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After *Rowley*: The Handicapped Child's Right to an Appropriate Education

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CASE COMMENTS

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Amy Rowley is a very bright eight year old child who despite her deafness performs well above the median in her class.¹ Like most deaf people, she has minimal residual hearing and is an excellent lipreader.² Since beginning public school, she has received many special services,³ and the administrators of her school district have responded constructively to the challenge of providing her with an education.⁴ Nevertheless, because Amy could discern

1. *Rowley v. Board of Educ.*, 483 F. Supp. 528, 532 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980) (per curiam), *rev'd*, 458 U.S. 176 (1982).

2. *Rowley*, 483 F. Supp. at 530. The efficacy of lipreading is reduced if the speaker is not in view, or if many people are speaking at once. However, Amy is a well-adjusted child who has excellent interaction with her teachers. Although she usually responds accurately to her teacher's instructions, if she happens to miss something, she notifies her teacher. *Id.* at 531.

3. *Id.* at 530. The school district's Committee on the Handicapped (made up of a psychologist, an educator, a physician and the parent of a handicapped child) recommend that Amy be provided with: a) an FM wireless hearing aid; b) the services of a tutor for the deaf for an hour every day; and c) the services of a speech therapist for three hours every week. These recommendations were incorporated into Amy's individualized education program (IEP) and enabled her to participate in class with a slight advantage over the other students. *Id.* at 530-31.

Under the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. §§ 1401-61 (1982), a local educational agency or intermediate educational unit that receives federal funds under section 1411(d) must provide every handicapped child with an IEP that must be revised at least once a year. 20 U.S.C. § 1414(a)(5). See *infra* notes 90, 93 and 94, and accompanying text.

4. *Rowley*, 483 F. Supp. at 530. A teletype machine was installed in the school principal's office to facilitate communication with Amy's parents who are also deaf. Additionally,

only fifty-nine percent of the words spoken to her,⁵ her parents insisted upon the services of a sign language interpreter.⁶ On several occasions, school officials provided interpreters for Amy, but she resisted the interpretation and instead relied on her teachers for instruction.⁷ As a result, the school administrators refused to provide her with the services of a sign language interpreter.⁸ Amy's parents, still insisting upon the services of a sign language interpreter, demanded and obtained a hearing before an independent examiner.⁹ The examiner denied the parents' request for an interpreter,¹⁰ and on appeal, the New York Commission of Education affirmed the denial.¹¹ The Rowleys then filed a civil suit in the United States District Court for the Southern District of New York.¹² The federal district court noted that although Amy was performing well academically, she was not performing as well as she would be performing without her handicap because she could not identify one hundred percent of the words spoken to her.¹³ Thus, the court held that she was not receiving a "free appropriate public education"¹⁴ as defined by the Education for All Handicapped Children Act of 1975 ("EAHCA").¹⁵ The district court de-

many of Amy's teachers enrolled in sign language interpretation courses.

5. *Id.* at 532. This figure was derived from the result of auditory speech discrimination tests performed on Amy. The district court noted that words spoken in a familiar surrounding by a familiar speaker are easier to identify than words spoken under test conditions. But the court also noted that Amy is likely to hear less in a noisy classroom and when more than one person is speaking at a time. With the use of "total communication," which includes simultaneously mouthing words and signing them, however, the court determined that Amy would be able to identify 100% of the words spoken to her. *Id.*

6. *Id.* at 531.

7. *Id.* at 530. To determine whether Amy would benefit from a sign language interpreter, an interpreter was placed with her in the classroom for two weeks. The interpreter reported that Amy resisted interpretation and asked the teacher rather than the interpreter to repeat words she had missed. Additionally, Amy's first grade teacher testified that when Amy's tutor used sign language to tell her what the teacher was saying in class, Amy looked to the teacher rather than the tutor. Finally, when Amy was subjected to a sign language interpretation test, she asked the teacher, rather than the sign language interpreter, to repeat whatever she failed to understand. *Rowley*, 632 F.2d at 950 (Mansfield, J., dissenting).

8. *Rowley*, 632 F.2d at 950.

9. *Rowley*, 483 F. Supp. at 531.

10. *Id.*

11. *Id.*

12. *Rowley*, 483 F. Supp. at 528.

13. *Id.* at 535. The court noted that no child understands 100% of the words spoken in class, but these failures are due to either lack of intellectual potential or to lack of interest and energy. In contrast, "Amy's lack of understanding . . . is inherent in her handicap." *Id.*

14. *Id.*

15. The EAHCA defines "free appropriate public education" as:

special education and related services which (A) have been provided at public

defined an "appropriate education" as "an opportunity [for handicapped children] to achieve [their] full potential commensurate with the opportunity provided to other children."¹⁶ The United States Court of Appeals for the Second Circuit affirmed the district court's decision,¹⁷ but the United States Supreme Court in *Board of Education v. Rowley*¹⁸ reversed and held that a state satisfies the EAHCA's requirement of "free appropriate public education" by providing personalized instruction with sufficient support services to make it possible for the handicapped child to benefit educationally.¹⁹ The Court noted that a state is not required to maximize the potential of each child commensurate with the opportunity provided to nonhandicapped children.²⁰

Although the EAHCA has made both handicapped children and their parents more conscious of a handicapped child's right to an education,²¹ the Act provides only general substantive guidelines for the meaning of a "free appropriate public education."²² In *Rowley*, the Supreme Court skimmed the broad outlines of the

expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate pre-school, elementary, or secondary school in the state involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1982).

16. *Rowley*, 483 F. Supp. at 534. The district court borrowed this definition from Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1125-26 (1979). *Rowley*, 483 F. Supp. at 534. The author of the Harvard Note in turn borrowed the definition from 45 C.F.R. § 84.33(b)(1) (1977) (current version at 45 C.F.R. § 84.33(b)(1) (1983)). Note, at 1126 n.143. See *infra* text accompanying note 119.

17. *Rowley v. Board of Educ.*, 632 F.2d 945 (1980).

18. 458 U.S. 176 (1982).

19. *Id.* at 203.

20. *Id.* at 198; see *infra* notes 113-14.

21. Large, *Special Problems of the Deaf Under The Education for All Handicapped Children Act of 1975*, 58 WASH. U.L.Q. 213, 214 (1980).

22. Congress intentionally did not attempt to define the word "appropriate" in the EAHCA. See *supra* note 15; Stafford, *Education For Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 75 (1978). Some commentators have addressed the substantive issues surrounding the definition of a "free appropriate education." See Haggerty & Sacks, *Education Of The Handicapped: Towards a Definition of An Appropriate Education*, 50 TEMP. L.Q. 961 (1977); Large, *supra* note 21; Miller & Miller, *The Education for All Handicapped Act: How Well Does it Accomplish its Goal of Promoting the Least Restrictive Environment for Education?* 28 DE PAUL L. REV. 321 (1979); Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1 (1978); Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and an Analysis*, 13 GONZ. L. REV. 717 (1978) [hereinafter cited as Comment, *The Least Restrictive Environment*].

EAHCA and interpreted its provisions consistently with pre-EAHCA decisions. This Comment establishes that prior to *Rowley* the courts recognized a handicapped child's constitutionally based right to an education. A handicapped child's right to an education, however, has never extended beyond simple access to a publicly supported education. The study of these cases reveals that the Supreme Court has been quite consistent in interpreting the right to a publicly supported education and has respected the states' traditional role in education. Finally, this Comment discusses the reasons why education for the handicapped has always been a controversial subject.

I. HISTORY OF THE RIGHT TO EDUCATION

A. *The Judicially Recognized Right to an Education*

Traditionally, both federal and state governments have been concerned with the education of our nation's children.²³ The federal government, however, has never constitutionally guaranteed the right to a public education to either handicapped or nonhandicapped children. In contrast, all the states, at one time or another, have guaranteed the right to a public education in their constitutions.²⁴ The constitutions of only about one-half of the states, however, provide that a public education should be equally available to

23. The government interest in education predates the American Revolution by more than a hundred years. In 1647, for example, the Colony of Massachusetts Bay passed an act requiring towns of a hundred families or more to establish grammar schools. The first measure adopted by the federal government came when the Continental Congress passed an ordinance that disposed of lands for schools. When the Constitution superseded the Articles of Confederation, federal aid was extended to higher education. Gradually, public and private educational institutions began receiving funds from the various levels of government. Koenig, *The Law and Education*, in *THE COURTS AND EDUCATION*, 1-6 (C. Hooker ed. 1978).

24. See ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. 11, § 1; ARK. CONST. art. 14, § 1; CAL. CONST. art. 9, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. 8, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 2-6601; HAWAII CONST. art. X, § 1; IDAHO CONST. art. 9, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 12; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. XII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. VIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 6; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 64; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

all.²⁵ Although "all children" includes handicapped children, educational programs for the handicapped lagged behind the advancements made in regular educational programs. Early educators simply did not know how to educate special children. In the days when travel was on horseback, children with severe disabilities had difficulty getting to school.²⁶ In some cases, schools denied admission to handicapped children solely because of the "nauseating" effect they had on the other children.²⁷

Special education classes first appeared in the 1860's.²⁸ Despite the popular perception that handicapped children were uneducable and not trainable,²⁹ special education increased.³⁰ The early special education classes eventually became a dumping ground for those who could not adapt to the normal classroom.³¹ Given the impetus of these special classes, experts gradually learned how to implement educational strategies to meet the special students' needs.³² An educable-uneducable dichotomy developed, but successful educational programs for the "uneducable" eroded the distinction.³³ During the 1950's and 1960's the scope of special education programs³⁴ expanded greatly.

25. See, e.g., IND. CONST. art. VIII, § 1 (requiring that public schools be "equally open to all"); MISS. CONST. art. VII, § 201 (requiring that public education be provided "for all children between the ages of 6 and 21 years"); N.D. CONST. art. VIII, § 147 (requiring the "establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota"); UTAH CONST. art. X, § 1 (requiring that the state public education system be "open to all children of the state"); WIS. CONST. art. X, § 3, (requiring that the public schools "be free and without charge for tuition to all children between the ages of 4 and 20 years").

26. Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 871 (1975).

27. See, e.g., *State ex. rel. Beattie v. Board of Educ.*, 169 Wis. 231, 233-34, 172 N.W. 153, 154 (1919) ("The right of a child of school age to attend the public schools of this state cannot be insisted upon when its presence therein is harmful to the best interests of the school. This, like other individual rights, must be subordinated to the general welfare.").

28. Burgdorf & Burgdorf, *supra* note 26, at 870-76.

29. Large, *supra* note 21, at 215. For literature describing the historical treatment of exceptional children, see THE LEGAL RIGHTS OF HANDICAPPED PERSONS 53-194 (R. Burgdorf, Jr. 3d ed. 1980); W. CRUICKSHANK & G. JOHNSON, EDUCATION OF EXCEPTIONAL CHILDREN (3d ed. 1975); Comment, *Historical Overview from Charity to Rights*, 50 TEMP. L.Q. 953 (1977).

30. See Burgdorf & Burgdorf, *supra* note 26, at 870-75 (discussing generally the development of education for the handicapped).

