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Education-Board of Education v. Rowley: The Supreme Court Takes a Conservative Approach to the Education of Handicapped Children

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NOTES

Education—*Board of Education v. Rowley*: The Supreme Court Takes a Conservative Approach to the Education of Handicapped Children

Amy Rowley was born deaf in 1972. In 1975, Congress passed P.L. 94-142, the Education for All Handicapped Children Act,¹ which guarantees all handicapped children a “free appropriate public education”² and establishes procedural safeguards for its implementation. The Act became effective on October 1, 1977. Amy began her public school education that fall. Five years later she became the subject of the first case in which the United States Supreme Court interpreted the meaning of free appropriate public education and considered the scope of judicial review under the Act.³

To understand *Board of Education v. Rowley*, a basic understanding of the Act is important. The Education for All Handicapped Children Act of 1975 was enacted in response to growing recognition of the rights of handicapped children to an appropriate education.⁴ Congress began employing funding measures to encourage education of the handicapped as early as 1966,⁵ but it

1. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1461 (1976 & Supp. V 1981)).

2. It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1400(c) (Supp. V 1981). Free appropriate public education (FAPE) is defined at 20 U.S.C. § 1401(18) (1976). See *infra* text accompanying note 65.

3. *Board of Educ. v. Rowley*, 102 S. Ct. 3034 (1982).

4. Congress found that of the eight million handicapped children in the United States, only 3.9 million received appropriate education, while one million were completely excluded. 20 U.S.C. § 1400(b) (Supp. V 1981); S. REP. NO. 168, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432; see also H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-3 (1975).

5. In that year Congress passed the Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 161, 80 Stat. 1191, 1204 (replaced 1970) (amending Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27), which added title VI, established the Bureau for Education and Training of the Handicapped, and funded programs to aid education of the handicapped. In 1970, title VI was replaced by the Education of the Handicapped Act, a grant program to assist state plans for handicapped education. Pub. L. No. 91-230, §§ 601-662, 84 Stat. 175-88 (1970), amended by Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1461 (1976 & Supp. V 1981)). In 1973, Congress passed § 504 of the Rehabilitation Act of 1973, broad civil rights legislation requiring that states which accept federal funds for education follow educational policies that do not violate the equal protection or due process clauses of the Constitution. Pub. L. No. 93-112, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794 (1976 & Supp. V 1981)). For a statutory history of P.L. 94-142, see generally Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and an Analysis*, 13 GONZ. L. REV. 717, 761-67 (1978) [hereinafter cited as Comment, *A Legislative History*].

The road to this recognition was long and arduous. In 1917, Merritt Beattie, a child with cerebral palsy, was not allowed to return to sixth grade in a Wisconsin public school. The Wisconsin Supreme Court upheld his exclusion on the basis that his rights must be subordinated to

was only after judicial recognition of a "right" to equal education⁶ that Congress followed the lead of a number of states⁷ and passed P.L. 94-142.⁸

The first major judicial affirmation of a right to education for the handicapped came in *Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*,⁹ a class action on behalf of mentally retarded children who, under Pennsylvania law, had been excluded from public schools as "uneducable or untrainable."¹⁰ A three-judge federal panel approved a consent decree in which the parties agreed that all mentally retarded children are capable of benefiting from some form of education or training.¹¹ The state recognized the right to a free public education and agreed to place each mentally retarded child in a "free, public program of education and training appropriate to the child's capacity."¹² Because the label "mentally retarded" carries with it a serious stigma, the court also suggested that the children might be guaranteed due process protection before being so classified.¹³

those of the other schoolchildren, whom he bothered. State *ex rel* Beattie v. Board of Educ., 169 Wis. 231, 233-34, 172 N.W. 153, 154 (1919); see Blakely, *Judicial and Legislative Attitudes Toward the Right to an Equal Education for the Handicapped*, 40 OHIO ST. L.J. 603, 603-05 (1979); see also Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893). Cf. Buck v. Bell, 274 U.S. 200, 207 (1927) (statement by Justice Holmes that "[t]hree generations of imbeciles are enough" to justify sterilizing a mentally retarded woman).

For historical discussions of handicapped education, see Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975); Comment, *A Legislative History*, *supra*, at 742-46; Comment, *Historical Overview: From Charity to Rights*, 50 TEMP. L.Q. 953 (1977).

For specific problems encountered by the deaf, see generally Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 WASH. U.L.Q. 213 (1980).

6. In 1954, the United States Supreme Court first declared school segregation unconstitutional and recognized the right of blacks to an equal education. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Similar rights for the handicapped were judicially recognized in *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), *modifying* 334 F. Supp. 1257 (E.D. Pa. 1971), and in *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). See *infra* text accompanying notes 9-23.

7. In 1971, only 7 states had mandatory education legislation protecting all handicapped children while 26 others required education of certain classes of the handicapped. H.R. REP. NO. 332, *supra* note 4, at 10.

After *PARC* and *Mills*, most states enacted laws guaranteeing educational rights to the handicapped. See S. REP. NO. 168, *supra* note 4, at 20-21 table 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1444-45 table 2. The Massachusetts statute, MASS. ANN. LAWS ch. 71B (Michie/Law. Co-op. 1978 & Supp. 1982), was supposedly the drafting model for Pub. L. No. 94-142. 121 CONG. REC. 37,029 (1975) (statement of Rep. Conte).

8. In 1974, Congress passed Pub. L. No. 93-380 as an emergency interim measure until Pub. L. No. 94-142 could be finalized. Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, §§ 611-621, 88 Stat. 579-85 (codified at 20 U.S.C. §§ 1401-1461 (Supp. V 1975)) (amended 1975) (amending Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121 (1970)). See Comment, *A Legislative History*, *supra* note 5, at 763-66.

9. 343 F. Supp. 279 (E.D. Pa. 1972), *modifying* 334 F. Supp. 1257 (E.D. Pa. 1971). There had been earlier less publicized cases upholding a similar right. See, e.g., *Wolf v. Legislature of Utah*, Civ. No. 182646 (3d Judicial Circuit, Salt Lake County, Utah Jan. 8, 1969) (since education is so important to the development of children, and Utah's policy is that the state and not the family should bear its cost, trainable mentally retarded children have a right to a free public education).

10. *Id.* at 312.

11. *Id.* at 307.

12. *Id.*

13. *Id.* at 293-95. The court applied the logic of *Wisconsin v. Constantineau*, 400 U.S. 433

The gains made by the mentally retarded in *PARC* were extended to all handicapped children in *Mills v. Board of Education*.¹⁴ In *Mills* the school system regularly excluded certain handicapped children, using the justification that the school lacked funds to provide proper evaluation, personnel, and service. The court held that no child could be excluded from public schools unless an adequate alternative was provided and proper procedural safeguards were followed.¹⁵ Because inadequacies of school funding could not "be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child,"¹⁶ the school district was ordered to provide each child of school age "a free and suitable publicly supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."¹⁷ *PARC* and *Mills* provided strong impetus for P.L. 94-142.¹⁸ The decisions were also important in convincing Congress that there was in fact a constitutional right to education for the handicapped,¹⁹ and influenced Congress' formulation of the Act.²⁰ This influence is reflected in the Act's emphasis on Individualized Educational Programs²¹ within the least restrictive environ-

(1971), to reason that since posting someone as an habitual drunk required due process, by alleging that children were being labelled "mentally retarded," plaintiffs had established a claim of due process violation sufficient to give the court jurisdiction. 343 F. Supp. at 295. *But cf.* Paul v. Davis, 424 U.S. 693 (1976) (state action that tends to defame or degrade an individual's reputation is not an interference with a liberty or property interest protected by the due process clause); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education is not a fundamental right of the type triggering strict scrutiny).

Because *PARC* was a consent decree, the issues were not adjudicated. *PARC*'s precedential value, therefore, is theoretically limited, although it is often cited and followed. *See infra* note 19.

14. 348 F. Supp. 866 (D.D.C. 1972).

15. *Id.* at 876, 878 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1969)).

16. *Id.* at 876.

17. *Id.* at 878.

18. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3043 (1982) (quoting S. REP. NO. 168, *supra* note 4, at 6, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1435); *see Note, The Education of All Handicapped Children Act of 1975*, 10 U. MICH J.L. REF. 110, 119 (1976).

19. In a 1973 case involving interdistrict disparities in educational spending based on property taxation, the Supreme Court rejected arguments that children from property-poor school districts formed a suspect class and that education was a fundamental right. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Nevertheless, Congress largely ignored testimony to that effect at the hearings leading to Pub. L. No. 94-142. Blakely, *supra* note 5, at 615; *see Comment, A Legislative History*, *supra* note 5, at 750; *see also* S. REP. NO. 168, *supra* note 4, at 6, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430; H.R. REP. NO. 332, *supra* note 4, at 3-4.

For detailed consideration of the constitutional issues involved, *see* Blakely, *supra* note 5, at 606-13; Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087 (1973); Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 961-984 (1977); Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 358-67 (1975); Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972); Krass, *The Right to a Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1026-42; Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037 (1972); Yudof, *Equal Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973); *Comment, A Legislative History*, *supra* note 5, at 746-50; *Note, supra* note 18, at 110-18, 129-35; *see also Note, Defining an "Appropriate Education" Under the Education for All Handicapped Children Act of 1975*, 34 ME. L. REV. 79, 82 n.27 (1982) [hereinafter cited as *Note, Defining*].

