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Van Duyn v. Baker School District: A “Material” Improvement in Evaluating a School District’s Failure to Implement Individualized Education Programs

David G. King*

I. INTRODUCTION

¶1 Just before Christopher Van Duyn entered middle school, his teachers, school district representatives, and mother agreed to an extensive plan for his following year’s education.¹ The plan was very detailed: It laid out how many hours per week and what days he would work on specific subjects, provided him with a full-time behavior management plan, required him to be placed in a self-contained classroom and to regularly see a specialist, and described how his progress was to be evaluated.² Christopher was entitled to this Individualized Education Program (IEP) because his severe autism qualified him for special education and related services under the Individuals with Disabilities Education Act (IDEA or Act).³

¶2 Soon after the new school year began, a dispute arose when Christopher’s parents suspected that the school district was not fulfilling the requirements of his newly created IEP.⁴ Specifically, his parents alleged that Christopher was not getting enough hours of math instruction, that his behavioral management plan was different from that which was agreed-upon, that some of his assignments were not on his educational level, and that he was not being educated in a self-contained classroom.⁵ His parents sued the school district for failing to implement Christopher’s IEP, and his case eventually reached the United States Ninth Circuit Court of Appeals.⁶ A divided court, adopting a rule similar to that applied in two other circuits, held that a school district violates the IDEA for failing to implement an IEP only if the failure to implement is “material.”⁷ Thus, despite the fact that Christopher’s school did not provide him with all the provisions agreed upon in his

* Juris Doctor, 2009, Northwestern University School of Law; Bachelor of Arts, 2003, University of Michigan. Special thanks go to Wally Winter of the Legal Assistance Foundation of Metropolitan Chicago for his initial assistance in developing this Note and to Mark Weber of DePaul University College of Law for both introducing me to Special Education Law and for his insightful comments on previous drafts.

¹ Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 815 (9th Cir. 2007).

² *Id.* at 815–16.

³ 20 U.S.C. § 1414(d) (1997). In 2004, Congress reauthorized the Act with the “Individuals with Disabilities Education Improvement Act.” *See* Pub L. No. 108-446, 118 Stat. 2647 (2004). Because this case began before the reauthorization, the new Act does not apply. However, the implications of the new Act are discussed at *infra* note 28.

⁴ Van Duyn, 502 F.3d at 816.

⁵ *Id.* at 816, 823–25.

⁶ *Id.* at 817.

⁷ *Id.* at 822.

IEP, the school district was only liable for its failure to provide him with enough hours of math instruction because the other failures were not “material.”⁸

This newly created materiality standard will have an important effect upon subsequent courts in their evaluation of whether school districts meet IDEA obligations despite failing to implement some or all of the provisions of a student’s IEP. Part II of this Note provides an overview of the statutory right of a disabled student to a “Free Appropriate Public Education” (FAPE),⁹ details how courts have interpreted this right, and discusses the different standards used by courts to evaluate alleged implementation failures. Part III analyzes the Ninth Circuit’s opinion in *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, and evaluates the strengths and weaknesses of both the majority and dissenting opinions. Part IV discusses the vast implications of this case, raising the issues of whether the *Van Duyn* majority applied the Act and case law correctly, whether the materiality standard is appropriate for the judiciary, and how the case will affect the creation and implementation of future IEPs. Part V concludes that the decision is legally correct and represents a step in the right direction for courts, schools, and most importantly, students with disabilities.

II. OVERVIEW OF SPECIAL EDUCATION LAW

A. *The Right to a “Free Appropriate Public Education”*

Although federal subsidies in the 1960s¹⁰ and two favorable court decisions in the 1970s¹¹ helped some students with disabilities gain access to education, the major breakthrough did not occur until the passage of the Education for All Handicapped Children Act of 1975 (EAHCA).¹² Congress, mindful of the need to continue the progress of educational reform that had become a national focus in the Civil Rights Era, was particularly concerned that millions of disabled students were receiving either an inappropriate education or no education at all due to their disabilities.¹³ More specifically, Congress found that 2.2 million students were receiving an inappropriate education and 1.75 million students were receiving no education at all.¹⁴ The EAHCA sought to correct this problem by requiring all schools receiving federal funding to provide FAPE to all disabled students “regardless of the severity of their handicap.”¹⁵

The EAHCA framework for providing a student with FAPE still exists today (renamed now as the Individuals with Disabilities Education Act). The Act¹⁶ first directs

⁸ *Id.* at 823–25.

⁹ 20 U.S.C. § 1400(d)(1)(A).

¹⁰ See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

¹¹ See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Penn. Ass’n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

¹² Pub. L. No. 94-142 (1975).

¹³ 20 U.S.C. § 1412(3) (1976) (stating that Congress was concerned with providing money to “handicapped children who are not receiving an education” and to the several “handicapped children . . . with the most severe handicaps who are receiving an inadequate education”).

¹⁴ S. REP. NO. 94-168, at 8 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1432; H.R. REP. NO. 94-332, at 11–12 (1975).

¹⁵ Pub. L. No. 94-142, § 612(2)(C) (1975).

¹⁶ To avoid confusion, the term Act refers to the EAHCA and its progeny.

school districts to identify students with disabilities.¹⁷ It further creates several procedures designed to increase parental participation in order to further one of the Act's central provisions—the IEP. An IEP is a written statement detailing an educational plan tailored to the student's unique learning needs and is developed by a multi-disciplinary team consisting of teachers, educational administrators, and parents.¹⁸ The statement includes, among other things, a report of the child's present academic achievement and functional performance, measurable annual goals, a metric for measuring the child's progress towards these goals, and a list of the special education and related services needed to advance these goals.¹⁹ Congress concluded that such a written educational plan “would require school systems to develop an expertise and ability to provide services guaranteed to assure educational process.”²⁰

¶6 Providing a written IEP was especially important to the overall goal of increasing parental participation—one of Congress' chief goals in creating the IEP:

Thus, it is the intent of this provision that local educational agencies involve the parent at the beginning of and at other times during the year regarding the provision of specific services and short-term instructional objectives for the special education of the handicapped child, which services are specifically designed to meet the child's individual needs and problems. The Committee views this process as a method of involving the parent and the handicapped child in the provision of appropriate services, providing parent counseling as to ways to bolster the educational process at home, and providing parent with a written statement of what the school intends to do for the handicapped child.²¹

Put another way, written IEPs “are a way to provide parent involvement and protection to assure that appropriate services are provided to the handicapped child.”²²

¶7 Of course, the importance of parental involvement does not disappear at the IEP's creation. For example, the Act requires prior written notice to parents whenever the school either proposes or refuses to initiate or change the “identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.”²³ Parents also have the opportunity to inspect records relating to their child and to “obtain an independent educational evaluation of the child.”²⁴ Most importantly, the Act enables parents to challenge proposed initiations or changes through a “Due Process Complaint Notice.”²⁵ After filing such a notice, parents are entitled to an “impartial due process hearing,”²⁶ and then the Act permits *any* aggrieved party to file a

¹⁷ 20 U.S.C. § 1412(3).

¹⁸ 20 U.S.C. § 1414(d)(1)(B).

¹⁹ 20 U.S.C. § 1414(d)(1)(A).

²⁰ S. REP. NO. 94-168, at 11 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1435.

²¹ *Id.*

²² *Id.* at 12.

²³ 20 U.S.C. § 1415(b)(3).

²⁴ 20 U.S.C. § 1415(b)(1).

²⁵ 20 U.S.C. § 1415(b)(7)(a); 1415(c)(2).

²⁶ 20 U.S.C. § 1415(f).

civil action in either state or federal court.²⁷ Therefore, the detailed provisions of the Act provide significant rights to parents and students with disabilities, as well as places several affirmative obligations upon school districts.

Central to both these rights and obligations is the requirement that states provide eligible students with FAPE. While the Act has significantly changed since 1975,²⁸ the statutory definition of a “Free Appropriate Public Education” has not.²⁹ The current definition is:

The term “free appropriate public education” means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.³⁰

However detailed the rights and obligations of the Act, the ambiguity of this statutory definition, combined with the fact that Congress has never clarified the definition in the Act’s subsequent reauthorizations, has meant that the courts have had to interpret its meaning and requirements by relying upon other provisions of the Act.

²⁷ 20 U.S.C. § 1415(i)(2)(A).

²⁸ Congress reauthorized the EACA in 1990 and changed the title to the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (1990). Although the reauthorization made some changes, the most significant change was the change in terminology “in recognition of the changing dynamics of special education and the emergence of ‘people-first’ terminology.” Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity under the IDEA*, 58 HASTINGS L.J. 1147, 1156 (2007). Unlike the 1990 reauthorization, the 1997 amendments substantially changed the IDEA. Most importantly, Congress shifted the focus of the Act from ensuring that all disabled students had *access* to FAPE to attempting to *improve* the education that the disabled students receive. In accomplishing this shift, Congress increased substantive and procedural requirements for IEPs, as well as redefined school discipline and accountability. Tara L. Eyer, Comment, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 DICK. L. REV. 613, 628–30 (1998). In 2004, Congress reauthorized the Act with the Individuals with Disabilities Education Improvement Act (IDEIA). Again, this reauthorization did not fundamentally change the structure of the Act. The IDEIA’s new provisions linked the Act with No Child Left Behind, changed the eligibility requirements for learning-disabled students, and changed dispute resolution procedures and disciplinary procedures. *See generally* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7 (2006) (reviewing the IDEIA’s changes).

²⁹ *See* 20 U.S.C. § 1401(18) (1990); 20 U.S.C. § 1401(18) (1997); 20 U.S.C. § 1401(8) (2000); 20 U.S.C. § 1401(9) (2004).

³⁰ 20 U.S.C. § 1401(9) (2004).

B. How Courts Have Interpreted FAPE

1. The Rowley Standard

¶9 The Supreme Court first interpreted the FAPE requirement in *Board of Education of Hendrick Hudson Central School District of Westchester County v. Rowley*.³¹ In what is commonly referred to as the *Rowley* two-prong test, the Supreme Court found that a school district satisfies the IDEA’s requirement to provide all qualifying students with FAPE when (a) the school meets the procedural requirements imposed on the school by the Act, and (b) when the student’s IEP is substantively valid.³²

¶10 In regards to the procedural requirement,³³ the Court emphasized the importance of parental “participation at every stage of the administrative process,”³⁴ and even stated that “adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”³⁵ But the Court’s seemingly large emphasis on the importance of procedural rights did not translate over to the evaluation of the substantive validity of a student’s IEP.³⁶ More specifically, the Court’s decision turned on what the undefined “appropriate” meant under the Act. The Court reasoned that since the intent of the Act was to guarantee educational *access* and not to *maximize a student’s potential*, a student’s IEP is “appropriate” when it is “reasonably calculated to enable the [student] to receive educational benefits.”³⁷ Furthermore, the Court stated that the Act established a “basic floor of opportunity” for a student and does not guarantee a specific substantive level of educational achievement to be provided through special education and related services.³⁸ This minimal educational standard³⁹ is often referred to as entitling students with disabilities to a “serviceable Chevrolet as opposed to a luxury Cadillac.”⁴⁰

2. Interpretation of Rowley

¶11 It has been over twenty-five years since the *Rowley* decision and it is still as controversial as when it was first decided. In addition to its contentious minimal educational standard, there is confusion among the circuits and commentators as to *Rowley’s* application. For example, there is a circuit split regarding what constitutes the “educational benefit” portion of *Rowley’s* FAPE definition.⁴¹ Six circuits require the

³¹ 458 U.S. 176 (1982).

³² *Id.* at 206–07.

³³ See 20 U.S.C. § 1415 (outlining the procedural safeguards available to children and their families under the FAPE provision).

³⁴ *Rowley*, 458 U.S. at 205.

