No. 01-5050

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADAM BARNETT,

Plaintiff-Appellant

v.

MEMPHIS CITY SCHOOLS,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

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IDENTITY AND INTEREST OF THE UNITED STATES AS AMICUS CURIAE

This case involves the proper interpretation and application of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, a funding statute that implements important civil rights for children with disabilities. The statute is enforced against states by the United States Department of Education, which also is authorized to promulgate regulations. 20 U.S.C. 1406, 1417. Because of its interest in the proper interpretation of the statute, the United States has participated in a number of IDEA cases. See, *e.g.*, *Cedar Rapids Cmty. Sch. Dist.* v. *Garrett F.*, 526 U.S. 66 (1999); *Board of Educ.* v. *Rowley*, 458 U.S. 176 (1982); *C.M.* v.

Board of Educ. of Henderson County, 241 F.3d 374 (4th Cir. 2001); *Birmingham* v. *Omaha Sch. Dist.*, 220 F.3d 850 (8th Cir. 2000). The United States files this brief pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUES

1. Whether the School System violated the procedural requirements of the IDEA, 20 U.S.C. 1400 *et seq.*

2. Whether the School System failed to provide a student a free appropriate public education under the IDEA, 20 U.S.C. 1412, where there is objective evidence spanning more than five years that the student either regressed in attaining educational goals or failed to make meaningful educational progress throughout his school career.

STATEMENT OF THE CASE

Adam Barnett filed this action against the Memphis City School System (School System) in April 2000 pursuant to the IDEA, 20 U.S.C. 1415(i)(2). Plaintiff claimed that the School System had denied him the free appropriate public education (FAPE) the IDEA requires, 20 U.S.C. 1412(a)(1)(A), and that the School System had committed numerous and repeated procedural errors in formulating Adam's individualized education program (IEP). On the basis of the record from the state administrative hearing and a supplemental affidavit, the district

court granted judgment for the School System (R. 13, Order Affirming the Final Order of the Administrative Law Judge (Order)).[1]

STATEMENT OF FACTS

1. Adam Barnett was born in 1979 with no hands and only one foot. He has Cerebral Palsy. Adam uses a wheel chair and is dependent on the assistance of others for most of his activities. Adam is of low average intelligence, but is not retarded (Exh. 11).

Adam began attending the Shrine School in the Memphis City School System (School System) when he was six years old and remained there until the year 2000, when he graduated at age 21with a special education diploma (R. 13, Order at 2). In 1995, when Adam was 16, the School System conducted a psychological assessment. On the Weschler Intelligence Scale, Adam scored 82 (plus or minus 6), which is classified as Low Average (Exh. 1 at 64, 66). Mental retardation is usually defined as below 70. Stephen T. Warren, Ph.D., *Uncovering a Common Cause of Mental Retardation and an Unusual Type of Mutation*, available at http://www.sfn.org/nas/summaries/Warren.html (1999). Adam's reading score on the Woodcock-Johnson Achievement Test showed his reading to be equivalent to a first-grader's (1.3). His mathematical reasoning was at the

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[1] "R. __" indicates the record entry number on the district court docket sheet. "Tr. __" refers to the pages in the transcript, "Exh. __ " refers to the exhibits, and "ALJ Order at __" refers to the final order in the file of the state administrative hearing. The administrative file was docketed in the district court on June 30, 2000 (R. 7).

kindergarten (K.8) level (Exh. 1 at 59-66). Both scores placed him below the 1st percentile of the population (Exh. 1 at 66). The evaluation noted that "Adam earned standard scores significantly lower than would be predicted based upon his current level of intellectual functioning" (Exh. 1 at 63). The Vineland Adaptive Behavior Scales assess an individual's ability to function in daily life (Tr. 190). Adam's prorated score on the Vineland Adaptive Behavior Scales placed him within the 1st percentile (Exh. 1 at 62). The School System's 1995 evaluation concluded that Adam has a learning disability in reading and math (Exh. 1 at 64).