20. 102 S. Ct. at 3044; Blakely, *supra* note 5, at 614.

21. 20 U.S.C. § 1414(a)(5) (1976). *Mills* required that "each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs," 348 F. Supp. at

ment²² and a provision safeguarding procedural due process during both the evaluation and implementation stages.²³

The Education for All Handicapped Children Act²⁴ was created to: Assure that all handicapped children have available to them, within the time periods specified [in the Act], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.²⁵

To accomplish this purpose the Act provided that beginning October 1, 1977 (fiscal year 1978), any state²⁶ would be entitled to federal funds²⁷ if it had in effect a policy guaranteeing a free appropriate public education,²⁸ and had set forth a detailed plan for its implementation.²⁹ Handicapped children were defined as "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other[s] . . . who by reason of [health or learning disabilities] require special

880 (emphasis added), and in *PARC*, the order mandated "education and training appropriate to the child's capacity." 343 F. Supp. at 307 (emphasis added).

22. 20 U.S.C. § 1412(5)(B) (1976). The consent decree in *PARC* required that "among the alternative programs . . . placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training." 334 F. Supp. at 1260. *Mills* expressed a similar policy. 348 F. Supp. at 880.

23. *PARC* and *Mills* both provided for: (1) written notice of any proposed action concerning a child's placement; (2) a right to an impartial hearing if there is an objection; (3) access to pertinent records; and (4) right to counsel, to examine witnesses, and to present evidence. 343 F. Supp. at 303-05; 348 F. Supp. at 880-81; see Note, *supra* note 18, at 116-17. These and further safeguards are codified at 20 U.S.C. § 1415 (1976), discussed *infra* at notes 32-35 and accompanying text.

24. For in depth treatment of the provisions and policies of the Act, see Blakely, *supra* note 5, at 615-32; Haggerty & Sacks, *supra* note 19, at 984-94; Comment, *A Legislative History*, *supra* note 5, at 724-41; Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979) [hereinafter cited as Note, *Enforcing*]; Note, *supra* note 18, at 120-28.

25. 20 U.S.C. § 1400(c) (Supp. V 1981).

26. Every state except New Mexico now receives money under the Act. 102 S. Ct. at 3039.

27. The amount of federal funds is calculated by multiplying the number of handicapped of ages 3-18 (3-21 as of 1981) who were receiving special education in the state by a percentage of the average cost per student throughout the country. The percentage was 5% in the 1978 fiscal year, and increased yearly to a plateau of 40% in 1982. 20 U.S.C. § 1411(a)(1), (4) (1976). The Act limits to 12% the number of children a state may count as "handicapped" in figuring funding allotments. 20 U.S.C. § 1411(a)(5)(A)(i) (1976 & Supp. V 1981). The states are, however, required to provide services for all handicapped, even if above the 12% ceiling.

The state education agency must distribute 75% of the funds directly to local education agencies, and retains control over only the remaining 25%. 20 U.S.C. § 1411(c)(1) (1976). See Colley, *The Education for All Handicapped Children Act (EHA): A Statutory & Legal Analysis*, 10 J. LAW & EDUC. 137, 144-46 (1981).

28. 20 U.S.C. § 1412(1) (1976). This is consistent with the Act's emphasis on local decision-making, and is thought to encourage mainstreaming. See Large, *supra* note 5, at 242-43.

29. 20 U.S.C. § 1412(2) (1976). The plan must include a timetable for accomplishing full educational opportunity, a description of the facilities, personnel, and services required, and a method to locate, identify, and evaluate handicapped children. 20 U.S.C. § 1412(2), (3) (1976). Priority is given to those children then excluded, and next to those most severely handicapped. *Id.* § 1412(2), (3).

education and related services."³⁰

The term "free appropriate public education" (FAPE) means special education and related services, provided at public expense and under public supervision, which meet the standards of the state educational agency, include an appropriate preschool, elementary, or secondary school education in the state involved, and conform with the child's individualized education program.³¹ To ensure a child's receipt of a FAPE designed to meet his specific needs, the Act requires that local education agencies prepare for each handicapped child an Individualized Education Program (IEP).³² An IEP is a written plan setting forth the child's present level of performance, a statement of annual educational goals (including short-term objectives and the extent to which the child can participate in regular programs), and a statement of specific services to be provided. It should also include a projected implementation date and duration of the services, and appropriate objective criteria and procedures for determining success in achieving objectives.³³

To implement and protect the right to a FAPE, the Act requires educational agencies seeking federal funds to identify, locate, and evaluate all handicapped children in the jurisdiction,³⁴ and imposes extensive procedural guarantees.³⁵ The Act also requires state plans to "assure that, to the maxi-

30. *Id.* § 1401(1).

31. *Id.* § 1401(18); see *infra* text accompanying note 65.

32. *Id.* § 1414(a)(5).

33. *Id.* § 1401(19). The IEP is prepared at a meeting between a qualified representative of the local education agency, parents or guardian, the child's teacher, and, if appropriate, the child. *Id.* The IEP has been described as a "process" as well as a document because it involves evaluations and negotiations that help define the child's educational needs. Note, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81, 96-98 (1981).

Much has been written concerning the practical aspects of the IEP. It has been suggested that the IEP process is too adversarial, with mediation offered as a possible solution. See Geiser, *The IEP Dilemma: Obstacles to Implementation*, EXCEPTIONAL PARENT, Aug. 1979, at E14. But see Shanker, *Public Law 94-142: Prospects and Problems*, EXCEPTIONAL PARENT, Aug. 1980, at 51, 55 (the teacher, like the school and the family, should have the right to counsel). It has also been argued that the IEP is so time-consuming that teachers are left with insufficient time to teach. *Id.* at 52. See generally *Excerpts from the Office of Special Education's Policy Paper on the IEP*, EXCEPTIONAL PARENT, Aug. 1980, at 20.

With all its drawbacks, the IEP is generally viewed as an effective and essential tool for parental influence of a child's education. Numerous "how to" materials are available to help the parents prepare for the conference. See *The IEP Conference*, EXCEPTIONAL PARENT, Aug. 1980, at 43; see also Geiser, *supra*, at E16. Cf. White, *P.L. 94-142's Toughest Topics: Health Care, Discipline, Summer School*, AM. SCH. BD. J., Feb. 1981, at 19, 21 (coaching teachers on how to handle appeals).

For the problems specific to formulation of a deaf child's IEP, see Johnson & Caccamise, *Rationale and Strategies for Planning Communication Individualized Education Programs (CIEP) for Deaf Students*, 126 AM. ANNALS OF THE DEAF 370 (1981); Large, *supra* note 5, at 255-63.

34. 20 U.S.C. § 1412(2)(C) (1976). This was referred to by the Bureau of Education as "Childfind." See Blakely, *supra* note 5, at 618.

35. These include: (1) an opportunity to present complaints concerning identification, evaluation, or placement of the child, or the free appropriate public education of that child, 20 U.S.C. § 1415(b)(1)(E) (1976); (2) a requirement of notice to parents or guardians of a proposed change in the child's placement, *id.* § 1415(b)(1)(C); (3) the right to "an impartial due-process hearing," *id.* § 1415(b)(2); and (4) the right to examine all relevant records, *id.* § 1415(b)(1)(A).

At the due process hearing the parties have a right to counsel, to cross-examine witnesses and compel their attendance, and to a written record of the hearing, including written findings of fact

num extent appropriate, handicapped children . . . are educated with children who are not handicapped."³⁶ This "mainstreaming" requirement, probably the most controversial in the Act, was intended to encourage integration of the handicapped into society.³⁷

The *Rowley* case arose from a disagreement between the school system and the deaf student's parents over what type of services best suited the child's needs. Shortly after Amy Rowley was born, her parents, both deaf, began training Amy in the use of Total Communication, which benefits³⁸ people with relatively good residual hearing³⁹ and combines lipreading, manual communication ("signing"), and the use of hearing aids.⁴⁰ When Amy's parents enrolled her in public school, she was able to communicate and socialize better than most deaf children, largely due to the efforts of her parents.⁴¹ The teachers and administrators made great efforts to accommodate her by studying basic sign language, installing a teletype machine in the office in order to communicate with her parents at home, and providing Amy with an FM wireless hearing aid.⁴² In February of her kindergarten year, a sign language interpreter

and decisions. *Id.* § 1415(d). An initial decision made by a local education agency can be appealed to the state education agency, and then to either state or federal court. *Id.* § 1415(e). A reviewing court receives the record, but can hear additional evidence on request, and can grant whatever relief it deems appropriate. *Id.* 1415(e)(2).

The parents also have the right to an independent educational examination of the child. *Id.* § 1415(b)(1)(A). See Geers, Moog & Calvert, *The Independent Educational Evaluation*, 82 *VOLTA REV.* 280 (1980) concerning the effectiveness of this provision for the deaf.

36. 20 U.S.C. § 1412(5)(B) (1976).

