

The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes

Mark C. Weber*

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* Associate Professor of Law, De Paul University. B.A. Columbia University, 1975; J.D. Yale Law School, 1978. I thank Katharine Bartlett, Matthew Cohen, John Elson, Laura Rothstein, Jane Rutherford, and Morrison Torrey for their comments on an early draft.

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INTRODUCTION

In 1975, after years of organizing, lobbying, and litigating,¹ the community of handicapped persons and their allies won passage of the Education for All Handicapped Children Act.² That law, which amended the 1970 Education of the Handicapped Act,³

¹ See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); Abeson, *Movement and Momentum: Government and the Education of Handicapped Children—II*, 41 EXCEPTIONAL CHILDREN 109 (1974).

² Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1416 (1988)).

³ Pub. L. No. 91-230, 84 Stat. 175 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988)). For brevity's sake, and to indulge the author's hostility toward acronyms, this Article will refer to the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act, as the Education of the Handicapped Act or simply as the Act. When special emphasis is being called to particular aspects of the 1975 Act, that Act will be referred to specifically. Public Law No. 101-476, § 901, 104 Stat. 1103, 1142 (October 30, 1990), changes the name of the Education of the Handicapped Act to the Individuals with Disabilities Education Act and replaces the terminology "handicapped children" with "children with disabilities," and "handicap" with "disability." To facilitate comparison with earlier sources, this Article uses the old nomenclature.

The new law also makes a number of substantive changes, including prospectively abolishing the sovereign immunity defense for state

called for free, appropriate public education for all handicapped children of school age.⁴ It authorized a 700 percent increase in the federal share of funding for education of the handicapped.⁵ In disputes between parents and schools about the educational programs of handicapped children, it guaranteed the right to an administrative hearing and the right to bring a civil action in state or federal court.⁶

The statute was truly radical in attempting to bring a large, previously ignored segment of the population into the mainstream of public education. To make that social transformation work, the Act conferred new, enforceable, and well-funded rights upon the children's parents. Advocates of handicapped children, who had worked so hard for change, exulted in their congressional victory.⁷

Seven years later the Supreme Court turned that enthusiasm into despair. In *Board of Education v. Rowley*⁸ the Court ruled that the Education of the Handicapped Act requires merely that schools provide services "sufficient to confer some educational benefit upon the handicapped child."⁹ The Court found that "the intent of the Act was more to open the door of public education to handicapped children . . . than to guarantee any particular level of education once inside."¹⁰ Handicapped persons and advocates were aghast at the decision.¹¹ Prominent scholars com-

defendants under the eleventh amendment to the United States Constitution. Pub. L. No. 101-476, § 604, 104 Stat. 1106 (1990). See generally *infra* note 270 (describing eleventh amendment immunity issues in applying state educational standards under the Act).

⁴ 20 U.S.C. § 1412(2)(B) (1988).

⁵ The increase in the federal government's share of special education costs from five percent to forty percent was to take place from the fiscal year ending September 30, 1978, to fiscal year 1982. *Id.* § 1411(a)(1)(B). Although congressional appropriations have increased, they have never met the Act's level of authorization. See Hill, *Legal Conflicts in Special Education*, 64 U. DET. L. REV. 129, 137 (1986) (discussing appropriations).

⁶ 20 U.S.C. § 1415 (e)(2) (1988).

⁷ See *infra* note 94 and accompanying text.

⁸ 458 U.S. 176 (1982).

⁹ *Id.* at 200.

¹⁰ *Id.* at 192.

¹¹ See McCarthy, *The Pennhurst and Rowley Decisions: Issues and Implications*, 49 EXCEPTIONAL CHILDREN 517, 521 (1983); Meador, *What's Left After Rowley: The Future of Advocacy in Special Education*, EXCEPTIONAL PARENT, Feb. 1983, at 59, 61; see *infra* note 152 and accompanying text.

plained that the Court had gutted the statute¹² by holding that schools need only provide "some form of specialized education,"¹³ and by denying that schools must provide services that afford handicapped children an opportunity to maximize their potential commensurate with that provided nonhandicapped children.¹⁴ Apparently the Court had "deradicalized" a radical law, just as it had done with other laws that threatened to bring about too drastic a social transformation.¹⁵ Observers waited for the lower courts to follow the Supreme Court's lead in minimizing the statutory obligations of the schools.

Astonishingly, in the eight years since *Rowley*, the lower courts have done nothing of the sort.¹⁶ Instead, they have retreated dra-

¹² Myers & Jenson, *The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act*, 1984 S. ILL. U.L.J. 401, 416; Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley: *Utter Chaos*, 12 J.L. & EDUC. 235 (1983); see Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, LAW & CONTEMP. PROBS., Spring 1985, at 7, 47 (criticizing *Rowley* as irrational); cf. Comment, *Handicapped Children—Statutory Mandate for "Free Appropriate Public Education" Satisfied When Handicapped Benefit from Specialized Instruction and Support Services*, 14 RUTGERS L.J. 989, 1000 (1983) [hereafter Comment, *Handicapped Children: Statutory Mandate*] (criticizing *Rowley* as contrary to Act); Casenote, *Free Appropriate Public Education of Handicapped Children Requires Personalized Instruction and Support Services To Produce Beneficial Results but Does Not Require Reaching Full Potential of Handicapped Student*, 14 ST. MARY'S L.J. 425, 440 (1983) (criticizing *Rowley* as confusing and contrary to Act). *But see* Wegner, *Variations on a Theme—The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, LAW & CONTEMP. PROBS., Winter 1985, at 169, 186 (criticizing *Rowley* opinion but generally approving result); Comment, *Beyond Conventional Education: A Definition of Education Under the Education for All Handicapped Children Act of 1975*, LAW & CONTEMP. PROBS., Spring 1985, at 63, 72-73 [hereafter Comment, *Beyond Conventional Education*] (generally endorsing *Rowley*'s standard for appropriateness); Comment, *The Education of All Handicapped Children Act Since 1975*, 69 MARQ. L. REV. 51, 74 (1985) [hereafter Comment, *The Act Since 1975*] (same).

¹³ *Rowley*, 458 U.S. at 195.

¹⁴ *Id.* at 200.

¹⁵ See Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967) (discussing Reconstruction Civil Rights Acts); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (discussing National Labor Relations Act); see also *infra* notes 363-64 (discussing judicial history of Reconstruction Civil Rights Acts and Wagner Act).

¹⁶ Gallegos, *Beyond Board of Education v. Rowley: Educational Benefit for the Handicapped?*, 97 AM. J. EDUC. 258, 259-60 (1989); see Yudof, *Education for*

matically from *Rowley*, distinguishing it when they could, and minimizing it and finding other sources of guidance when they could not.¹⁷ This Article will discuss the 1975 Act and the *Rowley* decision, describe the lower court retreat from the Supreme Court holding, and evaluate the retreat against traditional, sensible standards of fidelity to congressional will and case precedent. The Article will speculate on when and how, that is, under what legal and social conditions, the Supreme Court and lower courts might transform a radical statute, “deradicalizing” or “reradicalizing” it.

The legislative history and social context of the 1975 Act establish that Congress enacted it to achieve major social change.¹⁸ In *Rowley*, the Court rejected a request for a sign language interpreter for a deaf child who was performing at grade level, though below her potential, without one. The *Rowley* opinion appeared to blunt the social impact of the Act by saying that it was intended to provide only access to services that would provide “some benefit” to handicapped children. In doing so, the opinion rejected legislative history, lower court decisions, and regulatory interpretations — all of which called for education that would maximize

the Handicapped: Rowley in Perspective, 92 AM. J. EDUC. 163, 174 (1984) (suggesting possibility that lower federal courts might not apply the “the spirit of *Rowley*”); Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 469 (1983) (same). Ms. Gallegos notes that “[a] few courts appear to ignore the spirit of *Rowley*” in confronting cases involving residential education, extended school years, and least restrictive environment claims. Gallegos, *supra*, at 275. She appears to believe that the compelling facts of individual cases account for the results in some of the cases. *Id.* at 277. This Article submits that the lower court revolt is more dramatic than what Gallegos describes, and that it amounts to a transformation of the Act, returning it to its original intentions. Gallegos also contends that court review of procedures employed by school districts to make decisions on handicapped children’s services “reduces the potential for the relaxed substantive standard [of appropriate education articulated in *Rowley*] to weaken the educational component of the act.” *Id.* at 273. Although this position appears sound in theory, she cites no examples and the cases discussed in this Article do not support her hypothesis.

¹⁷ Of course, this statement does not apply to all lower courts and all lower court cases. See *infra* note 166 and accompanying text. Nevertheless, courts have departed from *Rowley*, especially when confronted with particular patterns and when employing particular modes of reasoning. This trend seems to be escalating. See *infra* text accompanying notes 167-275.

¹⁸ See *infra* text accompanying notes 86-94.

handicapped children's educational achievement to an extent comparable to that afforded nonhandicapped children.¹⁹ Lower courts would have been expected to follow the lead of the Supreme Court and apply the Court's interpretation of the Act to reject parents' requests for services for their children.

Although in many instances the lower courts have done so, in a great many others they have sided with parents and children and ordered schools to provide the services. The reasoning they have employed includes distinguishing *Rowley* factually: emphasizing the severity of the handicap, for example, or stressing the failure of existing services to enable the child to succeed in the mainstream. They have also relied on parts of the statute referred to but not developed in *Rowley*: requirements of education in the least restrictive environment, individualization, and obedience to state educational standards.

The lower courts' decisions have transformed the Act as surely as the *Rowley* decision appeared to transform it. Their interpretations are more faithful than the Supreme Court's to the Act's original, radical message that handicapped children are to be brought into the public schools and treated equally there. Although their decisions raise questions about the treatment of *Rowley* as a binding precedent, the lower courts' methods of dealing with *Rowley* do not frustrate the important policies served by the doctrine of stare decisis.

The transformation of the Education of the Handicapped Act provides a case study in the interpretation of radical statutes. Study of the judicial interpretation of the Act demonstrates that the Supreme Court may play a unique but not necessarily better role in interpreting radical statutes than the lower courts do, that radical statutes put strains on existing legal theory, and that individual case facts and general social trends influence legal development. The history of the Act and its judicial treatment also demonstrate that while social agitation can promote radical judicial interpretation, it need not take the form of civil unrest to make a difference.

Part I of this Article describes the Education of the Handicapped Act, focusing on its social context, legislative history, and key provisions. Part II looks at *Board of Education v. Rowley*, contrasting the decision with the expectations the Education for All Handicapped Children Act had generated. Part III examines the

¹⁹ See *infra* text accompanying notes 96-101.

lower court case law in the wake of *Rowley*. It discusses cases that retreat from *Rowley* by ordering extensive services for handicapped children, noting the methods the courts have used to distance themselves from the influence of the *Rowley* opinion. Part IV of this Article evaluates the lower court retreat from *Rowley*. It questions the significance of the departures from the Supreme Court's decision and asks whether the departures are justified by traditional methods of statutory interpretation and deference to precedent. Part V speculates on the conditions for judicial transformation of radical statutes, drawing tentative conclusions about the cross-impact of law and social forces.

I. THE EDUCATION OF THE HANDICAPPED ACT

For generations, the legal system has played a role in the education of the handicapped. That history culminates in the 1975 Education for All Handicapped Children Act and the activity of courts and others under its authority. Yet it begins on a less benign note, with the legal exclusion of handicapped children from public education and with only halting efforts to provide those children some of the educational services enjoyed by non-handicapped children.

A. Legal Exclusion of Handicapped Children

Legal involvement in the education of handicapped children began with legislative, administrative, and judicial activity either permitting or requiring the exclusion of these children from public education. In 1893 the Massachusetts Supreme Judicial Court upheld the expulsion from the public schools of a child who was "weak in mind."²⁰ In a 1919 case the Wisconsin Supreme Court approved the exclusion of a child who had the academic and physical ability to benefit from school, but who drooled uncontrollably, had a speech impediment, and exhibited facial contortions.²¹ Cases of this type continued until relatively recently. In 1958 the Illinois Supreme Court found that existing legislation which required compulsory education for children and established programs for the handicapped nevertheless did not require that a free public education be provided to a mentally

²⁰ *Watson v. City of Cambridge*, 157 Mass. 561, 32 N.E. 864 (1893).

²¹ *State ex rel. Beattie v. Board of Educ.*, 169 Wis. 231, 172 N.W. 153 (1919).

impaired child.²² In many states legislation permitted the exclusion of any child whenever school authorities judged that the child would not benefit from public education or that the child's presence would be disruptive to others.²³ Until 1969 a North Carolina statute actually made it a crime for a parent to persist in forcing the attendance of a handicapped child after the superintendent had determined to exclude the child from the public schools.²⁴

B. *The Context of the 1975 Act*

Public exclusion practices eventually collided with the civil rights movement. In 1954 *Brown v. Board of Education* established that black children had the right to equal educational opportunities, and that segregated schooling denied them this right.²⁵ Advocates of the disabled argued that handicapped children were also entitled to equal access to the public schools, either by integration into the regular classroom or by implementation of special programs that while separate were at least equal.²⁶ Like the advocates of minority school children, advocates of the handicapped took to the courts to enforce the right to educational equality.

Two federal district court cases were central to the movement for handicapped children's right to education: *Pennsylvania Association for Retarded Children v. Pennsylvania*²⁷ (*P.A.R.C.*) and *Mills v. Board of Education*.²⁸ These cases from the early 1970s declared that equal protection does not permit handicapped children to be excluded from free public education, and that even if it did, due process would require a meaningful opportunity to challenge the exclusion. The consent agreement that settled the *P.A.R.C.* case required the state to provide "access to a free public program of education and training appropriate to [the] capacities" of each

²² *Department of Pub. Welfare v. Haas*, 15 Ill. 2d 204, 154 N.E.2d 265 (1958).

²³ Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 351 (1974).

²⁴ Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Laws 641 (amending N.C. GEN. STAT. § 115-165 (1963)).

²⁵ 347 U.S. 483 (1954).

²⁶ See Kirp, *Schools As Sorters*, 121 U. PA. L. REV. 705, 747-51 (1973).

²⁷ 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972).

²⁸ 348 F. Supp. 866 (D.D.C. 1972).

mentally retarded child.²⁹ Educational "assignments" were to be made in a process that included parent participation and provided for resolution of any disputes the parents might raise.³⁰ The *Mills* decision provided similar rights to an even broader category of handicapped children.³¹ These court cases were hardly unique. In 1974 one observer counted thirty-six pending lawsuits over handicapped children's rights to education.³²

Even at the height of the period in which states excluded children with handicaps from public school, reformers forced the creation of some programs to educate handicapped children.³³ In 1823 Kentucky created the first state school for the deaf.³⁴ In 1864 the federal government established Gallaudet College, an institution of higher education for the deaf.³⁵ Pennsylvania first allocated funds for the private schooling of developmentally delayed children in 1852, and various large cities established public school classes for these children before 1900.³⁶ New Jersey, Minnesota, Pennsylvania, and Oregon all passed laws providing some measure of public funding for education of the handicapped in the first quarter of the twentieth century.³⁷

Significant federal financial involvement in the education of handicapped children did not take place until 1958, when the federal government appropriated funds for training educators of children with mental retardation.³⁸ General federal involvement in primary and secondary education expanded dramatically the same year with the passage of the National Defense Education Act

²⁹ *P.A.R.C.*, 343 F. Supp. at 314.

³⁰ *Id.* at 303.

³¹ See *Mills*, 348 F. Supp. at 878-79 (holding all children entitled to public education, regardless of mental, physical, or emotional disability).

³² Abeson, *supra* note 1, at 113.

³³ Weintraub & Ballard, *Introduction: Bridging the Decades*, in *SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS* 1, 2 (J. Ballard, B. Ramirez & F. Weintraub eds. 1982).

³⁴ *Id.* at 1. Federal involvement took place in 1827, when the United States government sold Kentucky land for the school. *Update*, *TEACHING EXCEPTIONAL CHILDREN*, Summer 1990, at 67.

³⁵ Weintraub & Ballard, *supra* note 33, at 1.

³⁶ *Id.* at 1-2.

³⁷ *Id.* at 2. See H.R. REP. NO. 332, 94th Cong., 1st Sess. 10 (1975) ("The first mandatory laws establishing programs for handicapped children were enacted in New Jersey in 1911, New York in 1917 and Massachusetts in 1920.").

³⁸ Expansion of Teaching in the Education of Mentally Retarded Children Act of 1958, Pub. L. No. 85-926, 72 Stat. 1777.

of 1958, which for the first time provided significant direct federal subsidies for education.³⁹ The federal Elementary and Secondary Education Act of 1965 built on that statute, providing grants to meet the special needs of educationally disadvantaged children.⁴⁰ Congress amended this legislation in 1966, adding a Title VI to provide grants for programs for handicapped children.⁴¹ In 1970 Congress passed a separate Education of the Handicapped Act, replacing and expanding Title VI.⁴² The 1970 Act has been the framework for subsequent federal initiatives in primary and secondary education of handicapped children. In the years immediately following 1970, federal subsidies for services to handicapped children increased markedly.⁴³

Legislative activity also occurred in many states, prodded by litigation. States repealed restrictive laws and began extensive programs for the handicapped,⁴⁴ but progress was uneven. Even the most progressive state legislation frequently lacked enforcement mechanisms that parents could use if their children were wrongfully denied educational services or placed in inappropriate settings.⁴⁵

In 1973 Congress enacted section 504 of the Rehabilitation Act, a general federal civil rights law for the handicapped with

³⁹ Pub. L. No. 85-864, 72 Stat. 1580.

⁴⁰ Pub. L. No. 89-10, 79 Stat. 27.

⁴¹ *Id.*, amended by Pub. L. No. 89-750, § 161 [Title VI], 80 Stat. 1204 (1966).

⁴² Education of the Handicapped Act of 1970, Pub. L. No. 91-230, §§ 601-662, 84 Stat. 175, amended by Pub. L. No. 93-380, §§ 611-621 [Title VI], 88 Stat. 484, 579-585 (1974), amended by Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified with subsequent amendments at 20 U.S.C. §§ 1400-1485 (1988)).

⁴³ Note, *The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 119 (1976).

⁴⁴ McClung, *Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?*, 3 J.L. & EDUC. 153, 167-71 (1974) (discussing statutes and litigation in New York, Massachusetts, Utah, and California); see H.R. REP. NO. 332, *supra* note 37, at 10. The House Committee on Education and Labor reported that "In 1971 seven States had adopted mandatory legislation in all categories of exceptionality, in addition to 26 States already having some form of mandatory provisions. Now in 1975, only one or two States remain without mandatory laws for all categories of exceptionality." *Id.*

⁴⁵ See H.R. REP. NO. 332, *supra* note 37, at 10 ("Mandatory legislation, which has characteristically lacked meaningful provisions for actual enforcement, has proven to be of limited value.").

respect to all federally assisted activity,⁴⁶ thus setting the stage for major federal legislation to ensure handicapped children an enforceable right to education. Amendments to the Education of the Handicapped Act adopted in 1974 required each state receiving federal special education funding to establish a goal of providing full educational opportunities to all handicapped children.⁴⁷ The amendments called for state assurances of procedural protections for parents of children denied appropriate services, and for assurances that handicapped children would be educated in the least restrictive environment.⁴⁸ Nevertheless, the law still did not provide the enforceability that advocates of the handicapped believed was necessary. Statistical information bore out the results of that deficiency. As late as 1975, approximately 1,750,000 handicapped children of school age were totally excluded from free public schooling, while 2,500,000 were in programs that did not meet their needs.⁴⁹

C. *The Act, Its Legislative History, and Regulations*

Against this background Congress enacted The Education for All Handicapped Children Act of 1975. The Act begins with express findings and statements of purpose. These include the finding that the special education needs of handicapped children are not being fully met and the statement that the Act's purpose is to assist state and local educational efforts "in order to assure equal protection of the law" and to assure that handicapped children have available "special education and related services designed to meet their unique needs."⁵⁰ This language received detailed consideration in the House-Senate Conference Report.⁵¹

Next, the Act lists what might be termed "substantive definitions," which both clarify the meaning of terms used in the Act

⁴⁶ Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794 (1988)).

⁴⁷ Education Amendments of 1974, Pub. L. No. 93-380, §§ 612-615, 88 Stat. 484, 580-83 (1974); see H.R. REP. NO. 332, *supra* note 37, at 11 (discussing Public Law 93-380).

⁴⁸ Pub. L. No. 93-380, § 612, 88 Stat. 484 at 582 (1974).

⁴⁹ H.R. REP. NO. 332, *supra* note 37, at 11-12. Some authorities have disputed the accuracy of these figures, but it is clear that large numbers of children were out of school. See Clune & Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, LAW & CONTEMP. PROBS., Winter 1985, at 15-18.

⁵⁰ 20 U.S.C. § 1400 (1976).

⁵¹ See S. REP. NO. 455, 94th Cong., 1st Sess. 28-29 (1975).

and set out some of the obligations the Act creates. For example, the Act defines "free appropriate public education" as:

special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [this title].⁵²

The "individualized education program" is a written statement developed in a meeting of the school, the teacher, and the parents. It includes the child's current performance, annual goals and short-term instructional objectives, specific educational services needed, and objective criteria and evaluation procedures for determining whether the objectives are being achieved.⁵³ Special educational services include both "special education," defined as "specially designed instruction . . . to meet the unique needs of a handicapped child," and "related services," defined as "such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education."⁵⁴ The Act also defines "handicapped children"⁵⁵ and a variety of other terms.

The Act continues with a series of administration and funding provisions, including state eligibility requirements. The state must have a policy that assures all handicapped children the right to a free, appropriate public education;⁵⁶ it must make such an education available to all handicapped children who meet age requirements by September 1, 1978.⁵⁷ The state must establish a

⁵² 20 U.S.C. § 1401(a)(18) (1976).

⁵³ *Id.* § 1401(a)(19).

⁵⁴ *Id.* § 1401(a)(16), (17). The Act includes specific services, but the text does not limit the provision to those services. The services include transportation, early identification and assessment of handicapping conditions, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services. Medical services, however, are limited to those for diagnostic and evaluation purposes. *Id.* § 1401(a)(17).

⁵⁵ "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." *Id.* § 1401(a)(1).

⁵⁶ *Id.* § 1412(1).

⁵⁷ *Id.* § 1412(2)(B).

timetable for serving children by that date that places priority in delivering services first to handicapped children not receiving an education, and second to the most severely handicapped children within each disability who are receiving an inadequate education.⁵⁸ The state must create procedures to assure that, to the maximum extent appropriate, handicapped children, even those in institutions, are educated with nonhandicapped children.⁵⁹ Thus, under the Act handicapped children will be placed in special classes, schooled separately, or otherwise removed from the regular educational environment only when education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily because of the nature or severity of the handicap.⁶⁰ The Act also prohibits tests and evaluations that discriminate racially or culturally.⁶¹

Funds flow from the federal government to the state educational agency to local school districts. The Act sets out the requirements that funded agencies — state and local — must meet in the plans they submit to receive funding. In addition to covering fiscal, reporting, and personnel development matters, these plan requirements establish a number of specific duties that state and local education agencies owe to handicapped children within their jurisdiction. In particular, the state must assure that handicapped children in private schools and facilities will be provided special education and related services in conformance with an individualized education program at no cost to their parents, if the state or local educational authority placed or referred them there.⁶² Local districts must have programs that carry into effect the state eligibility requirements.⁶³

The eligibility and plan requirements mandate the provision of procedural rights for parents of handicapped children. Parents have the right to prior written notice when the school initiates, changes, or refuses to initiate or change the designation, evaluation, or placement of a child.⁶⁴ Children whose parents are unknown or unavailable, or who are wards of the state, have the

⁵⁸ *Id.* §§ 1412(2)(A), 1412(3).

⁵⁹ *Id.* § 1412(5)(B).

⁶⁰ *Id.*

⁶¹ *Id.* § 1412(5)(C).

⁶² *Id.* § 1413(a)(4)(B).

⁶³ *Id.* § 1414(a).