The School System performed another psychological evaluation in 1999, which revealed that Adam had not progressed meaningfully on *any* scale during his education and had regressed in one area. On the Woodcock-Johnson Achievement Test, Adam's reading and math reasoning had not progressed beyond the first grade level (Exh. 11), even though he was 20 years old. Adam was able to count objects and identify the value of coins, and to solve word problems involving basic addition and subtraction. He was unable to solve more complicated word problems or determine how much money would be given back after a purchase. "His performance in the area of reading and math was significantly below what would be expected given his measured level of intellectual functioning" (Exh. 11). On the Vineland Adaptive Scales, Adam's prorated adaptive behavior composite score had decreased to less than the 1st percentile (Exh. 11). Dr. Connolly, the chairman of the Department of Physical Therapy at the University of Tennessee,

testified that this was a "large drop" in the standard score and that Adam had lost skills he had in 1995 (Tr. 190).

Between the two psychological assessments, in 1998, the School System performed what it termed a vocational evaluation on Adam. The report shows that Adam was not able to perform *any* independent living skills (*e.g.,* counting, patterning, coin recognition, color recognition) and demonstrated *none* of the worker characteristics (*e.g.,* following instructions, working well alone) (Exh. 1 at 28). The report nevertheless concluded that "Adam should continue with his present program of instruction" (Exh. 1 at 28).

While Adam was a student at Shrine, he was in a special education classroom with other students with disabilities. During that time, the School System never assessed Adam's need for assistive technology, nor did it provide him with any of the many types of equipment that may have allowed him to become more functional (Tr. 301-311). He received occupational therapy once a month at most, and the School System provided no physical therapy and had performed no physical therapy or complete occupational therapy evaluation (Tr. 170-172). At one time, the school provided Adam an electric feeding device but it broke frequently, requiring Adam to be fed by school staff (Tr. 49-50). Although Adam's psychological assessments reflect that Adam has math and reading learning disorders, these assessments were never discussed in any of the IEP meetings until

1999, after Adam's parents had reviewed his educational records (Tr. 119-120).[2] The School System never discussed with Adam's parents why he was getting such low scores (Tr. 119-120). The School System made no accommodations for Adam's learning disabilities, nor did it provide any resources or special services (Tr. 191).

Until Adam's parents received his records in 1999, they also were unaware that the School System had performed a vocational evaluation in 1998 (Tr. 45). The School System did not seek permission to perform the evaluation and did not contact the parents to schedule a meeting to discuss the results (Tr. 42-45). Adam did not undergo any vocational assessment from 1994 to 1997 and received no vocational services while at Shrine (Tr. 42-45, 237, 385). The School System did not provide information regarding options for Adam after graduation or any information about community agencies from whom Adam could receive transition services (Tr. 79-80). The only community-based experiences the School District provided were field trips to the mall and bowling alley (Tr. 79).

After Adam's parents received his school records, they requested an IEP meeting so that Adam could be comprehensively evaluated and a new IEP could be in place for the beginning of the 1999-2000 school year (R. 13, Order at 5). At the May 1999 IEP meeting, the team agreed that the School System would conduct

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[2]Adam's parents sought his educational records after school staff dropped Adam (failing to use the required Hoyer lift) and broke his arm as a result (Tr. 37, 81-84) .

comprehensive assessments of Adam in several areas, including occupational therapy, physical therapy, assistive technology, vocational rehabilitation, and psychological testing (Exh. 1 at 3, 82; R. 13, Order at 5). Although the School System conducted the psychological evaluation before the end of the 1998-1999 school year, it made no provision for evaluations over the summer so that a proper IEP could be in place in the fall. After repeated efforts to communicate with the School System, the Barnetts arranged for occupational therapy and assistive technology assessments over the summer without the School System's involvement (Tr. at 50-55). From those assessments, the Barnetts learned of a number of things that might allow Adam to become more self-sufficient (*e.g.,* helping to feed and dress himself) and to communicate better (*e.g.*, use of a track ball on the computer) (Tr. at 50-55).

