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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

*Elexis Reed**

PRIOR to 1975, Congress found that the educational needs of millions of children with disabilities were not being fully met.¹ In response, Congress created what is now called the Individuals with Disabilities Education Act (“IDEA”) “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”² One of the most significant mechanisms for achieving the goals of the IDEA is the creation and implementation of an individualized education program (“IEP”) for each disabled child.³ The United States Supreme Court has articulated the standard for assessing an IEP’s content.⁴ However, only the Fifth Circuit and the Eight Circuit have addressed the standard for assessing an IEP’s implementation.⁵ The Ninth Circuit dealt with this issue for the first time in *Van Duyn v. Baker*

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1. See 20 U.S.C. § 1400(c)(2) (2000).

2. 20 U.S.C. § 1400(d)(1)(A) (2000).

3. 20 U.S.C. § 1414(d)(1)(A) (2000); see also *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 818 (9th Cir. 2007).

4. See generally *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982) (holding that a state meets its obligation to provide handicapped children with a free appropriate education by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction”).

5. See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *Nesho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

School District 5J, holding that only a *material failure* to implement an IEP violates the IDEA.⁶ The Ninth Circuit's holding was in error because it contradicted the IDEA and its goals. The court should have found, as the dissent did, that failure to implement any portion of an IEP violates the IDEA.

During the 2001-2002 school year, Van Duyn was a thirteen-year-old mentally disabled child who had a severe case of autism and required an IEP.⁷ As such, "[o]n February 22, 2001, a team comprised of teachers, district representatives and Van Duyn's mother finalized a comprehensive IEP for the 2001-02 school year."⁸ The IEP required Van Duyn to work on reading and writing for six to seven hours per week, mathematics for eight to ten hours per week, and physical education for three to four hours per week.⁹ Additionally, it incorporated a behavioral plan.¹⁰ Furthermore, the IEP required that Van Duyn be placed in a self-contained classroom and that all materials be presented at his level.¹¹ It also required a regional autism specialist to visit the school twice per week, "augmentative communication" services for two hours per month, and his aide to receive autism training.¹² Finally, the IEP mandated that the school give quarterly report cards marking Van Duyn's progress and ensuring that all short-term objectives were being pursued.¹³

Van Duyn alleged that Baker School District 5J (the "District") failed to implement key portions of his IEP during the 2001-2002 school year, which included, among other things, that the district "fail[ed] to train [his] teachers and aide; fail[ed] to provide required placement in a self-contained classroom; fail[ed] to provide adequate 'direct teacher engagement' with [Van Duyn]; fail[ed] to work on several of [his] academic IEP goals throughout the day; and fail[ed] to follow the IEP-designated behavior plan."¹⁴ Van Duyn alleged that this failure to implement his IEP violated the IDEA by depriving him of a free appropriate public education ("FAPE") guaranteed by the IDEA.¹⁵

Van Duyn's parents requested a due process hearing pursuant to 20 U.S.C. § 1415(f).¹⁶ An administrative law judge ("ALJ") concluded that because Van Duyn was not being given the required eight to ten hours of mathematics per week, the District had failed to implement the IEP in that respect.¹⁷ However, the ALJ ruled in favor of the District in every

6. *Van Duyn*, 502 F.3d at 822.

7. *Id.* at 815.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 816.

12. *Id.*

13. *Id.*

14. *Van Duyn v. Baker Sch. Dist. 5J*, No. 02-1060-MO, 2005 U.S. Dist. LEXIS 44883, at *18 (D. Or. Jan. 11, 2005).

15. *Van Duyn*, 502 F.3d at 814-15.

16. See 20 U.S.C. § 1415(f) (Supp. 2004); *Van Duyn*, 502 F.3d at 816.

17. *Van Duyn*, 502 F.3d at 816-17.

other contested area.¹⁸ More specifically, the ALJ “found that Van Duyn’s aide and teachers had been properly trained, that he had been placed in a self-contained classroom, that his teachers had worked with him on oral language skills, that he had received daily instruction in reading and that short-term objectives . . . had not initially been implemented but were now being followed.”¹⁹

Following the ALJ’s decision, Van Duyn appealed to the district court.²⁰ The district court found that the District did not fail to implement a substantial portion of Van Duyn’s IEP, and that the District had obeyed the ALJ’s direction to provide additional math instruction to Van Duyn.²¹ Van Duyn then appealed to the Ninth Circuit, which held that only a “*material failure* to implement an IEP violates the IDEA.”²²

The Ninth Circuit addressed the issue of how much leeway the IDEA allows a district in implementing an IEP.²³ The Ninth Circuit looked to both the text of the IDEA and decisions of other courts to determine the standard for assessing an IEP’s implementation.²⁴ The court held that when the “school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child’s IEP.”²⁵ In particular, the court found that “[a] material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.”²⁶ In Van Duyn’s case, the Ninth Circuit held that the District had not materially failed to implement his IEP and thus had not violated the IDEA.²⁷

