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Chelsea Henderson

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by Chelsea Henderson

I. INTRODUCTION

In 2002, L.J., a child with intellectual disabilities and autism, began using an individualized education plan (IEP).[1] This IEP was meant to provide L.J. with the free appropriate public education (FAPE) that is guaranteed to all children across the United States. However, L.J.'s mother did not believe the School Board of Broward County adequately implemented L.J.'s IEP.[2] L.J.'s mother's concern resulted in an almost twenty-year legal battle between L.J. and the Broward County School Board.[3] This battle finally ended in June 2019, when the United States

* The University of Alabama at Birmingham (B.S., cum laude, 2017); Mercer University School of Law (J.D., magna cum laude, 2020). Member, Mercer Law Review (2019-2020). The author would like to thank Associate Dean Linda Jellum for her guidance and support in writing this casenote.

1. 20 U.S.C. § 1401(14) (2020) (defining "individualized education plan"); L.J. v. Sch. Bd. of Broward Cty., 927 F.3d 1203, 1206 (11th Cir. 2019).

2. Parents can make two different legal challenges to their child's IEP: content challenges and implementation challenges. *L.J.*, 927 F.3d at 1207. The Supreme Court of the United States has determined the proper standard for IEP content challenges already. *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203–04 (1982); Endrew F. v. Douglas Cty. Sch. Dist., 137 S.Ct. 988, 998–99 (2017). However, the Court has yet to determine the proper standard for implementing a child's IEP. *L.J.*, 927 F.3d at 1207. As a result, the circuit courts must determine what standard to use in IEP implementation cases.

3. *Id.* at 1206.

Court of Appeals for the Eleventh Circuit joined four other circuits[4] in holding that the proper standard in determining whether a child's IEP is being adequately implemented is the "material deviation" standard.[5]

Congress recognized the right to a FAPE in the Education for All Handicapped Children Act of 1975.[6] Known today as the Individuals with Disabilities Education Act (IDEA),[7] FAPEs are guaranteed to all intellectually disabled children across the country through the use of IEPs.[8] Generally, parents can make two different legal challenges to their child's IEP: content challenges and implementation challenges.[9] The Supreme Court of the United States has addressed IEP content challenges in a number of cases.[10] However, the Court has yet to determine the proper standard for implementing a child's IEP.[11] As a result, the circuit courts have been left to determine what standard to use in IEP implementation cases.

II. FACTUAL BACKGROUND

The plaintiff, L.J., has a speech-language impairment and autism. He attended Broward County public schools from kindergarten to middle school, with periods of home-schooling intermixed. During L.J.'s third-grade year, staff at L.J.'s elementary school worked with L.J.'s mother to create an IEP. This IEP followed L.J. through elementary school, but once L.J. began sixth-grade, the school board proposed a change in L.J.'s IEP. School professionals on L.J.'s IEP Team wanted to update his IEP to accommodate the new middle-school environment. Meanwhile, L.J. displayed disruptive behavior, including refusing to attend school. When L.J. refused to attend school, his mother chose to home-school him.[12]

L.J. returned to school in the seventh grade, but his attendance issues remained. In all, L.J. missed over 100 days of school due to his refusal to attend class and his multiple illnesses. Not only did L.J. miss

4. *See generally* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000); Sumter Cty. Sch. Dist. 17 v. Heffernan, 642 F.3d 478 (4th Cir. 2011); A.P. v. Woodstock Bd. of Educ., 370 Fed.Appx. 202 (2d Cir. 2010) (unpublished).

5. *L.J.*, 927 F.3d at 1207.

6. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat 773.

7. 20 U.S.C. § 1400 (2020).

8. 20 U.S.C. § 1401(9).

9. *L.J.*, 927 F.3d at 1207.

10. *See generally Rowley*, 458 U.S. 176; *Endrew F.*, 137 S.Ct. 988.

11. *L.J.*, 927 F.3d at 1207.

12. *Id.* at 1207–08.

approximately three-fourths of the school year, but when he did attend school, L.J. either engaged in violent outbursts in the classroom or left school early. Once L.J. was in his eighth-grade year, his mother once again unenrolled him from school and began home-schooling L.J.[13]

During this tumultuous time for L.J. and the school, L.J.'s mother began a lengthy legal battle with the Broward County School Board spanning from 2002 to 2019.[14] In 2007, L.J.'s mother filed a final complaint against the Broward County School Board. In this complaint, L.J.'s mother challenged the implementation of L.J.'s elementary school IEP during the "stay-put" period. Although the ALJ had previously found that the school had adequately implemented the elementary IEP, L.J.'s mother claimed that the school failed to properly implement the elementary IEP during her appeal to the United States District Court for the Southern District of Florida.[15]

It is this last complaint that brings us to the current case. An ALJ heard the new complaint during eighteen hearings that spanned two years.[16] This ALJ found that the school had not adequately implemented the elementary school's IEP during L.J.'s seventh- and eighth-grade years—the years when L.J.'s mother appealed the first ALJ's decision to the district court. After the ALJ sided with L.J., both L.J.'s mother and the school filed separate complaints in the district court.[17] L.J.'s mother asked the court to enforce the ALJ's order, along

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13. *Id.* at 1208–09.