2. Adam was twenty years old when his parents sought a due process hearing in August 1999, claiming that the School System had violated the IDEA, 20 U.S.C. 1400 *et seq.* (R. 13, Order at 2). During the hearing before the administrative judge in September 1999, the Barnetts presented evidence that the School System had committed numerous procedural errors during the time it was responsible for developing IEPs for Adam, and that the educational program designed for Adam was substantively flawed, as evidenced by the objective evidence of Adam's total lack of meaningful progress over many years. They argued that the IEPs either contained no goals or goals that were not measurable and thus did not comply with the IDEA (see Tr. 224-236, 246-54; Exh. 1 at 92-98,

108-116, 135-152). The parents also contended that the School System delayed unduly in performing the various assessments that were agreed to at the IEP in May 1999 and which Adam should have had years before. Adam's parents sought compensatory education and related services as relief.

The School System argued that it had complied substantially with the IDEA's procedures and that any procedural flaws had not denied Adam a FAPE because he had made meaningful progress at the Shrine School. The School System presented testimony that a 1992 psychological evaluation revealed that Adam had reading and math learning "developmental disorders" and that the parents were aware of the learning problems earlier (Tr. 587). There also was testimony that the School System had made attempts to discuss the 1995 psychological evaluation with the parents but received no response (Tr. 557-558). The School System did not contest its failure to notify the parents of the results of the vocational assessment or to discuss the evaluation in an IEP meeting. The School System's Director of Exceptional Children agreed that, under the IDEA, the School system was required to show the results of assessments to the child's parents and discuss their significance in an IEP meeting (Tr. 380-381; 421-428). The School System also presented general testimony from the compliance supervisor for the Division of Exceptional Children that the IEPs presented sufficiently measurable goals, although he admitted that the adequacy of an IEP would depend on the individual needs of the child (Exh. 24; Tr. 701-708). Finally, the School System argued that the IDEA did not require it to perform the

assessments agreed to in the May 1999 IEP meeting over the summer while school was not in session.

3. The State Administrative Law Judge issued a Final Order (ALJ Order) in March 2000 (R. 7). The ALJ concluded that the School System had not committed any procedural violations of the IDEA. The ALJ did not address the School System's failure to notify the parents of the vocational evaluation or to discuss its implications in an IEP meeting. The ALJ did find that since the parents had some knowledge of Adam's "developmental disorders" as a result of a 1992 evaluation, the School System's failure to address specifically the results of the 1995 evaluation in the IEP process was inconsequential (ALJ Order at 2[3]). According to the ALJ, "[i]t was shown, without rebuttal, that the IEP goals and [Adam's] language and math goal sheets were appropriate for his disability" (ALJ Order at 2). The ALJ found that the School System's failure to provide assessments over the summer of 1999 was not unreasonable and did not "rise to the level of a procedural violation" (ALJ Order at 11).

The ALJ also found that there was no substantive violation of the IDEA because Adam "has made substantial progress during his years at the school" (ALJ Order at 2). This finding is based on "report cards and IEPs" (ALJ Order at 2), although there are no report cards in the record (see Tr. 260-261). It also is based on the testimony of one teacher, Ms. Pulley, who said that Adam "made progress

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[3] Because the Final Order is not paginated, we assume page 1 is the page that begins with "I. Procedural History."

in [sic] as a student in her Math class" (ALJ Order at 2). Ms. Pulley had taught Adam math for one year three years before (Tr. 595-600). The ALJ did not discuss the School System's objective evaluations, including the 1998 vocational assessment, that showed that Adam was performing, at best, at a first grade level, and had made *no* meaningful progress for many years.

4. Adam's parents filed a complaint on his behalf in federal court pursuant to the IDEA on April 26, 2000 (R. 1). On November 30, 2000, the district court issued its decision based on the administrative record and an affidavit from the School System showing that Adam had received a special education diploma (R. 13, Order at 2, 9). The court found that the School System had violated the IDEA's procedural requirements by not informing the Barnetts of the results of the 1995 psychological evaluation and the 1998 vocational assessment (R. 13, Order at 17-19). With regard to the psychological evaluation, the court concluded that the School District had violated the IDEA since "the Barnetts could not adequately participate [in formulating the IEP] because they were not aware of the results of the 1995 psychological evaluation" (R. 13, Order at 17, citing 20 U.S.C. 1415(b)(1)). The court also found that failure to inform the parents of the vocational assessment was "more than a mere technical deviation. Such a procedural miscue goes to the very heart of parental involvement in their child's FAPE" (R. 13, Order at 19). The court rejected the other procedural claims, finding that the School System had no obligation to perform assessments over the summer and that, even though Adam had never had an assistive technology

assessment, the Barnetts "failed to present evidence that the IEP Team did not consider assistive technology when formulating its post June 4, 1997 [effective date of the IDEA amendments] IEPs" (R. 13, Order at 21).