⁶⁴ *Id.* § 1415(b)(1)(C).

right to have surrogates act in the parents' place.⁶⁵ Parents have the right to examine educational records and receive an independent evaluation of the child.⁶⁶

These procedural rights culminate in the parents' opportunity for an "impartial due process hearing,"⁶⁷ subject at state option to an impartial review by the state educational agency.⁶⁸ Any party aggrieved by the results of these proceedings has the right to bring a civil action in state or federal court.⁶⁹ During the pendency of the various administrative proceedings, the child is to stay in the current educational placement, unless the parents and educational authorities agree otherwise.⁷⁰ Other provisions of the 1975 Act cover federal withholding of funds when states, or in some cases local educational agencies, disobey the law;⁷¹ judicial review of the withholding;⁷² authorization for rulemaking;⁷³ protection of privacy rights;⁷⁴ and federal evaluation.⁷⁵

The legislative history of the Education for All Handicapped Children Act stresses the origins and description of the law almost to the exclusion of its interpretation. Throughout the committee reports mention is made not only of the growing trend toward state legislation, but also of the difficulty with enforcement of that legislation.⁷⁶ The reports also contain repeated references to the right-to-education litigation, particularly *P.A.R.C.* and *Mills*,⁷⁷ to the numbers of children unserved and inadequately served,⁷⁸ and to the justification for the law in terms of

⁶⁵ *Id.* § 1415(b)(1)(B).

⁶⁶ *Id.* § 1415(b)(1)(A).

⁶⁷ *Id.* § 1415(b)(2).

⁶⁸ *Id.* § 1415(c).

⁶⁹ *Id.* § 1415(e)(2).

⁷⁰ *Id.* § 1415(e)(3). If the child is out of school, the child shall, with the consent of the parents, be placed in the public school program until the completion of proceedings. *Id.*

⁷¹ *Id.* § 1416(a).

⁷² *Id.* § 1415(b).

⁷³ *Id.* § 1417(b).

⁷⁴ *Id.* § 1417(c).

⁷⁵ *Id.* § 1418.

⁷⁶ S. REP. NO. 168, 94th Cong., 1st Sess. 8 (1975); H.R. REP. NO. 332, *supra* note 37, at 10.

⁷⁷ S. REP. NO. 168, *supra* note 76, at 6; H.R. REP. NO. 332, *supra* note 37, at 10.

⁷⁸ S. REP. NO. 168, *supra* note 76, at 8; H.R. REP. NO. 332, *supra* note 37, at 11-12.

both human rights⁷⁹ and the nation's long-term economic self-interest.⁸⁰

Pursuant to the Act, the Department of Health, Education and Welfare promulgated proposed regulations in late 1976.⁸¹ The regulations became final August 23, 1977,⁸² about a year before the Act became fully effective.⁸³ The regulations recapitulate the Act and add significant details, including specifics about assessment of children, parental participation in the formulation of programs, and various procedural rights. The regulations do little to furnish a more detailed definition of appropriate education, although they do provide that free, appropriate education

⁷⁹ The Senate Committee on Labor and Public Welfare, in recommending passage of the Act, stated:

This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation [O]ver the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. . . . It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. . . .

S. REP. NO. 168, *supra* note 76, at 9.

⁸⁰ The House Committee on Education and Labor, in describing the need for the legislation, noted:

The long-range implications [of inadequate education] are that taxpayers will spend many billions of dollars over the lifetime of these handicapped individuals simply to maintain such persons as dependents on welfare and often in institutions.

With proper educational services many of these handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society.

H.R. REP. NO. 332, *supra* note 37, at 11; see Comment, *Self-Sufficiency Under the Education for All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516, 523 nn.50, 51 & 53, 525 nn.66-67 (emphasizing Congress' perception of need to equip handicapped children for self-sufficiency to avoid burdening public).

⁸¹ 41 Fed. Reg. 56,966 (1976).

⁸² 42 Fed. Reg. 42,476 (1977).

⁸³ The duty to provide a free, appropriate public education became effective September 1, 1978. 20 U.S.C. § 1412(2)(B) (1976).

includes expensive residential placements.⁸⁴ Moreover, they fill out the Act's requirement that handicapped children be educated to the maximum extent practicable with nonhandicapped children, a requirement the regulations place under the heading "least restrictive environment."⁸⁵

D. *Expectations Generated by the Act*

The sponsors of the Act intended it to have radical social consequences. Senator Stafford, one of its sponsors, has written that before the Act handicapped children were invisible: both locked away out of sight and, when seen, seen not as themselves but as manifestations of a disabling condition.⁸⁶ The Act was to have a radical effect on both types of invisibility:

[A]s much as any other action of the Congress in the two hundred years of the Republic, the Education for All Handicapped Children Act represents a gallant and determined effort to terminate the two-tiered invisibility once and for all with respect to exceptional children in the Nation's school systems.⁸⁷

The effect of the Act on the nonhandicapped would be as profound as its effect on the handicapped. Once the previously "invisible" children were in the classroom, nonhandicapped students and teachers would be forced to see them, to work with them, and to treat them as real human beings.⁸⁸ Their differences would no longer make them deviant. Other children would grow up to realize that children different from them are neither threatening nor evil, furthering the integration of the handicapped into the larger community.⁸⁹

Senator Harrison Williams, the principal drafter of the Act, called it "the most important Federal legislation affecting American public education since the enactment of the Elementary and Secondary Education Act of 1965."⁹⁰ The Act's seven-fold

⁸⁴ 34 C.F.R. § 300.302 (1990).

⁸⁵ *Id.* §§ 300.550-.556 (1990). This concept includes the idea of "mainstreaming." See, e.g., *Board of Educ. v. Rowley*, 458 U.S. 176, 181 n.4 (1982).

⁸⁶ Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72 (1978).

⁸⁷ *Id.*

⁸⁸ See *id.* at 71 (discussing R. ELLISON, *INVISIBLE MAN* (1952)).

⁸⁹ See Minow, *Learning To Live with the Dilemma of Difference: Bilingual and Special Education*, LAW & CONTEMP. PROBS., Spring 1985, at 157, 168-69 (describing aspirational rhetoric of educational reformers of the 1970s).

⁹⁰ 121 CONG. REC. 37,413 (1975). Williams also stated: "This measure

increase in the share of authorized federal funding for special education also suggests an intention to promote major social change, even though advocates of the Act knew that funding would not meet expectations.⁹¹ The funding authorization itself symbolized the dramatic changes the Act was to work.⁹² A non-supplanting provision forbade state or local decreases in funding as the federal share increased.⁹³ Observers shared the dramatic expectations of the law's authors.⁹⁴

The radical expectations of the framers shaped early views of the meaning of appropriateness in the Act's guarantee of a free, appropriate public education. Articles published before *Board of Education v. Rowley*⁹⁵ proposed that the standard for appropriateness be one by which services would be afforded to maximize the child's educational development, at least to the degree that services maximize nonhandicapped children's development.⁹⁶ The

fulfills the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left out." *Id.*

⁹¹ See 121 CONG. REC. 37,419 (1975) (statement of Sen. Muskie); Ward & Abernethy, *Background, Enactment and Implementation of P.L. 94-142*, PEABODY J. EDUC., Summer 1983, at 1, 10.

⁹² Ward & Abernethy, *supra* note 91, at 10, 14; see Note, *The Education of All Handicapped Children Act of 1975*, 10 U. MICH. J.L. REF. 110, 110, 124-28 (1976) (describing "a national commitment to full equality of educational opportunity" and "an expanded program of financial assistance to the states to aid them in the massive court-mandated effort to provide an education for every handicapped child" (footnote omitted)).

⁹³ 20 U.S.C. § 1413(a)(9) (1976).

⁹⁴ R. WEINER & M. HUME, . . . AND EDUCATION FOR ALL 16 (1987) (quoting Joseph Ballard of the Council for Exceptional Children that on the day the President signed the law, "We all had tears in our eyes" and "We felt a great thing had happened"); Weintraub & Ballard, *supra* note 33, at 4 (quoting Albert Shanker, president of the American Federation of Teachers, who called the Act "one of the most important developments in the history of American education, one with far-reaching consequences for every parent, teacher and school district in the country."); Note, *supra* note 43, at 124 ("The Education of All Handicapped Children Act of 1975 represents a dramatic change in the philosophy of federal assistance for the education of handicapped children.").

⁹⁵ 458 U.S. 176 (1982).

⁹⁶ Comment, *supra* note 80, at 526 (applying educational philosophy and legislative history, and tying idea of handicapped persons' self-sufficiency to standard of appropriateness that leads to maximization of development); 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) ("[A]n appropriate education for a particular child would require services

articles noted, however, that the content of "appropriateness" was so vague that it appeared Congress had left the term completely open to future administrative and judicial interpretation.⁹⁷ The absence of any statutory limits to appropriate services based on individual or aggregate cost, they argued, reinforces the idea that Congress contemplated a large shift in public resources to the handicapped.⁹⁸

E. Early Case Law Under the Act

During the period immediately following passage of the Act the courts applied a definition of appropriateness that jibed with the views of the commentators. Some courts interpreted the Act to require services that provide handicapped students an opportunity to achieve their full potential that is commensurate with the opportunity provided to nonhandicapped students.⁹⁹ For exam-

aimed at developing the child's intellectual capacity to the same degree that the school sought to develop the 'normal' abilities of its nonhandicapped students."); see Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1065 ("Throughout the scope and language of P.L. 94-142 Congress has declared its affirmative intent to satisfy completely the educational needs of the country's 8,000,000 handicapped youngsters."); Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 502 (1982) ("[T]he Act is premised upon notions of proportional equality . . ."); cf. Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 992-93 (1977) (suggesting that Congress intended to improve on access to education required by even progressive court decisions, but expressing skepticism about school systems' views of handicapped children's needs); Jones, *Educational Rights of Handicapped Children*, 19 HARV. J. ON LEGIS. 287, 296-97 (1982) (discussing lower court opinions in *Rowley*).

⁹⁷ E.g., Note, *supra* note 96, at 1105-06.

⁹⁸ See, e.g., Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and Analysis*, 13 GONZ. L. REV. 717, 727-28 (1978) (arguing from legislative materials that Congress did not intend to impose cost restriction on related services).

⁹⁹ *Springdale School Dist. v. Grace*, 656 F.2d 300, 305 (8th Cir. 1981); see *Rowley v. Board of Educ.*, 632 F.2d 945, 947 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982); *Battle v. Pennsylvania*, 629 F.2d 269, 277 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *Espino v. Besteiro*, 520 F. Supp. 905, 912 (S.D. Tex. 1981); *Gladys J. v. Pearland Indep. School Dist.*, 520 F. Supp. 869, 875 (S.D. Tex. 1981); *Pinkerton v. Moye*, 509 F. Supp. 107, 113 (W.D. Va. 1981); *Hines v. Pitt County Bd. of Educ.*, 497 F. Supp. 403, 406 (E.D.N.C. 1980); see also Tucker, *supra* note 12, at 238 n.15 (calling standard used by these courts "commensurate opportunity" standard).

ple, in *Gladys J. v. Pearland Independent School District*,¹⁰⁰ the court found inappropriate the school district's placement of a multiply handicapped child suffering from organic schizophrenia in a self-contained day program for mentally retarded students. The court ordered residential placement, reasoning that for a child so severely affected, only a 24-hour structured environment would provide her "educational opportunities commensurate with that provided other children in the public schools."¹⁰¹ Other courts used a standard closer to maximization of potential without regard to the opportunity provided nonhandicapped students.¹⁰²

II. BOARD OF EDUCATION V. ROWLEY

Without waiting for any clear conflict to develop between the circuit courts' interpretation of appropriate special education, the Supreme Court granted certiorari in *Rowley v. Board of Education*.¹⁰³ The case gave the Court its first opportunity to interpret the Act.

A. The Case

In *Board of Education v. Rowley*¹⁰⁴ the parents of a deaf first-grade girl challenged her individualized education program because it failed to include the services of a qualified sign language interpreter. The program instead provided for the use of a wireless hearing aid, one hour of tutoring a day, and three hours of speech therapy each week.¹⁰⁵ Although Amy Rowley performed better than the average child in her class and was advancing easily from grade to grade,¹⁰⁶ her hearing aid and lip reading abilities permitted her to understand less than sixty percent of

¹⁰⁰ 520 F. Supp. 869 (S.D. Tex. 1981).

¹⁰¹ *Id.* at 875, 878-79.

¹⁰² See *Kruelle v. Biggs*, 489 F. Supp. 169, 173-74 (D. Del. 1980), *aff'd*, 642 F.2d 687 (3d Cir. 1981); *DeWalt v. Burkholder*, 1979-80 Educ. Handicapped L. Rep. (CRR) 551:550 (E.D. Va. 1980); *Armstrong v. Kline*, 476 F. Supp. 583, 603-04 (E.D. Pa. 1979), *remanded sub nom. Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

¹⁰³ 632 F.2d 945 (2d Cir. 1980), *aff'ing* 483 F. Supp. 528 (S.D.N.Y. 1980), *cert. granted*, 454 U.S. 961 (1981), *rev'd*, 458 U.S. 176 (1982). Although no circuit court decision conflicted in any clear way with *Rowley*, the case itself did have a strong dissent by Judge Mansfield. 632 F.2d at 948-55 (Mansfield, J., dissenting).

¹⁰⁴ 458 U.S. 176 (1982).

¹⁰⁵ *Id.* at 184-85.

¹⁰⁶ *Id.* at 185.

what was being said in class, even under ideal conditions.¹⁰⁷ Thus, she was not learning as much or performing as well as she would have had she had no handicap¹⁰⁸ or had she obtained the services her parents requested.¹⁰⁹

The district court found no clear standard for appropriateness in the Education of the Handicapped Act.¹¹⁰ It reasoned from secondary authority¹¹¹ and from regulations promulgated under section 504 of the Rehabilitation Act of 1973,¹¹² however, that the Act required "an opportunity to achieve . . . full potential commensurate with the opportunity provided to other children."¹¹³ Thus, the district court concluded that services must be provided until the shortfall between the handicapped child's potential and her performance is no greater than that of non-handicapped children.¹¹⁴ The court of appeals affirmed.¹¹⁵

The Supreme Court reversed. Justice Rehnquist, writing for the majority, began with the definition of free, appropriate public education found in the Act: special education and related services which are free of charge, which conform to the standards of the state educational agency, and which are provided in accordance with an individualized education plan.¹¹⁶ Conceding that the definition was "cryptic,"¹¹⁷ the Court concluded that its language did not support the proportional maximization standard

¹⁰⁷ *Rowley v. Board of Educ.*, 483 F. Supp. 528, 532 (S.D.N.Y. 1980); *see Rowley*, 458 U.S. at 185.

¹⁰⁸ *Rowley*, 458 U.S. at 185.

¹⁰⁹ *Rowley*, 483 F. Supp. at 535.

¹¹⁰ *Id.* at 533.

¹¹¹ *Id.* at 533-34 (citing Note, *supra* note 96).

¹¹² *Id.* at 533 (citing 45 C.F.R. § 84.33 (1979)).

¹¹³ *Id.* at 534.

¹¹⁴ *Id.* at 534-35.

¹¹⁵ *Rowley v. Board of Educ.*, 632 F.2d 945 (2d Cir. 1980).

¹¹⁶ *Board of Educ. v. Rowley*, 458 U.S. 176, 188 (1982). The statutory language is:

The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education 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) (1976).

¹¹⁷ *Rowley*, 458 U.S. at 188.

applied by the lower courts.¹¹⁸ Instead, the Court found that the language, combined with the legislative history, showed that "Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."¹¹⁹

The Court reasoned that *P.A.R.C.* and *Mills*, which strongly influenced Congress, had imposed no standard of education beyond access.¹²⁰ The Court also declared that sponsors of the Act, in describing numbers of unserved children, had equated mere receipt of some form of specialized services with receipt of an appropriate education.¹²¹

Responding to the argument that the equal educational opportunity goal of the Act requires maximization of potential commensurate with opportunities provided nonhandicapped children, the Court said that the commensurate opportunity standard was unworkable and contrary to congressional intent. The comparison between handicapped and nonhandicapped would entail "impossible measurements."¹²² Giving handicapped children the same services as nonhandicapped would not be "appropriate," but maximizing each handicapped child's potential is "further than Congress intended to go."¹²³

The Court also argued that Congress' intent in enforcing the constitutional right of equal protection, which had been the primary basis of the two influential lower court cases mentioned in the legislative history,¹²⁴ depended on the meaning the Supreme

¹¹⁸ *Id.* at 189-90.

¹¹⁹ *Id.* at 192.

¹²⁰ *Id.* at 192-94.

¹²¹ *Id.* at 195-97.

¹²² *Id.* at 198.

¹²³ *Id.* at 198-99. The Court linked the ideas of practicality and supposed limits on congressional generosity. The passage referred to in the text concludes:

Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

Id.

¹²⁴ *Mills v. Board of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (equal

Court had given that phrase in contemporaneous educational financing cases.¹²⁵ For example, in *San Antonio Independent School District v. Rodriguez*,¹²⁶ decided two years before passage of the Act, the Court had held that equal protection does not require states to spend equal amounts on the education of each child.¹²⁷ Based on the meaning ascribed to "equal education opportunity" in these school financing cases, the Court concluded that Congress did not intend "that equal protection required anything more than equal access."¹²⁸

The Court conceded that the access Congress intended to guarantee was of a level that would confer some benefit on the handicapped child, reasoning that Congress expected to see benefits conferred for the money it was spending.¹²⁹ Although the Court rejected the contention that Congress intended to provide the level of services needed to maximize the eventual self-sufficiency of handicapped persons,¹³⁰ it said that the goal of self-sufficiency supported the requirement of at least some educational benefit.¹³¹ Cautioning that the Act covers a wide spectrum of handicapped children, the Court declined to "attempt . . . to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."¹³² It restricted its analysis to the facts of the case: "a handicapped child who is receiving substantial specialized instruction

protection component of due process); *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279, 283 (E.D. Pa. 1972).

¹²⁵ *Rowley*, 458 U.S. at 199-200.

¹²⁶ 411 U.S. 1 (1973).

¹²⁷ *Id.* at 54-55. The Court also cited an earlier district court case with a similar holding, *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), which the Court had summarily affirmed, 394 U.S. 322 (1969).

¹²⁸ *Rowley*, 458 U.S. at 200.

¹²⁹ *Id.* at 200-01.

¹³⁰ *Id.* at 201 n.23. Although the Court spoke only briefly to this point, it appeared to be saying the same thing it said about the commensurate opportunity standard: that it is both unworkable and more demanding than what Congress intended. The Court said: "Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, 'self-sufficiency' as a substantive standard is at once an inadequate protection and an overly demanding requirement." *Id.* at 202 n.23.

¹³¹ *Id.* at 201 n.23. References to that goal pervade the legislative history of the statute. *See id.* (citing sources).

¹³² *Id.* at 202.

and related services, and who is performing above average in the regular classrooms of a public school system.”¹³³ For that child, however, yearly advancement from grade to grade “constitutes an important factor in determining educational benefit.”¹³⁴

The Court reinforced its low standard of appropriateness with state-federal contracting ideas. It said that in legislation enacted under the spending power, Congress must impose any conditions unambiguously.¹³⁵ Thus, any ambiguity in the duty Congress imposed should be resolved in favor of the state, which would generally be arguing for a lower standard of obligation.¹³⁶

The rest of the majority opinion focused on the standard of review of administrative decisions, a procedural matter not within the immediate scope of this Article.¹³⁷ Nevertheless, the Court

¹³³ *Id.* The phrase “our analysis” is ambiguous. It could mean either the entirety of the Court’s interpretation of the term “appropriate education” or just the conclusion that advancement from grade to grade is an important factor in determining appropriateness for children like Amy Rowley.

¹³⁴ *Id.* at 203. The Court summarized:

Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP [individualized education program]. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 203-04 (footnotes omitted). Even so, the Court cautioned:

We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a “free appropriate public education.” In this case, however, we find Amy’s academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.

Id. at 203 n.25.

¹³⁵ *Id.* at 204 n.26 (citing *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981)).

¹³⁶ *Id.*

¹³⁷ In resolving this issue, the Court rejected the contention that the Act

obliquely supported its view of appropriateness, and sought to minimize the significance of objections to that view, by stressing the elaborate procedural requirements of the Act:

We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP [individualized education plan], as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.¹³⁸

Various comments in the Court's discussion of judicial review may shed some additional light on its idea of appropriateness. In particular, the Court's remarks about the primacy of state control of education,¹³⁹ combined with its references to statutory language,¹⁴⁰ indicate great deference to the state's determination of appropriateness. The Court found it "highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories" in special education proceedings in federal court.¹⁴¹ Courts, it noted, generally lack the educational exper-

gives courts "*de novo* review" of state educational decisions, *id.* at 205, holding that "due weight" should be given to state administrative proceedings, *id.* at 206, and that "courts must be careful to avoid imposing their view of preferable educational methods upon the States . . .," *id.* at 207.

¹³⁸ *Id.* at 206. The Court said:

When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.

Id. at 205-06.

¹³⁹ *Id.* at 207.

¹⁴⁰ *Id.* The Court noted: "The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials.' § 1413(a)(3)." *Id.*

¹⁴¹ *Id.* at 208 (citing as support for primacy of states in public education

tise to resolve educational policy questions.¹⁴² Further, parental involvement in the development of state plans and policies and in the formulation of individualized education plans affords handicapped children sufficient "protection" under the Act.¹⁴³

Applying its interpretation of "appropriate education" as receipt of some education benefit and relying on the district court's finding that Amy was "receiving an 'adequate' education" since she was doing better than average and advancing from grade to grade, the Court rejected the conclusion that the Act required the provision of an interpreter.¹⁴⁴ It reversed the decision of the court of appeals and remanded for consideration of whether the school system failed to comply with the Act's procedural requirements, an issue not reached by the district court.¹⁴⁵

Justice Blackmun concurred, finding the legislative intent clearly called for a standard under which the educational program, viewed as a whole, offers the handicapped child an opportunity to understand and participate in the classroom that is substantially equal to that given her nonhandicapped classmates.¹⁴⁶ Blackmun believed that the school system had met the standard.¹⁴⁷

Justice White dissented, joined by Justices Brennan and Marshall. The dissent emphasized statements in the legislative history speaking of full educational opportunity, equal educational opportunity, equivalent education, and maximization of each child's potential. These statements, the dissent argued, were hardly the passing and isolated phrases the majority said they were.¹⁴⁸ Moreover, the dissent read at least one of the two lower court special education cases, upon which the majority said Congress had relied, as establishing a standard of equal opportunity.¹⁴⁹ The dissent thus endorsed the lower courts'

comment in debate on Act, 121 CONG. REC. 19,498 (1975) (remarks of Sen. Dole) and *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹⁴² *Id.* (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

¹⁴³ *Id.* at 208-09.

¹⁴⁴ *Id.* at 209-10.

¹⁴⁵ *Id.* at 210 & n.32.

¹⁴⁶ *Id.* at 211 (Blackmun, J., concurring).

¹⁴⁷ *Id.* at 211-12.

¹⁴⁸ *Id.* at 213-14 (White, J., dissenting).

¹⁴⁹ *Id.* at 214 n.2 (citing *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)).

interpretation of appropriateness,¹⁵⁰ saying that the majority's interpretation would require no more than that a deaf child like Amy Rowley "receive a teacher with a loud voice, for she would benefit from that service."¹⁵¹

B. The Reaction

The popular reaction to the *Rowley* opinion was that the civil rights movement for handicapped persons had suffered a serious setback.¹⁵² The Act's promise of lavish services for handicapped children was now a grudgingly borne obligation to do the minimum necessary.¹⁵³

Typical of the scholarly criticism of *Rowley* was an article by Bonnie Poitras Tucker, an attorney prominent in the field of education for the deaf. She argued that the Court had "deliberately ignored" Congress' intent to provide equal educational opportunities, reflecting its hostility to the civil rights claims of handicapped persons.¹⁵⁴ Tucker reinforced her argument that the Court was reaching out to do harm by noting that on the majority's own standards, the case should have gone the other way: because the child would be unable to hear her teacher or classmates whenever they turned away, she received no benefit from her public education. It just happened that Amy was smart enough to progress from grade to grade without any benefit from formal schooling.¹⁵⁵ Other critics decried the Court's selective use of legislative history and argued that the Court had subverted the will of Congress, which was to effect major change in the lives of the handicapped and to guarantee them true educational

¹⁵⁰ *Id.* at 214.

¹⁵¹ *Id.* at 215. The dissent also challenged the majority's position on the standard of judicial review for hearing officer decisions. *Id.* at 216-18. This discussion concerns procedural matters not directly within the scope of this Article.

¹⁵² See Beach, *Less Handicapped Help*, TIME, July 12, 1982, at 53; *Setback for Handicapped*, N.Y. Times, June 30, 1982, at B2, col. 5; *supra* notes 11-12 and accompanying text.

¹⁵³ *Cf.* sources cited *supra* note 12 (criticizing *Rowley*).

¹⁵⁴ See Tucker, *supra* note 12, at 245. Ms. Tucker also noted that the case was presented in an odd way because of a conflict between sign language advocates and oralists, each group expecting an endorsement of their methods. The Supreme Court wisely sidestepped the issue. *Id.* at 236, 242-43.

