paid to the all areas and each need provisions—which were incorporated into the law after the Supreme Court spoke—and only a limited number of scholars have assessed the impact of these evaluation and IEP requirements on the nature of the services children are entitled to receive.<sup>8</sup> This Article begins the task of gathering and interpreting the extensive recent case law on the all areas and each need requirements.

Section I of this Article will lay out the basic entitlements, procedures, and standards that IDEA creates. Section II will discuss the text and context of the all areas and each need provisions. Section III will describe the recent case law enforcing the obligations that the provisions establish. Then Section IV will consider three explanations for the recent judicial attention to the provisions: (1) a way of enforcing IDEA obligations that does not depend on interpretations of appropriate education derived from the single Supreme Court case on the subject but instead on evaluation and IEP provisions added to the law after

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at 7, 43-49, 55, 61; John E.B. Myers & William R. Jenson, *The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act*, 9 S. ILL. U. L.J. 401, 411-16, 427-41 (1984); Bonnie Poitras Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley: *Utter Chaos*, 12 J.L. & EDUC. 235 *passim* (1983); Patricia L. Arcuri, Case Comment, 14 RUTGERS L.J. 989, 997-1010 (1983); Margaret Corning Boldrick, Casenote, 14 ST. MARY'S L.J. 425, 438-42 (1983). More recent critical commentary includes: Joyce O. Eckrem & Eliza J. McArthur, *Is the Rowley Standard Dead? From Access to Results*, 5 U.C. DAVIS J. JUV. L. & POLY 199, 204-07, 213-17 (2001); Chad Hinson, Note, *A Supreme Paradox: Autism Spectrum Disorder and Rowley Misapplication of a Judicial Relic to an Unprecedented Social Epidemic*, 5 FLA. A & M U. L. REV. 87 *passim* (2009); Jonathan Stead, Note, *Toward True Equality of Educational Opportunity: Unlocking the Potential of Assistive Technology Through Professional Development*, 35 RUTGERS COMPUTER & TECH. L.J. 224, 233-35 (2009). More recent studies of Rowley and the case law on appropriate education include: Julie F. Mead & Mark A. Paige, Board of Education of Hendrick Hudson v. Rowley: *An Examination of Its Precedential Impact*, 37 J.L. & EDUC. 329 (2008); Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 ED. LAW REP. 1 (2009); Scott Goldschmidt, Comment, *A New Idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATH. U. L. REV. 749 (2011). See generally Amy June Rowley, *Rowley Revisited: A Personal Narrative*, 37 J.L. & EDUC. 311 (2008) (providing personal narrative of background and consequences of case).

7. See *infra* note 54 and accompanying text.

8. Several exceptions to this generalization are discussed *infra* notes 33, 40, and 43.

the Supreme Court spoke; (2) an approach to education of children with disabilities that is most consistent with inclusion; and (3) a parental and judicial reaction to school district cuts in services due to budgetary shortfalls.

### I. IDEA ENTITLEMENTS, PROCEDURES, AND STANDARDS

IDEA provides federal special education funding to states and school districts that agree to obey its requirements.<sup>9</sup> The states and school districts must provide free, appropriate public education to all children with disabilities,<sup>10</sup> a duty that includes furnishing related services,<sup>11</sup> such as speech-language pathology and audiology services, physical and occupational therapy, recreation, social work services, school nurse services, counseling, and other activities that may assist the child to benefit from special education.<sup>12</sup> The statute further requires that children with disabilities be educated, “[t]o the maximum extent appropriate,” with children who are not disabled, and that removal from general education occur only when the child’s education “cannot be achieved satisfactorily” in general education classes with the use of supplementary aids and services.<sup>13</sup>

After a child is referred for special education by a parent or teacher, the school district must assess the child, determine whether the child is eligible under IDEA as a child with a disability, write an individualized education program for the child, and provide a placement for the child in a setting in which needed services can be delivered.<sup>14</sup> The IEP is a single document that spells out the child’s entire educational arrangement, including goals to be met, services to be offered, and measures to assess progress towards the goals.<sup>15</sup> If the parent disagrees with what the school district offers, the parent may request a due

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9. *See* 20 U.S.C. § 1411 (2006) (authorizing allocations to states and appropriations).

10. *Id.* § 1412(a)(1).

11. *Id.* § 1401(9).

12. *Id.* § 1401(26)(A).

13. *Id.* § 1412(a)(5)(A).

14. MARK C. WEBER ET AL., SPECIAL EDUCATION LAW: CASES AND MATERIALS 204 (3d ed. 2010) (detailing basic special education process); *see* 20 U.S.C. § 1414(a)-(d) (2006) (specifying legal requirements for identification, evaluation, creation of IEP, and implementation).

15. 20 U.S.C. § 1414(d)(1)(A) (2006).

process hearing, and in some states, the school district or the parent who loses at the hearing may obtain an administrative review.<sup>16</sup> Any party to the administrative proceedings who remains aggrieved can file an appeal in court.<sup>17</sup> Hearing officers and courts may make orders for future placements and services, and may award tuition reimbursement,<sup>18</sup> compensatory education,<sup>19</sup> and other appropriate remedies.<sup>20</sup> Courts may award attorneys' fees to prevailing parents, or, if the parents pursue a frivolous due process proceeding, to a prevailing school district.<sup>21</sup>

In *Board of Education v. Rowley*,<sup>22</sup> a 1982 case rejecting a claim that a school district needed to provide a sign language interpreter for a child with a severe hearing impairment who was already receiving an FM hearing aid and had excellent lip-reading skills, the Supreme Court interpreted the appropriate education term of the statute as requiring a "basic floor of opportunity," an education that would "confer some educational benefit."<sup>23</sup> The Court rejected a proposed definition of appropriate education that would require services to maximize the child's potential commensurate with the opportunities provided other children.<sup>24</sup> Though the Court cautioned that it was "not attempt[ing] to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act,"<sup>25</sup> lower courts have applied the case's standard to a vast range of disputes over the adequacy of services offered to children with disabilities.<sup>26</sup> Various authorities have discussed whether subsequent legislative and judicial

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16. 20 U.S.C. § 1415(f)-(g).

17. *Id.* § 1415(i)(2).

18. *Id.* § 1412(a)(10)(C)(ii)-(iv); see *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (recognizing general right of reimbursement under IDEA when school district fails to offer appropriate education to child, and parent unilaterally places child privately in appropriate placement).

19. *E.g.*, *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).

20. See 20 U.S.C. § 1415(i)(2)(C)(iii) (2006) ("grant such relief as the court determines is appropriate").

21. *Id.* § 1415(i)(3)(B)(i).

22. 458 U.S. 176 (1982).

23. *Id.* at 200.

24. *Id.* at 198.

25. *Id.* at 202.

26. See WEBER ET AL., *supra* note 14, at 32 (noting that lower courts had fully discussed *Rowley* in more than 750 cases as of 2010).

developments have effectively limited *Rowley*,<sup>27</sup> but the Supreme Court has not considered whether *Rowley* has been superseded in any way, for the Court has not taken a case on the definition of appropriate education in the last thirty-one years.

## II. EVALUATION IN ALL AREAS AND GOALS AND SERVICES TO MEET ALL NEEDS

IDEA's provisions mandating assessment of children in all areas of suspected disability and services to meet each need fit, respectively, into the contexts of a set of evaluation requirements and a set of IEP requirements. Both provisions share roots in a 1997 revision to IDEA, though the assessment provision has a longer history tracing to the first set of regulations promulgated under the law that is now IDEA.

### A. ASSESSMENT IN "ALL AREAS OF SUSPECTED DISABILITY":

As noted at the outset of this Article, IDEA requires school districts to assess children "in all areas of suspected disability."<sup>28</sup> This mandate is part of a whole group of requirements pertaining to evaluation. Evaluation must take place before the initiation of special education services for a child,<sup>29</sup> and reevaluation must take place at least once every three years, unless the parent and school district agree that a reevaluation is not needed.<sup>30</sup> When conducting an evaluation, the school district must use a variety of assessment tools and strategies, must not use any single measure or assessment as the sole criterion for determining eligibility or programming for a child, and must use technically sound instruments.<sup>31</sup> The school district must be sure that assessments and evaluation materials are selected and administered so as not to be racially or culturally discriminatory, administered in the child's own language, used for the purposes for which the assessments are valid and reliable, administered by trained and

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27. *Compare Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (stating that current version of IDEA evidences congressional intent to require programs requiring meaningful educational benefit toward self-sufficiency goal), *with J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 951 (9th Cir. 2010) (holding that current version of IDEA does not supersede *Rowley* appropriate education standard). *See generally* Goldschmidt, *supra* note 6 (describing contrasting treatment of *Rowley* standard in federal courts).