37. Although the Court in *Rowley* did not expressly deal with the issue of mainstreaming, the fact that Amy was in a mainstreamed school created the issue of what was an appropriate education in such an environment.

For discussions of the issues raised by mainstreaming, including the "dumping" of the handicapped, conflicts among educational policies, and fiscal concerns, see Blakely, *supra* note 5, at 629-32; Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 *IND. L.J.* 1 (1978); Comment, *A Legislative History*, *supra* note 5, at 757-61, 769-79; Note, *Enforcing*, *supra* note 24, at 1118-24; Note, *supra* note 33, at 89-98. For case histories sympathetic to the concept of mainstreaming, see Blumberg, *The Case for Integrated Schooling*, *EXCEPTIONAL PARENT*, Aug. 1981, at 23; Lewis & Fraser, *Avoiding Classroom Tokenism*, *EXCEPTIONAL PARENT*, Aug. 1979, at E7.

The American Federation of Teachers supports mainstreaming on philosophical grounds, but believes that such placements must be made cautiously and under proper conditions. Shanker, *supra* note 33, at 52-53 enumerates suggested guidelines for effective placement. There are problems with mainstreaming the deaf; some are unavoidable, and some are created by the Act. Large, *supra* note 5, at 241-54.

38. The district court stated that deaf children raised in deaf households with Total Communication fare better academically and socially than other deaf children. *Rowley v. Board of Educ.*, 483 F. Supp. 528, 530 (S.D.N.Y. 1980).

39. Amy's residual hearing was best in the lower frequencies where vowel sounds, which are difficult to lipread, are distinguished. *Id.* at 529.

40. Large, *supra* note 5, at 235. Educators of the deaf are strongly divided about which type of communication is best for deaf children. Proponents of oralism (lipreading) and auralism (amplification devices) feel that the combination allows the deaf to integrate more readily into society and expand their employment opportunities. Manualists argue that it is unrealistic and often detrimentally frustrating for deaf children to rely on verbal communication. Total Communication, while combining both schools, is criticized by each. *See id.* at 229-40.

41. 483 F. Supp. at 530. Even at the time of the litigation Amy's mother continued to spend at least an hour daily working with her.

42. *Id.* The aid allows teachers and classmates to speak into a transmitter when they read aloud.

was placed in Amy's classroom full-time for a two-week trial period. He reported that Amy did not require his services and that she in fact ignored and resisted his efforts.⁴³

In the preparation of Amy's IEP for the following year, the school system's Committee on the Handicapped⁴⁴ recommended that Amy be provided (1) the continued use of her FM wireless hearing aid; (2) one hour each day with a tutor for the deaf; and (3) speech therapy for three one-hour sessions per week.⁴⁵ When the IEP was drafted to incorporate these guidelines, Amy's parents objected, insisting that Amy be provided with an interpreter. The Committee on the Handicapped reviewed the proposed IEP and rejected the Rowleys' request.⁴⁶ The Rowleys demanded and received a hearing before an independent examiner, who agreed with the school system that an interpreter was not necessary since "Amy was achieving educationally, academically and socially" without one.⁴⁷ This decision was appealed to the New York Commissioner of Education, who affirmed on the basis that the decision of the examiner was supported by substantial evidence.⁴⁸

Amy's parents, pursuant to P.L. 94-142,⁴⁹ brought suit in the Federal District Court for the Southern District of New York.⁵⁰ The court found that Amy was "remarkably well adjusted," and that she interacted well with her classmates and with her teachers, who were particularly sensitive and accommodating to her needs.⁵¹ After considering the results of a number of tests,⁵² the court determined that, although Amy was very bright and was progressing at slightly above the median in her class, she was only able to understand fifty-nine percent of what was spoken in class. The court therefore concluded that she was "not learning as much, or performing as well academically, as she would without her handicap."⁵³ To determine what education was appropriate, the court reasoned that Amy's performance should be com-

43. *Rowley v. Board of Educ.*, 632 F.2d 945, 950 (2d Cir. 1980) (Mansfield, J., dissenting). By affidavit, the interpreter testified that his recommendation referred to only the kindergarten class, and was not intended to rule out similar assistance to Amy in subsequent grades. 483 F. Supp. at 530.

44. The Committee is comprised of a psychologist, educator, physician, and the parent of a handicapped child. 34 C.F.R. § 300.532(e) (1981). The Committee heard expert evidence from the Rowleys concerning the importance of sign language, and also testimony from school personnel familiar with Amy's case. 483 F. Supp. at 530-31. The New York procedures for IEP formulation are controlled by article 89 of the New York Education Law. N.Y. EDUC. LAW §§ 4401-4409 (McKinney 1981 & Supp. 1982); see Note, *supra* note 33, at 98-106.

45. 483 F. Supp. at 531.

46. *Id.*

47. 102 S. Ct. at 3040. The right to an independent evaluation is guaranteed by the Act. 20 U.S.C. § 1415(b)(1)(A) (1976); see Geers, Moog & Calvert, *supra* note 35 (concerning its effectiveness).

48. 102 S. Ct. at 3040.

49. 20 U.S.C. § 1415(e) (1976) provides for appeal to state or federal court. See *supra* note 35.

50. *Rowley v. Board of Educ.*, 483 F. Supp. 528 (S.D.N.Y. 1980). The district courts have jurisdiction and can grant whatever relief they deem appropriate. 20 U.S.C. § 1415(e)(4) (1976).

51. 483 F. Supp. at 531.

52. The tests measured speech discrimination, academic achievement, and intelligence. The court opinion lists the data. *Id.* at 532.

53. *Id.*

pared to that of her nonhandicapped classmates of similar intellectual ability and initiative.⁵⁴ While all children have some "shortfall" between their potential and achievement, any additional shortfall on Amy's part would be "inherent in her handicap and is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education."⁵⁵ Therefore, the court reversed the findings of the Commissioner and held that Amy had to be provided with an interpreter⁵⁶ so that she would have "an opportunity to achieve her full potential commensurate with the opportunity provided other children."⁵⁷

Defendants Board of Education and New York Commissioner of Education appealed the district court's decision to the United States Court of Appeals for the Second Circuit. The two-member majority affirmed the lower court, agreeing with its conclusions of law and holding that its findings of fact were not clearly erroneous.⁵⁸ Because of the unique fact situation, the court stated that its decision would have no precedential value.⁵⁹ One judge dissented, arguing that the district court had ignored the statutory definition of free appropriate public education and had applied an erroneous and impractical standard.⁶⁰

The Supreme Court granted certiorari, and considered two issues:⁶¹ the substantive standard of "appropriate" in the statutory directive, and the scope of judicial review under the Act.⁶² The Court first applied itself to defining "appropriate" and rejected the lower court's requirement that "states maximize the potential of handicapped children 'commensurate with the opportunity provided other children.'"⁶³ Stating that the language of the Act contains no such requirement,⁶⁴ the Court turned to the statutory definition of FAPE for guidance:

The term 'free appropriate public education' means *special education*

54. *Id.* at 534. The court rejected the school system's argument that Amy was receiving a FAPE because she was performing above the average in her class and was advancing from grade to grade.

55. *Id.* at 535.

56. *Id.* at 529.

57. *Id.* at 534.

58. *Rowley v. Board of Educ.*, 632 F.2d 945, 947 (2d Cir. 1980) (per curiam).

59. *Id.* at 948 (following a special rule of the circuit, *id.* at 948 n.7).

60. *Id.* at 948 (Mansfield, J., dissenting). Judge Mansfield argued that the Act's legislative history revealed an intent to promote the self-sufficiency of handicapped children, *id.* at 952, and contended that if a child's IEP enables her to become reasonably independent, productive, and capable of achieving academically at a level roughly approximate to that of her peers, then the Act has been complied with, *id.* at 953. The judge felt that Amy's progress, as summarized above, was clear evidence of such compliance. *Id.* Judge Mansfield dissented on two additional points: (1) "the court should first have given the state educational authority . . . the opportunity to apply the proper standard and submit their [sic] determination before deciding the case;" and (2) the court erred in considering certain affidavits not presented below. *Id.* at 948.

61. 102 S. Ct. 3034 (1982). Justice Rehnquist delivered the Court's opinion, with Justice Blackmun filing a concurrence, while Justice White, with whom Justices Brennan and Marshall joined, dissented.

62. *Id.* at 3040.

63. *Id.* at 3042 (quoting 483 F. Supp. at 534).

64. *Id.*

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 in section 1414(a)(5) of this title.⁶⁵

"Special education," the Court continued, means "specially designed instruction . . . to meet the unique need of a handicapped child," and "related services" are those "as may be required to assist a handicapped child to benefit from special education."⁶⁶ Stressing this requirement of benefit, the Court determined that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act."⁶⁷

Because of the lack of precision in the statutory definition, the Court turned to the legislative history of the Act to determine whether Congress had intended any greater substantive requirements.⁶⁸ First, it looked at *PARC* and *Mills*, because they had served as impetus to the Act,⁶⁹ and read both as equal protection cases requiring primarily that handicapped children have access to an adequate publicly supported education, but with no particular requirement as to the substance of that education.⁷⁰ This reasoning followed logically, said the Court, in light of statements made by legislators during the debates on the Act that emphasized the numbers of handicapped children excluded from public education,⁷¹ and was supported by remarks characterizing the "3.9 million handicapped children who were 'served' " in 1975 as "receiving an appropriate education."⁷² Thus, the Court determined, Congress equated FAPE with access to public education plus receipt of some specialized services.⁷³ The Court also rejected respondents' argument that the intent of the Act was to provide equal educational opportunity,⁷⁴ stating instead that the goal was to

65. *Id.* at 3041 (quoting 20 U.S.C. § 1401 (18) (1976) (emphasis supplied by the Court).

