ACHIEVING THE PROMISE OF ASSISTIVE TECHNOLOGY: WHY ASSISTIVE TECHNOLOGY EVALUATIONS ARE ESSENTIAL FOR COMPLIANCE WITH THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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† Symposia Editor, Cardozo Law Review. J.D. Candidate (June 2017), Benjamin N. Cardozo School of Law; B.A., Duke University, 2012. I would like to thank, first and foremost, Professor Leslie Salzman for her unwavering support and guidance as my Note advisor; my brother, Michael Abend, for personally introducing me to the field of special education law and the ramifications of what happens when schools do not appropriately individualize educational programs; the Cardozo Law Review's extraordinary editors, especially Joshua Montazeri, Melanie DeFiore, Shannon Rozell, Sarah Ganley, and Emma Guido; and Michael Naclerio for generously reading drafts of this Note and providing me with endless amounts of love and encouragement. Finally, I would like to thank my family and friends for their patience and understanding. All mistakes are my own.

INTRODUCTION

When Lilly, a student with cerebral palsy who was completely non-verbal, was about to enter the third grade, people were unaware of her capabilities.[1] Her family and previous teachers simply assumed that because she was non-verbal, she probably could not and did not comprehend what people said.[2] At one of the first meetings with Lilly and her family, the Individualized Education Program (IEP)[3] team invited an assistive technology (AT) consultant to discuss how the school might be able to assist Lilly with her communication needs.[4] When the consultant was demonstrating ideas on a tablet next to Lilly, Lilly craned her neck to get a glimpse of what the consultant was doing.[5] The consultant handed Lilly the tablet and right at that moment, Lilly began creating sentences.[6] According to her family, nobody knew she could do that;[7] it was not until someone thought that Lilly might benefit from AT that Lilly had the opportunity to access AT and demonstrate her capabilities. Lilly, who likely has above-average intelligence, is now

1 *See* Jennifer Roland, *How Special Education Technology Improves Learning [VIDEO]*, SAMSUNG BUS. INSIGHTS, https://insights.samsung.com/2015/08/26/how-special-education-technology-improves-learning-video (last visited Dec. 23, 2015).

2 *See id.*

3 An IEP is a legal document, which states an individual child's educational program; every child who receives special education services must have an IEP. *See* 20 U.S.C. § 1414(d)(1)(A), (d)(6) (2012); 34 C.F.R. § 300.320 (2016). The IEP is an essential tool within special education as it states what the child's disability is and the child's current level of performance, provides measurable annual goals for the student, provides for how the student will meet those goals, provides for related services and supports, and explanations for why the child will be removed from general education settings or interactions with typically developing peers. *See* 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320. An IEP team consists of, first and foremost, the parent of the child, the child's special education teacher, related services providers, a school representative, and as many other related personnel as the parent or school deems necessary in order to provide the child with a legally adequate and acceptable IEP as defined by the statute and the regulation. 20 U.S.C. § 1414(d)(1)(B).

4 *See* Roland, *supra* note 1.

5 *Id.*

6 *Id.*

7 *Id.*

able to be in a general education setting[8]—her least restrictive environment (LRE).[9] Without this type of technology and without someone requesting that Lilly have the opportunity to access it, Lilly's intelligence may have gone undiscovered and she may never have been able to exercise her right to be in her LRE.[10] Now, however, because of AT, Lilly's life has changed forever.[11]

The Individuals with Disabilities Education Act (IDEA)[12] provides students with disabilities the right to attend public schools.[13] A key component of IDEA mandates that local education agencies (LEAs)[14] provide and consider services that help students with disabilities access a free appropriate public education (FAPE). One such service is the use of AT.[15]

AT devices can come in a variety of forms—no-tech, low-tech, medium-tech, and high-tech.[16] A rubber pencil grip or a magnifying glass, for example, would qualify as no-tech, while calculators, post-it notes, and voice-recorders are classified as either low-tech or medium-tech devices.[17] High-tech devices are tablets, computers, specialized software, and screen readers.[18]

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8 *Id.*

9 For a discussion of "least restrictive environment," see *infra* Section I.A.

10 Roland, *supra* note 1.

11 *Id.*

12 20 U.S.C. §§ 1400–1482 (2012).

13 *Id.*

14 20 U.S.C. § 1401(19)(A) ("The term 'local education agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.").

15 20 U.S.C. § 1414(d)(3)(B)(v). For a definition of FAPE, see 20 U.S.C. § 1401(9) ("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."). In order to receive federal IDEA funds, states must assure the U.S. Department of Education that they have the policies and procedures in place to ensure that all children with disabilities receive a FAPE. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: SPECIAL EDUCATION LAW 22 (2d ed. 2007).

16 *Assistive Technology Center (ATC)*, N.Y. ST. EDUC. DEP'T OFF. OF SPECIAL EDUC., http://www.p12.nysed.gov/specialed/nyssb/departments/atc.html (last updated Mar. 12, 2015).

17 Allan G. Osborne, Jr., Commentary, *Providing Assistive Technology to Students with Disabilities Under the IDEA*, 280 EDUC. L. REP. 519, 520–21 (2012) (discussing low-tech AT devices); *see also Assistive Technology for Students with Disabilities*, N.Y. ST. EDUC. DEP'T OFF. OF SPECIAL EDUC. 1, 10 (May 2016), http://www.p12.nysed.gov/specialed/publications/2016-memos/documents/assistive-technology-webcast-may-2016.pdf.

18 Screen readers are a type of software that can help people who are blind or have severe visual impairments to use a computer. *See* Susan David deMaine, *From Disability to Usability in*

Since IDEA added AT in 1990, there have been many technological advances, which have changed the way people view, consider, and use AT.[19] Recent touchscreen innovations have allowed people who are non-verbal, like Lilly, or who have difficulty communicating, to engage with their families, peers, and communities in empowering ways.[20]

Despite all of these new and innovative technologies that assist people with disabilities, children may only be able to access AT in schools if their IEP teams consider and allow them to try it.[21] As noted above, IDEA requires that LEAs "consider . . . assistive technology"[22] when developing a student's IEP, but it fails to define the contours of the LEA's obligation to "consider." Instead, IDEA leaves how to interpret or define "consider" to the LEA, giving the LEA enormous discretion in making this determination.

This Note argues that although IDEA mandates that all students with disabilities be educated in their LRE, LEAs fail to satisfy this obligation by declining to adequately and meaningfully "consider . . . assistive technology"[23] that would enable students with disabilities to access their educational curriculum. This Note attempts to explain the concept of failing to consider AT by using the New York City Department of Education (DOE)[24] as an example. After reviewing

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Online Instruction, 106 LAW LIBR. J. 531, 535 (2014); *see also* Harvard Law Documentary Studio, *Blind Ambition*, VIMEO (June 25, 2013, 5:19 PM), http://vimeo.com/69119995.

19 For example, the iPod Touch was released in September 2007, while the first tablet to reach the market, the iPad, was released over six years ago in April 2010. *See iPod + iTunes Timeline*, APPLE, https://www.apple.com/pr/products/ipodhistory (last visited Oct. 18, 2015); *Apple Launches iPad: Magical & Revolutionary Device at an Unbelievable Price*, APPLE (Jan. 27, 2010), http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html.

20 *See Apple iPad Being Called a Miracle Cure*, SPECIAL EDUC. L. BULL. (Quinlan, Boston, M.A.), May 2011, art. 7 (describing how iPads have dramatically helped individuals with autism stay focused and communicate their feelings in ways that would have otherwise been impossible). For an example of another communication device, see *Tobii Dynavox Communicator 5*, TOBII DYNAVOX, http://www.tobiidynavox.com/software/#aac-software (last visited Oct. 18, 201). The Dynavox Communicator 5 is a touch screen communication device that helps a person convert texts and symbols into speech through augmentative and alternative communication (AAC). The Dynavox also enables a person to write emails, text messages, and full sentences that the device will then convert into speech. *Id.*

21 *See* 20 U.S.C. § 1414(d)(3)(A), (B)(v) (2012) ("In developing each child's IEP, the IEP Team . . . shall . . . consider whether the child needs assistive technology devices and services."); *see also* Jonathan Stead, Note, *Toward True Equality of Educational Opportunity: Unlocking the Potential of Assistive Technology Through Professional Development*, 35 RUTGERS COMPUTER & TECH. L.J. 224, 242 (2009).

22 20 U.S.C. § 1414(d)(3)(B)(v).

23 *Id.*; *see also infra* Parts II, III.

24 *See generally* N.Y. COMP. CODES R. & REGS. tit. 8 § 160.4 (2016). *See also Providers—Roles and Responsibilities*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov/RulesPolicies/NCLB/SES/Providers/RolesandResponsibilities/Prov_Roles.htm (last visited Nov. 28, 2015) (discussing the roles and responsibilities of the LEA (DOE) and Providers under the No Child Left Behind Supplemental Educational Services process). In New York City, charter schools are considered their own LEAs because they are considered their own "independent and autonomous public

the DOE's policies and practices, this Note proposes that the DOE should enact a new regulation requiring an AT evaluation as a prerequisite for the DOE to fulfill its legal obligation to meaningfully "consider . . . assistive technology."[25] If the DOE were required to conduct an evaluation as part of its statutory obligation to "consider . . . assistive technology,"[26] then students who *could* be more fully integrated in their general education classes with the help of AT actually would be more fully integrated; would be in their LREs earlier in their education; and would be more prepared for an independent life.[27] This mandated approach would enable the DOE to increase students' access to a meaningful education within the spirit of IDEA.[28]

This Note will proceed in four parts. Part I will discuss, as a background, the history of IDEA, the addition of AT in IDEA, and the definitions of AT and LRE. Part I will also discuss how AT is "considered" by the DOE in order to illustrate that although AT evaluations are a legally defined service, IDEA and the relevant regulations have left LEAs like the DOE with wide discretion in how to "consider . . . assistive technology."[29]

Part II analyzes the legislative history regarding AT in IDEA. Part II argues that, based on Congress's intent, the standard for evaluating

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school[s]." *Frequently Asked Questions*, N.Y.C. DEP'T OF EDUC. CHARTER SCHOOLS OFFICE 1, 5, http://schools.nyc.gov/NR/rdonlyres/0452A0FF-2FAF-425F-B893-6F903CAA99CD/0/CharterWebsiteFAQsFinal.pdf (last visited Oct. 30, 2016). For this Note, DOE stands for the New York City DOE and does not refer to the federal Department of Education.

25 20 U.S.C. § 1414(d)(3)(B)(v).

26 *Id.*

27 *See* H.R. REP. NO. 102-198, at 13 (1991), *reprinted in* 1991 U.S.C.C.A.N. 310, 322 ("The Committee has been made aware of many instances in which the provision of assistive technology has dramatically altered prospects for a child's future—where access to technology has resulted in labels being dropped, in the provision of opportunities in integrated environments, in increased confidence and ability of the child, and in changed perceptions of the child by the family and others.").

28 According to 20 U.S.C. § 1400, some of the purposes of IDEA are

> 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 . . . [and] to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services . . . .

20 U.S.C. § 1400(d)(1)(A), (C)(3) (emphasis added). This is in addition to Congress's finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

29 20 U.S.C. § 1414(d)(3)(B)(v).

AT claims should be whether AT maximizes a child's education.[30] Part III analyzes the relevant special education case law to highlight how courts interpret "consider" and evaluate a student's access to AT.

Part IV proposes two changes. First, that the DOE should enact a regulation requiring an AT evaluation to satisfy IDEA's requirement to "consider . . . assistive technology"[31] in all instances when AT might be useful for a student with a disability. Second, courts and administrative tribunals should find that a failure to conduct an AT evaluation is a failure to "consider . . . assistive technology,"[32] because the word "consider" should be read to require a real and substantive process that almost always requires an evaluation.

I. BACKGROUND

During the 1970s, Congress launched an investigation into the status of children with disabilities and found that millions of such children were not receiving any semblance of an appropriate education.[33] From its disturbing findings, Congress enacted The

30 *See* H.R. REP. NO. 108-779, at 4 (2004) (Conf. Rep.), *reprinted in* 2004 U.S.C.C.A.N. 2480, (discussing section 682(c)(5)(H)). See *infra* Part II for a discussion on the legislative history.

31 20 U.S.C. § 1414(d)(3)(B)(v).

32 *Id.*; *see, e.g.*, Blake C. *ex rel.* Tina F. v. Dep't of Educ., 593 F. Supp. 2d 1199, 1212 (D. Haw. 2009) (finding that the Hawaii Department of Education's failure to perform an AT evaluation violated IDEA).

