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The Quest for a Meaningful Mandate for the Education of Children with Disabilities

Gary L. Monserud

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ARTICLE

THE QUEST FOR A MEANINGFUL MANDATE FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

GARY L. MONSERUD¹

¹ Professor of Law, New England School of Law. The author is very grateful to Dean John F. O'Brien and the Board of Trustees of New England School of Law for a sabbatical semester during the spring of 2003. The sabbatical made it possible for me to write this article. Additionally, I especially thank four persons whose labors enabled me to finish this article. First, Marjory Lant, class of 2001, tirelessly and creatively did the basic research over the course of many months. Without Marjory's unfailing dedication, I would never have written this article. Three persons read and commented upon an earlier draft. From their comments, I gained many insights, and I am indebted to each. My first reader was Ann Jones, my wife. Ann is not only a good spouse and mother but a capable lawyer, and I appreciated every comment she gave. My second reader was Professor Mark C. Weber, DePaul University College of Law. The care and depth with which he considered my work was very encouraging. I have found his writing in the area of special education to be insightful and challenging. My third reader was Pamela Milman, a January 2004 graduate of New England School of Law, who has great practical knowledge of special education law gained from years of employment with the Massachusetts Department of Education. Pamela commented upon an earlier draft in a very constructive manner and provided useful insights about current issues in special education law. Finally, I thank the editors at St. John's Journal of Legal Commentary for a job well done in a timely manner.

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INTRODUCTION

I am the father of three daughters, two of whom have significant cognitive disabilities. The oldest, Josephine, was born February 28, 1983, with a chromosomal abnormality that led to the development of acute hydrocephalus which was shunted successfully at the regional hospital in Rapid City, South Dakota, when she was ten months old. She is moderately mentally retarded. The youngest, Ingrid, born December 7, 1986, was diagnosed as autistic when she was two. Autism is a life-long, neurologically-based disability. Both Josephine and Ingrid have been the recipients of special education services since before age two. Consequently, special education programs have profoundly influenced the course of my family's life for almost twenty years. Throughout these years, my wife and I have also had the joy of parenting our third child, Eleanor, who is a first year student at Mount Holyoke College.

It has been my good fortune that my wife, Ann Jones, is a responsible partner who has fully shared the struggles of raising children with disabilities. We have worked through numerous IEP²planning meetings. Our school districts have served us well. Many excellent administrators, teachers, specialists, and aides have helped our daughters along the way. For these dedicated

² Individualized Education Programs required by 20 U.S.C. § 1414(d), discussed in detail in Part II.B.2 of this article.

persons, we have been and remain very grateful.³ Their sacrifices and hard work have borne fruit in our children's lives.

When children have significant cognitive disabilities, parenting never really ends. Neither Josephine nor Ingrid will ever be *independent* in any normal meaning of the term. They have lived, and to some extent will continue to live, sheltered lives. Their daily routines have always been managed for them, and so far as we can foresee, this will be always be the case. Each will delight in spending nickels, dimes, quarters, and even dollars, but most of their resources are, and will primarily remain, in someone else's control.⁴ So far as we can fathom, their respective worlds in time and space are very small. The fact is: both Josephine and Ingrid are significantly, mentally disabled for life.⁵

Josephine and Ingrid differ in one important respect. Josephine's world includes many friends and acquaintances. She is gregarious. In her own way, she can charm people. She visits people and people visit her. Ingrid relates to her immediate family, her teachers, some dedicated care givers, a couple of classmates, her van drivers, and our cats, Dinah and Betsey. Ingrid has never had a friend of her own age and choosing with whom she could communicate or play spontaneously. This does not mean that children have been unwilling; in fact, a few little girls tried hard without success. Ingrid simply has no interest in, perhaps no ability for, anything akin to a normal friendship with anyone of her own age. Chiefly, she enjoys schoolwork, storybooks, videos, going out for pizza, tandem biking with her Dad, and recently practicing simple piano lessons with her Mom.

Our family passed through hard times, especially with Ingrid. Starting at age ten, Ingrid went through two terrible phases: first, of physically self-abusive behavior, and second, of physically aggressive behavior. We investigated residential placements

³ Above all we thank Chris Healey, Ingrid's tutor for three years at Alcott School in Concord, Massachusetts. Chris weathered the worst of Ingrid's stormy behaviors with equanimity. We also thank Joanne Delaney, the special education coordinator for our school district, who has skillfully and cheerfully helped us to secure the most appropriate placements for our daughters.