¹⁵⁵ *Id.* at 241 & n.31.

equality.¹⁵⁶

Nevertheless, commentators had some difficulty formulating an alternative approach to the definition of appropriateness. One choice was to leave the term undefined, subject only to case law and administrative development. Few suggested that Congress intended to give administrators and courts unbridled discretion, however.¹⁵⁷ Another option was a proportional maximization standard, like the one used by the lower courts in *Rowley*. Some commentators noted the difficulties of applying this standard,¹⁵⁸ and others expressed their fear of crushing costs if the standard were widely applied.¹⁵⁹

Cost was the main factor that commentators identified as driving the decision of the Court.¹⁶⁰ Ms. Tucker declared, "The obvi-

¹⁵⁶ Comment, *Handicapped Children: Statutory Mandate*, *supra* note 12, at 1008-10 (endorsing standard similar to that proposed by Justice Blackmun; arguing cost considerations motivated Court); Casenote, *supra* note 12, at 437-40 (stressing legislative history portion of *Rowley* takes materials out of context, and when read in context, congressional emphasis more on guaranteeing self-sufficiency and achievement of maximum potential); see Bartlett, *supra* note 12, at 9 (endorsing "program parity" in which educational needs of handicapped children are met in same proportion as nonhandicapped children's needs); Myers & Jensen, *supra* note 12, at 438-41 (arguing minimal benefit standard is too low, and courts should look to norms of professional practice now that Supreme Court has rejected standards based on equal opportunity or self-sufficiency); Comment, *The Meaning of Appropriate Education to Handicapped Children Under the EHCA: The Impact of Rowley*, 14 Sw. U.L. REV. 521, 538 (1984) [hereafter Comment, *The Meaning of Appropriate Education*] (arguing congressional funding increase and recognition of handicapped children's dependence on schools indicate congressional desire to guarantee more than some benefit).

¹⁵⁷ One writer taking a similar position was the author of an influential student piece predating *Rowley*, Note, *supra* note 96. This author advances a standard for appropriateness that would entail proportionality of intellectual development for the mentally handicapped and equal academic achievement for the physically handicapped. In support of this standard, the author argues that Congress trusted the judiciary to use common law development to come to such a position. *Id.* at 1125-27.

¹⁵⁸ Stark, *supra* note 96, at 500 (noting difficulty in applying standard of equal right to maximize potential because for severely and profoundly handicapped children, educational tasks simply are not comparable to those undertaken by nonhandicapped children); Wegner, *supra* note 12, at 189-91.

¹⁵⁹ See Bartlett, *supra* note 12, at 21-24; Comment, *Handicapped Children: Statutory Mandate*, *supra* note 12, at 1004-05 (arguing cost concerns led to *Rowley's* result).

¹⁶⁰ Comment, *The Act Since 1975*, *supra* note 12, at 74 n.133 (approving *Rowley* result); Comment, *Handicapped Children: Statutory Mandate*, *supra* note

ous rationale for the Court's blatant disregard of congressional intent was its unspoken fear that a contrary result would have opened the floodgates by allowing every seriously handicapped child in the nation to receive full-time individualized educational assistance where needed."¹⁶¹ Tucker felt that the cost motivation of the Court, combined with the "some benefit" approach of the majority, spelled disaster for handicapped children in future cases.¹⁶² At the very least, courts could be expected to contract the range of programs and services they had previously found appropriate, particularly services with high price tags.¹⁶³

12, at 1004 (disapproving *Rowley* result). Educating handicapped children can be expensive: the Senate Committee Report on the Education for All Handicapped Children Act reported that, on average, costs for educating a handicapped child are double those of educating a nonhandicapped child. S. REP. NO. 168, *supra* note 76, at 15. The Act provides partial funding for the "excess costs" of educating handicapped children beyond the costs of educating nonhandicapped children. 20 U.S.C. §§ 1401(a)(20), 1414(a)(2)(B)(i) (1988). Nevertheless, some severely handicapped students receiving specialized services may benefit little or not at all from expenditures that are attributed in part to their education, such as interscholastic athletic programs and laboratory facilities.

¹⁶¹ Tucker, *supra* note 12, at 235.

¹⁶² Tucker wrote:

This case clearly indicates that in the area of handicapped rights the Court reigns supreme, and, at least in the present political climate, the Court does *not* intend to give recognition to the Civil Rights movement for handicapped persons. It does not bode well for the future of handicapped persons in general or deaf persons in particular.

Tucker, *supra* note 12, at 245 (footnote omitted) (emphasis in original).

¹⁶³ R. WEINER & M. HUME, *supra* note 94, at 57 ("Some experts [believe *Rowley*] may encourage courts to think twice before requiring a school to offer year-round courses or longer school days to a special education student."); Osborne, *How the Courts Have Interpreted the Related Services Mandate*, 51 EXCEPTIONAL CHILDREN 249, 251 (1984); Note, *The Education for All Handicapped Children Act: Trends and Problems with the "Related Services" Provision*, 18 GOLDEN GATE U.L. REV. 427, 440 (1988); Casenote, *supra* note 12, at 441; Comment, *The Meaning of Appropriate Education*, *supra* note 156, at 538; see Hill, *supra* note 5, at 167. Two commentators have noted, however, that because the Court did not explicitly consider cost in its definition of appropriate education, expenditures in an individual case could be higher than if cost were a defense or a component of the statutory duty. Bartlett, *supra* note 12, at 15; Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence* (pt. 1), 17 J.L. & EDUC. 387, 406 (1988).

Tucker's criticisms of *Rowley* hit home,¹⁶⁴ but her predictions have fallen wide of the mark. The predictions have failed not because she misinterpreted the opinion, but because lower courts have declined to follow its implications.¹⁶⁵

III. THE LOWER COURT RETREAT FROM *BOARD OF EDUCATION V. ROWLEY*

Numerous courts have applied *Rowley* to deny services requested for handicapped children.¹⁶⁶ Strikingly, however,

¹⁶⁴ See *infra* text accompanying notes 308-28 (discussing *Rowley's* interpretation of appropriate education).

¹⁶⁵ Ms. Broadwell and Professor Walden have argued that *Rowley* has rendered parents' efforts to obtain services significantly more difficult, but they cite cases that, in the main, give children the services their parents request. Broadwell & Walden, "Free Appropriate Public Education" After *Rowley: An Analysis of Recent Court Decisions*, 17 J.L. & EDUC. 35 (1988).

¹⁶⁶ *Leonard v. McKenzie*, 869 F.2d 1558 (D.C.Cir. 1989) (denying request for private placement on basis of hearing officer's decision that public school was adequate; affirming denial of preliminary injunction); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307 (9th Cir. 1987) (rejecting regular schooling plus tutoring for child in favor of school's proposed placement in class for mildly mentally retarded because placement reasonably calculated to provide educational benefits); *Mark A. v. Grant Wood Area Educ. Agency*, 795 F.2d 52 (8th Cir. 1986) (upholding administrative decision approving placement of child with visual and developmental problems in public preschool development class rather than continuing placement in private child center program that mixed handicapped and nonhandicapped children), *cert. denied*, 480 U.S. 936 (1987); *Rettig v. Kent City School Dist.*, 788 F.2d 328 (6th Cir.) (denying equal opportunity to participate in extracurriculars for autistic teen-ager with signs of mental retardation), *cert. denied*, 478 U.S. 1005 (1986), *prior proceedings*, 720 F.2d 463 (6th Cir. 1983) (affirming part of district court's order denying continuous occupational therapy and summer program on ground that requested programs unnecessary to permit child to benefit from instruction; vacating for consideration in light of *Rowley* part of district court order requiring school to afford child one hour of extracurriculars a week), *app. dismissed, cert. denied*, 467 U.S. 1201 (1984); *Karl v. Board of Educ.*, 736 F.2d 873 (2d Cir. 1984) (observing *Rowley* compels deferential review of individualized education program); *Bertolucci v. San Carlos Elementary School Dist.*, 721 F. Supp. 1150 (N.D. Cal. 1989) (holding student with dyslexia not entitled to special private placement when achieving above grade level); *Warren v. School Bd.*, 1988-89 Educ. Handicapped L. Rep. (CRR) 441:473 (E.D. Va. 1988) (denying reimbursement for private residential placement); *B.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1140, *supplemental opinion*, 702 F. Supp. 1158 (D.N.J. 1988) (denying reimbursement for placement of child at youth behavior program on ground that only floor of opportunity need be provided), *aff'd mem.*, 882

many other courts have ordered schools to increase services, either distinguishing, or actually relying on, the *Rowley* opinion.¹⁶⁷ The retreat from *Rowley* has occurred both with cases that

F.2d 510 (3d Cir. 1989); *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987) (holding that since parents stipulated available public education appropriate, voluntary enrollment in private program for deaf is not special education, and related services such as transportation need not be provided even though transportation provided to some nonhandicapped children attending nonpublic schools), *aff'd sub nom. McNair v. Oak Hills Local School Dist.*, 872 F.2d 153 (6th Cir. 1989) (denying requested transportation service on the ground that it was not for purpose of meeting individual needs of child); *Rouse v. Wilson*, 675 F. Supp. 1012 (W.D. Va. 1987) (finding school district's placement appropriate); *Romeo v. Ambach*, 1984-85 Educ. Handicapped L. Rep. (CRR) 556:488 (E.D.N.Y. 1985) (holding for one learning disabled student that public day placement with mainstreaming providing more remediation than residential school was appropriate; holding for second learning disabled student that self-contained public placement was appropriate and residential school not required; and holding for third handicapped student that self-contained class with some mainstreaming was appropriate; applying *Rowley* to find school programs reasonably calculated to enable children to receive educational benefits); *Scituate School Comm. v. Robert B.*, 620 F. Supp. 1224 (D.R.I. 1985) (approving failure to afford more than two periods of reading instruction per week for learning disabled child and denying residential program on least restrictive environment grounds), *aff'd mem.*, 795 F.2d 77 (1st Cir. 1986); *Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984) (denying residential placement for child who would benefit from it); *Doe v. Lawson*, 579 F. Supp. 1314 (D. Mass.) (upholding public program over parents' desire for private program), *aff'd mem.*, 745 F.2d 43 (1st Cir. 1984); *Cothorn v. Mallory*, 565 F. Supp. 701 (W.D. Mo. 1983) (denying services); *Cohen v. School Bd.*, 450 So.2d 1238 (Fla. App. 1984) (denying family's transportation costs for visits to handicapped child in residential placement); *School Bd. v. Beasley*, 238 Va. 44, 380 S.E.2d 884 (1989) (upholding public school's placement of severely dyslexic child over parents' objections that he needed private placement); *Martin v. School Bd.*, 3 Va. App. 197, 348 S.E.2d 857 (1986) (denying residential placement even though promising superior benefit because child with emotional disturbance made significant progress in existing day placement); *Frank v. Grover*, 1982-83 Educ. Handicapped L. Rep. (CRR) 554:148 (Wis. Cir. Ct. 1982) (deferring to district on ground that education reasonably calculated to benefit child, when district proposed total communication method in public high school for deaf teenager previously placed in private program with only oral-aural instruction); *see Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988) (reversing and remanding district court's order for placement in group home for application of *Rowley* standard, and placing burden of persuasion on parents to overcome hearing officer's decision that proposed public day program was appropriate).

¹⁶⁷ Simply counting the cases that go for and against parents gives a

involve particular fact patterns and with cases that apply some specific lines of reasoning. The fact patterns include disputes about severely handicapped children, whose parents argue that *Rowley* by its own terms does not apply to their cases, and disputes about less severely handicapped children, whose parents use *Rowley* to argue for services that will permit them to progress from grade to grade. The lines of reasoning that lead to expanded services apply concepts mentioned but not fully developed in the *Rowley* opinion: least restrictive environment, individualization, and state educational standards.

A. Cases Involving Severely Handicapped Children

Rowley itself cautions that its application of the Act extends only to children who are able to progress from grade to grade in an ordinary classroom.¹⁶⁸ Many handicapped children cannot. They are in self-contained classes or other special programs most of the day and do not advance each June like their nonhandicapped counterparts. Although many courts have applied *Rowley*'s ideas about "some educational benefit" and deference to state decisions to deny services to these children,¹⁶⁹ others have ordered

misleading picture of the impact of *Rowley*. Some of the cases would have gone against the parents under a pre-*Rowley* standard; others would have been decided in favor of the parents under the broadest interpretation of *Rowley*. Moreover, reported cases represent but a small portion of disputes over handicapped children's education. Nevertheless, the existence of substantial numbers of cases that either distinguish *Rowley* or use it to support awards of services to handicapped children is persuasive evidence that the impact of the case is not nearly as great as would have been expected.

¹⁶⁸ The Court wrote:

We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. 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.

Board of Educ. v. Rowley, 458 U.S. 176, 202 (1982). The passage is ambiguous, however, because it follows an extended discussion of the legislative history and language of the statute, and nowhere in this discussion does the Court limit its analysis of the statutory language and legislative history to the factual setting of the case. *See id.* at 188-201.

¹⁶⁹ *E.g.*, *Mark A. v. Grant Wood Area Educ. Agency*, 795 F.2d 52 (8th Cir. 1986), *cert. denied*, 480 U.S. 936 (1987); *Rettig v. Kent City School Dist.*, 788 F.2d 328 (6th Cir.), *cert. denied*, 478 U.S. 1005 (1986); *Warren v. School*

schools to provide extensive services, applying different reasoning altogether.¹⁷⁰

*Polk v. Central Susquehanna Intermediate Unit 16*¹⁷¹ illustrates the movement away from *Rowley*'s reasoning in cases involving severely handicapped children. In *Polk*, the Third Circuit held that a fourteen-year-old suffering from the effects of encephalopathy, who had the mental and physical capacities of a toddler, was entitled to the services of a licensed physical therapist.¹⁷² The court reasoned that for this student, physical therapy is both an essential prerequisite to education and itself the core of the child's education. In discussing *Rowley*, the court noted "the

Bd., 1988-89 Educ. Handicapped L. Rep. (CRR) 441:473 (E.D. Va. 1988); *B.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1140, *supplemental opinion*, 702 F. Supp. 1158 (D.N.J.), *aff'd mem.*, 882 F.2d 510 (3d Cir. 1988); *Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984); *Appel v. Ambach*, 1982-83 Educ. Handicapped L. Rep. (CRR) 554:236 (S.D.N.Y. 1982); *School Bd. v. Beasley*, 238 Va. 44, 380 S.E.2d 884 (1989); *Martin v. School Bd.*, 3 Va. App. 197, 348 S.E.2d 857 (1986).

¹⁷⁰ *Spielberg v. Henrico County Pub. Schools*, 853 F.2d 256 (4th Cir. 1988) (reversing administrative decision to end residential placement for severely disabled child), *cert. denied*, 489 U.S. 1016 (1989); *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984) (requiring out-of-state residential placement for severely disabled child); *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983) (approving residential placement for severely disabled child); *Vander Malle v. Ambach*, 667 F. Supp. 1015 (S.D.N.Y. 1987) (upholding placement at accredited psychiatric hospital for schizophrenic child); *Garland Indep. School Dist. v. Wilks*, 657 F. Supp. 1163 (N.D. Tex. 1987) (affirming residential placement of autistic child); *Doe v. Anrig*, 651 F. Supp. 424 (D. Mass. 1987) (ordering psychotherapy for severely disturbed child); *Department of Educ. v. Mr. & Mrs. S.*, 632 F. Supp. 1268 (D. Haw. 1986) (upholding residential placement for severely disabled child); *T.G. v. Board of Educ.*, 576 F. Supp. 420 (D.N.J. 1983) (approving services for severely disturbed child), *aff'd mem.* 738 F.2d 420, 421, 425 (3d Cir.), *cert. denied*, 469 U.S. 1086 (1984); *Christopher T. v. San Francisco Unified School Dist.*, 553 F. Supp. 1107 (N.D. Cal. 1982) (requiring residential placement for severely handicapped child); *Adams Cent. School Dist. v. Deist*, 214 Neb. 307, 334 N.W.2d 775 (ordering residential placement for mentally retarded child), *modified*, 215 Neb. 284, 338 N.W.2d 591, *cert. denied*, 464 U.S. 893 (1983).

¹⁷¹ 853 F.2d 171 (3d Cir. 1988) (*Becker, J.*), *cert. denied*, 489 U.S. 1030 (1989).

¹⁷² The *Polk* court held that the district court applied the wrong legal standard to its appropriateness determination when it granted summary judgment to the school district. It reversed and remanded the case for a factual determination based on the correct standard, stating that a factual dispute concerning the level of benefit received from the educational program precluded summary judgment. 853 F.2d at 184-86.

tension in the . . . majority opinion between its emphasis on procedural protection (almost to the exclusion of substantive inquiry) and its substantive component."¹⁷³ This tension, the court concluded, had remained unresolved "because the facts of [*Rowley*] (including Amy Rowley's quite substantial benefit from her education) did not force the Court to confront squarely the fact that Congress cared about the quality of special education."¹⁷⁴ The court declared that in the case before it, "the question of how much benefit is sufficient to be 'meaningful' is inescapable."¹⁷⁵

Reaching the territory that *Rowley* had not had to enter, the *Polk* court said that meaningful education meant more than a trivial educational benefit.¹⁷⁶ The court relied on legislative history stressed by the *Rowley* dissent, which referred to the Act's purposes of "full educational opportunity," of enabling handicapped students to "fully benefit from special education," and of promoting self-sufficiency.¹⁷⁷ The court also relied on the facts of *Rowley*: Amy was receiving substantial benefit, so that "some benefit" in Amy's case "meant a great deal more than a negligible amount."¹⁷⁸ The court continued:

[T]o the extent that dicta in *Rowley* might be read to imply that courts should not become involved in the substantive aspects of the EHA [Education of the Handicapped Act], we find *Rowley* distinguishable from the case *sub judice*. . . . *Rowley* specifically limited itself to the facts before it, involving a hearing-impaired child advancing from grade to grade in a "mainstreamed" classroom. Because the Court so self-consciously restricted the scope of its holding, we may . . . reexamine the policies and legislative history of the EHA to inform our decision.¹⁷⁹

¹⁷³ *Id.* at 180.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 181.

¹⁷⁸ *Id.* at 182.

¹⁷⁹ *Id.* The court had further grounds on which to distinguish *Rowley*:

Additionally, *Rowley* is distinguishable from the case *sub judice* because of the type of services requested. Unlike the services of a full-time interpreter (which arguably may be deemed extraordinary assistance), physical therapy . . . is an integral part of what Congress intended by "appropriate education" as defined in EHA, and it is an essential part of Christopher's education. . . .

Finally, because of the severity of Christopher's disabilities and their qualitative difference from those of Amy Rowley, it is difficult to apply *Rowley* here. Christopher's progress cannot be

The *Polk* court further noted that its approach was consistent with its earlier decision in *Board of Education v. Diamond*,¹⁸⁰ in which it had ordered a residential placement on the theory that the Act requires “educational progress,” rather than merely a program that is “of benefit.”¹⁸¹

In *Diamond* the court had distinguished between severely handicapped children and those with lesser handicaps, stressing the Act’s requirement that each handicapped student be treated individually.¹⁸² The *Diamond* court directed the school district to continue the residential placement of a multiply handicapped child and to reimburse the child’s parents for expenses incurred in placing him independently. The court considered *Rowley* irrelevant:

For disabled children able to attend regular classrooms in the public education system, as was the child in *Rowley*, the individualized plan “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Andrew Diamond has never been able to attend classes in regular classrooms. Thus the *Rowley* standard of enabling one to achieve passing marks and advance from grade to grade probably is not achievable for Andrew. But *Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational progress is likely.¹⁸³

Using reasoning very similar to that in *Polk* and *Diamond*, the court in *Tolland Board of Education v. Connecticut State Board of Education*¹⁸⁴ affirmed a state hearing officer decision determining that a child with a learning disability, social and emotional problems, and psychotic behavior needed residential placement “for educational reasons.”¹⁸⁵ This child’s handicaps were so severe, the court held, that “a free appropriate public education cannot be

measured by advancement in grade or acquisition of academic skill. His needs are dramatically different, but no less important. . . . Indeed, the needs of children like Christopher were paramount in the eyes of the EHA sponsors.

Id. at 182 (citations omitted).

¹⁸⁰ 808 F.2d 987, 991 (3d Cir. 1986) (Gibbons, J.).

¹⁸¹ *Polk*, 853 F.2d at 183 (emphasis in original).

¹⁸² *Diamond*, 808 F.2d at 991-92. Although the court buttressed its decision with New Jersey’s elevated state standard for appropriateness, it also relied on the standard in the federal act. *Id.*

¹⁸³ *Diamond*, 808 F.2d at 991 (citation omitted).

¹⁸⁴ 1984-85 Educ. Handicapped L. Rep. (CRR) 556:412 (D. Conn. 1985).

¹⁸⁵ *Id.*

provided outside a residential treatment setting.”¹⁸⁶ The court limited *Rowley* to children who are performing well in a regular classroom and passing from grade to grade; in the case before it the child “cannot be educated in a regular public school classroom.”¹⁸⁷ For such a child, unlike Amy Rowley, progress towards self-sufficiency must be considered; mere ability to make progress in academic subjects in another setting is not enough.¹⁸⁸ Other cases employ similar reasoning.¹⁸⁹

Some cases ordering extensive services for severely handicapped children have even relied on ideas articulated in *Rowley*. For example, in *Timothy W. v. Rochester, New Hampshire School District*¹⁹⁰ the First Circuit reversed a district court decision denying special education services to a child with little or no voluntary brain function on the ground that he was uneducable. The appellate court first cited *Rowley*'s assertion that the Act does not guarantee any particular level of achievement to support its conclusion that educability is not an eligibility requirement.¹⁹¹ The court then distinguished *Rowley*'s holding on the ground that *Rowley* did not concern eligibility.¹⁹²

¹⁸⁶ *Id.* The court found that the appropriate program for the child had to have a “formal academic curriculum integrated with a social learning curriculum Unless J. can learn to cope with his sexual impulses and social insecurity he cannot attend or direct himself to other learning tasks.” *Id.* at 556:415 (quoting hearing officer's decision). The court further held that the program had to “be highly structured, consistent and continuous; hence, a residential setting is required.” *Id.* at 556:416 (quoting hearing officer's decision).

¹⁸⁷ *Id.* at 556:418 (emphasis in original).

¹⁸⁸ *Id.* The court concluded:

Whether the case is viewed as one in which the child's emotional and educational needs cannot be separated, or one in which residential placement is necessary in order to provide instruction in a therapeutic environment in which it will be effective, the preponderance of the evidence in the record supports the hearing officer's decision [in favor of residential placement].

Id. at 556:419 (citations omitted).

¹⁸⁹ See, e.g., *Vander Malle v. Ambach*, 667 F. Supp. 1015, 1037-41 (S.D.N.Y. 1987) (holding placement at psychiatric hospital covered under the Act where child “only properly educable through residential placement”); *Garland Indep. School Dist. v. Wilks*, 657 F. Supp. 1163, 1167 (N.D. Tex. 1987) (affirming residential placement of autistic child because only that option will result in educational benefits).

¹⁹⁰ 875 F.2d 954 (1st Cir.), cert. denied, 110 S. Ct. 519 (1989).

¹⁹¹ *Id.* at 971.

¹⁹² *Id.*

Thus, in cases dealing with severely handicapped children, courts have treated *Rowley* as incomplete, as irrelevant, and even as supportive of extensive services. Indeed, cases like *Diamond* and *Tolland* that involve residential placement beg for treatment different from that in *Rowley*. The regulations under the Act explicitly provide for residential placement of children when it is "necessary to provide special education and related services to a handicapped child."¹⁹³ That expansive provision creates a ten-

¹⁹³ 34 C.F.R. § 300.302 (1989). Courts have employed a variety of approaches in evaluating residential placement. Many courts have permitted residential placement for severely handicapped children. *E.g.*, *Drew P. v. Clarke County School Dist.*, 877 F.2d 927 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1510 (1990); *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983); *Doe v. Smith*, 1987-88 Educ. Handicapped L. Rep. (CRR) 559:391 (M.D. Tenn. 1988); *Mahoney v. Administrative School Dist. No. 1*, 42 Or. App. 665, 601 P.2d 826 (1979). Some courts have stressed the need for individual determinations more than the severity of the handicap. *Riley v. Ambach*, 508 F. Supp. 1222 (E.D.N.Y. 1980) (finding policies barring residential placement unlawful), *rev'd on other grounds*, 668 F.2d 635 (2d Cir. 1981); *Cox v. Brown*, 498 F. Supp. 823 (D.D.C. 1980); *Hines v. Pitt County Bd. of Educ.*, 497 F. Supp. 403, 409 (E.D.N.C. 1980); *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979). In *Corbett v. Regional Center for East Bay, Inc.*, 699 F. Supp. 230 (N.D. Cal. 1988), the court issued a preliminary injunction to maintain the child's residential placement and prevent the defendants from unilaterally terminating the placement. The court had previously held that the child's placement in a residential facility was not necessarily a related service covered by the Act, and so no jurisdiction lay against defendants. *See Corbett*, 676 F. Supp. 964, 968-69. On reconsideration, the court issued the injunction, retreating from its earlier position. *See* 699 F. Supp. at 230.