31. *Id.*

32. As a result, special classes for the retarded were initiated. New Jersey, for example, was the first state to statutorily authorize classes for the mentally retarded. L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION 5 (1973).

33. Burgdorf & Burgdorf, *supra* note 26, at 873.

34. *Id.* at 874.

One of the judiciary's major concerns since the early 1950's has been the establishment of a constitutionally-based right to a free education.³⁵ The legal foundation for a constitutional right to a free education derives from the United States Supreme Court's decision in *Brown v. Board of Education*,³⁶ in which the Court announced:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³⁷

Although *Brown* involved discrimination against black children, the decision extended the equal protection and due process provisions of the fourteenth amendment to *all* students. Educators believed that the *Brown* Court's language had special relevance regarding the rights of disadvantaged children.³⁸ *Brown*, however, was primarily an "access" case involving a child's right of access to a public education.³⁹ The Court did not address the quality of education that should be provided to constitute access to an appropriate education.⁴⁰ Although the Court prohibited states from discriminating in the area of access to their school systems, the Court did not usurp state authority over the educational curriculum.

The *Brown* concept of equal access to education formed the basis of two of the most proclaimed "right to education" decisions: *Pennsylvania Association for Retarded Children v. Pennsylvania*

35. See Zettel and Abeson, *The Right to a Free Appropriate Public Education*, in *THE COURTS AND EDUCATION* at 188.

36. 347 U.S. 483 (1954).

37. *Id.* at 493. The Supreme Court has emphasized the importance of an education in several other decisions. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Abington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); *Illinois ex. rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

38. Weintraub and Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037 (1972). One commentator believed that the Court's statements were actually a warning regarding the rights of exceptional children in public schools. Nystrand & Straub, *The Courts as Educational Policy Makers*, in *THE COURTS AND EDUCATION* at 27, 43.

39. The *Brown* Court held that the dual school system of southern states discriminated against black children. Thus, black children may not be denied access to a "white" school simply because of their color.

40. The Court probably recognized the problem of articulating justiciably manageable standards to enable the judiciary to question a state's objectives and the appropriateness of its educational methods.

nia⁴¹ (*PARC*) and *Mills v. Board of Education*.⁴²

PARC was the first judicial decision to deal specifically with the right to education for handicapped children. In *PARC*, the plaintiff brought a class action in the United States District Court for the Eastern District of Pennsylvania on behalf of the state's mentally retarded children.⁴³ The Pennsylvania statutes denied these children access to a publicly supported education.⁴⁴ The plaintiffs contended that the Pennsylvania statutes were unconstitutional because they violated the due process clause of the fourteenth amendment.⁴⁵ The plaintiffs further argued that before the state could change the plaintiffs' educational placement, they were entitled to notice and an opportunity to be heard.⁴⁶ Additionally, the plaintiffs argued that the contested statutes violated the equal protection clause because the statutes' presumption that certain retarded children are uneducable and untrainable lacked a rational basis in fact.⁴⁷

An injunction, a consent agreement between the parties, and a court order resolved the suit.⁴⁸ The district court's decree required that state officials afford due process protections—notice and a hearing—before denying a handicapped child access to an appropriate public education.⁴⁹ *PARC*, like *Brown*, however, was primarily an "access" decision. The court in *PARC* required that the state provide disadvantaged children with a public education; the court did not require the state, either explicitly or implicitly, to afford disadvantaged children the same educational opportunity given to nonhandicapped children. Nevertheless, the court held that handi-

41. 343 F. Supp. 279 (E.D. Pa. 1972).

42. 348 F. Supp. 866 (D.D.C. 1972).

43. 343 F. Supp. at 282.

44. PA. STAT. ANN. tit. 24, § 13-1304, -1326, -1330, -1375 (Purdon 1962 & Supp. 1983). The statutes excluded over an estimated 70,000 children from "any public education services in schools, home or day care or other community facilities, or state residential institutions." *PARC*, 343 F. Supp. at 296. See generally *PARC v. Pennsylvania*, 18 VILL. L. REV. 277, 277-88 (1972) (generally discussing the decision).

45. *PARC*, 343 F. Supp. at 283. The fourteenth amendment provides in relevant part that no state shall "deprive any person of life, liberty, or due process of law." U.S. CONST. amend. XIV, § 1.

46. 343 F. Supp. 283.

47. *Id.*

48. *Id.* at 302. The district court viewed Pennsylvania's willingness to enter the agreement as an "intelligent response to overwhelming evidence against their position." *Id.* at 291. For a discussion of the consent agreement, see Kuriloff, True, Kirp & Buss, *Legal Reform and Educational Change: The Pennsylvania Case*, 41 EXCEPTIONAL CHILDREN 35 (1974).

49. *PARC*, 343 F. Supp. at 303.

capped children have a constitutionally protected right to a free education.⁵⁰ The idea of denying handicapped children complete access to a public education was quickly becoming outdated.⁵¹

The *Mills* case, a district court decision, immediately followed *PARC* and contained similar facts. The *Mills* court found that the Board of Education of the District of Columbia had denied admission to handicapped children at the entrance level and had suspended or expelled the children after they entered school.⁵² Neither a hearing nor a review was available to these children.⁵³ The defendants admitted their failure to provide the plaintiffs with access to a free education,⁵⁴ but claimed that it would be impossible for them to provide the requested relief because of lack of funds.⁵⁵

The United States District Court for the District of Columbia held that the *total* exclusion of disadvantaged children from a publicly supported education was unconstitutional because it violated the due process clause.⁵⁶ Additionally, the court adopted the due process protections afforded by *PARC*.⁵⁷ The court, however, mentioned no requirement of a particular quality of education. *Mills* is significant because of its rejection of the defendant's lack-of-funding argument.⁵⁸ After *Mills*, defendant school boards could no longer assert a lack of funds as a defense for their failure to provide access to a public education. The *Mills* court stated: "If sufficient funds are not available to finance all of the services

50. *Id.* at 302. Significantly, the district court noted that all mentally retarded persons have the capacity to benefit from an education. *Id.* at 296.

51. For a full discussion of *PARC*, see Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 646-50 (1976), and Kuriloff, True, Kirp & Buss, *supra* note 48.

52. The plaintiff children ranged in age from seven to sixteen, had behavioral problems, were mentally retarded, and were emotionally disturbed or hyperactive. *Mills*, 348 F. Supp. at 869-70.

53. *Id.* at 875.

54. *Id.* at 871.

55. *Id.* at 875. The defendants contended that it would be impossible to grant the plaintiffs the relief sought unless "[t]hese defendants divert millions of dollars from funds already specifically appropriated for other educational services in order to improve special educational services. These defendants suggest that to do so would violate an Act of Congress and would be inequitable to children outside the alleged plaintiff class." *Id.* (quoting defendants' Answer). The defendants, interestingly enough, relied on Congress to protect their actions.

56. *Id.*

57. *Id.* at 880.

58. *Id.* at 875-76. For another case related to the rejection of the fiscal defense, see *Kivell v. Nemointin*, No. 143913 (Conn. Super. Ct., Fairfield County, 1972), discussed in, Weintraub & Abeson, *supra* note 38, at 1050.

needed . . . then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education"⁵⁹

After *PARC* and *Mills*, several suits challenged state funding plans. Plaintiffs argued that the funding plans failed to provide children in poor districts with access to an education.⁶⁰ *PARC* and *Mills* also stimulated scholarly comment. Commentators, acknowledging the importance of the decisions, attempted to define the scope of the constitutional right to an education.⁶¹

The United States Supreme Court temporarily stymied the newly developed constitutional theories in *San Antonio Independent School District v. Rodriguez*.⁶² *Rodriguez* was a class action brought on behalf of school children. The children were members of poor families and resided in school districts having low property tax bases.⁶³ The plaintiffs based their argument on the equal pro-

59. *Mills*, 348 F. Supp. at 876. The court, while discussing the defendants' lack of funding argument, cited *Goldberg v. Keller*, 397 U.S. 254 (1969), which held that constitutional rights must be afforded citizens despite the greater expense involved. *Id.*

60. See, e.g., *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971) (denying motions to dismiss for failure to state a cause of action and holding that the Minnesota system of public school financing, which made spending per pupil a function of the school district's wealth, violated the equal protection guarantee of the fourteenth amendment); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (reversing trial court's order granting dismissal of action in a class action challenging the constitutionality of the public school financing system under which assessed valuation within a district's boundaries determines how much the district can spend for its schools); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972) (holding unconstitutional under the equal protection clause New Jersey's system of financing public education in which 67% of public school costs were derived from local taxes).

61. See, e.g., Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972); Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40 (1974); Schwartz, *The Education of Handicapped Children: Emerging Legal Doctrines*, 7 CLEARINGHOUSE REV. 125 (1973); Shapp, *The Right to an Education for the Retarded in Pennsylvania*, 23 SYRACUSE L. REV. 1085 (1972); Weintraub & Abeson, *supra* note 38; Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973); Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L. J. 554 (1973); Comment, *The Right to Education for Mentally Retarded Children*, 43 UMKC L. REV. 79 (1974); Comment, *Public Instruction to the Learning Disabled: Higher Hurdles for The Handicapped*, 8 U.S.F.L. REV. 113 (1973); Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriguez*, 59 CORNELL L. REV. 519 (1974); *Education: The Right of Retarded Children to Receive an Education Suited to Their Needs*, 77 DICK. L. REV. 577 (1973).

62. 411 U.S. 1 (1973). One commentator asserted that the *Rodriguez* decision was the start of an era of strict construction of the equal protection clause as applied to public education. J. HOGAN, *THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST* 5-6 (1974).

63. The plaintiff children were either members of a minority group or were poor. *Rodriguez*, 411 U.S. at 5.

tection clause and contended that because local property taxes partly financed the school districts, poor children were not receiving an education equal to that of wealthier children. *Rodriguez*, although not directly involving the handicapped, did have implications regarding the right to an education for all school-age children, including the handicapped.

Justice Powell, writing for the majority, refused to declare education a *fundamental* constitutional right and held that the school district had not violated the equal protection clause.⁶⁴ *Rodriguez* left open the question whether denial of a *minimally* adequate education abridges a fundamental right. The Court reasoned that whether an interest is fundamental depends not on its importance but on whether it is "explicitly or implicitly guaranteed by the Constitution."⁶⁵ A careful scrutiny of *Rodriguez*, however, suggests the implicit holding that *all* children have a right to a minimally adequate education.⁶⁶ The plaintiffs never denied that they had access to a minimally adequate education; the issue was whether poor children had a right to receive an education commensurate with the education given to wealthier children. The issue in *Rodriguez* was analogous to the issue in *Rowley*, and it is merely the plaintiff that has changed. The *Rodriguez* court based its decision in part on concerns for federalism. The Court refused to hold that disadvantaged children were entitled to receive an *equal* education and noted the deference that the federal courts owe to the states: "The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various states, and we do no violence to the values of federalism and separation of powers by staying our hand."⁶⁷

Acceptance of the proposition that *Rodriguez* implicitly holds that there is a right to a minimally adequate education⁶⁸ raises the complex question of what constitutes a minimally adequate educa-

64. *Id.* at 35.