⁴ Ann and I are guardians for Josephine and will become guardians for Ingrid when she turns eighteen. We have established guardianships for the time after our deaths.

⁵ As will be explained in Part I.B. the word "handicap" and its derivatives were in fashion for a time, but currently the word "disability" and its derivatives are more popular. I use these words and their derivatives interchangeably in this article.

very seriously at these points. We decided to try to work things out at home. We struggled, and with the help of teachers, caretakers, physicians, and a psychologist, eventually Ingrid calmed down.⁶ She successfully came through her days of self-abuse and aggression and emerged as a happy and generally cooperative teenager.⁷

Josephine's troubles were less dramatic even in their worst manifestations. She was at seven or eight a one-person home demolition expert, clearing shelves and counters randomly and frequently. She also went through crying phases when, for unfathomable reasons, she cried for hours at a time. But, she came through her times of low-level destruction and sadness. At age twenty-one, Josephine is a reasonably well-adjusted young woman in a residential placement.⁸ She went there when she was ready, not because she became too difficult. She is a frequent and refreshing presence in our family home for holidays and on weekends.

To an outsider, this family predicament might seem pathetic or even tragic. It is neither. After twenty years of struggle, I can say as confidently as I could testify to any fact in court, that our youngest and oldest daughters are intriguing, interesting, fun, and generally good company. With steady training, encouragement, and carefully made connections, Josephine and Ingrid have learned to enjoy their lives at school and at home. They are valued members of their school communities. Each has learned in small ways to be *useful*. Josephine is able to participate in productive work in her residential school. She does contract work that involves sorting items and stuffing envelopes

⁶ We never were able to gain a clear picture of everything that ailed Ingrid during the days of her worst troubles, but we know she had had bladder infections, intermittent and severe constipation (common among autistic children), and suffered terribly with the onset of puberty. We are especially grateful to Ingrid's pediatrician, Dr. Edward Saef, and to her psychiatrist, Dr. Beth Brownlow, both of whom practice in Concord. They allowed us to be partners in problem-solving. We have also had the good fortune to receive very special help from talented caregivers over the years, for which we are truly grateful. The selfless contributions of the following four women to our daughters and to our family life have been remarkable; they are Colleen Foley Ingersoll, Kelly Jaracz Weene, Sherri DiPippo Clark, and Heide Marquardt. They enriched our lives immeasurably.

⁷ Ingrid turned 17 on December 7, 2003, while I was editing this article.

⁸ At this time of this writing, Josephine lives at the Cardinal Cushing School in Hanover, Massachusetts, where she lives in an apartment with three other young women under supervision. This has to date proved to be a very fine placement.

and on occasion works in the school's thrift shop. Ingrid cleans tables and sweeps floors in her school's lunch area.⁹ She is learning to do increasingly difficult filing tasks. Josephine sings in a choir. Ingrid has played on after-school athletic teams. Ingrid's reading and her basic math skills continue to expand. She truly enjoys academic accomplishments. Ingrid started piano lessons at age sixteen and is slowly gaining skills. Given their disabilities, each is doing quite well.

It is true that we have been, and still are, a burden on society in a monetary sense. Our daughters have been costly for our school districts. Long-term, state and federal programs will probably expend money to help meet some of their needs.¹⁰ With familial and societal supports, both Josephine and Ingrid can have long, satisfying, and useful lives. But, while each will take much from society, each has much to give if society can receive it. To this possibility, I will return at the end of this article. However, at this point, I feel that I must justify the foregoing paragraphs as an introduction to a law review article.

My purpose has been to provide the reader with a context for my intense interest in the law of special education. The law of special education helped to rescue our family from disaster. The requirements of special education law, state and federal, helped to save Josephine and Ingrid from the real possibility of mundane or meaningless lives. I cannot easily imagine what their lives would have been to date without the *mandates* that have required school districts to develop *meaningful* special programs for persons such as Josephine and Ingrid.¹¹ I have chosen to write an article about the federal mandate and selected state mandates because they often come under attack, principally on account of costs.¹² Moreover, the *meaning* of the federal and

⁹ Ingrid attends a private day school, Melmark School, in Woburn, Massachusetts.