14. Almost as soon as L.J.'s IEP was implemented in 2002, L.J.'s mother challenged the IEP and requested due process hearings under 20 U.S.C. § 1414. Then, when L.J. entered sixth grade, and the school wanted to update L.J.'s IEP. L.J.'s mother filed an IDEA complaint challenging the content of this new IEP. Next she then invoked IDEA's "stay-put" provision. The "stay-put" provision requires the continued implementation of an older IEP during the challenge of the new IEP. Thus, L.J.'s mother's request to invoke the "stay-put" provision required the middle school to continue providing L.J.'s elementary school IEP rather than the updated IEP Broward County school board wanted to implement. *Id.* at 1208.

In addition, L.J.'s mother filed multiple other complaints, all of which alleged the middle school IEP was inadequate compared to the elementary IEP. Eventually, an Administrative Law Judge (ALJ) consolidated five of her complaints, along with one of the school's complaints, and held hearings over eight months. After the hearings concluded, the ALJ found that the school appropriately implemented the elementary IEP during the "stay-put" period. Consequently, L.J.'s mother appealed the ALJ's decision to the United States District Court for the Southern District of Florida. That court affirmed the ALJ's findings and order. *Id.* at 1208–09.

15. *Id.*

16. *Id.* at 1209. The time span ranged from March 2007 to October 2009.

17. *Id.*

with additional relief,[18] while the school challenged the ALJ's findings and order. After filing these complaints, both parties cross-moved for judgment on the administrative record.[19]

Instead of ruling on the motions, the United States District Court for the Southern District of Florida issued an order requiring both parties to supply supplemental briefing, thus deferring any decision on the merits of both the school and L.J.'s complaints.[20] As a result, the ALJ ordered both parties to brief the applicable standard of review for IEP implementation cases.[21] Five years after the supplemental briefing was filed,[22] the district court reversed the ALJ's decision and entered judgment in favor of the school, finding that, under the materiality standard, the school did not fail to implement L.J.'s IEP during the "stay-put" period.[23] L.J.'s mother then appealed the district court's decision to the Eleventh Circuit.[24] The issue for the Eleventh Circuit was whether the school's implementation of L.J.'s elementary school IEP during L.J.'s seventh- and eighth-grade school years was adequate according to the IDEA.[25]

III. LEGAL BACKGROUND

A. Life Before IDEA

Before enacting the IDEA in 1975, Congress passed multiple laws to address how the public education system should or would provide services to intellectually disabled students.[26] Then, in 1965, Congress passed the Elementary and Secondary Education Act[27] and the State

18. L.J. also asked to be compensated for attorneys' fees and damages. Complaint for Injunctive Relief, Damages, and Attorneys' Fees, 2011 WL 9198548, 6 (S.D. Fla. 2011).

19. *L.J.*, 927 F.3d at 1209. Judgment on the administrative record is akin to the summary judgment process. G.J. v. Muscogee Ct. Sch. Dist., 668 F.3d 1258, 1267–68 (11th Cir. 2012).

20. *L.J.*, 927 F.2d at 1209.

21. *Id. See* L.J. v. Sch. Bd. of Broward Cty., 850 F.Supp.2d 1315, 1325–26 (S.D. Fla. 2012).

22. There is no reasoning stated in the record that explains why five years passed between the first order in 2012 to the decision in 2017.

23. *L.J.*, 927 F.3d at 1209. *See* L.J. v. Sch. Bd. of Broward Cty., Fla., 2017 WL 6597516, 32 (S.D. Fla. 2017).

24. *L.J.*, 927 F.3d at 1209.

25. *Id.*at 1209–10.

26. A few of these laws include the Training of Professional Personnel Act of 1959, which helped train teachers and other education professionals on how to teach children with intellectual disabilities. Next, the Teachers of the Deaf Act of 1961 helped train teachers for children who were deaf or hard-of-hearing.

27. Elementary and Secondary Education Act, P.L. 89-10 (1965).

Schools Act.[28] Both provided states with grant assistance to help schools educate children with disabilities; however, neither provided direct federal funding for these special education services.