66. *Id.* (quoting 20 U.S.C. §§ 1401(16)-(17) (1976)).

67. *Id.* at 3042.

68. *Id.*

69. *Id.* at 3043. See *supra* text accompanying note 18.

70. *Id.* at 3044. The Court stated that, similar to the Act, *PARC* and *Mills* established procedures for formulating the substantive standard, but did not require any such standard. *But see infra* text accompanying notes 110-18.

71. The Court read these statements as showing that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." 102 S. Ct. at 3043; see *id.* at 3043 n.13; S. REP. NO. 168, *supra* note 4, at 11, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1435; see also 121 CONG. REC. 19,486 (1975).

72. 102 S. Ct. at 3045-46 & nn.19-20. The remarks refer to statistics of the Bureau of Education for the Handicapped—of eight million handicapped children, one million were entirely excluded and only 3.9 million were receiving special services. A chart in the Senate report indicated that these 3.9 million children were "served." S. REP. NO. 168, *supra* note 4, at 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432.

73. 102 S. Ct. at 3046.

74. The Court said that "'equal' educational opportunities would . . . present an entirely

provide a "basic floor of opportunity consistent with equal protection."⁷⁵ Since equal protection required only equal access, a congressional provision for specialized educational services for the handicapped could not be interpreted as imposing any substantive educational standard on the states. Instead, the Court determined that the intent of Congress was "primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."⁷⁶

Implicit in Congress' assurance of access to education,⁷⁷ and confirmed by the Act's requirement of supportive services to assist a handicapped child in benefiting from special education,⁷⁸ the Court found a mandate that "'the basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁷⁹ The Court also cited statements by legislators concerning the costs and benefits of educating the handicapped so that "many would be able to become productive citizens contributing to society instead of being forced to remain burdens. Others . . . would increase their independence, thus reducing their dependence on society."⁸⁰ These statements, the Court said, supported its definition of FAPE as an education which "provide[s] some educational benefits to the handicapped child."⁸¹

Because of the range of handicaps covered by the Act, the Court limited its holding to mainstreamed children, such as Amy, rather than attempting to formulate one test to judge the adequacy of "educational benefits."⁸² The Court held that, since grading, yearly advancement, and graduation from the public schools are society's yardsticks of educational benefit,⁸³ the requirement of a FAPE is satisfied 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

unworkable standard requiring impossible measurements and comparisons." *Id.* at 3047. This is reminiscent of Judge Mansfield's dissent in the circuit court. 632 F.2d at 953 (Mansfield, J., dissenting).

75. 102 S. Ct. at 3047.

76. *Id.* at 3048.

77. The Court said that receiving some benefit is implicit because it would do little good for Congress to spend millions of dollars in providing mere access without some benefit. *Id.*

78. 20 U.S.C. § 1401(17) (1976).

79. 102 S. Ct. at 3048.

80. *Id.* at n.23 (quoting S. REP. NO. 168, *supra* note 4, at 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433. In *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd sub nom. Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), the district court interpreted the Act as setting a substantive standard of maximizing self-sufficiency. *Id.* at 603-04. The Supreme Court in *Rowley* rejected this standard. 102 S. Ct. at 3048 n.23. *Battle* is discussed in 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, 501-04 (1982); Note, *supra* note 19, at 92-101; Note, *supra* note 33, at 106-10.

81. 102 S. Ct. at 3048.

82. *Id.* at 3049.

83. *Id.* The Court said that progress from grade to grade is not conclusive proof that a child has received FAPE. Amy's progress, however, taken in light of the services she received, was dispositive of the issue. *Id.* n.25.

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. 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.⁸⁴

The Court next considered the issue of the scope of judicial review, which the petitioner school system argued was limited to ensuring procedural compliance,⁸⁵ while respondents contended that the Act authorized de novo review of all aspects of educational decisions.⁸⁶ Because Congress had expressly rejected language restricting review,⁸⁷ the Court refused to adopt the school's position. Nevertheless, since Congress had established elaborate and specific procedural safeguards, the Court also rejected de novo review. The Court cited the Act's emphasis on procedures as support for its conclusion 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."⁸⁸ The Court then examined the provision that authorizes the reviewing court "to grant 'such relief as the court determines is appropriate' [basing its decision on the preponderance of the evidence]"⁸⁹ in light of the requirement that the reviewing court "receive the records of the [state] administrative proceedings."⁹⁰ The Court saw this as an implied requirement that the prior proceedings receive due weight,⁹¹ and that judicial review be restricted. Therefore, the Court held that a reviewing court's inquiry is twofold: (1) whether the state complied with the procedures of the Act,⁹² and (2) whether the IEP developed through those procedures is reasonably calculated to benefit the handicapped child.⁹³

Applying these principles, the Court reversed the court of appeals, as

84. 102 S. Ct. at 3049.

85. *Id.* at 3050.

86. *Id.* at 3049.

87. 20 U.S.C. § 1415(e)(2) (1976) provides that the reviewing court must receive the administrative record, hear additional evidence, and, based on a preponderance of the evidence, grant such relief as it determines appropriate. This language was substituted at conference for language which limited review to whether the states' decision was supported by substantial evidence. *See S. CONF. REP. NO. 455, 94th Cong., 1st Sess. 48-49, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1480, 1501-03; see also 632 F.2d 945, 948 n.5 (quoting H.R. 7217, 94th Cong., 1st Sess., reprinted in H.R. Rep. No. 332, 94th Cong., 1st Sess. 56 (1975)).*

88. 102 S. Ct. at 3050.

89. *Id.* at 3051 (citing 20 U.S.C. § 1415(e)(2) (1976)).

90. *Id.*

91. *Id.*

92. *Id.* In a footnote, the Court indicated that part of this first inquiry is whether the state has created an IEP in conformity with § 1401(19). *Id.* at 3051 n.27. *See supra* text accompanying note 33.

93. 102 S. Ct. at 3051. The Court warned against judges imposing their own view of educational policy, and noted that this case demonstrates the efficacy of the procedural trappings, especially the requirement of parental input, as parents will strongly advocate their child's position. *Id.* at 3051-52. *But see infra* notes 141-42 and accompanying text.

neither it nor the district court had found that the school system had failed to comply with the procedures of the Act. Nor could the findings of either court support a conclusion that Amy's educational program did not satisfy the substantive requirements of the Act.⁹⁴ The dissenting Justices looked at the language of the Act and its legislative history and argued in support of the lower court's standard of "educational opportunity commensurate with that given other children."⁹⁵ They also argued that there was no statutory or historical support for the majority's limitations on judicial review.⁹⁶

In construing P.L. 94-142 in *Rowley*, the Supreme Court established relatively conservative standards for a free appropriate public education, and also for the scope of judicial review. While the Court was correct in stating that the district court standard was not directly supported by the language of the Act,⁹⁷ and that the district court had mistakenly stated that the Act did not define "appropriate,"⁹⁸ it is clear that the statutory definition "tends toward the cryptic."⁹⁹ For assistance the district court had looked to the regulations promulgated under section 504,¹⁰⁰ which define "appropriate" as education "designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met."¹⁰¹ The Solicitor General argued in his brief opposing the grant of certiorari that this reliance on the section 504 regulations was proper.¹⁰² Although the language of the regulations in effect under the Act at the time of the district court's decision supports this view,¹⁰³ the Court ignored the argument.

94. 102 S. Ct. at 3052-53. The case was remanded to the district court for further proceedings consistent with the opinion because the lower court had previously failed to reach the issue of procedural compliance.

Justice Blackmun concurred in the result, but would have applied a standard of "whether Amy's program, viewed as a whole, offered an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates." *Id.* at 3053 (Blackmun, J., concurring) (emphasis in original). He felt that the emphasis should be on equality of access and opportunity, rather than the propriety of a particular educational outcome. Justice Blackmun felt that the school system had satisfied this standard.

95. *Id.* at 3055 (White, J., dissenting). Contending that the majority's restrictive standard of services, which mandates merely some educational benefit, would be satisfied by providing a deaf child with a loud-voiced teacher, the dissent asserted that the Act requires more: "The basic floor of opportunity is . . . intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible." *Id.*

96. *Id.* at 3056-57. The dissent would allow a "full and searching inquiry" into any aspect of a handicapped child's education. *Id.* at 3057.

97. *Id.* at 3042. The district court standard that the Court criticized was "that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" *Id.* (quoting 483 F. Supp. at 534).

98. *Id.* at 3041; see 483 F. Supp. at 533. The court of appeals agreed with the lower court's standard. 632 F.2d at 947. See 20 U.S.C. § 1401(18) (1976); *supra* text accompanying note 65.