65. *Id.* at 33-34; see, e.g., Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75 (1980).

66. The Court stated: "Whatever merit [plaintiffs'] argument might have if a State's financing system occasioned an absolute denial of educational opportunities . . . that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved . . ." *Rodriguez*, 411 U.S. at 37.

67. *Rodriguez*, 411 U.S. at 58. Significantly, the Court stated: "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us . . ." *Id.* at 44.

68. See *supra* note 66 and accompanying text.

tion. Although handicapped children may have access to an education, their particular handicaps may "constructively exclude" them from actually learning. For example, a blind person cannot read a book unless it is in braille. Without suitable course offerings from which the child can benefit, there is no offering at all, and the "minimal" requirement implicit in *Rodriguez* is violated. Thus, to the extent that a disability prevents education in a normal setting, special services must be provided.

The Supreme Court addressed the issue of constructive exclusion in the subsequent case of *Lau v. Nichols*.⁶⁹ In *Lau*, Chinese students who did not understand English brought an action alleging unequal educational opportunities. The students argued that because they were not receiving instruction in the English language,⁷⁰ their education was not commensurate with that of English speaking students. The Court granted relief but specifically declined to consider the equal protection argument the plaintiffs had advanced.⁷¹ Instead, the Court decided the case on the basis of the Civil Rights Act of 1964.⁷² The Court did, however, refer to a constitutionally based right to an appropriate education: "[T]here is no equality of treatment merely by providing students with the same facilities . . . for students who do not understand English are effectively foreclosed from any meaningful education."⁷³ The "meaningful education" language in *Lau* may be extended to handicapped children, because merely to place such children in school is not sufficient; special services must be provided so that handicapped children have meaningful, and not just actual, access to education.⁷⁴ The Court, however, did not address the issue of

69. 414 U.S. 563 (1974).

70. The Human Rights Commission of San Francisco submitted a report to the Court showing that "no more than 1,707 of the 3,457 Chinese students" in the school "system" needing special English instruction were receiving it. *Id.* at 564 n.1.

71. *Id.* at 566. The Chinese students had alleged that their unequal treatment violated the equal protection clause of the fourteenth amendment. *Id.* at 564.

72. 42 U.S.C. § 1981 (1976). The specific section the court relied on bars discrimination "on the ground of race, color, or national origin . . . [in] any program or activity receiving federal financial assistance." *Id.* § 2000(d).

73. *Lau*, 414 U.S. at 566.

74. See *Fialkowski v. Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975). In *Fialkowski*, mentally retarded children with the approximate intelligence of preschoolers were placed in a reading and writing program despite the fact that they could neither read nor write. As a result, the children were being constructively excluded from an education.

The district court denied defendant's motion to dismiss and adhered to the doctrine of federalism as did the *Rodriguez* court. The court read *Rodriguez* to mean that a handicapped person may be denied a particular level of education. *Id.* at 958. Thus, handicapped children need not be provided an opportunity afforded the nonhandicapped. See also Fred-

whether a certain quality of education was constitutionally required.

B. *The Statutory Framework*

The judiciary, it is argued, should not interfere in the area of education. Adherents to this position argue that courts lack judicially manageable standards by which to determine the level of education a state should provide its handicapped children.⁷⁵ As a result, state and local educational authorities have traditionally had broad authority over educational programs for handicapped children. This broad authority, however, has not been used in favor of the handicapped.⁷⁶ The high cost of educating the disadvantaged has exacerbated the problem.⁷⁷ Prior to the enactment of the EAHCA, less than one-half of the nation's handicapped children were receiving an appropriate education and almost one-quarter were receiving no educational services at all.⁷⁸

erick L. v. Thomas, 408 F. Supp. 832 (denial of motion to dismiss), 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3d Cir. 1977). Yet the *Fialkowski* court also believed that *Rodriguez* was consistent with the proposition that there exists a constitutional right to a certain minimal level of education under the fourteenth amendment. 405 F. Supp. at 958.

Courts have taken different positions on the constitutionality of a denial of public education to a handicapped child. *See, e.g.*, Special Educ. Div. of Dept. of Pub. Transp. v. G.H., 218 N.W.2d 441, 447 (N.D. 1974) (denial of equal education to handicapped child violated equal protection guarantee under state constitution); New York Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (denial did not infringe a fundamental constitutional right); *cf.* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972) (where disproportionate number of blacks placed in classes for mentally retarded based on exam results constituted plaintiffs' established denial of equal protection), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

75. *See* Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253, 275 (1978).

76. With the broad authority in educational programs came a wide discretion to label children as handicapped and thus deprive them of an education. *See, e.g.*, *Watson v. City of Cambridge*, 157 Mass. 561, 32 N.E. 864 (1938) (good faith determination by school officials to exclude a child from school because he was too "weak minded" not subject to judicial review). A complete summary of state statutes describing handicapped children and limiting education for the handicapped may be found in the legislative history of the EAHCA. S. REP. NO. 168, 94th Cong., 1st Sess. 20-21, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1444-45.

77. The high cost of educating the handicapped also prevented court decisions recognizing the rights of the handicapped from being implemented. S. REP. NO. 168, 94th Cong., 1st Sess. 7, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1424, 1431.

78. S. REP. NO. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432. This was true even though many states had passed laws helping the handicapped. For example, in Indiana, even though a 1969 Special Education Act mandated that each county develop a program to serve all handicapped children by 1973, 128 of the 305 schools did not have programs for teaching disabled children as of the 1976-1977 school year. Only 28% of the state's learning disabled children were served during the 1975-1976

To alleviate the plight of the handicapped, Congress in 1965 began to provide legislative and fiscal support to ensure that handicapped children would receive an education. The Elementary and Secondary Education Act of 1965 (ELSEA)⁷⁹ was the first in a series of laws that described the role of the federal government in the education of the handicapped. ELSEA funded state programs to assist educationally deprived children. Implementation was left to the discretion of local educational agencies. In 1966, ELSEA was amended⁸⁰ to include specific provisions for handicapped children. It was not until 1968, however, that Congress enacted the Education of the Handicapped Act, a statute exclusively concerned with the needs of the handicapped.⁸¹ A 1970 amendment⁸² to this Act combined related provisions of earlier legislation.⁸³ The 1970 amendment was expanded in 1974.⁸⁴

In spite of these congressional efforts, many handicapped children were still not being appropriately educated.⁸⁵ Finally, in 1975 Congress enacted the EAHCA.⁸⁶ This Act represents an ambitious

school year and that increased to about 33% for 1976-1977. Levinson, *supra* note 75, at 284-85.

79. Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

80. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191, 1204. Through these provisions, Congress authorized grants so that the states could initiate or improve education programs.

81. Pub. L. No. 90-247, 81 Stat. 804 (1968). This law was designed to establish experimental programs that could serve as models for state and local educational agencies. The Act proved especially beneficial; after its passage, federal assistance grew from \$2.5 million to \$100 million. 121 CONG. REC. 23,703 (1975).

82. Pub. L. No. 91-230, 84 Stat. 121 (1970).

83. The incorporated legislation included the Handicapped Children's Early Education Assistance Act, Pub. L. No. 90-538, §§ 1-5, 82 Stat. 901-02 (1968) and provisions for teacher training in fields related to education of the handicapped that appeared in the Act of Sept. 6, 1958, Pub. L. No. 85-926, 72 Stat. 1777.

84. Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 579-85 (codified at 20 U.S.C. §§ 1400-61 (1982)). The provisions of this Act required the states to: establish a goal of extending full educational opportunities to the handicapped; extend procedural safeguards to parents and guardians; ensure that, to the maximum extent appropriate, handicapped children are educated with nonhandicapped children; remove handicapped children from the normal classroom only when their handicap is so severe that education in regular classrooms could not be achieved; and, ensure that classification and placement decisions would be selected in a racially or culturally nondiscriminatory fashion. S. REP. NO. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CONG. & AD. NEWS 1425, 1431.

85. See *supra* note 78 and accompanying text.

86. 20 U.S.C. §§ 1401-61 (1982). For a general survey of legislation prior to the development of case law, see Altschuler, *Education for the Handicapped*, 7 J.L. & EDUC. 523 (1978); Baugh, *The Federal Legislation on Equal Educational Opportunity for the Handicapped*, 15 IDAHO L. REV. 65 (1978); Note, *The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110 (1976). For a full discussion of the statutory predecessors

effort to promote the education of handicapped children, and was passed in response to Congress's perception that a majority of this group of children "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"⁸⁷ Congress relied heavily on *PARC* and *Mills* in writing the EAHCA because it recognized that these decisions guaranteed the right to a free publicly supported education.⁸⁸

The major purpose of the EAHCA is to provide all handicapped children,⁸⁹ regardless of the severity of their handicap,⁹⁰ with a "free appropriate public education" in the least restrictive environment. The EAHCA defines "a free appropriate public education" as "special education and related services . . . which are provided in conformity with [an] individualized education program" (IEP).⁹¹ Special education is "specially designed instruction . . . to meet the unique needs of a handicapped child."⁹² The IEP is a written plan for each child, developed at a meeting among the child's parents, his teacher, and a school representative.⁹³ Although

to the EAHCA, see Semmel and Heinmiller, *The Education of All Handicapped Children Act of 1975: National Perspectives and Long Range Implications*, 53 *VIEWPOINTS*, Mar. 1977, at 1.

87. *Rowley*, 458 U.S. at 179 (quoting H.R. REP. NO. 332, 94th Cong., 1st Sess. 2 (1975)).

88. See S. REP. NO. 168, 94th Cong., 1st Sess. 6, 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430, 1432; Stafford, *supra* note 22, at 74.

89. "The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (1982).

90. The state shall ensure that "all children . . . who are handicapped, regardless of the severity of their handicap" receive special education and related services. *Id.* § 1412(2)(C). Additionally, a local educational agency that desires to receive funds under the EAHCA must provide assurance that funds will be used for handicapped children, "regardless of the severity of their handicap." *Id.* § 1414(a)(1)(A).

91. *Id.* § 1401(18) (1982). Congress did not attempt to specifically define a "free appropriate public education," (see *supra* note 15), but instead used the IEP as a baseline mechanism. See Stafford, *supra* note 22, at 75. One court interpreted an "appropriate education" to require educational programs designed to maximize the self-sufficiency of the handicapped child. *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd on other grounds sub nom.*, *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom.*, *Scanlon v. Battle*, 452 U.S. 968 (1981).

92. 20 U.S.C. § 1401(16) (1982).