Although the district court held that the School System's procedural violations precluded meaningful parental involvement in the IEP process, the court agreed with the ALJ that "Adam made educational progress at the Shrine School and * * * received a FAPE" (R. 13, Order at 24). As evidence that Adam had made progress that was more than "trivial," the district court cited Adam's scores on the Weschler Intelligence Scale, noting that the score in 1999 was 85 and the score in 1995 was 82 (R. 13, Order at 22). The court claimed that the Barnetts did "not offer any evidence that a three-point differential is inconsequential" (*ibid.*). The court discounted the scores on the Woodcock-Johnson achievement tests that showed essentially the same achievement level for 1995 and 1999, because "all material was enlarged and extra spaces were inserted between words" to accommodate Adam's disabilities (R. 13, Order at 22). The court also relied on the testimony of Adam's former teacher, Ms. Pulley, that Adam had "steadily improved" in mathematics in her class and that he made "excellent progress" with some of the other teachers (R. 13, Order at 23). She also testified that the next year, when she was no longer his teacher, she observed that Adam was making "gradual slow progress" (R. 13, Order at 23*)*. She opined that Adam had reached the goals of his 1997-1998 IEP (R. 13, Order at 23). The court noted the evidence that Adam had lost skills between 1995 and 1999, according to the Vineland

Adaptive Behavior Scales (R. 13, Order at 22), but did not reconcile this evidence with its conclusion that Adam had nevertheless received a FAPE. The district court entered judgment for the School System (R. 13).

SUMMARY OF ARGUMENT

The IDEA, 20 U.S.C. 1400 *et seq.*, imposes on school systems a duty not just to fill out the proper forms, but to design educational programs for children with disabilities that have a realistic chance of providing meaningful educational benefits. School districts must comply with the procedures set forth in the Act, as well as ensure that children have "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Board of Education* v. *Rowley*, 458 U.S. 176, 201 (1982). When it becomes clear that a child is not making reasonable progress, and the required evaluations confirm that the lack of progress is not the result of a lack of ability, the school system must adjust a child's educational program to try to narrow a substantial gap between ability and achievement.

The IDEA does not require a school district to show that a student has achieved a certain level of competence. The IDEA does, however, require a school to evaluate a child's progress, to ensure that if a student is not progressing in a reasonable way, that lack of achievement is recognized, and the school may then adapt the child's IEP so that other efforts are made to achieve meaningful progress. Here, the School System failed to perform complete evaluations of Adam's abilities and needs, and failed to make appropriate adjustments in his educational plan, even

after their own objective assessments revealed Adam's nearly complete lack of success under the current program. The ALJ and the district court ignored the undisputed and objective evidence that Adam was performing significantly below grade level and far below what his IQ would suggest he could achieve, and that his many years of education had resulted in virtually no educational progress. They relied instead on the testimony of one teacher that Adam was making some limited progress. The IDEA means more than that; the IDEA demands that schools truly attempt to provide educational opportunity to students with disabilities, and to react appropriately when a student clearly makes no progress.

ARGUMENT

I

THE SCHOOL SYSTEM VIOLATED THE IDEA'S PROCEDURAL REQUIREMENTS

A. *Reliance On Accurate Individual Evaluations And Informed Parent Involvement Are Critical Elements Of The IEP Process Under The IDEA*

In enacting the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, Congress sought "to ensure that all children with disabilities have available to them * * * a free appropriate public education designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. 1400(d)(1)(A). The Act also seeks "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. 1400(d)(1)(B). "This education must be tailored to the unique needs of the

disabled student through an individualized educational program." *Ridgewood Bd. of Educ.* v. *N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). The statutory scheme emphasizes the role of the parents in the special education decision-making process, and guarantees their right to contest the decisions of the state and local educational agencies that may not serve the best interest of the child. See *e.g.*, 20 U.S.C. 1414(d)(1)(B)(i), 1415(b)(1), 1415(i)(2).