99. 102 S. Ct. at 3041. Commentators have struggled with the meaning of FAPE and the intent of Congress in passing the Act. See generally Colley, *supra* note 27, at 137; Haggerty & Sacks, *supra* note 19; Stark, *supra* note 80; Note, *Enforcing*, *supra* note 24; Note, *Defining*, *supra* note 19.

100. See *supra* note 5.

101. 483 F. Supp. at 533 (quoting 45 C.F.R. § 84.33(b) (1979)).

102. Brief for the United States as Amicus Curiae, at 7-13.

103. The regulations in effect under the Act at the time of the district court's decision required that state plans submitted under 20 U.S.C. § 1413 assure compliance with § 504 regulations. 45 C.F.R. § 121a.150 (1979) (replaced by 45 C.F.R. §§ 100b.201, .500 (1980); recodified at 34 C.F.R.

To determine its own standard, the Court looked at the definition of FAPE in the Act,¹⁰⁴ but then focused on language defining "related services" as those which "may be required to assist a handicapped child to benefit from special education."¹⁰⁵ The Court ignored the statutory definition of IEP, to which related services are required to conform¹⁰⁶ and which demands "specially designed instruction to meet the unique needs of handicapped children."¹⁰⁷ Similarly, the Court overlooked the definition of Special Education, which requires that "unique needs" be met.¹⁰⁸ These provisions support the dissent's argument that the majority's standard of receiving some "educational benefit" falls short of congressional intent in passing P.L. 94-142. It seems clear that meeting "unique needs" requires more than merely providing "educational benefit."¹⁰⁹

Just as the Court construed the language of the Act to set a less rigorous standard of "appropriate," in interpreting *PARC* and *Mills* as mere access cases,¹¹⁰ it sidestepped language in each case requiring more. *PARC* required "access to a free public program of education and training appropriate to . . . learning capacities."¹¹¹ *Mills* speaks of "publicly-supported education consistent with . . . needs and ability to benefit therefrom."¹¹² Nonetheless, the Court said that neither case required any substantive level of education.¹¹³ It is also clear from the legislative history that the Act "incorporated the major principles of the right to education cases."¹¹⁴ When Congress brought all handicapped children within the scope of the Act,¹¹⁵ promising to "meet their unique needs"¹¹⁶ and setting "a goal of providing full educational opportunity to all handicapped children,"¹¹⁷ Congress seems to have intended to offer a

§§ 76.201, .500 (1981)); see 45 Fed. Reg. 77,368 (1980); see also Haggerty & Sacks, *supra* note 19, at 984-87.

In fact, one writer has suggested that *Rowley* could have been decided under § 504. See Note, *Defining*, *supra* note 19, at 104 (published prior to the Supreme Court decision).

104. 20 U.S.C. § 1401(18) (1976); see *supra* text accompanying note 65.

105. 20 U.S.C. § 1401(17) (1976); see *supra* text accompanying note 66.

106. 20 U.S.C. § 1401(18) (1976); see *supra* text accompanying note 65.

107. 20 U.S.C. § 1401(19) (1976).

108. *Id.* § 1401(16) (quoted in 102 S. Ct. at 3055 (White, J., dissenting)).

109. In fact, the dissenters' argument that a teacher with a loud voice would satisfy the majority's standard seems to be valid. See *supra* note 95.

110. 102 S. Ct. at 3044; see *supra* text accompanying note 70.

111. 334 F. Supp. at 1258.

112. 348 F. Supp. at 876.

113. 102 S. Ct. at 3044.

114. S. REP. No. 168, *supra* note 4, at 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432. *PARC* and *Mills* are discussed throughout the congressional reports. See e.g., H.R. REP. No. 332, *supra* note 4, at 3-5.

115. 20 U.S.C. § 1401(1) (1976).

116. *Id.* § 1400(c) (Supp. V 1981) (Congressional Declaration of Purpose).

117. *Id.* § 1412(2)(A)(i) (1976). The dissent referred to this language, 102 S. Ct. at 3054 (White, J., dissenting), as did the concurrence, 102 S. Ct. at 3053 (Blackmun, J., concurring). See Stark, *supra* note 80, at 499 n.103; see also S. REP. No. 168, *supra* note 4, at 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433; see also 102 S. Ct. at 3054 (White, J., dissenting) (citing remarks from the CONGRESSIONAL RECORD).

higher standard of educational benefit than the Court allowed.¹¹⁸

In its search for the congressional intent in passing P.L. 94-142, the Court also ignored a major indication of that intent—the Congressional Findings—which speaks of “full equality of opportunity.”¹¹⁹ Instead, the Court looked at the legislative history and stressed references to exclusion from education as evidence that mere access was the legislative goal.¹²⁰ The dissent, however, pointed to numerous references espousing a goal of “equal opportunity,” which the majority ignored.¹²¹ The dissent also cited statements emphasizing “maximum potential”¹²² and “education . . . equivalent, at least, to the one those children who were not handicapped receive.”¹²³ This is not to say that one or the other standard is necessarily definitive, but rather that the Court misrepresented the congressional attitude in order to support its standard of “access with some educational benefit.”¹²⁴

Similarly, by stressing the language of long-run cost benefits and self-sufficiency,¹²⁵ the majority lost sight of the fact that although self-sufficiency is a valid goal for many severely handicapped children, many of the handicapped, particularly the sensory deprived, are largely self-sufficient before attending school.¹²⁶ The Court could easily have read the language “many would . . . become productive citizens, contributing to society”¹²⁷ as evincing a broader legislative goal of realizing the potential of the handicapped not only in terms of relieving society from the the burdens of their dependence, or a simple cost/benefit analysis of their education, but in terms of every aspect

118. Query whether, if mere access were intended, there is any need for the Act. The right to access had already been established judicially in *PARC* and *Mills*.

119. 20 U.S.C. § 1400(b)(3) (Supp. V 1981). The congressional findings also asserted a national interest in assuring to all handicapped children “equal protection of the law.” *Id.* § 1400(b)(9). The Court in *Rowley*, however, restrictively defined equal protection by a narrow reading of *PARC* and *Mills*, see *supra* note 70 and accompanying text.

120. 102 S. Ct. 3043-46; see also *supra* text accompanying notes 70-73.

121. 102 S. Ct. at 3054 (White, J., dissenting). The majority called these “passing references” and said that they were “too thin a reed on which to base an interpretation of the Act.” *Id.* at 3049 n.26. The dissent refuted this, saying that the statements were too frequent to be “passing references.” *Id.* at 3054 (White, J., dissenting). See *id.* n.1, in which Justice White argued that statements cited by the majority emphasizing exclusion were often linked to statements urging equality of opportunity.

122. 102 S. Ct. at 3054 (White, J., dissenting) (quoting H.R. REP. NO. 332, *supra* note 4, at 19); see 121 CONG. REC. 23,709 (1975).

123. 102 S. Ct. at 3055 (White, J., dissenting) (quoting 121 CONG. REC. 19,483 (1975) (statement of Sen. Stafford)).

124. *Id.* at 3048-49.

125. *Id.* at 3048 n.23; see *supra* note 80 and accompanying text.

126. See Brief for the National Ass'n of the Deaf as Amicus Curiae, at 19-20. The Court recognized that because some handicapped children enter school self-sufficient, and because others will never be able to achieve self-sufficiency, self-sufficiency “as a substantive standard is at once an inadequate protection and an overly demanding requirement.” 102 S. Ct. at 3048 n.23. The Court, however, used the legislative history to support its standard of “access to specialized instruction and related services which are individually designed to provide educational benefit.” This relatively conservative standard fails to recognize that just as many handicapped children require little or nothing from schools in order to achieve self-sufficiency, many others require little in order to “benefit,” but will still be left far short of their potential. *Id.* at 3048.

127. 102 S. Ct. at 3048 n.23 (quoting S. REP. NO. 168, *supra* note 4, at 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433).

by which a person is able to develop and contribute to society. This reading seems to harmonize more with the overall tenor of the Act, and is consistent with the proposition that if Congress had intended self-sufficiency, or mere access, to be the determinative criterion in construing the legislation, it would have been relatively simple to use such language in the text of the Act.¹²⁸

In applying its conclusion (that the Act guarantees the child some "educational benefit") to the facts of *Rowley*, the Court relied heavily on Amy's grades and progress through the school system to determine whether the standard had been satisfied.¹²⁹ The Court pointed out that although such progress was dispositive in *Rowley*, it would not always be so; nevertheless, little guidance was offered to assist courts in determining when performance is not dispositive or what other factors are to be considered, and with what relative weight.¹³⁰ In addition, while it is certainly proper that grades and advancement be considered in assessing a child's achievement, the Court made them the determinative test for the propriety of a mainstreamed child's IEP.¹³¹ This emphasis conflicts with the nature of the IEP process, which calls for individualized annual evaluation and goals.¹³² While in certain instances passing marks may be a legitimate goal, Congress eschewed such a general standard, preferring individual assessment. It appears that the Court's broad approach contradicts this preference and undermines the IEP itself.