93. The IEP shall include: 1) a statement of the present level of performance of the child; 2) a statement of short and long-term goals; 3) a statement of the specific educational services to be made available to the child, and the extent to which the child may enroll in regular programs; 4) the date such services shall start and how long they shall be provided; and 5) appropriate criteria by which to determine if objectives are being achieved. *Id.* § 1401(19).

the EAHCA does not specify the substantive requirements that a program should have, if the plan does not meet with the parents' approval,⁹⁴ the parents are entitled to an "impartial due process hearing" before a hearing examiner.⁹⁵ The parents may then appeal to the state agency for review of the local decision.⁹⁶ If the administrative procedures fail to resolve the conflicts, a civil suit may be brought in a state or federal court,⁹⁷ which may then decide the case based on a preponderance of the evidence.⁹⁸

The importance of the EAHCA lies in its funding. While drafting the EAHCA, Congress was concerned about the financial difficulties a funding statute would encounter. An early proposal required outlays on each handicapped child equal to half of the average per pupil expenditure.⁹⁹ Congress later abandoned this expensive goal,¹⁰⁰ and reduced the maximum entitlement a state may receive from an original authorization of \$680 million per year to \$100 million for 1976 and \$200 million for 1977.¹⁰¹ The amount of funding a state receives is now based on the number of handicapped children in a given state.¹⁰² The number, however, may not exceed "12 per centum . . . of the number of all children aged five

94. The parents will have "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* § 1415(b)(1)(E).

95. *Id.* § 1415(b)(2). Whenever a complaint is received "the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the state educational agency or by the local educational agency or intermediate educational unit." The hearing officer cannot be an employee of the agency involved in the education of the child. *Id.*

96. *Id.* § 1415(c). Although most states have established procedures whereby an initial hearing takes place at the local level and is followed, when necessary, by an appeal to a state hearing officer, the EAHCA does not require a two-tiered system. *Id.* § 1415(b)(2).

97. *Id.* § 1415(e)(2). An aggrieved party "shall have the right to bring a civil action with respect to the complaint presented . . . which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." *Id.*

98. *Id.*

99. 121 CONG. REC. 25,526 (1975).

100. Congress's response was a result of two factors: an astronomical \$3.8 billion was needed to achieve the EAHCA's purposes, 121 CONG. REC. 23,704 (1975), and an anticipated Presidential veto, 121 CONG. REC. 25,534 (1975). *The Education For All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. L. REV. & SOC. CHANGE 43, 47 (1976) [hereinafter cited as *Opening the Schoolhouse Door*].

101. 121 CONG. REC. 37,024 (1975). The amount of funds the states may receive in 1982 is dramatically larger than the 1978 figure. See 20 U.S.C. § 1411(a)(1)(B) (1982). The EAHCA's escalating funding schedule indicates a change in federal and state priorities in favor of educating the handicapped. *Opening the Schoolhouse Door*, *supra* note 100, at 49-50.

102. 20 U.S.C. § 1411(a)(1)(A) (1982).

to seventeen, in the State."¹⁰³ The funds are to be spent on a priority basis: first with respect to children not receiving an education, and second with respect to children with the most severe handicaps receiving an inadequate education.¹⁰⁴

Congressional debate over the EAHCA centered on whether federal funds should be used for education, a traditional state concern.¹⁰⁵ Congress did not want the federal government to usurp traditional state responsibilities;¹⁰⁶ as a result, Congress allowed the states to administer the EAHCA.¹⁰⁷ Because Congress strongly favored local control, seventy-five percent of the funds allocated to a state were distributed to local educational agencies, and the state educational agencies retained control of the remainder.¹⁰⁸ The resulting legislation was, however, myopic in one respect. The EAHCA includes a "mainstreaming" requirement that has caused school officials great problems.

The mainstreaming requirement provides that an appropriate education take place in the least restrictive environment.¹⁰⁹ In other words, handicapped children should be placed in the "mainstream" and educated with other nonhandicapped children. The integration of handicapped children into the regular classroom has been proven to improve their performance substantially.¹¹⁰ As a result, separate schooling is to be considered only as a last resort for the severely handicapped child. Mainstreaming, however, has not lived up to Congress's expectations. There are three problems associated with the mainstreaming requirement. First, it imposes a ser-

103. *Id.* § 1411(a)(5)(A)(i).

104. S. REP. NO. 168, 94th Cong., 1st Sess. 15, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1439.

105. 121 CONG. REC. 19,478 (1975).

106. 121 CONG. REC. 25,526 (1975). Because no new federal mechanism was established, state educational agencies will be responsible for the administration of the EAHCA. *Id.* at 19,478 (1975).

107. This demonstrates Congress's reluctance to encroach on state authority. See 121 CONG. REC. 19,478 (1975).

108. 20 U.S.C. 1411(c) (1982). For a detailed discussion of the form and role of state education agencies, EMERGING STATE RESPONSIBILITIES FOR EDUCATION 37-80 (1970).

109. The state must adopt "procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped" 20 U.S.C. § 1412(5)(B) (1982). Any other alternative may be seen as "restrictive." A restrictive environment limits the way teachers and students view the child and could injure the child's chances of becoming self-sufficient. See R. MARTIN, EDUCATING HANDICAPPED CHILDREN: THE LEGAL MANDATE 85 (1979). Mainstreaming is a response to the practice of placing handicapped children in institutions. Many schools did not favor having "slow" children in their classrooms. See Large, *supra* note 21, at 2440.

110. S. KIRK, EDUCATING EXCEPTIONAL CHILDREN 199-201 (2d ed. 1972).

ious financial burden on the states that have to prepare teachers for participation in different programs for different types of handicaps.¹¹¹ Second, some disabilities are less adaptable than others to a normal classroom setting. For example, a wheelchair-bound person would obviously benefit from mainstreaming, while a deaf person would probably need intricate special services. Third, there are no set standards as to when mainstreaming is appropriate. Although parents may believe an education program that denies mainstreaming is unreasonable, school districts may find their programs to be "appropriate." This was precisely the predicament involved in *Rowley*. Consequently, *Rowley* would never have arisen if the EAHCA did not require mainstreaming.¹¹²

II. EVALUATION OF THE *Rowley* COURT'S REASONING

In *Rowley*, a five person majority of the Supreme Court¹¹³ decided that under the EAHCA a state is not required to maximize the potential of each handicapped child commensurate with the opportunity provided to nonhandicapped children.¹¹⁴ The Court

111. Aware of this problem, the National Educational Association has become critical of mainstreaming. It has noted that mainstreaming would be successful only with proper teacher preparation, alterations of class size and curricula, appropriate services and adequate funds solely for the purpose of mainstreaming. National Educational Association, Policy Resolution #26 (Mainstreaming) in Resolutions, Business and Other Actions (1975) at 21-22. Massachusetts has been mainstreaming its handicapped children since 1974 under a statute similar to the EAHCA. See MASS. GEN. LAWS ANN. ch. 71B (West 1982). Most of the teachers, however, were dissatisfied with the concept because they did not feel adequately prepared to deal with the added responsibilities. See Andelman, *Mainstreaming in Massachusetts Under Law 766*, TODAY'S EDUCATION, Mar.-Apr. 1976, at 20.

112. Prior to the EAHCA, many states recognized the expense of educating deaf children and established regional facilities for the deaf. If a large enough group of deaf children are brought together, extra expenditures for special equipment can be justified. Furthermore, a more diversified faculty with special expertise can be made available. A final advantage of placing handicapped children together is that more around-the-clock support for the deaf can be provided. See Large, *supra* note 21, at 244-48.

113. *Rowley*, 458 U.S. at 176. Justice Rehnquist authored the majority opinion in which Chief Justice Burger, Justices Powell, Stevens, and O'Connor joined. Justice Blackmun concurred in the judgment of the majority but not in its reasoning. *Id.* at 210-11 (Blackmun, J., concurring). He believed that the relevant question was not whether an IEP is reasonably calculated to produce educational benefits but whether the program, viewed as a whole, offers the handicapped child an educational opportunity that is substantially equal to the opportunity provided to a nonhandicapped child. *Id.* at 211. He concluded that Amy was given such an opportunity. Justice Blackmun's analysis and conclusion are flawed, however, because his inquiry is substantially the same as that propounded by the lower courts. Amy was *not* provided with a "substantially equal opportunity" because she could not understand everything said to her. See *supra* note 5 and accompanying text. Justice White, wrote a scathing dissent in which Justices Brennan and Marshall joined.

114. Additionally, the Court considered a court's inquiry in an action brought under

held that a state satisfies the EAHCA's requirement for a "free appropriate public education" by providing personalized instruction with sufficient support services to make it possible for the handicapped child to benefit educationally.¹¹⁵ To arrive at this holding, the Court analyzed the express words of the EAHCA, the legislative history behind the Act, and the judicial decisions that Congress relied upon in enacting the bill, to ascertain the meaning of a "free appropriate public education." This holding is also based on the doctrine of federalism as well as on a recognition of the practical difficulties that would result from reading the "free appropriate public education" requirement to mean that handicapped children are to receive an education that is equal to that of nonhandicapped children.

The district court in *Rowley* found that the EAHCA did not define the term "free appropriate public education" at all.¹¹⁶ The court examined the regulations accompanying the Rehabilitation Act of 1973¹¹⁷ to formulate its definition of an "appropriate education."¹¹⁸ These regulations provide that an "appropriate education" is "the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."¹¹⁹ Support for the district court's analysis may be found in a statement by Senator Robert Stafford of Vermont.¹²⁰ Senator Stafford stated that if any doubts exist regarding the intent of Congress in enacting the EAHCA, the doubts may be resolved by looking at the Rehabilitation Act and the regulations promulgated thereunder.¹²¹ All members of Congress, however, did not share Senator Stafford's view.¹²² Further-

the EAHCA to be twofold. First, the court must ask whether the state complied with the procedures set forth in the Act; and second, whether the IEP developed through the Act's procedures is reasonably calculated to assure that the child receives educational benefits. 458 U.S. at 206-07.

115. *Id.* at 203.

116. *Rowley*, 483 F. Supp. at 533.

117. Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794 (Supp. V 1975)).

118. *Rowley*, 483 F. Supp. at 533. The regulations may be found at 45 C.F.R. § 84.33(b) (1983).

119. 45 C.F.R. § 84.33(b) (1983).

120. Senator Stafford was an ardent supporter of the EAHCA. See 121 CONG. REC. 19,483 (1975).

121. See Stafford, *supra* note 22, at 79-80.

122. Senator Stafford was one of the few Senators who believed that the EAHCA was an effort to afford handicapped children an educational opportunity equal to that received by nonhandicapped children. See *infra* note 138.

more, the legislative history of the EAHCA and the regulations promulgated under the Rehabilitation Act, make no reference to the Rehabilitation Act as providing a supplement for determining the congressional intent behind the EAHCA. Finally, the argument can be made that since Congress could have placed a commensurate educational opportunities requirement in the EAHCA, and did not do so, Congress did not intend to provide the requirement.

The defendant school board disagreed with the district court's definition of an "appropriate education" and contended that the term was defined in the EAHCA itself.¹²³ The plaintiffs agreed but argued that the statutory definition is not "functional" and therefore "offers judges no guidance in their consideration of controversies involving the 'identification, evaluation, or educational placement of the child or of the provision of a free appropriate public education.'"¹²⁴

The Supreme Court found that the EAHCA does specifically define the expression¹²⁵ but stated that the definition "tends toward the cryptic rather than the comprehensive."¹²⁶ The Court concluded that the search for legislative intent must not be abandoned.¹²⁷ The Court believed that the judiciary's function in statutory interpretation is to construe what Congress has written, and not to add, subtract, delete, or distort the language of a statute.¹²⁸ The Court's adherence to the express definition in the Act is consistent with precedent. However, to determine whether the Court's definition of "appropriate" is consistent with congressional intent, the legislative history must be examined.