28. 20 U.S.C. § 1414(b)(3)(B) (2006).

29. *Id.* § 1414(a)(1)(A).

30. *Id.* § 1414(a)(2)(B)(ii).

31. *Id.* § 1414(b)(2).

knowledgeable personnel, and administered according to the authors' instructions.<sup>32</sup> Commentators have stressed how critical it is for children to have a thorough assessment of their disabilities.<sup>33</sup>

The importance that the United States Department of Education attaches to accurate evaluation is underscored by the Department's longstanding regulation providing that parents who disagree with the school district's evaluation may obtain an independent evaluation at public expense.<sup>34</sup> If the parent requests an independent evaluation, it is up to the school district either to file a due process complaint to show that its evaluation is appropriate, or to make sure that the independent evaluation is provided.<sup>35</sup> The Court of Appeals for the Eleventh Circuit recently held that the regulation was a valid use of the Department's regulatory authority<sup>36</sup> despite the absence of any statutory command that independent evaluations be free of

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32. 20 U.S.C. § 1414(b)(3)(A). Still more requirements apply to evaluation for specific learning disability, *see* 20 U.S.C. § 1414(b)(6) (2006); 34 C.F.R. §§ 300.307-.311(2013), a topic that has generated significant controversy in recent years with discontent over IQ-based testing and the emergence of Response-to-Intervention (RTI) methodology, *see* Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 122-43 (2009) (describing controversy over evaluation for specific learning disability and development of RTI techniques) (collecting sources).

33. *See, e.g.*, Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 107, 115 (2011) ("[I]n some districts, children do not receive thorough and adequate evaluations, and district employees are bound by blanket policies and even moratoria. Thus, the entire process breaks down. Poor families suffer most from this phenomenon.") (footnotes omitted); Terry Jean Seligmann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71, 79 (2012) ("There are few disputes over special education services that can be resolved without the aid of expert evaluations."); Sanu Dev, Note, *Implications of the Parental Right to Unilaterally Revoke Consent of Services on the Rights of a Child with Learning Disabilities Under the Individuals with Disabilities Education Act*, 8 RUTGERS J.L. & PUB. POL'Y 745, 772-73 (2011) ("If students have a right to a minimally adequate education, then all students, including those who were formally characterized as students with disabilities, should be entitled to an evaluation to determine the most appropriate alternative education program to ensure that they continue to receive an education.")

34. 34 C.F.R. § 300.502(b) (2013).

35. *Id.* §300.502(b)(2). *See generally* Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493 (9th Cir. 1996) (ordering school district to pay for independent evaluation when district's assessment team failed to include anyone with knowledge of disorders affecting child).

36. Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 693 (11th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3620 (U.S. Apr. 16, 2013) (No. 12-1252).

charge.<sup>37</sup>

### B. GOALS AND SERVICES TO MEET EACH OF THE CHILD'S EDUCATIONAL NEEDS

IDEA requires that each IEP must contain measurable annual goals designed to “meet each of the child’s . . . educational needs that result from the child’s disability,”<sup>38</sup> and that the IEP must include a statement of special education and related services that will be provided for the child “to advance appropriately toward attaining the annual goals.”<sup>39</sup> Thus the IEP has to have goals and services that address each of the needs identified by the assessment in all areas of disability.<sup>40</sup>

This requirement is part of an array of statutory definitions and dictates that concern IEPs. The IEP must contain a statement of the child’s present levels of academic achievement and functional performance; a statement of measurable annual goals; a description of how the child’s progress toward meeting the goals will be measured; a statement of the special education and related services and supplementary services to be provided the child and program modifications and supports; an explanation of the extent to which the child will not be participating with nondisabled children in general education classes; a listing of accommodations on state and district assessments; a statement of dates to begin services and their frequency, location, and duration; and a specification of goals and services for post-secondary transition if the child is sixteen or older.<sup>41</sup> The team that discusses and writes up the IEP must include the parents of the child, a general education teacher if the child is or might be participating in the general education environment, a special education teacher, a representative of the school district with

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37. See 20 U.S.C. § 1415(b)(1) (2006) (providing for independent evaluations without stating they must be free).

38. *Id.* § 1414(d)(1)(A)(i)(II).

39. *Id.* § 1414(d)(1)(A)(IV)(aa).

40. See Allan G. Osborne, Jr., *Are School Districts Required to Identify Placement Locations for the Delivery of Services in Proposed IEPs?*, 261 ED. LAW REP. 497, 505 (2010) (“Chosen placements must meet all of a student’s needs.”); Gabriela Brizuela, Note, *Making an “IDEA” a Reality: Providing a Free And Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U. L. REV. 595, 602 (2011) (“The IDEA’s individualized education programs require school districts to provide every disabled child with a written IEP that caters to the child’s specific educational needs.”).

41. 20 U.S.C. § 1414(d)(1)(A)(i) (2006).

authority over instructional decisions and knowledge about the general education curriculum and the resources of the district, a person who can interpret the instructional implications of evaluation results, other individuals with knowledge or special expertise regarding the child (including related services' personnel), and, whenever appropriate, the child.<sup>42</sup> The special education and related services that the team puts in place have to be "based on peer-reviewed research to the extent practicable."<sup>43</sup> The team has to consider a variety of factors when devising the IEP, including the strengths of the child, the parents' concerns, the evaluation results, and the academic, developmental, and functional needs the child has.<sup>44</sup> When the child has behavior problems, when the child has limited English proficiency, when the child is visually impaired, or when the child is deaf or hard of hearing, additional requirements to consider specific services and accommodations apply.<sup>45</sup> For all children with disabilities, needs for assistive technology must be considered.<sup>46</sup>

The IEP has been called the "cornerstone of IDEA,"<sup>47</sup> and that is no exaggeration. The process of creating it, and the final

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42. 20 U.S.C. § 1414(d)(1)(B).

43. *Id.* § 1414(d)(1)(A)(i)(IV). Commentators have stressed the importance of this innovation. *See, e.g.*, Jean B. Crockett & Mitchell L. Yell, *Without Data All We Have Are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education*, 37 J.L. & EDUC. 381, 388 (2008) ("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 . . ."); 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, 410-15 (2008) (discussing potential effects of peer-reviewed research provision); Amy D. Quinn, Comment, *Obtaining Tuition Reimbursement for Children with Special Needs*, 80 UMKC L. REV. 1211, 1222 (2012) ("Without this emphasis on peer-reviewed research, special education in the past was often just a repeat of the curriculum the child with a disability had already seen in the classroom . . . . Historically, special education teachers cobbled together their own programs, causing many children to go without systematic, specialized instruction, which is necessary to receive an appropriate education.").

44. 20 U.S.C. § 1414(d)(3)(A) (2006).

45. *Id.* § 1414(d)(3)(B).

46. *Id.* § 1414(d)(3)(B)(v).

47. Jeffrey A. Knight, Comment, *When Close Enough Doesn't Cut It: Why Courts Should Want to Steer Clear of Determining What Is—And What Is Not—Material in a Child's Individual Education Program*, 41 U. TOL. L. REV. 375, 387 (2010).

document produced, are what put the statutory right to individualized, appropriate education in the least restrictive setting into operation. Moreover, the IEP is the basis on which parents must decide whether to exercise their right to demand a hearing to challenge the school district's decisions about how to educate the child: "At the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents."<sup>48</sup>

### C. ORIGINS OF THE ALL AREAS AND MEET EACH NEED PROVISIONS

The assessment in all areas provision was not in the original Education for All Handicapped Children Act of 1975,<sup>49</sup> but appeared in the first set of regulations from the old Department of Health, Education, and Welfare interpreting the statutory text. The regulation required that state and local educational agencies guarantee that "the child is assessed in all areas related to the suspected disability, including, where appropriate, heath, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."<sup>50</sup> In a 1997 revision of what had by then been renamed the Individuals with Disabilities Education Act, Congress elevated the regulation's language to statutory text and edited it to state that "[e]ach local educational agency shall ensure that . . . the child is assessed in all areas of suspected disability."<sup>51</sup> The provision demanding goals and corresponding services to meet each of the child's educational needs appeared for the first time in the 1997 revision of the statute.<sup>52</sup> That text

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48. *R.E. v. N.Y. City Dep't of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012) (holding that IEPs must be evaluated as of time of drafting, and retrospective testimony about additional services said to be offered by school district beyond those listed in IEP should not be considered in tuition reimbursement cases).