Much as the Court used *Rowley* as a vehicle to establish a conservative definition of FAPE, so too did it limit the scope of judicial review under the Act. Although it expressly rejected petitioner's argument that review should be limited to ensuring state compliance with procedures, the Court's emphasis on the number and detail of the procedural protections¹³³ makes its final two-part inquiry¹³⁴ more nearly aligned with petitioners' contention than with respondents' assertion that the Act called for de novo review of all aspects of the standard. Certainly the procedural safeguards articulated by the Act are elaborate, in part resulting from their being drafted to counter overt discrimination against the handicapped.¹³⁵ It is not clear, however, that they were also in-

128. In its efforts to minimize congressional concern with the substantive meaning of FAPE, the Court went so far as to construe "appropriate" as intended "as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education." *Id.* at 3046 n.21.

This confusion of the statutory preference for mainstreaming "to the maximum extent appropriate," 20 U.S.C. § 1412(5) (1976), with the mandate of FAPE in § 1401(18), was pointed out by the dissent. 102 S. Ct. at 3055-56 (White, J., dissenting). The use of the term "appropriate" in many sections of the Act accords with congressional concern for discretion and flexibility in the Act's operation, rather than for hard and fast rules that are inapplicable to education. In the context of the opinion, this stretching for support makes the reader suspect the majority's belief in the soundness of its own rhetoric.

129. 102 S. Ct. at 3049.

130. The Court merely noted that "if the child is being educated in the regular classrooms . . . [the IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 3049.

131. 20 U.S.C. § 1401(19) (1976) (defining IEP).

132. *See supra* text accompanying notes 32-33.

133. *See supra* text accompanying notes 85-91.

134. *See supra* text accompanying note 93.

135. *See* 20 U.S.C. § 1400(b) (Supp. V 1981). The congressional findings note the number of

tended to be the ultimate test of whether FAPE has been provided. Although courts generally avoid decisions involving purely educational policy, the failure of the Act to limit review and its express direction that courts grant "such relief as the court determines is appropriate,"¹³⁶ as the dissent pointed out, seem to indicate a congressional intent that the scope of judicial review be somewhat broader than the majority would allow.¹³⁷ The majority also ignored a Conference Committee report directing courts to make an "independent decision." The dissent called attention to the report,¹³⁸ as well as to similar statements made by Senator Williams, the Act's chief sponsor, emphasizing review of any matter relating to FAPE¹³⁹ or the original complaint.¹⁴⁰ In an effort to bolster its argument that the procedures are sufficient to protect a child's right to FAPE, the majority emphasized procedures guaranteeing parental input and stated that "[a]s this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."¹⁴¹ This contention, however, is somewhat specious, for not all parents have the time, sophistication, and purse to effectively confront local and state agencies.¹⁴²

In addition, even though educational policy has traditionally been left to the states,¹⁴³ under the Act Congress expressed an interest in ensuring that federal funds are properly spent. This interest is particularly strong since there is a financial incentive for schools to label children "handicapped,"¹⁴⁴ but then to place them in a relatively inexpensive program.¹⁴⁵ Understanding this tension, it is more likely that Congress granted the courts authority to scrutinize educational decisions, rather than merely to determine whether procedures were followed and whether the IEP was reasonably calculated to produce an educational benefit. Although it is important, as the majority warns, that courts "avoid imposing their view of preferable educational methods upon the States"¹⁴⁶ and give "due weight" to the administrative proceed-

handicapped children who are excluded from education, and those who are not completely excluded but whose needs nevertheless are not met. *See also supra* notes 4-8 and accompanying text.

136. 20 U.S.C. § 1415(e)(2) (1976).

137. *See supra* note 87.

138. 102 S. Ct. at 3056 (White, J., dissenting) (quoting S. CONF. REP. NO. 455, *supra* note 87, at 50, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1480, 1503).

139. 102 S. Ct. at 3056 (White, J., dissenting) (quoting 121 CONG. REC. 37,415 (1975)).

140. *Id.* (quoting 121 CONG. REC. 37,416 (1975)).

141. *Id.* at 3052.

142. *See Large, supra* note 5, at 255-63; Note, *Enforcing, supra* note 24, at 1110-13. Parents often feel railroaded into their child's IEP. *See, e.g., M.J.S., Parents and the I.E.P., EXCEPTIONAL PARENT*, Aug. 1979, at E10.

143. *See Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

144. States receive funds for each child so labeled. 20 U.S.C. § 1411(a)(1) (1976).

145. Note, *Enforcing, supra* note 24, at 1110 n.43. *See Haggerty & Sacks, supra* note 19, at 991; Hartman, *Policy Effects of Special Education Funding Formulas*, 6 J. EDUC. FIN. 135, 156-57 (1980); Shanker, *supra* note 33, at 54.

146. 102 S. Ct. at 3051. The Court also warned that "once a court determines the requirements of the Act have been met, questions of methodology are for resolution by the States." *Id.* at 3052.

ings,¹⁴⁷ it is possible that these goals could have been satisfied without restricting judicial review more narrowly than the Act, its policies, and its history indicate was intended by the legislature.

It is somewhat superficial, however, to criticize the Court's conservative interpretation of the Act without recognizing certain considerations, outside the facts of the *Rowley* case, that may have influenced the decision. One is the long-standing philosophy that education should be left to state control, within constitutional limitations,¹⁴⁸ which conforms with the current trend of minimizing federal involvement in affairs of a local nature.¹⁴⁹ This concern was manifested by limiting review of state and local educational decisions, and is evidenced by the Court's reference to *San Antonio School District v. Rodriguez*.¹⁵⁰

Money may have been the Court's major concern.¹⁵¹ The cost of special education is rising at a rate greater than twice that of regular education.¹⁵² Congress has not allocated enough money to pay for special programs required by the Act,¹⁵³ and yearly appropriations are less than the cost of authorizations.¹⁵⁴ The financial concerns of the Court are best illustrated by its reference to the limit of Congress' use of its spending power to obligate state compliance with federal conditions.¹⁵⁵ Because of conflicts between educa-

147. *Id.* at 3051.

148. *See supra* note 143.

149. *See Stark, supra* note 80, at 528-29 (discussing the attempts to conform the Act to the "New Federalism").

150. *See* 102 S. Ct. at 3052 (citations omitted) (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)):

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

Cf. Plyer v. Doe, 102 S. Ct. 2382 (1982) (Texas statute depriving illegal alien children of access to education violates the equal protection clause), which indicates that the federal government will not defer to state education policies that violate a constitutional provision.

151. It has been estimated that the cost of Pub. L. No. 94-142 to New York City could reach \$50 million. Shanker, *supra* note 33, at 56. To provide interpreters for the deaf in New York State could cost an estimated \$100 million. McCarthy, *Education for the Handicapped: Lawyers and Judges Will Decide What Your Schools Can and Can't Do for Students*, AM. SCH. BD. J., July 1981, at 24, 24-25 (1981).

152. 121 CONG. REC. 23,705 (July 21, 1975). *See generally Stark, supra* note 80. A single sign language interpreter costs between \$10,000 and \$20,000 per year. Flygare, *Recent Court Decisions Could Greatly Increase Cost of Special Education Programs*, 62 PHI DELTA KAPPAN 210, 210 (1980).

153. *See Colley, supra* note 27, at 145; Shanker, *supra* note 33, at 55; Stark, *supra* note 80, at 484-87.

154. Vernon, *Education's "Three Mile Island": PL 94-142*, PEABODY J. EDUC., Oct. 1981, at 24, 26 (1981); *see Shanker, supra* note 33, at 55. *See generally McCarthy, Handicapped Children: Legal Mandates and Fiscal Implications*, 5 J. EDUC. FIN. 334 (1980) (arguing to limit services); Weiker, *The Need for a Strong Education for All Handicapped Children Act*, 14 CONN. L. REV. 471 (1982) (arguing for increased appropriations).

155. "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 . . ." 102 S. Ct. at 3049 n.26 (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981)).

tional and financial priorities, some commentators have predicted a "backlash" against special education.¹⁵⁶ As a result, the Reagan administration proposed regulations purporting to offer some relief,¹⁵⁷ but because of adverse public reaction, many of the proposals have since been withdrawn.¹⁵⁸

These problems are exacerbated by tensions within the Act itself. For example, the mainstreaming requirement,¹⁵⁹ which is supposed to aid handicapped and nonhandicapped children to integrate socially, often results in a lower standard of academic excellence.¹⁶⁰ Not only is mainstreaming controversial as an educational policy, but it also requires extra staff with special training and reduced class sizes, thereby increasing demands on local school budgets.¹⁶¹ Another tension is the "related services" provision, which requires medical services for diagnostic and evaluative purposes,¹⁶² but does not distinguish educational from noneducational services. As a result, many costly

156. The financial crisis created by the Act is discussed in McCarthy, *supra* note 151, at 25; Stark, *supra* note 80, at 524 & n.201; Vernon, *supra* note 154, at 27. The strains of the IEP process are equally strong. See Blakely, *supra* note 5, at 627-29; Shanker, *supra* note 33, at 51-52; Stark, *supra* note 80, at 483 n.20.