Professor Rothstein reports two different approaches used by courts in deciding residential placement cases: (1) asking whether the placement was necessary for educational purposes or whether it was a response to medical, social, or emotional problems that could be separated from the learning process; and (2) asking whether, without regard for a student's educational needs, the child would be in a residential facility for needs unrelated to the educational process. L. ROTHSTEIN, *RIGHTS OF PHYSICALLY HANDICAPPED PERSONS* § 2.20, at 45-46 (1984) (citing Mooney & Aronson, *Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements*, 14 CONN. L. REV. 531, 552 (1982)).

Some courts have made exceptions to the ordinary approaches to residential placement when the placement is in a psychiatric hospital, relying principally on language in the statute and regulations limiting related medical services to those needed for evaluation. *E.g.*, *Los Gatos Joint Union High School Dist. v. Doe*, 1984-85 Educ. Handicapped L. Rep. (CRR) 556:281 (N.D. Cal. 1984); *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340 (N.D. Ill. 1983). Other courts have allowed such

sion with the minimal, "some benefit" approach of *Rowley*.

placements. *E.g.*, *Bucks County Pub. Schools v. Commonwealth*, 108 Pa. Commw. 511, 529 A.2d 1201 (1987) (proper to consider both medical and educational regression). In *Vander Malle v. Ambach*, 667 F. Supp. 1015 (S.D.N.Y. 1987), the court held that placement at the Institute of Living, "an accredited psychiatric hospital which is fully staffed to treat a broad range of mental and nervous disorders," was covered under the Act. *Id.* at 1020. The court noted that "[a]s long as the child is properly educable only through a residential placement, when the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement." *Id.* at 1039. Citing *Rowley*, the court stated:

In deciding whether Bruce's residential placement was required by the EHA [Education of the Handicapped Act], and thus implicitly who is responsible to pay for the expenses incurred as a result of it, the Court must not decide the question on the basis of whether it would enhance an otherwise sufficient day program, but rather is to make the determination based upon an analysis of whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response solely to medical, social or emotional problems that are segregable from the learning process.

Id. at 1040. The court nevertheless held that on the basis of the Act's exception for physician's services, it would have to segregate "maintenance and related or supportive services from purely medical services not compensable under the Act." *Id.* at 1042.

In *Kerr Center Parents Association v. Charles*, 897 F.2d 1463 (9th Cir. 1990), the court upheld the provision of educational services to children at a private intermediate care facility. The court declared:

[W]e find no merit in the State defendants' contention that these sections of the statute and regulations [governing placement in private facilities and state responsibility for special education and related services at no cost for children so placed] are inapplicable because plaintiffs were placed in the Kerr Center for medical, not educational, reasons. We do not think that their placement there for medical reasons is unrelated to the goal of providing them with a free appropriate public education.

Id. at 1471.

One commentator has criticized the reluctance of courts to consider placements in psychiatric hospitals under the same tests as other residential placements. This commentator argues that the idea that mental illness-related placements are not covered by the Act is contrary to the Act's recognition of the "severely emotionally disturbed" category of handicapped children, the regulatory provision on residential placement, and the broad idea of educational environment embodied in the Act. She further suggests that courts may be blaming parents for their children's psychiatric problems and trying to hold them responsible, contrary to the intent of the Act. Comment, *Beyond Conventional Education*, *supra* note 12, at 79-81.

Rowley's own language and reasoning give openings for courts to treat severely handicapped children differently, both for residential placement and for the provision of other services.

Two student commentators, writing in the mid-1980s, anticipated the approaches used by these courts.¹⁹⁴ They stressed the limited application of the law to the facts in *Rowley*, and speculated that other approaches would develop for more severely handicapped children.¹⁹⁵

B. Cases Involving Less Severely Handicapped Children Who Need Special Services to Progress from Grade to Grade

Despite anything that *Rowley* might suggest about low levels of services to handicapped children, parents of less severely handicapped children in mainstreamed placements have used its precise holding and literal language to argue for greater services. *Rowley* implies that such parents may demand related services to enable their children, who are being educated in the regular classroom, to advance as easily from grade to grade as Amy Rowley did. For example, in *Blazjewski v. Board of Education*¹⁹⁶ the court granted a preliminary injunction requiring resource room services for a seventeen-year-old child with learning disabilities. The school district argued that since the child was achieving passing grades and advancing from grade to grade, no services were required under the Act.¹⁹⁷ The court rejected this argument, relying on *Rowley*. The court pointed to *Rowley*'s statement that advancement from grade to grade does not automatically establish that a child is receiving an appropriate education.¹⁹⁸ Noting the child's poor performance in basic courses and on individualized tests, it ordered relief to enable the child to improve his per-

¹⁹⁴ Note, *School Health Services for Handicapped Children: The Door Opens No Further*, 64 NEB. L. REV. 509 (1985); Comment, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 WIS. L. REV. 1469; see also Yudof, *supra* note 16, at 174 (suggesting possibility that lower federal courts might not apply "the spirit of *Rowley*"); Zirkel, *supra* note 16, at 469 (same). See generally Myers & Jenson, *supra* note 12, at 413 (arguing that although *Rowley* standard makes sense for children in regular classroom where educational benefit can be observed from grades and promotions, it is not useful for children placed outside the classroom).

¹⁹⁵ See Note, *supra* note 194, at 517; Comment, *supra* note 194, at 1514.

¹⁹⁶ 560 F. Supp. 701 (W.D.N.Y. 1983).

¹⁹⁷ *Id.* at 703.

¹⁹⁸ *Id.* at 705 (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 203 n.25 (1982)).

formance to keep up with the other children.¹⁹⁹

In *Hall v. Vance County Board of Education*²⁰⁰ the Fourth Circuit ordered extensive services²⁰¹ for a severely dyslexic sixteen-year-old student, who, like Amy Rowley, was of above-average intelligence and had been progressing from grade to grade.²⁰² The court pointed to *Rowley*'s statement that it was not establishing a single test for determining the adequacy of educational benefit, characterizing it as a recognition that promotion from grade to grade was a "fallible measure of education benefit."²⁰³ The court concluded that the district court had properly considered the evaluation of the student as "functionally illiterate" and his low test scores in reaching its determination that he was not receiving an appropriate education in public school.²⁰⁴

Seeing no obstacle in either the facts or language of *Rowley*, the court in *Woolcott v. State Board of Education*²⁰⁵ reversed a grant of summary judgment in an action seeking provision of a cued speech interpreter to enable a hearing-impaired child to succeed in a regular classroom.²⁰⁶ Thus, the court permitted the parents

¹⁹⁹ *Id.* Though the court purports to rely on *Rowley*, its treatment of *Rowley* is more an effort at distinguishing it. *See id.* at 704-05. A number of cases have ordered the provision of services to enable physically handicapped children to attend school in the mainstream. *Tatro v. Irving Indep. School Dist.*, 703 F.2d 823 (5th Cir. 1983) (upholding provision of clean, intermittent catheterization in order to permit services to be delivered to child with spina bifida in accordance with IEP placing her in classroom), *aff'd*, 468 U.S. 883 (1984); *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443 (3d Cir. 1981) (approving clean intermittent catheterization to keep child in regular school), *cert. denied*, 458 U.S. 1121 (1982); *Elizabeth S. v. Gilhool*, 1986-87 Education Handicapped L. Rep. (CRR) 558:461 (M.D. Pa. 1987) (dismissing action pursuant to stipulation to identify handicapped children not previously considered eligible for special services and provide due process hearing over denials of services designed to enable achievement at grade level in regular classroom).

²⁰⁰ 774 F.2d 629 (4th Cir. 1985) (Winters, C.J.).

²⁰¹ The court ordered placement in a private school, as well as reimbursement for a past independent private placement, finding that the public school was unable to provide an appropriate education. *Id.* at 633.

²⁰² *Id.* at 630-32.

²⁰³ *Id.* at 635-36 (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 202, 203 & n.25 (1982)).

²⁰⁴ *Id.* at 632, 633-34.

²⁰⁵ 134 Mich. App. 555, 351 N.W.2d 601 (1984). The court cited *Rowley* for a procedural point. *Id.* at 563-64, 351 N.W.2d at 606.

²⁰⁶ *Id.* at 562-63, 351 N.W.2d at 605. In reaching this result, the court

to seek services similar to those denied in *Rowley*.²⁰⁷

At least one commentator anticipated reliance on *Rowley* by parents of less severely handicapped children to obtain special services to enable their children to succeed in the mainstream.²⁰⁸ Although some commentators suggested that related services provided those children would be ineffective,²⁰⁹ others noted ample research demonstrating that support services and innovative teaching techniques can enable greater numbers of handicapped students to be educated in regular classrooms without harming — perhaps even enhancing — the education of non-handicapped students.²¹⁰ The whole logic of the Act's least restrictive environment provision supports this approach.²¹¹

C. Cases Involving Severely Handicapped and Less Severely Handicapped Children that Employ Reasoning Not Developed in Rowley

Many cases that retreat from *Rowley* use ideas *Rowley* mentioned but did not develop. The courts have applied these concepts to approve extensive services, apparently acting at odds with *Rowley*'s minimal education approach. Three of these ideas are least restrictive environment, individualization, and state standards for special education. Cases applying these ideas frequently involve the fact patterns discussed above: severely

relied on state handicapped education standards as well as on the federal Act and regulations promulgated under it. *Id.*

²⁰⁷ See also *In re Dixie School Dist.*, 1982-83 Educ. Handicapped L. Rep. (CRR) 504:274 (Cal. Dept. of Educ. 1983) (upholding provision of sign language interpreter).

²⁰⁸ See Comment, *supra* note 194, at 1510 (arguing logic of *Rowley* would call for provision of interpreter if child had been doing worse in school).

²⁰⁹ See Miller & Miller, *The Handicapped Child's Civil Right As It Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1, 21 (1978) (contending IEP goals for handicapped children are unlikely to match mainstream curriculum); cf. Hill, *supra* note 5, at 161, 167 (arguing *Rowley* defines purpose of Act primarily in terms of mainstreaming and achievement in regular educational program, rather than in terms of student's needs and goals of special education, and thus subordinates special education to regular education).

²¹⁰ Note, *supra* note 96, at 1124; Note, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81, 91 (1981) [hereafter Note, *The IEP Process*]; see Hanline & Murray, *Integrating Severely Handicapped Children into Regular Public Schools*, 66 PHI DELTA KAPPAN 273, 274-75 (1984).

²¹¹ See *supra* text accompanying notes 59-60, 209-44.

handicapped students out of the mainstream or less handicapped students trying to survive in the mainstream. Yet not all of the cases fit these fact patterns; even those that do not move a step beyond *Rowley*. They take the ideas of least restrictive environment, individualization, and state standards, and develop them into lines of reasoning that compete with the "some benefit" reasoning of the *Rowley* Court.

1. Least Restrictive Environment

Rowley mentioned the least restrictive environment provisions of the Act — the requirement that handicapped children be educated with nonhandicapped children — in its general description of the Act's terms,²¹² but the case did not develop or apply the concept. Courts retreating from *Rowley*'s beneficial education standard have applied the least restrictive environment concept to require the provision of extensive services to handicapped children.²¹³

*Department of Education v. Katherine D.*²¹⁴ typifies this development. In that case, the court rejected a program proposed by the school district that offered only homebound speech therapy and parent counseling to a child with multiple handicaps. The child required suctioning of mucus from her tracheostomy tube and other health services in order to attend class at a public school.²¹⁵ The court found that the child was capable of attending a school with nonhandicapped children if school personnel provided these services.²¹⁶ The court concluded that the Act's least restrictive environment requirement called for the child's placement in a regular school as long as the services needed to keep her there could be provided by a school nurse or other qualified person.²¹⁷

²¹² *Board of Educ. v. Rowley*, 458 U.S. 176, 181 (1982).

²¹³ For example, one court has approved a personal sign language interpreter on this theory, irrespective of *Rowley* and cost considerations. *Springdale School Dist. No. 50 v. Grace*, 693 F.2d 41 (8th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). *But see A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158 (8th Cir.) (considering cost in case involving least restrictive environment argument), *cert. denied*, 484 U.S. 847 (1987).

²¹⁴ 727 F.2d 809 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985).

²¹⁵ *Id.* at 815-16.

²¹⁶ *Id.* at 815. The court noted that the child had successfully participated in programs at a private child care center; her mother worked there and so performed the health services. *Id.*

²¹⁷ *Id.* (citing 34 C.F.R. § 300.13(b)(10) (1982)). In contrast to its holding on the homebound program, the court found that a later program

The court supported its holding with the plain language of the Act. Effort had to be made to educate the child "with children who are not handicapped," and while the child's handicap was severe, it was not so severe "that education in regular classes with the use of supplementary aids and services [could not] be achieved satisfactorily."²¹⁸ The court viewed the entitlement to supplementary aids and services enabling education in the least restrictive environment as open-ended, limited only by restrictions on some classes of medical assistance.²¹⁹

Roncker v. Walter,²²⁰ which preceded *Katherine D.* by a year, illustrates the divergence of "least restrictive environment" reasoning from the "appropriateness" reasoning of *Rowley*. In *Roncker*, the court vacated and remanded a district court decision ordering placement of a severely disabled child in a county school for the mentally retarded.²²¹ The district court had relied on expert testimony that the educational program in the county school was superior to that available in a regular school, and that the child was making no progress in a regular school placement.²²² The court of appeals held that the district court's unjustified deference to the school board's initial decision prevented it from properly examining the issue of least restrictive environment.²²³ The court instructed the district court on remand to apply the "strong [congressional] preference in favor of mainstreaming," noting that "[t]he perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic

entailing placement in public school was appropriate, because the district court's finding that staff resistance rendered the program untenable was clearly erroneous. *Id.* The court emphasized that the child was not entitled to the best program, only to an appropriate one. *Id.* at 814 n.4.

²¹⁸ *Id.* at 815 (quoting 20 U.S.C. § 1412(5)(B) (1982)) (emendation in original).

²¹⁹ *See id.* (citing 34 C.F.R. § 300.13(b)(10)(1982)).

²²⁰ 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983).

²²¹ *Id.* at 1064.

²²² *Id.* at 1061. The court of appeals held that the district court failed to give adequate weight to the due process hearing and administrative review decisions calling for the child to be mainstreamed with nonhandicapped children at least for lunch, gym, and recess. The due process hearing officer had ordered that the child be placed in a regular elementary school; the review board held that he could be placed in a county school if this placement provided the necessary contact with nonhandicapped children, presumably by busing the child to regular school for part of the day. *Id.* at 1061-62.

²²³ *Id.* at 1062-63.

disagreement with the mainstreaming concept.”²²⁴ In particular, the court stressed that “In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.”²²⁵ Thus the court transformed the mainstreaming duty from a negative one — do not segregate unnecessarily — to a positive one — provide all the services that render segregation unnecessary.

The court disposed of *Rowley* with little difficulty, stating that whereas *Rowley* concerned the meaning of appropriate education, the present case involved the mainstreaming requirement.²²⁶ *Rowley* was a dispute over methodology, *Roncker* a dispute over whether the school district had satisfied the Act’s least restrictive environment provision.²²⁷

That reasoning, however, cannot disguise the fact that the implications of *Roncker* run far to the contrary of *Rowley*. *Rowley* expounded the idea of a minimal duty to provide access to some educational benefit; *Roncker* established an open-ended commitment to provide services in settings where they have never before been provided. Although the facts of *Roncker* primarily involved moving the child into a regular school building, the commitment to provide services to enable a child to be in the mainstream could entail much more — as much outside help as the child needs to survive in a regular classroom for part or all of the day. Thus, mainstreaming becomes a methodology. Yet in contrast to cases involving appropriateness disputes, if the methodological dispute involves least restrictive environment, the court will substitute its judgment for that of the school district. Framing almost any methodological dispute in mainstreaming terms should not

²²⁴ *Id.*

²²⁵ *Id.* The court recognized the possibility, however, that some handicapped children might have to be educated in segregated facilities when they would not benefit from mainstreaming, when the marginal benefits of mainstreaming are far less than the benefits from services that cannot be provided in that setting, or when the child is a disruptive force in a mainstreamed setting. In addition, the court found cost to be a proper factor to consider, but said that cost is no defense if the school has not provided a proper continuum of alternative placements. *Id.*

²²⁶ *Id.* at 1060.

²²⁷ *Id.*

be overly difficult. Even the *Roncker* court, though straining to distinguish *Rowley* as an “appropriateness” case, could not avoid calling the issue of proper placement one of appropriateness.²²⁸

In 1984 the Supreme Court gave oblique support to the *Roncker* approach in *Irving Independent School District v. Tatro*,²²⁹ which held that clean, intermittent catheterization for a student with spina bifida is a necessary related service under the Act.²³⁰ Although the opinion discussed little more than the language of the related services portion of the statute, it upheld an order requiring an unusual health service in order to enable a child to be educated in a regular school setting.²³¹ It did not even consider a counter-argument based on *Rowley*: that the child could have received “some benefit” by going to school half day and being catheterized at home, or by receiving homebound services.²³²

The duty to provide education in the least restrictive environment furnishes an appealing basis for plaintiffs to argue for increased services for handicapped children. As *Katherine D.* and *Roncker* demonstrate, the duty is distinct from the duty to provide appropriate education, and is not limited in any clear way by *Rowley*'s restrictions on that duty.

²²⁸ The court wrote:

The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act.

Id. at 1063 (footnote omitted) (emphasis in original).

²²⁹ 468 U.S. 883 (1984). That case was foreshadowed by *Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3d Cir. 1981) (approving clean intermittent catheterization to keep child in regular school), *cert. denied*, 458 U.S. 1121 (1982).

²³⁰ *Tatro*, 468 U.S. at 891; *see infra* notes 276-77 and accompanying text.

²³¹ *See* 468 U.S. at 891.

²³² Note, *supra* note 194, at 529. The result thus compares with that in the pre-*Rowley* case *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981), which required that the whole classroom be air conditioned rather than placing a temperature-dependent child in an air conditioned box in the classroom. *See generally* *Stacey G. v. Pasadena Indep. School Dist.*, 547 F. Supp. 61 (S.D. Tex. 1982) (post-*Rowley* case approving training for parents to enable them keep child out of institutional placement); *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47, 50, 55 (N.D. Ala. 1981) (pre-*Rowley* case rejecting school district's argument that child should be sent to separate school to avoid ridicule, and requiring provision of extensive services in environment providing contact with nonhandicapped students).

Furthermore, cases asking for enhanced services to promote the integration of handicapped children with children in the mainstream rest on a powerful analogy to race discrimination cases.²³³ Forced separation of handicapped children, like forced separation of minority children, fosters inequality.²³⁴ Indeed, handicapped children's history of legal exclusion from school²³⁵ places them in a position of inferiority quite similar to that of black children legally barred from schools attended by whites. Courts have ordered school authorities that excluded children on the basis of race to provide special, enhanced services to permit the previously excluded children to take full advantage of newly integrated public school programs, and to eliminate the inferiority imposed by separate schooling.²³⁶ Similarly, schools should affirmatively provide the services to enable handicapped children to prosper in settings from which they have been unlawfully barred.

This conception of the government's duty to remedy inequality is, under current doctrine, a stronger egalitarian idea than that applied in the *Rowley* opinion. *Rowley* reached back to *San Antonio Independent School District v. Rodriguez*,²³⁷ a case refusing to find the inequalities of the Texas school financing system unconstitutional, to support its position that equal protection affords only the right of meaningful access to schooling. Courts fear that ordering equality of public services will involve them in excessive

²³³ Cf. Turnbull, Brotherson, Czyzewski, Esquith, Otis, Summers, Van Reusen & DePazza-Conway, *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 *RUTGERS L.J.* 489, 502 (1983) (discussing fourteenth amendment basis of duty to educate handicapped children in least restrictive environment). Michael Rebell argues that analogies to race discrimination frequently mislead courts in cases involving discrimination against handicapped persons. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 *GEO. L.J.* 1435 (1986). He would prefer to see courts focus on the priorities and costs of accommodating the disabled, rather than on proof of intent or the scope of affirmative action. *Id.* at 1436. Although the history, politics, and economics of discrimination against handicapped children might call for abandoning race analogies in many cases, comparisons to race discrimination may have persuasive force in others. *See id.* at 1451. When mainstreaming is at issue, the comparison is precise.

²³⁴ *See* Hanline & Murray, *supra* note 210, at 274; Minow, *supra* note 89, at 157.

²³⁵ *See supra* text accompanying notes 20-24.

²³⁶ *E.g.*, *Milliken v. Bradley*, 433 U.S. 267 (1977).

²³⁷ 411 U.S. 1 (1973).

social engineering,²³⁸ and so are unlikely to move much beyond the minimal access standard in the absence of special considerations. Forced separation that promotes inequality, however, is just such a special consideration, one that may provide a powerful argument for enhanced services.²³⁹

The text of the regulation on least restrictive environment also supports this interpretation, at least for handicapped children educated in regular classrooms. It requires provision of the extra services needed to make mainstreaming work:

Each public agency shall insure:

. . . .
That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.²⁴⁰

The regulation's words appear to impose an unlimited obligation on school districts to provide supplementary aids and services. Although *Rowley* might be taken as defining "education . . . achieved satisfactorily" as merely passing from grade to grade,²⁴¹ even that achievement might entail great resources in the case of some children.²⁴²

²³⁸ See *Edgewood Indep. School Dist. v. Kirby*, 761 S.W.2d 859, 861 (Tex. Ct. App. 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989).

²³⁹ This position is distinct from one that defends limited, voluntary separation of children, particularly deaf children, as a means of strengthening both skills and ego before a return to the mainstream. See DuBow, "Into the Turbulent Mainstream"—*A Legal Perspective on the Weight To Be Given to the Least Restrictive Environment in Placement Decisions for Deaf Children*, 18 J.L. & EDUC. 215, 227 (1989). The history of self-help and separatist political organizing among deaf persons may affect what is appropriate education for deaf children. The objectives should be to train the children for adulthood and to avoid any separation that fosters the appearance of deviancy. See Minow, *supra* note 89, at 207.

²⁴⁰ 34 C.F.R. § 300.550 (1990).

²⁴¹ *Board of Educ. v. Rowley*, 458 U.S. 176, 207 n.28 (1982).

²⁴² See Comment, *The Education for All Handicapped Children Act: The Benefits and Burdens of Mainstreaming Capable Handicapped Children in a Regular Classroom*, 38 MERCER L. REV. 903, 911 (1987) (noting that aids and services in regulation refers to related services, thus least restrictive environment ties in with appropriateness). A contrary position, expressed in Osborne, *supra* note 163, is that *Rowley* implies that children are not entitled to related services if they are making progress towards IEP goals without them. *Id.* at 251. This position ignores the text of the regulation and the various means lower courts have used in distinguishing *Rowley* on its facts.

One early commentator suggested that least restrictive environment ideas could provide a theme for interpreting the appropriate education duty.²⁴³ Although that view gives no clues about the meaning of appropriateness for children so severely disabled that residential or other highly restrictive programs are needed, it foreshadows the position taken by some lower courts retreating from *Rowley*'s interpretation of the term.²⁴⁴

Of course, courts have also used least restrictive environment ideas to deny services that parents request,²⁴⁵ but that is hardly surprising.²⁴⁶ The more remarkable use of the concept is as a

²⁴³ Note, *The IEP Process*, *supra* note 210, at 108-12 (expressing dissatisfaction with equalization and self-sufficiency definitions of appropriate education, and arguing such standards should be deemphasized in favor of concepts of least restrictive environment and delivery of services to enhance progress towards normalization). See generally Miller & Miller, *supra* note 209 (discussing issues of appropriateness in mainstreamed placements). Professor Goodwin, however, contends that appropriate education and least restrictive environment are unrelated, and that it is possible to have an appropriate education that is not in the least restrictive environment. Goodwin, *Public School Integration of Children with Handicaps After Smith v. Robinson: "Separate But Equal" Revisited?*, 37 ME. L. REV. 267, 280 (1985). He fails to observe that the Act and its regulations express duty in terms of services that must be provided, not just physical surroundings. Indeed, Goodwin notes the advantages to learning that come from integration of handicapped children with the nonhandicapped. See *id.* at 296-97 n.147. He argues that *Rowley*'s interpretation of the Act leads to denying handicapped students these advantages. *Id.* at 278-79. *Rowley*, however, did not in any way limit the duty to provide education in the least restrictive environment. See *supra* notes 213-28 and accompanying text (describing lower courts' use of least restrictive environment concept to distinguish *Rowley*).