To determine the standard for assessing an IEP’s implementation, the court looked to the text of the IDEA, which defines a free appropriate public education as “special education and related services that . . . are provided in conformity with the [child’s] individualized education program.”²⁸ The court read “in conformity with” the IEP as counseling “against making minor implementation failures actionable.”²⁹ After reviewing the text of the IDEA, the Ninth Circuit concluded the statute did not require perfect adherence to an IEP, nor did it require a court to find that minor implementation failures were a denial of a free appropriate education.³⁰ Additionally, the court looked to the Supreme Court’s decision in *Board of Education of Hendrick Hudson Central School District*,

18. *Id.*

19. *Id.* at 817.

20. *Id.*

21. *Id.*

22. *Id.* at 822.

23. *Id.* at 815.

24. *Id.* at 821.

25. *Id.* at 815.

26. *Id.*

27. *Id.* at 826.

28. 20 U.S.C. § 1401(9)(D) (Supp. 2004); *Van Duyn*, 502 F.3d at 821.

29. *Van Duyn*, 502 F. 3d at 821.

30. *Id.*

Westchester County v. Rowley regarding the standard for assessing the content of an IEP to help determine the standard to be used for assessing an IEP's implementation.³¹ The Supreme Court described the IDEA's purpose as providing a "basic floor of opportunity" rather than a "potential-maximizing education" which supported granting some flexibility to the district responsible for implementing the IEPs.³² Furthermore, the court looked to the Fifth Circuit and the Eighth Circuit, the only two circuits to have explicitly addressed IEP implementation failures, and found that both circuits had addressed the IEP implementation failures consistently with their reading of the text of the IDEA and *Rowley*.³³

Applying the "materiality" standard, the court only focused on what it understood to be Van Duyn's weightiest claims: (1) insufficient math instruction, (2) not implementing Van Duyn's behavior management plan, (3) not presenting work at Van Duyn's level; and (4) not placing Van Duyn in a self-contained classroom.³⁴ With respect to all of Van Duyn's claims, the court held that none of them constituted a material failure to implement his IEP, thus the District had not violated the IDEA.³⁵

In contrast, the dissent concluded that the District failed to fully implement the IEP, thus violating the IDEA, because failure to implement *any portion* of an IEP violates the IDEA.³⁶ The dissent argued that the "materiality" standard set forth by the majority to address implementation failures was "inconsistent with the text of the . . . IDEA . . . , inappropriate for the judiciary, and unworkably vague."³⁷

Indeed, the majority established the incorrect standard for assessing an IEP's implementation. The dissent correctly identified the flaws in the majority's "materiality" standard and applied the proper standard for assessing the implementation of IEPs—failure to implement *any portion* of an IEP violates the IDEA.³⁸ As the dissent correctly pointed out, "a school district's failure to comply with . . . an IEP to which it has assented

31. *Id.*

32. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., *Westchester County v. Rowley*, 458 U.S. 176, 197 n.21, 201 (1982); *Van Duyn*, 502 F.3d at 821.

33. *Van Duyn*, 502 F.3d at 821–22. The Fifth Circuit addressed the issue of IEP implementation failure in *Houston Independent School District v. Bobby R.*, holding 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 the 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." 200 F.3d 341, 349 (5th Cir. 2000). The Eighth Circuit addressed the issue of IEP implementation failure in *Neosho R-V School District v. Clark*, holding that the IDEA is violated "if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit." 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

34. *Van Duyn*, 502 F.3d at 823.

35. See *id.* at 825.

36. *Id.* at 829 (Ferguson, J., dissenting).

37. *Id.* at 826. For example, as the dissent pointed out, "if an IEP require[d] ten hours per week of math tutoring, would the provision of only nine hours be 'more than a minor discrepancy'? Eight hours?" *Id.*

38. See *id.* at 829.

is . . . a denial of FAPE, and, hence, a violation of the IDEA.”³⁹ The text of the IDEA states that free appropriate education means “special education and related services that . . . are provided *in conformity with* the individualized education program.”⁴⁰ The majority’s finding that “in conformity with” somehow “counsels against making minor implementation failures actionable” is unsupported by the text of the IDEA and incorrect based on the plain meaning of the word “conformity.”⁴¹ After all, “in conformity with” does not suggest flexibility as the majority advocates, but rather its definition connotes strict compliance. Therefore, failure to implement any portion of an IEP is not “in conformity with” the IEP as required by the statutory text, thus making it a denial of FAPE and resulting in a violation of the IDEA.