49. Pub. L. No. 94-142, 89 Stat. 773 (1975).

50. 45 C.F.R. § 121a.532(f) (1977). The Final Rules added the language, which is not found in the Proposed Rulemaking at 41 Fed. Reg. 56965-98 (Dec. 30, 1976).

51. Pub. L. No. 105-17 § 101, 111 Stat. 37 (1997).

52. *Id.* (codified as amended at 20 U.S.C. § 1414(d)(1)(A)(i)(II)-(IV)) ("The term 'individualized education program' or 'IEP' means a written statement for each child with a disability . . . that includes— . . . a statement of measurable annual goals, including benchmarks or short-term objectives, related to—meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and meeting each of the child's other educational

was original, with no specific antecedent in the prior regulations.<sup>53</sup>

The approach Congress took with these amendments was not to insist on a given level of intensity of services. Instead, Congress required a certain breadth of services—insisting that schools look for and find each area of need and put in place something to address it. Congress seemed to assume that once schools accurately identified needs and furnished services, the school personnel's own professionalism would kick in, and the services provided would be effective.

### III. JUDICIAL APPLICATIONS OF THE ALL AREAS AND EACH NEED PROVISIONS

Prominent court cases implementing the relevant provisions of the statute started emerging in significant numbers around the latter half of the 2000s, especially after 2007.<sup>54</sup> These decisions

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needs that result from the child's disability; [and] a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—to advance appropriately toward attaining the annual goals . . .”).

53. The legislative history of the provisions does not do much to amplify the text. The 1997 Amendments to IDEA included a general revision of the evaluation and IEP sections, but the specific changes addressed here receive only brief mention in the House and Senate Reports. *See generally* H.R. REP. NO. 105-95, at 96 (all areas of suspected disability), 100-01 (goals and services for each need) (1997); S. REP. NO. 105-17, at 18 (all areas of suspected disability), 20 (goals and services for each need) (1997).

54. The trend first came to my attention around then and I commented on it for the first time in an article written in the fall of 2011. *See* Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J.L. & EDUC. 95, 122-25 (2012). The development followed a period in the late 1990s and early 2000s in which a large number of disputes arose when parents contended that their children were eligible for special education services, but school systems maintained that the students did not meet IDEA's definition of a child with a disability. Significant amounts of scholarship on the eligibility topic followed. *See, e.g.,* Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147 (2007); Robert A. Garda, Jr., *Who Is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291 (2006); Weber, *supra* note 32; Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305 (2005). Whether there is a relationship between disputes over schools' cutbacks on eligibility in the early 2000s and the disputes over assessment and services litigation of more recent years remains to be explored. Professor Derek Black, however, has recently noted that because of information disparities about whether a student's learning problems are caused by disability or other factors, school systems may be better poised to win disputes over eligibility than over failure to provide services.

2013] **All Areas of Suspected Disability** 301

provide multiple instances of courts taking school districts to task for failure to assess children in all areas of suspected disability and failure to provide IEP goals and services to meet each of the child's needs arising from the disability identified in the assessment.

**A. ASSESSMENT IN ALL AREAS**

Many cases apply the requirement that children must be evaluated in all areas of suspected disability.<sup>55</sup> Three examples demonstrate some of the more common situations in which violations of the all areas requirement occur. *N.B. v. Hellgate Elementary School District* illustrates a delay in conducting a needed evaluation when the district had reason to know that the child had a disability and what the disability might be, but failed to act promptly to evaluate.<sup>56</sup> The court held that a school

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Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1751 (2012).

55. *E.g.*, Meridian Joint Sch. Dist. No. 2 v. D.A., No. 1:11-cv-00320-CWD, 2013 U.S. Dist. LEXIS 40794 (D. Idaho Mar. 20, 2013) (affirming hearing officer determination that evaluation conducted in regimented environment of juvenile detention failed to satisfy requirement of assessment in all areas of disability applicable in school setting); Orange Unified Sch. Dist. v. C.K., No. SACV 11-1253 JVS(MLGx), 2012 WL 2478389 (C.D. Cal. June 4, 2012) (holding that school district unlawfully failed to make timely assessment for autism after parents reported child displayed autistic-like symptoms, resulting in denial of appropriate education, citing state analogue of all areas provision); G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455 (E.D. Pa. 2011) (affirming hearing officer's determination that reevaluation was inadequate when it stressed child's superior cognitive abilities and progress but failed to incorporate observations about failure of behavior interventions, failed to make use of classroom observation, did not include functional behavioral analysis, and included only limited analysis of discrepancy between verbal IQ and memory and processing speeds); J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606 (S.D.N.Y. 2011) (requiring assistive technology evaluation for child with severe speech and language deficits); Compton Unified Sch. Dist. v. A.F., No. CV 09-1427 AHM (CWx), 2010 WL 1727674 (C.D. Cal. Apr. 26, 2010) (failure to evaluate child for emotional disturbance); D.B. v. Bedford Cnty. Sch. Bd., 708 F. Supp. 2d 564 (W.D. Va. 2010) (failure to evaluate student for learning disability); Suggs v. District of Columbia, 679 F. Supp. 2d 43 (D.D.C. 2010) (denying defendant's motion for summary judgment in case alleging school system failed to make needed evaluations); Blake C. v. Dep't of Educ., 593 F. Supp. 2d 1199 (D. Haw. 2009) (holding that school system violated IDEA by failing to perform assistive technology evaluation); see Charlotte-Mecklenburg Bd. of Educ. v. B.H., Civ. No. 3:07cv189, 2008 WL 4394191 (W.D. N.C. Sept. 24, 2008) (denying motion to dismiss action alleging prolonged failure to evaluate child for other health impairments or speech-language and occupational therapy, failure to assess writing, and use of invalid evaluation of verbal comprehension and perceptual reasoning).

56. 541 F.3d 1202 (9th Cir. 2008). The parents gave the doctor's report to the special education director in August, 2003, but in response the district merely

district violated its duty to assess in all areas by not evaluating a child for autism after receiving notice from a doctor's report submitted by the parents saying that the child might be autistic, instead referring the parents to a child development center so they could obtain an assessment on their own.<sup>57</sup> The resulting delay in obtaining information about the child's autism meant that the child did not receive appropriate services until the following school year; the court held that the parents should receive reimbursement for costs they incurred supplementing the child's education during the year of delay.<sup>58</sup>

Another situation is when the child is assessed in some, perhaps more obvious, areas, but not in every area for which there is ground to suspect disability. In *K.I. v. Montgomery Public Schools*, the court confronted the case of a child with a congenital condition manifesting itself in multiple joint contractures, muscle weakness and fibrosis, as well as muscular dystrophy and restricted breathing capacity.<sup>59</sup> The child was unable to speak or raise her arms, used a wheelchair for mobility, needed tube feeding, and had to have periodic suctioning of the lungs to prevent respiratory problems.<sup>60</sup> Although the school district provided services to the child at a specialized center for children with disabilities from as early as 2000 to November of 2004, it never performed a cognitive evaluation, and thus the school system had "no idea whether K.I. [was] operating in the normal intelligence range."<sup>61</sup> Moreover, the child never received a sufficient evaluation as to assistive technology, so her teacher could not design a proper communication system for her.<sup>62</sup> "Without a cognitive or assistive technology assessment, MPS [was] unable to design suitable goals for K.I. And without the ability to design goals, they [were] unable to develop an adequate

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referred the parents to an outside agency for general testing. "Hellgate did not fulfill its statutory obligations by simply referring C.B.'s parents to the CDC [Missoula Child Development Center]." 541 F.3d 1202, 1209 (9th Cir. 2008).

57. 541 F.3d 1202, 1209 (9th Cir. 2008).

58. *Id.* at 1210. Thus the district was guilty of a procedural error that denied the child appropriate education. *See id.* The parents did not prevail on a claim regarding extended school year services. *Id.* at 1212.

59. 805 F. Supp. 2d 1283, 1287 (M.D. Ala. 2011).

60. *Id.*

61. *Id.* at 1293. The child did not receive even an occupational therapy evaluation until the parents secured one in the summer of 2005. *Id.* at 1288.

62. *Id.* at 1293.