³⁵ *Id.* at 206.

³⁶ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. of Westchester County v. Rowley*, 458 U.S. 176, 189 (1982).

³⁷ *Id.* at 207.

³⁸ *Id.* at 201, 201 n.23.

³⁹ See Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After Rowley?*, 39 SUFFOLK U. L. REV. 1, 5 (2005).

⁴⁰ Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 564 (2003).

⁴¹ Aron, *supra* note 39, at 7; see also Andrea Blau, *The IDEA and the Right to an “Appropriate” Education*, 2007 BYU EDUC. & L.J. 1, 11 (2007) (“State, district, and circuit courts, subsequent to *Rowley*, have attempted to define ‘appropriate’ education with little consistency or uniformity.”).

benefit to be meaningful, five require the benefit to merely be adequate or provide some benefit, and one uses a combination of both.⁴² Thus, “[t]his definitional difference has led to divergent results for students in different parts of the country.”⁴³

¶12

Several commentators and federal courts have also questioned the precedential value of *Rowley*'s educational benefit standard in light of the latest amendments to the Act.⁴⁴ Although none of the subsequent amendments have altered the definition of FAPE,⁴⁵ critics point to significant changes in the language of the Act that call into question the continued validity of the *Rowley* standard. First, the stated intent of the Act is no longer just to ensure educational access.⁴⁶ This change of purpose was a reaction, in large part, to findings suggesting that although disabled children were able to access public education after the implementation of the ECHA, public education was not as effective as it could be.⁴⁷ To reflect these shortcomings, Congress amended the purpose of the Act “to ensure the effectiveness of [] efforts to educate children with disabilities.”⁴⁸ Furthermore, the statute details “our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”⁴⁹ These changes in the purposes of the Act suggest that *Rowley*'s FAPE definition “set[s] the bar too low.”⁵⁰

¶13

In addition to shifting the IDEA's purpose from ensuring educational access to improving educational outcomes, the 1997 amendments changed the substantive and procedural requirements for a student's IEP in accordance with the newly stated purpose.⁵¹ Moreover, the 2004 amendments that linked special education law with No Child Left Behind further changed requirements to hold teachers and schools more accountable.⁵²

⁴² Aron, *supra* note 39, at 7.

⁴³ *Id.* at 6 n.39 (commenting that states are free to “raise the floor” on their own if they so choose). See also Philip T.K. Daniel & Jill Meinhardt, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of Free Appropriate Public Education?*, 222 EDUC. L. REP. 515, 522–25 (2007) (arguing that the increase in educational standards among many states require “more than just a basic floor of opportunity or some educational benefit as was required under *Rowley*”).

⁴⁴ See generally *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033 (W.D. Wash. Dec. 8, 2006), *rev'd on other grounds*, No. C06-494P, 2007 WL 505450 (W.D. Wash. Feb 10, 2007); Eyer, *supra* note 28; Johnson, *supra* note 40; Andrea Valentino, Note, *The Individuals with Disabilities Education Improvement Act: Changing What Constitutes An “Appropriate” Education*, 20 J.L. & HEALTH 139 (2007).

⁴⁵ Eyer, *supra* note 28, at 630.

⁴⁶ The report by the House Committee shortly before passing the bill states that “[t]his committee believes that the critical issue now is to *place greater emphasis on improving student performance* and ensuring that children with disabilities receive a quality education. . . . This review and authorization of the IDEA is needed to move to the next step of providing special education and related services to children with disabilities: *to improve and increase their educational achievement.*” H.R. REP. NO. 105-95, 83–84 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 80–81 (emphasis added).

⁴⁷ In particular, Congress was concerned with the fact that a “significant number” of special education students were failing courses and dropping out of school. Eyer, *supra* note 28, at 628.

⁴⁸ 20 U.S.C. § 1401(d)(4) (1997).

⁴⁹ 20 U.S.C. § 1401(c)(1) (1997).

⁵⁰ *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033, at *5 (W.D. Wash. Dec. 8, 2006), *rev'd on other grounds*, No. C06-494P, 2007 WL 505450 (W.D. Wash. Feb 10, 2007).

⁵¹ The 1997 amendment added several requirements for the inclusion of specific determinations in a child's IEP. It also required that disabled students be included in a school's overall assessment tests and that students must be mainstreamed as much as their disability allows. See Eyer *supra* note 28, at 631–33; Johnson, *supra* note 40, at 578–80.

⁵² See Weber, *supra* note 28, at 16–21.

¶14 Despite the constant criticism, the *Rowley* standard is still good law. A further complication to this problem is that *Rowley* dealt with a challenge to the appropriateness of a student’s IEP and not to a school district’s actual implementation of a student’s IEP. As discussed in the next section, several district and circuit courts have extended *Rowley*’s logic and holding to such instances.

C. The Many Standards Used to Evaluate a School District’s Failure to Implement a Student’s IEP

¶15 The Supreme Court has not specifically addressed the appropriate standard for evaluating whether a school district’s failure to implement a provision of a student’s IEP violates the student’s right to FAPE.⁵³ At the circuit level, there is a growing trend towards requiring that the failure to implement be a substantive failure before it is cognizable, meaning that the nature of the failure is evaluated in relation to the student’s IEP and the district’s implementation.⁵⁴ In evaluating implementation failures, courts have used any combination of the following methods: requiring the failure to involve a “substantial,” “significant,” or “essential” provision of the student’s IEP; examining the reason for the failure; examining whether the student received an educational benefit despite a failure; and requiring the failure to be more than de minimis.⁵⁵ As these different methods suggest, the interpretation of whether a school district met the FAPE requirements in implementing a student’s IEP has not been consistent at the district and circuit court levels.⁵⁶ Before examining how the substantive failure requirement has percolated through the courts, it is necessary to examine the case that first established a substantive failure standard.

1. *Bobby R.*: Significant Provision Standard⁵⁷

¶16 In 2000, the Fifth Circuit Court of Appeals ruled on the case of *Houston Independent School District v. Bobby R.*⁵⁸ In this case, the parents of a learning-disabled student sued the Houston School District for failing to abide by the agreed-upon IEP.⁵⁹ Specifically, the parents alleged that the school had not provided their son with speech therapy and certain accommodations (such as highlighted texts, modified tests, and taped lectures), and had failed to place him into a phonics program.⁶⁰ Despite the fact that the school district admitted that it did not meet these requirements of the IEP, the Fifth Circuit found that the district’s failure to implement his IEP did not deprive the student of

⁵³ Cf. *Manalansan v. Bd. of Educ. of Balt. City*, No. Civ. AMD 01-312, 2001 WL 939699, at *11 (D. Md. Aug. 14, 2001) (“The majority of IDEA case law addresses the appropriateness of an IEP rather than the failure of implementation.”).

⁵⁴ See *infra* notes 58–123 and accompanying text.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ For the sake of brevity, this Note will refer to the standard as the “significant provision standard.” The *Bobby R.* court also used the word “substantial” and the court in *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003), used the word “essential,” but these appear to simply be synonyms and do not alter the analysis.

⁵⁸ 200 F.3d 341 (5th Cir. 2000).

⁵⁹ *Id.* at 344.

⁶⁰ *Id.*

the right to FAPE because “the significant provisions of [the student’s] IEP were followed, and, as a result, [the student] received an educational benefit.”⁶¹

¶17

The main issue in *Bobby R.* was whether the school district satisfied *Rowley*’s two-prong test for providing FAPE. First, the court quickly dispensed with the procedural requirements of the Act, as the student did not allege a procedural violation, and moved to the substantive prong (whether the IEP was reasonably calculated).⁶² Although this requirement only speaks to whether the IEP is reasonably calculated to provide some educational benefit, the court, without acknowledging this distinction, applied this prong to the IEP’s *implementation*.⁶³ In justifying this extension, the Fifth Circuit relied heavily on *Rowley*’s statement that a school district should have some flexibility in creating and implementing the content of an IEP.⁶⁴ Additionally, the court borrowed both language and logic from a 1989 case out of the Southern District of Ohio to find that a school district’s failure to implement “an IEP does not constitute a *per se* violation of the IDEA.”⁶⁵ The court then stated its new standard for evaluating IEP implementation failures:

[W]e conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.⁶⁶

After announcing this new rule, the court did not engage in a discussion about whether these three specific provisions were “significant;” it just stated that “the significant provisions of [the student’s] IEP were followed, and as a result, he received an educational benefit.”⁶⁷ Interestingly, it is not apparent from the opinion whether the court considered “substantial” to mean “many” provisions or whether the court considered “substantial” to be synonymous with “significant.”⁶⁸

⁶¹ *Id.* at 349.

⁶² *Id.* at 347.

⁶³ *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347–48 (5th Cir. 2000). In determining whether the student’s IEP was reasonably calculated, the court looked to *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). *Cypress-Fairbanks* established four factors to determine whether an IEP is reasonably calculated: “(1) the program is individualized on the basis of the student’s assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key ‘stakeholders’; and (4) positive academic and non-academic benefits are demonstrated.” *Id.* at 253.

⁶⁴ *Bobby R.*, 200 F.3d at 348; *see also* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist of Westchester County v. *Rowley*, 458 US 176, 208 (1982) (“We previously have cautioned that courts lack the ‘specialized knowledge and experience’ necessary to resolve ‘persistent and difficult questions of educational policy.’ [citations omitted]. . . . Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.”).

⁶⁵ *Bobby R.*, 200 F.3d at 349. The court borrowed this logic from *Gillette v. Fairland Board of Education*, 725 F. Supp. 343 (S.D. Ohio 1989), *rev’d on other grounds*, 932 F.2d 551 (6th Cir. 1991), noting that *Gillette* held “that a local education agency’s failure to provide all the services and modifications outlined in an IEP does not constitute a *per se* violation of the IDEA.”

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The phrase “substantial portion” appears three times in the opinion, most notably when the court analyzed the school district’s failure to provide a speech therapist to the student. *See* *Houston Indep. Sch.*

¶18 In an attempt to provide some guidance as to what “significant” means, the court stated in a footnote that “determination[s] of what are ‘significant’ provisions of an IEP cannot be made from an exclusively *ex ante* perspective. Thus, a factor to consider under an *ex post* analysis would be whether the IEP services that were provided actually conferred an educational benefit.”⁶⁹ The necessary implication of this guidance, as discussed below, is that a provision is not significant if a student receives an educational benefit despite the failure to implement.⁷⁰ Using this logic, the court then found that since the student had improved during the course of the year, he had received an educational benefit and thus the school district did not violate his right to FAPE.⁷¹

¶19 Although the *Bobby R.* standard has been cited in most of the circuits (mostly at the district level), few other circuit courts have analyzed the standard. The Eighth Circuit, in *Neosho R-V School District v. Clark*, for example, discussed *Bobby R.* in the context of a “reasonably calculated” claim for a school district’s failure to provide a behavior plan.⁷² While the court in *Clark* used the familiar *Rowley* rule to find that the district violated the student’s right to FAPE by not providing a “reasonably calculated” IEP due to a lack of an appropriate behavior plan,⁷³ the court indicated in dicta that it thought “the analysis . . . in *Bobby R.* more accurately suit[ed] the posture of th[e] case.”⁷⁴ However, in applying the *Rowley* standard, the Eighth Circuit reasoned that “we cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school district actually failed to implement an *essential* element of the IEP that was necessary for the student to receive an educational benefit.”⁷⁵ Just like the *Bobby R.* court, the *Clark* court did not provide analysis as to why this provision was “essential” to the student’s IEP.⁷⁶ It is important, however, to distinguish *Clark* from *Bobby R.* by noting that the two cases have fundamentally different analytical frameworks. *Bobby R.* attempted to delineate between “significant” and “insignificant” IEP provisions in terms of an educational benefit, while *Clark* interpreted *Rowley*’s “reasonably calculated” prong as only applying to “essential” provisions of IEPs.⁷⁷

¶20 Many district courts have interpreted *Bobby R.*’s standard literally; they apply the significant requirement to the specific provision of the student’s IEP in question. Thus, the term “significant” applies not to the type of failure, but rather to how important the provision was to the student’s IEP, and whether the provision was required for the student to receive an educational benefit. For example, in *J.P. ex rel. Peterson v. County*

Dist. v. Bobby R., 200 F.3d 341, 348 (5th Cir. 2000) (“[T]he [district] court opined that the ‘most significant failing’ in this area involved the fact that for *substantial portions* of the 1994–95 academic year a speech therapist was not available.”) (emphasis added). However, just a few sentences later, the court then found that “significant provisions” of the student’s IEP were followed. *Id.* at 349.