157. U.S. Department of Education Proposed Changes to P.L. 94-142 Regulations, 47 Fed. Reg. 33,836 (Aug. 4, 1982); see Stark, *supra* note 80, at 524-29.

One proposal, which is opposed by some critics who claim it contradicts the basic nature of mainstreaming, would eliminate § 121a.552(a)(3) of the regulations, which requires placement as near as possible to the child's home. See DEPARTMENT OF GOVERNMENTAL RELATIONS, COUNCIL FOR EXCEPTIONAL CHILDREN, AN ANALYSIS OF U.S. DEPARTMENT OF EDUCATION PROPOSED CHANGES TO P.L. 94-142 Regulations 14 (Aug. 4, 1982). While open to abuse, the proposal could prevent some duplication of services by allowing more flexibility in placement.

158. The general reaction was that the proposed changes would emasculate the Act. See Association for Retarded Citizens/N.C., "The Consumer" Info-gram (Sept. 3, 1982); DEPARTMENT OF GOVERNMENTAL RELATIONS, *supra* note 157; see also Stark, *supra* note 80, at 524-29 (concerning the proposed new regulations); Weicker, *supra* note 154 (criticizing block grant proposals). But see Tufts, *The Washington Climate and Handicapped Persons: A Report from Jean Tufts*, EXCEPTIONAL PARENT, Apr. 1982, at 13. Mrs. Tufts, Assistant Secretary, Special Education and Rehabilitative Services, U.S. Department of Education, presented the administration's viewpoint on the proposed regulations.

159. See *supra* notes 36-37 and accompanying text.

160. Large, *supra* note 5, at 241-54, discusses the counterbalancing considerations and concludes that, particularly with the deaf, the regular schools simply do not have the sophistication to provide the academic opportunities offered at specialized placements. See also Note, *Enforcing*, *supra* note 24, at 1121-24. But see Blakely, *supra* note 5, at 621, who suggests that mainstreaming not only facilitates integration of the handicapped, but improves self-esteem, which will have the effect of improving academic performance. Cf. Hanley, *Adrift in the Mainstream?*, EXCEPTIONAL PARENT, Aug. 1979, at E3 (putting a child into a mainstreamed environment has the effect of damaging self-image because the child cannot fully compete with his "normal" peers, and his disabilities seem more apparent than in private placement). Compare Harris, *Hearing Impaired Children: What Environment is Least Restrictive?*, EDUC. UNLIMITED, Nov.-Dec. 1980, at 14, 15 (postulating that residential placement is frequently less restrictive than the regular classroom; also suggesting that the availability of specialized services is far greater at residential placements, particularly at those for the deaf). See also Freeman, Gavron & Williams, *Public Law 94-142: Promises to Keep*, EDUC. HORIZONS, Spring 1981, at 107, 109, which asks how mainstreaming can eliminate the stigma of being labeled handicapped, if to be "mainstreamed," the child must first be labeled handicapped.

161. Blakely, *supra* note 5, at 627-33; see Shanker, *supra* note 33, at 54. Cf. Stark, *supra* note 80, at 493-94 (arguing that mainstreaming has had the ironic effect of reducing costs because it is cheaper than residential placement). In suits pertaining to this element of the Act, nearly seven times as many parents seek residential placement as mainstreaming. *Id.* at 494; see, e.g., Davis, *Mainstreaming Versus an Appropriate Education*, 6 Y.B. SPECIAL EDUC. 29 (1981).

162. 20 U.S.C. § 1401(17) (1976).

medical expenses have been introduced into school budgets.¹⁶³

In addition, the Court may have been influenced by the amount of time and money spent by schools litigating claims under the Act.¹⁶⁴ While any definitive standard would have reduced the litigation, by setting a conservative standard and particularly by limiting judicial review, *Rowley* could greatly reduce these costs.

Whatever factors may have affected the outcome of the case, as the first judicial interpretation of P.L. 94-142, *Rowley* will profoundly influence handicapped education. Although the Court expressly limited its holding to mainstreamed children who are receiving special instruction and services and are performing above the class average,¹⁶⁵ the groundwork for that holding established certain inescapable parameters for defining FAPE. By expressly rejecting an interpretation that the Act was intended to "maximize potential"¹⁶⁶ and substituting a standard that the handicapped child need only receive "educational benefit,"¹⁶⁷ the Court has authorized for all handicapped children a standard that should be met with relative ease by school systems. The standard offers the potential for abuse by an unscrupulous school administration, which could conceivably cut services to provide a handicapped child with only a minimal benefit, yet still fulfill the Act's requirements. In fact, although hyperbolic, the dissent's contention that a deaf child would "benefit" from a teacher with a loud voice seems valid.¹⁶⁸ Clearly, in order to protect the rights of handicapped children, "benefit" must not be read apart from the requirements of specialized instruction and related services individually designed to confer the benefit.¹⁶⁹

The Court's emphasis on progress from grade to grade¹⁷⁰ as satisfying the "benefit" test for mainstreamed children may also favor certain children while penalizing others. Children with physical handicaps will be affected very little by the Court's approach, because once physical access and mobility are provided, the ability to learn is usually not affected.¹⁷¹ Children with sensory handicaps, however, such as Amy, may tend to aggregate near the class me-

163. See Stark, *supra* note 80, at 495-97; see also White, *supra* note 33, at 20. Consider *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980), in which a school was forced to catheterize a child. *Tatro* is discussed in Note, *A Confusion of Rights and Remedies*, 14 CONN. L. REV. 585 (1982).

164. It has been suggested that the entire IEP process is too adversarial. See Geiser, *Commentary*, EXCEPTIONAL PARENT, Aug. 1979, at E2; White, *supra* note 33, at 20. Mediation has been suggested as a means both to protect the rights of handicapped children and to save expense. Geiser, *supra* note 33, at E14. The use of trained advocates has also been suggested. Comment, *A Legislative History*, *supra* note 5, at 326; see Note, *Enforcing*, *supra* note 24, at 1112.

165. 102 S. Ct. at 3049.

166. *Id.* at 3042.

167. *Id.*; see *supra* text accompanying note 67.

168. 102 S. Ct. at 3055 (White, J., dissenting); see *supra* note 95.

169. See *supra* note 79 and accompanying text. In *Rowley*, it was clear that Amy was receiving individually designed services and that they conferred educational benefit. It is likely that a "teacher with a loud voice" would confer benefit as well, but would not satisfy the test of "specialized instruction and related services which are individually designed."

170. 102 S. Ct. at 3049.

171. These children, however, do require that other courses, physical education being the most obvious example, be especially tailored to their needs.

dian, rather than being spread over the normal curve reflecting their abilities. This would result from the likelihood that greater effort and resources will be expended to bring children with greater learning difficulties up to passing standard, while diminished services may be provided to the more capable or gifted handicapped children, who could continue to progress, but now may never be able to excel.¹⁷² If this shifting of services does occur, it will be attributable solely to the influence of the child's handicap, even though it is arguable that the influence of a child's handicap on his education was the very thing the Act was intended to prevent.¹⁷³ Thus, the most capable handicapped children may bear the burden of *Rowley*, and their parents may be faced with a hard choice between the socialization benefits of the mainstreamed environment or the educational advantages of the private institution.¹⁷⁴ Many families cannot afford to choose between these options.¹⁷⁵

Another problem with the Court's emphasis on academic performance is that grades could be easily manipulated at a local level to give the appearance of progress.¹⁷⁶ Moreover, passing grades and progress through school do not necessarily represent acceptable standards of learning.¹⁷⁷ Congress called for setting yearly goals in the IEP,¹⁷⁸ recognizing that progress of the handi-

172. Amy Rowley has an I.Q. of 122, which is at the 92nd percentile in intelligence. J. SATT-
LER, ASSESSMENT OF CHILDREN'S INTELLIGENCE 458 table C-299 (1974). Yet she performs at
slightly above the median in her class. *Rowley*, 483 F. Supp. 528, 532 (S.D.N.Y. 1980). She could
excel, yet, because she receives some benefits from the services provided, she is said to be receiving
FAPE, and is effectively trapped near the median.

There is a certain irony in the Court's conclusions, for Amy's parents are largely responsible
for her progress. See *supra* note 41 and accompanying text. If, in an effort to compensate for the
low standard established in *Rowley*, Amy's parents put more effort into working with Amy, the
school could arguably cut back services so long as she still received some benefit. Conversely, by
cutting back on time spent, her parents could perhaps force the school to do more. This is an
absurd situation, admittedly hyperbolic, but frighteningly rational within the context of *Rowley*.

173. Of course, this was simply the view of the district court, which, in light of the decision of
the Supreme Court, has lost its argumentative value. 483 F. Supp. at 535. But considering the
scope of the Act and its history, it seems that the intention of the Act was to remove or reduce as
much as possible the effects of handicaps as barriers to receiving education. While the district
court focused on comparing the educational shortfall of the handicapped to their nonhandicapped
peers, this was merely the means by which it attempted to quantify the effect of the handicap. The
thrust of the opinion was that once the effect was measured, steps could be taken to eliminate it, so
that the child could receive an educational "opportunity commensurate with . . . [that] provided
to other children." *Id.* at 534. Perhaps if the district court had phrased its standard in terms of
eliminating as much of the adverse educational effects on the handicapped as is reasonably possi-
ble, its conclusion might have been less objectionable to the Court. See also 102 S. Ct. at 3055
(White, J., dissenting).