¹⁰ Supplemented, we hope, by the proceeds of considerable life insurance we have put in place.

¹¹ For a discussion of the federal mandate, see Part II of this article. The federal mandate and state mandates are discussed in much greater detail in connection with case discussions in Parts III - VII.

¹² One school committee member in a Boston suburb, who will not be named here, is reported to have publicly stated very recently, that if the mandates are too costly, we must simply rid ourselves of the mandates! Since the mandates are anchored in state and federal constitutional guarantees of equal protection, a sudden extinction of the mandates is unlikely, but the attitude betrayed is apparent.

state mandates for special education are constantly the subject matter of discussion, negotiation, mediation, and litigation. The subject of *funding* to meet the mandates has generated debates in local, state, and national political controversies.¹³

These political controversies have stirred up legal questions worthy of academic consideration. Two closely related questions are the following: (1) what does the federal mandate that a child with a disability be provided a "free and appropriate education"¹⁴ really mean? (2) have heightened state mandates, meaning state requirements for special education more rigorous than the federal mandate,¹⁵ truly made a difference for children with disabilities? The latter question became especially important in Massachusetts in 2000 when the legislature decided to repeal, and did repeal, our heightened mandate. At the time, my hunch was that the change, driven by a desire for cost-cutting, was probably ill-conceived and unlikely to cut very many costs, since the federal mandate, rightly construed, would usually require equal or similar programs and placements. I remained uninvolved in the political fray.

When the opportunity came, I decided to use my academic freedom to investigate the question of whether or not heightened state mandates, or their repeal, have made significant differences in the lives of children with disabilities. For a sabbatical project, I undertook a comparative study of case law arising from placement disputes in five jurisdictions having heightened state mandates. For comparison, I studied cases decided under the federal mandate showing the most progressive interpretations of that mandate, especially cases decided by the Third Circuit Court of Appeals. On the basis of that comparative study of pertinent case law, I have concluded that the heightened state mandates

¹³ Probably the best known and most dramatic political decision largely driven by concerns about funding special education was the decision by Senator Jim Jeffords, U.S. Senator from Vermont, to leave the Republican party to become an Independent in June, 2001. His frustration grew over many weeks as his colleagues refused to negotiate seriously about federal funding for special education. See Christopher Graff, *An Inside Look at a Party Switch That Changed History*, L.A. TIMES, June 24, 2001, at A14.

¹⁴ The statutory language of the federal mandate and related concepts are discussed in detail in Part II of this article.

¹⁵ Heightened state mandates are discussed in detail in Parts III through VII of this article.

have not *generally* required placements different from those required by progressive interpretations of the federal mandate.

I have further concluded that the federal mandate, as developed by some very able federal appellate judges, can serve as an acceptable, workable mandate for the education of children with disabilities. Consequently, in most states, political battles over the wording of state *statutory* mandates will not near-term be a necessary or worthwhile pursuit for advocates who care about special education. However, the federal circuit courts of appeal are not uniformly interpreting the federal mandate. The courts would do well to emulate the reasoning and careful implementation of the mandate undertaken in the Third Circuit. Moreover, through the course of research, I have come to believe that there are legal frontiers for special education advocates which merit more attention than has been given to date. Hence, my quest for a meaningful mandate, as the title implies, has given rise to a set of conclusions which I hope to justify in the pages following.

I. THE ORIGINS OF SPECIAL EDUCATION LAW

A. *Exclusion From Public Schools as the Historical Norm*

Mandatory public education for children with serious disabilities is a recent development. In the 19th century and for much of the 20th century, the case reports show students with physical and mental disabilities being *excluded* from public education solely on account of their disabilities. An oft-cited example is *Watson v. City of Cambridge*¹⁶ where a student was excluded from a public school in Cambridge, Massachusetts, by school officials “because he was too weak-minded to derive profit from instruction.”¹⁷ The suit that followed was pled in tort for wrongful exclusion.¹⁸ The trial judge allowed a jury to decide whether or not the school was liable, and the jury found for the plaintiff, meaning they concluded that the exclusion was a

¹⁶ 157 Mass. 561 (1893).

¹⁷ *Id.* at 561 (quoting records kept by school committee for City of Cambridge).