In examining the language of the EAHCA's legislative history,¹²⁹ Justice Rehnquist noted the repeated references in the legislative history to the number of handicapped children not receiving any education at all¹³⁰ and concluded that "the intent of the

123. 458 U.S. at 187. The defendants argued that Section 1401(18) defined an appropriate education. *See supra* note 15.

124. 458 U.S. at 187 (quoting Brief for Respondents at 287).

125. 458 U.S. at 187-88. The Court agreed with the defendants that section 1401(18) of the EAHCA defined a "free appropriate public education." *See supra* note 15.

126. 458 U.S. at 188.

127. *Id.*

128. *Id.* at 190 n.11 (citing 62 Cases of *Jam v. United States*, 340 U.S. 593, 596 (1951)); *see also* *Stafford*, *supra* note 22, at 75.

129. 458 U.S. at 191; *see generally* *Tennessee Valley Auth. v. Hill*, 437 U.S. 154 (1978) (Burger, C.J., writing for the majority, interpreted the statute at hand according to the plain language of the statute and its legislative history).

130. 458 U.S. at 191. The Senate Conference Report on the EAHCA recognized that over half of the estimated eight million handicapped children in the country did not receive

EAHCA was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."¹³¹ The dissent, on the other hand, concluded that because the statements urging equal educational opportunities for the handicapped sometimes followed statements within the EAHCA's legislative history concerning the percentage of handicapped children not receiving an appropriate education, Congress not only wanted to bring handicapped children into the classroom but also wanted them to benefit from the education offered to them.¹³² Justice White's dissent is problematic for three reasons. First, the dissent fails to discern that the opportunity to benefit educationally was precisely the test Justice Rehnquist expounded.¹³³ Second, the dissent asserts contradictory propositions. Justice White first states: "Certainly the language of the [EAHCA] contains no requirement like the one imposed by the lower courts—that states maximize the potential of handicapped children commensurate with the opportunity provided to other children."¹³⁴ He then asserts that: "The basic floor of opportunity is . . . as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn."¹³⁵ Third, the dissent's most obvious flaw in reasoning is its failure to consider the immense burden that the implementation of a commensurate educational opportunity standard would place on the states.

The EAHCA's legislative history supports Justice Rehnquist's position that handicapped children need not be provided with a commensurate educational opportunity. Congress enacted the EAHCA to provide for some priority in the allocation of funds for the education of the most needy handicapped children, that is, those not receiving any education at all, and those receiving an inadequate education.¹³⁶ The dissent is correct in stressing¹³⁷ that during debate, several congressmen referred to the EAHCA as an

an adequate education, over one million received no education at all, and that in Congress's view, the educational needs of handicapped children could be met. S. REP. NO. 168, 94th Cong., 1st Sess. 8-9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432-33.

131. 458 U.S. at 192.

132. *Id.* at 213 n.1 (White, J., dissenting).

133. *Id.* at 201.

134. *Id.* at 212-13 (White, J., dissenting).

135. *Id.* at 215 (White, J., dissenting).

136. S. REP. NO. 168, 94th Cong., 1st Sess. 14, 15, 17, 18, 22, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1438, 1439, 1441, 1442, 1446.

137. 458 U.S. at 213-14 (White, J., dissenting).

effort to afford handicapped children an equal educational opportunity.¹³⁸ Additionally, the legislative history states that "Congress must take a more active role under its responsibility for equal protection of the laws to guaranty that handicapped children are provided equal educational opportunity."¹³⁹ These words, however, are weakened by the statement that follows them: "It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school."¹⁴⁰ This statement can be read to require that a child should be placed in a program tailored to overcome the effects of his handicap and thus should not be constructively excluded from education.

These statements, however, are merely isolated assertions concerning the achievement of a commensurate educational opportunity. It was far more common for congressmen to speak of affording handicapped children "full" educational opportunity or simply appropriate education.¹⁴¹ As the *Rowley* Court noted, "passing references . . . are not controlling when analyzing a legislative history."¹⁴² Moreover, *Rowley* is consistent with prior federal court decisions.

According to *Brown*, the fourteenth amendment requires that an education be available to all persons.¹⁴³ *Brown*, however, did not interpret the fourteenth amendment to require an *equal quality* of education. Furthermore, in noting that the *PARC* and *Mills* decisions influenced the EAHCA,¹⁴⁴ the *Rowley* Court found that these decisions stood for the proposition that handicapped children could not be denied *access* to a free education, not that they must receive an *equal* education.¹⁴⁵ Although there is language in *Mills* to suggest that an equal education must be provided,¹⁴⁶ Justice Rehnquist's findings were correct because both *PARC* and *Mills*

138. See, e.g., 121 CONG. REC. 19,483 (1975) (remarks of Senator Stafford); 121 CONG. REC. 37,030 (1975) (remarks of Representative Mink); see also Stafford, *supra* note 22, at 71.

139. S. REP. NO. 168, 94th Cong., 1st Sess. 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

140. *Id.*

141. See, e.g., S. REP. NO. 168, 94th Cong., 1st Sess. 18, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1441 (remarks of Representative Randolph); 121 CONG. REC. 19,494 (1975) (remarks of Senator Javits).

142. 458 U.S. at 204 n.26 (quoting *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982)).

143. *Brown*, 347 U.S. at 483.

144. 458 U.S. at 199.

145. *Id.*

146. *Mills*, 348 F. Supp. at 875.

involved children who were totally excluded from a publicly supported education.¹⁴⁷ The subsequent cases of *Rodriguez* and *Lau* also buttress Justice Rehnquist's conclusion. *Rodriguez* and *Lau* held that there is a right to a minimum education, not that there is a right to an equal education.¹⁴⁸ As long as the handicapped child is in school, and special services have been provided to ensure that the handicap does not constructively exclude him from an education, a handicapped child's rights have not been abridged.

In holding that the EAHCA's provision for a "free appropriate public education" does not require a commensurate educational opportunity, the *Rowley* Court implicitly recognized the delicate federal and state relationship in the area of education.¹⁴⁹ Specifically, the *Rowley* Court interpreted the EAHCA as endowing the states with "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs."¹⁵⁰

The Court concluded that it was highly unlikely that Congress intended that reviewing courts overturn a state's educational theory.¹⁵¹ In the Court's view, the EAHCA's purpose was solely to extend funds to states to assist them in educating the handicapped,¹⁵² and Congress clearly recognized the primacy of the states in the field of education.¹⁵³ This view is supported by the fact that the EAHCA does not tell school authorities what to teach but rather sets forth in general terms the procedures that must be followed before a particular program may be said to meet the requirements of the Act. One may nonetheless argue that the EAHCA intervenes in an area where state supremacy has long been recognized.

In *Epperson v. Arkansas*¹⁵⁴ the Supreme Court stated: "By

147. See *supra* notes 41-59 and accompanying text.

148. See *supra* notes 62-74 and accompanying text.

149. The Burger Court has been extremely deferential to the authority of the states in the federal system; it has given greater deference to the states than did the Warren Court. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971); cf. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating an amendment to the Fair Labor Standards Act which extended the Act's minimum wage and maximum hour requirements to almost all employees of the states and their political subdivisions).

150. 458 U.S. at 207.

151. *Id.* at 207-08.

152. *Id.* at 208.

153. 121 CONG. REC. 19,498 (1975) (Senator Dole remarking, "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level.") See *supra* notes 105-108 and accompanying text.

154. 393 U.S. 97 (1968). In *Epperson*, a high school teacher and a parent of two school-

and large, public education in our Nation is committed to the control of the state and local authorities."¹⁵⁵ *Epperson* recognized, however, that courts may intervene when the operation of school systems sharply implicates basic constitutional values.¹⁵⁶ Court intervention in the area of public education is also justified because an education is necessary for the performance of other constitutionally recognized rights.¹⁵⁷ Because the *Rowley* Court recognized the basic right to an education, it held that under the EAHCA a handicapped child must be able to receive benefits from an education, and mere access to an education is not sufficient. On the other hand, by not going so far as to hold that the EAHCA mandates state implementation of a commensurate educational opportunity standard, the Court avoided placing an unbearable financial burden on states.

The Senate Labor and Public Welfare Committee's Report estimated that the average cost of educating a handicapped child is double the cost of educating a nonhandicapped child.¹⁵⁸ During the first three years following the effective date of the EAHCA's regulation there was an increase of nearly 328,000 handicapped children served. Thus, as of 1982, over 3.8 million children were eligible to receive special services under the Act.¹⁵⁹ An additional

aged children brought suit in a state court to challenge the constitutionality of a state statute making the teaching of evolution a misdemeanor. The Court held that the statute violated the freedom of speech clause of the first amendment. *Id.* at 109.

155. *Id.* at 104. In the areas of curriculum and classroom speech, for example, courts have almost unanimously upheld the authority of the state. See *Parker v. Board of Educ.*, 237 F. Supp. 222 (D. Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966); *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

156. 393 U.S. at 104.

157. See *Rodriguez*, 411 U.S. at 35-36. In *Rodriguez*, however, because of federalism concerns, the Court refused to recognize education as a fundamental right. *Id.* at 44. See *supra* notes 62-68 and accompanying text.

One commentator sharply criticized the Court's reasoning in *Rodriguez* and found four flaws with the Court's proposition that education is not a fundamental right. Prevolos, *supra* note 65, at 103-13. First, even though education is not an explicit constitutional right, "education occupies a special place in the constitutional plan." *Id.* at 108. Second, states recognize "the primacy of the education right . . . on the basis of its significance in the federal democratic scheme." *Id.* Third, citizens expect an education; education is perceived as a national right. Fourth, because education involves state action, states should not be allowed to act in a way that would burden citizens who are exercising their rights. *Id.*

Rodriguez, however, does not stand for the proposition that there is no right to a minimally adequate education. It simply holds that education is not a fundamental right guaranteed by the Constitution.

158. S. REP. NO. 168, 94th Cong., 1st Sess. 15, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1439.

159. STATE PROGRAM IMPLEMENTATION STUDIES BRANCH, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTA-

problem was that Congress did not intend for the EAHCA to pay for all the costs of educating handicapped children.¹⁶⁰ Hence, had *Rowley* imposed the requirement of a commensurate educational opportunity, the states might have been burdened to the point where they would have chosen not to subject themselves to the provisions of the EAHCA.¹⁶¹

The Supreme Court's reluctance to impose serious financial burdens on states in the area of education is also manifest in the pre-*Rowley* decision of *Pennhurst State School and Hospital v. Halderman*.¹⁶² In *Pennhurst*, a resident of the state hospital for the retarded brought a class action alleging that the Developmentally Disabled Assistance and Bill of Rights Act of 1975,¹⁶³ which provides for "appropriate treatment" of the retarded,¹⁶⁴ created substantive rights.¹⁶⁵

Pennhurst is similar to *Rowley* because the plaintiffs in *Rowley* argued that the EAHCA provided a substantive right to special services that would nullify the effect of a handicap. The *Pennhurst* Court rejected the plaintiff's argument and held that absent a stated intention to do so, Congress does not legislate to secure the guarantees of the fourteenth amendment, because such legislation imposes federal authority involuntarily on the states and often usurps traditional state functions.¹⁶⁶ The Court refused to assume that Congress has an unstated intent to enforce the fourteenth amendment. The *Pennhurst* Court reasoned that the argument for inferring intent is weakest when Congress places affirmative obliga-

TION OF PUBLIC LAW 94-142; THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 107-08 (1980). Even before the EAHCA, from 1967 to 1975, enrollment of the handicapped in public schools increased by 1.5 million. See 121 CONG. REC. 19,482 (1975).