Additionally, the majority inappropriately found that the Supreme Court’s approach in *Rowley* was informative in regards to the implementation of an IEP.⁴² The majority argued that the Supreme Court’s description in *Rowley* of the IDEA’s purpose supported granting “flexibility to school districts charged with implementing IEPs”; however, it failed to address the underlying tension occurring in *Rowley* regarding this purpose of the IDEA.⁴³ The majority in *Rowley* found that the standard for assessing IEP content is that the content of the IEP confer “some” educational benefit upon the disabled child.⁴⁴ The fact that the majority in *Rowley* found such a low standard in assessing IEP content, only requiring that it confer “some” benefit, does not imply “flexibility” as the majority suggests, but rather advocates the need for a stricter and more stringent standard for IEP implementation to uphold IDEA’s purpose of providing children with disabilities an education that meets their needs and prepares them for the future.⁴⁵ Allowing the flexibility that the Supreme Court and the Ninth Circuit 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. Also, granting this flexibility will further diminish the only educational rights disabled children have—the rights granted to them by the IDEA.⁴⁶

39. *Id.* at 827.

40. *Id.* at 827 (quoting 20 U.S.C. § 1401(9)(D) (2000)).

41. *Id.* at 821. Merriam-Webster’s Dictionary defines “conformity” as “correspondence in form, manner, or character” or “agreement.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 262 (11th ed. 2004).

42. *Van Duyn*, 502 F.3d at 821.

43. *See id.*; compare Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. *Rowley*, 458 U.S. 176, 200 (1982) (6-3 decision) (arguing that Congress only intended the IDEA to provide handicapped children “access” to FAPE), *with id.* at 215 (White, J., dissenting) (arguing that Congress intended the IDEA to identify and evaluate handicapped children and provide them with “an equal opportunity to learn”).

44. *See Rowley*, 458 U.S. at 200.

45. *See* 20 U.S.C. § 1400(d)(1) (2000).

46. In *Rowley*, the Supreme Court first diminished the educational rights of disabled children by finding that the purpose of the IDEA was to allow handicapped children “access” to FAPE, not to “maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children.” *See Rowley*, 458 U.S. at 200.

Furthermore, as the dissent correctly points out, instead of worrying about how material a failure is, one should assume that an IEP Team⁴⁷ settled on a specific educational service for a reason, especially because each specific educational service is designed by the IEP team for a specific disabled child for the purpose of providing that child with a free appropriate public education.⁴⁸ After all, “[i]f the IEP Team had thought that another, lesser service would be sufficient to provide FAPE, it would have included that service in the IEP” instead.⁴⁹ Enabling school districts to disregard portions of the IEP which the IEP Team has already agreed upon would essentially give them a license to single handedly change the content of the IEP, which disregards both the IEP and the parental participation provisions of the IDEA.⁵⁰ Furthermore, a substantial amount of work goes into deciding an IEP, and holding that a school district does not have to follow it could undermine both the work put into creating the IEP and the disabled child’s education. Also, as the dissent argues, the judiciary is not in the position to determine whether IEP implementation failures are material because they do not know the disabled child, and they know that the IEP team included measures that it thought was important enough to be incorporated into the IEP.⁵¹ Finally, even if the majority’s “materiality” standard is applied, because the IEP team designs the IEP to provide a specific student with FAPE any subsequent deviation from the IEP is necessarily material and, thus, a violation of the IDEA.⁵²

In *Van Duyn v. Baker School District 5J*, the Ninth Circuit determined the incorrect standard for assessing the implementation of an IEP and erred in holding that only a *material failure* to implement an IEP violates the IDEA. In reaching its holding, the Ninth Circuit mistakenly extended the Supreme Court’s decision in *Rowley* regarding the standard for IEP content to the area of IEP implementation and misinterpreted the text of the IDEA. In finding that the standard for assessing IEP implementation is one of “materiality,” the Ninth Circuit undermined the purpose and goals of the IDEA and further diminished the educational rights of disabled children. Instead, the Ninth Circuit should have found, as the dissent did, that failure to implement *any portion* of an IEP violates the IDEA.

Next, the Supreme Court diminished the educational rights of disabled children by holding that the standard for assessing IEP content is only that “some” education benefit is conferred upon the disabled child. *See id.*

47. An IEP Team is a group of individuals composed of the disabled child, the disabled child’s parents, at least one regular education teacher (if mainstream participation is contemplated), at least one special education teacher, a specially qualified representative of the school district, an individual who can interpret the instructional implications of evaluation results, and other individuals with expertise regarding the child’s needs and disability. *See* 20 U.S.C. § 1414(d)(1)(B) (2000).

48. *Van Duyn*, 502 F.3d at 827–28 (Ferguson, J., dissenting).

49. *Id.* at 828.

50. *Id.*

51. *Id.* at 829.

52. *Id.* at 828.