²⁴⁴ See *supra* text accompanying notes 213-25.

²⁴⁵ *Hall v. Freeman*, 700 F. Supp. 1106 (N.D. Ga. 1987) (rejecting residential placement for emotionally disturbed child; holding therapeutic day program least restrictive environment adequate for child's needs); *Lang v. Braintree School Comm.*, 545 F. Supp. 1221 (D. Mass. 1982) (rejecting residential placement on basis of least restrictive environment); *Zvi D. v. Ambach*, 520 F. Supp. 196 (E.D.N.Y. 1981) (denying residential placement on least restrictive environment idea), *modified on other grounds*, 694 F.2d 904 (2d Cir. 1982); *Mallory v. Drake*, 616 S.W.2d 124 (Mo. App. 1981) (noting child should be able to model behavior on less handicapped children); *Silvio v. Commonwealth*, 64 Pa. Commw. 192, 439 A.2d 893 (1982) (ordering public grade school placement for deaf child); *Shanberg v. Commonwealth*, 57 Pa. Commw. 384, 426 A.2d 232 (1981) (ordering public high school placement for paraplegic, speech-impaired student).

²⁴⁶ In addition, some courts have denied specialized or enhanced services that parents requested in order to achieve education in the least

means of enhancing services,²⁴⁷ an idea that has a taken on a life

restrictive environment. *Detsel v. Board of Educ.*, 820 F.2d 587 (2d Cir.) (denying nursing services), *cert. denied*, 484 U.S. 981 (1987); *Bevin H. v. Wright*, 1987-88 Educ. Handicapped L. Rep. (CRR) 559:122 (W.D. Pa. 1987) (same). *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989), upheld placement of a child in a segregated setting, but stressed that schools must provide services and take steps other than modifying the curriculum to accommodate a child in a regular classroom. *See id.* at 1045-50.

Some courts have placed convenience and deference to school authorities above least restrictive environment considerations. *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.) (denying request for full-time cued speech instructor in mainstreamed placement when school favored placement in regional hearing impaired program), *cert. denied*, 109 S. Ct. 308 (1988); *Wilson v. Marana Unified School Dist. No. 6*, 735 F.2d 1178 (9th Cir. 1984) (approving placement of physically handicapped child without learning disabilities in school 30 minutes away with teacher certified in physical disabilities and upholding child's transfer from neighborhood school with teacher certified in learning disabilities).

²⁴⁷ *Taylor v. Board of Education*, 649 F. Supp. 1253 (N.D.N.Y. 1986), further demonstrates the versatility of the least restrictive environment argument, and shows that the argument can draw the court far from the "some benefit" approach of *Rowley*. In *Taylor*, the court ruled that a specialized cerebral palsy center was a less restrictive environment than a program for multiply handicapped children at a public school regional cooperative. *Id.* at 1258. The public school had fewer, less integrated services. *Id.* at 1256. Discussing least restrictive environment, the court declared:

Adrian is entitled to learn in the least restrictive environment possible. While generally, the choice of the least restrictive environment will involve an attempt to mainstream a handicapped child with children who are not handicapped, such is not always the case. The crucial determination involves a full and careful consideration of the child's own needs; and in some instances, a special facility will constitute the least restrictive environment for a particular handicapped child. When considering the "potential harmful effect on [Adrian and] on the quality of services which [he] needs;" the court concludes that the CP [cerebral palsy] Center provides a less restrictive environment than the [cooperative's] class.

Id. at 1258 (citations omitted) (quoting 34 C.F.R. § 300.552(d)). The court applied *Rowley*, but said that the proposed program

reduces or omits at least several of the services that those who know Adrian believe are essential to his benefiting from an educational program. For instance, one such omission involves a functional curriculum. The failure of the BOCES [regional cooperative] class to utilize a curriculum that will provide Adrian with the tools to become, at least to a degree, self-sufficient, is

of its own.²⁴⁸

2. Individualization Concepts

“Individualization” is an awkward word for an elegant concept: the idea that children, especially handicapped children, should be treated as individuals with unique needs requiring specially tailored services. The Education of the Handicapped Act stresses the need for tailored services in its requirement of an individualized education program with unique and specific goals, objectives, and services for each handicapped child.²⁴⁹ Many courts have relied on these portions of the Education of the Handicapped Act in requiring extensive services for children even after *Rowley*.

Reasoning of this kind provided an additional basis for *Hall v. Vance County Board of Education*,²⁵⁰ the case in which the court

alone an important reason why the BOCES class would not provide an appropriate education.

Id. (citations omitted).

²⁴⁸ Some courts have applied least restrictive environment ideas in contagious disease cases. In *Martinez v. School Board*, 861 F.2d 1502 (11th Cir. 1988), the court reversed the district court’s decision that a trainable mentally handicapped child with AIDS who was incontinent, had thrush, and sucked her fingers had to be kept in a glass enclosure in a classroom for the trainable mentally retarded. Applying the first step of the *Rowley* analysis — determining whether the state had followed the Act’s procedural requirements — the court examined the school’s compliance with the least restrictive environment provision of the Act, which it characterized as a procedural requirement under the statute. *Id.* at 1505. The court also applied § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), and held that the district court first had to consider the nature, severity, duration, and degree of risk before evaluating reasonable accommodations. *Id.* It held that a remote, theoretical possibility of contagion does not rise to the significant risk required to isolate a child in a classroom. *Id.* at 1506; accord *Community High School Dist. 155 v. Denz*, 124 Ill. App. 3d 129, 463 N.E.2d 998 (1984) (requiring placement of mentally retarded child with hepatitis B in regular school rather than homebound placement). Although the inclusion of these children in regular placements is less expensive than creating different options for them, courts ordering inclusion frequently do so over the opposition of local authorities, whose decisions are entitled to deference under *Rowley*. See *supra* notes 141-42 and accompanying text.

²⁴⁹ 20 U.S.C. § 1414(a)(5) (1988); 34 C.F.R. § 300.341 (1989). The federal government has promulgated extensive question-and-answer regulations to describe the IEP and its formation in even greater detail. *Id.* § 300 app. C (1989).

²⁵⁰ 774 F.2d 629 (4th Cir. 1985) (Winter, C.J.). *Hall* also relied on express language in *Rowley* that rejected a single test of appropriateness

required the school district to provide private tutoring for a dyslexic child with above average intelligence, who had been offered only resource room services. The court cited the individualization language of the Act, noting the references found in *Rowley*:

Nor was the district court compelled by a showing of minimal improvement on some test results to rule that the school had given James a FAPE [free, appropriate public education]. *Rowley* recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children.²⁵¹

Individualization concepts permitted the court to ignore the *Hall* child's ability to get passing marks and progress from grade to grade in the regular classroom, exactly the factual situation of Amy Rowley.

Another case close to *Rowley* on its facts in which the court ordered enhanced services on the ground of individual need is *Max M. v. Illinois State Board of Education*.²⁵² In that case, the court required the school district to provide psychotherapy to a highly intelligent student whose academic performance, while sufficient to advance him from grade to grade, was substantially below expectations. The court relied on expert evaluations that documented the child's need for the services, and stressed the individualized nature of the determination.²⁵³ The case's close factual comparison to *Rowley* led one pair of commentators to declare:

There are more similarities than differences in the cases involving Max M. and Amy Rowley. Both handicapped students had been provided an education that the courts determined was beneficial; both the programs had assisted the students in academic achievement. Neither of the courts reached the conclusion that the school district had to go beyond the requirements for a beneficial education or attempt to maximize the potential of the students. The question may be asked, if the school districts did not have to maximize the potential of the students, were they only required to meet some minimum standard for the students? These school districts appeared to do more than provide a minimum of services for the unique and specialized program devised

based on advancement from grade to grade. *See supra* notes 202-03 and accompanying text.

²⁵¹ 774 F.2d at 636.

²⁵² 629 F. Supp. 1504 (N.D. Ill. 1986).

²⁵³ *Id.* at 1516.

for the student.²⁵⁴

The best answer to the rhetorical question is that individualization requires particularized determinations of need that may call for different results on seemingly analogous facts. Indeed, one commentator viewed *Rowley* as a sustained attack on individualization, because it ignored Amy Rowley's particular needs.²⁵⁵ Yet the concept has such an important role in the statutory scheme that it has provided a powerful means for courts to escape *Rowley*'s strictures in factually similar cases.²⁵⁶ Individualization concepts have also furnished the reasoning for courts ordering extensive services for more severely handicapped children.²⁵⁷

In addition, individualization has furnished a strong argument

²⁵⁴ Broadwell & Walden, *supra* note 165, at 45-46.

²⁵⁵ Hill, *supra* note 5, at 159.

²⁵⁶ Although individualization has proved a successful argument in the courts, doubts may exist whether school authorities have taken the concept seriously for the vast majority of children whose cases do not result in litigation. See Clune & Van Pelt, *supra* note 49, at 53. Clune and Van Pelt contend that the individualization theory has failed because it is too expensive and not appealing to the bureaucratic mind. *Id.* They argue for additional monitoring to promote it. See *id.* at 57-59.

²⁵⁷ *Drew P. v. Clarke County School Dist.*, 877 F.2d 927 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1510 (1990); *Timothy W. v. Rochester, N.H. School Dist.*, 875 F.2d 954 (1st Cir.), *cert. denied*, 110 S. Ct. 519 (1989); *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985) (upholding private placement of learning disabled child); *Helms v. Independent School Dist.*, 750 F.2d 820 (10th Cir. 1984) (requiring extended schooling), *cert. denied*, 471 U.S. 1018 (1985); *Kattan v. District of Columbia*, 691 F. Supp. 1539 (D.D.C. 1988) (approving private placement); *Visco v. School Dist.*, 684 F. Supp. 1310 (W.D. Pa. 1988) (upholding private placement for deaf children of deaf mother); *Tolland Bd. of Educ. v. Connecticut State Bd. of Educ.*, 1984-85 Educ. Handicapped L. Rep. (CRR) 556:412 (D. Conn. 1985) (affirming residential placement for child with learning disability, social and emotional problems, and psychotic behavior); *Adams v. Hansen*, 632 F. Supp. 858 (N.D. Cal. 1985) (holding placement of dyslexic child at private school appropriate because public school could not implement necessary program); *Russell v. Jefferson School Dist.*, 609 F. Supp. 605 (N.D. Cal. 1985) (holding child's program must be comprehensive enough to address each of child's disabilities; therefore child with smallness and fragility, difficulty walking and surgical shunt, cognitive difficulties, and language deficiencies entitled to extensive services to meet all handicaps); *Loudoun County School Bd. v. Lower*, 1983-84 Educ. Handicapped L. Rep. (CRR) 555:130 (E.D.Va. 1983) (finding proposed placement of handicapped child in public school class for multiply handicapped children inappropriate when child was only girl in class with five younger boys, all functioning below normal level); *T.G. v. Board of Educ.*, 576 F. Supp. 420 (D.N.J. 1983)

for invalidating policies against providing some types of services to handicapped students.²⁵⁸ Many cases have rejected blanket policies, notably those denying handicapped students summer school services, even though these policies appear consistent with *Rowley*'s minimal standards and even though under *Rowley* they should be afforded deference as the product of state decision making.²⁵⁹

3. State Educational Standards

The Education of the Handicapped Act, as *Rowley* mentioned, requires that special education meet the state's own educational standards.²⁶⁰ Several states, however, have statutes that require the states to maximize handicapped children's educational opportunities, "thereby putting these states in direct opposition to the *Rowley* majority."²⁶¹

*David D. v. Dartmouth School Committee*²⁶² led the way in applying state law to require services that will maximize the child's poten-

(approving psychotherapy for child under *Rowley* standards), *aff'd mem.* 738 F.2d 420, 425 (3d Cir.), *cert. denied*, 469 U.S. 1086 (1984).

²⁵⁸ Cases ordering extended year services and blocking the operation of contrary policies include: *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Yaris v. Special School Dist.*, 728 F.2d 1055 (8th Cir. 1984), *aff'g* 558 F. Supp. 545 (E.D. Mo. 1983); *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983); *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *Birmingham & Lamphere School Dist. v. Superintendent of Pub. Instruction*, 120 Mich. App. 465, 328 N.W.2d 59 (1982). The *Battle* decision is criticized in Makuch, *Year-Round Special Education and Related Services: A State Director's Perspective*, 47 EXCEPTIONAL CHILDREN 272 (1981), on the ground that the Education of the Handicapped Act is not the appropriate vehicle for delivering social services when the child's primary need is related services rather than special education. The criticism, however, ignores the difficulty in separating the need for related services from the need for special education, and further ignores the statutory command for individualization.

²⁵⁹ The leading case emphasizing the illegitimacy of blanket denials of extended year services is *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), *vacated and remanded*, 468 U.S. 1213.

²⁶⁰ *Board of Educ. v. Rowley*, 458 U.S. 176, 203 (1982); 20 U.S.C. § 1401(18)(B) (1988).

²⁶¹ Comment, *supra* note 194, at 1514 n.199; see Galie, *Social Services and Egalitarian Activism*, in HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING 97, 105 (S. Friedelbaum ed. 1988).

²⁶² 615 F. Supp. 639 (D. Mass. 1984), *aff'd*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

tial. The district court applied a Massachusetts statute that required the special education program to assure a child's maximum possible development,²⁶³ and held that residential services should be provided to a seventeen-year-old with Downs syndrome.²⁶⁴

In affirming, the court of appeals wrote that "Congress had incorporated by reference relevant state substantive and procedural law with the understanding that the law would form and be enforced as part of the federal right to a free appropriate public education."²⁶⁵ The court relied on the definition of special education and related services in the Act, which must "meet the standards of the State educational agency,"²⁶⁶ noting that this language was mentioned in *Rowley*.²⁶⁷ It also relied on language in the Congressional Record from Senator Williams that the due process right to challenge decisions about provision of a free appropriate public education extends to "questions relating to whether the services provided a child meet the standards of the State educational agency."²⁶⁸ It noted the practical advantage to statewide uniformity of standards, given the Act's "integrated review system" in which a case proceeds through the state administrative process until its appeal in state or federal court.²⁶⁹ The federal court would apply the same law as the state court.²⁷⁰ Sim-

²⁶³ MASS. GEN. LAWS ANN. ch. 71B, § 3 (West 1978).

²⁶⁴ 615 F. Supp. at 645-47. The boy displayed severe problems in controlling his sexual and aggressive behavior. *Id.* at 646.

²⁶⁵ *David D.*, 775 F.2d at 416 (citing *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 789 (1st Cir. 1984)).

²⁶⁶ *Id.* at 417 (citing 20 U.S.C. § 1401(18)(B)).

²⁶⁷ *Id.* (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982)).

²⁶⁸ *Id.* at 418 (citing 121 CONG. REC. 37,415 (1975)).

²⁶⁹ *See id.* at 419. Cases applying Massachusetts law to order the provision of services that exceed the *Rowley* standard include: *Doe v. Anrig*, 651 F. Supp. 424 (D. Mass. 1987) (state educational standard requires services for psychiatric needs of schizophrenic child, since without services educational program would not benefit child to maximum extent feasible); *Stock v. Massachusetts Hosp. School*, 392 Mass. 205, 467 N.E.2d 448 (1984) (rescinding high school diploma of student with multiple cognitive and motor disabilities and ordering special education services for three additional years), *cert. denied*, 474 U.S. 844 (1985).

²⁷⁰ *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*), may present a problem for application of state law. In *Pennhurst II*, the Court ruled that the eleventh amendment to the United States Constitution barred a federal court from enforcing against state defendants a state statute granting various protections to developmentally disabled persons. *See id.* at

121-23. Five years later, *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989), held that eleventh amendment immunity applies in Education of the Handicapped Act cases. Congress, however, has now abrogated eleventh amendment immunity in these cases. See Pub. L. No. 101-476, § 604, 104 Stat. 1103, 1106 (1990).

Although congressional abrogation is prospective from October 30, 1990, in cases arising before this date *Pennhurst II* does not bar results like those in *David D.* for two reasons. First, in cases like *David D.*, the court is not enforcing state law. Rather, it is enforcing federal law that incorporates state law by reference: the Act expressly requires that special education be consistent with state standards. 20 U.S.C. § 1401(18)(B)(1988). Second, in *Muth* the Supreme Court's conclusion that the Act does not override the eleventh amendment rests on its determination that Congress failed to manifest an intention to do so in the language of the statute. 109 S. Ct. at 2402. The Court, however, considered only the language of the Act concerning an individual cause of action for tuition reimbursement. *Id.* Although that language is not explicit in requiring monetary relief against states, the language imposing state standards could not be more explicit. The Act thus overrides the eleventh amendment in cases arising before October 30, 1990, if only in this narrow range not at issue in *Muth*.

Of course, state courts can enforce state law without any concern about the eleventh amendment; in state court actions enforcing state statutes, courts might impose tuition reimbursement. See *Byrnes v. Riles*, 157 Cal. App. 3d 1170, 204 Cal. Rptr. 100 (1984) (requiring retroactive reimbursement under California law). Also relevant to actions based on state law are state cases and statutes that predate the Act or affect both handicapped and nonhandicapped children. Historically, courts have ordered services for handicapped children under state law. *E.g.*, *Frederick L. v. Thomas*, 557 F.2d 373 (3d Cir. 1977), 578 F.2d 513 (3d Cir. 1978) (imposing services on basis of Pennsylvania state law and possible equal protection claim); *In re Petty*, 241 Iowa 506, 41 N.W.2d 672 (1950) (placing child in state school for deaf over parents' objection); *Amherst-Pelham Regional School Comm. v. Department of Educ.*, 376 Mass. 480, 381 N.E.2d 922 (1978) (upholding residential placement because of tenuous emotional situation of learning disabled child); *In re Leitner*, 40 App. Div. 2d 38, 337 N.Y.S.2d 267 (1972) (upholding out-of-state private placement because child needed maximum supervision and individualized instruction); *In re Young*, 84 Misc. 2d 740, 377 N.Y.S.2d 429 (Fam. Ct. 1975) (applying state law to reject argument that child with IQ of less than 50 is uneducable); *In re Kirkpatrick*, 77 Misc. 2d 646, 354 N.Y.S.2d 499 (Fam. Ct. 1972) (upholding private placement for multiply handicapped drug abuser); *In re G.H.*, 218 N.W.2d 441 (N.D. 1974) (holding failure to provide educational opportunity for handicapped children violates state constitution); *In re Children Residing at St. Aloysius Home*, 1989 Educ. Handicapped L. Rep. (CRR) 441:426 (R.I. 1989) (construing state laws on services public school district must provide to handicapped children in private residential facility); see also *McClung*, *supra* note 44, at 166-72 (discussing cases under various state statutes).

Recently, several courts have found expansive duties to apply to all

ilar state statutes have led to similar results in Michigan,²⁷¹ Missouri,²⁷² New Jersey,²⁷³ and North Carolina.²⁷⁴

children in the state under constitutional provisions establishing "free and efficient" public education. *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). For example, *Rose* established that the Kentucky school system failed to comply with the constitutional guarantee of efficient education because it does not afford equal educational opportunities to all children in the commonwealth. 790 S.W.2d at 212-13. Handicapped children might be entitled to enhanced services under such a standard. Other courts have applied education law not directly related to handicapped children to provide services. In *Kennedy v. Board of Education*, 337 S.E.2d 905 (W. Va. 1985), the Supreme Court of Appeals of West Virginia found that requiring students with spina bifida to be carried half a mile to a bus stop violated a state law requiring adequate transportation to all students more than two miles from school. In *In re B.B.*, 440 N.W.2d 594 (Iowa 1989), the court required the parents of a moderately retarded child to enroll him in school rather than continue attempts at home education, invoking the state child protection law.

Will v. Michigan Department of State Police, 109 S. Ct. 2304 (1989), does not undermine the conclusion that state courts must enforce the state law obligations imposed by the Act. That case established that a state or state officer is not a proper defendant in an action for retroactive monetary relief under 42 U.S.C. § 1983, even when the action is brought in state court. *Will*, 109 S. Ct. at 2307, 2311-12. The cause of action in the education cases, however, arises under either the Education of the Handicapped Act or the state law itself. These provisions have no such restriction. Moreover, local school boards, as proper defendants under federal law, are subject to suit in state court in actions enforcing federal statutes. See *Howlett v. Rose*, 110 S. Ct. 2430 (1990).

²⁷¹ Michigan's statute demands that the state, intermediate, and local agencies "provide for the delivery of special education programs and services designed to develop the maximum potential of every handicapped person." MICH. COMP. LAWS ANN. § 380.1701(a) (West 1988). Cases applying this standard include: *Barwacz v. Michigan Dep't of Educ.*, 674 F. Supp. 1296 (W.D. Mich. 1987) (holding issues of fact preclude summary judgment in case involving severely hearing impaired 14-year-old whose mother unilaterally enrolled her at residential school in Washington D.C.; reasoning Michigan standard, which requires education designed to develop "maximum potential," requires effort to seek out programs in neighboring states); *Nelson v. Southfield Pub. Schools*, 148 Mich. App. 389, 384 N.W.2d 423 (1986) (balancing needs of student against budgetary constraints of state); *Woolcott v. State Bd. of Educ.*, 134 Mich. App. 555, 351 N.W.2d 601 (1984); *Flint Bd. of Educ. v. Williams*, 88 Mich. App. 8, 276 N.W.2d 499 (1979).

²⁷² Schools in Missouri must provide special education services sufficient to "meet the needs and maximize the capabilities" of severely handicapped

Another avenue exists for applying local standards that exceed those imposed by *Rowley*. Even without the explicit invocation of any state definition of appropriateness, a hearing officer or review decision in an individual case might call for services a school district is unwilling to provide. Because of *Rowley*'s requirement of deference to local decisionmaking, various cases have required provision of services far beyond those that would ensure "some benefit."²⁷⁵

children. MO. ANN. STAT. § 162.670 (Vernon Supp. 1990). See *Cothorn v. Mallory*, 565 F. Supp. 701, 708 (W.D. Mo. 1983) (holding that it is unnecessary to determine if state standard exceeds federal standard, because program at issue both met federal standard and maximized child's capabilities).

²⁷³ A New Jersey statute calls for boards of education "to provide suitable facilities and programs of education for all the children who are classified as handicapped." N.J. STAT. ANN. § 18A: 46-13 (West 1989). "Suitable" takes its meaning from a state statute declaring it the policy of New Jersey to afford all children "the fullest possible opportunity to develop their intellectual capacities." N.J. STAT. ANN. § 18A: 46-19.1 (West 1989); see *Geis v. Board of Educ.*, 589 F. Supp. 269 (D.N.J. 1984) (approving residential placement for developmentally disabled child), *aff'd*, 774 F.2d 575 (3d Cir. 1985); see also *Board of Educ. v. Diamond*, 808 F.2d 987, 992 (3d Cir. 1986) (explicitly distinguishing lower standard of federal Act); *B.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1140, 1158 (D.N.J. 1988). The New Jersey Department of Education, however, recently adopted a regulation, N.J.A.C. 6:28-1.1 (effective May 15, 1989), stating that the New Jersey standard is the same as the federal, *Rowley* standard. 21 N.J. Reg. 1385, 1391 (May 15, 1989). Whether the courts will find the new regulation effective in blocking the effect of § 46-19.1 is unclear. See generally *Lascari v. Board of Educ.*, 116 N.J. 30, 560 A.2d 1180 (1989) (applying state's former "to best achieve success in learning" standard because higher standard in effect at time of due process hearing).

²⁷⁴ North Carolina has a state policy "to ensure every child a fair and full opportunity to reach his full potential." N.C. GEN. STAT. § 115C-106(a) (1990). See *Hall v. Vance County Bd. of Educ.*, 1983-84 Educ. Handicapped L. Rep. (CRR) 555:437 (E.D.N.C. 1983) (approving private placement for learning disabled child under state standard), *aff'd*, 774 F.2d 629 (4th Cir. 1985) (applying *Rowley* standard); cf. *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990) (applying elevated standard, but only to educational services, not in-home "habilitative services"); *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982) (applying state standard but denying requested services), *cert. denied*, 460 U.S. 1012 (1983).