33 *See* S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 (finding that there were more than 8 million children with disabilities requiring special education and related services, but only 3.9 million of those children were receiving an appropriate education); *see also* WRIGHT & WRIGHT, *supra* note 15, at 14. Congress found that 1.75 million children with disabilities were receiving *no* education at all and 2.5 million were receiving an *inappropriate* education. S. REP. NO. 94-168; *see, e.g.*, Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972). The Congressional investigation shaped Congress's outlook on helping and serving students with disabilities:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.
>
> There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far-reaching effects for such person's family.
>
> Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions. This Nation has long embraced a philosophy that the right to a free appropriate public education is basic

Education for All Handicapped Children Act (EHA)[34] in 1975 to ensure that all children with disabilities receive an education, and for states and LEAs to be held accountable for the education of students with disabilities.[35] Since 1975, the law has been renamed to IDEA and amended several times.[36]

In 1982, the Office of Technology Assessment submitted a report recognizing technology's power to enhance opportunities for individuals of all ages and disabilities across all programs and major life activities, including education.[37] Based on this report and others, in 1988, Congress enacted the Technology-Related Assistance for Individuals with Disabilities Act (Tech Act)[38] to improve the availability

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> to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.
>
> Parents of handicapped children all too frequently are not able to advocate the right of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. However, over the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive necessary steps to ensure that the rights of children and their families are protected.

S. REP. 94-168, at 9. The Willowbrook State School is an example of those "public residential institutions" mentioned in the report where children with disabilities were living in deplorable conditions, including but not limited to inadequate sanitary facilities, overcrowding, feeding times of under three minutes, contracting diseases such as Hepatitis C and parasites, and general neglect by the school staff. *Willowbrook: The Last Great Disgrace* (WABC-TV television broadcast 1972).

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

35 S. REP. NO. 94-168, at 3–4; *see also* WRIGHT & WRIGHT, *supra* note 15 at 14.

36 See *infra* Part II for discussion of the IDEA history.

37 S. REP. NO. 100-438, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1383, 1384–85 (specifically listing education, rehabilitation, early intervention, training, employment, residential living, independent living, and recreation as the programs and major life activities that technology can impact with tremendous power). John H. Gibbons, Director of the Office of Technology Assessment, was quoted saying,

> Technology exerts a powerful influence over the lives of everyone, making life easier, more fulfilling, but sometimes more painful and frustrating. This statement is especially true for people with disabilities. The appropriate application of technologies to diminishing the limitations and extending the capacities of disabled and handicapped persons is one of the prime social and economic goals of public policy.

Id.

38 Pub. L. No. 100-407, 102 Stat 1044 (1988) (codified as amended in 29 U.S.C. §§ 3001–3007 (2012)).

of, access to, and training for AT for individuals with disabilities throughout all programs and all ages.[39] Congress believed that access to AT would increase the independence of people with disabilities.[40] The

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[39] 29 U.S.C. § 3001(b). The purposes of the Tech Act are:

> (1) to support State efforts to improve the provision of assistive technology to individuals with disabilities through comprehensive statewide programs of technology-related assistance, for individuals with disabilities of all ages, that are designed to—
>
> (A) increase the availability of, funding for, access to, provision of, and training about assistive technology devices and assistive technology services;
>
> (B) increase the ability of individuals with disabilities of all ages to secure and maintain possession of assistive technology devices as such individuals make the transition between services offered by educational or human service agencies or between settings of daily living (for example, between home and work);
>
> (C) increase the capacity of public agencies and private entities to provide and pay for assistive technology devices and assistive technology services on a statewide basis for individuals with disabilities of all ages;
>
> (D) increase the involvement of individuals with disabilities and, if appropriate, their family members, guardians, advocates, and authorized representatives, in decisions related to the provision of assistive technology devices and assistive technology services;
>
> (E) increase and promote coordination among State agencies, between State and local agencies, among local agencies, and between State and local agencies and private entities (such as managed care providers), that are involved or are eligible to be involved in carrying out activities under this chapter;
>
> (F) increase the awareness and facilitate the change of laws, regulations, policies, practices, procedures, and organizational structures, that facilitate the availability or provision of assistive technology devices and assistive technology services; and
>
> (G) increase awareness and knowledge of the benefits of assistive technology devices and assistive technology services among targeted individuals and entities and the general population; and
>
> (2) to provide States with financial assistance that supports programs designed to maximize the ability of individuals with disabilities and their family members, guardians, advocates, and authorized representatives to obtain assistive technology devices and assistive technology services.

Id.

[40] 29 U.S.C. § 3001(a)(5) ("Substantial progress has been made in the development of assistive technology devices, including adaptations to existing devices that facilitate activities of daily living that significantly benefit individuals with disabilities of all ages. These devices, including adaptations, increase involvement in, and reduce expenditures associated with, programs and activities that facilitate communication, ensure independent functioning, enable early childhood development, support educational achievement, provide and enhance employment options, and enable full participation in community living for individuals with disabilities. Access to such devices can also reduce expenditures associated with early childhood intervention, education, rehabilitation and training, health care, employment, residential living, independent living, recreation opportunities, and other aspects of daily living."); *see also* Ronald M. Hager & James R. Sheldon, Jr., *Work, Assistive Technology and Transition-Aged Youth: Funding for Work-Related Assistive Technology Through Special Education Programs, State Vocational Rehabilitation Agencies, Medicaid, Medicare and SSI's Plan for Achieving Self-Support*, *in* 1 DISABILITY LAW AND PRACTICE: SPECIAL EDUCATION, ASSISTIVE TECHNOLOGY

Tech Act provided for inclusive definitions of AT devices and services to ensure expansive coverage and support for AT.[41] The Tech Act's focus on closing the access gap between people with disabilities and people without disabilities prompted IDEA's authors to ensure that IDEA increased the importance of and access to AT in education.[42] IDEA incorporated the Tech Act's exact definitions of devices and services in the 1990 IDEA amendments,[43] and mandated that LEAs consider the student's need for AT in order to provide a FAPE.[44] Congress believed that it was vital to improve students' access to and use of AT because AT would enable them to participate in educational activities, be placed in their correct LRE, and achieve increased independence[45]—core concepts of IDEA.[46]

AND VOCATIONAL REHABILITATION 223, 228 n.5 (Nancy Maurer & Simeon Goldman eds., 2013) (explaining that in 1998 and 2004, the Tech Act was updated and is now codified in 29 U.S.C. §§ 3001–3007).

41 The definition of assistive technology in the Tech Act consists of three definitions:

> (3) Assistive Technology: The term "assistive technology" means technology designed to be utilized in an assistive technology device or assistive technology service.
>
> (4) Assistive technology device: The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.
>
> (5) Assistive technology service: The term "assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes—
>
> (A) the evaluation of the assistive technology needs of an individual with a disability, including a functional evaluation of the impact of the provision of appropriate assistive technology and appropriate services to the individual in the customary environment of the individual . . . .

29 U.S.C. § 3002(3)–(5).

42 Ralph E. Julnes & Sharan E. Brown, *The Legal Mandate to Provide Assistive Technology in Special Education Programming*, 82 EDUC. L. REP. 737, 739 (1993).

43 *Id.* (explaining that Congress incorporated the definitions of AT device and service "word for word" with very minor exceptions in the 1990 amendments of IDEA); *see also* 20 U.S.C. § 1401(1)–(2) (2012); 34 C.F.R. §§ 300.5–300.6 (2016).

44 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101. Prior to the 1990 amendments to IDEA, the Office of Special Education Programs (OSEP) released a letter that addressed the LEAs' obligations about AT. *See* Julnes & Brown, *supra* note 42, at 740–41. In the letter, OSEP emphasized how the use and need for AT must be made on a case-by-case basis and therefore, if the IEP team determined that AT was needed to provide a FAPE, it *must* be specifically stated on the IEP. *Id.*

45 H.R. REP. NO. 101-544, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1730 (stating that this addition was a way to "redefine an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity"). See *infra* note 114 for a discussion of the Committee Report.

46 In 2004, Congress reauthorized IDEA to ensure that children with disabilities receive an education that meets a child's unique needs, prepares them for an independent life after high

Under IDEA, AT is any device[47] or service[48] that can help a student with a disability access her education.[49] An AT device is any item, equipment, or product "used to increase, maintain, or improve functional capabilities of a child with a disability."[50] An AT service is any service that directly aids the student in selecting or using an AT device.[51] AT falls within the definitions of special education,[52] related service,[53] and supplementary aid or service[54]—all of which LEAs are required to provide to adequately educate children in their LRE.[55]

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school, and protects the rights of children with disabilities and their parents. 20 U.S.C. § 1400(d).

47 "[A]ny item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A); 34 C.F.R. § 300.5; *see also* N.Y. COMP. CODES R. & REGS. tit. 8 § 200.1(e) (2016) (mentioning student instead of child).

48 The definition of an assistive technology service is:

> [A]ny service that *directly assists a child* with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes—
>
> (A) *the evaluation* of the needs of such child, including a functional evaluation of the child in the child's customary environment;
>
> (B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;
>
> (C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
>
> (D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
>
> (E) training or technical assistance for such child, or, where appropriate, the family of such child; and
>
> (F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.

20 U.S.C. § 1401(2) (emphasis added); 34 C.F.R. § 300.6.

49 20 U.S.C. § 1401(1)(A); 34 C.F.R. § 300.5.

50 20 U.S.C. § 1401(1)(A); 34 C.F.R. § 300.5. An AT device does not include a medical device surgically implanted in the student. 20 U.S.C. § 1401(1)(B).

51 20 U.S.C. § 1401(2) ("The term 'assistive technology service' means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device."); 34 C.F.R. § 300.6.

52 20 U.S.C. § 1401(29) (defining special education as a "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education").

53 20 U.S.C. § 1401(26). This defines "related services" as

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in

A. *Least Restrictive Environment*

In order to provide a FAPE, schools are supposed to place all children with disabilities in their LRE.[56] IDEA requires the school to educate a child with a disability with her typically developing peers to the maximum extent appropriate for that child.[57] It also requires that a child should only be removed from her general education setting if the child's disability is so severe that the child could not be educated in a general education setting with the use of supplementary aids or services, such as AT.[58] Case law interprets LRE to mean that students should be educated in the environment that is best for their specific and unique needs—with a presumption that the best environment is a regular education classroom.[59] Thus, schools should have a variety of supports and placements available to use as means of implementing the child's special education services and ensuring that the student is in the LRE specific to her.[60]

> the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id.

54 20 U.S.C. § 1401(33) (defining supplementary aids and services as "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with section 1412(a)(5)").

55 *See* Osborne, *supra* note 17, at 520; *see also* Julnes & Brown, *supra* note 42, at 739 (explaining that in the 1990 amendments, IDEA made AT devices and services available to students with disabilities if it would be required as special education, related service, or supplementary aids and services). See also 20 U.S.C. § 1412(a)(5) for the definition of LRE, requiring that schools educate children with disabilities alongside children without disabilities "[t]o the maximum extent appropriate," and can only remove a child with a disability from a regular educational setting if the nature or severity of the disabilities prohibit that child from being educated in regular classes even with the use of supplementary aids and services.

56 20 U.S.C. § 1412(a)(5)(A).

57 *Id.* ("[R]emoval of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the *use of supplementary aids and services* cannot be achieved satisfactorily." (emphasis added)); *see also* Stead, *supra* note 21, at 232 (explaining that in 1997, Congress added that a student's IEP must include an explanation about why the student would not participate with her typically developing peers in the general education setting).

58 20 U.S.C. § 1412(a)(5)(A); *see* Stead, *supra* note 21, at 232.

59 *See* Philip M. Ferguson, *The Present King of France Is Feeble-Minded: The Logic and History of the Continuum of Placements for People with Intellectual Disabilities*, *in* RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION 151, 153 (Arlene S. Kanter & Beth A. Ferri eds., 2013).

60 *See id.*

By viewing AT as a special education service, a related service, or a supplementary aid or service,[61] AT is perfectly aligned with what Congress intended for the schools to use to keep students with disabilities in their LRE.[62] For example, AT enables students who have difficulty communicating to speak and participate in class discussions as well as interact with their peers through the use of communication devices.[63] AT also allows students with physical disabilities to write on the same level as their typically developing peers and allows students who have visual impairments to access written materials.[64] If the school did not consider AT in these situations, then it is likely that the students would be placed in a smaller, special class only for students with disabilities where they would receive more intensive support from a teacher or a paraprofessional than is theoretically necessary for them.[65] However, there are some obstacles for a student in gaining access to AT, one of which is simply receiving an AT evaluation, a defined service within IDEA and federal regulations.[66] This definition does not need further interpretation, but rather needs to be followed. By failing to provide greater specificity about the obligation to "consider . . . assistive technology,"[67] IDEA leaves LEAs with huge discretion in how they decide to consider AT.[68] Because the definition requires an evaluation, Parts II and III will illustrate why the example LEA, the DOE, should conduct an AT evaluation in all instances when AT might be useful as part of its obligation to consider AT.