⁶⁹ *Id.* at 349 n.2.

⁷⁰ *But see infra* notes 92 and 216 and accompanying text.

⁷¹ *Bobby R.*, 200 F.3d at 350.

⁷² 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

⁷³ *Id.* at 1028.

⁷⁴ *Id.* at 1027 n.3.

⁷⁵ *Id.* (emphasis added).

⁷⁶ A possible explanation for why the court found that the district’s failure to implement the behavior plan might be that the student was autistic, and thus the behavior plan could be instrumental in the student’s educational development.

⁷⁷ Despite this distinction, many courts find *Clark* to be synonymous with *Bobby R.* *See, e.g.,* B.F. v. Fulton County Sch. Dist., No. 04 Civ. 3379, 2008 WL 4224802, at *25 (N.D. Ga. Sept. 9, 2008); *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007).

School Board of Hanover County, a district court evaluated the student's claim that the district failed to implement provisions of his IEP.⁷⁸ The court dismissed the school district's failure to implement an "Oral Motor Skills Assessment," reasoning that the assessment "would have minimal impact on improving his speech and language" and thus the district's delay in assessing the autistic student was not "material."⁷⁹ However, the court held that the district violated the FAPE requirements by not implementing a "discrete trial method," because such a method "is central to the ABA instructional method" and thus, a significant provision of the IEP.⁸⁰ Other courts have applied similar logic in many specific instances, including evaluating the significance of a student's behavioral plan in relation to other provisions,⁸¹ the significance of a classroom aide,⁸² and the significance of providing Extra School Year (ESY) services during the summer.⁸³ Thus these courts followed the *Bobby R.* standard strictly as they weighed the relative importance of the challenged provision to the entire IEP.⁸⁴

¶21

Other district courts have interpreted *Bobby R.*'s standard to require analyzing whether the student received an educational benefit despite a school district's failure to implement.⁸⁵ This standard is similar to a "significant provision" analysis, but requires examination of whether the student received an educational benefit instead of whether the specific provision was "significant."⁸⁶ One example of such an "educational benefit" analysis is in the case of *Leighty v. Laurel School District*.⁸⁷ The school district was alleged to have failed to implement a learning-disabled student's IEP by not placing "specific emphasis on the skill-related goals contained in her IEP."⁸⁸ The district court

⁷⁸ 447 F. Supp. 2d 553 (E.D. Va. 2006), *rev'd on other grounds*, J.P. *ex rel.* Peterson v. County Sch. Bd. of Hanover County, 516 F.3d 254 (4th Cir. 2008).

⁷⁹ *Id.* at 569.

⁸⁰ *Id.* at 570–72. The court reasoned that this was essential to the success of the IEP because the student had success using this method at a different school and returned to the current school "on the condition that [the district] make efforts to emulate the methods used [at the previous school.]" The court went further to state that "if discrete trials had been implemented for each, or at least most, of [his] goals, the discrete trial technique could certainly have been a substantial and significant component of [his] IEP." *Id.* at 571.

⁸¹ *See* Mr. C. v. Maine Sch. Admin. Dist. No. 6, No. 06-198-P-H, 2007 WL 4206166, at *24–25 (D. Me. Nov. 28, 2007) (holding that the student's behavioral plan was in "a position of preeminence, making clear that other IEP objectives were to yield if need be").

⁸² *See* Slama *ex rel.* Slama v. Indep. Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 888–89 (D. Minn. 2003) (finding that a provision providing a specific personal care attendant was not significant because other attendants were "available to render services of similar quality"); *Manalansan v. Bd. of Educ. of Balt. City*, No. Civ. AMD 01-312, 2001 WL 939699, at *11 (D. Md. Aug. 14, 2001) (holding that a school district violated FAPE for failing to provide classroom aides because "[t]he aide provides assistance for all classroom [sic] activities and makes it possible for [the student] to be maintained in the general education setting").

⁸³ S.S. *ex rel.* Shank v. Howard Road Academy, Civ. No. 08-214, 2008 WL 4891391, at *10 (D.D.C. Nov. 12, 2008) (reasoning that because the student's IEP team noted the student had a "critical need" for ESY services over the summer due to "prior 'serious regression,'" the school's failure to provide such services was a material failure to implement his IEP).

⁸⁴ *See also* Marc V. *ex rel.* Eugene V. v. North East Indep. Sch. Dist., 455 F. Supp. 2d 577, 595–96 (W.D. Tex. 2006) (finding that the school district implemented the student's IEP by providing a trained, qualified, and certified teacher and aide).

⁸⁵ Evaluating a student's educational benefit depends upon which standard the specific court uses in evaluating the educational benefit. *See supra* notes 41–43 and accompanying text.

⁸⁶ Such analysis makes sense given the fact that the *Bobby R.* court did not engage in a discussion as to why the certain IEP provisions were significant. *See supra* notes 67–71 and accompanying text.

⁸⁷ 457 F. Supp. 2d 546 (W.D. Pa. 2006).

⁸⁸ *Id.* at 555.

held that the school district did not violate her right to FAPE because the student's special education teacher testified that she made "meaningful" progress and "remarkable improvement," and an assessment showed "mixed progress."⁸⁹ Several other courts have employed similar logic.⁹⁰ Thus, under the educational benefit standard, it is possible that a school district could not implement a "significant" element, yet still not violate the IDEA if the student were to receive some/any educational benefit.

¶22 However, this methodology has been criticized by at least two courts.⁹¹ As one district court explained:

Such a holding would seem to reflect a belief that the IDEA serves a deterrent function and creates substantive rights that can be enforced even if a child has been lucky enough to make progress despite a school district's failure to comply with federal law. In other words, when it is clear that the statute has been violated, a school should not be released from liability because a child has made some educational progress.⁹²

This criticism of focusing on the student's educational benefit is discussed more thoroughly below.⁹³

¶23 Although *Bobby R.* is generally cited for almost all IEP implementation challenges,⁹⁴ not all courts have strictly interpreted *Bobby R.* in the same manner as the *J.P.* and *Leighty* courts. One of the ways other courts have interpreted the *Bobby R.* standard is to examine not how significant the provision was to the student's IEP, but instead how significant the failure was on behalf of the school district.

⁸⁹ *Id.*

⁹⁰ See *Burke v. Amherst Sch. Dist.*, No. 08 Civ. 0140SM, 2008 WL 5382270, *11–12 (D.N.H. Dec. 18, 2008) (“[H]ere, as in *Bobby R.* [citations omitted], the record demonstrates academic achievement . . . [and thus,] the District's failure to implement the videotaping objective did not deprive [the student] of a FAPE.”); *Wanham v. Everett Pub. Sch.*, 550 F. Supp. 2d. (D. Mass. 2008) (holding the Independent Hearing Officer did not err in “requiring [the student] to show harm where services listed in the IEP were not delivered”); *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F. Supp. 2d. 991, 996 (S.D. Tex. 2005) (holding that the district did not violate FAPE despite the student's regression in toilet training because the district did provide the student with “some benefit”); *Falzett v. Pocono Mountain Sch. Dist.*, 152 F. App'x. 117, 120 (3d Cir. 2005) (holding that “substantial evidence exists in the record to support the finding that [the school] provided [the student] with meaningful educational benefit despite some failures”); *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343, 347 (S.D. Ohio 1989), *rev'd on other grounds*, 932 F.2d 551 (6th Cir. 1991) (holding that the school provided the student with FAPE despite the fact that “portions of the IEP were not followed” because the student was “able to achieve satisfactory grades and to advance [grade levels]”).

⁹¹ See *Manalansan v. Bd. of Educ. of Balt. City*, No. Civ. AMD 01-312, 2001 WL 939699, at *14 (D. Md. Aug. 14, 2001); *Indep. Sch. Dist. No. 281 v. Minn. Dept. of Educ.*, No. A06-1617, 2007 WL 2774337, *8 (Minn. Ct. App. Sept. 25, 2007) (“But if a district fails to implement the IEP, it is irrelevant whether the student made educational progress despite the district's failure to comply with the IDEA.”).

⁹² *Manalansan*, 2001 WL 939699, at *14.

⁹³ See *infra* notes 215–220 and accompanying text.

⁹⁴ See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 74 (D.D.C. 2007) (“[T]he consensus approach to (failure to implement cases) among federal courts that have addressed it has been to adopt a standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*”).

2. Melissa S.: Shifting The Focus Away From the IEP Provision to the School District's Failure

¶24 In *Melissa S. v. School District of Pittsburgh*, the Third Circuit applied the *Bobby R.* standard in a slightly different manner to a case in which the parents of a student with Down's Syndrome challenged the implementation of her IEP.⁹⁵ In *Melissa S.*, the parents of the student alleged that the school district failed to provide an educational aide everyday, assign homework daily, and implement a behavioral plan.⁹⁶ Though the Third Circuit cited the *Bobby R.* significant provision standard with approval,⁹⁷ the court deviated from that standard by examining the school's reason for failing to provide the educational aide. Here the court found that although the school did not provide an aide everyday (due to the aide leaving the position), the school complied with the student's IEP because the district either utilized a substitute teacher or just notified the student's parents that an aide could not be provided and told them to keep the student home for the day.⁹⁸ Thus, the court implied that the district's excuse for failing to provide an aide was in good faith or at least reasonable, and therefore did not violate the student's right to FAPE.⁹⁹ This shift represents a slight, but significant change to *Bobby R.*—the Third Circuit focused on the reason for the failure instead of how significant the provision was to the student.

¶25 Other courts also seem to focus on the reason for the school district's failure to implement a student's IEP instead of a provision's "significance." Take, for example, *Catalan ex rel. E.C. v. District of Columbia*.¹⁰⁰ At issue in *Catalan* was the school district's failure to provide the student with the agreed-upon speech therapy.¹⁰¹ In finding that such a failure was not "material," the court specifically stated that "the failure to follow the IEP's requirements to the letter was *excusable* under the circumstances."¹⁰² Such circumstances included the speech therapist missing a few sessions, cutting other sessions short because the student's fatigue made the therapy unproductive, and missing sessions altogether due to snow days, school holidays, and the student's absences.¹⁰³ Thus, while "[t]echnically, the IEP was violated . . . these failures were not substantial enough to constitute a FAPE deprivation."¹⁰⁴

⁹⁵ 183 F. App'x. 184, 186 (3d Cir. 2006).

⁹⁶ *Id.* at 187.

⁹⁷ *Id.* ("To prevail on a claim that a school district failed to implement an IEP, a plaintiff must show that the school failed to implement substantial or significant provisions of the IEP, as opposed to mere *de minimis* failure, such that the disabled child was denied a meaningful benefit."). The court did not explicitly state that there was a good faith exception, however, it did so implicitly in its application.

⁹⁸ *Id.* The court found that because the student was never left alone, the district met its obligations to provide a full-time aide.

⁹⁹ *Id.* The court also used the traditional *Bobby R.* standard to find that the district's possible failure to give homework everyday was *de minimis* and that the district had implemented a behavioral plan. *Id.* at 188–89.