Years later, two lower court decisions proposed that children with disabilities deserve an equal education compared to their typically developing counterparts. The first was *Pennsylvania Association for Retarded Children v. Pennsylvania*.[29] The plaintiffs (PARC) sued on behalf of all intellectually disabled students "who [had] been denied access to a free, public program of education and training" across Pennsylvania school districts.[30] According to PARC, the Pennsylvania school districts failed to provide a free public education to all intellectually disabled children.[31] Both parties entered into a consent agreement that gave all intellectually disabled students the right to free educational programs and training.[32]

The other lower court case that addressed the education of children with intellectual disabilities was *Mills v. Board of Education of the District of Columbia*.[33] Here, a civil action group sought a declaration and an injunction on behalf of seven children to stop the District of Columbia Public Schools from denying children with intellectual disabilities a public education.[34] The court quoted *Brown v. Board of Education*[35] to emphasize the importance of an education.[36] The court emphasized the following statement from *Brown*: "Such an opportunity, where the state has undertaken to provide [education], is a right which must be made available to all on equal terms."[37] The court also pointed out that the Supreme Court of the United States had found that the

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28. State Schools Act, P.L. 89-313 (1965).

29. 334 F.Supp. 1257 (E.D. Pa. 1971). In October 2010, President Obama passed Rosa's Law, amending all federal law, including the IDEA, that referenced "mental retardation" to instead use "having intellectual disabilities" along with other variations of these phrases. P.L. 111-156, 124 Stat 2643. This change in language is in line with the American Psychological Association's newest edition of the Diagnostic and Statistical Manual of Mental Disorders and the World Health Organization's International Classification of Diseases. *Intellectual Disability*, AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION, https://www.asha.org/PRPSpecificTopic.aspx?folderid=8589942540&section=Overview (last visited March 31, 2020).

30. *PARC*, 334 F.Supp. at 1268.

31. *Id.*

32. *Id.* at 1257–58.

33. 348 F.Supp. 866 (D.D.C. 1972).

34. *Id.* at 868.

35. 347 U.S. 483 (1954).

36. *Mills*, 348 F.Supp. at 874–75.

37. *Id.* at 875 (quoting *Brown*, 347 U.S. at 493).

denial of a public education is an "arbitrary deprivation of [students'] liberty in violation of the Due Process Clause [of the Fourteenth Amendment of the Constitution of the United States]."[38] As such, the court found that the Constitution of the United States required the District of Columbia School Board to provide a free public education to children with intellectual disabilities.[39] Both of these cases exhibited a trend in protecting the right to education for children with disabilities.

B. The Birth of the IDEA and How It Works Today

From *PARC* and *Mills*'s reasoning came the IDEA.[40] After these cases, Congress analyzed the education of children with disabilities across the United States. After this Congressional investigation, Congress enacted Education for All Handicapped Children Act of 1975.[41] Congress included findings in the Act, which included that in 1975 there were more than "eight million handicapped children in the United States . . ."[42] Congress further found that the educational needs of these eight million children were not being appropriately met, showing that "more than half of the handicapped children . . . do not receive appropriate educational services which would enable them to have full equality of opportunity[.]"[43] Even more, at least one million of these children with disabilities were completely excluded from the public-school system.[44] Congress further found that detecting disabilities in schoolchildren and the training provided to educators was ineffective.[45]

Today, the Act, known as IDEA, provides that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society."[46] Two of

38. *Id.* at 875 (quoting Bolling v. Sharp, 347 U.S. 497, 500 (1954) (supplemental opinion to *Brown*)).

39. *Id.* at 876.

40. S.R. No. 94-168, at 1430 (1975). According to the Senate Report, these two cases mattered in the creation and enactment of IDEA.

41. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat 773.

42. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(b)(1), 89 Stat 773.

43. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(b)(2)-(3), 89 Stat 773.

44. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(b)(4), 89 Stat 773.

45. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(b)(5), (7), 89 Stat 773.

46. 20 U.S.C. § 1400(c)(1) (2020).

the Act's main purposes are to ensure children with disabilities have the right to a FAPE and to protect this right.[47] To protect the right to a FAPE, the IDEA creates procedural safeguards including the right for students and parents to file a complaint against the school challenging "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a *free appropriate public education* to such child[.]"[48] There are two questions in the current case: What is a FAPE is and how should schools implement a FAPE?[49]

According to the Act, a FAPE is:

> [S]pecial education and related services that—(A) have been provided at the 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].[50]

Although the FAPE itself is important, the implementation of a FAPE is equally important, as shown in subsection (D).[51] Subsection (D) involves IEPs.[52] An IEP is "the centerpiece of the statute's education delivery system for disabled children,"[53] and is defined as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section [1414(d) of this title]."[54] Together, educators and parents play a very significant role in determining the appropriate IEP for a specific child.[55]

Section 1414[56] sets out the collaborative procedure involved in creating an IEP. First, either a parent may request or an educational agency may conduct a full individual evaluation to determine whether a child has a disability.[57] Next, IEPs are created according to statutory guidelines.[58] Then, there is the creation of an IEP Team once an IEP is