160. See S. REP. NO. 168, 94th Cong., 1st Sess. 13, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1437 (The EAHCA "is designed to establish basic minimum procedures governing the distribution of federal funds for assistance to the states for the education of all handicapped children . . .") (emphasis added). Although the amount of funds states received grew from five percent of the average per pupil expenditure in 1978 to forty percent in 1982, 20 U.S.C. § 1411(a)(1)(B) (1982), federal funds cover less than one quarter of the total education cost. 121 CONG. REC. 25,536 (1975).

161. Forty-nine states have chosen to receive federal funds and have therefore subjected themselves to the compliance mechanisms of the EAHCA. New Mexico is the sole exception. Note, *supra* note 16, at 1105 n.18.

162. 451 U.S. 1 (1981).

163. 42 U.S.C. §§ 6000-81 (1976). Like the EAHCA, this Act is voluntary and the states are given the choice of complying with its conditions or foregoing federal funding. *Id.* at § 6063.

164. *Id.* at §§ 6010(1)-(2).

165. *Pennhurst*, 451 U.S. at 5.

166. *Id.* at 16.

tions on the states to fund certain services, because this imposes "massive financial obligations on the states."¹⁶⁷ *Pennhurst* is consistent with a number of cases¹⁶⁸ that hold that only an expressly articulated intent can manifest Congress's desire to legislate pursuant to the fourteenth amendment.¹⁶⁹ Like the statute in question in *Pennhurst*, the EAHCA does not expressly state that Congress is legislating pursuant to the fourteenth amendment. In light of *Pennhurst*, one may argue that the EAHCA was not a congressional attempt to legislate under the fourteenth amendment¹⁷⁰ because the EAHCA, like the statute at issue in *Pennhurst*, imposes an affirmative obligation on states to fund certain services.¹⁷¹ Hence, *Rowley* is correct in holding that the requirement of a "free appropriate public education" does not require that handicapped children be given the same educational opportunity as that given to nonhandicapped children. *Pennhurst* and *Rowley* are also similar in that Congress enacted the statute at issue in each case pursuant to its spending power.¹⁷²

Legislation enacted pursuant to the spending power is in the nature of a contract. States agree to comply with federal conditions in return for federal funds. Thus, the inquiry is whether the state has voluntarily and knowingly accepted the terms of the contract.¹⁷³ To allow such inquiry, Congress must state the conditions of the contract unambiguously.¹⁷⁴ Congress, in enacting the EAHCA, legislated pursuant to the spending power, because under the EAHCA, a state will receive federal funds only if the state

167. *Id.* at 17.

168. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

169. *Pennhurst*, 451 U.S. at 16.

170. Although Congress stated that it was relying on the *PARC* and *Mills* decisions, S. REP. NO. 168, 94th Cong., 1st Sess. 6, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430, those decisions involved equal protection and due process rights. The protections afforded by *PARC* and *Mills* extend only to access to a free education. See *supra* notes 41-59 and accompanying text. In the instant case we are involved with the question of whether handicapped children should receive an opportunity to learn commensurate with the opportunity given to nonhandicapped children. In the EAHCA's legislative history Congress does not rely on any case to extend fourteenth amendment protection to this situation, nor is there any other evidence of its intent to do so.

171. Lack of funds is no defense for a state that does not provide handicapped children with access to a public education. See *Mills*, 348 F. Supp. at 866.

172. U.S. CONST. art. I, § 8, cl. 1.

173. *Pennhurst*, 451 U.S. at 17, (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)).

174. *Pennhurst*, 451 U.S. at 17, (citing as a comparison *Employees of Dep't of Pub. Health & Welfare*, 411 U.S. 279, 285 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974)).

agrees to comply with the conditions imposed by the Act. Neither the EAHCA, nor its legislative history expresses an unambiguous intent to provide a commensurate educational opportunity to a handicapped child. Additional support for the *Rowley* Court's decision can be found in the lack of agreement among educators as to what programs are most effective for handicapped children.¹⁷⁵

In the *Rowley* case, at least three experts called by the defendant were of the opinion that a sign language interpreter would not make a significant difference in Amy's education.¹⁷⁶ However, experts called on by the plaintiff believed that the best education for any deaf person would include the services of a sign language interpreter.¹⁷⁷ Thus, if the EAHCA was read to require that a handicapped child receive an educational opportunity commensurate with the opportunity provided nonhandicapped children, an increase in litigation would result. Parents of handicapped children would have experts testify at trial who believe that certain services must be provided for an equal opportunity, while school boards might present the testimony of experts with different opinions. Furthermore, the plaintiff's contention that the goal of the EAHCA is to provide absolute equality of educational opportunity¹⁷⁸ is inapposite, because "it assumes that all children have innate capabilities for common educational attainments."¹⁷⁹ The proponents of the commensurate educational opportunity standard erroneously assume that testing procedures exist that can determine a child's capabilities. Although testing procedures may exist when the handicap only involves sensory impairment,¹⁸⁰ testing procedures might not exist when intellectual impairment is present. Furthermore, the tasks for which severely handicapped children are trained and the educational information handicapped children receive are not comparable to the education provided non-

175. See Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 47 (1974).

176. *Rowley*, 632 F.2d 945, 950-51 (Mansfield, J., dissenting). Susan Williams, a teacher of deaf children and Amy's tutor, testified that "a sign language interpreter would not make a significant difference in Amy's education, but would, on the contrary deter her interactions with her teachers and other children . . ." *Id.* at 950. Ellen Garzione, a hearing therapist who also worked with Amy, corroborated this testimony. *Id.* Finally, Dr. Ann Mulholland, an expert audiologist, "testified on the basis of her clinical experience with Amy's case that Amy's education was appropriate and adequate." *Id.* at 951.

177. See *Rowley*, 483 F. Supp. at 535.

178. 458 U.S. at 198.

179. Weintraub & Abeson, *supra* note 38, at 1055.

180. For example, in Amy's case it was possible to determine her potential by comparing tests administered orally with tests administered by sign. *Rowley*, 483 F. Supp. at 532.

handicapped children. As a result, academic equality cannot be achieved.¹⁸¹

In short, the *Rowley* Court was justified in rejecting the district court's definition of a "free appropriate public education" and in equating the term with the receipt of specialized services that are designed to alleviate the particular handicap involved and enable the child to receive educational benefits.¹⁸² The express language of the EAHCA, the Act's legislative history, and previous court decisions, as well as federalism and concern over the adverse impact that a commensurate educational opportunity standard would have on state educational systems, justify the Court's outcome.¹⁸³

181. Assuming academic equality could be achieved, to provide the myriad of services a profoundly retarded child would need in order to somehow approach "equality", would result in an inequitable sharing of resources. See *Large*, *supra* note 21, at 242. *Mills*, however, requires that "[i]f sufficient funds are not available to finance all of the services and programs that are needed . . . then the available funds must be expended equitably in such a manner that no child is entirely excluded from a[n] . . . education" *Mills*, 348 F. Supp. at 876.

182. 20 U.S.C. § 1401(17) (1982) provides that related services are necessary "to assist a handicapped child to benefit from special education"

183. Immediately following the treatment of what is meant by an "appropriate education," the Court went on to discuss the scope of judicial review as stated in the EAHCA. The plaintiffs contended that the EAHCA requires courts to exercise *de novo* review over state decisions and policies. 458 U.S. at 205. The defendants contended that courts have the authority to review the Act's procedural requirements but have no authority to review the substance of the state program. *Id.*

The Court in formulating its version of the appropriate standard of judicial review reached a conciliatory ground between the plaintiffs' and the defendant's contentions. The Court held that a reviewing court must make two inquiries. First, the court must ask whether the state has complied with the procedures set forth in the Act. *Id.* at 206. The second inquiry of a reviewing court is whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Id.* at 206-07.

A close scrutiny of the Court's analysis concerning the appropriate judicial review reveals three flaws. First, the Court places emphasis on the fact that the provisions for judicial review are found in the section providing for procedural safeguards. *Id.* at 205-06; see U.S.C. § 1415 (1982). But as the dissent pointed out, "Where else would a provision for judicial review belong?" *Rowley*, 458 U.S. at 216 (White, J., dissenting). The Court also emphasized that if the procedural requirements of the EAHCA are met, the substantive content of an IEP would probably also be sufficient. *Id.* at 206. If this is true, then why did the Court formulate a second prong to a court's inquiry during judicial review, namely, whether an IEP is reasonably calculated to enable the child to receive educational benefits?

Second, although the Court rejected the assertion that judicial review should not extend to the substance of an educational program, the Court failed to state whether the parties would be bound by the record of the hearing officer or would be entitled to present additional evidence. Section 1415 of the EAHCA provides that "[i]n any action [brought under the EAHCA] the court shall receive the records of the administrative proceedings [and] shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(e)(2)(1982). This provision suggests that the role of the court is to make an independent determination and not simply to accept the findings of a hearing officer when supported by substantial evi-

III. LOOKING TO THE FUTURE

A. Quality Education for the Handicapped

Board of Education v. Rowley is a case of first impression. The decision represents the first time that the United States Supreme Court has been called upon to interpret a provision of the EAHCA.¹⁸⁴ Lower courts had previously interpreted the statute, particularly the requirement of a "free appropriate public education," in various ways.¹⁸⁵ Ignoring these interpretations, the Su-

dence. Several lower court decisions have recognized this interpretation. See, e.g., *Laura M. v. Special School Dist. No. 1*, [1980-81 Decisions] EDUC. HANDICAPPED L. REP. (CRR) 552:152 (D. Minn. Jan. 21, 1980) (under the EAHCA's scope of review no special deference need be given to the hearing officer's decision); *Lora v. Board of Educ.*, 456 F. Supp. 1211, 1227 (E.D.N.Y. 1978), *vacated*, 623 F.2d 248 (1980) (interpreting the language of section 1415 to mean that the proceedings were to be conducted as a "de novo" hearing); see also *Anderson v. Thompson*, 495 F. Supp. 1256 (E.D. Wis. 1980), *aff'd*, 658 F.2d 1205 (7th Cir. 1981); *Ladson v. Board of Educ.* [1979-80 Decisions] EDUC. HANDICAPPED L. REP. (CRR) 551:188 (D.D.C. Mar. 12, 1979); *New York State Ass'n for Retarded Children v. Carey*, 466 F. Supp. 479 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979).