²⁷⁵ See, e.g., *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988) (ordering placement in private treatment center for child with multiple physical and emotional handicaps); cf. *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 791-92 (1st Cir. 1984) (remanding to district court to give deference to administrative decision ordering

D. Supreme Court Cases After Rowley

The Supreme Court has not taken an opportunity to consider the meaning of appropriate education since *Rowley*. Its five interpretations of other provisions of the Education of the Handicapped Act offer few clues whether the Court, given the opportunity, might join the lower court retreat.

In *Irving Independent School District v. Tatro*,²⁷⁶ the Court found that clean, intermittent catheterization was a required related service under the Act.²⁷⁷ Nevertheless, the Court did not adopt the more expansive analysis characteristic of post-*Rowley* cases on least restrictive environment. *Smith v. Robinson*,²⁷⁸ decided the same day as *Tatro*, established that the Act does not permit an award of attorneys fees to parents who prevail in a case that could be brought under it.²⁷⁹ *Smith* involved a severely handicapped child who needed residential placement, but the Court had no occasion to comment on whether appropriate education had a different meaning in her case than in Amy Rowley's.

residential placement), *aff'd*, 471 U.S. 359 (1985). Some courts have approved even services that the school district wanted to provide over the objection of the parents. *See, e.g., Hudson v. Wilson*, 1986-87 Educ. Handicapped L. Rep. (CRR) 558:186 (W.D. Va. 1986) (approving services for both emotional disturbance and learning disability over objection of grandmother, who wanted services only for learning disability; relying on *Rowley*, giving deference to school district decision that child needed dual placement).

²⁷⁶ 468 U.S. 883 (1984).

²⁷⁷ *Id.* at 890-91. Note, *supra* note 194, at 517, emphasizes that *Rowley* did limit its analysis to the facts to some degree, applying its test only where a child is in the regular classroom. The Note argues that the *Tatro* Court could have let the child go to school half a day, because she still would have received some benefit. Since the Court did not do so, *Tatro* in effect raises *Rowley's* standard for appropriate education in cases where mainstreaming is possible through providing a contested service. *Id.* at 529.

²⁷⁸ 468 U.S. 992 (1984).

²⁷⁹ To reach that result, the majority reasoned that by passing the Education for All Handicapped Children Act, Congress precluded parents from bringing claims for appropriate education for a handicapped child under both § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the equal protection clause (through suit under 42 U.S.C. § 1983). 468 U.S. at 1012-16. Those two claims could support an award of attorneys fees; the Education of the Handicapped Act could not. *Id.* at 1015, 1021. The Court declared that plaintiffs could not obtain attorneys fees even though they might have obtained the same relief had the courts decided those claims. *Id.* Congress overruled *Smith* in 1986. *See infra* text accompanying notes 335-50.

Burlington School Committee v. Department of Education,²⁸⁰ decided in 1985, held that courts may award tuition reimbursement relief in placement disputes under the Act. Again, the merits of the placement were not before the Court, although the Court must have recognized that reimbursement disputes of any significance would involve expensive residential placements for severely handicapped children. Thus, perhaps *Burlington* signifies the Court's willingness to recognize the distinction between more mildly handicapped children in mainstreamed environments and severely handicapped children in specialized placements.

*Honig v. Doe*²⁸¹ established that the Act barred summary disciplinary suspensions of handicapped students. The case demonstrated that the Court took the procedural provisions of the Act seriously, and that it recognized that for some students antisocial behavior cannot be treated as distinct from handicapping conditions. Once again, though, appropriate education was not directly before the Court. In *Dellmuth v. Muth*,²⁸² the Court ruled that eleventh amendment immunity protects state defendants from retrospective monetary relief in actions under the Act in federal court.²⁸³ The Court had foreordained that result in *Atascadero State Hospital v. Scanlon*,²⁸⁴ which ruled that the Rehabilitation Act of 1973 did not eliminate eleventh amendment immunity in suits against state defendants. *Muth* thus betrays little about the Court's fundamental views of the Education of the Handicapped Act.²⁸⁵

IV. EVALUATION OF THE LOWER COURT RETREAT FROM ROWLEY

The lower courts have retreated from *Rowley*, but a retreat from a limiting construction is not necessarily a transformation. Is the departure from *Rowley* as dramatic as it seems? Moreover, lower court decisions that move in a direction different from that indicated by a Supreme Court decision might either be praised as

²⁸⁰ 471 U.S. 359 (1985).

²⁸¹ 484 U.S. 305 (1988).

²⁸² 109 S. Ct. 2397 (1989).

²⁸³ In October 1990 Congress prospectively abrogated eleventh amendment immunity for state defendants in cases arising under the Act. See *supra* note 270.

²⁸⁴ 473 U.S. 234 (1984).

²⁸⁵ As emphasized above, the ruling does not limit the availability of state law as an avenue for expanding the duties of defendants in cases about appropriate education. See *supra* note 270.

necessary legal development or condemned as subversion of binding precedent. The last word will be the Supreme Court's, if and when it accepts another case dealing with appropriateness.

To evaluate whether the lower courts' reaction to *Rowley* has fostered the radical change anticipated by the Act, this Article will consider the implications of the lower court decisions for the redistribution of resources and for change in the daily lives of handicapped and nonhandicapped individuals. This Article will also consider the merits of the retreat. Whether the Supreme Court should endorse or limit the lower court decisions depends first on the correctness of the lower courts' statutory interpretation, that is, whether it corresponds to the language and spirit of the Education for the Handicapped Act, and second on the reasonableness of the lower courts' treatment of binding Supreme Court precedent. This Article will take up those issues in turn.

A. *Really a Transformation?*

It is not obvious that the lower court cases described above work a transformation, much less a restoration of a radical statutory purpose. Even before *Rowley*, some lower court cases interpreted the Act narrowly, anticipating *Rowley*.²⁸⁶ Nevertheless, the intention of Congress, so far as can be determined, was to work a

²⁸⁶ *Bales v. Clarke*, 523 F. Supp. 1366 (E.D. Va. 1981) (rejecting proposed placement as overly elaborate); *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981) (allowing school board to apply monetary considerations and rejecting maximization standard). One authority, writing before *Rowley* but perhaps anticipating both it and some of the subsequent case law, wrote:

"[A]ppropriate," as a minimum standard, is still a fairly high one. The regulations and judicial interpretation show that it contains eight essential components:

- (1) An appropriate offering includes specially designed instruction to meet the child's unique needs.
- (2) It includes related services as needed.
- (3) It is based on adequate evaluation.
- (4) It must be in accordance with an IEP.
- (5) The child must be able to benefit from the appropriate program.
- (6) There must be a periodic review of progress.
- (7) It must be offered in the least restrictive placement alternative.
- (8) There must be no interruption in services.

R. MARTIN, *THE IMPACT OF CURRENT LEGAL ACTION ON EDUCATING HANDICAPPED CHILDREN* 166 (1981).

radical change.²⁸⁷ *Rowley*, according to the consensus of contemporary commentators, acted to bar such a change.²⁸⁸

One measure of the radicalism of a provision is its propensity to cause great shifts in resources. The Education of the Handicapped Act calls for short-term shifts in tax funds, significantly federal but predominantly state and local, to handicapped children's educational services. Credible arguments support the proposition that Congress intended a "money is no object" construction of the Education for the Handicapped Act.²⁸⁹ To the extent that *Rowley* represents an effort to cut costs,²⁹⁰ the lower courts' efforts have been radical indeed.²⁹¹ In fact, many post-*Rowley* cases express the view that cost is no object in determining appropriateness.²⁹²

²⁸⁷ See *supra* text accompanying notes 87-98.

²⁸⁸ See *supra* text accompanying notes 152-62.

²⁸⁹ See *supra* text accompanying note 98.

²⁹⁰ See *supra* text accompanying note 160.

²⁹¹ Professor Bartlett contends that *Rowley* endorses the disregard-the-cost approach, for it contains no cost test for reaching the floor of services that should be mandatory. Bartlett, *supra* note 12 (suggesting courts should address cost considerations explicitly, and use "program parity" analysis — idea of proportional cost reductions for handicapped and nonhandicapped). *But see, e.g.*, Note, *supra* note 194, at 530, 532 (1985) (contending *Rowley's* thrust is to reduce expenditures).

²⁹² See, e.g., *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984) (holding that \$88,000 per year program was only program appropriate for child); *T.G. v. Board of Educ.*, 576 F. Supp. 420 (D.N.J. 1983) (requiring school district to pay for psychotherapy services totalling over \$25,000), *aff'd*, 738 F.2d 420, 425 (3d Cir. 1984); *William S. v. Gill*, 572 F. Supp. 509, 516 (N.D. Ill. 1983) ("As *Rowley* . . . makes plain, the appropriateness of an education is a function not of cost but of the actual or potential educational benefits conferred"); *Adams Cent. School Dist. No. 090 v. Deist*, 214 Neb. 307, 314-18, 334 N.W.2d 775, 781-82 (upholding residential placement for mentally retarded child), *modified*, 215 Neb. 284, 338 N.W.2d 591, *cert. denied*, 464 U.S. 893 (1983); *cf. D.S. v. Board of Educ.*, 188 N.J. Super. 592, 609, 458 A.2d 129, 140 (App. Div.) (upholding state's power to compel school districts to pay for residential placements despite lack of federal funding), *cert. denied*, 94 N.J. 529, 468 A.2d 184 (1983).

Contra A.W. v. Northwest R-1 School Dist., 813 F.2d 158 (8th Cir.) (rejecting mainstreamed placement on cost grounds), *cert. denied*, 484 U.S. 847 (1987); *Department of Educ. v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983) (denying private placement when suctioning and other needed health services available in public school, and noting that because of budgetary constraints school need only make efforts to accommodate "within reason"), *cert. denied*, 471 U.S. 1117 (1985); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.) (noting cost a proper factor in considering

Another measure of the radicalism of a change is its effect on the everyday lives of its beneficiaries or victims, and on others incidentally affected. For example, deinstitutionalization of mental patients yielded no dramatic shifts in national resource allocations — indeed it was provoked by efforts to conserve government resources in the fiscal pinches of the mid-1970s and 1980s.²⁹³ Yet it had a radical effect on the lives of the patients released and of the rest of the population, who now had those persons in its midst.²⁹⁴

Though more benign than deinstitutionalization, the reforms of the Education for All Handicapped Children Act could be expected to work a similar change in the national consciousness by bringing handicapped children into the mainstream and forcing society to provide services to enable them to survive there.²⁹⁵ The ultimate promise of the Act was no less than a redefinition of deviancy;²⁹⁶ the immediate and more realistic goal was improvement in the education and life opportunities for those physically or mentally different from the majority.²⁹⁷ Achievement of even the more modest goal would be a social transformation. The decisions of the lower courts after *Rowley*, particularly those extending the duty to educate in the least restrictive environment

appropriate placement since “excessive spending on one handicapped child deprives other handicapped children”), *cert. denied*, 464 U.S. 864 (1983); *Doe v. Anrig*, 692 F.2d 800, 806 (1st Cir. 1982) (stating needs of child must be balanced against scarce resources); *Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984) (denying residential placement for child who would benefit from it); *Rettig v. Kent City School Dist.*, 539 F. Supp. 768, 777 (N.D. Ohio 1981) (rejecting cost-blind approach), *aff’d in part and rev’d in part on other grounds*, 720 F.2d 463 (6th Cir. 1983), *cert. denied*, 467 U.S. 1201 (1984). Moreover, the Supreme Court mentioned cost consideration as a basis for the Act’s exclusion of medical services from its related services provision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), in which the court approved clean intermittent catheterization as a related service.

²⁹³ See Morrissey & Goldman, *Care and Treatment of the Mentally Ill in the United States: Historical Developments and Reforms*, ANNALS, Mar. 1986, at 12, 22.

²⁹⁴ See generally Golden, *Ill, Possibly Violent, and No Place To Go*, N.Y. Times, Apr. 2, 1990, at A1, col. 1 (nat’l ed.) (“Since the early 1980’s, the homeless mentally ill have been a ubiquitous muttering presence: slung over benches, crumpled on grates, led on mysterious crusades by shopping carts filled with scraps of other people’s lives.”).

²⁹⁵ Stafford, *supra* note 86, at 72 (1978).

²⁹⁶ *Id.* Professor Minow has noted that the structure of the Act, which requires a child’s identification as handicapped to entitle her to funded services, undercuts this goal. Minow, *supra* note 89, at 179.

²⁹⁷ H.R. REP. No. 332, *supra* note 37, at 11.

and provide the services to do so successfully, drive powerfully towards that social goal.

B. Correctness of the Lower Courts' Statutory Interpretation

The hallmark of the cases that retreat from *Rowley* is the implicit position that the statutory duty to provide appropriate education exceeds the obligation to furnish education conferring "some educational benefit."²⁹⁸ This position appears to run contrary to *Rowley*'s text with respect to children in a regular classroom progressing from grade to grade²⁹⁹ and may be contrary to *Rowley*'s reasoning with respect to other children.³⁰⁰ To assess the correctness of the lower courts' position on what Congress meant by appropriate education, one must consider methods of statutory construction and take up its ordinary tools: statutory language, prior and subsequent legislative history within the social context, and administrative interpretation.

1. Methods of Statutory Interpretation

No single, generally accepted mode of statutory interpretation exists. As Professor Llewellyn pointed out a generation ago, opposing canons of statutory construction apply to almost every question of interpretation that might be posed.³⁰¹ *Rowley*'s interpretation of appropriateness, however, does rest on one frequently used canon of construction: that in legislation enacted under the spending power, conditions imposed on states must be unambiguous.³⁰² The idea sounds more in contract than in public law — the states should be able to know what obligations they

²⁹⁸ Board of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

²⁹⁹ *Id.* at 203.

³⁰⁰ See *supra* text accompanying notes 129-34.

³⁰¹ Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950), reprinted in K. LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960). For example, Professor Llewellyn contrasts two canons of statutory construction as follows: "Thrust" — "A Statute cannot go beyond its text," *id.* at 522 (citing *First Nat'l Bank v. DeBerriz*, 87 W. Va. 477, 105 S.E. 900 (1921)), is met by "Parry" — "To effect its purpose a statute may be implemented beyond its text," *id.* (citing *Dooley v. Penn. R.R. Co.*, 250 Fed. 142 (D. Minn. 1918)).

³⁰² In *Rowley*, the court explained:

Moreover, even were we to agree that these statements [in the legislative history] evince a congressional intent to maximize

are undertaking in return for federal money.³⁰³ As a rule of statutory construction, this principle is dubious. A court construing a statute enacted pursuant to the spending power would do less violence to public policy by interpreting it as Congress intended, and then offering the state the choice to comply with the law or withdraw from the federal program.³⁰⁴ The Supreme Court did precisely that in *Rosado v. Wyman*,³⁰⁵ a 1970 case construing the Social Security Act.

Even if the principle were valid, however, it should not apply to the Education for All Handicapped Children Act, because Congress enacted that legislation pursuant to its duty to enforce the fourteenth amendment to the United States Constitution.³⁰⁶

each child's potential, we could not hold that Congress had successfully imposed that burden upon the States.

"[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."

458 U.S. at 204 n.26 (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981)).

³⁰³ *Pennhurst*, 451 U.S. at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.").

³⁰⁴ Even as a contract idea, this rule seems to place an undue burden on Congress. Although texts of contracts should be construed against their drafters to prevent drafters from taking unfair advantage, the states are the drafters of their own federally funded plans under the Education of the Handicapped Act and many other federal programs. See 34 C.F.R. § 300.110 (1989). Moreover, the states are hardly inexperienced or unadvised in undertaking commitments imposed by grant-in-aid programs.

³⁰⁵ 397 U.S. 397 (1970).

³⁰⁶ 20 U.S.C. § 1400(b)(9) (1988); S. REP. NO. 168, *supra* note 76, at 13; see *Rowley*, 458 U.S. at 198-200. *Smith v. Robinson*, 468 U.S. 992, 1012-13 (1984), went so far as to hold that Congress intended the Education for All Handicapped Children Act to be the exclusive avenue through which a parent could assert an equal protection claim about the content of a handicapped child's education. Congress has overruled *Smith* in part but has never cast doubt on its premise that the Act was intended to enforce the equal protection clause. See *infra* notes 335-39 and accompanying text. Although *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989), determined that the Act does not override the eleventh amendment so as to permit monetary relief against states in federal court actions brought under 20 U.S.C. § 1415,

Conditions imposed by such a statute should be construed fairly, even liberally.³⁰⁷

2. Congress' Original Language and Intentions

Rowley's narrow interpretation of the duty to provide appropriate education is difficult to square with the statutory text and legislative history. Although the statute features the unadorned word "appropriate," that word did have wide use, if somewhat unclear meaning, in professional circles.³⁰⁸ Apparently, the word signified a level of services higher than "some educational benefit."³⁰⁹

Strictly on the legislative history, the dissenters in *Rowley* have the better argument.³¹⁰ The House Report insists that "each child requires an educational plan that is tailored to achieve his or her maximum potential."³¹¹ Numerous passages in the transcript

it never questioned the claim that the Act's purpose was to enforce the fourteenth amendment.

³⁰⁷ See *Oregon v. Mitchell*, 400 U.S. 112, 286 (1970) (Stewart, J., concurring in part and dissenting in part) ("Congress brings to the protection and facilitation of the exercise of privileges of United States citizenship all of its power under the Necessary and Proper Clause."); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966). Mr. Rebell argues that the Education of the Handicapped Act is a hybrid civil rights and funding statute. He sees a paradox between *Smith* and *Rowley*, but suggests that its significance has diminished because the Handicapped Children's Protection Act reverses most of *Smith*. Rebell, *supra* note 233, at 1472, 1475-76.

³⁰⁸ See Gallagher, *The Special Education Contract for Mildly Handicapped Children*, 38 EXCEPTIONAL CHILDREN 527, 529 (1972); Rubin, Krus & Balow, *Factors in Special Class Placement*, 39 EXCEPTIONAL CHILDREN 525, 525 (1973); Smith & Arkans, *Now More than Ever: A Case for the Special Class*, 40 EXCEPTIONAL CHILDREN 497, 498 (1974).

³⁰⁹ Kuriloff, True, Kirp & Buss, *Legal Reform and Educational Change*, 41 EXCEPTIONAL CHILDREN 35, 38 (1974) (distinguishing between children "placed somewhere" and those "placed in appropriate programs" in accordance with the settlement in *P.A.R.C.*); see *Panitch v. Wisconsin*, 390 F. Supp. 611, 613 (E.D. Wis. 1974); *McMillan v. Board of Educ.*, 331 F. Supp. 302, 304 (S.D.N.Y. 1971).

³¹⁰ The majority's contention that Congress equated numbers of children receiving any level of services with those receiving appropriate services assumes a precision in dealing with statistics that is not found in any parliamentary body. As the dissent noted, statements in the legislative history about numbers were frequently linked to statements that insisted on the need for full equality of educational opportunity. *Rowley*, 458 U.S. at 213 & n.1 (White, J., dissenting).

³¹¹ H.R. REP. NO. 332, *supra* note 37, at 13.

of debates emphasize equality of educational services for handicapped and nonhandicapped children.³¹² Though the majority tried to dismiss these statements as isolated and ambiguous, they are fairly pervasive and quite clear.³¹³ The majority relies on this isolated and ambiguous characterization to buttress the idea of a low standard.³¹⁴ The majority is correct in saying that Congress' concern with the ultimate self-sufficiency of handicapped children does not necessarily support a high standard of services,³¹⁵ but it is incorrect in completely ignoring Congress' stated concern for self-sufficiency. Particularly for more severely handicapped children, minimal services will never lead to self-sufficiency; services that maximize potential will, at least for some of these children.

The *Rowley* majority relied more on the historical context of the statute than on its formal legislative history, reasoning that the right to education cases influenced Congress' ideas of what the law should require. It argued that Congress sought to impose by legislation the duties that the courts had imposed in interpreting the equal protection and due process clauses of the fourteenth amendment, and that these duties were minimal.³¹⁶ The majority noted that the term "appropriate" originated in *P.A.R.C.* and *Mills*, the leading handicapped education cases prior to the Act's adoption, where it was used in conjunction with the term "ade-

³¹² 121 CONG. REC. 37,418-19 (remarks of Sen. Cranston); *id.* at 37,413 (remarks of Sen. Williams); *id.* at 37,412 (remarks of Sen. Taft); *id.* at 37,030 (remarks of Rep. Mink); *id.* at 37,025 (remarks of Rep. Perkins); *id.* at 25,540 (remarks of Rep. Grassley); *id.* at 25,538 (remarks of Rep. Cornell); *id.* at 23,704 (remarks of Sen. Brademas); *id.* at 19,505 (remarks of Sen. Beall); *id.* at 19,504 (remarks of Sen. Humphrey); *id.* at 19,483 (remarks of Sen. Stafford); *id.* at 19,482-83 (remarks of Sen. Randolph); *see also* S. REP. NO. 168, 94th Cong., 2d Sess. 9 (emphasizing "equal educational opportunity" for handicapped children).

³¹³ *See* sources cited *supra* note 312.

³¹⁴ *See Rowley*, 458 U.S. at 208-09 (quoting Senate Report statement that services need not guarantee any particular level of achievement). While no one in Congress contended that the services had to guarantee a given level of achievement, there are repeated statements indicating that the services should be calculated to permit the child to achieve as much of her potential as possible. *See, e.g.*, H.R. REP. NO. 332, *supra* note 37, at 13; 121 CONG. REC. 37,419 (remarks of Sen. Beale); *id.* at 37,412 (remarks of Sen. Taft); *id.* at 37,030 (remarks of Rep. Daniels); *id.* at 25,538 (remarks of Rep. Cornell); *id.* at 23,704 (remarks of Rep. Brademas).

³¹⁵ *See Rowley*, 458 U.S. at 201 n.23.

³¹⁶ *See id.* at 199-200.

quate.”³¹⁷ These cases receive repeated mention in the legislative history.³¹⁸

The Court was incorrect, however, in assuming that *P.A.R.C.* and *Mills* applied a restrictive concept of appropriate education and imposed only limited duties. Nothing in the cases themselves limits services or lends support to the idea that equal protection involves only a limited notion of appropriate education.³¹⁹ While the Court buttressed its position by noting that Supreme Court interpretations of equal protection in education at the time of passage of the 1975 Act conferred only limited obligations on schools, *San Antonio Independent School District v. Rodriguez*,³²⁰ the case most clearly embodying those ideas, came down well after *P.A.R.C.* and *Mills*.³²¹ The earlier cases were strongly influenced by *Hobson v. Hansen*,³²² in which Judge J. Skelly Wright had emphasized that equal protection implies full equality of opportunity across all groups provided educational services.³²³ While *Rodriguez* may have influenced Congress apart from the influence of *P.A.R.C.* and *Mills*, this influence would not necessarily lead Congress to impose only limited duties. Congress knew that its statutes enforcing equal protection can impose obligations that exceed those imposed by the clause itself, particularly when the statute is one that does more than simply bar discrimination against a particular group.³²⁴ Indeed, recent cases that seek rem-

³¹⁷ *Id.* at 197 n.21.

³¹⁸ *Id.* at 194.

³¹⁹ See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279, 286 (E.D. Pa. 1972). The Supreme Court's emphasis on the word "access" is misplaced. The *P.A.R.C.* consent agreement speaks of access to appropriate education, not that access is appropriate education. See *id.* at 286. The word "access" may have been used to indicate that special education would not be imposed on children without their parents' consent.

³²⁰ 411 U.S. 1 (1973).

³²¹ *Rodriguez*, though supporting the idea of only a minimal duty to educate, does not dispute that a constitutional entitlement to minimum education may arise because education is needed to exercise rights under the first amendment or other constitutional provisions. See *Handel*, *supra* note 23, at 354. But see *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citing *Rodriguez* for the proposition that no general constitutional right to education exists).

³²² 269 F. Supp. 401 (D.D.C. 1967); see *Mills*, 348 F. Supp. at 875.

³²³ *Hobson*, 269 F. Supp. at 497-98.

³²⁴ See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 627 n.6 (1987) (distinguishing more expansive provisions of Title VII of Civil Rights

edies for educational deprivations occurring before the Act's passage generally have failed, despite the argument that the Act merely codified duties imposed all along by the Constitution.³²⁵

Significantly, supporters of *Rowley*'s interpretation of appropriate education tend to focus on practicality, saying that a comparability or maximization standard is unworkable.³²⁶ Although statutes should not be construed to achieve bizarre results, Congress should be free to enact the impractical. Indeed, the impracticality of an enactment is evidence of Congress' radical intentions. Any difficulty inherent in these higher standards does not rise to bizarre legislative results; before *Rowley*, courts imposed the standards without creating educational crises. The *Rowley* standard, moreover, has its own workability problems.³²⁷ The Court may have been strongly sensitive to cost concerns, but

Act of 1964 from those of Title VI, whose scope does not exceed that of the equal protection clause).