47. 20 U.S.C. § 1400(d)(1)–(2) (2020).
48. 20 U.S.C. § 1415(b)(6)(A) (emphasis added).
49. *L.J.*, 927 F.3d at 1212.
50. 20 U.S.C. § 1401(9) (2020).
51. 20 U.S.C. § 1401(9)(D) (2020).
52. *Id.*
53. Honig v. Doe, 484 U.S. 305, 311 (1988).
54. 20 U.S.C. § 1401(14) (2020).
55. Schaffer v. Weast, 546 U.S. 49, 53 (2005) (citing *Rowley*, 458 U.S. at 205–06).
56. 20 U.S.C. § 1414 (2020).
57. 20 U.S.C. § 1414(a)–(c) (2020).
58. 20 U.S.C. § 1414(d)(1)(A)(i) (2020).

in place.[59] This team includes the child's parents, members of the school, local agency, and where appropriate, the child with the disability.[60] The IEP Team decides what should and should not be in the IEP and how to implement the IEP. Further, the IEP Team must meet at least once a year to ensure the IEP is still achieving its goal.[61]

The Act also provides safeguards to ensure schools follow all IDEA procedures.[62] Section 1415 guarantees parents their right to review their child's records, to notice if the local educational agency intends to initiate or refuse to initiate a change in the child's education, and to a due process hearing over IEP issues.[63] This section also sets forth the "stay-put" provision, which provides "during the pendency of any proceedings conducted pursuant to this section, . . . the child shall remain in the then-current educational placement . . ."[64] All in all, IDEA provides comprehensive procedures and guidelines for both educational professionals and parents to ensure children with disabilities receive their constitutionally guaranteed right to a FAPE. The Act gives parents the power to sue if their child is not receiving their FAPE.

IV. COURT'S RATIONALE

In *L.J. v. School Board of Broward County*, the Eleventh Circuit affirmed the district court, holding that the school adequately implemented L.J.'s IEP during his seventh- and eighth-grade school years.[65] Supporting the holding is the administrative posture of the claim, statutory interpretation canons, and similar cases from neighboring circuits.[66]

A. Standard for Reviewing an ALJ's Decision

When district courts review an ALJ's order, such as those orders from IDEA cases, the district court must base its decision on a preponderance of the evidence and must give the ALJ's conclusions their "due weight[.]"[67] When a court gives an ALJ's decision its "due

59. 20 U.S.C. § 1414(d)(1)(B) (2020).

60. *Id.*

61. 20 U.S.C. § 1414(d)(1)(B), (d)(3)–(4) (2020).

62. *See* 20 U.S.C. § 1415.

63. 20 U.S.C. § 1415(b)(1), (b)(3), (b)(6)–(7) (2020).

64. 20 U.S.C. § 1415(j) (2020).

65. *L.J.*, 927 F.3d at 1220.

66. *See generally L.J.*, 927 F.3d at 1211–13.

67. *L.J.*, 927 F.3d at 1210. (quoting R.L. v. Miami-Dade City Sch. Bd., 757 F.3d 1173, 1178 (11th Cir. 2014)).

weight," the court must be cautious to ensure it does not "substitute its judgment for that of the state educational authorities."[68] However, giving an ALJs decision its "due weight" does not mean that a district court must give the ALJ's decision blind deference.[69] Instead, a district court has the discretion to determine how much deference it will give to the ALJ's conclusions of law.[70]

Then, when a federal appellate court reviews the district court's decision, questions of law are reviewed *de novo* while findings of fact are reviewed for clear error.[71] However, where the district court was not provided with additional evidence and the district court based its decision on a "cold administrative record," the federal appellate court "stand[s] in the same shoes as the district court" when reviewing the administrative record.[72] At this point, the federal appellate court can either accept or reject ALJ findings.[73]

B. Interpreting the IDEA

Using these standards, the Eleventh Circuit reviewed the district court's finding of law *de novo* and analyzed the statutory language. First, the court looked to the text of the IDEA to find the ordinary meaning of the words used.[74] The relevant language is found in 20 U.S.C. § 1401(9)(D).[75] This section provides: "Free appropriate public education[.] The term 'free appropriate public education' means special education and related services that— . . . (D) are provided *in conformity with* the individualized education program required under section [1414(d) of this title]."[76] The specific language the court focused on is "in

68. *Id.* (quoting *R.L.*, 757 F.3d at 1178).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (quoting *R.L.*, 757 F.3d at 1181).

73. *Id.*

74. *Id.* at 1211–1212.

75. 20 U.S.C. § 1401(9)(D). The court does not state how it finally ended up at 20 U.S.C. § 1401(9)(D) to interpret the language. However, it seems that the operative section of the statute that leads to the definitions section is 20 U.S.C. § 1415(b)(6), where parents are given an opportunity to challenge an IEP "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or *the provision of a free appropriate public education* to such child[.]" To understand what a "free appropriate public education" is, one must see the definition, which takes one to 20 U.S.C. § 1401(9)(D). Then, the application of statutory interpretation canons begins. LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 80 (Russell L. Weaver ed., Carolina Academic Press 2d. ed. 2013).