¹⁸ *Id.* at 562 (exhibiting plaintiff sought damages for wrongful exclusion and not being able to “enjoy the privileges of the school”).

tortious act. Yet on appeal, the Supreme Judicial Court of Massachusetts reversed and upheld the exclusion in deference to the statutorily granted powers of the city's school committee.¹⁹

As recently as 1958, the Supreme Court of Illinois explicitly approved the exclusion of children with cognitive disabilities from public education.²⁰ This ruling arose in a case commenced by the Illinois Department of Public Welfare seeking reimbursement for the costs of keeping the defendant's son, Richard, in the Lincoln State School.²¹ Under a state statute, relatives were liable for the cost of keeping residents, in this case \$60 per month. The defendant father, not a wealthy man, argued, *inter alia*, that the Illinois constitution required the legislature to provide a system of schools, "whereby all children of this state may receive a good common school education," and "that the constitutional mandate embraces mentally deficient children as well as those of normal intelligence."²² Therefore, claimed the father, the state was merely doing what it was constitutionally obliged to do, and as a consequence he owed nothing to the state. His argument was unavailing.²³ The trial court granted summary judgment for the Department.²⁴

The Supreme Court of Illinois affirmed, and citing state precedent, in relevant part justified the decision as follows:

19 In fairness to the court and to the school officials, their concern was the good order and learning environment for other students. The evidence tended to show that the child was "troublesome to other children, making uncouth noises, pinching others etc." and that he was "unable to take the ordinary decent physical care of himself." *See id.* at 561-62. The court concluded:

The management of the schools involves many details, and it is important that a board of public officers, dealing with these details and having jurisdiction to regulate the internal affairs of the schools, should not be interfered with, or have their conduct called in question before another tribunal, so long as they act in good faith within their jurisdiction. *Id.* at 563.

I find it interesting that the exclusion of a pupil with disabilities was justified on grounds similar to the rationale employed for the exclusion of an Afro-American girl from the Boston public schools in the 1840s. *See Sarah C. Roberts v. City of Boston*, 59 Mass. 198 (1849).

20 *See Dep't of Public Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958) (noting right to common school education implies one must have capacity to receive such training).

21 *See id.* at 270-71 (remarking the court classified Lincoln State School not as part of state school system but rather as hospital for mentally deficient).

22 *Id.* at 270.

23 *Id.* at 270 (explaining that legislation does not require state to provide free education programs for mentally deficient children, and that constitutional mandate claimed by plaintiff has no application).

24 *See id.* at 274 (concluding no legitimate issue of fact was presented in pleadings).

These cases hold that the constitution requires that the school system and schools provided thereunder shall be free to all children of the State for the purpose of providing a good common school education, and that the legislature has the power to determine what shall constitute such education. While this constitutional guarantee applies to all children in the State, it cannot assure that all children are educable. *The term "common school education" implies the capacity, as well as the right, to receive the common training;* otherwise the educational process cannot function. Defendant has admitted that his son was properly adjudicated incompetent and that the boy is described as "mentally deficient or feeble minded." Existing legislation does not require the State to provide a free educational program, as a part of the common school system, for the feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education. *Under the circumstances, this constitutional mandate has no application.*²⁵

It could scarcely be clearer that a child with a cognitive deficiency was simply outside of the state constitutional mandate and any rights to education afforded the rest of the children. Earlier, in the neighboring state of Wisconsin, a child with a *normal intelligence* was excluded from a public school because he suffered from a severe neurological impairment and related motor problems.²⁶ Teachers and other students thought the boy, Merritt, was annoying, even nauseating.²⁷ The school officials offered a segregated placement in a program designed for students with hearing and speech defects. His father declined

²⁵ *Id.* at 270 (emphasis added) (citing *People ex. re. Leighty v. Young*, 309 Ill. 27, 33 (1923) and *People v. Moore*, 240 Ill. 408, 412 (1909)).

²⁶ *State ex. rel. Beattie v. Bd. of Educ. of Antigo*, 172 N.W. 153, 153 (Wis. 1919) (presenting in facts that child appeared mentally normal).