IEP.”<sup>63</sup> The court required the district to reevaluate the child and develop a new IEP.<sup>64</sup>

Still another situation in which the all areas regulation has an impact is when a child is assessed in a specific area, but the assessment is insufficiently comprehensive within that field. *Dracut School Committee v. Bureau of Special Education Appeals* involved a twenty-year-old student with Asperger’s Syndrome, attention deficit hyperactivity disorder, bipolar disorder, and an anxiety disorder.<sup>65</sup> The student did well academically in high school but after leaving school lacked the skills and abilities to successfully make the transition to college or work, demonstrating poor personal hygiene, inadequate social relations, and the inability to succeed in discussion-based college classes and to navigate any but one bus route in the community.<sup>66</sup> The court found that the school system failed to make a timely assessment in the area of post-secondary transition when a full transition assessment was not made until the spring of the student’s senior year.<sup>67</sup> Most significantly, the evaluation did not “provide proper assessments and benchmarks for functional language pragmatics,” which the student needed for success in social behavior connected with education, employment, and independent living after high school.<sup>68</sup> The court awarded a compensatory education remedy.<sup>69</sup>

Failure to assess in all areas of suspected disability is necessarily linked to the failure to provide services to meet each of the child’s needs. If the need is never identified, it cannot be met. Accordingly, courts ordering remedies for failure to assess require the school district to provide a remedy for failing to meet

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63. *K.I. v. Montgomery Pub. Schs.*, 805 F. Supp. 2d 1283, 1293 (M.D. Ala. 2011). The court said that a district need not evaluate a child in every conceivable area, but that in this case both cognitive and assistive technology assessments were necessary to develop appropriate educational goals. *Id.* at 1293-94.

64. *Id.* at 1299. The court rejected various other claims put forward by the parent, including ones based on the obligation to serve in the least restrictive environment, to provide services at home when the child was absent from school, and to avoid discrimination on the basis of disability pursuant to 29 U.S.C. § 794. *Id.* at 1296-98.

65. 737 F. Supp. 2d 35 (D. Mass. 2010).

66. *Id.* at 47.

67. *Id.* at 50.

68. *Id.*

69. *Id.* at 55.

all the child's needs resulting from the disability.<sup>70</sup>

### B. GOALS AND SERVICES TO MEET ALL NEEDS

Courts have found violations of IDEA and ordered relief when an otherwise beneficial program lacks particular needed services such as speech therapy, writing programs, behavior intervention, and post-secondary transition activities. Here the cases may be broken down into those addressing specific kinds of needed services. Consider speech: In *B.H. v. West Clermont Board of Education*, the court held that the school district denied a child appropriate education when it failed to consider independent evaluations showing that the child needed speech services and when it predetermined that the child did not need speech services, even though other services were provided.<sup>71</sup> Writing is another relevant area. Deficiencies in services addressed to a deficit in writing will support relief, even when other areas of need are met.<sup>72</sup> Occupational therapy is another

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70. See, e.g., *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1210 (9th Cir. 2008) (“[W]ithout evaluative information that C.B. has autism spectrum disorder, it was not possible for the IEP team to develop a plan reasonably calculated to provide . . . meaningful educational benefit . . .”); *Bd. of Educ. v. H.A.*, No. 2:09-01318, 2011 WL 861163 (S.D. W. Va. Mar. 9, 2011) (finding that failure to evaluate behavior and provide services violated appropriate education obligation), *aff’d*, 445 F. App’x 660 (4th Cir. 2011); *E.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417 (S.D.N.Y. 2010) (finding program for school year inadequate for failing to account for progress reflected in qualitative evaluations from past year), *aff’d*, 487 F. App’x 619 (2d Cir. 2012); *District of Columbia v. Bryant-James*, 675 F. Supp. 2d 115 (D.D.C. 2009) (holding that IEP was inadequate in failing to address evaluation’s conclusion that child needed distraction-free environment); *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549 (E.D. Pa. 2007) (finding failure to evaluate child for behavioral or psychiatric problems led to failure to provide appropriate services). Courts have also ordered that the evaluations be conducted, e.g., *Long v. District of Columbia*, 780 F. Supp. 2d 49 (D.D.C. 2011) (holding that defendant must perform functional behavior evaluation), and that parents be reimbursed for evaluations they needed to obtain privately, e.g., *JG v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 795 (9th Cir. 2008).

71. 788 F. Supp. 2d 682 (S.D. Ohio 2011). The school also failed to provide needed occupational therapy services, *id.* at 697, and provided ineffective behavioral services, *id.* at 699. In another case, the court concluded that the defendant school system denied a child appropriate education when it failed to include in the child’s IEP the speech and language services that he needed, apparently because the system was awaiting a central auditory processing disorder evaluation for the child. *I.T. v. Dep’t of Educ.*, Civ. No. 11-00676 LEK-KSC, 2012 WL 3985686, at \*12 (D. Haw. Sept. 11, 2012) (awarding compensatory education remedy).

72. See *Me. Sch. Admin. Dist. No. 56 v. Ms. W*, Civ. No. 06-81-B-W, 2007 WL 922252 (D. Me. Mar. 27, 2007) (magistrate judge recommendation) (stating that school district denied child appropriate education by failing to provide services to

2013] **All Areas of Suspected Disability** 305

field in which an IEP will be found insufficient if it fails to meet an identified need for individual services.<sup>73</sup>

Behavioral services are an additional important category. A number of courts have required a level of adequacy of services addressed specifically to behavior. For example, the Court of Appeals for the Second Circuit held that failure to conduct a functional behavioral analysis and incorporate a behavior intervention plan into an IEP for a child with autism called for a remedy when the child's behavior impeded her learning, even though there was evidence her behavior was not atypical for a child with autism.<sup>74</sup> Another court required in-home behavior services to be delivered to diminish a child's self-stimulation and aggression, and ruled that parent training offered by the school district was not sufficient, even though the child was provided extensive applied behavior services in school.<sup>75</sup>

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address his weakness in writing, though noting that program addressed other problems), *adopted*, 2007 WL 1129378 (D. Me. Apr. 16, 2007). *But see* Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013) (discussed *infra* text accompanying notes 85-102).

73. *See* B.R. v. N.Y.C. Dep't of Educ., No. 11 Civ. 8433(JSR), 2012 WL 6691046 (S.D.N.Y. Dec. 26, 2012) (in case of nine-year-old with autism, holding that school department failed to prove that proposed public school placement could meet child's need for one-on-one occupational therapy identified by IEP team in light of evidence that at time of IEP, occupational therapy services were available only in group setting with six students; ordering reimbursement for private placement).

74. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 194 (2d Cir. 2012).

75. *New Milford Bd. of Educ. v. C.R.*, No. 09-328 (JLL), 2010 WL 2571343 (D.N.J. June 22, 2010), *aff'd*, 431 F. App'x 157 (3d Cir. 2011). The court relied in part on the Judge Alito's gloss on *Rowley*. *See id.* at \*5. *See generally* Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (Alito, J.) ("The IEP must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the child's 'intellectual potential.'") (citations omitted). A number of cases require specific behavioral services for students with autism, despite the provision of general programs oriented towards autistic behaviors. *E.g.*, *Aaron P. v. Haw. Dep't of Educ.*, 897 F. Supp. 2d 1004, 1020-22 (D. Haw. Sept. 17, 2012) (finding denial of appropriate education when goals on IEP did not address child's self-injurious behaviors and other behavior problems, nor child's communication needs; awarding reimbursement); *Escambia Cnty. Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248, 1265-71 (S.D. Ala. 2005); *Ind. Area Sch. Dist. v. H.H.*, No. Civ.A. 04-1696, 2005 WL 3970591, at \*8-9 (W.D. Pa. July 25, 2005). Additional cases address other failures to provide behavioral services when evidence of need exists. *E.g.*, *Coventry Pub. Schs. v. Rachel J.*, 893 F. Supp. 2d 322(D.R.I. Sept. 28, 2012) (in case of student with ADHD, oppositional defiance disorder, and severe behavior disorder, holding that failure to provide clear behavior goals in IEP denied appropriate education even though student's grades were acceptable; finding reimbursement for private residential school to be proper); *Council Rock Sch. Dist. v. M.W.*, No. 11-4824, 2012 WL 3055686, at \*7 (E.D. Pa. July 26, 2012) ("As described above, the District was aware

Post-secondary transition services are another area to which the courts have devoted attention. As noted above, IEPs must have plans to address transition for children sixteen and older.<sup>76</sup> Courts have ruled that IEPs violate IDEA when they do not set out specific services to facilitate the adjustment to post-secondary experience. *Dracut School Committee v. Bureau of Special Education Appeals*, discussed above, found an IEP's transition services not to be adequate when the IEP failed to address the student's need for pragmatic language skills, vocational skills, and independent living skills, even though the student did well in the mainstream in high school and graduated in the top half of his class.<sup>77</sup> The court stressed that despite the student's academic achievement, he never was able to develop the communication skills and other life skills to attend and participate effectively in college classes or other activities after high school.<sup>78</sup>

Courts have also rejected IEPs that did not provide parent training,<sup>79</sup> lacked specific plans to facilitate a child's transition from private school to public school and failed to call for adequate training for a child's teachers,<sup>80</sup> and neglected to include goals concerning auditory processing disorder and anxiety and occupational therapy needs.<sup>81</sup> IEPs have also been found

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of M.W.'s behavioral needs, particularly his anxiety, prior to 2009. The school was also aware of new behavioral issues beginning in 2009. These included stealing, inappropriate interpersonal interactions, and tantrums. None of these behavioral needs were addressed in the 2009 IEP.") (awarding partial tuition reimbursement); *Orange Unified Sch. Dist. v. C.K.*, No. SACV 11-1253 JVS(MLGx), 2012 WL 2478389 (C.D. Cal. June 4, 2012) (finding that child with autism was denied appropriate education due to failure to provide needed behavioral therapy and one-on-one behavioral aide; awarding compensatory and other remedies).

76. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb) (2006).

77. 737 F. Supp. 2d 35, 50-53 (D. Mass. 2010).

78. *Id.* at 47, 52-53.

79. *See R.K. v. N.Y.C. Dep't of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at \*20-21 (E.D.N.Y. Jan. 21, 2011) (noting obligation under state law to offer parent training and counseling services to children with autism and requiring inclusion of parent training and counseling in IEP; further requiring provision of adequate speech and language therapy services), *adopted*, 2011 WL 1131522 (E.D.N.Y. Mar. 28, 2011), *aff'd sub nom. R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012).

80. *Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. P.*, No. 3:06 CV 01278(CFD), 2009 WL 103376, at \*3 (D. Conn. Jan. 12, 2009) (finding program not to be appropriate due to absence of plan for transition from private to public school, and failure to require adequate training for child's teachers and family members, and assessment of child's assistive technology needs).

81. *C.B. v. Garden Grove Unified Sch. Dist.*, 655 F. Supp. 2d 1088, 1097-98 (C.D.

2013]                    **All Areas of Suspected Disability**                    307

insufficient when the goals listed were too vague or not measurable.<sup>82</sup>

#### **IV. THREE INTERPRETATIONS OF THE DEVELOPMENTS CONCERNING THE ALL AREAS AND EACH NEED PROVISIONS**

There are various ways to look at the recent attention to the all areas and each need requirements. One would be to fit what the courts are doing into the context of the *Rowley* case and the courts' understandings of the duty to provide appropriate education. Is the use of the provisions a limit on *Rowley*, or a parallel development regarding parts of the law distinct from the appropriate education term, or some combination of the two? A second would be to fit the development into the duty to provide education, to the maximum extent, with children who are not disabled, and the requirement to provide aids and services to achieve that inclusion. A third would be to view the attention to the all areas and each need provisions as a simple reaction to steps that school districts have taken to curtail evaluations and services in response to hard budgetary times. These explanations are not mutually inconsistent, and taking them in turn may give a clearer understanding of how the all areas and each need provisions ought to be applied consistently with Congress's intentions.

##### **A. ENFORCEMENT OF IDEA BEYOND ROWLEY**

*Rowley* made no reference to the assessment in all areas language of the regulations, and of course could not have discussed the language about meeting each of the child's educational needs that Congress was not to adopt for another fifteen years. That omission is significant, for it might be possible to interpret *Rowley* to permit a school to ignore one or another

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Cal. 2009), *aff'd*, 635 F.3d 1155 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 500 (2011); *see also* Sch. Bd. of Norfolk v. Brown, 769 F. Supp. 2d 928, 935, 943 (E.D. Va. 2010) (finding IDEA child-find obligation violation in case of child whose IEP lacked any behavioral goals or objectives).

82. *See, e.g.*, Woods v. Northport Pub. Sch., No. 1:09-cv-243, 2011 WL 1230813, at \*15-16 (W.D. Mich. Mar. 31, 2011) (stating that IEP lacked adequate information about present level of functioning and criteria to measure progress), *aff'd in part & vacated in part on other grounds*, 487 F. App'x 968 (6th Cir. 2012); *see also* M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 248-49 (2d Cir. 2012) (rejecting IEP with short term objectives lacking evaluative procedures and containing goals not tailored to child's unique needs).

area of need, as long as the program as a whole confers some benefit on the child. But by compelling school districts to make an assessment in every area where disability is suspected, and then by requiring them to provide services to meet each educational need identified, the current version of the statute rules out that reading. Courts accordingly have forced schools to evaluate in all suspected areas and provide services that confer some benefit to a child with a disability in all identified areas. They have resisted letting schools by with claiming they have provided an amorphous “some benefit” from the educational program as a whole.

Giving credit to the all areas and each need provisions is not an assault on *Rowley*. It is simply following congressional commands that relate to the other, more recently revised, portions of the statute. Even an expansive interpretation of *Rowley* may be reconciled with giving those sections of the law the credit they are due. Schools have to determine and address all needs, even if they need to meet only a level of adequacy with regard to the specific services given. *Rowley* might be given due credit in that regard, but the issue in the all areas and each need cases actually is one that was not considered in *Rowley*—in that case each of the child’s needs was being addressed, just not with the intensity the parents wanted. This understanding of the all areas and each need provisions dovetails with the *Rowley* opinion itself, which emphasized the importance of the IEP and the procedural safeguards around its creation.<sup>83</sup>

That being said, it should be noted that other developments over the years have helped render *Rowley* less central to the special education inquiry, even without pushing it entirely out of the picture. With regard to just one example, several astute commentators have pointed out that the movement to standards-based education has displaced the centrality of the vague some-benefit standard, as well as *Rowley*’s highly manipulable measure of passing from grade to grade for children with disabilities who are in general education classrooms.<sup>84</sup>

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83. See *Rowley*, 458 U.S. at 203, 205-06 & n.27.

84. See 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 *HAMLIN L. REV.* 503, 530 (2011) (“The *Rowley* standard has not been raised, but the legal measure of ‘some educational benefit’ today differs significantly from the measure in 1982. Where achievement of passing marks and advancement from grade to grade were the markers at the time

There is an exception to the general trend regarding the interpretation of the all areas and each need language of IDEA. One recent court of appeals' decision, *Klein Independent School District v. Hovem*,<sup>85</sup> takes *Rowley* beyond its limits and commits the error of reading the all areas and each need provisions out of the statute.<sup>86</sup> In *Klein Independent*, the district court held that the school district failed to adequately remediate a highly intelligent high schooler's identified weakness in the area of writing.<sup>87</sup> He passed his classes, the district court found, by obtaining assistance from his mother and brother on his homework and by being given other informal accommodations.<sup>88</sup> The district court held that the student's transition plan was not individualized and lacked result-oriented goals and identification

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Rowley was decided, attainment of state educational standards must now become the measure in this era of standards-based reform."); Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 577 (2003) ("Incorporating state educational content and proficiency standards into the statutory definition of FAPE [free, appropriate public education] means high expectations must now be included in disabled students' IEPs. Educational standards define performance criteria for students that school districts and parents must use when developing goals and objectives in a student's IEP."); Maureen A. MacFarlane, *The Shifting Floor of Educational Opportunity: The Impact of Educational Reform on Rowley*, 41 J. L. & EDUC. 45, 68 (2012) ("[A] state's educational standards reflect the level of adequacy expected in public education for all students and, therefore, [the level of adequacy] is likely to impact the educational discussion as to expected growth and outcome for special education students even if a higher outcome standard is not express in the IDEA."). A source has also suggested that the threat of loss of federal funding from failure to achieve adequate yearly progress under the No Child Left Behind initiative has the effect of raising special education standards. See Andrea Kayne Kaufman & Even Blewett, *When Good Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the Rowley Definition of a Free Appropriate Public Education*, 41 J.L. & EDUC. 5, 17 (2012) ("After NCLB [No Child Left Behind], it seemed plausible that while a school could provide 'sufficient' services to pass the FAPE threshold established in *Rowley*, it may still face the threat of reduced or withheld federal funds for not showing adequate academic progress for students with disabilities. In many cases, NCLB's threat of withholding funding or closing schools provides more compliance and a better education than enforcement of IDEA.").

85. 690 F.3d 390 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013).

86. *Cf. Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (collecting cases) (footnote omitted).

87. *Klein Indep. Sch. Dist. v. Hovem*, 745 F. Supp. 2d 700, 753 (S.D. Tex. 2010), *rev'd*, 690 F.3d 390 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013). The court of appeals also noted that the school district's IEPs provided some individualized accommodations. 690 F.3d at 392-93.