³²⁵ For example, in *Alexopoulos v. Riles*, 784 F.2d 1408 (9th Cir. 1986), the court denied a handicapped student's claim for compensatory education beyond age 21 and damages for the period before 1973 based on equal protection, due process, and retroactive application of § 504 and the Education of the Handicapped Act. The court held that *Smith* bars even pre-1973 equal protection claims, that the due process claim was barred by the statute of limitations since the plaintiff had not raised tolling for incompetence before the trial court, and that *Smith* bars the retroactive § 504 claim. *Id.* at 1411-12. With regard to the retroactive Education of the Handicapped Act claim, the court noted that compensatory education is equivalent to tuition reimbursement, which is barred by the eleventh amendment. *Id.* at 1412. Retroactivity, the court held, does not extend beyond cases awaiting administrative action at the time the Act became effective. *Id.*

In *Gallagher v. Pontiac School District*, 807 F.2d 75 (6th Cir. 1986), the court rejected a claim for damages by a deaf person with a mental handicap who was inadequately educated from 1973 to 1979. The court found that the Act was inapplicable because the plaintiff was 23 on its effective date, and that due process was not violated because the provision of inadequate services is not a deprivation or exclusion. *Id.* at 78-79. The court also rejected an equal protection claim because the plaintiff was not excluded or shown to have been treated differently from others. *Id.* at 79. Finally, it found § 504 inapplicable because the defendants' specific programs were not federally funded. *Id.* at 80-81. *But see* *White v. State*, 195 Cal. App. 3d 452, 240 Cal. Rptr. 732 (1987) (upholding declaratory judgment that plaintiffs were entitled to compensatory education for defendants' failure to allocate state funds for education of children in state hospital system from 1977 to 1981, allegedly in violation of Act and § 504).

³²⁶ *E.g.*, *Wegner*, *supra* note 12, at 191-92.

³²⁷ *See supra* text accompanying note 155.

it should not have assigned those concerns more weight than Congress did.³²⁸

3. Subsequent Congressional Activity

Congress did nothing to overrule *Rowley*. It has reauthorized the Education of the Handicapped Act without changing any of the language on which the Court relied.³²⁹ The failure of Congress to overturn a Supreme Court interpretation suggests that the Court correctly interpreted congressional intent, or, even if it did not, that the Court's interpretation reflects the present will of Congress.

Although commentators take different positions on the validity of such an argument,³³⁰ even the argument's proponents agree that the courts have applied it inconsistently³³¹ and that it carries persuasive force only in certain circumstances.³³² The argument gains strength when the precedent that Congress has failed to disturb is well known, authoritative, and unambiguous.³³³ It weakens when those conditions do not apply. Although *Rowley's* interpretation of appropriate education probably meets the first condition, it fails the latter two. The opinion came down eight years ago, but it has not had the authoritative impact that might have been expected. A legislator who felt *Rowley* misinterpreted the Act would probably investigate the effect of the opinion on the lower courts. Once she learned its limited effect, she would decide to leave well enough alone.

The ambiguity of *Rowley* would reinforce such a legislative decision. By limiting its holding to the unusual facts before it, the *Rowley* majority allowed for a significant portion of the lower

³²⁸ See *supra* text accompanying note 98.

³²⁹ E.g., Act of Nov. 7, 1988, Pub. L. No. 100-630, 102 Stat. 3289; Act of Oct. 8, 1986, Pub. L. No. 99-457, 100 Stat. 1145, 1177.

³³⁰ Compare R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 179-83 (1975) (challenging validity of argument) with Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 56-62 (1988) (endorsing argument in some circumstances as expression of intent of present legislature and means of promoting coherence of laws). Justice Scalia has taken a strong position against use of the argument under most circumstances. E.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

³³¹ Aleinikoff, *supra* note 330, at 40; Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90 (1988).

³³² See Eskridge, *supra* note 331, at 108.

³³³ See *id.*

court retreat. Even a legislator ignorant of the retreat from *Rowley* might have been able to predict it. Indeed, an argument might now be made that Congress' failure to amend the statute is an endorsement of the lower court case law imposing enhanced obligations on states and localities.³³⁴

Congress did overrule *Smith v. Robinson*,³³⁵ in which the Court held that because the Act preempts other substantive statutory and constitutional requirements for educating handicapped children, attorneys fees are not available under either the Civil Rights Attorneys Fees Act of 1976 or section 504 of the Rehabilitation Act of 1973.³³⁶ The Handicapped Children's Protection Act of 1986³³⁷ overturned *Smith*. It gives a right to attorneys fees to parents who prevail in Education for the Handicapped Act proceedings³³⁸ and restores the availability of remedies under the Constitution and the Rehabilitation Act for deprivation of handicapped education rights, subject to exhaustion of administrative procedures prescribed by the Education for the Handicapped Act.³³⁹ On the one hand, congressional overruling of *Smith* may re-enforce the argument that Congress has acquiesced in *Rowley*. On the other hand, the Handicapped Children's Protection Act may, by its own terms, weaken *Rowley*, both formally and practically.

It may weaken *Rowley* formally by restoring the availability of a cause of action under section 504 of the Rehabilitation Act of 1973³⁴⁰ in cases having to do with handicapped children's education. The Handicapped Children's Protection Act thus restored

³³⁴ See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (finding congressional acquiescence ratified statutory interpretation found in lower court decisions).

³³⁵ 468 U.S. 992 (1984).

³³⁶ *Id.* at 1009-13. Recently Congress overruled a second Supreme Court case interpreting the Act, *Dellmuth v. Muth*, 109 S. Ct. 2379 (1989), by prospectively abrogating state sovereign immunity in cases arising under the Act. See Pub. L. No. 101-476, § 604, 104 Stat. 1103, 1106 (1990).

³³⁷ Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified at 20 U.S.C. § 1415(e)-(f) (1988)); see Guernsey, *The Education for All Handicapped Children Act, 42 U.S.C. § 1983, and Section 504 of the Rehabilitation Act of 1973: Interaction Following the Handicapped Children's Protection Act of 1986*, 68 NEB. L. REV. 564, 591-92 (1989).

³³⁸ 20 U.S.C. § 1415(e)(4) (1988).

³³⁹ *Id.* § 1415(f).

³⁴⁰ Section 504 prohibits discrimination on the basis of handicap in any program or activity receiving federal funds. 29 U.S.C. § 794 (1988).

the force of regulations promulgated under section 504, which define appropriate education as that which both satisfies the Education of the Handicapped Act and meets an equality standard: "the provision of an appropriate education is the provision of regular or special education and related aids and services that . . . are designed to meet individual needs of handicapped persons as adequately as the needs of nonhandicapped persons are met" ³⁴¹ *Smith* had rendered this regulation unavailable in suits challenging the educational services provided handicapped children, holding that Congress meant to give all the protection that was due to handicapped children in the Education of the Handicapped Act and its regulations. ³⁴² Moreover, *Rowley* had specifically disapproved of reliance on the section 504 regulation in its interpretation of the Education of the Handicapped Act. ³⁴³ By restoring the availability of the "as adequately" regulation, the Handicapped Children's Protection Act effectively may have overruled that portion of *Rowley*. ³⁴⁴

Rowley may also have been weakened practically, because the Handicapped Children's Protection Act allows parents to assert section 504 standards (albeit after exhausting Education of the Handicapped Act remedies) to obtain the same services that would be denied under *Rowley*'s interpretation of the Education of the Handicapped Act. They simply would join a claim for violation of section 504 and its regulations to their Education of the Handicapped Act claim. ³⁴⁵ Parents will thus be able to rely on the

³⁴¹ 34 C.F.R. § 104.33(b)(1) (1989). Senator Stafford, a sponsor of the 1975 Act, emphasized its harmony with the Rehabilitation Act regulations. See Stafford, *supra* note 86, at 80-82.

³⁴² *Smith v. Robinson*, 468 U.S. 992, 1012-13 (1984).

³⁴³ See *Board of Educ. v. Rowley*, 458 U.S. 176, 186 n.8 (1982).

³⁴⁴ The Handicapped Children's Protection Act might be taken to be approval, in general, of the § 504 regulations governing the education of handicapped children. Congress enacted it just after *Alexander v. Choate*, 469 U.S. 287 (1985), which commented favorably on regulations dealing with handicapped education promulgated under § 504. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), is not to the contrary. *Davis* might be viewed as casting doubt on the validity of the § 504 regulations, see *Jones*, *supra* note 96, at 302-05, but any doubt should no longer exist after *Choate*, *Smith*, and the Handicapped Children's Protection Act. Articles written before *Rowley* and *Smith*, such as Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 14 (1981), stress the "as effective a benefit" language of the § 504 regulations.

³⁴⁵ Jurisdiction would lie in federal court under the general federal

equality-oriented section 504 regulations, as well as on case law interpreting section 504 as imposing expansive educational obligations.³⁴⁶

Although the Education of the Handicapped Act and section 504 are not coterminous,³⁴⁷ they overlap. The section 504 regu-

question jurisdiction statute. 28 U.S.C. § 1331 (1988). Further, numerous cases establish the existence of a private cause of action under § 504. *E.g.*, *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

³⁴⁶ See *infra* note 349 and accompanying text. Dean Wegner casts some doubt on this position. Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence—Part II: Future Rights and Remedies*, 17 J.L. & EDUC. 625 (1988). She suggests that the Education of the Handicapped Act, § 504, and § 1983 can be read in harmony by using the three statutes for distinct factual situations. In particular, she would reserve § 504 for cases in which handicapped children seek equal participation in programs for nonhandicapped children. The programs may need to be modified to accommodate disabled students. Wegner, *supra*, at 645. Dean Wegner's observation that § 504 applies to extracurriculars and other such educational activities may call for overruling *Rettig v. Kent City School District*, 788 F.2d 328 (6th Cir.), *cert. denied*, 478 U.S. 1005 (1986), which found the regulations' requirement of equal opportunity for participation in extracurriculars, 34 C.F.R. § 300.306 (1985), conflicts with the statute as interpreted in *Rowley*. Nevertheless, *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), may support *Rettig's* result, since the Court there doubted the ability of handicapped students to benefit from the activities. *Id.* at 410.

Wegner objects to the use of the equality duty established by § 504 in disputes hinging on the level of educational services for the handicapped on the ground that substantively unequal education is extremely difficult to define or prove. Wegner, *supra*, at 644. The courts, however, should not be reluctant to impose a standard that has been articulated by Congress and its designated regulatory agency simply because application is difficult. See *supra* text accompanying notes 326-28. Moreover, as noted above, courts have applied an equality standard without disastrous consequences; they did so quite frequently before the Supreme Court opinion in *Rowley*. See *supra* text accompanying notes 99-101.

³⁴⁷ At a minimum, § 504 covers more children than does the Education of the Handicapped Act. See Wegner, *supra* note 346, at 648. In various cases involving exclusion of children who test positive for the human immunodeficiency virus (HIV), courts have found the children covered by § 504 but not the Education of the Handicapped Act, thus sparing them the need to exhaust administrative remedies. For example, in *Doe v. Belleville Public School District No. 118*, 672 F. Supp. 342 (S.D. Ill. 1987), the court held that an HIV-infected hemophiliac six-year-old child was not covered by the Education of the Handicapped Act, and thus was not required to exhaust administrative remedies in an action brought under § 504 to challenge his exclusion from school. *Id.* at 345. The *Doe* court stated:

[T]hree tests must be met before the provisions of [the

lations call for educational services for the handicapped that "are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met," a requirement that the courts cannot simply ignore. Although *Smith* put that regulation beyond the reach of parents in most cases, the legislative history of the Handicapped Children's Protection Act evinces a clear intent to overrule *Smith* and restore all rights lost by the decision.³⁴⁸ Parents should be able to take full advantage of the section 504 cases preceding the *Smith* decision in which courts frequently ordered expansive relief under section 504.³⁴⁹ Nevertheless, recent case law has not yet demon-

Education for All Handicapped Children Act] can be made to apply in this case: 1) there must be limited strength, vitality, or alertness due to chronic or acute health problems, 2) which adversely affects a child's educational performance, and 3) which requires special education and related services. Here, the record reveals virtually no evidence that plaintiff suffers from limited strength, vitality, or alertness. Furthermore, given such evidence as is in the record of Johnny's limited strength, there is virtually no evidence that this limitation has adversely affected his educational performance.

Id. at 344 (footnotes omitted).

In *Thomas v. Atascadero Unified School District*, 1987-88 Educ. Handicapped L. Rep. (CRR) 559:113 (C.D. Cal. 1987), the court held that an HIV-infected student who was excluded from school after biting a classmate had to be admitted into regular classes. The court held that the child was covered by § 504, which requires that handicapped persons be in the regular educational environment unless it is demonstrated that education there cannot be achieved satisfactorily with the use of supplementary aids and services. *Id.* at 559:117-118. The court in that case did not even discuss the applicability of Education of the Handicapped Act or the possibility of an exhaustion requirement.

Section 504 may also cover parents. *Rothschild v. Grottenthaler*, 716 F. Supp. 796 (S.D.N.Y. 1989), held that a school district had to pay for sign language interpreters and for the installation of a telephone for the deaf device to communicate with deaf parents of two non-hearing-impaired students. The court held that § 504 applied to the parents and that the requested services were not unreasonable as accommodations. *Id.* at 800.

³⁴⁸ See *Handicapped Children's Protection Act: Hearings on H.R. 1523 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 7 (1986) (statement of Rep. Williams); 132 CONG. REC. S9,277 (daily ed. July 17, 1986) (remarks of Sen. Weicker) ("The handicapped children of this country have paid the costs for two years now. But today we correct this error. In adopting this legislation, we are rejecting the reasoning of the Supreme Court in *Smith versus Robinson*, and reaffirming the original intent of Congress . . .").

³⁴⁹ *E.g.*, *David H. v. Spring Branch Indep. School Dist.*, 569 F. Supp.

strated the use of section 504 and its regulations in the manner suggested here; the courts have applied the law mostly in traditional cases of overt discrimination.³⁵⁰

4. Administrative Interpretation of the Statute

The regulations promulgated under the Education of the Handicapped Act, though they fill in many procedural details, play only a limited role in interpreting the substantive duty of appropriate education.³⁵¹ Nevertheless, to the extent that the provisions on placement in the least restrictive environment³⁵² and in residential settings call for enhanced services, those provi-

1324 (S.D. Tex. 1983); John A. v. Gill, 565 F. Supp. 372 (N.D. Ill. 1983); Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361 (W.D. Mich. 1983); William S. v. Gill, 536 F. Supp. 505, 512 (N.D. Ill. 1982); Gregg B. v. Board of Educ., 535 F. Supp. 1333, 1340 (E.D.N.Y. 1982); Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460 (S.D. Tex. 1982); Reineman v. Valley View Community School Dist. No. 365-U, 527 F. Supp. 661, 665 (N.D. Ill. 1981); Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142, 1146 (D.D.C. 1981); Hark v. School Dist., 505 F. Supp. 727, 731 (E.D. Pa. 1980); Patton v. Dumpson, 498 F. Supp. 933, 938-39 (S.D.N.Y. 1980); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 949 (D.N.J. 1980); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1112 (N.D. Cal. 1979); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976).

³⁵⁰ For example, in *Riley v. Jefferson County Board of Education*, 1988-89 Educ. Handicapped L. Rep. (CRR) 441:632 (N.D. Ala. 1989), the court found that a fee scale for after-school care that charges more for handicapped children violates § 504. In *Martinez v. School Board*, 861 F.2d 1502 (11th Cir. 1988), the court reversed the district court and held that an HIV-infected, mentally handicapped child who was incontinent, had thrush and sucked his fingers could not be restricted to an enclosure in the classroom. In *Hendricks v. Gilhool*, 709 F. Supp. 1362 (E.D. Pa. 1989), the court found that a cooperative of school districts providing services to severely handicapped children from several localities violated both the Act and § 504 by providing significantly unequal classrooms for handicapped students and by segregating handicapped children in different buildings from nonhandicapped students. The court declared:

[B]oth Acts prohibit funding recipients from furnishing to handicapped individuals facilities and services that are objectively *inferior* to those provided their nonhandicapped peers. The prohibition of discrimination against the handicapped is explicit in Section 504, and is a pervasive theme in the case law and regulations implementing both Section 504 and the EHA.

Id. at 1366 (emphasis in original).

³⁵¹ See *supra* text accompanying notes 81-85.

³⁵² See *supra* text accompanying note 85.

sions are entitled to deference.³⁵³ Moreover, to the extent that the section 504 regulations are applicable to disputes over appropriate education, they too are entitled to deference. In *Alexander v. Choate*, a section 504 challenge to hospital stay restrictions in a state Medicaid plan, the Supreme Court indicated that regulations promulgated under section 504 are “an important source of guidance on the meaning of section 504.”³⁵⁴ Thus the regulations may lend further support to the lower courts’ expansive interpretations of “appropriate education.”

C. Propriety of Treatment of Precedent

Even if one concludes that the lower courts’ interpretations of the Act represent better constructions than that found in *Rowley*, that conclusion hardly ends the assessment of the courts’ radicalization. The lower courts are *lower* courts. To evaluate whether their conduct is proper in light of the Supreme Court’s authoritative construction of the statute, this Article will take up the issues underlying fidelity to precedent and consider the policies that might call for either broad or narrow readings of the precedent’s rationale. It will then consider whether the grounds on which the lower courts have distinguished *Rowley* or declined to extend its reasoning significantly undermine those policies.

³⁵³ The current standard for deferring to administrative regulations is *Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984), which states that if Congress has not addressed the precise question at issue, the court asks whether the agency’s answer is based on a permissible construction of the statute. *See id.* at 843. The reasons for this rule are the wisdom of following agency expertise and the court’s desire to protect the agency’s ability to act effectively. *Id.* at 865. Other considerations support the rule, such as uniformity and coherence of regulatory activity, even apart from following Congress’ intentions. *See Diver, Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 585-92 (1985); Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). Moreover, the Court has shown a strong willingness to defer to enforcement agencies’ interpretations in civil rights matters. *E.g.*, *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 603-07 (1983) (holding that Title VI regulations may proscribe conduct not forbidden by the statute); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 430-35 (1975) (placing reliance on EEOC guidelines in interpreting Title VII).

³⁵⁴ *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985).

1. Issues in the Application of Precedent

Stare decisis has three dimensions: a court's fidelity to its own decisions, its fidelity to nonbinding court decisions, and its fidelity to binding decisions of courts superior to it. Most recent scholarship on precedent focuses on the first two issues,³⁵⁵ perhaps reflecting the view that duties authoritative precedent are obvious.³⁵⁶ Nevertheless, nearly the same breadth of technique applies to a court's treatment of authoritative precedent as applies to a court's treatment of ordinary or merely persuasive precedent. The court cannot overrule or ignore binding precedent,³⁵⁷ but it may distinguish, read narrowly, or follow an approach that leads in a contrary direction with independent support. None of these techniques is illegitimate if done openly.³⁵⁸ Still, the court must be sensitive to the policies behind fidelity to authoritative precedent: preservation of the authority of the higher court and the law itself,³⁵⁹ fairness,³⁶⁰ certainty and finality in application of the law,³⁶¹ application of expertise,³⁶² and

³⁵⁵ E.g., Kornhauser, *An Economic Perspective on Stare Decisis* 65 CHI.[-]KENT L. REV. 63 (1989); Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.[-]KENT L. REV. 93 (1989); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

³⁵⁶ Two recent pieces on issues concerning fidelity to binding precedent indicate that this assumption is far from correct. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORD. L. REV. 53 (1982); Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87 (1984).

³⁵⁷ *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[P]recedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

³⁵⁸ K. LLEWELLYN, *supra* note 301, at 77-91 (classifying legitimate and illegitimate techniques in applying or retreating from precedent).

³⁵⁹ *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970).

³⁶⁰ *Id.*

³⁶¹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled*, *Commissioner v. Mountain Producers Corp.*, 303 U.S. 376 (1938). Justice Scalia emphasizes this concern and fairness concerns in his recent essay about the scope of Supreme Court decisionmaking. Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989). Scalia argues that early establishment of a broad rule of decision, rather than a narrow holding, is a preferable course for Supreme Court review of matters of law. Although his position gains support from the value society places on certainty, predictability, and uniformity in the law, it does not account adequately for the need to adapt the law to changing conditions over time or over a range of social conditions. Moreover, it assumes a monopoly of wisdom in the Supreme Court, even

achievement of economy.³⁶³ Balanced against these policies are those that may be served by more narrowly reading some decisions of higher courts: furtherance of the intentions of framers of legislation or constitutional text;³⁶⁴ sensitivity to individual facts;³⁶⁵ and adaptation to social change.³⁶⁶

No court making the retreat from *Rowley* has disregarded it entirely. Instead, the courts have sought to distinguish it on any of a number of grounds, or they have applied policies not fully considered in the opinion that push in directions contrary to it. The policies involved in application of authoritative precedent lend varying degrees of support to the distinctions and use of alternative statutory policies.

2. Validity of Distinctions Used

The *Rowley* Court invited lower courts to make distinctions by restricting its application of the law to the case of a child who could succeed in a regular classroom without the services demanded.³⁶⁷ Courts thus legitimately reach different results for more severely handicapped children in self-contained placements and for mildly handicapped children who nevertheless cannot succeed in the mainstream without additional help.

Still, the underlying reasoning of *Rowley* may render this analysis too facile. The Court found that the Act requires only access to useful education. It implied, at least, that the Act's obligations are tempered by cost considerations. Given the invitation of the Court to distinguish the case, however, lower courts hardly diminish the authority of the Supreme Court or the legal process by failing to extend the Court's reasoning to what is in fact a dramatically different context. Fairness concerns are also minimal

when that wisdom lacks the basis of the varied factual settings that produce a line of cases developing a principle in common law fashion. The Court in *Rowley* hedged its bets on articulating a broad rule, permitting the development of a line of lower court cases that pushes in a different direction. The justice of the result in those cases and the importance of the congressional policies they advance show the value of hedging and the danger of early establishment of a broad Supreme Court rule of decision.

³⁶² See Schauer, *supra* note 355, at 575.

³⁶³ See Kornhauser, *supra* note 355, at 65.

³⁶⁴ See *Barden v. Northern Pac. R.R.*, 154 U.S. 288, 322 (1894).

³⁶⁵ See *K. LLEWELLYN*, *supra* note 301, at 126.

³⁶⁶ Note, *The Attitude of Lower Courts to Changing Precedents*, 50 *YALE L.J.* 1448, 1456-57 (1941).

³⁶⁷ *Board of Educ. v. Rowley*, 458 U.S. 176, 202 (1982).

because the facts of the cases differ. The lower courts do compromise certainty and finality, though the ambiguity of *Rowley* and its departure from legislative intent and previous lower court case law suggest a lowered premium on those policies in this context. The lower courts also frustrate the economy and benefits of Supreme Court expertise in construing federal statutes when they re-examine the Act and adopt different approaches. Nevertheless, *Rowley*'s restriction of its application of the law to its specific facts suggests a tentativeness that again seems to minimize the importance of these policies in lower court cases.

Balanced against these concerns are the lower courts' fidelity to Congress' commands and their adaptation to compelling facts in individual cases. Although the passage of time may not call for departure from *Rowley*'s reasoning on the ground of social change, the lower courts are exercising greater sensitivity to the social context of the statute than the Supreme Court did.³⁶⁸

3. Other Statutory Policies

Courts have retreated from *Rowley* not only by distinguishing it on its facts, but also by invoking statutory policies in favor of delivering services in the least restrictive environment, individualization, and application of state educational standards, even in factually similar cases. These policies run contrary to the policies the *Rowley* Court emphasized: allowing only minimal access and preserving state and local resources. The lower courts' conduct may slightly diminish the authoritativeness of the Supreme Court's statutory interpretation, the certainty of the interpretation, and the conservation of judicial effort. Yet it does so far less than would be the case had the *Rowley* Court explicated the policies of least restrictive environment, individualization, and state educational standards, and found them subordinate to minimal access and cost-saving.

In fact, the *Rowley* Court did not explicitly balance any of the important statutory policies that might influence the interpretation of the Act. The Court's later conduct in cases such as *Tatro* and *Burlington* suggests that the policies of least restrictive environment and individualization ought to matter. *Rowley* itself, with its emphasis on state educational policy making, implies that state educational standards should affect the interpretation of the Act. Even if what the lower courts have done is gently correct *Rowley*'s

³⁶⁸ See *supra* text accompanying notes 25-49.

interpretation of the Act, they have achieved considerable gains in furthering congressional policies.