In *Board of Education* v. *Rowley*, 458 U.S. 176, 205 (1982), the Court recognized the importance of parental participation in the IEP process and established the two-part analysis applicable to suits under the IDEA. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" 458 U.S. at 206-207. This Court recently held that "a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents. [Citations omitted]. Substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process." *Knable* v. *Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001).

Ensuring that children with disabilities are evaluated properly is a critical aspect of the IEP process. The IDEA details how evaluations should be conducted and what the IEP team should do with those evaluations. Under 20 U.S.C. 1414(b)(3)(C), the school must assess the child "in all areas of suspected

disability." See also 34 C.F.R. 300.532(g) (school district must ensure "[t]he child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities"). The evaluation process includes identifying "whether any additions or modifications to the special education and related services are needed" to enable the child to achieve the measurable goals established in the IEP, 20 U.S.C. 1414(c)(1)(B)(iv), and "whether the child requires assistive technology devices and services." 34 C.F.R. 300.346(a)(2)(v).

Initial evaluations are to be conducted to identify whether the child has a disability and to determine the child's educational needs stemming from that disability. 20 U.S.C. 1414(a)(1)(A), 1414(a)(1)(B). Reevaluations must be conducted every three years. However, new evaluations or assessments are not needed if the IEP team, which includes the parents, and other professionals determine that no additional data are needed "to determine whether a child continues to be a child with a disability," and the parents are specifically notified of the determination and the reasons for it, and do not request an assessment. 20 U.S.C. 1414(c)(4). The presumption, contrary to the district court's interpretation (see R. 13, Order at 19), is that a child's progress will be regularly assessed unless there is an explicit determination that an assessment is not needed, and the parents are notified of and do not disagree with the decision not to conduct an assessment.

The IDEA then requires the local educational agency to ensure that the IEP team, including the parents, considers "the results of the initial evaluation or most recent evaluation of the child" in developing the IEP and establishing appropriate, measurable goals. 20 U.S.C. 1414(d)(3)(A)(ii); see also 34 C.F.R. 300.320(b)(2). In subsequent reviews of the IEP, the team shall "revise[] the IEP as appropriate to address * * * the results of any reevaluation conducted under this section." 20 U.S.C. 1414(d)(4)(A)(ii); see also 34 C.F.R. 300.321(b). Such procedures ensure that the child's educational program is tailored continuously to his individual needs, taking into account his abilities, disabilities, and educational progress or lack of progress, and is thereby calculated to give the child the opportunity to learn. They also *require* modification of a child's IEP when evaluations demonstrate that the child is not deriving an educational benefit from the program and goals are simply repeated from year to year.

B. *The School System Failed To Conduct Proper Assessments And To Incorporate Evaluations Into The IEP Process*

The district court properly found that the School System violated the IDEA's procedural requirements by failing to inform Adam's parents of the School System's 1995 psychological evaluation, which revealed Adam's learning disorders and that Adam's achievement level was significantly out of proportion with his intelligence level (R. 13, Order at 18). The court also found that the School System had never told the parents of any vocational assessment, and that this failure, as with the failure to tell them of the 1995 psychological evaluation, "goes to the very

heart of parental involvement in their child's FAPE" (R. 13, Order at 19; see 20 U.S.C. 1414(d)(1)(A)(vii)). Failure to inform parents of the results of evaluations is the type of procedural violation that this Court found in *Knable* will constitute a denial of a free and appropriate public education, in that the violation "seriously infringe[s] upon the parents' opportunity to participate in the IEP process." 238 F.3d at 765.

The IEP meetings the School System conducted between 1995 and 1999 failed to accomplish key aspects of the IEP process: to consider all of the relevant information about the child, including "existing evaluation data," to determine "the present levels of performance and educational needs of the child" and whether "any additions or modifications to the special education and related services are needed." 20 U.S.C. 1414(c)(1)(A) and (B)(i), (ii), (iv). As both the district court and the School System's own Director of Exceptional Childen recognized, the IEP process simply cannot function as Congress envisioned if the IEP team, including the parents, makes decisions and develops goals without explicitly considering the most current, complete information about the child's needs and abilities that is reasonably available (see Tr. 417-428).