88. 745 F. Supp. 2d at 750.

of needed services.<sup>89</sup> The court of appeals reversed, stressing that overall educational benefit, rather than the remediation of the child's disability, is decisive under *Rowley*, and concluding that the child's IEPs were sufficient because they were reasonably calculated to enable him to achieve passing marks and advance from grade to grade.<sup>90</sup>

In contrast to the appellate opinion in *Klein Independent*, the cases described above apply the all areas and each need provisions so as to give them independent meaning, not balancing a specific failure to evaluate disabilities and meet needs against a general educational benefit. As the district court in *Klein Independent* said, responding to the argument ultimately adopted by the court of appeals:

[Under IDEA,] [t]he focus is on the special education services' targeting the student's disability and/or weakness, not his normal abilities or strengths. The FAPE [free, appropriate public education] must provide educational instruction designed to meet the disabled child's unique needs, supported by services necessary for the child to benefit from the instruction. [The district] appears to turn that standard on its head in arguing that because [the student] did well in all other areas than that in which his disability lies, his IEP was adequate even though it was not designed nor modified when shown to be ineffective to focus on that unique weakness/need.<sup>91</sup>

The dissenting judge in the court of appeals put the matter more bluntly:

The approach taken by the majority undermines the rehabilitative purpose of the IDEA by treating individualized education as an afterthought. The majority invites school districts to forgo measured, individualized mainstreaming of special needs students—a laudable goal under the IDEA—in favor of social promotion of disabled students unprepared for the difficult and sometimes harsh world that awaits them after high school graduation.<sup>92</sup>

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89. *Klein Indep. Sch. Dist. v. Hovem*, 745 F. Supp. 2d 700, 751 (S.D. Tex. 2010), *rev'd*, 690 F.3d 390 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013).

90. *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 397 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1600 (2013).

91. 745 F. Supp. 2d at 749.

92. 690 F.3d at 409 (Stewart, J., dissenting).

Other courts apply the all areas and each need provisions correctly in the face of the arguments advanced in *Klein Independent*.<sup>93</sup>

The majority opinion in *Klein Independent* is an outlier. Some prominent cases that might be thought to align with the decision turn out on closer examination not do so. *Houston Independent School District v. Bobby R.* stated that “it is not necessary for [a child] to improve in every area to obtain an educational benefit,” and rejected the parents’ IDEA claim even though some parts of the IEP, notably a particular phonics program, were not fully implemented.<sup>94</sup> But the decision in the case rested on the fact that the school district offered compensatory services to make up for the implementation problem; the court relied on the quite distinct principle that *de minimis* failures in IEP implementation do not support a remedy when the child makes educational progress in the area the missing services would have addressed.<sup>95</sup> Nor does *R.P. v. Alamo Heights Independent School District*<sup>96</sup> undermine the conclusion that all areas of suspected disability must be assessed and addressed. The court in that case held that a child’s IEP was not sufficiently individualized because a school district delayed conducting an assistive technology evaluation so that it was not

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93. Another case dealing with writing is *W.H. v. Clovis Unified School District*, No. CV F 08-0374 LJO DLB, 2009 WL 1605356 (E.D. Cal. June 8, 2009), *stay denied*, 2009 WL 2959849 (E.D. Cal. Sept. 10, 2009), *judgment withdrawn in part*, 2009 WL 5197215 (E.D. Cal. Dec. 22, 2009), which ruled that a failure to assess a child in writing “including determining all aspects of Student’s difficulty with written expression, deprived Student of educational benefits,” *id.* at \*18, despite the conclusion by the administrative law judge that the child was progressing academically in the general education classroom, *id.* at \*22. *Maine School Administrative District No. 56 v. Ms. W.*, Civ. No. 06-81-B-W, 2007 WL 922252 (D. Me. Mar. 27, 2007) (magistrate judge recommendation), *adopted*, 2007 WL 1129378 (D. Me. Apr. 16, 2007), found an IDEA violation and affirmed a partial tuition reimbursement award when a school district “essentially ignore[d] [the child’s] more pronounced deficits in writing skills,” 2007 WL 922252, at \*10, though it provided reading skills services and evidence indicated that the child made substantial academic and behavioral gains during the relevant time period. Additional relevant cases include: *Long v. District of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (stressing IEP requirement to consider strategies to address behavior and noting deterioration of child’s behavior); *Sch. Bd. v. Brown*, 769 F. Supp. 2d 928, 943-44 (E.D. Va. 2010) (finding IDEA violation in failure to implement positive behavioral interventions and supports, preventing child from achieving educational benefit).

94. 200 F.3d 341, 350 (5th Cir. 2000).

95. *See id.* at 349-50.

96. 703 F.3d 801 (5th Cir. 2012).

considered until the time for planning for the following school year.<sup>97</sup> The court nevertheless upheld the refusal to order any relief, because the child “demonstrated positive academic and non-academic benefits from her use of AT [assistive technology] devices” during the relevant period.<sup>98</sup> Thus the court never denied that IDEA required assessment in all areas, nor did it permit an overall educational benefit to outweigh the failure to meet specific needs. Instead, the court found that the child made educational progress in the exact area where the assessment was deficient, and so the parents did not establish an actionable harm caused by the failure to assess.<sup>99</sup> Finally, *D.K. v. Abington School District*,<sup>100</sup> a case rejecting claims about delays in assessing a child in his early years of primary education, might be thought to diminish the reach of the requirement to evaluate in all areas of suspected disability, but the case goes off on issues regarding the statute of limitations,<sup>101</sup> and the essential holding on the issue of delay is that the school was justified in not suspecting the child of a disability at the time the parents argued it had a basis for suspicion.<sup>102</sup>

The bottom line is that the courts applying the all areas and each needs provisions as independent requirements that have to be met irrespective of *Rowley* have it right and that *Klein Independent* has it wrong. The other courts are enforcing IDEA in line with statutory text and congressional intentions; moreover, the opinions that might seem to support *Klein*

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97. R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 813 (5th Cir. 2012).

98. *Id.* at 814.

99. The court further held that the child was well behaved, and the district did not violate IDEA by failing to conduct a functional behavioral assessment, instead basing a behavior plan on observations, review of records, and data analysis. *Id.* at 813. Hence there was no failure to assess in an area of suspected disability with regard to behavior. A behavior plan may in fact have been unnecessary, but that is beside the point for the present discussion.

100. 696 F.3d 233 (3d Cir. 2012).

101. *See id.* at 244-48.

102. *Id.* at 251-52 (“We are also unpersuaded that the School District violated its Child Find obligations by failing to suspect D.K. of a disability after the April 2006 evaluation based on further misconduct and additional opinions by his parents and private therapist . . . [S]chools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.”). The court conceded that once grounds for suspicion exist, “a poorly designed and ineffective round of testing does not satisfy a school’s Child Find obligations.” *Id.* at 250.

*Independent* do not.

### B. A NEW APPROACH FOR AN ERA OF INCLUSION

An implementation of special education law that goes beyond *Rowley* is not the only way to look at the all areas and each need provisions. The approach that Congress used in 1997 and that the courts have applied more recently fits well with the increasing attention to the problem of how to make education in mainstream environments work. From the very beginning, the federal special education law concerned itself with avoiding the problem of educators obsessing over diagnoses and shunting children into diagnosis-related programs isolated from the general education classroom.<sup>103</sup> But integration requires more than just a legal command to educate children in the least restrictive environment. Gradually, educators and lawmakers realized that the way to enable children with disabilities to succeed in general education was to identify specific areas of cognitive, social, or other need, and meet those needs with targeted interventions.<sup>104</sup> Once their individual needs were addressed, the children could take their place in general education classes with everyone else.<sup>105</sup> The message is one of support and accommodation, special education as a bundle of services to assist children rather than special education as a place to put children.

Although the law stressed the importance of education in the mainstream from the very beginning, the trend line shows a greater emphasis on the issue from the inception of the special education law to the adoption of the all areas and each need provisions, with courts displaying a greater recognition that enhanced individualized services are what is needed to make mainstream education of children with disabilities successful. In the 1990s, two cases from the courts of appeals elaborated on the close connection between less restrictive settings and supportive

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103. See Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174, 179 (2007) (collecting sources).

104. As Congress recognized in the 2004 revision of IDEA, the interventions did not necessarily have to be called special education, and might be used to prevent a child from ever having to receive a special education designation. See Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 22-23 (2006) (describing early intervening services).