Third, the Supreme Court in *Rowley* failed to recognize that a reviewing court may on its own initiative provide appropriate relief. See 20 U.S.C. § 1415(e)(2) (1982) (requiring a court to "hear additional evidence and to grant the relief it deems appropriate"). The reviewing court is therefore not limited merely to affirming or invalidating the administrative decision and may mandate a particular educational program if it finds that the existing educational program does not benefit a child. A reviewing court, however, should not exercise its authority under section 1415 to totally revise a particular educational program. Courts lack specialized knowledge in the area of education and as a result should be cautious in interfering with the informed judgment of state administrators. In *Rodriguez*, the Supreme Court recognized that education presents a myriad of "intractable economic, social, and even philosophical problems." 411 U.S. at 42 (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)). The lack of agreement among educators further dictates against a court's deciding which substantive educational programs would be most beneficial for a handicapped child.

It may be argued, therefore, that a narrow reading of the *Rowley* Court's reasonableness standard is the only practical standard of review. The majority's standard not only shows respect for the states' traditional role in the area of education but also places a proper amount of responsibility on the parents of handicapped children.

184. *Rowley*, 485 U.S. at 186.

185. In the leading case of *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), the court struck down a Pennsylvania state education policy that limited the time of instruction per year for all children, including handicapped children, to 180 days. The United States Court of Appeals for the Third Circuit found that the EAHCA's IEP requirement is suggestive of the emphasis that the Act places on the individual child. *Id.* at 280. Consequently, the court believed that Pennsylvania's inflexible policy of refusing to provide more than 180 days of education was incompatible with the Act's emphasis on the needs of an individual child. *Id.* Two judges wrote separate opinions. One judge determined that the maximization of individual potential was the objective of the EAHCA and, therefore, limited finances could not be used as an excuse for failure to achieve this objective. *Id.* at 285-86 (Sloviter, J., concurring in part, dissenting in part). A concurring opinion, however, concluded that school districts may eliminate some educational programs as long as they did so because of "legitimate funding limitations." *Id.* at 283 (Van Duesen, J., concurring).

preme Court scrutinized the precise words of the EAHCA and its legislative history and refused to distort the plain import of Congress's language.¹⁸⁶ Some educators have construed the Court's ruling that a hearing-impaired student was not entitled to the services of a sign language interpreter as relieving the problems of financially burdened schools.¹⁸⁷ *Rowley*, however, furnished sufficient leeway for different types of handicaps and may have actually expanded the scope of the right to education for handicapped children as conferred by prior decisions.

The *Rowley* decision involved the particular kinds of services that were needed in order to provide a particular student with an appropriate education. Justice Rehnquist carefully limited his analysis to the unique facts of the case and stated: "Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation."¹⁸⁸ The Court specifically stated that it was not establishing any one test for determining the adequacy of educational benefits.¹⁸⁹ Hence, the Court provided sufficient flexibility for future situations involving

186. 458 U.S. at 190 n.11 (quoting 62 Cases of *Jam v. United States*, 340 U.S. at 592.). On a general level, the *Rowley* decision demonstrates the Court's absolute conviction to determine legislative intent through investigation of the language and legislative history of a particular statute. In doing so the Court embarks on a wild goose chase. Congress did not attempt to define the word "appropriate" in the EAHCA and left to the judiciary the task of formulating a definition of this term on a case-by-case basis. The Court might have formulated such a definition had its membership not changed after Congress passed the EAHCA. Unlike the Warren Court in existence at the time of the EAHCA's enactment, the Burger Court is conservatively disposed. Hence, it is not surprising that the *Rowley* Court refused to impose its view of policy upon the states. 458 U.S. at 190 n.11, 207. The Burger Court is very concerned that the judiciary stay within its limits so as not to strengthen its position vis-a-vis the other branches of government. See generally *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (judiciary cannot hear cases that are generalized grievances as a matter within the scope of article III of the Constitution); *Goldwater v. Carter*, 444 U.S. 996 (1979) (dismissing a complaint brought by members of Congress alleging that the President had exceeded his constitutional powers by terminating a treaty without the consent of Congress where Congress had not taken official action against the President); *Rizzo v. Goode*, 423 U.S. 362 (1976) (courts should only decide legal claims of a specific person with a specific injury caused by the actions of a specific government action). Thus, if Congress wants a statutory provision to be interpreted in a particular manner, Congress will have to express its intent unambiguously. Passing references, the *Rowley* Court made clear, will not be considered controlling. See *supra* note 141 and accompanying text.

187. Butler & Cook, *After Rowley: An Effective Education for Handicapped Children*, TRIAL, Sept. 1982, at 71.

188. 458 U.S. at 202.

189. *Id.*

different handicapping conditions. Furthermore, despite frequent references in the EAHCA's legislative history to the desirability of promoting self-sufficiency among the handicapped,¹⁹⁰ the Court felt that the self-sufficiency goal was inadequate protection for the mildly handicapped.¹⁹¹ Although a grade advancement seemed to be dispositive in *Rowley*, the Court recognized that not every handicapped child who advances from grade to grade could be deemed to have received a "free appropriate public education."¹⁹² Prior decisions emphasized that a child may not be denied access to a publicly supported education; passing from one grade to another would definitely be evidence that this requirement had been fulfilled. The decision in *Rowley*, therefore, may have enlarged the rights of handicapped children.

The *Rowley* decision also confirmed the mainstreaming requirement of the EAHCA. The Court stated that "the Act requires participating states to educate handicapped children with non-handicapped children wherever possible."¹⁹³ Because *Rowley* would never have arisen if the EAHCA had no mainstreaming requirement, the Supreme Court's belief that mainstreaming is beneficial is quite apparent. Unfortunately, despite the favorable impact of *Rowley* on the right of a handicapped child to an education, this right remains somewhat illusory under the EAHCA.

The Supreme Court in *Rowley* confirmed Congress's recognition of the primacy of the states in the area of education.¹⁹⁴ *Rowley* determined that the states have the primary responsibility for determining educational programs and that it is highly unlikely that Congress intended reviewing courts to overturn a state's educational theory. As a result, the Court fashioned a standard of judicial review for cases arising under the EAHCA that is very limited in scope. The basic inquiry under the Court's standard is whether an IEP¹⁹⁵ is reasonably calculated to enable a handicapped child to receive educational benefits. Furthermore, the *Rowley* Court showed a great degree of deference to states' administrative proceedings.¹⁹⁶ As a result of *Rowley*, a state's school officials now

190. See S. REP. NO. 168, 94th Cong., 1st Sess. 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433; see also 121 CONG. REC. 37,416 (1975).

191. 458 U.S. at 201 n.23.

192. *Id.* at 203 n.25.

193. *Id.* at 202 (footnote omitted).

194. See *supra* notes 149-53 and accompanying text.

195. See *supra* note 182.

196. "The fact that Section 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement

know that a court is not likely to find their educational theory inconsistent with the requirements of the EAHCA.

This minimum standard, that the particular educational program selected be only reasonably likely to confer benefits upon a handicapped child, might encourage some school officials to become lax on the quality of education that they provide. The reasonableness factor considered by the Court in formulating the scope of judicial review under the EAHCA might encourage states to consider budgeting a priority in formulating a program for a handicapped child. It should be noted, however, that the *Rowley* Court never mentioned that cost is a valid reason for a state's failure to provide a handicapped child with an appropriate education. On the contrary, the Court stated that Congress intended for education to be beneficial, regardless of the cost.¹⁹⁷ However, states are not required to expend all available federal funds toward education for the handicapped. The omission of a requirement that states must expend all available funds toward the education of the handicapped, and the Court's holding that the states do not have to provide opportunities commensurate with those given nonhandicapped children, impose a lesser burden upon the states than the lower court's interpretation would have imposed. Given this leeway, local school administrators will realize that funds allocated towards special education may be cut from other areas of the school budget. Thus, they will "focus on what is available within the school system rather than on what [educational program] is most appropriate for an individual child."¹⁹⁸

Other factors will influence local school officials' choice of what educational programs to fund. Because only a small percentage of public school teachers have training in special education,¹⁹⁹ officials are likely to choose inferior educational programs that require little expertise among teachers at the expense of the quality of a handicapped child's education. Furthermore, school adminis-

that due weight shall be given these proceedings." 458 U.S. at 206. Therefore, while future reviewing courts will probably still allow new evidence to be presented, the courts will demonstrate greater respect for the decisions of hearing officers. See *Laura M. v. Special School Dist. No. 1*, [1980-81 Decisions] EDUC. HANDICAPPED L. REP. (CRR) 552:152 (D. Minn. Jan. 21, 1980).

197. 458 U.S. at 201 n.23. Cost considerations for the most severely handicapped are often misplaced. Congress has recognized that children with severe handicaps are by far the fewest in number. H.R. REP. NO. 332, 94th Cong., 1st Sess. 11-12 (1975).

198. Note, *supra* note 16, at 1109-10.

199. See NATIONAL ADVISORY COUNCIL ON EDUCATION PROFESSIONS DEVELOPMENT, MAINSTREAMING: HELPING TEACHERS MEET THE CHALLENGE 18 (1976).

trators will probably choose programs that require the least administrative workload.²⁰⁰

The *Rowley* Court's emphasis on parental protection suggests that the Court recognized that as a result of its decision, states might attempt to limit the quality of public education available to the handicapped.²⁰¹ The Court assumed that parents would be zealous in promoting the rights of their handicapped children. The Court's assumption, however, may be erroneous in that many parents are simply not heard. Some parents, for example, blindly submit to the opinions of professional educators either because they are ignorant of alternative educational approaches or because they simply trust the "expert."²⁰² Lack of time and resources, especially among poorer parents, further hampers parental efforts to check the discretion of local administrators. Finally, some parents just do not understand their rights under the EAHCA.²⁰³

B. *Political Implications of Rowley*

In enacting the EAHCA, Congress believed that properly educating handicapped children and thereby enabling them to become productive citizens, would be less costly than allowing them to remain societal burdens.²⁰⁴ A lifetime of institutionalized care, for example, may cost as much as 400 thousand dollars per person.²⁰⁵ Furthermore, the burden of caring for an uneducated handicapped child significantly disrupts the lives of his or her family members.²⁰⁶ These views, however, conflict with the budgetary realities of government. Special education costs have been rising at double the rate of regular education costs.²⁰⁷ The EAHCA only supplies

200. Administrators may attempt to standardize administrative functions. See Kirp, Buss & Kuriloff, *supra* note 61, at 47. Administrators may also attempt to convince parents that they are providing their children with appropriate services. See R. WEATHERLY & M. LIPSKY, *STREET-LEVEL BUREAUCRATS AND INSTITUTIONAL INNOVATION* 60-62 (1977).

201. 458 U.S. at 208-09.

202. See R. WEATHERLY & M. LIPSKY, *supra* note 199, at 51.

203. See *Lora v. Board of Educ.*, 456 F. Supp. 1211, 1252-53 (E.D.N.Y. 1978). To alleviate cost problems, Congress may authorize an award of attorney fees. An additional alternative would be to bar schools from having attorneys present in administrative hearings when parents are not represented by counsel. See Note, *supra* note 16, at 1112.