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61 *See supra* notes 52–55 (discussing how IDEA defines AT as a special education service, a related service, or a supplementary aid or service).

62 *See supra* notes 52–55.

63 Osborne, *supra* note 17, at 521.

64 *Id.*

65 *See* Memorandum from James P. DeLorenzo, Assistant Comm'r, Office of Special Educ., N.Y. State Educ. Dep't, School Districts' Responsibilities to Provide Students with Disabilities with Specially-Designed Instruction and Related Services in the Least Restrictive Environment (Dec. 2015), http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationFieldAdvisoryMemoLRE.pdf (proposing that in order to increase the number of students in general education classrooms, schools need to develop and implement a plan to enhance inclusive opportunities through means such as assistive technology).

66 20 U.S.C. § 1401(2) (2012); 34 C.F.R. § 300.6 (2016).

67 20 U.S.C. § 1414(d)(3)(B)(v).

68 This could mean that a school in New York City defines "consider" differently than a school in Newark, New Jersey or even Westchester, New York.

B. *The New York City DOE and Center for Assistive Technology (CAT)*

The New York City DOE is the LEA for New York City,[69] and it is the largest school district in the United States.[70] The DOE provides a pre-kindergarten to grade twelve education for over one million students across thirty-two "Districts" and ten "Regions."[71] Approximately 221,700 of those students, or twenty-one percent, are enrolled in special education—a number that is only expected to increase.[72] The Region or District that is responsible for providing an appropriate education to a child is determined either by the child's place of residence or the child's current school.[73] Each Region, comprised of different Districts, has its own Committee on Special Education (CSE).[74] In New York, the New York State Education Department (NYSED) provides that the local CSEs[75] make all determinations relating to students with disabilities,[76] such as considering whether the student

69 *See* sources cited *supra* note 24.

70 *See* REGINA SKYER, HOW TO SURVIVE TURNING 5: THE HANDBOOK FOR NYC PARENTS OF SPECIAL NEEDS CHILDREN 7 (2015); *see also* JOHN C. LIU, CITY OF N.Y., OFFICE OF THE COMPTROLLER, AUDIT REPORT ON THE DEPARTMENT OF EDUCATION'S SPECIAL EDUCATION STUDENT INFORMATION SYSTEM 4 (July 22, 2013), http://comptroller.nyc.gov/wp-content/uploads/documents/7A12_114.pdf.

71 *See* SKYER, *supra* note 70, at 7; *see also Committees on Special Education (CSE) and Preschool Special Education (CPSE)*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov/NR/rdonlyres/8BF37972-114D-404E-98D2-F1ACC6C3ADC4/0/CSEandCPSEContacts.pdf (last updated Sept. 2016).

72 *See* LIU, *supra* note 70, at 4; *see also* Ruth Ford, *Fixing Special Ed: Are New York City's Reforms on Target?*, CITY LIMITS (Mar. 10, 2015), http://citylimits.org/2015/03/10/fixing-special-ed-are-new-york-citys-reforms-on-target.

73 *See* N.Y.C. DEP'T OF EDUC., *supra* note 71; *see also FAQs*, N.Y.C. DEP'T OF EDUC., http://www.nyc.gov/portal/site/nycgov/menuitem.a7711323366a72aee846f0b001c789a0 (last visited Jan. 8, 2017).

74 *See* N.Y.C. DEP'T OF EDUC., *supra* note 71; *see also* SKYER, *supra* note 70, at 7.

75 N.Y. EDUC. LAW § 4402 (McKinney 2010); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3 (2016). The CSE Office houses the IEP team to conduct the meeting. According to the regulation, the CSE was created to ensure that evaluations were done on time and that students were placed in their correct settings. N.Y. EDUC. LAW § 4402; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3. The CSE is made up of the parent(s), one general education teacher if the student is or may be participating in the regular education classroom, one special education teacher, a school psychologist, a representative of the school district (the DOE) who is qualified to provide or supervise special education and has knowledge about the general education curriculum—this person is the chairperson of the committee—an interpreter for the evaluation results, a school physician if requested in writing, an additional parent member and other people who have knowledge or expertise relating to the student, and, if appropriate, the student. N.Y. EDUC. LAW § 4402; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3.

76 N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4. The DOE defines "student with a disability" by one of thirteen categories, despite there being more than thirteen different types of disabilities. OFFICE OF SPECIAL EDUC. INITIATIVES, N.Y.C. DEP'T EDUC., SPECIAL EDUCATION SERVICES: AS PART OF A UNIFIED SERVICE DELIVERY SYSTEM 46–49, http://schools.nyc.gov/

needs AT to receive a FAPE.[77] The CSE is required to produce an IEP, a written legal document describing the student's individualized education program for that year.[78] This IEP is the foundation of the special education program, and is created to help the student reach his or her individual goals by helping teachers and related service providers understand the child's disability.[79] The IEP must describe a variety of things about the student such as how the child learns, the child's strengths, and how the teacher and related service providers can help the child learn more effectively through goals and short-term objectives.[80] As long as the child is required to receive special education services, the IEP must be updated and reviewed at least every single year.[81]

In New York City, a computer-generated system, developed to ensure that the DOE complies with the law, creates students' IEPs.[82] Of particular concern to this Note is the "Student Needs Relating to Special Factors" section of the IEP.[83] In this section, the IEP team indicates whether or not the student needs AT in the form of a check box,

documents/d75/iep/Continuum%20of%20Services.pdf (last visited Feb. 10, 2016) (categorizing the disabilities as follows: autism, deaf-blindness, deafness, hearing impairment, emotional disturbance, learning disability, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, speech or language impairment, traumatic brain injury, and visual impairment).

77 *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(3)(v) ("[The CSE shall] consider whether the student requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]."); *see also* N.Y. EDUC. LAW § 4402(3); Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122–23 (2d Cir. 1998). The CSE must examine the student's level of achievement and specific needs and determine an appropriate educational program. *See* Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 107–08 (2d Cir. 2007).

78 20 U.S.C. § 1401(14) (2012).

79 *Id.*; *see also* SKYER, *supra* note 70, at 59.

80 *See* SKYER, *supra* note 70, at 59–60.

81 N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(f); *see also* SKYER, *supra* note 70, at 59–60.

82 *See* Bd. of Educ. v. United Fed'n of Teachers, No. 451028/2013, 2014 WL 2828830, at *1 (N.Y. Sup. Ct. June 19, 2014) ("In the spring of 2010, petitioner began implementing the Special Education Student Information System ('SESIS'), a computerized system capable of recording important data regarding services provided to special education students. SESIS was introduced after a 2005 study commissioned by the petitioner recommended that a computer system which tracked factors such as referral information, date and nature of evaluation, and program placement would enable petitioner to better manage these students, who often needed to be seen by several providers, including, inter alia, teachers, speech and other therapists, and psychologists. Whereas a student's individualized education plan ('IEP') had previously been maintained in hard copy form, SESIS was designed to serve as a central repository for all information related to a student's IEP."); *see also SESIS*, UNITED FED'N OF TEACHERS, http://www.uft.org/teaching/sesis (last visited July 24, 2016).

83 *New York State Education Department IEP Form*, N.Y. ST. EDUC. DEP'T OFF. OF SPECIAL EDUC., http://www.p12.nysed.gov/specialed/formsnotices/IEP/IEPform.doc (last updated Dec. 31, 2015).

without any description of the consideration process the team had about the student's AT needs.[84]

The DOE, as the LEA—and thus the CSE—is responsible for conducting the AT evaluation, which it does through its Center for Assistive Technology (CAT).[85] To access an AT evaluation, a parent or IEP team member first makes a referral to the CSE office to request an AT evaluation.[86] Once the CSE submits the evaluation referral to the CAT team,[87] the CAT team has sixty days under law to complete the evaluation and determine whether or not the student needs AT.[88] Once the student is evaluated and the CAT team determines that AT is necessary, the student and teachers train with the device.[89] The CAT team then reviews the student's progress with the device, and, when appropriate, refines the student's IEP goals to ensure successful

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84 *Id.*

85 *Center for Assistive Technology (CAT)*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov/Academics/SpecialEducation/SupportsServices/AssistiveTechnology [https://web.archive.org/web/20160416082343/http://schools.nyc.gov/Academics/SpecialEducation/programs/relatedServices/Assistive+Technology.htm] (last visited Oct. 17, 2015). CAT works with students in preschools, community schools, charter schools, and non-public schools. *Id.* If a student is in a District 75 school (a self-contained school), the CSE will submit the referral to Tech Solutions. *Id.*; *see also Assistive Technology*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov/Academics/SpecialEducation/SupportsServices/AssistiveTechnology [https://web.archive.org/web/20160422125156/http://schools.nyc.gov/Academics/SpecialEducation/D75/for_employees/AssistiveTechnology.htm] (last visited Oct. 17, 2015). A District 75 school or a self-contained school is a public school that only serves students who are "on the autism spectrum, have significant cognitive delays, are severely emotionally challenged, sensory impaired and/or multiply disabled," which means that typically developing students or neurotypical students are not educated in a District 75 setting. *Appropriate Learning Environments for Children with Severe Challenges*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov/Academics/SpecialEducation/D75/Feeds/slider/AppropriateLearningEnvironments.htm (last visited Jan. 9, 2017).

86 *Center for Assistive Technology*, *supra* note 85.

87 The CSE submits the evaluation referral to the CAT team unless the student is in District 75, in which case it will be submitted to the Tech Solutions team. *Id.*

88 20 U.S.C. § 1414(a)(C)(i)(I) (2012). Although the CSE is required to do the evaluation once the parent makes a request, there may be significant delays in scheduling or even receiving an evaluation. *See, e.g.*, Birsner v. Lindenhurst Pub. Sch., No. 29720/2007, 2010 WL 4219694 (N.Y. Sup. Ct. Oct. 20, 2010); *infra* Part III; *see also* N.Y.C. DEP'T OF EDUC., LOCAL LAW 27 OF 2015 ANNUAL REPORT ON SPECIAL EDUCATION: SCHOOL YEAR 2014–2015 2 (Feb. 29, 2016), http://schools.nyc.gov/NR/rdonlyres/6035782C-F95D-4224-8372-F2B1F7E9A226/0/LocalLaw27of20152292016FINAL.pdf (stating that the DOE's ability to reliably report on specific IDEA compliance metrics, such as the timeliness of evaluations, is significantly hindered by its use of SESIS). In the 2014–2015 DOE Report, it mentions that forty percent of students with disabilities were not receiving, or only partially receiving, their special education services in conformity with their IEPs. *Id.* at 23 (the data, however, does not specifically report on AT).

89 *Center for Assistive Technology*, *supra* note 85. Sometimes the sixty-day evaluation may include the student trial where the student's performance with the device is evaluated. *Id.* Other times the student trial occurs after the evaluation has taken place. *Id.*

implementation of AT, and adds the AT device to the student's IEP.[90] The student's IEP must then indicate the specific device or service required in the appropriate sections.[91]

The DOE does not currently require an AT evaluation before the IEP team considers whether or not the student with a disability needs AT.[92] Since an AT evaluation is a legally defined AT service, some DOE representatives may interpret their obligation to "consider" AT as the obligation to solely consider whether an evaluation is necessary.[93] However, in 2008 and 2009, CAT put forth a guidebook,[94] which stated a definition of "consider" for the purposes of AT is "a process in which

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90 *Id.* The device is not necessarily added to the IEP at the training stage, and it is only added when the CSE determines that AT is appropriate for the student. *Id.*

91 *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2)(v), (3) (2016); *see also New York State Education Department IEP Form*, *supra* note 83.