76. 20 U.S.C. § 1401(9)(D) (emphasis added).

conformity with."[77] The court explained that it must determine what it means for a school to provide a FAPE to a child "in conformity with" an IEP.[78]

The court focused heavily on the phrase "in conformity with"[79] to determine how adequate IEP implementation must be: must it be perfect or can it be materially sufficient?[80] Congress did not define the phrase "in conformity with," so the court had to look to other sources of meaning to determine the phrase's meaning. In doing so, the court first looked at dictionary definitions, finding that "'[c]onformity' means '[c]orrespondence in form, manner, or use; agreement; harmony; congruity[,]'"[81] and "the condition or fact of being in harmony or agreement; correspondence; congruity; similarity[.]"[82] Next, the court looked to the Code of Federal Regulations, specifically 34 C.F.R. § 300.323(c)(2),[83] which requires schools to provide an education "in accordance with" IEPs.[84] Additionally, the court noted "conspicuously absent" words from the statute, such as "exact" or "identical."[85] The lack of such specific words suggested that "IDEA recognizes . . . some degree of flexibility is necessary in implementing a child's IEP[,]" and that perfect IEP implementation is not appropriate.[86]

Moving beyond the plain meaning canon, the court then considered the statute *in pari materia*.[87] In looking at another code section, specifically 20 U.S.C. § 1400(d)(1)(A), the court noted that the IDEA recognizes that special education services are designed according to each child's "unique needs."[88] The court reasoned that as these "unique needs" change, so does the IEP; [89] children develop quickly, meaning

77. *L.J.*, 927 F.3d at 1212.

78. *Id.*

79. 20 U.S.C. § 1401(9).

80. *L.J.*, 927 F.3d at 1212.

81. *Id.* (quoting BLACK'S LAW DICTIONARY 207 (6th ed. 1991)).

82. *Id.* (citing WEBSTER'S NEW WORLD COLLEGE DICTIONARY 313 (5th ed. 2014)).

83. 34 C.F.R. § 300.323(c)(2) (2020).

84. *L.J.*, 927 F.3d at 1212 (quoting 34 C.F.R. § 300.323(c)(2)). The reason *Chevron* deference was not afforded to the C.F.R. is because this regulation does not interpret the statute section the court is concerned with. In fact, neither the regulation nor the statute interprets the phrase "in conformity with" in reference to the statute at hand, 28 U.S.C. § 1415(b)(6). Thus, the C.F.R. regulation is simply being used as a guide.

85. *L.J.*, 927 F.3d at 1212.

86. *Id.*

87. *Id.* This method considers the whole act's context to help the court determine what the language at issue means. JELLUM, *supra* note 73, at 127–29.

88. *L.J.*, 927 F.3d at 1212 (quoting 20 U.S.C. § 1400(d)(1)(A)).

89. *Id.* (quoting 20 U.S.C. § 1400(d)(1)(A)).

once adequate IEPs can shortly become inadequate.[90] The court also focused on the fact IEPs are reviewed at least once a year,[91] showing that "IEPs have some amount of flex in their joints" with how schools and parents must work together to ensure an IEP remains suitable.[92]

While Congress did not define how to provide an IEP in conformity with the Act, Congress did describe how to create an IEP.[93] The court emphasized that an IEP is not a contract between the school, the parents, and the child, but instead is merely "a written statement."[94] Thus, the court explained that using a standard that requires strict compliance to a particular provision would contravene the idea that an IEP is only a "plan."[95] Moreover, the implementation of "stay-put" IEPs is another telling contextual clue.[96] Some implementation cases revolve around implementing a "stay-put" IEP, such as the current case.[97] As such, perfect implementation of an older IEP "may quite literally be impossible" considering new school settings.[98] The court recognized that whatever standard it creates must also be able to accommodate old IEPs, where "blind compliance" may not be realistic.[99] Thus, when looking at the Act as a whole, the phrase "in conformity with" could not equate to perfect implementation.[100]

C. Guidance from the Sister Circuits

Not only did the Eleventh Circuit apply traditional statutory interpretation tools to determine meaning of the language in the section and, thus, the correct standard for IEP implementation cases, but the court also looked to what other circuits had done in similar cases.[101] The United States Court of Appeals for the Fifth Circuit was the first federal appellate court to determine a standard for IEP implementation cases.[102] The court held that the challenging party "must show more