¹⁰⁰ 478 F. Supp. 2d 73 (D.D.C. 2007).

¹⁰¹ *Id.* at 75.

¹⁰² *Id.* at 76 (emphasis added).

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see also *Sarah Z. v. Menlo Park City Sch. Dist.*, No. 06 Civ. 4098, 2007 WL 1574569, at *7 (N.D. Cal. May 30, 2007) (affirming the ALJ's decision for the school district despite a fourteen-day gap in services caused when the school district chose to not renew the provider of the student's services because the small time-frame and because the student was being "closely monitored" during this gap); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Michael R.*, No. 02 Civ. 6098, 2005 WL 2008919, at *12 (N.D. Ill.

¶26

This shift is grounded in the idea that courts should not examine the educational significance of a particular IEP provision, but should instead examine “whether the deviations from the IEP’s stated requirements were ‘material.’”¹⁰⁵ As the *Catalan* court recently explained:

[T]he Fifth Circuit’s language [in *Bobby R.*] easily could be misread as contemplating an abstract inquiry into the significance of various “provisions” . . . of the IEP, rather than a contextual inquiry into the materiality (in terms of impact on the child’s education) of the failures to meet the IEP’s requirements. This is a subtle distinction, but, in this court’s view, an important one. Very few, if any, “provisions” of an IEP will be insignificant or insubstantial, and the *Bobby R.* standard should not be read to allow educators to distinguish in the abstract between important and unimportant IEP requirements. To the contrary, all the requirements in an IEP are significant, and educators should strive to satisfy them. It is in the contextual, *ex post* analysis—i.e., whether the requirements are feasible and in the best interest of the child as she progresses—that questions of substantiality and significance arise.¹⁰⁶

This standard, therefore, essentially shifts “significant” as a modifier of the provision of the student’s IEP to a modifier of the nature of the failure and to the reason behind that failure. By doing this, these courts have allowed school districts to essentially present a good faith excuse.

¶27

One court that strictly interpreted the *Bobby R.* standard explicitly rejected the notion of a good faith excuse for IEP implementations. In *Manalansan v. Board of Education of Baltimore City*, a district court stated that a “‘good faith effort’ will not meet the statutory and regulatory command.”¹⁰⁷ It reasoned that the Department of Education promulgated federal regulations that required school districts to “[m]ake a *good faith effort* to assist the student to achieve the *goals and objectives* or benchmarks listed in the IEP” did not apply to IEP implementation challenges because the “goals and objectives” were different from actual implementation.¹⁰⁸ By focusing on the purpose of the regulation, it found that the good faith provision protects schools by not penalizing them when students do not meet all of their objectives because “[e]ven the best educator with all the services available cannot guarantee that a child will meet all objectives set out in an IEP.”¹⁰⁹ In contrast, according to the court, a good faith effort defense should

Aug. 15, 2005) (refusing to find a district liable for failing to implement a behavior plan because “the root of the problem in implementing the plan was not the staff, but the complexity of [the student]’s plan and the difficulties of carrying it out in a large, regular education high school”).

¹⁰⁵ *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007).

¹⁰⁶ *Id.* at 76 (internal citations omitted).

¹⁰⁷ No. Civ. AMD 01-312, 2001 WL 939699, at *13 (D. Md. Aug. 14, 2001).

¹⁰⁸ *Id.* at *14; 34 C.F.R. § 300.350 (emphasis in original). This “accountability” regulation has since been removed by the Department of Education because the “good faith” requirement was “unnecessary because other Federal laws, such as title 1 of the ESEA, already provide sufficient motivation for agency effort to assist children with disabilities in making academic progress.” Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46540, 46753 (Aug. 14, 2006) (removing 34 C.F.R. § 300.350 effective Oct. 14, 2006).

¹⁰⁹ *Manalansan*, 2001 WL 939699, at *12.

not apply when a school district fails to implement services in a student's IEP, as implementation of these services is within the control of the school district and not subject to a student's ability to satisfy all objectives in an IEP.¹¹⁰ Thus, providing services "in accordance with [an] IEP is mandatory, not discretionary."¹¹¹

¶28 *Melissa S.* and other similar cases applied a slightly different analysis in the failure to implement issue, as they focused not on how significant a particular provision was to the student's IEP, but instead on the reason for the failure to implement. To further complicate things, as further elaborated below, other courts have taken the *de minimis* language from *Bobby R.* in situations where the failure was so minor or trivial that it did not adversely affect a student's educational performance.

3. More than de minimis Standard

¶29 The more than *de minimis* standard arises out of language in *Bobby R.* in which the Fifth Circuit stated that "a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP."¹¹² *Black's Law Dictionary* defines a *de minimis* failure as something that is "trifling," "minimal," or "so insignificant that a court may overlook it in deciding an issue or case."¹¹³ The *Bobby R.* court used this standard to find that the student's failure to improve in specific language skills "was *de minimis* . . . [as] it is not necessary for [the student] to improve in every area to obtain an educational benefit from his IEP."¹¹⁴

¶30 In an effort to define failures that are not *de minimis*, the recent case of *Damian J. v. School District of Philadelphia*¹¹⁵ proves to be quite instructive. One of the issues in *Damian J.* was the school district's failure to implement many different portions of the student's IEP due to his teachers' lack of qualifications and training.¹¹⁶ Here, his "emotional support classroom teacher" was not "highly qualified" as required by the Act because she was neither licensed nor certified as a special education teacher.¹¹⁷ His teacher also did not receive any training on how to implement his IEP.¹¹⁸ This fundamental failure led to many implementation gaps, including not tracking his progress towards his IEP's goals and objectives,¹¹⁹ never meeting with the student's mother, and even continuing to "use" an old IEP after a newer one was written.¹²⁰ In finding that the student was denied FAPE due to a failure to implement his IEP, the court drew from the

¹¹⁰ *Id.*

¹¹¹ *Id.*; see also *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 512 (2d Cir. 2006) ("[T]he IDEA does not simply require substantial compliance on the part of the participating states; it requires compliance.").

¹¹² *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

¹¹³ BLACK'S LAW DICTIONARY 197 (3d Pocket ed. 2006).

¹¹⁴ *Bobby R.*, 200 F.3d at 350.

¹¹⁵ See Civ. No. 06-3866, 2008 WL 191176 (E.D. Pa. Jan. 22, 2008).

¹¹⁶ *Id.* at *3-5.

¹¹⁷ *Id.* at *3.

¹¹⁸ *Id.* at *3-4.

¹¹⁹ As an example of how poorly his teacher was in implementing his IEP, his teacher acknowledged that while "she knew she had to write a daily journal on Damian, she viewed this as unfair as it was not done for the other children." *Id.* at *4.

¹²⁰ *Damian J. v. Sch. Dist. of Phila.*, Civ. No. 06-3866, 2008 WL 191176, at *4 (E.D. Pa. Jan. 22, 2008). The court even found that after the student's teacher was fired, her replacement did not do much better. *Id.* at *4-5.

testimony of an independent specialist who stated that “it is frustrating and demoralizing to see almost complete failure to implement even the simpler components of the plan.”¹²¹

¶31 Thus, this standard is probably best used in terms of better narrowing the significant provision test that *Bobby R.* first prescribed; de minimis failures occur when a school fails to implement insignificant provisions of an IEP, which does not cause a loss of appropriate educational benefits.¹²²

4. Combination of Standards

¶32 Finally, several courts have used a combination of standards, applying different tests to different provisions of an IEP. This means courts will look at whether the failure was de minimis, whether the provision was significant, and whether the school district had a reasonable excuse for the alleged failure.¹²³ It should also be noted that cases examining the qualifications of school personnel, while technically not “failure to implement” cases, do seem to address IEP implementation. In such cases, courts have found that failing to provide a qualified teacher, aide, or other personnel violates Section 504 regulations,¹²⁴ and furthermore may be evidence of an inappropriate placement, thus making the child eligible for compensatory relief.¹²⁵ For example, the Seventh Circuit affirmed a compensatory education award when a school district did not provide the student with a properly licensed occupational therapist.¹²⁶ While the court in *Evanston Community Consolidated School District Number 65 v. Michael M.* neither undertook a

¹²¹ *Id.* at *5.

¹²² See also *Melissa S. v. Sch. Dist. of Pittsburg*, 183 F. App’x. 184, 188 (3d Cir. 2006) (holding that the alleged failure to instruct the student in math at her grade level and to give her homework were de minimis); *Fisher ex rel. T.C. v. Stafford Twp. Bd. of Educ.*, No. 05-2020, 2007 WL 674304, at *12 (D.N.J. Feb. 28, 2007) (holding that a school district’s failure to provide a trained aide when the normal aide was not available was “at most, [a] de minimis failure to fully implement”); *Clear Creek Ind. Sch. Dist. v. J.K.*, 400 F. Supp. 2d 991, 997 (S.D. Tex. 2005) (holding that inconsistent locations for in-home trainings were de minimis because “there [was] no evidence that the varying locations of the training affected [the student’s learning] at all”); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Michael R.*, No. 02 Civ. 6098, 2005 WL 2008919, at *12–20 (N.D. Ill. Aug. 15, 2005) (holding that the district’s several failures to implement among other things a behavior plan, speech and physical therapy services, and using a properly fitting weighted vest did not violate the student’s right to FAPE because these failures were de minimis). The case of *Sarah Z. v. Menlo Park School District*, No. Civ. 06-4098, 2007 WL 1574569, at *7–9 (N.D. Cal. May 20, 2007) could also be analyzed as a de minimis case as the court found two “harmless errors,” but the court did not use the term and instead cited to *Van Duyn’s* materiality standard instead. *But see Indep. Sch. Dist. No. 281 v. Minn. Dept. of Educ.*, No. A06-1617, 2007 WL 2774337, at *9 (Minn. Ct. App. Sept. 25, 2007) (finding the de minimis exception does not apply to the Department of Education’s “authority under the IDEA”).

¹²³ See *Melissa S.*, 183 F. App’x. at 184; *Falzett v. Pocono Mountain Sch. Dist.*, 152 F. App’x. 117, 120 (3d Cir. 2005); *Clear Creek*, 400 F. Supp. 2d at 991; *Michael R.*, 2005 WL 2008919, at *14; *Indep. Sch. Dist. No. 281*, 2007 WL 2774337, at *9; *Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104, 116–28 (D.Mass. 1999); *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343, 346–48 (S.D. Ohio 1989), *rev’d on other grounds*, 932 F.2d 551 (6th Cir. 1991). Despite being decided prior to *Bobby R.* it is important to note that *Gillette* and *Ross* also fall into this category. Furthermore, *Ross* first articulated “guidelines” to use when evaluating a district’s failure to implement, stating that districts do not violate FAPE when the: “(1) Failure to implement must not be complete, (2) Variance from special education and related services specified by the IEP must not deprive the student of FAPE, (3) Provision of special education and related services must make progress toward the achievement of the goals stated in the IEP.” *Ross*, 44 F. Supp. 2d at 119.

¹²⁴ MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 19: 2–3 (LRP Publ’n 3d. ed. 2008) (collecting cases).

¹²⁵ *Id.* at § 19:7–8.

¹²⁶ *Evanston Comm. Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798, 802–03 (7th Cir. 2004).

“failure to implement” analysis nor cited to any of the above cases, it did appear to implicitly reject one of *Bobby R.*’s central tenets as it affirmed compensatory relief in the face of a lack of evidence that the occupational therapist “did not do a good job.”¹²⁷ Thus, the court affirmed a substantive “technical violation,” as opposed to a procedural violation,¹²⁸ without regard to the effect of this failure as to the child’s educational benefit.