92 *See* JUDY E. MANNING, CTR. FOR ASSISTIVE TECH., NEW YORK CITY DEPARTMENT OF EDUCATION CENTER FOR ASSISTIVE TECHNOLOGY GUIDEBOOK 2008–09, at 3 (2009), http://schools.nyc.gov/NR/rdonlyres/C275A4F4-A341-4638-A6D0-81FEE99A2401/0/ATGuidebook0809Finalcopy.pdf; *see also* N.Y. ST. EDUC. DEP'T OFF. OF SPECIAL EDUC., *supra* note 17, at 10. It should be noted that a new Family Guide for AT was published at the end of Spring 2016, and while this guide is easier to read, there have been no substantial changes to the content since the 2009 Guidebook. *See* CTR. FOR ASSISTIVE TECH. AND TECH SOLS., N.Y.C. DEP'T OF EDUC., ASSISTIVE TECHNOLOGY: A FAMILY GUIDE (2016), http://schools.nyc.gov/NR/rdonlyres/BDA701A7-347A-44F2-B888-FEECACC3A5C0/0/FINALATFGFormattedUpdateDraft5_31_16.pdf. The regulation to "consider . . . assistive technology" could be interpreted as considering whether or not to even do an AT evaluation. This situation could arise when a team member believes that because an AT evaluation is defined as an AT service, considering whether or not to complete an evaluation means the team has considered the statutory definition of an AT service. *See* 20 U.S.C. § 1401(2)(A). This is an incorrect reading of "consider . . . assistive technology," because if the IEP team is only considering whether or not to do an AT evaluation, but not using the evaluation to "directly assist[] [the] child" in selecting an AT device that can provide the child with a FAPE, then the LEA has failed in its obligation to "consider . . . assistive technology." *See* 20 U.S.C. § 1401(2); 34 C.F.R. § 300.6.

93 20 U.S.C. § 1401(2)(A); *see* discussion *supra* note 92.

94 This Guidebook holds legal significance because IDEA leaves defining "consider" for the purposes of AT up to the LEA. *See* 20 U.S.C. §§ 1401, 1414 (failing to define "consider" within the federal statute in either the definition sections or in the relevant sections); 34 C.F.R. §§ 300.4–300.45, 300.324 (failing to define "consider" within the federal regulation in either the definition sections or in the relevant sections, thus suggesting that this definition is left to the LEA); *see also* N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.1, 200.4 (showing the absence of a "consider" definition on the state level and deferring to the LEA's ability to define this term). *But see* tit. 8, § 200.22 (specifically defining when and how the LEA shall "consider" a behavioral intervention plan for students with disabilities). Thus, for AT, it is possible for the LEA to decide to delegate this task of defining "consider" to a sub-agency, which is what happened in New York: IDEA left the task of defining "consider" up to the LEA, the DOE for New York City, which then delegated this task to CAT, a sub-agency of the DOE. Ultimately, CAT did define "consider" as "a process in which the IEP team gathers information, documentation, and analyzes it to determine the student's needs for AT." MANNING, *supra* note 92, at 3. Thus, the Guidebook's definition of "consider" holds some legal significance. In general, this illustrates the problem with leaving it up to the LEA to decide how to define "consider." If there were a statutory definition of "consider" there would not be this multilayered delegation problem and there would not be a risk for the definition of "consider" to vary from school district to school district within the same state.

the IEP team gathers *information, documentation, and analyzes it* to determine the student's needs for AT."[95] This suggests that an evaluation is needed to provide documentation and information to analyze the child's use or need for AT, not that the team should consider whether to do an evaluation in the first place. Understanding the definition of consider in relation to the DOE's practices is critical, because the team is considering whether or not to provide an important service without an evaluation—something that would provide concrete information about the student's strengths, needs, and solutions.[96]

However, in its guidebook, CAT lists four possible decisions that the DOE could make in an IEP meeting for AT *before* the information and documentation are gathered and analyzed: (1) AT is not needed; (2) AT is needed and being used successfully; (3) AT is needed but the IEP team is unsure as to what would meet the student's need; and (4) AT is needed but the IEP team does not have AT knowledge or the IEP team needs a specialized evaluation in order to make an informed decision.[97] For the purposes of this Note, options three and four are the decisions that are most concerning.[98] In option three, the IEP team "might decide"[99] that the student should have an AT trial or that the team needs more documentation before it can make its decision.[100] Contrast this with option four, where CAT recommends that the IEP team refer the student for an AT evaluation as directed later in its guide.[101] It is not apparent why a referral for an evaluation is only necessary when the IEP team does not know about AT, but not for when the IEP team is simply unsure as to what service or device may be useful for the student. Neither CAT nor the DOE explains the distinction; however, it seems to be important in determining how many students are actually adequately considered for AT.

To help support the IEP team in making some of these distinctions, CAT strongly encourages the team to use the Student, Environment, Tasks, and Tools Framework, or SETT Framework,[102] when considering

95 MANNING, *supra* note 92, at 3 (emphasis added).

96 *See generally* 20 U.S.C. § 1414 (discussing the procedures, requirements, uses, and reasons for conducting evaluations and how the evaluation results should be incorporated into the IEP to create educational strategies).

97 MANNING, *supra* note 92, at 3.

98 Option one is also problematic as it never even affords the student a chance at an evaluation to see if AT could be beneficial for her educational program.

99 MANNING, *supra* note 92, at 3.

100 *Id.* at 10–11. CAT does not recommend an AT evaluation after this decision. *Id.*

101 *Id.* at 3.

102 *See generally* Joy Smiley Zabala, *SETT Framework Documents*, JOYZABALA.COM, http://www.joyzabala.com/Documents.html (last visited Oct. 17, 2015).

AT.[103] However, the use of the SETT Framework is not mandated through regulations or an official manual.[104] The SETT Framework is a way for the IEP team to gather and organize information in order to help make informed decisions about the student with a disability.[105] The process begins with the "Student" prong, where the team asks what the student needs to do that may be difficult or impossible for the student to do independently.[106] Under the "Environment" prong, the team looks at what is already in place in the classroom (such as computers or SmartBoards[107]), the student's access to those devices, and whether there are expectations, attitudes, or issues associated with the devices that interfere with the student's use or access.[108] Under the "Tasks" prong, the team examines what tasks the student is required to accomplish in the classroom.[109] If the student cannot accomplish or make reasonable progress toward her goals without AT, the team should brainstorm appropriate solutions and, under the "Tools" prong, select a tool based on the information from the Environment and Task prongs.[110]

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103 MANNING, *supra* note 92, at 4; *see also* N.Y. ST. EDUC. DEP'T OFF. OF SPECIAL EDUC., *supra* note 17, at 10 (discussing a checklist modeled after the SETT Framework and used in two other states). This checklist is simply meant to be a suggested tool for the DOE—i.e., an example of how the NYSED believes "consideration" should take place—but it does not indicate that schools are required to use this checklist. *Id.* While the NYSED checklist is an improvement, it still does not require an evaluation as part of the consideration process, and thus still fails in the eyes of this Note to enable students with disabilities to access AT to enable them to achieve a meaningful educational benefit.

104 *See* MANNING, *supra* note 92, at 4 (not mandating that the IEP team follow this framework, but rather suggesting it and encouraging it through the description that other IEP teams have used it). "The SETT framework is a process developed by Joy Zabala and was first presented at the 'Closing the Gap Conference in 1995.' Since then, this framework has been adopted by others as a resourceful tool in helping IEP teams with the decision making process for Assistive Technology." *Id.*

105 *See* Joy Smiley Zabala, *Using the SETT Framework to Level the Learning Field for Students with Disabilities*, JOYZABALA.COM 1 (2005), http://www.joyzabala.com/uploads/Zabala_SETT_Leveling_the_Learning_Field.pdf.

106 *Id.* (discussing the "S" in SETT, which stands for "Student").

107 *See generally SMART Board 4000 Series Interactive Display*, SMART TECH, http://downloads01.smarttech.com/media/sitecore/en/pdf/products/ifp/ed-ifp4000-factsheet-en.pdf?_ga=1.109198405.1731336891.1455404876 (last visited Feb. 13, 2016). *See also* Sneha Sanghavi, *Using the SMART Board Wisely in Classrooms*, UNITED FED'N OF TEACHERS (Jan. 11, 2010) http://www.uft.org/teacher-teacher/using-smart-board-wisely-classrooms ("The SMART Board is a large interactive whiteboard. It is, quite simply, a big touch screen that students can use to kinesthetically manipulate characters and information. Utilizing included notebook software, teachers working with the SMART Board are able to create interactive lessons that make students eager to learn . . . .").

108 Zabala, *supra* note 105, at 2 (discussing the Environment for "E"). Such issues could include "access to the classroom, accessibility of instructional materials, support for staff that helps them develop and sustain learning environments that are inviting, challenging, and productive for ALL students, including those with the full range of abilities and special needs." *Id.*

109 *Id.* (discussing the Tasks for the first "T").

110 *Id.* (discussing the Tools for the second "T").

At this point, the IEP team, theoretically, would recommend an AT evaluation, but there is no requirement for the team to request an evaluation after completing the SETT process.[111] This missing requirement suggests that students with disabilities do not get an adequate chance to access the AT that IDEA entitles them to. Moreover, a CAT consultant is not necessarily the person utilizing the SETT Framework; instead another related service provider or an assistant principal—who may not have accurate knowledge of the devices and services available—might lead the analysis.[112] Thus, the current standard for considering AT leaves maximum discretion to the DOE and can lead to inconsistent access to AT devices and services.

II. LEGISLATIVE HISTORY SUPPORTS THE PROPOSITION THAT ASSISTIVE TECHNOLOGY IS ESSENTIAL TO A CHILD'S EDUCATION

The legislative history informing IDEA amendments in 1990, 1991, 1997, and 2004 provides useful insight in understanding the importance of AT and how the DOE should "consider . . . assistive technology"[113] within the meaning of the statute. In 1990, prior to renaming the statute IDEA, the House Committee on Education and Labor remarked that one of the goals behind the revisions was to increase the use and knowledge of AT.[114] Specifically, the Committee stated that there was still a gap between students' needs for AT and the awareness of AT devices among special education personnel.[115] Congress purposefully wanted more LEAs to use AT to promote educational goals for students with disabilities. Congress believed that accessing and using AT would enable students with disabilities to participate in educational activities, be placed in their correct LRE, and increase their independence and

111 MANNING, *supra* note 92, at 5.

112 *Id.* Also, there is a chance that a DOE employee might believe there are financial constraints to what they are actually able to offer to the student and therefore may not use the SETT Framework in the most useful or individualized manner.

113 20 U.S.C. § 1414(d)(3)(B)(v) (2012).

114 H.R. REP. NO. 101-544, at 8–9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1731 ("The Committee bill incorporates definitions for assistive technology service and assistive technology device in order: (1) to clarify the broad range of assistive technology devices and related services that are available, and (2) to increase the awareness of assistive technology as an important component of meeting the special education and related service needs of many students with disabilities, and thus enable them to participate in, and benefit from, educational programs. The definitions for 'assistive technology device' and 'assistive technology service' are derived from the Technology Related Assistance for Individuals with Disabilities Act of 1988.").

115 *Id.* at 8 ("[T]here continues to be a gap between the need for assistive technology and the level of awareness among special education and related services personnel of the existing devices and services available for students with disabilities . . . .").

productivity.[116] Thus, Congress added the definitions of AT to the EHA, adding that AT use should be promoted, where appropriate, for students with disabilities.[117]

Furthermore, the Committee explained how it deliberately imported the definitions of AT device and service from the Tech Act into IDEA to clearly define AT and increase AT awareness.[118] Congress believed that using AT led to educational progress, and so, by improving AT access and understanding, Congress believed it could significantly improve the educational outcomes for students with disabilities.[119]

In 1991, the House Committee amended the Act to add AT to early intervention services because the Committee recognized the critical importance of the service in helping students with disabilities enhance their learning experience.[120] It also found that AT could help educate students with disabilities alongside their typically developing peers, which in turn would "dramatically alter" a child with a disability's future.[121]

In 1996, the Senate Committee on Labor and Human Resources proposed several IDEA amendments, including some that more clearly defined IEP requirements in substantive provisions of IEP subsections.[122] The Committee explained that for the IEP team to make

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116 *Id.* (stating that this addition was a way to "redefine an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity"). The Committee believed it would help "redefine" LRE because AT was continuing to develop and provide new devices and services that could help students with disabilities participate in their educational programs. *Id.* This specific statement only enhances how important AT is to placing students in their LRE.

117 Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, §§ 101(g)-(h), 303(a)(7)(H), 104 Stat 1103 (1990) (codified as amended at 20 U.S.C. §§ 1401, 1423).

118 H.R. REP. NO. 101-544, at 8–9. Congress paralleled the definitions in order to "increase the awareness of assistive technology as an important component of meeting the special education and related service needs of many students with disabilities, and thus enable them to participate in, and benefit from, educational programs." *Id.*

119 *Id.* at 37–38. The Committee also explained how it was concerned with students who had access to AT but lost these devices and services when they made the transition to adult life. *Id.* at 38. Thus, the Committee wanted to incentivize programs and projects that found ways of continuing to provide AT for individuals with disabilities after they left school. *Id.* This illustrates how important the Committee believed AT to be for students with disabilities.

120 H.R. REP. NO. 102-198, at 1–2, 12–13 (1991), *reprinted in* 1991 U.S.C.C.A.N. 310, 310–11, 321–22; *see* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, § 7–8, 105 Stat 587 (1991) (codified as amended at 20 U.S.C. §§ 1419, 1423).