90. *Id.* (citing Cory D. v. Burke Cty. Sch. Dist., 285 F.3d 1294, 1299 (2002)).
91. 20 U.S.C. § 1414(d)(4)(A)(i).
92. *L.J.*, 927 F.3d at 1212.
93. *See* 20 U.S.C. § 1414
94. *L.J.*, 927 F.3d at 1212 (citing 20 U.S.C. § 1414(d)(1)(A)(i)).
95. *Id.* at 1213 (quoting *Endrew*, 137 S.Ct. at 999).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1212–13.
101. *Id.* at n.6.
102. *See generally Bobby R.*, 3000 F.3d 341.

than a *de minimus* failure to implement all elements of [the] IEP[.]"[103] Instead, the challenging party must show that the school "failed to implement substantial or significant provisions of the IEP."[104] Then, the United States Court of Appeals for the Ninth, Second, and Fourth Circuits also adopted this materiality standard.[105] Thus, four of eleven circuits that have heard this question have adopted this material failure standard, with the Eleventh Circuit following suit.

D. The Eleventh Circuit's Bright IDEA

After discerning the ordinary meaning of the statutory language, considering the statue's context, and discussing the other circuits' resolution of this issue, the Eleventh Circuit held that "the materiality standard—asking whether a school has failed to implement substantial or significant provisions of the child's IEP—is the appropriate test in a failure-to-implement case."[106] However, the court refused to delineate specific steps school districts should take to better assist district courts in applying this new standard.[107] Instead, the court emphasized that every child and every child's IEP are different, and the specific facts of each case should be considered on a case-by-case basis.[108] Although, the court did provide broad guidelines for the lower courts.[109]

First, the court stated that the "focus" in an implementation case should be on "the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld."[110] Reviewing courts must compare the services the school actually delivered against the services outlined in the specific IEP.[111] To determine how much of the service was withheld and how important those withheld services were in light of the IEP as a whole, the courts must use a qualitative and quantitative approach.[112]

Second, a child's academic progress, or lack thereof, should be considered.[113] However, the court was swift in pointing out that a lack

103. *Id.* at 349.
104. *Id.*
105. *Van Duyn*, 502 F.3d at 821; *A.P.*, 370 Fed. Appx. at 205; *Heffernan*, 642 F.3d at 484.
106. *Id.* at 1213.
107. *Id.* at 1214.
108. *Id.*
109. *Id.*
110. *Id.* (quoting *L.J.*, 850 F.Supp.2d at 1320).
111. *Id.*
112. *Id.*
113. *Id.*

of academic progress is not dispositive.[114] Thus, a complaint cannot merely state that a child is not progressing in their education and expect the court to find an implementation failure.[115] Instead, if a complaining party wishes to cite their child's lack of educational progress as proof that the IEP is being implemented incorrectly, the complaining party must show a connection between the lack of progress and a specific implementation failure.[116]

Additionally, the court held that "schools must be afforded some measure of leeway" in determining whether a school should implement a stay-put IEP.[117] Given certain circumstances, it may not be fair to judge a school based only on the effectiveness of a plan not meant to be implemented in its new setting.[118] The court pointed out this does not give schools the unilateral decision-making power to determine whether a "stay-put" IEP should remain in place, and instead, courts should look at the context surrounding the implementation of the IEP.[119] For example, children who move from elementary school to middle school may need different services, but are receiving an education under their old IEP according to the "stay-put" provision may not be able to receive the same exact educational experience that they once had simply based on the child's development and the changing school environment.[120]

Finally, the IEP should be viewed as a whole, considering the IEP's overarching goals.[121] Reviewing courts "must consider the cumulative impact of multiple implementation failures" instead of viewing each implementation failure in isolation of the others.[122] Although one failure may not be enough to trigger the materiality standard, when put together, multiple implementation failures can amount to an IDEA violation.[123] Because of the new materiality standard, Broward County School Board prevailed against L.J. and his mother.[124]

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1215.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 1220. First, the Eleventh Circuit claimed that the ALJ's conclusions lacked support in the administrative record or failed to actually link supposed failures to a provision in L.J.'s "stay-put" IEP. The court reasoned that the ALJ improperly blamed the school for failing to implement certain curriculum recommendations although there was no provision in the "stay-put" IEP requiring the school to adopt the recommendation. The

E. Circuit Judge Jordan's Concurrence and Dissent

Circuit Judge Jordan concurred in part and dissented in part.[125] While Judge Jordan agreed with the materiality standard announced in the opinion, he disagreed with the majority's phrasing of the new standard and the announced outcome.[126] Judge Jordan reasoned that courts should be very careful with the words it chooses when creating new common law.[127] "Instead of asking 'whether a school has failed to implement substantial or significant portions of the child's IEP,' [Judge Jordan] would use the Ninth Circuit's formulation" created in *Van Duyn*.[128] Specifically, Judge Jordan prefers the language that "[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."[129] Judge Jordan recognized that the difference in the language is "subtle," but he emphasized the

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ALJ also improperly faulted the school for not understanding L.J.'s behavior issues because the record indicated that the school did identify L.J.'s behavior problems. Put simply, the "stay-put" IEP did not require the school to implement certain services, so the school cannot be at fault for not implementing them. The court then explained its belief that many alleged implementation failures were due to simple disagreements between L.J.'s mother and the school about how to provide certain amenities. The court further criticized the "stay-put" IEP as a whole, focusing on the fact that the "stay-put" IEP was not meant for middle-school—it was meant to stay in elementary school. As such, the court stated it should be "no surprise" that the "stay-put" IEP did not adequately address some of L.J.'s problems because the IEP was forcibly outdated. *Id.* at 1216–17.