204. S. REP. NO. 168, 94th Cong., 1st Sess. 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

205. R. CONLEY, *THE ECONOMICS OF MENTAL RETARDATION* 322 (1973). Because the EAHCA requires mainstreaming, an increase in the enrollment of handicapped children does not result in a corresponding increase in costs. See National Public Radio & Institute for Educational Leadership, *Optims in Education Program* No. 36, July 5, 1976, at 11.

206. H.R. REP. NO. 332, 94th Cong., 1st Sess. 24 (1975).

207. Rauth, *What Can Be Expected of the Regular Education Teacher? Ideals and*

part of the cost of educating a handicapped child; some states and localities simply cannot be expected to provide the difference. For example, in New York City, while the number of special education students rose dramatically, a financial emergency forced the city to cut its entire educational spending budget.²⁰⁸ One commentator has suggested that under the EAHCA, schools will resemble mental health clinics and that the states will not be able to bear the costs.²⁰⁹ Congressmen have stated that the bill represented the "ultimate in irresponsibility,"²¹⁰ and President Ford felt that the funds authorized were both excessive and unrealistic.²¹¹

In addition to their fiscal limitations, public educational facilities across the nation are already being severely criticized for failing to meet fundamental educational goals. With widespread functional illiteracy and declining SAT scores,²¹² it is difficult to justify spending colossal amounts of funds on the problems—perhaps irremediable—of the seriously handicapped. Parents of nonhandicapped children, concerned with the decline in the quality of public education, feel that funds expended on special education for the handicapped should be spent to better educate their own children.²¹³

The Reagan Administration, as part of its policy of deregula-

Realities, 2 EXCEPTIONAL EDUC. Q., Aug. 1981, at 31.

208. N.Y. Times, Apr. 25, 1976, § 12, at 1, col. 1.

209. Smith, *Chapter 766: A Problem in Implementation*, B.U.J. EDUC., Feb. 1975, at 9.

210. 121 CONG. REC. 25,534 (1975) (remarks of Representative Ashbrook).

211. N.Y. Times, Dec. 3, 1975, at 31, col. 1.

212. *Why Public Schools Fail*, NEWSWEEK, Apr. 20, 1981, at 62. Studies have found academic regression among students in public schools. "The 1964 Haryou Report showed actual academic regression in New York City's Harlem where 'twenty-two percent of the third grade students in that area were reading above grade level, while thirty percent were reading below grade level . . . By the sixth grade twelve percent were reading above grade level, and eighty-one percent were reading below grade level.'" Gard, *San Antonio Independent School District v. Rodriguez: On Our Way to Where?*, 8 VAL. U.L. REV. 1, 5 (1973) (citing NEW YORK: HARLEM YOUTH OPPORTUNITIES UNLIMITED, INC., YOUTH IN THE GHETTO 168-70 (1964)); see also, R. HURLEY, POVERTY AND MENTAL RETARDATION: A CAUSAL RELATIONSHIP 262 (1969); B. BLOOM, A. DAVIS & R. HESS, COMPENSATORY EDUCATION FOR CULTURAL DEPRIVATION 74 (1965).

Former students have brought actions against their schools alleging negligence and educational malpractice. The students have argued that their former schools are liable because they have deprived the student of basic academic skills. See, e.g., *Peter W. v. San Francisco United School Dist.*, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); *Garret v. School Bd.*, No. 77-8703 (Fla. Dade County Ct. Dec. 5, 1977); *Donohue v. Copague Free School Dist.*, 95 Misc. 2d 1, 408 N.Y.S.2d 584 (Sup. Ct. 1977), *aff'd*, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978); see also Note, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117 (1978).

213. See Large, *supra* note 21, at 242.

tion,²¹⁴ has taken action on programs involving rights of the handicapped. In 1981, the Administration ordered the Office of Special Education and Rehabilitative Services (OSERS) to review the provisions of the EAHCA.²¹⁵ OSERS was directed to accomplish four goals: 1) minimize unnecessary regulations in special education; 2) reduce unnecessary paperwork burdens on states and localities; 3) relieve fiscal pressures by applying a cost-benefit analysis of the substantive provisions of the EAHCA; and 4) protect the rights of the handicapped by affording them an equal educational opportunity.²¹⁶ The Reagan Administration also ordered OSERS to consider more restrictive definitions of a "free appropriate public education."²¹⁷ The Supreme Court in *Rowley* was probably aware of the fiscal limitations of the states, and of the Reagan Administration's deregulatory activity, when it decided not to provide an overexpansive interpretation of the "free appropriate public education" requirement.

The proposed regulations²¹⁸ issued by Secretary of Education Terrence H. Bell in response to the *Rowley* decision evidence the controversial nature of the debate over a handicapped child's right to an education. These regulations have been regarded as a "major Reagan Administration deregulatory initiative."²¹⁹ The regulations were intended to ease the fiscal and administrative burdens on the

214. See, e.g., Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified in scattered sections of 26 U.S.C.).

215. *Council for Exceptional Children*, 12 UPDATE No. 4, at 8 (1982).

216. *EHLR Special Report: OSE Regulation Review*, [1980-81 Decisions] EDUC. HANDICAPPED L. REP. (CRR) AC190 (Oct. 2, 1981). OSERS identified sixteen provisions that would be subject to review. *Id.* at 189. Listed for review are: 34 C.F.R. §§ 300.5, .540-43 (1983) (defining handicapped children and dealing with specific learning disabilities); *id.* §§ 300.13-.14 (1983) (defining special education and related services); *id.* §§ 300.121-.284 (dealing with state plans and local educational agency applications); *id.* §§ 300.650-.653 (dealing with state advisory panels); 34 C.F.R. §§ 300.750-.754 (dealing with reports state agencies must file); 34 C.F.R. §§ 300.1, .4, .300-.307 (dealing with free appropriate public education); *id.* §§ 300.4, .300 (dealing with an extended school year program); *id.* §§ 300.300, .4, .513 (dealing with suspension and expulsion); *id.* §§ 300.302, .401 (dealing with the out-of-state placement of handicapped children); *id.* §§ 300.340-.349 (dealing with individualized education program); *id.* §§ 300.451-.452, 76.651-.655 (dealing with services provided children in private schools); *id.* §§ 300.380-.387 (dealing with comprehensive system of personnel development); *id.* §§ 300.506-.513 (dealing with due process procedures); *id.* §§ 300.350(b), .532 (dealing with nondiscrimination in evaluation procedures); *id.* §§ 300.550-.556 (dealing with the least restrictive environment requirement); *id.* §§ 300.560, .576 (dealing with confidentiality of information). *EHLR Special Report: OSE Regulation Review*, [1980-81 Decisions] EDUC. HANDICAPPED L. REP. (CRR) AC189 (Oct. 2, 1981).

217. *EHLR Special Report, OSE Regulation Review*, [1980-81 Decisions] EDUC. HANDICAPPED L. REP. (CRR) at AC189 (Oct. 2, 1981).

218. 47 Fed. Reg. 33,836 (1982) (to be codified at 34 C.F.R. pt. 300).

219. Wall St. J., Sept. 30, 1982, at 20, col. 3.

local school systems, without jeopardizing the rights of handicapped youngsters.²²⁰ The public, by submitting comments that the Presidential Task Force on Regulatory Relief requested, aided the Department of Regulation in identifying regulations that were unnecessary or unduly burdensome.²²¹ Immediate protests met the proposed regulations. Opponents argued that while some school districts might continue to provide quality education, others might take advantage of the deregulatory nature of the regulations.²²² Parents of 4.2 million handicapped youths criticized the plan as a threat to their children.²²³ Congress especially disapproved of the proposed regulations²²⁴ and as a result, adopted a resolution disapproving of the entire set of proposed regulations before recessing. By adopting the resolution, Congress wanted to ensure that the Reagan Administration would not attempt to promulgate any new regulations during the Congressional recess.²²⁵

It is, therefore, apparent that the rights of the handicapped to a special education are caught in the middle of a political struggle between the executive and the legislative branches. Furthermore, *Rowley* was decided in the midst of one of our nation's worst recessions. The Supreme Court, undoubtedly aware of these circumstances, was reluctant to take the liberal step of providing handicapped children with an educational opportunity commensurate with that of nonhandicapped children. Instead, the Court returned a substantial amount of the responsibility for educating the handicapped to the states.²²⁶

220. 47 Fed. Reg. at 33,836 (1982) (to be codified at 34 C.F.R. pt. 300).

221. *Id.* Some of the proposed regulations would have eviscerated the EAHCA. One provision would have reduced the obligation of schools to provide health related services. Another would have weakened the role of parents in the IEP process. A final provision would have allowed schools to remove disruptive children from regular classrooms. *Id.*

222. N.Y. Times, Sept. 30, 1982, at A26, col. 1.

223. Wall St. J., Sept. 30, 1982, at 20, col. 3.

224. See N.Y. Times, Sept. 30, 1982, at A1, col. 5. The disapproval really "sends a message [on] what the will of Congress is on this issue." *Id.* (remarks of Representative Erdahl). "'Yes, this will clearly be a message to the White House.'" *Id.* (remarks of Representative Biaggi).

225. *Id.*

226. It has been suggested that in times of limited resources, a nationalized decision-making framework is disadvantageous because policy statements are highly visible. It would be extremely embarrassing for the national government to restrict the objectives of the EAHCA. Furthermore, such policies are more susceptible to attack by special advocacy groups. Thus, a return of responsibility to the states is in the nature of a "subterfuge." Decisions made on the state level are more difficult to challenge. See G. CALABRESI & P. BOBBIT, TRAGIC CHOICES 53-54, 73 (1978).

IV. CONCLUSION

According to the United States Supreme Court in *Board of Education v. Rowley*, the Education for All Handicapped Children Act does not confer upon handicapped children the right to receive an education equal in quality to the education available to non-handicapped children. The Court, faced with the challenge of interpreting the Act for the first time, displayed its conservative nature and refused to substitute its own ideals and values for those of the legislature and the administrative boards by narrowly defining the Act's provision of a "free appropriate public education." At the same time, the Court's holding that an appropriate education does not require commensurate opportunities was consistent with the holdings of pre-EAHCA decisions. Furthermore, the *Rowley* Court's decision reaffirmed the states' traditional role in the area of education.

The seeming callousness of the Court's decision is mitigated upon delving into the Court's reasoning and taking into account the political climate existing at the time of the decision. The judiciary reflects contemporary social factors and values. In balancing the realities of the economic depression our country was experiencing when the Court decided *Rowley*, with the peculiar facts of *Rowley*, the Court had no choice but to deny Amy a sign language interpreter. However, realizing the facial harshness of its decision, the Court struggled to provide some flexibility. As a result, the Court emphasized the diligence local school administrators had displayed when confronted with Amy's education. Should future cases involve blatant failure on the part of the states to provide for the education of the handicapped, or should the economy return to a healthy condition, the Supreme Court might favor interpreting the EAHCA to provide handicapped children with an educational opportunity that is more substantial than the one they now receive.

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