121 H.R. REP. NO. 102-198, at 13 ("The Committee has been made aware of many instances in which the provision of assistive technology has dramatically altered prospects for a child's future—where access to technology has resulted in labels being dropped, in the provision of opportunities in integrated environments, in increased confidence and ability of the child, and in changed perceptions of the child by the family and others.").

122 S. REP. NO. 104-275, at 33, 49 (1996). In these amendments, all substantive provisions of the IEP (sections 614(d)–614(i)) content and process would be in one place in order to make the provisions more logical. *Id.* at 49.

certain educational decisions, the team members needed specific information about the child including the evaluation results, the child's strengths, and the parents' educational concerns.[123]

The Committee was particularly concerned about students who had disabilities that required more specialized services—such as students with hearing, visual, communication, motor, and physical impairments—and how LEAs were not adequately considering these unique needs in the students' IEPs.[124] It explicitly mentioned what LEAs should do when considering appropriate IEPs for students who are deaf or hard of hearing, who are blind or have visual impairments, who have expressive or receptive language deficits, and who have sensory or motor communication or physical impairments.[125] The Committee plainly stated that for students with sensory, motor communication, or physical limitations, "the IEP team should consider the provision of assistive technology devices and services."[126]

The Committee's language suggests that the Committee wanted the consideration process to be one with a careful discussion of the student's constellation of needs while contemplating the vast number of supports and services available. Thus, the legislative history supports the argument that when Congress adopted "consider," it did not intend to use it as a mechanism for preventing students from gaining access to these supports.[127] The Committee report also implies that prior to the 1996 amendments, schools were not adequately considering AT, and thus Congress defined examples of when and how to do so.[128] Therefore,

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123 *Id.*

124 *Id.* ("[I]n the past, other unique needs of some children with disabilities [had] not been adequately considered in their IEP's [sic].").

125 *Id.* at 49–50.

126 *Id.* at 50.

127 *See supra* notes 114–26 and accompanying text.

128 The Report states:

> The bill requires the child's IEP team to consider basic factors in developing each child's IEP, including the most recent evaluation results on the child, the child's strengths, and parent concerns for enhancing the child's education. The bill also provides that, in the case of a child whose behavior impedes the learning of the child or others, the IEP team, as appropriate, shall consider strategies, including behavior management plans, to address that behavior. The committee recognizes that addressing students' behavioral problems often requires a multifaceted approach. Psychological services are effective techniques for identifying underlying problems and ascertaining appropriate interventions.
>
> Furthermore, the committee is concerned that, in the past, other unique needs of some children with disabilities have not been adequately considered in their IEP's [sic]. For example, the committee believes that it is important that State and local educational agencies, in developing IEP's [sic] for children who are deaf or hard of hearing, consider factors such as: language and communication needs; opportunities for direct communications with peers and professional personnel in the child's language and communication mode; academic level; and social, emotional and

after the amendment and under these broad definitions, students with at least the disabilities specified in the legislative history should currently be evaluated for and using AT.[129] Additionally, the Committee specifically mentioned that it was making federal funds available for AT evaluations,[130] implying that the Committee wanted LEAs to actively evaluate students for AT, not prevent it.[131]

In 1997, the House Committee on Education and the Workforce and the Senate Committee on Labor and Human Resources submitted reports for the 1997 IDEA Amendments that provide exceptional background regarding how to "consider . . . assistive technology."[132] The Committees discussed how the IEP team must consider the strengths of a child, the concerns of the parent, and the evaluations of the child when

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> cultural needs, including opportunities for direct instruction in the child's language and communication mode.
>
> The committee believes that . . . . [i]n the case of a child who is blind or visually impaired, the IEP team should consider whether the child needs instruction in braille or in the use of braille. In the case of a child with expressive or receptive language deficits, the IEP team should consider techniques to ensure that the child understands what is being spoken. In the case of a child with sensory or motor communication, or physical impairment, the IEP team should consider the provision of assistive technology devices and services.

S. REP. NO. 104-275, at 49–50.

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> The committee believes that, in the case of a child with limited English proficiency, it [was] important to consider the language needs of the child as the needs relate[d] to the child's IEP. In the case of a child who is blind or visually impaired, the IEP team should consider whether the child needs instruction in braille or in the use of braille. In the case of a child with expressive or receptive language deficits, the IEP team should consider techniques to ensure that the child understands what is being spoken. In the case of a child with sensory or motor communication, or physical impairment, the IEP team should consider the provision of [AT] devices and services.

Id. at 50. This provision did not explicitly include children with auditory and visual processing problems, though that does not mean that they should *not* have access to AT.

130 *Id.* at 36–37.

131 *See supra* notes 114–30 and accompanying text. When the House Committee on Economic and Educational Opportunities made comments on the IDEA Improvement Act of 1996, some members added their own views to the majority's report. H.R. REP. 104-614 (1996). The additional views discussed the importance of technology and how AT could improve the educational opportunities for eight million students with disabilities (the number of students with disabilities at the time of the report in 1996). *Id.* at 51. The additional views referenced a quote from House Speaker Newt Gingrich who recognized the importance of technology for people with disabilities, noting its ability to "dramatically expand the potential for people, who historically have been totally outside the mainstream, to lead remarkably full lives," and further stating that "if you have [the] potential for liberating people and enabling them to lead full lives and you don't do everything you can to make it real, then it is an enormous, enormous mistake"—to which the additional views strongly agreed. *Id.* at 258, 260 (alteration in original).

132 S. REP. NO. 105-17 (1997); H.R. REP. NO. 105-95 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78.

developing an IEP.[133] However, the reports also said that there were essential considerations to ensuring that IEPs were successful.[134] Both reports stated that the purpose of an IEP was to create an educational program that was tailored to the child's needs, not one where the child has to adapt to the general educational curriculum without assistance.[135] Congress then proceeded to list instances where the IEP should consider specific programs, devices, and services in order to provide the child with a FAPE.[136] Congress specifically provided that the IEP team must consider a behavioral intervention plan and positive behavioral intervention strategies to address specific problem behaviors; Braille for a child who was blind or visually impaired; language and communication needs for children who were deaf or hard of hearing; and AT devices and services.[137] By specifically listing AT as a

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133 S. REP. NO. 105-17, at 24; H.R. REP. NO. 105-95, at 104.

134 S. REP. NO. 105-17, at 24; H.R. REP. NO. 105-95, at 104.

> [T]he Committee believes that a number of considerations are *essential* to the process of creating a child's IEP. The purpose of the IEP is to tailor the education to the child; not tailor the child to the education. If the child could fit into the school's general education program without assistance, special education would not be necessary.

H.R. REP. NO. 105-95, at 104 (emphasis added).

135 S. REP. NO. 105-17, at 24; H.R. REP. NO. 105-95, at 104.

136 S. REP. NO. 105-17, at 24; H.R. REP. NO. 105-95, at 104; *see* Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 614(d)(3)(B), 111 Stat. 37 (codified as amended at 20 U.S.C. § 1414) (amending the consideration of special factors section).

137 Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37.

> The bill provides that, in the case of a child whose behavior impedes the learning of the child or others, the IEP team, as appropriate, shall consider strategies, including positive behavior interventions strategies and supports, to address that behavior. . . . In the case of a child who is blind or visually impaired, the IEP team must provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child.
>
> The team also is to consider the communication needs of the child in order to ensure that local educational agencies better understand the unique needs of children who are deaf or hard of hearing. Section 614(d)(3)(B)(iv) includes special factors that must be considered in developing IEP's [sic] for these children. The policy included in the bill provides that, in the case of the child who is deaf or hard of hearing, the IEP team must consider the language and communication needs of the child; opportunities for direct communication with peers and professional personnel in the child's language and communication mode; the child's academic level; and the child's full range of needs, including the child's social, emotional, and cultural needs and opportunities for direct instruction in the child's language and communication mode. The committee also intends that this provision will be implemented in a manner consistent with the policy guidance entitled "Deaf Students Education Services," published in the Federal Register (57 Fed. Reg. 49274, October 30, 1992) by the U.S. Department of Education.

"Consideration of Special Factors" for the "Development of [an] IEP,"[138] Congress believed AT was one of the *essential* pieces to consider when developing an IEP. In fact, Congress's language suggests that it had *wanted* students to be evaluated for their AT needs, otherwise AT would not have been an essential component.

III. THE CURRENT JUDICIAL STANDARD FOR DETERMINING ASSISTIVE TECHNOLOGY CASES IS WHETHER ASSISTIVE TECHNOLOGY PROVIDES A "BASIC FLOOR OF OPPORTUNITY"[139]

This Part discusses the case law concerning AT and special education in general. The case law, although interesting as a background on how courts view AT issues, is of limited utility in supporting a proposition that AT should be considered for a student if it can provide an educational benefit. This is because many courts apply a standard that predates IDEA amendments regarding AT, and is therefore less helpful.[140]

As a background for understanding special education case law, a parent may file an Impartial Due Process Hearing Request against the school district when the parent feels that the district violated her child's special education rights or when the parent disagrees with the district's placement, services, evaluations, classifications, or eligibility for special education.[141] The Impartial Due Process Hearing is an administrative proceeding before an Impartial Hearing Officer (IHO).[142] In New York, if either party is unhappy with this decision, either party may appeal to

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> The bill further requires that the IEP team consider the provision of assistive technology devices and services when developing the child's IEP.

S. REP. NO. 105-17, at 24–25; H.R. REP. NO. 105-95, at 104–05.

138 Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 614(d)(3)(B), 111 Stat. 37.

139 Bd. of Educ. v. Rowley, 458 U.S. 176, 198–200 (1982).

140 This is known as the "*Rowley* standard" or a "basic floor" because of the Supreme Court case, *Board of Education v. Rowley*. *Id.*

141 20 U.S.C. § 1415(b)(6), (f) (2012).

142 *Id.* States can have either a one or two-tiered due process hearing system. WRIGHT & WRIGHT, *supra* note 15, at 113 n.130.

> In a one-tier system, the state department of education conducts the hearing and the losing party can appeal to the state or federal court. In a two-tier system, the hearing is conducted by the school district. The losing party must appeal to the state department of education, which will appoint a review officer or review panel. After the review officer or panel issues a decision, the losing party can appeal to state or federal court.

Id. New York has a two-tiered due process hearing system. *See* N.Y. EDUC. LAW § 4404(1) (McKinney 2010).

the State Review Officer (SRO).[143] After the SRO issues a decision, either party may appeal the case to the state or federal court and follow the appeals process for either court system.[144] It is also important to mention that only a small number of cases are actually reported, because many are settled through mediation or are not appealed to the SRO.[145]

Before delving into the case law, it is significant to understand the two-part inquiry that courts use to determine whether an IEP complies with IDEA.[146] First, courts look to see whether there were any procedural violations under IDEA.[147] Second, courts examine for any substantive issues within the IEP.[148] Substantive inadequacies automatically violate the child's rights, but procedural violations only do so if the violations rise to the level of a denial of FAPE.[149]

A. *"Basic Floor of Opportunity"*[150]

In the pivotal special education case, *Board of Education v. Rowley*,[151] the Supreme Court held that IDEA only entitles students with

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143 "A State Review Officer reviews decisions of impartial hearing officers concerning the identification, evaluation, program or placement of children who have, or are suspected of having, an educational disability." *Office of State Review*, N.Y. ST. EDUC. DEP'T, http://www.sro.nysed.gov (last updated Jan. 5, 2017). Either party has the right to appeal to the SRO after an impartial hearing officer makes a decision. *Id.; see* EDUC. § 4404(2).

144 20 U.S.C. § 1415(i)(2). In a two-tier system like New York, if the losing party does not appeal to the SRO, the IHO's decision is final; if the losing party wants to appeal to state or federal court, the losing party has ninety days or less to file an appeal. 20 U.S.C. § 1415(i)(2)(B).

145 Myrna R. Mandlawitz, *The Impact of the Legal System on Educational Programming for Young Children with Autism Spectrum Disorder*, 32 J. AUTISM & DEVELOPMENTAL DISORDERS 495, 497 (2002). If the decision from the IHO is not appealed, the public cannot access it. *Id.*

146 *See, e.g.*, R.E. *ex rel.* J.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 190 (2d Cir. 2012).

147 *See, e.g.*, Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2d Cir. 2005) (determining whether the state complied with the procedures set forth in the IDEA).

148 *See, e.g.*, *id.* (considering whether the IEP was "reasonably calculated to enable the child to receive educational benefits").