5. *Van Duyn*: Only Material Failures Violate the IDEA

¶33 Just recently, in *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, the Ninth Circuit became the latest circuit court to throw its hat into the proverbial substantive failure ring, adding a slightly different standard for evaluating failure to implement cases. The divided court cited the *Bobby R.* standard with approval and held that only *material* failures to implement an IEP constitute a deprivation of FAPE.¹²⁹ This case is important not only because it expands the substantive failure requirement to another circuit, but also because the dissenting judge articulates reasons for why this growing standard might not be a good idea.

III. *VAN DUYN EX REL. VAN DUYN V. BAKER SCHOOL DISTRICT 5J*

A. *Facts and Procedural History*

¶34 Christopher Van Duyn is a severely autistic boy who received special education and related services at his local public school.¹³⁰ Prior to completing elementary school, the school’s IEP team, comprised of teachers, district representatives, and his mother, agreed to an IEP that would be used the following year (2001–02 school year).¹³¹ Some of the IEP’s provisions included: work on language arts for six to seven hours a week, math for eight to ten hours a week, and “adaptive P.E.” for three to four hours a week; a behavior management plan; placement in a “self-contained classroom” and presentation of work at his level; access to a regional autism specialist who would visit the school twice a week; “augmentative communication” services for two hours per month; an educational aide who has received state autism training; quarterly report cards to measure his progress; and about seventy short-term objectives for the year.¹³² Christopher’s performance during the following year was mixed; his reading scores “deteriorated,” but his behavior and math skills improved.¹³³

¶35 Just a few weeks into the 2001–02 school year, Christopher’s parents filed a request for a due process hearing.¹³⁴ His parents alleged that the school district did not

¹²⁷ *Id.* at 801.

¹²⁸ *Id.* at 803.

¹²⁹ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007).

¹³⁰ *Id.* at 815. It is important to note that Christopher’s eligibility for special education and related services was not in dispute.

¹³¹ *Id.*

¹³² *Id.* at 815–16.

¹³³ *Id.* at 816.

¹³⁴ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 816 (9th Cir. 2007). Section 1415(f) provides for an “[i]mpartial due process hearing” when a student (usually through his or her parents) alleges a deprivation of FAPE and describes the procedural and substantive requirements of the hearing.

implement Christopher’s IEP and that this failure to implement constituted a deprivation of FAPE.¹³⁵ Specifically, they complained that the school district failed to train his teachers and aides, he was not placed in a self-contained classroom, did not receive one-on-one instruction, the district did not implement the behavioral plan, and the district failed to provide specific daily instruction in oral language, reading, and math skills.¹³⁶

¶36

The Administrative Law Judge (ALJ) held that the school district failed to implement his IEP with respect to his math education because Christopher only received half of the hours stated in his IEP, but that the district did implement the other provisions.¹³⁷ As a remedy, the ALJ ordered that the district comply with the IEP’s requirement of “8–10” hours of math instruction per week.¹³⁸ On appeal, the district court affirmed the ALJ’s decision.¹³⁹ In so finding, the court stated that “perfection [in terms of implementation] cannot be the standard” and held that although not all of the agreed-upon provisions were met, outside of the math instruction, none of the other failures constituted a “substantial or significant” failure to implement Christopher’s IEP under the *Bobby R.* standard.¹⁴⁰ Additionally, the district court clarified the ALJ’s order regarding the math instruction, finding that the district was required to provide an additional five hours of math instruction a week, but that this was not a compensatory remedy.¹⁴¹ This is significant, as a compensatory remedy would require the school district to “make up” its failure by providing extra services in addition to its regular obligations.¹⁴² However, because the ALJ’s order was not compensatory, the school district was only required to provide the eight to ten hours of math instruction already required by the IEP without providing additional math instruction to make up for the deficit. The parents appealed to the Ninth Circuit, seeking to reverse the district court’s decision.

B. Ninth Circuit Majority Opinion

¶37

On appeal to the Ninth Circuit, the Van Duyns alleged that the district’s failure to implement Christopher’s IEP satisfied neither the procedural nor substantive prongs of the *Rowley* two-prong test.¹⁴³ Regarding the procedural violation, the Van Duyns did not allege a violation of a “traditional” procedural requirement under Section 1415 since they

¹³⁵ *Van Duyn*, 502 F.3d at 814.

¹³⁶ *Id.* at 816–17. For a more detailed description of the facts and allegations, see *Van Duyn ex rel. Van Duyn v. Baker School District*, 2005 WL 50130, at *3–7 (D. Or. Jan. 11, 2005).

¹³⁷ *Van Duyn*, 502 F.3d at 817.

¹³⁸ *Id.*

¹³⁹ *Van Duyn*, 2005 WL 50130, at *20–21.

¹⁴⁰ *Id.* at *3, *20.

¹⁴¹ *Id.* at *20. Christopher’s parents argued that the ALJ’s order for the extra math instruction was compensatory (“to make up for the math lost time”), but the district successfully argued that the ALJ only held that the “district was required to provide additional math instruction on a going-forward basis.” *Id.* Additionally, the District Court also rejected a claim for attorney’s fees under Section 1515(i)(3)(B)(i) because it found that “taken as a whole, [the] plaintiff did not obtain relief on a significant claim in a manner that caused a material alternation in his legal relationship with the defendant.” *Id.* Thus, the District Court rejected the awarding of attorney’s fees despite the fact that the Court awarded a remedy for the plaintiff. Although the discussion of attorney’s fees is outside the scope of this Note, it is briefly mentioned at *infra* note 187.

¹⁴² See *Walker v. District of Columbia*, 157 F. Supp. 2d 11, 30 (D.D.C. 2001) (“Where a school system fails to provide special education or related services, a student is entitled to compensatory education.”).

¹⁴³ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 818–19 (9th Cir. 2007).

had approved the IEP. Instead, they argued that by not implementing portions of Christopher's IEP, the district had changed his IEP without notice to or consent of his parents.¹⁴⁴ Furthermore, his parents argued that the school district's action prevented their participation in the decision-making process around their son's IEP.¹⁴⁵ The court rejected these arguments because it did not read the district's failure to implement specific portions of the IEP as the district "changing" the IEP.¹⁴⁶ The court reasoned that there was "no evidence in the record that the District ever attempted to change his IEP after the 2001–02 school year began."¹⁴⁷ Furthermore, the court rejected the notion that when a district fails to implement a portion of an IEP, it changes the IEP and thus creates a procedural violation because "there is no indication that a conflation of this sort is intended or permitted by the statute."¹⁴⁸ Thus, the court strictly interpreted IDEA's procedural safeguards, finding that since there were no "official" revisions of Christopher's IEP, the district did not violate the Act's procedural requirements.¹⁴⁹

¶38

After addressing the Van Duyns' procedural argument, the court then addressed their substantive argument. First, the Van Duyns argued that the burden of proof during the administrative hearing should have been placed on the school district.¹⁵⁰ Based on the recent Supreme Court decision of *Schaffer v. Weast*,¹⁵¹ the Ninth Circuit rejected this contention, finding that the Van Duyns, as the party seeking relief, bore the burden of proof.¹⁵² The Van Duyns argued that *Schaffer* did not apply because it dealt with a challenge to an IEP's content and not to its implementation, but the Ninth Circuit rejected this too, commenting that "[n]othing in *Schaffer* hinged on the kind of challenge being made to the IEP. . . . [Thus n]either *Schaffer* nor the text of the IDEA supports imposing a different burden in IEP implementation cases than formulation cases."¹⁵³ Second, the

¹⁴⁴ *Id.* at 819. Section 1415(b)(3) requires that "written prior notice to the parents of the child [must occur] before (A) propos[ing] to initiate or change; or (B) refus[ing] to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(3).

¹⁴⁵ *Van Duyn*, 502 F.3d at 819. Section 1415(f)(3)(E)(ii)(II) allows "a hearing officer [to] find that a child did not receive a free appropriate public education only if the procedural inadequacies . . . significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child." 20 U.S.C. § 1415(f)(3)(ii)(II).

¹⁴⁶ *Van Duyn*, 502 F.3d at 819.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* The court also rejected a claim by Christopher's parents that *Manalansan v. Board of Education of Baltimore City* applies, stating that "[l]ike all other courts to have considered the relationship between the IEP implementation failures and IDEA procedural violations, *Manalansan* understood the tardiness and absences of the plaintiff's aides as failure to implement the IEP, not surreptitious attempts to alter it." *Id.*

¹⁴⁹ This argument is important as it implicates educational policy and a school district's motives for avoiding legal challenges to the implementation of an IEP. This is because parents who are satisfied with an IEP's content are probably less likely to challenge a school district's implementation of that IEP. Therefore, a school district might have an incentive to promise more than it intends to provide, betting that the parents might not challenge the IEP's implementation (assuming of course the parents learns of the failure). Thanks to Professor Mark Weber for this insight.

¹⁵⁰ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 820 (9th Cir. 2007).

¹⁵¹ 545 U.S. 49, 62 (2005) ("[T]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.").

¹⁵² *Van Duyn*, 502 F.3d at 820.

¹⁵³ *Id.* Many commentators have called upon Congress to amend the IDEA in order to undo the *Schaffer* decision, but Congress has yet to do so. See generally Luke Hertenstein, Note, *Assigning the Burden of Proof in Due Process Hearings: Schaffer v. Weast and The Need to Amend The Individuals with Disabilities in Education Act*, 74 UMKCC L. REV. 1043 (2006); Kevin Pendergast, Comment, *Schaffer's Reminder: IDEA Needs Another Improvement*, 56 CASE W. RES. L. REV. 875 (2006); Jordan L. Wilson,

Van Duyns also argued that the IEP should be treated as a contract and thus should be analyzed under breach-of-contract analysis, but the court rejected this argument.¹⁵⁴

¶39 Third, and most importantly, the Van Duyns alleged that the district’s failure to implement Christopher’s IEP deprived him of FAPE.¹⁵⁵ Because the standard of evaluating an IEP’s implementation was a matter of first impression in this circuit, the court analyzed the IDEA and relevant case law to articulate a new standard before deciding whether the district violated the IDEA.

¶40 Beginning with the IDEA, the court found that “[t]here is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.”¹⁵⁶ Although the court concluded that a party may claim injury due to a district’s failure to implement an IEP under Section 1415(f), it limited this claim by stating that the Act “counsels against making minor implementation failures actionable.”¹⁵⁷ It supported this statement with a citation to Section 1401(9), which defines FAPE as “special education and related services that . . . are provided *in conformity* with the [student’s] individualized education program.”¹⁵⁸ Thus, the court concluded the “in conformity” clause of Section 1401(9) limits the scope of challenges available under Section 1415(f) to more than just minor implementation failures, because the word “conformity” does not imply an exact requirement.¹⁵⁹

¶41 After finding no textual support for a “perfect adherence” standard in the IDEA, the court then examined whether the relevant case law supported such reasoning. Like many other courts,¹⁶⁰ the majority first turned to *Rowley*’s interpretation of FAPE. In extending *Rowley* logic to implementation challenges, the majority focused on two parts of the Supreme Court’s opinion. First, the majority reasoned that since *Rowley* found that minor *procedural* flaws are not per se violations of FAPE, it therefore logically follows that minor *substantive* flaws in implementation of an IEP are also not per se violations of FAPE.¹⁶¹ Second, the majority drew from *Rowley*’s overall policy discussion regarding a

Note, *Missing the Big IDEA: The Supreme Court Loses Sight of the Policy Behind The Individuals With Disabilities Education Act* in Schaffer v. Weast, 44 HOUS. L. REV. 161 (2007). *But see* Jennifer M. Burns, Note, Schaffer v. Weast: *Why the Complaining Party Should Bear the Burden of Proof in an Administrative Hearing to Determine the Validity of an IEP under IDEA*, 29 HAMLINE L. REV. 569 (2006).