VI. SPECULATIONS ON THE CONDITIONS FOR JUDICIAL TRANSFORMATION OF RADICAL STATUTES

A mix of social forces may induce a legislature to pass a radical statute, but other social forces may operate on the courts that interpret it or the officials who administer it. Different forces may even act on various levels of courts or on the same courts at different times. The Education of the Handicapped Act has undergone a transformation of judicial interpretation. By study of the transformation, some conclusions may emerge about the influence of society on law and, perhaps, law on society.

This study of judicial transformation is a little like a social experiment without a control group.³⁶⁹ The observer can describe features of the transformation of the Education of the Handicapped Act from its radical origins through its deradicalization to its current reradicalized state. Yet the observer has no way of knowing whether this transformation is unique or typical for statutes that seek to remake society.³⁷⁰ Comparison to other stat-

³⁶⁹ Cf. Wells, *The Unimportance of Precedent in the Law of Federal Courts*, 39 DE PAUL L. REV. 357, 358 (1989) (using examples to show comparative unimportance of precedent in one field of law, but acknowledging lack of empirical proof).

³⁷⁰ The most appealing subject for comparison would be the Wagner Act, 29 U.S.C. §§ 151-168 (1988), which was the subject of Professor Klare's influential study of Supreme Court "deradicalization" of a radical congressional enactment. See Klare, *supra* note 15. The Wagner Act and the Education of the Handicapped Act have a number of similarities. Both were the result of widespread social movements. In the eyes of their framers, both laws would have a profound impact both on the class of persons they protected and on greater society, altering the balance of power between the protected group and other social groups. They radically changed the legal landscape, imposing enforceable rights and specific duties that had not existed previously.

Both statutes received early, limiting constructions of key terms from the Supreme Court. The lower federal courts expanded the Supreme Court's limited construction in the case of the Education of the Handicapped Act; they did not do so with the Wagner Act. Nevertheless, with the Wagner Act the National Labor Relations Board, effectively a lower adjudicatory body, sought to limit the reach of Supreme Court holdings it felt hobbled the law. The Board's efforts ultimately failed. Whether a similar fate awaits the lower court interpretations of the Education of the Handicapped Act remains to be seen. The history of the Wagner Act stretches half a century,

utes is difficult, because of differences in both statutory language

while the Education of the Handicapped Act has existed barely 15 years. Still, the interpretation of the Wagner Act has not changed dramatically since the cases of the late 1930s that cut short its radical reach. Instead, the Wagner Act decisions have grounded a consistent if not entirely coherent paradigm of "industrial pluralism," which has continued throughout the period following World War II. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1514-15 (1981).

The National Labor Relations Act, or Wagner Act, was "perhaps the most radical piece of legislation ever enacted by the United States Congress." Klare, *supra* note 15, at 265. *Contra* Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23, 85 (1984). Congress sought to end a wave of Depression-era strikes and to forestall civil unrest by massively shifting both immediate bargaining power and future purchasing power to organized workers. Klare, *supra* note 15, at 266, 282-84. Thus, the Wagner Act had the potential to reallocate social resources and change the life experience of large segments of the population. *See supra* text accompanying notes 289-97 (describing radical legislation as that which seeks to reallocate vast resources or change the everyday lives of many people). As in the case of the Reconstruction Civil Rights Acts, the targets of the law mounted large-scale resistance. A wave of strikes and other assertions of power by workers led to some acceptance of the law, however. Klare, *supra* note 15, at 266. Supreme Court approval of the Wagner Act's constitutionality followed. *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

The Reconstruction Civil Rights Acts may supply other examples of radical social statutes. The radical Republicans who dominated Congress after the Civil War approved not only the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution, but also a series of acts designed to implement those amendments. These include the Civil Rights Act of 1866, 14 Stat. 27, codified as amended at 18 U.S.C. § 242 and 42 U.S.C. §§ 1981-1982 (1988), a law forbidding "black code" restrictions on emancipated slaves' rights; the Civil Rights Act of 1870, 16 Stat. 144, codified as amended at 18 U.S.C. §§ 241-242 and 42 U.S.C. § 1981 (1988), which amended and reenacted the 1866 Act, expanding protection of voting rights and providing criminal sanctions for conspiracies; and the Civil Rights Act of 1871, 17 Stat. 13, codified as amended at 42 U.S.C. §§ 1983, 1985(c), and 1986 (1988), which established civil and criminal liability for rights violations under color of state law and civil liability for conspiracies to deprive persons of rights. The Civil Rights Act of 1875, 18 Stat. 337, the last of the series, required equality in public accommodations. *See generally*, G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 974-77 (10th ed. 1980) (discussing history of Reconstruction Civil Rights Acts). The amendments and civil rights acts had "one pervading purpose": the "freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873). This radical goal entailed a total upheaval of economic and social life in the South, as well as a reorientation of governmental power from the states to

and social and political history.³⁷¹ Nevertheless, the attempt

the central government. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 342 (1949). These aspirations qualify the Reconstruction Civil Rights Acts as radical statutes under the description proposed *supra*, in text accompanying notes 285-94.

³⁷¹ The historical convolutions of the Wagner Act and the Reconstruction Civil Rights Acts have been heroic. After initially affirming the constitutionality of the Wagner Act, the Supreme Court, in a series of cases, limited workers' collective powers under the Wagner Act. The decisions allowed permanent replacement of economic strikers, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); see Klare, *supra* note 15, at 319 (discussing cases that limited the reach of the Wagner Act), banned the sit-down strike, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), barred some types of strikes during the term of a contract, *NLRB v. Sands Mfg.*, 306 U.S. 332 (1939), and established a duty to mitigate the effects of management unfair practices, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Although debate continues on the justification for the decisions, few suggest that the Wagner Act could be read only to support such readings, and none deny that the rulings limited the statute's potential radical effects. In the period following the early cases, the Supreme Court interpreted the Wagner Act primarily as a tool to facilitate collective bargaining and the orderly administration of collective bargaining agreements, rather than as a vehicle for conferring substantive rights, reordering economic power, or shifting wealth. Stone, *supra* note 370, at 1529-30. Again, debate exists on this topic, but centers more on whether the Supreme Court was justified in its interpretations than on whether the interpretations had that effect. See Finkin, *supra* note 370, at 64-71.

The Reconstruction Civil Rights Acts underwent a similar judicial deradicalization. With the end of Reconstruction in 1877, the federal government ceased direct enforcement of the Civil War amendments and the acts. Private enforcement remained open, but in 1883 in *The Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court declared the 1875 public accommodations provisions unconstitutional and effectively restricted the scope of the Civil War amendments and the other civil rights acts to discriminatory state action. This restriction gutted the acts; they were no longer effective as a means of "securing the firm establishment of that freedom" which the newly freed slaves had been promised. See Tussman & tenBroek, *supra* note 370, at 342. Beginning in the 1940s, however, the federal courts, both lower and Supreme, retreated from the position of *The Civil Rights Cases*, initially by finding more and more private discriminatory conduct to be state action. *E.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957). In 1968, the Supreme Court determined that one of the Reconstruction acts reached private conduct, and that the thirteenth amendment authorized it to do so. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (applying 42 U.S.C. § 1982). Although the Court recently considered overruling that holding, it reaffirmed it. *Patterson v.*

seems worth the effort.

How does the unseen hand of society guide judges — particularly different levels of judges — to give life to a statute's radical intentions, to stifle these intentions, or to revive them? A speculative investigation might consider the roles courts play in fostering and responding to group expectations, the legal theories they employ in reaching results, and the impact of both social facts and the facts of individual cases on case results. The investigator might also ask about the effects that social conflicts over resources and power have on the interpretation of a statute.

A. *Courts and Legal Theory*

The Supreme Court plays a different role in American life than do other courts of review. Decisions of the Supreme Court can unleash expectations or stymie popular movements.³⁷² *Brown v. Board of Education*³⁷³ eased the way for the mass civil rights movement by making popular protest appear more legitimate.³⁷⁴

McLean Credit Union, 109 S. Ct. 2363 (1989). In *Patterson*, however, the Court imposed a restrictive reading on the scope of the Reconstruction Civil Rights Act at issue, 42 U.S.C. § 1981.

The Supreme Court has placed other restrictions on some of the Reconstruction acts, *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) (holding § 1981 imposes intent requirement), but in some respects has construed them liberally, *e.g.*, *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (allowing punitive damages under § 1981).

As with the Education of the Handicapped Act, the Supreme Court issued a highly restrictive interpretation of both the Wagner Act and the Reconstruction Civil Rights Acts while the statutes were still new and barely developed by lower courts. Unlike what it has done with the Wagner Act, the Supreme Court eventually retreated from its own interpretation in cases under the civil rights acts. It did so initially by an ever more expansive development of the part of the law the early opinion had left open. Later it explicitly overturned its earlier interpretation. Most recently, the Court has feinted at restoring the restrictive reading of the law, but has finally reaffirmed its more radical view.

³⁷² “When the [court] structure is the typical pyramid, the subset of decisions that reaches the highest tier becomes imbued with great importance — either because the litigants have raised critical issues or because, by being decided by the most prestigious decisionmakers, the cases become critical to other litigants.” Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 868 (1984).

³⁷³ 347 U.S. 483 (1954).

³⁷⁴ F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 207 (Vintage ed. 1979).

*Wyman v. James*³⁷⁵ and *Jefferson v. Hackney*³⁷⁶ helped kill the welfare rights movement by convincing its leadership that legal challenges and other forms of working within the system could no longer provide easy victories.³⁷⁷ In some cases, the Court seems conscious of its role, and the role influences the Court's decision and reasoning.³⁷⁸

Lower courts' lesser visibility may make them more adventurous, less worried about the expectations their decisions create.³⁷⁹

³⁷⁵ 400 U.S. 309 (1971).

³⁷⁶ 406 U.S. 535 (1972).

³⁷⁷ Other factors, particularly organizational and political mistakes, may have been far more important, however. See F. PIVEN & R. CLOWARD, *supra* note 374, at 349-53.

³⁷⁸ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (recognizing welfare as statutory entitlement rather than charity); *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (stating that blacks were no longer "special favorites of the laws").

³⁷⁹ See Resnick, *supra* note 372, at 868 ("[T]he existence of a third tier, if small, may increase public scrutiny of that court, and the visibility of its proceedings may provide some constraints."). Compare *O'Connor v. Donaldson*, 422 U.S. 563, 572 (1975) (declining to decide whether mentally ill persons have a right to treatment under all circumstances) with *Donaldson v. O'Connor*, 493 F.2d 507, 519-22 (5th Cir. 1974) (finding broad right to treatment for all persons involuntarily confined for mental illness), *vacated*, 422 U.S. 563 (1975). Some lower courts came around to a somewhat more radical view of the Reconstruction Civil Rights Acts before the Supreme Court did. For example, *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948), anticipated *Terry v. Adams*, 345 U.S. 461 (1953), in barring white-only political primaries run by private organizations.

Comparisons to the interpretation of the Wagner Act do not support this idea, however. The courts of appeals were closer to the Supreme Court in their views on the statute. The National Labor Relations Board had a more explicitly political composition and ethos than the courts, though, and maintained a more radical view of the law than the Supreme Court did, even after the Supreme Court began issuing restrictive interpretations of statutory guarantees. See, e.g., *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); *Fransteel Metallurgical Corp.*, 5 N.L.R.B. 930, *rev'd*, 98 F.2d 375 (7th Cir. 1938), *aff'd*, 306 U.S. 240 (1939). As a single body reviewing implementation of a discrete set of important laws, the Labor Board received significant public attention. The attention apparently contributed as much to the Board's expansive constructions of the Wagner Act as to the Supreme Court's restrictive interpretations. Other factors beside the Board's relative visibility make problematic any comparisons between its conduct in Wagner Act cases and the conduct of the lower courts in Education of the Handicapped Act cases. The Labor Board's decisions involved more than a single term of the statute, unlike court decisions on

On the other hand, sometimes their lesser visibility contributes to an apparent indifference to appearance, which results in a less radical vision than the Supreme Court's. The state supreme courts in *Hansberry v. Lee*³⁸⁰ and *Reed v. Reed*³⁸¹ demonstrated obliviousness to the devastating messages that their decisions sent to black persons and to women respectively. When the Supreme Court reversed those decisions, it ignored the more radical reasoning suggested by the prevailing parties, but did not ignore the need to reach a result the nation could live with.³⁸²

This difference in the roles played by the lower courts and the Supreme Court may account for the more radical approach the lower courts have taken towards the Education of the Handicapped Act, despite the constraint of the *Rowley* precedent. The lower courts may have felt freer to embrace the clear meaning of the Act; in contrast, the Supreme Court may have feared unleashing expectations that would be costly to satisfy. The Court had taken a similarly conservative approach to handicapped rights in *Southeastern Community College v. Davis*,³⁸³ decided just three years before *Rowley*. There, the Court limited the duties imposed on federal grantees by section 504 of the Rehabilitation Act of 1973, holding that the law did not require the defendant college to substantially modify its nursing education program to accommodate a deaf student nurse.³⁸⁴ That interpretation was hardly inevitable: it was inconsistent not only with the

the meaning of "appropriateness." Further, the Labor Board's decisions affected not a government entitlement, but rather the ability to exercise economic or political power to obtain economic or political advantage in society.

³⁸⁰ 311 U.S. 32 (1940). *Hansberry* reversed a state court decision enforcing a covenant that forbade sale of specified land to blacks. The Court reasoned that the black petitioners challenging the covenant were not bound by a previous court decision in a case to which they were not parties, which had erroneously found the covenant properly executed. *Id.* at 45-46.

³⁸¹ 404 U.S. 71 (1971). *Reed* applied a rational basis standard of review to reverse a decision upholding a state statute giving preference to males as administrators of estates when women were equally qualified. *Id.* at 76-77.

³⁸² Ultimately, the Court did adopt more radical positions, comparable to those urged by the appellants in the two cases. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (applying elevated standard of review for laws discriminating on basis of sex); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding enforcement of racially discriminatory covenant a prohibited state action).

³⁸³ 442 U.S. 397 (1979).

³⁸⁴ *Id.* at 413-14.

lower court's interpretation³⁸⁵ but also with the Court's own comments in the next major section 504 case it decided.³⁸⁶ The Supreme Court of the early 1980s, however, did not want to create open-ended entitlements for the handicapped. Even recently, the Court chose to apply minimal scrutiny to overturn restrictions on the location of group homes for the mentally disabled, rejecting an elevated standard of review partly on the ground that its impact could not be predicted.³⁸⁷

Moreover, in *Rowley* the Court may have been conscious of the demands a decision in favor of persons with disabilities might have fueled among other groups of disfavored persons. In *San Antonio Independent School District v. Rodriguez*,³⁸⁸ the court had rejected a constitutional claim for equal educational benefits for poor, disproportionately minority children disadvantaged by the state school financing scheme.³⁸⁹ Conferring greater educational benefits on handicapped children than on other disfavored groups would have prompted charges of inequality of treatment between those handicapped physically and mentally and those handicapped by social station. It might also have called into question the continuing validity of the *Rodriguez* approach in cases involving education of impoverished children.³⁹⁰

³⁸⁵ 574 F.2d 1158 (4th Cir. 1978).

³⁸⁶ *Alexander v. Choate*, 469 U.S. 287 (1985). In *Alexander*, the court wrote: "[A]n otherwise qualified handicapped individual must be provided with meaningful access [T]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.* at 301 (footnote omitted).

³⁸⁷ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445-46 (1985). The Court's approach was reminiscent of its approach in the *Reed* case, because in both the Court overturned laws on the basis of minimal scrutiny that seemed easily to withstand that test. Thus the *Cleburne* approach may have no more durability than the Court's short-lived rejection of an elevated standard in *Reed*. See *supra* note 381 and accompanying text.

³⁸⁸ 411 U.S. 1 (1973).

³⁸⁹ *Id.* at 55; see also *Lau v. Nichols*, 414 U.S. 563 (1974) (interpreting Title VI of the Civil Rights Act of 1964 to require a meaningful opportunity to participate in public education for students who spoke only Chinese). The Court's reasoning in *Rodriguez*, which emphasized practical considerations as well as state and local autonomy, bore a similarity to its reasoning in *Rowley*. As in *Rowley*, the Court stressed that the children did not suffer any "absolute deprivation" of services. *Rodriguez*, 411 U.S. at 23.

³⁹⁰ Cf. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 58-59 (1969). At the very least, a contrary decision in *Rowley* would have created an incentive for advocates of the poor to undertake legislative activity, for the

The history of the Education of the Handicapped Act may also provide lessons about the theories courts use in making decisions. Legal theory shows strains when radical statutes meet conservative courts and when more liberal courts meet deradicalized statutes.³⁹¹ The Education of the Handicapped Act does not exemplify this phenomenon in any clear way, however. *Rowley* did not need to break new ground in legal theory; the Court reached its result by such traditional methods as examining the legislative history and legal context of the statute. Nor have the lower courts needed to forsake conventional doctrines, even *stare decisis*, to make their retreat from the Supreme Court's position.³⁹² Enough avenues have now been opened, in the form of factual distinctions and statutory concepts not passed on in *Rowley*, to allow the Supreme Court to join the retreat in a later case without doing any violence to traditional modes of legal reasoning.

Courts' perceptions of the facts influence their view of legal requirements.³⁹³ The *Rowley* facts were peculiar: a very talented child with a serious disability who managed to succeed in the mainstream despite denial of the requested service. The facts of the cases before the lower courts display a more typical pattern: children who desperately need extra services to succeed, but can-

presence of a federal statute was a key distinction between *Rodriguez* and *Rowley*. Justice Rehnquist, however, was uncomfortable with statutes enforcing the fourteenth amendment that impose duties beyond the minimum the amendment itself imposes. See *Pennhurst State School v. Halderman*, 451 U.S. 1, 16 n.12 (1981). *But see supra* text accompanying note 324 (discussing ability of Congress to enforce fourteenth amendment by compelling states to undertake greater obligations than amendment requires).

³⁹¹ The need to justify decisions placing a conservative construction on the Wagner Act led to the inconsistent mix of formalism and realism characteristic of modern legal theory. See Klare, *supra* note 15, at 335. Principles from that mix placed rigid constraints on later labor decisions. See generally Stone, *supra* note 370, at 1516 (criticizing interpretive history of Wagner Act). A similar process may have taken place with Reconstruction Civil Rights Acts. The need to justify decisions condemning appalling discriminatory practices led the Court to make progressively more strained findings of state action to satisfy the requirements of those statutes. Kinoy, *supra* note 15, at 417-18. The Court, in a discontinuity of theory, finally rediscovered the original understanding of the acts. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 applies to private action without state involvement).

³⁹² See *supra* text accompanying notes 367-68.

³⁹³ K. LLEWELLYN, *supra* note 301, at 121-28.

not get them.³⁹⁴ In the Education of the Handicapped Act cases, the district courts may be closer to the case facts, for they frequently hear evidence in cases involving appropriate education. Yet this difference alone cannot account for the difference between the lower courts and the Supreme Court; the courts of appeals have joined the retreat from *Rowley*, sometimes in a more aggressive fashion than the district courts.

B. Society

Perceptions about social facts matter as much as perceptions about the facts of the individual case before the court.³⁹⁵ No evidence suggests that the *Rowley* majority ever considered the school-time existence of handicapped children beyond the portrait which that case presented. As disability rights has become a more prominent political and social issue, however, lower court judges have formed more complete ideas about the hardships most handicapped children face in the educational system.

Moreover, a court's social perceptions depend on actual social conditions. Even misguided social perceptions result from the social conditions of the perceiver.³⁹⁶ Evolving social conditions may help explain how, with the Education of the Handicapped Act, a return to radicalism might receive Supreme Court approval.³⁹⁷

While the Education of the Handicapped Act resulted from the

³⁹⁴ See *supra* notes 171-211 and accompanying text.

³⁹⁵ The Wagner Act cases embodied consistent, if perhaps unrealistic, assumptions about the nature of industrial life. See Stone, *supra* note 370, at 1516. Once again, the Reconstruction Civil Rights Acts may serve as a comparison. In *The Civil Rights Cases*, 109 U.S. 3 (1883), and in modern civil rights cases, the Court applied its perceptions of the realities of African-American life. In *The Civil Rights Cases*, Justice Butler declared that the task of abolishing the badges and incidents of slavery had been accomplished, and that the fourteenth amendment need not be interpreted to permit additional measures to ensure full citizenship for blacks. 109 U.S. at 25. Butler, of course, was utterly wrong, but his factual error made his legal conclusions more sensible.

³⁹⁶ See Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 979 (1982).

³⁹⁷ Of course, with the Wagner Act no such event has occurred. While the length of time involved in the retreat from the Reconstruction Civil Rights Acts was glacial, the longevity of the retreat from the Education of the Handicapped Act is still uncertain. Thus, comparisons between the retreats under these two statutes and a contrast with the stasis in Wagner Act interpretation fall within the realm of speculation.

organized disability rights movement, that movement was not accompanied by the level of civil unrest characteristic of some other social movements.³⁹⁸ The impact of the movement was ambiguous enough that different courts could take it more or less seriously. Nevertheless, the movement has continued to grow and to exercise increasing power through the 1980s. It has recently shown its strength by achieving passage of the Americans with Disabilities Act.³⁹⁹ Although it has achieved importance in a less dramatic way than have some other social movements, the disability rights movement has become a force in American public life. The courts are beginning to respond to it.

The courts can respond to the disabilities rights movement and restore the Education of the Handicapped Act's radicalism at a lower social cost than that entailed by radical constructions of statutes that directly affect the balance of economic power.⁴⁰⁰

³⁹⁸ This account does not ignore the impact of ADAPT and other militant groups that have mounted campaigns of civil disobedience. These campaigns may have been quite effective, but it is incontrovertible that they have taken place on a much smaller scale than the agitation of labor in the 1930s or of blacks more recently. By way of contrast, the Wagner Act was born in utter social upheaval. See R. BOYER & H. MORAIS, *LABOR'S UNTOLD STORY* 277-91 (1955). The Great Depression and the mass labor movement of the 1930s produced rapid social change and radical statutes. See S. MORRISON, H. COMMAGER & W. LEUCHTENBERG, *A CONCISE HISTORY OF THE AMERICAN REPUBLIC* 608-10 (1977). When the agitation subsided, the pressure for carrying out the radical reforms diminished. In the labor field, agitation was halting after the 1930s, as unions shifted to more conventional political organizing. See J. RAYBACK, *A HISTORY OF AMERICAN LABOR* 400 (1959). The greatest example of militancy during this period was the post-World War II strike wave, but the political response to that event was resistance, in the form of the Taft-Hartley Amendments, Labor-Management Relations Act of 1947, ch. 120, sec. 101, 61 Stat. 136. See J. RAYBACK, *supra*, at 389-401. Again, a comparison to the Reconstruction Civil Rights Acts may be instructive. In the civil rights field, the agitation returned some 80 years after the enactment of the statutes; the courts, after an extended period of legal development, responded. At least in contrast to labor's earlier years, the courts in labor cases have not had much need to respond.

³⁹⁹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

⁴⁰⁰ Although the Education for the Handicapped Act is a radical statute, it is a less radical statute than the Wagner Act. From the perspective of the beneficiary of either of these laws, the law's effect can be profound, but from the perspective of society at large, the effect of the Education of the Handicapped Act is less significant. This Act does call for a major shift of resources, and will gradually expose the national population to a population

Radical results are easier to achieve on the margins of social conflict, rather than at its center: the radical is easier to sustain than the revolutionary. The Education of the Handicapped Act has encountered bureaucratic resistance,⁴⁰¹ but that resistance is lower than resistance based on imminent loss of wealth or political power.

CONCLUSION

The Education of the Handicapped Act is a radical statute. *Rowley* sought to transform it into something less challenging to the settled way of doing things, but the real transformation of the law has been the lower courts' restoration of the statute's original meaning. Study of the structural, doctrinal, and social forces involved in this transformation reveal that a social movement that is not accompanied by large-scale social unrest, but that nevertheless makes gradual strides in power and visibility, may retrieve statutory rights that once seemed lost. Social forces do matter, but there is no simple pattern by which social forces manifest themselves in the judicial interpretation of radical statutes.

segment it previously ignored. Still, it does not threaten the balance of economic power, as did the Wagner Act, or the balance of economic and electoral power, as the did Reconstruction Civil Rights Acts. Even the shift of resources has proven less significant than anticipated. *See supra* text accompanying note 91.

⁴⁰¹ Neal & Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, LAW & CONTEMP. PROBS., Winter 1985, at 63, 76-80.