149 *See R.E.*, 694 F.3d at 190 ("Procedural violations, however, only [entitle parents to reimbursement] if they 'impeded the child's right to a [FAPE],' 'significantly impeded the parents' opportunity to participate in the decisionmaking process,' or 'caused a deprivation of educational benefits.'" (second alteration in original) (quoting 20 U.S.C. § 1415(f)(3)(E)(ii); A.C. *ex rel.* M.C. v. Bd. of Educ., 553 F.3d 165, 172 (2d Cir. 2009))). Multiple procedural violations when taken together may result in the denial of a FAPE even if the individual violations do not. *See, e.g.*, Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 659 (S.D.N.Y. 2005).

150 Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

151 *Id.* Justice Rehnquist delivered the opinion and believed this was a case of "statutory interpretation" in order to answer the questions: "What is meant by the [Education of All Handicap Children] Act's requirement of a 'free appropriate public education'? And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. § 1415?" *Id.* at 179, 186.

disabilities to a "basic floor of opportunity,"[152] and that a school district offers a FAPE when it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[153] Amy Rowley was an intelligent kindergartener with a severe hearing impairment; her parents wanted Amy to have a sign-language interpreter during her class to help her understand the material.[154] However, the school district argued that because Amy was able to pass her classes without an interpreter—she was an "excellent lipreader"[155] and the teachers took a course in sign-language[156]—the school had satisfied its legal obligation to provide Amy with an appropriate education.[157] The Supreme Court ruled that the district had met its obligation without providing Amy with an interpreter because Amy was only entitled to a "basic floor of opportunity."[158] Since *Rowley*, the Second Circuit further clarified that the school district still has an obligation to provide an IEP that provides the student with an opportunity that is more than just "mere 'trivial advancement,'"[159] and provides some "meaningful benefit."[160]

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152 *Id.* at 200. Amy Rowley's parents and amicus briefs from the United States urged the court to affirm the rulings below because although the Act says a child is entitled to a free appropriate public education, the statutory definition of "appropriate" was not explained. *Id.* at 187. The Court vehemently disagreed that Congress did not offer any help in defining "appropriate" in the statute itself and in the legislative history. *Id.* at 187–201.

153 *Id.* at 203. The dissent criticized the majority for this point, because the majority believed that "[b]ecause Amy was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education." *Id.* at 214 (White, J., dissenting).

154 *Id.* at 184–85. Amy's parents requested a sign-language interpreter for her academic classes instead of other assistance that the school placed in her IEP because she was provided with an interpreter in her kindergarten class for a trial period. *Id.* at 184.

155 *Id.*

156 *Id.*

157 *Id.* The school said that during the trial period, Amy did not need the interpreter's services and therefore did not need it for her first-grade class. *Id.* at 184–85. This decision was reached after the school had expert evidence from Amy's parents on the importance of an interpreter, had testimony from Amy's teacher, and visited a class for the deaf. *Id.* at 185. Instead, the school believed Amy would be fine with an FM hearing aid to "amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities." *Id.* at 184.

158 *Id.* at 200. *Rowley* also states that students with disabilities have to be placed in educational programs that confer some sort of educational benefit. *Id.* at 206–07; *see also* Allan G. Osborne, Jr., *Free Appropriate Public Education*, EDUC. L., http://usedulaw.com/300-free-appropriate-public-education.html (last visited Nov. 28, 2015).

159 *See* Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 (2d Cir. 2005) (quoting Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998)).

160 Mrs. B. *ex rel.* M.M. v. Milford Bd. of Educ., 103 F.3d 1114, 1120–21 (2d Cir. 1997) (holding that although IDEA does not state that the court can impose its own educational views on the state, the state IEP must provide some meaningful benefit to the child with a disability); *see also* Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) (holding that the *Rowley* standard means enabling access to educational opportunities and something

B. *Judicial Determinations on Substantive Discussions and Consideration*

It is beneficial to turn to a case that attempts to define what "consider" means in the context of an IDEA defined independent evaluation[161] to understand what is judicially sufficient for "consider[ing] . . . assistive technology."[162] This is because federal courts have been vague on deciding this issue for AT specifically. In 1993, the Second Circuit heard a case where the parent argued that the LEA violated IDEA and state regulations, which require independent educational evaluations to be "considered" by her son's team to create his IEP.[163] The parent's argument was that because only two school employees out of the six on the team were able to read the evaluation prior to the meeting, and because the evaluation was not discussed at any reasonable length, the evaluation was not "considered" by the team within the meaning of IDEA.[164]

The Second Circuit reasoned that because the regulations omitted a definition of "consider" and did not provide any indication of how

more than de minimis educational benefit). In addition, the First Circuit held that LEAs could not refuse to provide services to students with severe disabilities whom the school boards felt were too disabled to find any benefit from special education services. Timothy W. v. Rochester, 875 F.2d 954 (1st Cir. 1989); *see also* Osborne, *supra* note 158. In various unpublished district court cases concerning AT access *after* an AT evaluation has been completed, the courts have used a questionable application of the Second Circuit's meaningful benefit analysis. *See, e.g.*, High v. Exeter Twp. Sch. Dist., No. 09-2202, 2010 WL 363832, at *5 (E.D. Pa. Feb. 1, 2010) (finding that although an AT consultant found that the student needed AT in reading and writing, because the school declined this suggestion and decided it was unnecessary the court found no evidence that the student needed access to AT in order to receive FAPE); *see also* J.C. *ex rel.* C. v. New Fairfield Bd. of Educ., No. 3:08-cv-1591 (VLB), 2011 WL 1322563, at *18–19 (D. Conn. Mar. 31, 2011) (finding that a student who used a myoelectric arm did not need her arm for educational benefit, the myoelectric arm was not an AT device, and thus, there was no denial of FAPE). In these cases, courts found that "although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary. Moreover, the failure to provide [AT] denies a student FAPE only if the student could not obtain a meaningful benefit without such technology." *J.C. ex rel. C.*, 2011 WL 1322563, at *18 (quoting *High*, 2010 WL 363832, at *5). Arguably, however, under the "meaningful benefit" standard, AT should be determined as providing a meaningful benefit if it enables the child to access her educational materials.

161 This is an evaluation conducted by a qualified person who is not related or employed by the school district or LEA. 34 C.F.R. § 300.502(a)(3)(i) (2016). A parent has a right to an independent evaluation at public expense if the parent disagrees with the LEA's own evaluation (already conducted). 34 C.F.R. § 300.502(a)–(b).

162 20 U.S.C. § 1414(d)(3)(B)(v) (2012).

163 T.S. v. Bd. of Educ., 10 F.3d 87, 88 (2d Cir. 1993).

164 *Id.* at 89.

much weight an IEP team should place on the information, [165] the court should look to the plain meaning of the word to guide its interpretation.[166] Under this definition, the court concluded that not every person on the team needed to read a document in order to "consider" it, nor did the definition reveal that there was support for giving more weight to one piece of evaluative information over another.[167] This interpretation is further supported by the First Circuit case of *G.D. v. Westmoreland School District*,[168] where the court decided that the regulations did not require there to be "substantive discussion" in order to "consider" an independent evaluation.[169]

In an AT case,[170] the SRO used the Second Circuit's reasoning about independent evaluations to make the determination that whether a school district considered assistive technology should be evaluated under the same standard as whether a school district considered an independent evaluation.[171] In the SRO appeal, the parent argued that her son required Fast ForWord[172] to be in his IEP to receive a FAPE.[173] The school district argued, though, that Fast ForWord was not AT, but rather instructional methodology, which the school had no obligation to place in a student's IEP.[174] The case rested on whether the school actually considered AT.[175]

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165 *Id.* ("No definition of the term 'considered' is offered in either the federal or state regulations. Nor do they require that the [team] assign a specific weight to any item of information presented to it for its consideration.").

166 *Id.* The court determined that based on Webster's Dictionary, it defined consider as "to reflect on: think about with a degree of care or caution." *Id.*

167 *Id.* at 89–90 ("Plain meaning is ordinarily our guide to the meaning of a statutory or regulatory term. The plain meaning of the word 'consider' is 'to reflect on: think about with a degree of care or caution.' Nothing in this definition suggests that every member of a body must read a document in order for the body collectively to 'consider' it. In addition, T.S.'s interpretation of the term 'considered' would assign greater weight to an [individual educational evaluation] than to other information presented to a[n IEP team], and accordingly conflicts with the commentary to the state regulation.").

168 930 F.2d 942 (1st Cir. 1991).

169 *Id.* at 947. The Second Circuit also used *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988) to support the proposition that the evaluation was adequately considered when just the director of special education read it. *T.S.*, 10 F.3d at 90; *see also* K.E. *ex rel.* K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 806 (8th Cir. 2011) (discussing how "considering" the results of independent evaluations did not mean that the school was forced to incorporate all of the evaluation into the IEP).

170 Student with a Disability, No. 10-126 (N.Y. State Educ. Dep't Jan. 21, 2011) (appeal to Office of State Review), http://www.sro.nysed.gov/decisionindex/2010/10-126.pdf.

171 *Id.* at 6–7.

172 Fast ForWord is a software product that assists students who have difficulty reading. *Fast ForWord*, SCI. LEARNING, http://www.scilearn.com/products/fast-forword (last visited Oct. 17, 2015).

173 *Student with a Disability*, No. 10-126 at 6.

174 *Id.*

175 *Id.* at 6–7.

According to the SRO,[176] "consideration" did not require some "substantive discussion,"[177] and thus, found that the CSE adequately "considered" Fast ForWord and rejected it.[178] The SRO explained that Fast ForWord was not a "critical component"[179] of the student's IEP because there was no documentary evidence or testimony that supported the proposition that the student *required* Fast ForWord in order to receive a FAPE.[180] Furthermore, at the time of the hearing, the student had not begun using Fast ForWord and therefore the benefit was only speculative.[181] Thus, the combination of the SRO's reasoning and the lack of concrete information from an evaluation strongly supports the proposition that there is a critical need for a requirement to evaluate in order to satisfy the legal obligation to consider AT. If there had been an evaluation, the benefit would not have been "speculative."[182]

The SRO's decision to use the independent evaluation definition of "consider" is misplaced. The analysis for considering an independent evaluation should be distinct from when IDEA requires an IEP team to "consider . . . assistive technology."[183] This is because when IEP teams "consider" an independent evaluation, an evaluation has already been completed and the district is only considering how to weigh the findings of the evaluation. With AT, though, the district might consider whether or not the student needs AT before ever conducting an evaluation, and

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176 Because of the structure of the appeals process, the SRO's decision has precedential value. *See supra* notes 143–44.

177 *Student with a Disability*, No. 10-126 at 7. The SRO believed the CSE's obligation to consider was satisfied when the private neurologist stated that the student required Fast ForWord for his severe verbal apraxia and the CSE discussed and rejected this finding for the IEP. *Id.*

178 *Id.*

179 *Id.*

180 *Id.* The SRO reasoned that because the student had other AT services and devices, the student did not need this particular one. Specifically, the SRO stated:

> A speech-language pathologist/audiologist from SLCD testified that she had supervised the use of Fast ForWord with approximately 30 students, but that at the time of her testimony, Fast ForWord had not yet been tried with the student. Although she stated that Fast ForWord was "not for every child," she opined that based on the student's profile, he was an appropriate candidate for Fast ForWord as it could "possibly" help him improve his processing speed. The SLCD speech-language pathologist/audiologist also testified that Fast ForWord was not the only way to effectively address the student's language needs, and that she had "no direct evidence" that Fast ForWord would be effective to use with the student.

Id. at 7–8 (citations omitted). In summary, the SRO believed that it was not "inappropriate for the SLCD to try" Fast ForWord, but it was "not a *necessity* for the student." *Id.* at 8 (emphasis added).

181 *Id.* at 7.

182 *Id.* at 8.

183 20 U.S.C. § 1414(d)(3)(B)(v) (2012).

is thus "considering" without any relevant, evaluative information before it.[184]

Furthermore, the legislative history specifically states that educating students with disabilities can be more effective if schools support the development of AT to "*maximize* [their] accessibility."[185] This use of "maximize"—a term that deliberately contemplates a different standard than *Rowley*'s "basic floor"[186]—indicates that the legislature intended for AT to be used to provide maximum access to the general education curriculum, not simply to enter the educational doors. In *Rowley*, the majority relied on the sections of the legislative history of the EHA that focused on excluding children with disabilities from education to reach the decision that children with disabilities were not entitled to every special service that could possibly maximize the student's education.[187] For AT, however, Congress *did* intend for students to access and utilize AT, a particular special service, to *maximize* their education.[188]

C. *The Failure to Conduct an Assistive Technology Evaluation Within the* Rowley[189] *Standard*

In determining how to interpret "consider" as it applies to AT, the standard should be that a failure to conduct an AT evaluation is equal to a failure to consider AT,[190] unless there is an evidentiary reason why the child should not have such an evaluation. This standard is illustrated in a Hawaii district court case, *Blake C. v. Department of Education*,[191] which interpreted a failure to conduct an AT evaluation as a failure to "consider . . . assistive technology."[192] There, the parent made a claim that the Hawaii Department of Education violated IDEA by failing to

184 *See* MANNING, *supra* note 92, at 3.