¹⁵⁴ Specifically, the Van Duyns argued that the IEP should be treated as a contract and thus the ambiguities in the IEP that led to the district’s failure to implement should be “resolved in [his] favor because the document was drafted by the district for his benefit.” *Van Duyn*, 502 F.3d at 820. The court rejected this argument, finding that since IEPs are a statutorily created right, IEP claims cannot proceed under breach-of-contract analysis. *Id.* Furthermore, the court stated in dicta that even if contract law did govern this claim, that it would not make a difference because Christopher’s parents “played a central role” in creating his IEP and that the contract really was not that ambiguous. *Id.*

¹⁵⁵ *Id.* at 819.

¹⁵⁶ *Id.* at 821.

¹⁵⁷ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 821 (9th Cir. 2007). The court reasoned that a party may “challenge an IEP . . . ‘on substantive grounds based on a determination of whether the child received a free appropriate public education.’” *Id.* (quoting 20 U.S.C. § 1415(f)(3)(E)(i)).

¹⁵⁸ 20 U.S.C. § 1401(9) (emphasis added).

¹⁵⁹ *See infra* note 203 and accompanying text.

¹⁶⁰ *See* 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, 334 (2008) (“[T]he two-part test articulated by the *Rowley* Court has become the guiding framework when determining whether the services contemplated by an IEP have delivered FAPE.”).

¹⁶¹ *Van Duyn*, 502 F.3d at 821; *see also* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982).

school district's flexibility and expertise in providing special education and related services and concluded that a "perfect adherence" standard would conflict with a school district's flexibility in the creation and implementation of a student's IEP.¹⁶²

¶42 Finally, the majority then looked to *Bobby R.* and *Clark* for additional support for its reading of *Rowley* and the text of the IDEA.¹⁶³ After discussing both *Bobby R.* and *Clark*, the majority concluded that only "a *material* failure to implement an IEP violates the IDEA."¹⁶⁴ A material failure, according to the court, "occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."¹⁶⁵ (It should be noted that this is a slightly different definition from an earlier version of the Ninth Circuit's decision as the earlier version included both the minor discrepancy language as well as stated that "[a] material failure occurs when the services a school provides to a disabled child *fall significantly short* of the services required by the child's IEP."¹⁶⁶) Most importantly, and as discussed below, the court significantly limited the material failure standard: "[W]e clarify that the materiality standard *does not require* that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided."¹⁶⁷

¶43 In applying the material failure standard, the court held that only the school district's failure to provide sufficient math instruction violated Christopher's right to FAPE.¹⁶⁸ In so holding, the majority did not provide any reason why this was a material failure other than noting that the ALJ had found that this was a failure.¹⁶⁹ After addressing the math claim, the court then found that none of the other allegations rose to the "material failure" standard.¹⁷⁰

¶44 The majority applied its new materiality standard to the four main claims advanced by the Van Duyns (failure to provide math instruction, failure to implement the behavior plan, whether the work was on his level, and whether he was placed in a self-contained classroom) and to seven secondary claims.¹⁷¹ Below are the majority's conclusions for all of the alleged implementation failures:

¹⁶² Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821 (9th Cir. 2007).

¹⁶³ *Id.* at 821–22. Neither the court nor the appellate briefs cite to *Melissa S. v. School District of Pittsburgh*, 183 F. App'x. 184 (3d Cir. 2006). This is perhaps due to the fact that *Melissa S.* is a non-precedential case published only in the Federal Appendix.

¹⁶⁴ *Van Duyn*, 502 F.3d at 822 (emphasis added).

¹⁶⁵ *Id.*

¹⁶⁶ See Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 481 F.3d 770, 781 (2007), *amended by* Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (2007) (emphasis added).

¹⁶⁷ *Van Duyn*, 502 F.3d at 822 (emphasis added).

¹⁶⁸ *Id.* at 823.

¹⁶⁹ See *id.*

¹⁷⁰ See *infra* notes 171–183.

¹⁷¹ Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 823–25, 823 n.5 (2007). The court did not use the terminology "main" or "secondary" claims, but they are organized in this fashion as the court discussed the four "major" claims in detail in the text, and discussed the other "secondary" claims very briefly in a footnote.

Findings on Major Claims

- (1) The school district’s failure to provide eight to ten hours of math instruction per week was a material failure because Christopher only received five hours a week.¹⁷²
- (2) The district’s failure to implement his behavioral plan in the same manner that his middle school did was not a material failure because the IEP did not say it had to be identical, the school did use many of the behavioral techniques in the plan, and evidence suggested that the elementary school behavior plan was inappropriate for the middle school.¹⁷³
- (3) Since there was “ambiguity in the record about whether . . . work was presented at [Christopher]’s level,” the court could not conclude that the district materially failed to present work at his level.¹⁷⁴
- (4) The district did not materially fail to provide him with a self-contained classroom because his IEP did not require a single classroom of just “highly disabled students receiv[ing] instruction individually or in small groups . . . [, allowing] complete flexibility as to the timing and content of instruction.”¹⁷⁵ Even if his IEP did require this, the district provided a self-contained classroom as his class-sizes varied from seven to fifteen, he always had one teacher and one aide assigned specifically to him, and because the instruction was flexible enough to allow breaks and individual instruction when necessary.¹⁷⁶

Findings on Secondary Claims

- (1) The district did not materially fail to provide daily reading and writing because he had language arts on certain days of the week and had “relevant” classes on the other days of the week.¹⁷⁷

¹⁷² *Id.* at 823.

¹⁷³ *Id.* at 823–24. The Van Duyns claimed that the plan was not implemented because (1) the middle school did not use daily behavior cards as strictly as the elementary school; (2) a social worker wasn’t employed in one of his classrooms and was used “improperly” by two others; (3) Christopher was not told to go to his “quiet room” after misbehaving; and (4) Christopher’s “quiet room” was not adequately equipped. *Id.* at 824. The majority concluded that the IEP did not explicitly say that the middle school’s implementation had to be identical to the elementary school’s implementation; it was also not implicit because his IEP did not “clearly describe” how the elements in his elementary school behavior plan were either used in elementary school or how they were to be used in middle school. *Id.*

¹⁷⁴ *Id.* at 824. The ambiguity existed because his aide testified, “what [Christopher] would learn about on any given day depended on what the [rest of the] class was taught that day.” *Id.* In contrast, Christopher’s two main teachers testified that his instruction was one-on-one and “was never subjected to lecture-style teaching.” *Id.* Additionally, this is one area where the court noted his educational progress, stating that “there is no evidence that his educational progress was hindered as a result of exposure to materials that were too advanced for him.” *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 824–25 (2007). The majority distinguishes this situation from *Ash v. Lake Oswego School District No. 7J*, 766 F. Supp 852 (D. Or. 1991), a case cited by the Van Duyns.

¹⁷⁷ *Van Duyn*, 502 F.3d at 823 n.5. The district alternated student schedules in blocks, thus on “red” days he had gym, language arts/reading, math, and study skills; on “white” days he had social studies/language arts, computers/vocational, language arts, and reading. *Id.* at 815.

- (2) Despite not working towards all of his short-term objectives, the district did not materially fail “given the extremely large number of objectives.”¹⁷⁸
- (3) There was no material failure regarding his augmentative communication services because his IEP only required these services two hours a month. Furthermore, the IEP did not require these services to be provided only by regional staff.¹⁷⁹
- (4) Despite the regional autism consultant’s failure to visit twice a week as stated in the IEP, this was not a material failure because the regional autism consultant made “frequent visits” as did other autism consultants.¹⁸⁰
- (5) The district provided Christopher with “approximately” the required time for gym and swimming, thus the district did not materially fail to implement these provisions of his IEP.¹⁸¹
- (6) Christopher’s report cards “largely resembled the elementary school report cards used previously and tracked many of the IEP’s goals and short term objectives.”¹⁸²
- (7) His aide’s failure to be trained at the state level was not a material failure because she attended autism classes elsewhere and had met with “people knowledgeable about [Christopher]’s experience with the condition.”¹⁸³

¶45

In conclusion, the majority held that only the district’s failure to provide adequate math instruction constituted a deprivation of FAPE.¹⁸⁴ Although the Ninth Circuit affirmed the district court’s holding that the school district did not have to provide compensatory instruction, and thus the school district’s “corrective actions” met the IEP’s requirements,¹⁸⁵ it partially reversed the district court’s refusal to grant attorney’s fees. The Ninth Circuit found that a party challenging an implementation of an IEP could recover attorney’s fees, despite not being awarded compensatory education, if a party “prevail[s] on the issue’s merits and obtain[s] a remedy . . . that materially alter[s] his

¹⁷⁸ *Id.* at 823 n.5.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* According to Christopher’s parents, the IEP required “26 regional consultations” within a 3-month period, but the autism consultant only visited 14 times. Brief of Petitioner-Appellants at *21, *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007) (No. CV-02-01060). Relying on the district court’s conclusion that (1) Christopher’s parents did not explain why the IEP required twice-a-week visits from a regional consultant instead of just an autism consultant from the district and that (2) the difference between “regional” and “district” consultation in this case was one merely of title not substance, the court found that there was not a material failure. *Van Duyn*, 502 F.3d at 823 n.5. See also *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.*, 2005 WL 50130, at *13 (D. Or. Jan. 11, 2005).

¹⁸¹ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 823 n.5 (2007). The ALJ found that the IEP did not specifically require gymnastics and swimming. “Instead the IEP required three or four hours per week of ‘adaptive PE.’ Gymnastics, along with swimming, were listed in the IEP as ‘related services.’” *Van Duyn*, 2005 WL 50130, at *13 (D. Or. Jan. 11, 2005). Thus, these services were just a few among many activities that could be used. *Id.* The lower court did note, however, that “even if the IEP required a certain amount of weekly time spent in gymnastics class, it would be difficult on this record to find any failure to provide such classes material” because “the parents do not show that a failure to participate in gymnastics cost plaintiff material vestibular benefits which he did not obtain from swimming.” *Id.* This analysis by the lower court seems to use the educational benefit standard.

¹⁸² *Van Duyn*, 502 F.3d at 823 n.5.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 825.

¹⁸⁵ The school district accommodated the extra hours by increasing Christopher’s math instruction to three days a week and required him to work on math during “advisory time.” *Id.* at 823.

legal relationship with the District.”¹⁸⁶ Despite prevailing on the merits (math instruction) and obtaining a remedy (corrective actions by the school district), the court refused to grant attorney’s fees because “attorney’s fees should not be granted to *parent* attorneys who represent their children in IDEA proceedings.”¹⁸⁷

C. Judge Ferguson’s Dissenting Opinion

¶46 In his dissent, Judge Ferguson sounded several judicial and policy concerns as he criticized the majority’s materiality standard. First, Judge Ferguson viewed a failure to comply with a student’s IEP as a *per se* deprivation of FAPE.¹⁸⁸ Judge Ferguson argued that the “in conformity with” language in the Act and the use of the phrase “in accordance with the child’s IEP” in the Federal Regulations leaves no room for the courts to evaluate the substantive quality of a district’s failure to fully implement an IEP.¹⁸⁹

¶47 Among the several reasons for this view, Judge Ferguson argued that it would be inappropriate for the judiciary to determine what constitutes a material failure.¹⁹⁰ He reasoned that since IEP teams are experts in the area of special education, once the content of an IEP is agreed upon by all required parties, judges are not in a position to substantively evaluate the contents of an IEP.¹⁹¹ Additionally, he argued that school districts could use this materiality rule to intentionally change certain parts of a student’s IEP without meeting the Act’s procedural requirements just by ignoring what it deems “non-material.”¹⁹² Finally, he argued that the materiality standard is too vague, especially in light of the fact that “most IEPs contain . . . quantitative requirements.”¹⁹³

IV. EVALUATING *VAN DUYN EX REL. VAN DUYN V. BAKER SCHOOL DISTRICT 5J*

¶48 In determining whether the *Van Duyn* court came to the correct legal decision, it is necessary to examine the majority’s application, textual analysis, and its precedential analysis. It is also relevant to apply the other standards discussed above to show the implications of the new standard and how the decision has affected this new body of law.