The district court failed to consider, however, the School System's other procedural violations of the IDEA, in part because it appeared to misunderstand the School System's obligations after Congress amended the statute in 1997 (see R. 13, Order at 19). While under the amended statute there now are circumstances under which a school may be excused from conducting new assessments every three

years, those circumstances are not applicable here. See 20 U.S.C. 1414(c)(4). Adam's school records are devoid of any evidence that the School System ever properly evaluated, let alone reevaluated, Adam in the many areas in which he needed services -- physical therapy, occupational therapy, assistive technology, and vocational rehabilitation; all areas of "suspected disability" or "related to the suspected disability." 20 U.S.C. 1414(b)(3)(C); 34 C.F.R. 300.532(g) (see Exh. 1; Tr. 38-42, 50-54, 170-172, 181-183). The School System also did not notify Adam's parents of any determinations that would excuse it from performing reevaluations under 20 U.S.C. 1414(c)(4) (see, *e.g.*,Tr. 41-42).

If there were ever a child who should have been receiving extensive related services, it appears to be Adam. The plaintiff's witnesses testified to a host of technological and practical measures that may have helped Adam become more self-sufficient and better able to communicate, and possibly even prepare for a job after graduation (Tr. 50-58, 290-294, 301-318). The School System's failure to evaluate the ways in which Adam could benefit from related services is plainly inconsistent with its statutory obligations to educate children with disabilities, and has left him unprepared for a life outside his special education classroom.

II

THE SCHOOL SYSTEM VIOLATED THE IDEA BY FAILING TO A PROVIDE A MEANINGFUL EDUCATIONAL BENEFIT

A. *The IDEA Requires A School System To Design An Individualized Educational Program That Will Provide More Than A Trivial Educational Benefit*

Even more important than the procedural deficiencies in this case is the School System's failure to provide a meaningful educational opportunity to this student. The Supreme Court held in *Board of Education* v. *Rowley*, 458 U.S. 176, 201 (1982), that the IDEA imposes on school systems a duty to provide "educational benefit" to students with disabilities. While the IDEA does not require the schools to "maximize the potential of each handicapped child," the Act does require the schools to provide "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 200-201. The Court recognized the difficulty of assessing "educational benefit." The Court noted, however, that the adequacy of educational benefits can be assessed only relative to the cognitive and physical abilities of the individual child. "It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." 458 U.S. at 202.

Interpreting *Rowley*'s requirement, this Court has held that "the public education required by the [IDEA] is to be tailored to the unique needs of each handicapped child." *Doe* v. *Smith*, 879 F.2d 1340, 1341 (1989); see also *Knable*

v. *Bexley City Sch. Dist.*, 238 F.3d 755, 769 (6th Cir. 2001) (IEP must "provide services that are individualized to the child's needs"). Other courts also emphasize the need for individual assessment. In *Ridgewood Bd. of Educ.* v. *N.E.*, 172 F.3d 236, 248 (3d Cir. 1999), the Third Circuit criticized the district court's failure to consider adequately the intellectual potential of the child in relation to his IEP. "Athough [the district court's] opinion discussed the IEP in considerable detail, it did not analyze the type and amount of learning of which [the student] is capable." 172 F.3d at 248. The court noted that both it and the Supreme Court in *Rowley* "reject a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's abilities." 172 F.3d at 248.

While maximization of potential is not the standard under the IDEA, this Court has specifically recognized that "the educational benefits the state does provide must be more than *de minimis* in order to be appropriate." *Doe* v. *Board of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 459 (6th Cir. 1993) (internal quotations omitted), cert. denied, 511 U.S. 1108 (1994). Other courts have articulated similar standards. The Third Circuit has held that the IDEA "calls for more than a trivial educational benefit." *Polk* v. *Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989). Rather, the benefit conferred must be "meaningful," 853 F.2d at 182, and "[w]hen students display considerable intellectual potential, IDEA requires a great deal more than a negligible benefit." *Ridgewood*, 172 F.3d at 247 (internal

quotations omitted). The Fourth Circuit similarly determined that "[c]learly, Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall* v. *Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