²⁷ According to the summary of the facts provided in the opinion written for the majority of the Supreme Court of Wisconsin:

Merritt [Beattie] has been a crippled and defective child since his birth, being afflicted with a form of paralysis which affects his whole physical and nervous make-up. He has not the normal use and control of his voice, hands, feet, and body. By reason of said paralysis his vocal chords are afflicted. He is slow and hesitating in speech, and has a peculiarly high, rasping, and disturbing tone of voice, accompanied with uncontrollable facial contortions, making it difficult for him to make himself understood. He also has an uncontrollable flow of saliva which drools from his mouth on to his clothing and books, causing him to present an unclean appearance. He has a nervous and excitable nature.

See id. at 153.

and litigated, seeking a *writ of mandamus* to compel the school board to reinstate his son in a regular public classroom.²⁸ A jury found for the petitioning father.²⁹ But, in deference to school officials, the Supreme Court of Wisconsin reversed and upheld the exclusion stating, “[t]he right of a child of school age to attend the public schools of this state cannot be insisted upon when its presence therein is harmful to the best interests of the school.”³⁰ The school board decided the best interests of the school. There was a dissenter who would have deferred to the jury’s verdict.³¹ It is interesting to note that in this case and in *Watson*, the common sense of the jurors favored inclusion, meaning that persons with disabilities should be granted a right to go to school. It was judges *applying the law* who ousted the children.³²

These reported cases convey clear statements about societal values. Disabled children, especially cognitively disabled children, were deemed a nuisance. Children with motor impairments were an annoyance. Neither normal children nor teachers nor administrators wanted to be bothered with any of *them*. Many educators, perhaps most, genuinely believed that bringing children with significant disabilities - especially cognitive disabilities - into the public schools would disrupt the good order of the schools and thereby diminish the educational opportunities of non-disabled pupils. Indisputably, for many generations the doors of the country’s public schools were closed to students such as those described above. Our Josephine would likely have been barred on account of her moderate mental retardation and occasional tendency to drool slightly.³³ Ingrid’s autism, her greatly impaired ability to express herself verbally, and her worst phases of self-abuse and physical aggressions, would have barred her from any regular public school classroom

²⁸ See *id.* at 155 (exhibiting father’s view that his son was being denied Constitutional right of public education).

²⁹ See *id.* (claiming it was error for trial court to state School Board’s opinion was reviewable and subordinate to jury’s opinion).

³⁰ *Id.* at 154.

³¹ See *id.* at 155 (Eschweiler, J., dissenting) (opining there is no power vested within school board to determine whether or not there was an unreasonable interference with plaintiff’s rights; hence, it should be within jury’s discretion).

³² For that particular point, I am indebted to Professor Mark Weber, DePaul University School of Law, who wrote comments on an earlier draft of my article.

³³ Josephine has had absence seizures which caused slight drooling but the seizures are generally controlled with medication.

in an earlier era. The unpleasant truth is that over many generations, millions of children with cognitive and physical disabilities were barred by law from public schools.³⁴ Private alternatives were not publicly funded. No doubt rich parents sometimes made compensatory arrangements. Poor and middle class parents did their best at home or committed their children to state institutions where their lives were lived well outside of any serious public scrutiny and were often lives of degradation and misery.³⁵

B. Civil Rights for the Handicapped: A Quest for Access & Equal Protection

Progress for the disabled came about mainly as a spin-off of the civil rights movement which sought equal treatment for African-American children in public schools. This movement gained its landmark victory in *Brown v. Board of Education* in 1954.³⁶ In *Brown*, the Court put power into the Fourteenth Amendment's equal protection clause in the context of public education by recognizing that if black children were educated separately, even with best efforts directed toward equalization of teaching and facilities, their education was *inherently unequal*.³⁷ This was necessarily so because of the stigma attached to separate education and the deprivation of interaction with the mainstream children. In the generation that followed, advocates for children with disabilities picked up the equal protection argument and won important victories in courts.³⁸

³⁴ See, e.g., Christine Moyles Kovan, *Issues in the Third Circuit: Casebrief: Disability Law—Susquehanna School District v. Raelle S., Pendent Placement and Financial Responsibility Under the Individuals With Disabilities Act: The Third Circuit's Extension of Burlington*, 42 VILL. L. REV. 1867, 1871 (1997) (quoting Judith Herman, Assistant Secretary for Secretary of Special Education and Rehabilitative Services, "I was one of more than one million disabled children who were being denied the right to go to school.")