¹⁸⁶ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 826 (2007). Thus, the court rejected the school district’s argument that “because the ALJ ordered only the provision of services already required by the IEP, there was no change in the parties’ existing legal relationship.” The court went further, stating that “[w]ere the District’s argument accepted, it would mean that a plaintiff in an implementation failure suit could win attorney’s fees only if he was awarded not only the remedies mandated by his IEP, but also compensatory education (or other relief) not called for his IEP.” *Id.*

¹⁸⁷ *Id.* Currently, four Circuits do not permit the recovery of attorney’s fees for parents who represent their children. See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir.1998). Whether or not this is a correct interpretation of the IDEA is outside the scope of this Note.

¹⁸⁸ *Van Duyn*, 502 F.3d at 827 (Ferguson, J., dissenting) (“A school district’s failure to comply with the specific measures in an IEP to which it has assented is, by definition, a denial of FAPE, and, hence, a violation of the IDEA.”).

¹⁸⁹ *Id.* See 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.323(c)(2).

¹⁹⁰ *Van Duyn*, 502 F.3d at 828.

¹⁹¹ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 828 (2007).

¹⁹² *Id.*

¹⁹³ *Id.*

A. Application of the New Materiality Standard

¶49 Several patterns emerge in the application of the new standard. First, two of the four major claims addressed not whether the district failed to implement agreed-upon content, but instead whether the IEP even required the district to provide those services.¹⁹⁴ Thus, the analysis of these claims was more like analysis in typical IDEA claims, dealing with content of an IEP and not implementation. This is an interesting twist to the case, as the majority spent significant time detailing the new materiality standard, yet at the same time did not apply it across the board. This perhaps indicates the materiality standard—as evidenced by the court’s application and the lack of voluminous discussion regarding implementation standards generally throughout federal courts—only applies in very limited situations.

¶50 Second, the majority used the materiality standard not in the *Bobby R.* or *Clark* manner, but more in the de minimis or “more than a minor discrepancy” manner for several of his claims.¹⁹⁵ Thus despite citing to the *Bobby R.* and *Clark* standard for its rule, the court did not apply the standard from those cases. By never discussing whether any of the provisions were essential to Christopher’s IEP, the majority implicitly rejected *Bobby R.*, despite citing it with approval.

¶51 Third, the court only discussed Christopher’s educational performance twice. The main instance was in discussing the behavioral plan, when the court used the fact that Christopher’s behavior improved to show that the elementary school’s behavioral plan “was inappropriate for the middle school context.”¹⁹⁶ The only other mention of his educational benefit was when the court discussed the level of work claim.¹⁹⁷ Here the court refused to find an implementation failure due to conflicting evidence, but did note that there was no evidence that his “educational progress was hindered as a result of exposure to materials that were too advanced for him.”¹⁹⁸

¶52 Fourth, the court seemed to briefly use a good faith/excusable behavior standard for his aide’s failure to be trained at the state level, for the district’s failure to not work toward all of his short-term objectives, and for the autism consultant’s failure to meet with him twice a week.¹⁹⁹

¹⁹⁴ For example, the court held that the district did not have to provide an identical behavior plan, *supra* note 173 and accompanying text, and found that the IEP did not require a self-contained placement, *supra* note 175 and accompanying text. Additionally, the court also conducted a content analysis with the augmentative communication skills program, *supra* note 179 and accompanying text.

¹⁹⁵ The provisions that the court found to be “not material,” in such a manner that it analyzed whether the failure “was more than a minor discrepancy,” included the self-contained classroom issue, his reading and writing, the short-term objectives, the autism consultant, gym/swimming classes, report cards, and his aide’s training. *Van Duyn*, 502 F.3d at 824, 823 n.5.

¹⁹⁶ *Van Duyn*, 502 F.3d at 824.

¹⁹⁷ *Id.* at 823 n.5.

¹⁹⁸ *Id.* at 824.

¹⁹⁹ *Id.* at 823 n.5. The court excused the aide’s failure to be trained at the state level because she was trained in other ways and had sought out assistance of others. *Id.* Regarding the failure to work toward all of the short-term objectives, the court excused the district’s failure due to the “extremely large number of objectives.” *Id.* Finally, the court excused the failure of the autism expert to visit the school twice a week because she and other autism consultants “frequently visit[ed]” the school. *Id.*

B. The New Materiality Standard is Legally Sound

¶53 The majority's new materiality standard is legally sound, but its analysis of the Act's requirements and applicable caselaw is deficient and could have been much stronger. First, the majority's textual analysis is incomplete. The court is correct in noting that the Act provides for a wide range of challenges. The Act affords a party the right to challenge the lack of an IEP, the content of a proposed IEP, the procedures used to create, maintain, and alter an IEP, and a district's failure to implement provisions of an IEP.²⁰⁰ However, the court did not provide any textual or secondary support for why the "in conformity with" clause should limit implementation challenges. Even the *Bobby R.*, *Clark*, and *Melissa S.* courts did not follow this textual analysis.²⁰¹ One commentator argues that the "in conformity with" clause of Section 1401(9)(D) "does not suggest flexibility . . . but rather its definition connotes strict compliance."²⁰² Such criticism is valid given that the court failed to analyze how others have defined "in conformity with." To surmount this criticism, the court's textual argument would have been stronger had it defined the word "conformity." For example, several dictionaries define "conformity" as "similarity" and "likeness."²⁰³ These words do not imply "exact" or "perfect" adherence.

¶54 Second, the majority's precedential analysis is incomplete. The majority substantially relies on *Rowley's* characterization that the IDEA's purpose is to establish a "basic floor of opportunity" and not to require "potential-maximizing education."²⁰⁴ However, this controversial proclamation is the subject of constant scrutiny.²⁰⁵ Furthermore, the court applied *Rowley's* "appropriate education" holding to the context of IEP implementation challenges, despite the fact that *Rowley*, as the majority acknowledged, dealt "with a challenge to an IEP's content," not its implementation.²⁰⁶ The court's logic seems slightly contradictory, as it looked to *Rowley's* substantive "appropriate education" holding for extension into implementation cases through a flexibility to school districts argument, but at the same time relied on *Rowley's* procedural holding.²⁰⁷ A clearer explanation of this extension is needed. One way to

²⁰⁰ See generally 20 U.S.C. § 1415.

²⁰¹ See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App'x. 184 (3d Cir. 2006). Furthermore, neither of *Bobby R.'s* predecessors used this analysis either. See *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd on other grounds*, 932 F.2d 551 (6th Cir. 1991); *Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104 (D. Mass. 1999).

²⁰² Elexis Reed, Note, *The Individuals with Disabilities Education Act—The Ninth Circuit Determines That Only A Material Failure to Implement an Individualized Education Program Violates the Individuals with Disabilities Education Act*, 61 SMU L. REV. 495, 499 (2008).

²⁰³ For example, an Oxford Dictionary from around the time when the bill was passed defined "conformity" as "[c]orrespondence in form or manner; agreement in character, likeness; congruity." THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (C.T. Onions ed., Oxford at the Clarendon Press 3d ed. 1973). A 1995 Oxford defines "conformity" as only "to make similar." CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (R.E. Allen ed. 1995).

²⁰⁴ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 821 (2007) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 197 n.21, 201 (1982)).

²⁰⁵ See, e.g., *J.L. v. Mercer Island Sch. Dist.*, No. CO6-494P, 2006 WL 3628033, at *4 (W.D. Wash. Dec. 8, 2006), *rev'd on other grounds*, No. CO6-494P, 2007 WL 505450 (W.D. Wash. Feb 10, 2007); see also *supra* notes 44–52 and accompanying text.

²⁰⁶ *Van Duyn*, 502 F.3d at 821.

²⁰⁷ *Id.* ("This suggests that minor failures in implementing an IEP, just like minor failures in following the IDEA's procedural requirements, should not automatically be treated as violations of the statute.")

possibly solidify this extension depends upon how one views *Rowley* and implementation challenges. If *Rowley* is seen as requiring rigid enforcement of the IDEA's procedural requirements, but yet setting low substantive requirements, perhaps this extension can be justified. Put another way, if *Rowley's* procedural requirements are harder to satisfy than its substantive requirements, once a court determines procedural requirements are met, then the Act's substantive requirements cannot be held to such a rigorous standard. This appears to be the *Van Duyn* court's view, as it evaluated the implementation challenge within *Rowley's* substantive prong instead of within *Rowley's* procedural prong. However, if a court views implementation challenges as violations of the IDEA's procedural requirements, especially those going to parental participation, then such an extension might not be warranted. Clarification is needed here that is beyond the scope of this Note. Congress should evaluate the trend of courts' extensions of *Rowley's* fairly low standard for IEP content into areas not directly related to the appropriateness of an IEP, such as implementation challenges, eligibility determination, and least restrictive environment cases.²⁰⁸

¶55 The majority also ignores the fact that the Ninth Circuit (along with five other circuits) uses the "meaningful" educational benefit standard and not just *Rowley's* "some educational benefit."²⁰⁹ Although the majority's conclusion that school districts should be "grant[ed] some flexibility . . . with implementing IEPs" is not substantiated with a complete legal discussion, it appears to be the correct conclusion due simply to the fact that *Rowley* still remains good law.²¹⁰

¶56 In addition to not fully discussing the *Rowley* standard, the majority also failed to completely connect the dots between other courts' substantive failure standards and the newly announced materiality standard. There is no discussion as to why the majority chose not to fully adopt the standard used in *Bobby R.* and subsequently in *Clark*. Although the courts in *Bobby R.* and *Clark* required a failure to be "substantial," "significant," or "essential," the *Van Duyn* court required only a material failure. This is a subtle, but important difference. According to the court, a material failure "occurs when there is *more than a minor discrepancy* between the services a school provides to a disabled child and the services required by the child's IEP."²¹¹ This new standard does not require analysis of the importance of the provision within the IEP; in fact, it appears in definition and in practice like a more rigorous de minimis standard.²¹² Further, the court specifically states that "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail."²¹³ Therefore, this standard

²⁰⁸ See Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 154 (2009) ("[T]he reach of *Rowley* should be limited to its definition-of-appropriate-education context . . ."); *id.* at 157 ("[Courts] need to recognize that its some-benefit standard does not govern questions such as which services are needed for a child to be educated in the least restrictive environment.").

²⁰⁹ Aron, *supra* note 39, at 7 n.40.

²¹⁰ This is bolstered by the fact that the Supreme Court has consistently cited *Rowley* with approval, most recently in *Winkelman ex. rel. Winkelman v. Parma City School District*, 550 U.S. 516, 525 (2007).

²¹¹ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (2007) (emphasis added).

²¹² Another example of a more rigorous de minimis standard appears to have been applied in one of the cases applying *Van Duyn's* material failure standard. See *Termine v. William S. Hart Union High Sch. Dist.*, 249 F. App'x 583, 586 (9th Cir. 2007) (finding a denial of FAPE, for among other things, a material failure to implement a student's existing IEP when the school proposed an interim placement for the student in general education thirty-two percent of the time, despite the fact the student's IEP provided that the student spend no time in general education).

²¹³ *Van Duyn*, 502 F.3d at 822.

rejects the educational improvement standard used by other courts, including the court that *Bobby R.* cited for its standard.²¹⁴ Also, the case discussion left out mention of standards employed by other courts, like *Melissa S.*, that examine the reason for the school district's failure. Thus, despite the growing body of law addressing standards used to evaluate a district's failure to implement an IEP, the *Van Duyn* court cited only to *Bobby R.* and *Clark* while omitting other court decisions and, more importantly, other standards.