185 H.R. REP. NO. 108-779, at 4 (2004) (Conf. Rep.), *reprinted in* 2004 U.S.C.C.A.N. 2480, 2480 (emphasis added) (discussing section 682(c)(5)(H)). See *supra* Part II for a discussion on the legislative history.

186 Bd. of Ed. v. Rowley 458 U.S. 176, 198–200 (1982).

187 *Id.* at 198–99 ("The requirement that States provide 'equal' educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. . . . to require . . . the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go.").

188 H.R. REP. NO. 108-779, at 4 (2004) (Conf. Rep.), *reprinted in* 2004 U.S.C.C.A.N. 2480, (discussing Sec. 682(c)(5)(H)). See *supra* Part II for a discussion on the legislative history.

189 458 U.S. 176.

190 *See* 20 U.S.C. § 1414(d)(3)(B)(v) (2012).

191 Blake C. *ex rel.* Tina F. v. Dep't of Educ., 593 F. Supp. 2d 1199 (D. Haw. 2009).

192 20 U.S.C. § 1414(d)(3)(B)(v).

perform an AT evaluation.[193] The court agreed with the parent because (1) the parent raised potential AT devices with the school;[194] (2) the Department did not consider any type of AT device; (3) the Department did not do an evaluation;[195] and (4) the record indicated that the student should have "at least" been considered or evaluated for AT.[196]

Moreover, if the DOE fails to "consider . . . assistive technology,"[197] which this Note argues consists of failing to conduct an AT evaluation, then the DOE fails to provide a student with a FAPE.[198] In *J.G. ex rel. N.G. v. Kiryas Joel Union Free School District*,[199] although the claims are similar to a typical IDEA case, the facts are very different.[200] The family at issue lived in a very religious community where people preferred to send their children to religious schools (yeshivas); however, those religious schools did not provide special education services.[201] Therefore, children with disabilities had to attend public schools *outside* of their community, which were extremely unsatisfactory.[202] The New York State Legislature sought to remedy this situation by allowing Kiryas Joel to create its own union free school district, a self-contained, special education program only for students with disabilities, to keep students with disabilities in the Kiryas Joel Village.[203]

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193 *Blake C.*, 593 F. Supp. 2d at 1212.

194 *Id.* (noting the parent requested a "word processor unit" to assist the student with writing).

195 *Id.* The school's argument was that the concern was never raised at the IEP meeting or before so it had no knowledge that the student wanted an AT evaluation.

196 *Id.* It is unclear though *why* the court uses the phrase "at least" considered for evaluation, though it could be because the student was diagnosed with autism, making it difficult for the student to communicate. *See id.* The phrase "at least" seems to indicate that the evaluation is a baseline service to determine whether a student even needs AT.

197 20 U.S.C. § 1414(d)(3)(B)(v).

198 *See, e.g.*, J.G. *ex rel.* N.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 616 (S.D.N.Y. 2011); *Blake C.*, 593 F. Supp. 2d at 1212.

199 *J.G.*, 777 F. Supp. 2d 606.

200 *Id.* at 616.

201 *Id.* at 616–17.

202 *Id.* at 617. The residents of Kiryas Joel are

> vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. . . . Children are educated in private religious schools, . . . where they receive a thorough grounding in the Torah and limited exposure to secular subjects. . . . These schools do not, however, offer any distinctive services to handicapped children.

Id. at 616–17 (quoting Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 691–92 (1994)). The religious schools did not provide special education services, so those children had to attend highly unsatisfactory public schools outside the village. *Id.* Because parents found these schools so unsatisfactory, all but one child in 1989 were enrolled in privately funded special education services or were simply not receiving their necessary services. *Id.*

203 *Id.* at 617. New York tried to solve the problem by authorizing Kiryas Joel to have its own "union free school district" that ended up operating only a special education program for children with disabilities. *Id.* (citing to *Bd. of Educ. of Kiryas Joel*, 512 U.S. at 693). The Supreme

N.G., the child in this case, had multiple disabilities and his mother requested that he be placed in a mainstream, yeshiva setting.[204] The CSE, however, recommended a self-contained class with speech, occupational, and physical therapy for him.[205] The CSE did *not* recommend an AT evaluation, because the CSE believed N.G.'s disability was too severe and, thus, AT would not be beneficial.[206] Furthermore, the school claimed that because it incorporates a variety of technology within the classroom, it did not need to discuss AT during IEP meetings.[207]

Although the ultimate ruling granted the school district's motion for summary judgment because the court found that the parents' unilateral placement of their child in a private school was not appropriate under the circumstances,[208] the decision focused on the connection between AT and LRE. In particular, the Southern District of New York relied on a case that provided a framework for assessing whether a child is in his LRE, which is useful in analyzing the district's obligation to consider AT in the context of using an evaluation.[209]

Court held that this legislative attempt violated the Establishment Clause of the First Amendment, but after multiple legislative attempts, there are no further constitutional concerns. *Id.*

204 *Id.* at 618 ("While Kiryas Joel focuses on teaching children to read, write, make decisions, and understand information, parents in the village, 'most typically, want their children to be able to recite prayers, to read the Bible in its original, in the Hebrew text, to read comment areas in that language.' . . . 'If [parents] had the choice, if their child does not have special needs they wouldn't send their child to [Kiryas Joel] either, they prefer having their children in yeshivas.'" (second and third alterations in original) (citations omitted)). A mainstream placement is also known as a general education setting; however, here, the mainstreaming was not in a regular education setting, but it did provide the child access to an education with his typically developing peers. *Id.*

205 *Id.* at 626.

206 *Id.* at 627 ("[His] speech and language skills were so basic and underdeveloped that he had not reached the stage where an assistive technology would be useful.").

207 *Id.* (stating that the law only required them to consider AT when a child required "some special education equipment, device, supplementary aid, service, or accommodation beyond what the district already had in place").

208 The court held that the IEP was "reasonably calculated to provide [the student] with educational benefits," and although the district violated IDEA by not placing the child in his LRE, the parents' unilateral placement of the child in a yeshiva was not appropriate. *Id.* at 650–51, 656–57.

209 *Id.* at 651. The framework is as follows: (1) whether the child can be educated in a regular classroom with supplementary aids and services, which is evaluated by (a) whether the school district made reasonable efforts to accommodate the child in the regular classroom setting; (b) whether there are educational benefits available to the child in a regular classroom with the appropriate aids and services as compared to the support in a special education class; and (c) whether there are negative effects regarding the inclusion of a child with a disability on the typically developing children already in the general education class. *See* P. *ex rel.* Mr. and Mrs. P. v. Newington Bd. of Educ., 546 F.3d 111, 120 (2d Cir. 2008). Then, (2) the school has to also consider whether the child has actually been mainstreamed to the maximum extent appropriate. *Id.*

According to the district court, Kiryas Joel did not take steps toward mainstreaming N.G., because the school district simply relied on his disabilities to make its determination, and because a conversation alone did not constitute a reasonable effort to accommodate N.G.[210] More importantly, the court stated that "the most important step toward inclusion that a school district can take is 'to provide *supplementary aids and services* to enable children with disabilities to learn *whenever possible in a regular classroom*,'"[211] such as AT.[212]

Applying this framework to N.G., the court found that Kiryas Joel had the ability to place children in their LRE; yet, the CSE assumed without *evaluating* for AT that N.G. simply could not use technology beyond what Kiryas Joel already had in place.[213] This, the court believed, was inappropriate given the goals of IDEA and Kiryas Joel's "undisputed failure to undertake an assistive technology evaluation despite the fact that N.G. was almost entirely nonverbal."[214] Thus, the court ordered Kiryas Joel to conduct an AT evaluation[215]—an order that highlights how vital an evaluation is in "consider[ing] . . . assistive technology."[216] Thus, *Blake C.* and *J.G.* support the proposition that LEAs should use an AT evaluation to satisfy the legal obligation to "consider . . . assistive technology,"[217] especially when it can lead to more LRE placements.

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210 *J.G.*, 777 F. Supp. 2d at 651 (explaining how important mainstreaming was "in light of Congress's goal of maximizing the time that children with disabilities spend among their typically developing peers").

211 *Id.* at 651–52 (emphasis added). Here, the court cited to *Oberti*, defining a continuum of placements to assist in meeting the educational needs of children with disabilities. *J.G.*, 777 F. Supp. 2d at 652 (citing Oberti v. Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993)).

212 *Id.* (citing A.G. *ex rel.* S.G. v. Wissahickon Sch. Dist., 374 F. App'x 330, 334 (3d Cir. 2010)).

213 *Id.* (highlighting the point further by stating "[i]f there is a continuum of educational placements, N.G. was placed squarely at the most restrictive end of it").

214 *Id.*

215 *Id.* at 659. In the conclusion of the case, the court stated that it denied the parents' claim for declaratory relief and reimbursement for privately obtained related services and denied the parents' reimbursement for pendency entitlements. *Id.* at 658. However, the court also ordered Kiryas Joel to "conduct an assistive technology evaluation of N.G., if one has not been undertaken since the due process demand notice originally was filed." *Id.* at 659.

216 20 U.S.C § 1414(d)(3)(B)(v) (2012).

217 *Id.*

IV. PROPOSAL

A. *The New York City DOE, or NYSED, Should Enact a New Regulation that Is in Compliance with Legislative History*

IDEA sets forth a specific standard to educate all students with disabilities in their LRE.[218] Using the legislative history and the case law above, this Note has argued that the Legislature intended for AT to be used as a mechanism to achieve this standard. However, LEAs are not adequately considering AT.[219] Thus, this Note argues that the DOE, as an example LEA,[220] cannot meaningfully "consider . . . assistive technology"[221] without an evaluation to determine whether AT will provide educational benefits, meet the student's unique needs, and help the student become independent.[222]

To ensure that an evaluation is conducted, this Note proposes that the DOE to enact a new Chancellor's regulation, or that NYSED as the governing New York education body enact a new state-wide regulation, requiring an AT evaluation as part of the IDEA requirement to "consider . . . assistive technology"[223] in all instances when AT might be useful for a student's disability. For most disabilities (such as learning disabilities, autism, and multiple disabilities) there is no way of knowing whether AT will be helpful unless there is an evaluation.[224] However, there will be cases when it is plainly apparent that a student with a disability simply does not require AT, let alone an evaluation.[225] For

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218 20 U.S.C. § 1412(a)(5)(A); *see also supra* Section I.A.

219 *See, e.g.*, S. REP. NO. 104-275, at 49–50 (1996); *supra* Parts II, III; *see also* Susan Zeiter, *One View: Parents Often Need Help Advocating for Child*, RENO GAZETTE-J. (July 22, 2016, 7:40 AM), http://www.rgj.com/story/news/education/2016/07/15/one-view-parents-often-need-help-advocating-child/84937608; Dave Edyburn, *Assistive Technology Advocacy*, ADVOCACY IN ACTION (Sept. 2009), http://www.advocacyinstitute.org/advocacyinaction/ATAdvocacy.pdf.

220 Although this proposal may apply to other states, this Note specifically focuses on New York, and thus must limit its recommendation to New York.

221 20 U.S.C. § 1414(d)(3)(B)(v).

222 *See* H.R. REP. NO. 101-544, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1730. *See generally supra* Part II.

223 20 U.S.C. § 1414(d)(3)(B)(v).