105. This development came with some prodding from the courts. See cases cited *infra* text accompanying notes 106-11.

services. In *Sacramento City Unified School District v. Rachel H.*, the Court of Appeals for the Ninth Circuit required the placement of a child with an intellectual disability in a full-time regular education program with the help of a part-time aide and other assistance.<sup>106</sup> The court adopted a test that looked to the educational benefits available to a child in a general education classroom, “supplemented with appropriate aids and services,” in comparison to “educational benefits of a special education classroom.”<sup>107</sup> In *Oberti v. Board of Education*, the Third Circuit required a school district to include a child with Down Syndrome in a mainstream class.<sup>108</sup> The court admitted that mainstreaming had previously been unsuccessful for the child, but noted that no supplemental aids and services had been provided during that trial.<sup>109</sup> Evidence indicated that the child could succeed if given the help of an itinerant special education instructor, special education training for the regular education teacher, modifications of the curriculum, parallel instruction, and part-time resource room services.<sup>110</sup> The court said:

One of our principal tasks in this case is to provide standards for determining when a school’s decision to . . . place [a] child in a segregated environment violates IDEA’s presumption in favor of mainstreaming. This issue is particularly difficult in light of the apparent tension within the Act between the strong preference for mainstreaming and the requirement that schools provide individualized programs tailored to the specific needs of each disabled child.

The key to resolving this tension appears to lie in the school’s proper use of ‘supplementary aids and services’ . . .<sup>111</sup>

These cases were not the only ones of their era regarding the least restrictive environment obligation, and in a number of instances, school district opponents of inclusive placements prevailed.<sup>112</sup> Nevertheless, by 1997, one prominent writer asked the question “Is the Era of Judicially-Ordered Inclusion Over?”

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106. 14 F.3d 1398 (9th Cir. 1994).

107. *Id.* at 1400.

108. 995 F.2d 1204 (3d Cir. 1993).

109. *Id.* at 1223.

110. *Id.* at 1222.

111. *Id.* at 1214 (citations and footnote omitted).

112. *See, e.g.*, *Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997); *Briggs v. Bd. of Educ.*, 882 F.2d 688 (2d Cir. 1989); *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988).

2013] **All Areas of Suspected Disability** 315

and after reviewing the case law concluded:

There is no indication from the recent litigation that the courts will retreat from the emphasis they have placed on the IDEA's LRE provision in the past few years. Before school officials can make the decision to exclude a student with disabilities from the mainstream, they must have either made a legitimate attempt at inclusion, and failed in spite of their best efforts, or have substantial evidence that inclusion will not work. Furthermore, the effort to include a child within the regular education mainstream must be genuine; window dressing will not suffice.<sup>113</sup>

The drafters of the 1997 Amendments linked the adoption of the assessment in all areas provision to the goal of enabling children to succeed in the mainstream:

The amendments in section 614(b) are designed to link evaluation procedures and instructional programming . . . It is the committee's intent that all tests given to children must be linked to the general education curriculum to which the child is exposed and that each test must provide information that directly assists in the process of instructional programming.<sup>114</sup>

This passage reinforces the basic point that if the school district does not identify the specific weaknesses (not just the general diagnosis) of the child, it cannot target the services to accomplish the child's integration with nondisabled children.

A major innovation in the 1997 Amendments was the revision and recodification of the requirements pertaining to IEPs, and these changes, including the each need provision, acted to facilitate children's success in the mainstream by means of tailored services. One such requirement was that a regular education teacher be a member of the IEP team whenever a child with a disability would be served in the regular education classroom, so the team would have the information it needed to identify services the child would need to learn in that setting.<sup>115</sup>

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113. Allan G. Osborne, Jr., *Is the Era of Judicially-Ordered Inclusion Over?*, 114 ED. LAW REP. 1011, 1025 (1997).

114. S. REP. NO. 104-275, at 48-49 (1996).

115. Pub. L. No. 105-17, § 101 (1997) (codified as amended at 20 U.S.C. § 1414(d)(1)(B)(ii) (2006)); see S. REP. NO. 104-275, at 49; see also 20 U.S.C. § 1414(d)(3)(C) (2006) ("A regular education teacher of the child, as a member of the

Another provision demanded that an IEP describe how the disability affects the child's progress in the general education curriculum so that any obstacles to success in the mainstream could be addressed.<sup>116</sup> Thus, the assessment in all areas of suspected disability and meet each need provisions are part and parcel of the effort to enable children to succeed more readily in inclusive settings.<sup>117</sup>

Various aspects of the 1997 Amendments to IDEA other than the evaluation and IEP provisions also fit well with the increasing emphasis on additional services to make mainstreaming succeed. One example is a provision that stated that a child need not be classified under any specific disability category as long as the child meets the eligibility requirements of the Act.<sup>118</sup> This statutory term, which codified existing

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IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel . . . ." (adopted in 1997 Amendments).

116. Pub. L. No. 105-17, § 101 (1997) (codified as amended at 20 U.S.C. § 1414(d)(1)(A)(i) (2006)); see S. REP. NO. 104-275, at 50 ("The provisions on "Content of IEP's" in redesignated section 614(e) have been revised to make the IEP a more useful document that places greater emphasis on educational results for children with disabilities and on ensuring that each eligible child, as appropriate, has the opportunity to progress in the general education curriculum and to participate with nondisabled children in various settings."). This provision overlaps in part with the meet-all-needs requirement that is central to the discussion in this Article. 20 U.S.C. § 1414(d)(1)(A)(ii) (2006).

117. See Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 215 (2006) (stating, "The 1997 Amendments continued to emphasize the importance of inclusion with a focus on the least restrictive environment requirement," and commenting that congressional supporters of 1997 changes and President Clinton stressed importance of inclusion and access to regular education curriculum). Ms. Gordon goes on to suggest that the 2004 Amendments moved away from an emphasis on individualized services by stressing school- and district-wide accountability measures. *Id.* at 216. But accountability and progress for children with disabilities in the aggregate need not be inconsistent with individualized services to enable them to achieve in general education settings. In fact, it is difficult to imagine that students could be able to demonstrate proficiency at grade-appropriate levels unless they are exposed to the general education curriculum with their peers and have adequate supportive services to make that exposure effective. As Ms. Gordon notes, the highly-qualified-teacher provisions of the 2004 Amendments could have the effect of promoting inclusion and development of more inclusive teaching methods, although she seems to question whether the development is necessarily a good thing. *Id.* at 221.

118. Pub. L. No. 105-17, § 101 (1997) ("Nothing in this Act requires that children be classified by their disability so long as each child who has a disability listed in section 602 and who, by reason of that disability, needs special education and related

2013] **All Areas of Suspected Disability** 317

Department of Education policy, illustrates the movement away from decisions about services and placement driven by rigid disability-category determinations towards viewing special education as a group of services tailored to the child's individual needs in settings not determined by diagnosis.<sup>119</sup>

The 1997 Amendments also required that the state's formula for funding special education not create incentives to placement in more restrictive settings. The provision reads:

If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism [must] not result in placements that violate the requirements of subparagraph (A) [the provision requiring education of children with disabilities with nondisabled children to maximum extent appropriate].<sup>120</sup>

In discussing this provision and the least restrictive environment duty in general, the Senate Committee specifically addressed the relationship between placement in the mainstream and the provision of additional services:

[I]f a child with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the student with a disability cannot be met in that environment. However, before making such a determination, school districts must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the student or to the teacher in the regular educational environment to accommodate the unique needs of the child with a disability.<sup>121</sup>

The emphasis on inclusion has grown even stronger in the period after the 1997 Amendments to IDEA, and that reality may help account for the increasing prominence of the all-areas

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services is regarded as a child with a disability under this part.”) (codified at 20 U.S.C. § 1412(a)(3)(B) (2006)).

119. S. REP. NO. 104-275, at 38 (1996).

120. Pub. L. No. 105-17, § 101 (1997) (codified as amended at 20 U.S.C. § 1412(a)(5)(B)(i) (2006)).

121. S. REP. NO. 104-275, at 38-39 (1996). The Committee also stressed the requirement that states take action so that minority children would not be placed in overly restrictive settings. *Id.* at 39; *see* 20 U.S.C. § 1412(a)(6)(B) (2006).

provisions in the recent IDEA case law. In 2002, the President's Commission on Excellence in Special Education issued a report declaring that "[c]hildren placed in special education are general education children first . . . . General education and special education share responsibilities for children with disabilities. They are not separate at any level—cost, instruction, or even identification."<sup>122</sup> In the amendments to IDEA in 2004, Congress acted on this declaration by adding provisions to implement testing of the achievement of children in special education using learning standards based on the general education curriculum.<sup>123</sup>

Empirical studies show that more and more children with disabilities are being educated in mainstream settings with supportive services.<sup>124</sup> Summarizing data from the National Center for Education Statistics, one source noted:

[M]ore students with disabilities are being integrated into general education classrooms. For instance, in 1989, less than 32% of special education students between the ages of six and twenty-one spent 20% or less of their class time in segregated special education classrooms. In contrast, by 2008, 58% of special education students spent 20% or less in segregated classrooms. Furthermore, in 1989, nearly 25% of special education students spent more than 60% of the school day in segregated classrooms; in 2008, only 15% of special education students spent more than 60% of their day in segregated classrooms or facilities.<sup>125</sup>

An interpretation of the all areas and each need developments that emphasizes the increasing importance of educational achievement in mainstream settings is quite

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122. PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 7 (2002).