³⁵ See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305, 1310-12 (5th Cir. 1974) (describing filthy conditions and brutal environment at state institution for children with mental retardation).

³⁶ 347 U.S. 483 (1954) (holding that in the field of public education the doctrine of "separate but equal" is no longer applicable).

³⁷ See *id.* at 495 (indicating that segregation of children in public schools solely on the basis of race deprives those children of equal educational opportunities).

³⁸ The story of the great cases preceding statutory special education law, along with the story of the evolution of federal and state statutory law has been told in whole or in part in many treatises and primers. The following have been of enormous value to me in understanding the evolution of special education law, especially federal law, and they are

Two federal district court cases in the early 1970s were especially important, *Pennsylvania Association for Retarded Citizens v. Pennsylvania* (PARC)³⁹ and *Mills v. Board of Education of the District of Columbia*.⁴⁰

PARC was a class action suit against the Pennsylvania state board of education and others⁴¹ on behalf of mentally retarded children. The plaintiffs alleged that the defendants were meeting neither their state statutory obligations nor their federal Constitutional equal protection obligations with respect to the education of mentally retarded children.⁴² After a trial on the merits, PARC was resolved by a consent decree. The defendants agreed to provide a free public education for mentally retarded children between the ages of six and twenty-one in a manner calculated to meet the legal challenges advanced under the equal protection clause of the Fourteenth Amendment.⁴³

rich in citations to great case law. See generally RICHARD DAUGHERTY, SPECIAL EDUCATION (Greenwood Publishing Group, Inc. 2001) (detailing the development of special education law); STEVEN S. GOLDBERG, SPECIAL EDUCATION LAW (Plenum Press 1982) (indicating the manner in which special education law has evolved); THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW (Carolina Academic Press, 2001 ed.) (providing an overview of special education law); MARGARET C. JASPER, THE LAW OF SPECIAL EDUCATION (Oceana Publications, Inc. 2000) (evincing the evolution of special education law); N. MURDICK, B. GARTIN, & T. CRABTREE, SPECIAL EDUCATION LAW (Prentice Hall 2002) (describing the growth of special education law); EILEEN L. ORDOVER, EDUCATION RIGHTS OF CHILDREN WITH DISABILITIES (The Advocado Press 2001) (delineating the expansion of special education law); ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION (Allyn & Bacon 1996) (exploring the growth of special education law); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW (2d ed. Longman Publishers 1995) (tracing the maturation of special education law); JAMES A. SHRYBMAN, DUE PROCESS IN SPECIAL EDUCATION (Aspen Systems Corporation 1982) (recounting the unfolding of special education law); MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION (Merrill, 1998) (chronicling the advances in special education law); MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE (LRP Publications, 1992).

³⁹ 343 F. Supp. 279 (E.D. Pa. 1972) (entering judgment upon the consent decree); 334 F. Supp. 1257 (E.D. Pa. 1971) (indicating that Pennsylvania may not deny any mentally retarded child access to a free public program of education and training).

⁴⁰ 348 F. Supp. 866 (D.D.C. 1972) (holding that denial of publicly supported education to mentally retarded children violated the Due Process Clause).

⁴¹ See PARC, 334 F. Supp. at 1258 (maintaining that among the defendants were many officials and thirteen school districts in Pennsylvania).

⁴² See *id.* (using the term "retarded" instead of "disabled" to designate the Plaintiffs).

⁴³ Points proved or stipulated to and the main points in the consent decree were summarized by Mitchell L. Yell as follows:

Witnesses for the plaintiffs established four critical points. The first was that all children with mental retardation are capable of benefiting from a program of education and training. Second, education cannot be defined as only the provision of academic experiences for children (this legitimizes experiences such as learning to clothe and feed oneself as outcomes for public school programming). A third point was that, having undertaken to provide all children in the Commonwealth of

The *Mills* decision arose out of a class action in the District of Columbia against the District School Board. The parents and guardians of seven children with various disabilities claimed that these children, and approximately 18,000 other children with disabilities, were excluded from public schools in the District. The court entered a judgment that *mandated* a free public education for all children with disabilities (who except for their disabilities would have been admitted for a public education) and further ordered due process safeguards against arbitrary actions by administrators.⁴⁴ The court was not swayed by pleas from the Board that the relief ordered was not affordable. The equal protection argument successfully employed was consistent with *PARC*, but the due process safeguards were a judicial innovation in *Mills*.⁴⁵ Advocates in other jurisdictions were encouraged and filed suits which were often successful.⁴⁶