C. *The New Materiality Standard is an Important Shift in Legal Policy*

¶57 The new materiality standard used by the *Van Duyn* court is an important legal development as it strikes a better balance between deference to educational authorities and maintaining protections for students with disabilities. The most significant legal shift is the majority's *explicit* limiting language regarding examining the student's educational benefit. The *Van Duyn* court specifically rejected the extension of *Bobby R.* that other courts have found,²¹⁵ stating that "we would disagree with *Bobby R.* if it meant to suggest that an educational benefit in one IEP area can offset an implementation failure in another."²¹⁶ The *Bobby R.* court spent considerable time discussing the fact that the student still received an educational benefit despite the failure to implement the student's speech therapy.²¹⁷ The rejection of the educational benefit standard is correct, especially since courts have awarded compensatory education for both procedural²¹⁸ and substantive violations²¹⁹ without regard to the student's educational performance. By not requiring "that the child suffer demonstrable educational harm in order to prevail," the materiality standard shifts the focus away from assessing a student's educational performance and towards the nature of the failure itself.²²⁰

¶58 In addition to this important limitation on the materiality standard, by not fully adopting the *Bobby R.* standard, the *Van Duyn* court adopted a linguistically similar yet, substantively different standard that is more appropriate for judges to use. Judge Ferguson's warnings that "[j]udges are not in a position to determine which parts of an

²¹⁴ See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348–49 (5th Cir. 2000) (adopting "[t]he approach taken" in *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd on other grounds*, 932 F.2d 551 (6th Cir. 1991)).

²¹⁵ See *supra* notes 78–90.

²¹⁶ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 823 n.3 (2007).

²¹⁷ See *Bobby R.*, 200 F.3d at 349–50 (commenting on the fact that the student's "test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basis reading cluster and proofing improved during his years [at the school]").

²¹⁸ See *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) (stating that "Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement" despite failing to meet the Act's procedural requirements).

²¹⁹ See, e.g., *Evanston Comm. Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798, 802–03 (7th Cir. 2004).

²²⁰ *Van Duyn*, 502 F.3d at 822. Such guidance appears to have been lost in one recent case applying *Van Duyn*, *Bobby R.*, and *Clark*. See *Burke v. Amherst Sch. Dist.*, Civ. No. 08-014-SM, 2008 WL 5382270, at *11 (D.N.H. Dec. 18, 2008) ("[H]ere, as in *Bobby R.*, the record demonstrates academic achievement [in spite of a failure to implement]. Across the eight areas of focus in her IEP, [the student] achieved or made satisfactory progress towards more than sixty-five objectives, and made at least some progress toward nearly eighty-five of them. Thus, like the court in *Bobby R.*, . . . [the student] received an educational benefit from [her] IEP.") (internal citations omitted).

agreed-upon IEP are or are not material” mischaracterizes the materiality standard. Such a reading focuses on the materiality of specific provisions of a student’s IEP (like the *Bobby R.* standard) instead of whether the discrepancy between what was agreed-upon in the IEP and what was actually provided was material.²²¹ Quite the opposite, the materiality standard protects the judiciary by only allowing judges to focus on how significant a failure was or if the failure was justified, instead of focusing on the significance of a particular provision of an IEP. Although the court did not explicitly reject the *Bobby R.* standard like the District Court of Columbia in *Catalan v. District of Columbia*, its application implicitly rejected it.²²² Thus, it is advantageous for courts not to decide how important a provision is to a student’s IEP, as courts are not well versed in educational policy and the creation of IEPs.²²³

¶59 Finally, the materiality standard was used to extend *Schaffer* to implementation challenges.²²⁴ The court clearly states that “the party objecting to [an] IEP’s implementation [bears] the burden of proof at the administrative hearing.”²²⁵ Although this might seem inconsistent with the IDEA and unfair due to the nature of the challenge, unless Congress amends the Act to change the burden or unless state legislatures require placing the burden on school districts, the law appears to be settled.²²⁶ Thus, students (and their representatives) have the burden of showing that the failure to implement was “more than a minor discrepancy.”²²⁷ The use of the materiality standard appears to calm fears about placing the burden of proof on the student because, as discussed above, proving harm or a lack of harm to a student’s educational performance is not mandatory.

¶60 Although the materiality standard repudiates *Bobby R.*’s significant provision test and represents an advancement in legal policy, it raises several questions that will need to be answered as the standard is applied. One area that the case does not sufficiently address and thus leaves open to debate is whether a court can find a technical violation of an IEP, find that it was not material, but yet order some type of relief?²²⁸ How does the material failure standard for implementation failures interact with procedural failures?²²⁹

²²¹ Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 827 (2007) (Ferguson, J., dissenting). This perception by Judge Ferguson is probably warranted because the majority’s opinion is not as clear as it could have been; the majority relies on *Bobby R.*, but does not apply the new rule in the same manner as the *Bobby R.* rule.

²²² See *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007) discussed *supra* note 105, 106. More important than rejecting the *Bobby R.* standard, the court in *Catalan* evaluated the claim’s materiality based on a good faith/reasonable excuse standard. Thus, the *Catalan* court held that the school district was excused in not providing the required amount of therapy because the therapist missed just a “handful of sessions,” the therapist had to cut sessions short due to the child’s fatigue, and snow days, holidays, and the child’s absences from school prevented some of the sessions. *Id.* at 76.

²²³ It is hard to imagine what the outcome of this case would have been had the court contemplated whether certain provisions of Christopher’s IEP were significant (outside of his math instruction). It could perhaps be argued that his behavior plan was significant because he is autistic; however, the court decided this issue by merely interpreting the requirements of the IEP, instead of considering the failure to implement. The same could be said about the self-contained classroom allegation. See *supra* notes 173 and 175 and accompanying text.

²²⁴ *Van Duyn*, 502 F.3d at 820.

²²⁵ *Id.*

²²⁶ Weber, *supra* note 28, at 40 n.195.

²²⁷ Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (2007).

²²⁸ Perhaps the court in these cases could enter nominal damages on behalf of the student.

²²⁹ See *S.B. ex rel. Dilip B. v. Pomona Unified Sch. Dist.*, No. CV 06-4874 AHM (RCx), 2008 WL 1766953, at *11–12 (C.D. Cal. Apr. 15, 2008) (refusing to apply *Van Duyn*’s material failure standard to the school district’s failure to ensure that a regular education teacher attend the student’s IEP meeting); see

Or with other non-IDEA claims such as state disability rights statutes, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and claims under the Constitution?²³⁰ Furthermore, should material failures to implement require granting the same type of compensatory relief usually received in procedural and content-based challenges?²³¹ Interestingly, the caselaw cited above regarding the trend in the federal courts to require a substantive failure almost exclusively deals with students seeking compensatory and/or reimbursement relief. This, then, presents the possibility that students could avoid the substantive failure standard by just filing for injunctive relief in an effort to force school districts to strictly comply with the written IEP. Of course, doing so would not compensate the students from past failures. Also, attorney's fees under the IDEA are awarded to the "prevailing party," but what does "prevailing" mean in an implementation context?²³² Does prevailing only apply to material failures? Finally, in light of the court's extension of *Shaffer's* burden of proof holding, should implementation challenges that focus on the school's failure instead of the significance of an IEP provision fit within this category?²³³ These questions are not within the scope of this Note and thus will be left for some other commentator or court to answer.

D. The Materiality Standard Benefits Students and Schools

¶61

In addition to being good for the judiciary, the new materiality standard is also good for schools and children with disabilities. First, the materiality standard still preserves a school district's significant flexibility and leeway in implementing a student's IEP. Additionally, it allows school districts to focus on the bigger picture and not spend considerable time and resources on ensuring the full implementation of every provision of a student's IEP. Finally, having the flexibility provides school districts with some

also Adam J. *ex rel.* Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 812 n.24 (5th Cir. 2003) (refusing to apply *Bobby R.* to procedural violations).

²³⁰ See, e.g., *Couture v. Bd. of Educ. of Albuquerque Public Sch.*, 535 F.3d 1243, 1251–53 (10th Cir. 2008) (noting some possible tension between implementing an IEP and the Fourth Amendment: "If we do not allow teachers to rely on a plan specifically approved by the student's parents and which they are statutorily required to follow, we will put teachers in an impossible position-exposed to litigation no matter what they do."); *Wiles ex rel. Bond v. Dept. of Educ.*, Civ. Nos. 04-00442 ACK-BMK, 05-00247 ACK-BMK, 2008 WL 5331138, at *3 n.4 (D. Haw. Dec. 18, 2008) ("If failures to implement services in an IEP are not automatically considered violations of the IDEA, it follows that similar failures would not give rise to per se liability under Section 504.").

²³¹ The court stated clearly that it would not order compensatory education; instead, it merely required the district to begin complying with the math sections of Christopher's IEP per the ALJ's order. *Van Duyn*, 502 F.3d at 823.

²³² 20 U.S.C. §1415(1)(B)(1). Here, the court stated that attorney's fees for the issue of failing to implement his math instruction would have been awarded despite no order for compensatory education as they were the "prevailing party" had the Van Duyn's hired a third-party to represent them. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 825 (2007).

²³³ See generally Hertenstein, *supra* note 153, at 1052–56. Hertenstein breaks the burden of proof discussion into three phases: Initial Evaluation, Initial IEP Development, and IEP Review and Modification. During evaluation, he argues that the party opposing evaluation should bear the burden of proof as to why the "evaluation is obviously unnecessary." During the development of the IEP, he argues that "the school should bear the burden of proof in the . . . due process hearing [challenging the creation of the IEP], regardless of which party initiated the hearing." Finally, he argues that *Shaffer's* holding should apply only to when a party seeks to modify an IEP "over the objections of the other party." Thus, the burden of proof in these cases lies with "the party asking for change" as this "reflects the IDEA's strong preference both for consensus for the status quo, and protects the child from unnecessary changes unless there are convincing reasons to modify the IEP." *Id.*

incentive to provide as many services as possible.²³⁴ Conversely, if a district is legally responsible to provide all provisions of an IEP, then a district conceivably does not have an incentive to write in as many objectives as possible.

¶62 Second, the materiality standard should prevent school districts from intentionally disregarding certain portions of an IEP in an attempt to alter it without going through the required procedures. This is good for students because it requires districts to meet the agreed-upon provisions and holds them accountable if they do not. Furthermore, the materiality standard is a dramatic improvement from *Bobby R.*'s standard, in that students no longer have to prove that a provision was significant; all they have to do now is show that the failure was significant. Finally, the court allowed the recovery of attorney's fees for material failures, despite the fact that the remedy ordered was not compensatory in nature. Although this standard might appear to only favor school districts, the protections that it affords children are better than *Bobby R.* and are reasonable in light of the current educational benefit standard under *Rowley*.

V. CONCLUSION

¶63 The Ninth Circuit's decision in *Van Duyn* represents a significant and important departure from earlier decisions that required a substantive failure standard in IEP implementation cases. It is unfortunate that the court did not expressly reject the *Bobby R.* standard; instead, the court implicitly rejected it by developing a subtly different rule and application. Nonetheless, it is an important rejection as the newly created materiality standard benefits all parties involved; courts, schools, and students with disabilities stand to gain from the use of the materiality standard. The decision stands on relatively firm legal ground and is a good standard in light of its legal and educational implications.

²³⁴ *But see* Reed, *supra* note 202, at 499 ("Allowing the flexibility that the Supreme Court [in *Rowley*] and the Ninth Circuit [in *Van Duyn*] suggest regarding IEP content and implementation only undermines the very reason Congress created the IDEA—the educational needs of millions of children with disabilities were not being fully met.").