123. See 20 U.S.C. § 1412(a)(16) (2006) (governing participation in assessment by children with disabilities).

124. To the distress of some observers. See, e.g., Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006); Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775 (1997); Megan Roberts, *The Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041 (2008).

125. Mark T. Keaney, *Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools*, 56 ST. LOUIS U. L.J. 827, 830 (2012) (interpreting data from United States Department of Education National Center for Education Statistics).

compatible with an interpretation that views the case law as a means to enforce IDEA that does not run up against *Rowley*'s limits on appropriate education. More than a decade ago, it was clear that courts were interpreting the least restrictive environment obligation as a positive command to provide services to facilitate inclusive education and were ruling that the services required could exceed the floor of opportunity established in *Rowley*.<sup>126</sup> After comparing the lax appropriate education cases that follow *Rowley* with the more demanding cases that interpret the least restrictive environment duty, one recent observer concluded, "As a consequence of these decisions, courts balancing FAPE [free, appropriate public education] and LRE [least restrictive environment] employ a lop-sided standard: whereas integration must be absolutely maximized, the actual education provided need only satisfy the 'basic floor' of an adequate educational opportunity."<sup>127</sup>

### C. A RESPONSE TO RECESSION-ERA CUTBACKS

Still another, more pedestrian, way to look at the increased attention to the all areas provisions is to view parents' and courts' reliance on them as defensive. It is no secret that school districts suffering from the decline in tax revenues from the economic downturn after 2007 have curtailed special education,<sup>128</sup> including specialized assessments and therapies,<sup>129</sup> particularly those provided by costly professionals.<sup>130</sup> The contraction is part of a general cutback in public education funding during the same

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126. Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services*, 5 U.C. DAVIS J. JUV. L. & POL'Y 147, 149-51, 153-55 (2001) (collecting cases).

127. Caroline Jackson, Note, *The Individuals with Disabilities Education Act and Its Impact on the Deaf Community*, 6 STAN. J. C.R. & C.L. 355, 364 (2010).

128. See Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1930 (2012) (discussing New York Regents' elimination of previous requirement of minimum of 30 to 60 minutes of daily language services for children with autism).

129. See *id.* at 1930 n.324 ("Other special education mandate relief measures that the Regents are proposing include repealing the current requirements that boards of education have plans and policies for declassification of students with disabilities, that a psychologist determine whether there is a need to administer an individual psychological evaluation in all cases, that parents have a right to choose the preschool evaluators, and that the preschool evaluation timeline be extended from thirty days to sixty days.").

130. See *id.* at 1930-31 (discussing proposals to limit role of psychologists to eligibility determinations and eliminate right of parent to have physician on IEP team).

time period.<sup>131</sup> Federal stimulus money cushioned the impact of the shortfalls for a while, but school administrators held back from making long-term commitments to personnel or programs because the additional federal funding was temporary.<sup>132</sup>

When school districts skimp on specialized assessments and services to meet individual needs, parents can be expected to resist by exercising rights to due process hearings. Eventually many of those disputes wind up in court, with school districts spending money on lawyers to defend their refusal to spend money on assessments and services. If the parents prevail, the districts must spend money to pay for the parents' lawyers as

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131. See Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 905-06 (2011)

("State and local governments usually lag behind the private sector by a year or two in feeling the effects of a recession and having to cut their budgets, but even by now it is old news that most school districts have been cutting back—postponing orders for new equipment and textbooks, cutting programs such as arts and athletics. However, the cuts stretch beyond regular belt-tightening: at least two-thirds of school districts laid-off teachers and staff for the 2009–2010 school year and between seventy-five and ninety percent of school districts expected to do so before or during the 2010–2011 school year. Because of the second round of stimulus funding, the number of teachers laid-off in fall 2010 did not reach the 100,000-300,000 previously predicted, but 60,000 teachers still lost their jobs. As a result, almost two-thirds of school districts expected that they would be consolidating most students into larger classes by fall 2010.")

(footnotes omitted); see also Black, *supra* note 54, at 1747

("The 2008 financial crisis placed immense pressure on state and local budgets. Some localities were nearly insolvent, and the rest faced 'the biggest cutbacks they've seen in decades.' Only the influx of \$53.6 billion in federal stimulus and emergency aid avoided educational catastrophe during the last two years. With no more aid readily forthcoming, school districts have been fully confronting the harsh reality of falling state revenues that required staggering budget cuts. Thirty-four states and the District Columbia have already made enormous cuts to public schools, some approaching one billion dollars.")

(footnotes omitted); Rebell, *supra* note 128, at 1857 ("Extensive reductions in state and local funding for public education since the economic downturn that began in 2008 have resulted in substantial cutbacks in educational services . . .").

132. See Lisa Fine, *Title I, Spec. Ed. Aid Casts Long Stimulus Shadow*, EDUC. WEEK (Feb. 5, 2010), [http://www.edweek.org/ew/articles/2010/02/10/21mtr\\_stim-speded.h29.html?qs=and+recession+special\\_education](http://www.edweek.org/ew/articles/2010/02/10/21mtr_stim-speded.h29.html?qs=and+recession+special_education) ("Programs serving the nation's economically disadvantaged students and those with disabilities are receiving massive funding boosts through the federal stimulus package—\$13 billion for Title I aid and \$11.3 billion for special education—but how school districts choose to use the money may set them up for problems when it dries up."); Christina A. Samuels, *Spec. Ed. Stimulus Money Raising Cautions*, EDUC. WEEK (Mar. 16, 2009), [http://www.edweek.org/ew/articles/2009/03/18/25idea\\_ep.h28.html?qs=and+recession+special\\_education](http://www.edweek.org/ew/articles/2009/03/18/25idea_ep.h28.html?qs=and+recession+special_education) ("Though grateful for the largess, school leaders face restrictions with that money. The rules governing the use of federal special education money mean that it's unwise for districts to use the added funding to start new programs or hire new teachers.").

2013] **All Areas of Suspected Disability** 321

well.<sup>133</sup> In those cases in which the parents prevail, the courts recognize the reality that the districts have failed to assess children in all areas of suspected disability and to furnish services to address each need.

If the economy recovers, and states and localities see their tax revenues rise, it is possible that school districts will be more willing to make fully comprehensive evaluations and commit to goals and services to meet each of the needs identified. Thus, the problem may decline and the litigation disappear or at least diminish. An economic expansion over the next few years may provide a natural experiment to demonstrate whether the resource-constraint interpretation is correct.<sup>134</sup>

### CONCLUSION

Perhaps no single explanation suffices for the recent attention courts have paid to the all areas and each need provisions. There is reason to view the development as salutary, however. Congress enacted the all areas and each needs provisions consciously, for a reason. By making school districts discover and address the specific obstacles that are keeping children from making educational progress in all areas, and not just requiring the minimum children need to skate by into the next grade, courts are enforcing IDEA as written and expanding educational opportunity as Congress demanded. By requiring the assessments and services that the children need to make that advancement in inclusive settings with their nondisabled peers, again the courts are enforcing both the letter and the spirit of the current law. And by resisting creation of a budget-shortfall exception that the law nowhere provides, courts that apply the all

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133. See 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2006) (providing for attorneys' fees for parents who prevail in hearings or court).

134. This view may be unduly optimistic. At the time of writing, media reports indicate that the sequester of federal funds will cause—once again—the reduction of available special education services. See, e.g., Motoko Rich, *Teacher Layoffs*, N.Y. TIMES, Feb. 26, 2013, available at 2013 WLNR 4831290 (discussing reaction of one director of student services to impending automatic federal spending cuts, “Mr. Lambert said he feared that he would have to raise student-teacher ratios in classes for students with cognitive delays or autism.”); see also Cameron Brenchley, *Sequestration Would Hurt Students, Teachers, and Schools*, THE OFFICIAL BLOG OF THE U.S. DEP’T OF EDUC. (Feb. 25, 2013), <http://www.ed.gov/blog/2013/02/sequestration-would-hurt-students-teachers-and-schools/> (detailing reductions in federal special education funding totaling \$600 million, requiring states and school districts to cover cost of about 7,200 teachers and other staff nationally).

areas and each need provisions as written further the underlying goals of guaranteeing appropriate education and inclusion that Congress had in enacting IDEA.