Whether a child has received a meaningful benefit should be determined, to the extent possible, on the basis of objective evidence rather than conclusory opinions that a child has "progressed." *Houston Indep. Sch. Dist.* v. *Bobby R.*, 200 F.3d 341, 349-350 n.3 (5th Cir.), cert. denied, 121 S. Ct. 55 (2000) (noting that the Woodcock-Johnson achievement test is a widely-accepted method for determining educational progress and that steady progress of one or more grade levels over 2-3 years on the tests demonstrated an adequate IEP for the particular child in that case). In *Walczak* v. *Florida Union Free School District*, 142 F.3d 119, 130 (2d Cir. 1998), the court held that "[f]or a court to conduct an 'independent' review of a challenged IEP without 'impermissibly meddling in state educational methodology [citations omitted], it must examine the record for any 'objective evidence' indicating whether the child is likely to make progress or regress under the proposed plan." The court in *Walzak*, noted, as in *Rowley*, that a child who has been mainstreamed can be assessed based on "advancement from grade to grade." 142 F.3d at 130. But a child like Adam, who has more serious disabilities and is educated in a self-contained classroom, also must be assessed

based on educational progress, as measured by "test scores and similar objective criteria." 142 F.3d at 130.

A school district can meet its obligations under the IDEA even though the IEP may prove unsuccessful, but "the fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP," because "the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the program has already failed." *Board of Educ. of the County of Kanawha* v. *Michael M.*, 95 F. Supp. 2d 600, 609 n.8 (S.D.W. Va. 2000). As explained above, the Act requires periodic evaluations to determine how the child is performing and what related services he may need. 20 U.S.C. 1414(a)(2). IEP teams must consider those evaluations as they formulate the IEPs, including new appropriate goals, so that when a child reaches a plateau, as Adam's teacher recognized happened here (Tr. 615-622), the team meets with appropriate professionals who can develop modifications tailored to the child's abilities and disabilities. 20 U.S.C. 1414 (c)(1), (c)(1)(B)(iv).

B. *Adam's IEPs Failed To Afford Him The FAPE The IDEA Requires*

The district court erred in finding that these important violations did not have a substantive impact on Adam, and that Adam had received a FAPE as the IDEA requires. In contrast to the ALJ's decision (which relied, in part, on report cards that were never produced or even described), the district court recognized the objective evidence -- based on the School System's own assessments -- that Adam's IEPs had provided him virtually no educational benefit over his entire

educational career. The district court's rejection of this evidence in favor of a teacher's subjective opinion, however, is nonsensical. First, the court found that Adam must have made progress because his score on the Weschler Intelligence Scale went from 82 to 85. Order at 22. The district court claimed that the Barnetts offered no evidence that this "differential" was not significant (R. 13, Order at 22). The district court plainly did not understand that the Wechsler Intelligence Scale measures intelligence rather than academic achievement (Tr. 184). The district court also disregarded the unrebutted testimony of the Barnetts' expert that the difference between 82 and 85 on this test is not significant (Tr. 184-188). The evaluation that the School District performed also noted the score had an error range of plus or minus 6, or that "ninety-five times out of 100, Adam's true score would fall in the range of scores between 76 to 88" (Exh. 1 at 63-64). To base a finding that Adam had achieved an educational benefit on this evidence, with a record showing a total lack of meaningful progress, is clearly erroneous.

The district court rejected the results of the Woodcock-Johnson Test of Achievement because the 1999 psychological evaluation contained the caveat that "all material was enlarged and extra spaces were inserted between words," so that "the administration [of the test] is considered unstandardized and results should be viewed with caution" (R. 13, Order at 22, quoting Exh. 11). There was no evidence that enlarging the material or inserting extra spaces resulted in scores on the 1995 and the 1999 tests that inaccurately reflected Adam's level of achievement in math and reading. While accommodations may prevent his scores from being

directly comparable to national norms, both scores clearly indicate that Adam was operating far below grade level, and that, as the School System's 1999 evaluation found, "his performance in the area of reading and math was significantly below what would be expected given his measured level of intellectual functioning" (Exh. 11 at 5). In 1995, the School System's evaluation reached the same conclusion: "On the Woodcock Johnson Tests of Achievement Revised, Adam earned standard scores significantly lower than would be expected based upon his current level of intellectual functioning" (Exh. 1 at 63).