Additionally, the court faulted L.J. for the failure of many IEP services. The blame stemmed from L.J.'s persistent absence from school. Although a child's absence from school does not relive a school of its duties under IDEA, where a child's refusal to attend school is not related to a failure to implement an IEP, the school cannot be faulted. Here, L.J. claimed to have frequent illnesses along with a severe aversion to attending school that began before the current case was brought. Moreover, the school offered L.J. support in an effort to address is frequent absences. Thus, the court held that the school could not be held accountable for L.J.'s persistent absence from school. *Id.* at 1217–19.

The court then addressed L.J.'s behavioral problems. The administrative record indicated that the school created strategies to address future behavior based on observations of L.J.'s past behavior. Also, the school's data collection forms were effective in finding the information that surrounded L.J.'s behavioral issues. The IEP's broad language regarding behavioral issues—"'[b]ehavior[al] needs' will be 'addressed through goals/objectives'" in L.J.'s behavioral plan—supported the notion that the school's efforts did not constitute a material failure. All in all, the school's implementation of L.J.'s "stay-put" IEP during L.J.'s seventh- and eighth-grade school years was not a material failure. *Id.* at 1219–20.

125. *Id.*

126. *Id.*

127. *Id.* at 1221.

128. *Id.*

129. *Id.* (quoting *Van Duyn*, 502 F.3d at 821).

difference is how the language tilts.[130] He would instead like the language to "tilt[] slightly in favor of the child" because that is the population IDEA protects.[131]

Moreover, Judge Jordan reasoned that this was not the right case to use for formulating a new standard.[132] Judge Jordan pointed out that this case has been in the court system since 2002, when the IEP in question was first implemented.[133] In 2002, L.J. was nine-years-old, and by the time of the publication of the opinion, L.J. was twenty-six.[134] Considering the time gap, Judge Jordan reasoned that the facts were too unique to attempt to carve out a new standard based on them.[135] In all, Judge Jordan dissented from the final holding of the case because he believed that the school materially failed to implement L.J.'s "stay-put" IEP.[136] As such, Circuit Judge Jordan would have remanded to the district court to determine the appropriate remedy.[137]

V. IMPLICATIONS

Although the Eleventh Circuit determined what standard lower courts should use for IEP implementation issues, the court did not clearly define how the standard should be applied in these cases.[138] Instead, the court explicitly stated that it would "not attempt to map out every detail of this test," preferring that lower courts use a case-by-case fact analysis.[139] Although the court's choice was no real surprise considering the trend in adopting the materiality standard across circuits,[140] the court could have parsed out the standard more. With this lack of clear guidelines, litigation over IEP implementation will continue because a court will have to evaluate each student's IEP based on its specific facts. This continued litigation means parents are still unable to focus on educating their child with a disability, and schools

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1222. Although Judge Jordan recognized the issues L.J.'s incessant absences caused, he nonetheless believed that the failure of the school to provide L.J.'s mother with lesson and study plans at least seven days in advance of tests and assignments was a material failure. *Id.* at 1222–23.

137. *Id.* at 1223.

138. *See Id.* at 1213–14.

139. *Id.* at 1214.

140. *See Van Duyn*, 502 F.3d at 821; *A.P.*, 370 Fed. Appx. at 205; *Heffernan*, 642 F.3d at 484.

are still unable to know the limits of their obligations to their students with disabilities.

While the courts have not yet crafted clear guidelines in addressing IEP implementation issues, the United States Department of Education (DOE) or Florida Department of Education could do so. The IDEA grants the DOE the power to promulgate regulations to implement the IDEA.[141] The DOE has already promulgated unrelated regulations, including one that guarantees that these regulations apply to states that receive federal funding under the IDEA.[142] Florida receives funding under the IDEA, and to keep this funding, has enacted state statutes and regulations to ensure compliance with the federal law.[143]

Understanding how the federal and state statutes and regulations work together is important in the statutory scheme. This importance stems from the deference usually accorded to a federal agency's interpretation of a federal statute it has been given the power to administer. Known as *Chevron*[144] deference, a federal court must defer to an agency's reasonable interpretation of a federal statute if Congress has not "directly spoken to the precise question at issue."[145] Thus, here, Congress has enacted no legislation to guide IEP implementations, the DOE has the power to interpret the IDEA to guide schools in implementing IEPs, and if reasonable, the DOE's reasonable interpretation would be given *Chevron* deference.[146]