For an influential source in the district court's formulation, see Note, *Enforcing, supra* note
24, at 1125-27.

174. See *supra* note 160.

175. Large, *supra* note 5, at 260. It is conceivable that this problem could be compounded by
Rowley, for if the language emphasizing self-sufficiency is grasped as a goal for the more severely
handicapped, it may have the effect of channeling more dollars into educating the severely handi-
capped to self-sufficiency, and fewer to those who need only to "benefit." See *supra* notes 126-27
and accompanying text.

176. But see Geiser, *supra* note 33, at E16 (suggesting that in the case of handicapped children,
it is often necessary to modify the grading system in order to accurately reflect achievement).

177. See *Donahue v. Copiague Union Free School Dist.*, 64 A.D.2d 29 (1978), *aff'd*, 47 N.Y.2d
440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979), in which a student graduated from high school,
but could not read or write well enough to fill out job applications.

178. 20 U.S.C. § 1401(19)(B) (1976).

capped is not always measured as accurately by grades¹⁷⁹ as it is by specific individualized goals.¹⁸⁰ By stressing grades, the Court has distorted the IEP provision and weakened the ability of parents to monitor effectively their child's progress through the attainment of particular goals. As a consequence, parents will have to be more careful about requiring specificity in the IEP and ensuring that the goals are met independently of grades. There will also be a need for scrutiny of grading procedures, perhaps even at the judicial level.

The Court's heavy emphasis on the procedural safeguards in the Act should force school systems and state educational agencies to adhere strictly to those procedures. Once the procedures are followed, *Rowley* effectively renders the decisions made thereunder impervious to attack because there is no room in the language of the decision for judges to review an IEP beyond whether it is "reasonably calculated to enable the child to receive educational benefits."¹⁸¹ By limiting the scope of judicial review, the court has strengthened the position of state and local education agencies. Parents, who started out in a weak bargaining position,¹⁸² have now lost the threat of suit as an effective negotiating weapon during the IEP process.¹⁸³ This shift in strength will place a greater burden on the integrity of educators to make decisions that are sound educationally rather than merely fiscally.¹⁸⁴ Another effect of the child's weakened position may be a push for better representation of the child during the critical initial administrative stages. Commentators have suggested protecting the child through the use of trained advocates,¹⁸⁵ or mediation, which would have the additional advantage of eliminating administrative expenses.¹⁸⁶ After *Rowley*, such a change may become necessary.

One additional consequence of *Rowley* may be that the states will follow the federal lead in construing the standards of FAPE under their individual state statutes. While many state statutes are drafted in conformity with the federal model, many others have explicit standards set out in the statute.¹⁸⁷ At

179. See Geiser, *supra* note 33, at E16.

180. 20 U.S.C. § 1401(19)(B) (1976) requires that the IEP set forth "a statement of annual goals, including short-term instructional objectives." Section 1401(19)(E) (1976) calls for "appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved."

181. 102 S. Ct. at 3051; see *supra* text accompanying note 93.

182. See Large, *supra* note 5, at 257-63; Silverberg, *Due Process Hearings: Schools Have Home Court Advantage*, 4 AMICUS 89, 89-90 (1979).

183. But see Vernon, *supra* note 154, at 28 (urging that a minority of assertive parents abuse the process at the cost of the remaining students). Some parents use the process as a release for their own frustrations. Jacob, *A School Administrator's View: Hidden Dangers, Hidden Costs*, 4 AMICUS 86 (1979).

184. Vernon, *supra* note 154, at 164; see Shanker, *supra* note 33, at 54. See generally Hartman, *supra* note 145.

185. Comment, *A Legislative History*, *supra* note 5, at 326; see Note, *Enforcing*, *supra* note 24 at 1112.

186. See Geiser, *supra* note 33, at E14.

187. See, e.g., IOWA CODE ANN. § 281.2 (West Supp. 1981); MO. ANN. STAT. § 162.670 (Vernon Supp. 1981); MONT. CODE ANN. § 20-7-401(1) (1981) (requiring services designed to "meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped are met"); TENN. CODE ANN. § 49-2912 (Supp. 1982) (requiring services "sufficient to meet the needs and maximize the capabilities of handicapped children").

least one state court has held that its statute requires more than *Rowley*.¹⁸⁸ It is certain that, at a minimum, the states must abide by the federal requirements.

By focusing on the "benefit" language in the definition of related services,¹⁸⁹ and by reading narrowly the germinal pre-Act cases¹⁹⁰ and pursuant legislative history,¹⁹¹ the Supreme Court in *Rowley* established a relatively conservative standard for FAPE.¹⁹² While the standard of receiving some educational benefit is higher than the self-sufficiency standard argued by some,¹⁹³ it is well below that espoused by the district court, upheld by the circuit court, and defended by the dissent, of "maximizing potential commensurate with the opportunity offered other children."¹⁹⁴ Because the Court limited its holding to the precise facts before it, the effect on nonmainstreamed students is an open question, although it appears certain that the standard of receiving some benefit applies to all handicapped children.¹⁹⁵

Particularly in light of the Court's emphasis on passing grades as satisfying educational benefit, *Rowley* could have the effect of allowing schools to cut back on services, particularly those offered to the more gifted handicapped children.¹⁹⁶ Additionally, by stressing grades as a test for appropriate education, the Court has potentially weakened the effectiveness of the IEP in providing a FAPE, and has contradicted the individualized nature of the process mandated by the Act.¹⁹⁷

The Court also aggrandized the procedural safeguards of the Act to the point that, if they are fulfilled, and the IEP is reasonably calculated to produce educational benefit, then the reviewing court can consider no more.¹⁹⁸ This emphasis will have the dual effect of forcing schools to abide painstakingly by the procedures and therefore making educational decisions effectively final after administrative remedies are exhausted. It will also weaken the negotiating position of the handicapped child relative to the school's ability to resist implementing the requested services.¹⁹⁹

A question that remains unanswered is how a school's failure to abide by the procedures set out in the Act will affect the validity of the school's plan. It

188. In *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982), the court held that although N.C. GEN. STAT. § 115-363 (1978) was drafted to bring the state into conformity with the Act, *Rowley* did not control interpretation of the statute, which had since been rewritten to express "that the policy of the State is to ensure every child a fair and full opportunity to reach his full potential." 58 N.C. App. at 264-65 & n.1, 293 S.E.2d at 690 & n.1 (quoting N.C. GEN. STAT. § 115C-106 (Cum. Supp. 1981)).

189. See *supra* notes 104-06 and accompanying text.

190. See *supra* notes 110-18 and accompanying text.

191. See *supra* notes 119-28 and accompanying text.

192. See *supra* notes 97-128 and accompanying text.

193. See *supra* note 80.

194. See *supra* notes 57-59 & 95 and accompanying text.

195. See *supra* notes 165-68 and accompanying text.

196. See *supra* notes 170-75 and accompanying text.

197. See *supra* notes 129-31 & 178-80 and accompanying text.

198. See *supra* note 181 and accompanying text.

199. See *supra* notes 182-84 and accompanying text.

is arguable that if the IEP is reasonably calculated to provide an educational benefit, a breach of the procedural mechanism becomes insignificant. In light of the stress the Court laid on those mechanisms, however, such nonadherence will be difficult for a reviewing court to overlook.²⁰⁰

Although *Rowley* is now controlling law in interpreting the provisions of P.L. 94-142, it remains to be seen what its full impact will be. It is clear that by selecting *Rowley* as its first case to interpret the Act, the Court brought before itself a relatively sympathetic factual situation. The school system was providing individualized services,²⁰¹ and the child was progressing socially and academically.²⁰² The question was how much progress is enough, and the Court used this sympathetic fact pattern to establish a relatively conservative standard of acceptable benefit. In doing so, the Court may have been, in part, reacting to considerations outside of the language and history of the Act itself.²⁰³ It is for Congress now to determine whether *Rowley* truly reflects the intentions of P.L. 94-142, for, after *Rowley*, the hands of the judiciary in construing its provisions are effectively tied.

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200. In reviewing administrative determinations, courts apply the rule of "harmless error," and will not reverse a decision for failure to follow a procedural rule if such failure did not seriously prejudice or otherwise injure the party entitled to the protection of the procedural safeguard. *Dodson v. National Transp. Bd.*, 644 F.2d 647 (7th Cir. 1981). Courts are cautious, however, in applying the doctrine when basic procedural rights have been implicated. *See, e.g., Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977).

The question of which rights are "basic" under the Act, and at what point prejudice occurs, is yet to be answered. Considering that the Supreme Court has raised the procedures of Pub. L. No. 94-142 to a level of being almost substantive requirements of an IEP, it could be contended that any breach of the procedures interferes with a basic right and causes prejudice to the handicapped child.

201. *See supra* text accompanying note 42.

202. *See supra* text accompanying note 47.

203. *See supra* notes 148-64 and accompanying text.