224 A report from 2004 makes an excellent point that by not assessing all "struggling students," schools run the risk of "perpetuating discriminatory AT assessment practices that provide AT only to those students with advocates that challenge the system." Dave L. Edyburn, *Rethinking Assistive Technology*, SPECIAL EDUC. TECH. PRACTICE, Sept.–Oct. 2003, at 16, 16–18, 21. While this Note argues specifically within the context of students with disabilities in schools, who may or may not be struggling at the point of consideration, promulgating a regulation that operates under an opt-out policy also prevents the perpetual discriminatory evaluation tactics mentioned in the report. *Id.*

225 One possible example is a student with a surgically implanted device. In this case, the IDEA specifically states that a medical device is not considered AT. *See* 20 U.S.C. § 1401(1)(B).

those students, there must be a conversation with the parent and student (if appropriate) about the potential AT options and why each of those options is not appropriate for the child's educational benefit. After this conversation, the DOE must then document this consideration by listing the reasons why the various AT devices and services were not appropriate for the student and noting the Parent's concerns with the recommendation. Then, in addition to the Parent signing the IEP document itself, the parent will sign an additional statement in the IEP stating that the team has had a conversation about all available AT and the parent has either decided not to have an evaluation or would still like one despite the reasons why AT would be inappropriate. If the parent still requests an evaluation after understanding why it would be inappropriate, the DOE can contest it through a due process impartial hearing.[226]

In practice, this proposal would proceed as follows: during the IEP meeting, when the DOE representative reviews the "Special Factors" section, the representative will ask the group whether the student could receive an educational benefit if she was provided with *any* level or type of AT.[227] If the answer is yes, the DOE will conduct an AT evaluation to make an informed decision about the devices and services appropriate for the student. By conducting an evaluation, the DOE will be able to decide whether AT could aid in providing access to the student's educational curriculum—without resorting to speculation. If it can aid the student, then the DOE will be able to accurately identify what type of AT the student needs to become independent and compete with their typically developing peers.[228] The evaluation is critical to the "consider . . . assistive technology"[229] mandate because it provides a solid basis for making an appropriate decision. Therefore, if the IEP team obtains an evaluation, it will be better equipped to adequately

Thus, the student would not require an AT evaluation for her disability that requires the surgically implanted device. However, if she had another disability that could benefit from AT then an evaluation would be required under this proposal.

226 *See, e.g.*, 34 C.F.R. § 300.502(b)(2)(i) (2016) (stating that if a parent requests an independent educational evaluation at the public's expense, but the district disagrees, believing that the public educational evaluation was appropriate, the district can file a due process complaint requesting a hearing).

227 See *supra* note 20 for various examples of AT.

228 *See* Memorandum from Cosimo Tangorra, Jr., former Deputy Comm'r for P-12 Educ.; Kevin G. Smith, Deputy Comm'r of Adult Career & Continuing Educ. Servs.; Jeffrey Cannell, Deputy Comm'r of Cultural Educ. on Assistive Tech. for Individuals with Disabilities, to the P-12 Educ. Comm., ACCES Comm., Cultural Educ. Comm., at 2 (Feb. 2, 2015), http://www.regents.nysed.gov/common/regents/files/215p12ACCESCEd1.pdf ("Assistive technology for individuals with sensory, mobility, cognitive and learning disabilities should provide them with the independence to compete effectively with peers while in school and in the working world.").

229 20 U.S.C. § 1414(d)(3)(B)(v).

"consider . . . assistive technology."[230] If the team decides that a student does not need AT *or* an evaluation, then the team would be required to write why the child does not need those services on the IEP, and indicate any parental disagreement before the IEP is signed.

Requiring the DOE to document reasons why a service or setting is inappropriate is not a new concept. The federal regulations already require LEAs to write in the IEP why a child will not be in a mainstream setting—the preferred setting for LRE.[231] This is because the goal of IDEA is to ensure students are in their LRE with the use of supplementary aids and services.[232] Therefore, this Note argues, that in order to best adhere to the spirit of IDEA, the documentation requirement must include the LEA's responsibility to "consider . . . assistive technology."[233] Extending this requirement would ensure that the team is considering AT appropriately, while keeping the goals of LRE and FAPE in mind. More importantly, it would ensure that the school is "tailor[ing] the education to the child; not tailor[ing] the child to the education."[234]

Two possible counter arguments to this proposal are that the DOE has limited financial resources and that the DOE is already acting in good faith when it considers AT. First, requiring the DOE to conduct evaluations and possibly increase the number of students with AT devices could place an unreasonable financial burden on the LEA.[235] However, the Legislature heard testimony on this issue in relation to the Tech Act and found that because of AT, individuals with severe disabilities were now able to become more independent in their education and lives—shifting the cost-benefit analysis in favor of

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230 *Id.*

231 *See generally* 20 U.S.C. § 1412(a)(5)(A).The statute reads,

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of *supplementary aids and services* cannot be achieved satisfactorily.

Id. (emphasis added); *see also* 34 C.F.R. § 300.320(a)(5) ("An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and . . . activities. . . .").

232 *See* 20 U.S.C. § 1412(a)(5)(A).

233 20 U.S.C. § 1414(d)(3)(B)(v).

234 S. REP. NO. 105-17, at 24 (1997); H.R. REP. NO. 105-95, at 104 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 102.

235 *See, e.g.*, Amy Clark, *Assistive Technology in the Special Education World*, SPECIAL EDUC. L. BULL. (Quinlan, Boston, M.A.), Dec. 2011, art. 2 (stating that schools across the country are facing budget cuts, and so adding new technology to already existing practices can take time away from teachers).

providing AT.[236] Moreover, if the law states that children with disabilities have an equal right to receive a FAPE, then ensuring that students receive those services to guarantee an appropriate education is fundamental.[237] Thus, by requiring evaluations as part of the definition to "consider" the DOE would maximize the chances that students with disabilities are educated with their typically developing peers and become independent members of the community.[238] Furthermore, IDEA itself allows for some federal reimbursement of this particular expense.[239]

Second, the DOE would likely argue that it already operates in good faith when considering AT. The DOE would point to its use of the SETT Framework and how SETT illustrates the DOE's commitment to identifying the students who need AT. However, if this were always accurate, then there would not be various AT complaints like the ones discussed in this Note.[240] A requirement to evaluate a student for AT and document the reasons why the child would not receive it could decrease the amount of AT complaints filed against the DOE and increase access to AT amongst students. As such, requiring that the DOE evaluate a student for AT to comply with the legal standard ensures that IEP teams are making informed, documented decisions and are enabling students with disabilities to access their educational programs.

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236 *See* S. REP. NO 100-438, at 29–30, 43 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1383, 1389, 1402.

237 *See* Stead, *supra* note 21, at 250 ("It has been argued that providing assistive technology as required by the IDEA will be prohibitively expensive, and that special education in general unfairly devotes a disproportionate share of education funds to a select few students. To accept this argument is to reject the principles behind the passage of the IDEA, that children with disabilities have the right to receive a free appropriate public education. It also runs counter to the United States' long commitment to free compulsory public education. After all, if a school is not going to pay for what is needed for a student to receive a meaningful education, compulsory attendance serves little purpose." (footnotes omitted)). In addition, the Stead Note points out that "[e]ven if one ignores this contradiction, a cost-benefit analysis of the provision of assistive technology . . . quickly reveals that it is worth a great deal more than it costs." *Id.*

238 *See* S. REP. NO 100-438, at 29–30, 43 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1383, 1389, 1402.

239 *See* Memorandum from Thomas B. Neveldine to District Superintendents et al., http://www.trecenter.org/appendixc.htm (last visited July 24, 2016).

240 In fact, these are just the reported cases; however, many cases are resolved at the IHO level and it is likely that at least some of those cases involve AT claims.

B. *Courts and Tribunals Should Interpret Assistive Technology Claims in Accordance with Legislative History*

In addition to proposing a new regulation, this Note also proposes that the courts and tribunals find that a failure to evaluate for AT is a failure to "consider . . . assistive technology,"[241] except where it is apparent that the student would not benefit from any AT. This standard is more in line with maximizing a child's educational benefit[242] that the legislature intended, rather than simply providing them a "basic floor of opportunity."[243] Essentially, this standard takes a seemingly basic procedural violation and raises it to the level of a denial of FAPE by saying that the absence of an AT evaluation impeded the child's right to a FAPE and/or deprived the child of educational benefits to which she is legally entitled.[244] Arguably, this is the same standard the courts already use when evaluating the CSE's failure to complete an adequate functional behavioral assessment (FBA).[245] When the CSE fails to conduct an adequate FBA, a serious procedural violation, the CSE is unable to gather and evaluate the necessary information about the student's behaviors, which leads to an inadequate IEP.[246] In fact, this procedural violation is so egregious that it substantially impairs the "substantive review of the IEP" because the court is unable to determine the actual information from the FBA or whether the FBA information would have been consistent with the IEP.[247] This is the exact situation at play with AT. Despite the fact that the evaluation is procedural in nature, the lack of an AT evaluation seriously impairs a court's ability to

241 20 U.S.C. § 1414(d)(3)(B)(v) (2012).

242 H.R. REP. NO. 108-779, at 4 (2004) (Conf. Rep.), *reprinted in* 2004 U.S.C.C.A.N. 2480.

243 Bd. of Educ. v. Rowley, 458 U.S. 176, 198–201 (1982).

244 *See supra* notes 147–49.

245 *See* R.E. *ex rel.* M.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 190 (2d Cir. 2012) ("The failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all. . . . [S]uch a failure seriously impairs substantive review of the IEP because courts cannot determine exactly what information an FBA would have yielded and whether that information would be consistent with the student's IEP. The entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors."). In general, an FBA is a process used to identify the reasons for a behavior and the possible interventions that can be used to address the behavior. *See Functional Behavioral Assessments*, N.Y. ST. EDUC. DEP'T OFF. OF SPECIAL EDUC., http://www.p12.nysed.gov/specialed/publications/topicalbriefs/FBA.htm (last updated May 23, 2011).

246 *R.E.*, 694 F.3d at 190.

247 *Id.* ("The entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors."); *see* Harris v. District of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008) ("The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.").

substantively review the child's IEP because the court lacks the information it would have gathered from the AT evaluation.

A counter argument against proposing to change how courts and tribunals interpret AT claims is that *Rowley* is clear that maximizing opportunities for students with disabilities is not required.[248] However, there are three reasons why that argument falls short for AT. First, the proposed regulation would provide courts and administrative tribunals a mechanism for analyzing an AT claim. Second, the Second Circuit already adopted a seemingly higher standard for IDEA claims than the Supreme Court did in *Rowley*,[249] and thus the Note proposes a standard that is in line with the Second Circuit's test. Third, the legislative history indicates that the AT provisions within IDEA are *essential* to creating a student's IEP.[250] The plain language of IDEA says that schools must "consider . . . assistive technology,"[251] but the intent behind the word "consider" indicates that it should be a meaningful process.[252] This level of deliberation can only be achieved if LEAs, like the DOE, enact a regulation as proposed above. The legislative history regarding AT suggests that courts and tribunals misinterpret the legislative intent and spirit of IDEA when they decide that there was not a denial of a FAPE when the LEA fails to execute an AT evaluation.[253] This misjudgment is problematic because instead of ordering an evaluation for more information, the judge simply denies the FAPE claim and the school is under no obligation to conduct an evaluation to determine whether AT could benefit the student. Therefore, if courts and tribunals used a standard guided by legislative history and the "meaningful benefit"[254] standard, then students with disabilities would have the opportunity to access AT, opening the door to the general education curriculum and a more independent life.[255]

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248 Bd. of Educ. v. Rowley, 458 U.S. 176, 190, 198–99 (1982); *see also* Julnes & Brown, *supra* note 42, at 740.

249 *See supra* notes 159–60 and accompanying text. It should be noted that in October 2016, the Supreme Court decided to grant certiorari to *Endrew F.*, a case that would redefine a federal standard for a FAPE. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 798 F.3d 1329 (10th Cir. 2015), *cert. granted*, 136 S. Ct. 2405 (2016).

250 *See* S. REP. NO. 105-17, at 24 (1997); H.R. REP. NO. 105-95, at 104 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 102 (stating how AT is an essential component).

251 20 U.S.C. § 1414(d)(3)(B)(v) (2012).

252 *See* S. REP. NO. 104-275, at 49 (1996).

253 *See* Student with a Disability, No. 10-126 (N.Y. State Educ. Dep't Jan. 21, 2011) (appeal to Office of State Review), http://www.sro.nysed.gov/decisionindex/2010/10-126.pdf; *see also supra* note 160.

254 *See supra* note 160 and accompanying text.

255 *See* H.R. REP. NO. 101-544, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1730. *See generally supra* Part II.

CONCLUSION

AT is an essential component of a child's IEP, and the DOE should conduct AT evaluations to adequately consider AT and adhere to the spirit of IDEA. Courts, SROs, and IHOs should also evaluate AT claims with the understanding that Congress intended for AT to maximize[256] a child's education, not for merely providing a "basic floor of opportunity."[257] In conclusion, more students with disabilities will have access to a better education and life if LEAs, like the DOE, were required to conduct an AT evaluation as a prerequisite for adequately considering AT,[258] and if courts and administrative tribunals altered their interpretation of failure to consider AT claims to be consistent with legislative history.

256 H.R. REP. NO. 108-779, at 4 (2004) (Conf. Rep.), *reprinted in* 2004 U.S.C.C.A.N. 2480, 2480 (discussing section 682(c)(5)(H)). See *supra* Part II for a discussion on the legislative history.

257 Bd. of Educ. v. Rowley, 458 U.S. 176, 198–200 (1982).

258 *See* 20 U.S.C. § 1414(d)(3)(B)(v) (2012).