Unfortunately, the DOE has not put forth any reasonable interpretation regarding IEP implementation, even though the DOE was aware that IEP implementation has been an issue between parents and schools since 2000.[147] In the twenty years since the Fifth Circuit set out a standard in IEP implementation cases, the DOE remained silent; the phrase "in conformity with"[148] has not been interpreted by rule or even in a guidance document. As such, the important task of determining the correct standard in implementing IEPs has been left to the circuits. In leaving this important question up to the different federal circuits, the agencies leave open the opportunity for the inconsistent application of federal law. There are two options at this

141. 20 U.S.C. § 1406(a) (2020).

142. 34 C.F.R.§ 300.2 (2020).

143. *See* FLA. STAT. §§ 1003.571, 1003.5715 (2020); FLA. ADMIN. CODE ANN. r. 6A-6.03311 (2020).

144. 467 U.S. 837 (1984).

145. *Id.* at 842–43.

146. *See generally Id.* at 842–45.

147. *See generally Bobby R.*, 200 F.3d 341. This is the first circuit case to address IEP implementation.

148. 20 U.S.C. § 1401(9).

point: (1) Congress could amend the act and define the language or (2) the DOE could issue a regulation or guidance document interpreting the relevant language in the act.

The first option—Congress codifying an interpretation— is the better option of the two. If Congress were to codify an interpretation, all IEP implementation cases could be resolved at *Chevron* step-one because Congress would have "directly spoken to the precise question at issue."[149] The courts will defer to Congress and there will be fewer questions about whether an IEP is being implemented correctly. This codification would also ensure that the interpretation will not change with every new administration considering amendments to statutes have a much longer and more arduous procedure than compared to agency rules. On the other hand, if the agency promulgates a regulation interpreting the language at issue, "in conformity with"[150] in the IEP implementation context, ALJs and lower courts are bound by the agency's interpretation so long as it is reasonable."[151] However, this option leaves open the possibility of a changing interpretation every time a new administration comes into office.

While these options both address the overarching issue, these two options both only relate to the federal government; neither consider what would happen if the Florida Department of Education promulgated rules or published guidance documents on IEP implementation. However, how much deference a state agency's interpretation of a federal statute should be given is up for debate. For example, in the Fourth Circuit, the court held that a state agency implementing a federal statute under congressional authorization should be afforded deference because the state agency's regulation followed the federal law and the court did not want to substitute its reasoning where the state agency's interpretation was reasonable.[152] Then, the First Circuit recognized that deference that should be afforded to state agencies interpreting federal statutes it was charged with enforcing.[153] Finally, and more recently, the Ninth Circuit held that a state agency should be afforded "some deference" because of its expertise in the issue before the court.[154] However, the Tenth Circuit and Second Circuit have not afforded deference to state agencies when

149. *Chevron*, 467 U.S. at 842–43.

150. 20 U.S.C. § 1401(9).

151. *Chevron*, 467 U.S. at 845.

152. Ritter v. Cecil Cty. Off. of Hous. and Cmty. Dev., 33 F.3d 323, 328 (4th Cir. 1994).

153. City of Bangor v. Citizens Commc'n Co., 532 F.3d 70, 94 (1st Cir. 2008).

154. Ariz. v. City of Tucson, 761 F.3d 1005, 1014 (9th Cir. 2014).

the issue was presented to the respective courts.[155] Thus, the Third, Fifth, Sixth, Seventh, Eighth, and Eleventh circuits are left to determine what deference should be given to a state agency's interpretations of federal law.

In conclusion, until Congress or an agency interprets 20 U.S.C. § 1409, states and circuits are left to craft their own interpretations of federal law. Because circuits are not bound by other circuits' interpretations, there is the risk of inconsistent application of federal law. An inconsistent application of this law has grave consequences for children across the country. According to the IDEA, children are guaranteed a FAPE, but depending on where a school is located in its respective judicial circuit, a child in one circuit could be receiving a much different FAPE than a child in another circuit. Additionally, with Congress and the DOE not acting on this issue, parents and schools are left with no real guidance. Parents of children with disabilities will be left to spend money they do not have in litigation with schools over IEP implementation. Conversely, schools will be guessing on how to adequately implement students' IEPs in compliance with court's vague standards, possibly wasting taxpayer dollars in litigation or incorrectly educating students. In either instance, parents and schools would benefit from Congress or the DOE stepping up and issuing clear guidance once and for all.

155. AMISUB (PSL), Inc. v. Colo. Dep't of Soc. Servs., 879 F.2d 789, 796 (10th Cir. 1989); Bldg. Trades Emp'rs Educ. Ass'n v. McGowan, 311 F.3d 501, 507 (2nd Cir. 2002).