The district court recognized that Adam had scored lower on the Vineland Adaptive Behavior Scales in 1999 than he had in 1995 (R. 13, Order at 22). Although the plaintiff's expert was disturbed by this significant loss of skills (Tr. at 190), neither the ALJ nor the district court explained why this evidence was not significant in determining whether the School System had complied with the IDEA and had provided the FAPE to which Adam was entitled.

Finally, neither the district court nor the ALJ noted the results of the 1998 vocational evaluation, which showed Adam's inability to succeed in any category that would allow him to consider a vocational technical program (Exh. 1 at 28). The district court was obligated to consider evidence that the School District had not complied with the IDEA's substantive components, see 20 U.S.C. 1414(d)(1)(A)(vii), rather than rely on the general testimony of a teacher (a witness whose credibility it could not assess) who had taught Adam for one year three years earlier (Tr. 611; R. 13, Order at 22-23).

The School System's failures cannot be dismissed as mere technicalities in light of the objective evidence that Adam has failed to make any meaningful educational progress while a student at the Shrine School. The IDEA requires a school district to do more than just provide "mere access to the schoolhouse door." *Polk*, 853 F.2d at 182. Where, as here, there is significant evidence that a child's achievement consistently is substantially lower than his abilities, the IEP process must consider the learning disabilities and the accommodations that could help to overcome the disabilities. The Fourth Circuit found in *Hall* that an IEP cannot be considered adequate when a child of above average intelligence is functionally illiterate, based on test scores and independent evaluations. 774 F.2d at 629. The School System here identified a similarly large gap between Adam's abilities and his test scores. The IEPs it provided, however, were not designed to deal with Adam's specific disabilities and failed to give Adam the educational benefit the IDEA requires. It is not a sufficient individual accommodation simply to reduce the number of problems a child must complete, as Adam's teacher apparently did in this case (Tr. 649-655), when the student's specific disability impedes his ability to do *any* of the problems.

In *Doe*, this Court found that the IEP offered was reasonably calculated to provide the child educational benefits. The IEP in *Doe* provided, *inter alia*, for comprehensive testing at Vanderbilt University, tutorial services four days per week after regular school hours, speech therapy one hour a day, computer-assisted instruction in math and English, word processing, a tape recorder for class lectures,

and extensive counseling services during and outside regular school hours. 9 F.3d at 459. Adam's IEPs did not come close to offering the services provided in *Doe*. Here, the IEPs reflect no learning disability and there is no resource or services provided to address the problems that the School System had known about for years (Tr. 38-42; 191). The School System similarly failed to evaluate Adam for physical therapy, occupational therapy, or assistive technology, as plaintiff's expert testified the School System should have done (Tr. 170-72), and as the law requires. 20 U.S.C. 1414(b)(3)(C). Adam made no meaningful progress during the 15 years he was a student at the Shrine School, either academically or practically. In fact, there was objective evidence that Adam had lost practical skills between 1995 and 1999 while a student at Shrine School (Tr. 190). As a result, Adam "graduated" from the Shrine School with a special education diploma, completely unprepared to participate in community life or to fend for himself in any meaningful way.

The IDEA provides no guarantee of a certain level of achievement, and it does not require a school to "provide a Cadillac solely for [the child's] use." *Doe*, 9 F.3d at 459. The IDEA does, however, require a plan that will provide basic services and a guarantee that if, based on required periodic assessments of a child's educational progress, a student's achievement is wholly out of proportion with his abilities, the School System will adopt a revised educational program, better tailored to that child's needs and designed to provide him meaningful educational opportunity. The School System failed Adam by not making modifications in his

educational program that would allow him to attain something more than a trivial benefit.

CONCLUSION

The district court's judgment should be reversed and the case remanded for consideration of relief or, at the very least, for consideration of the record under the correct legal standards.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 6707 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify on May 3, 2001, that I caused to be served two copies of the foregoing Brief for the United States as Amicus Curiae Supporting Appellant Urging Reversal by first-class mail, postage prepaid, on:

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