Congress took up the cause and after two lengthy hearings, Congress passed and on November 29, 1975 President Gerald Ford signed into law, the Act -The Watershed Legislative Act - upon which the educational rights of the disabled have rested for more than twenty five years, Public Law 94-142.⁴⁷ Thereafter it was commonly referred to as the Education for All Handicapped

Pennsylvania with a free public education, the state could not deny students with mental retardation access to free public education and training. Finally, it was stipulated that the earlier students with mental retardation were provided education, the greater the amount of learning that could be predicted. . . .

PARC was resolved by consent agreement specifying that all children with mental retardation between the ages of 6 and 21 must be provided a free public education, and that it was most desirable to educate children with mental retardation in a program most like the programs provided for their peers without disabilities.

YELL, *supra* note 38, at 59-60.

⁴⁴ See *Mills*, 348 F. Supp. at 877-83 (fashioning an extensive post-judgment role for the Court in the enforcement of the judgment).

⁴⁵ See *id.* at 877 (indicating the novelty of the post-judgment role for the Court).

⁴⁶ See *Panitch v. Wisconsin*, 444 F. Supp. 320, 323 (E.D. Wis. 1977) (detailing that mentally retarded children be provided with an education at public expense which is sufficient to their needs and generally equivalent to the education provided to non-handicapped children); *In re G.H.*, 218 N.W.2d 441, 448 (N.D. 1974) (maintaining generally that mentally retarded children are entitled to education where they reside); *In re Downey*, 340 N.Y.S.2d 687, 689 (N.Y. Fam. Ct. 1973) (indicating that generally the State has a duty to use all means and measures necessary to adequately meet the physical and educational needs of handicapped children).

⁴⁷ The Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 (1975) (redressing special education policy because the needs of children with disabilities were not being fully met).

Children Act (EAHCA).⁴⁸ There were amendments in the 1980's⁴⁹ and in 1990; Congress passed a major modification which changed the Act's title to the Individuals with Disabilities Education Act (IDEA).⁵⁰ Throughout the Act, amendments changed the word "handicap" to "disability" and accordingly derivatives of those terms were also changed.⁵¹ Of importance for our family, autism was specifically recognized as a cognitive impairment entitling a student to services. The Act has been re-authorized by Congress periodically. Re-authorization was in progress at time of this writing.⁵² Since the Act's enactment in 1975 one fact has been constant: *a child with a disability has a right to a free and appropriate public education (FAPE)*.⁵³ However, the meaning of a FAPE in many contexts is not apparent, so the question keeps recurring. What does the federal FAPE mandate require?

⁴⁸ The Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380 (1974) (designed as an amendment to Title IV - B of the Elementary and Secondary Education Act).

⁴⁹ The Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457 (1986) (providing for the award of reasonable attorneys' fees and costs to parents who prevail in litigation).

⁵⁰ The 1990 amendments have been summarized by Mitchell Yell as follows:

The 1990 amendments to P.L. 94-142 renamed the EAHCA the Individuals with Disabilities Education Act (IDEA). The IDEA included the following major changes: (a) the language of the law was changed to emphasize the person first, including the renaming of the law to the Individuals with Disabilities Education Act, as well as changing the term "handicapped student" to "child/student/individual with a disability"; (b) students with autism and traumatic brain injury were identified as a separate and distinct class entitled to the law's benefits; and (c) a plan for transition was required to be included on every student's individualized education program. (IEP) by age 16.

YELL, *supra* note 38, at 63.

⁵¹ The Substitution of "Individuals with Disabilities Education Act" for "Education of the Handicapped Act" Act of 1990, Pub. L. No. 101-476 (1990) (requiring the substitution of the term "handicap" for the term "disability").

⁵² See H.R. 1350, 108th Cong. (2003) (detailing the re-authorization of The Individuals with Disabilities Education Act); S. 1248, 108th Cong. (2003) (providing for the re-authorization of The Individuals with Disabilities Education Act).

⁵³ The Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (maintaining the general proposition that all children are entitled to a free and public education).

II. THE FEDERAL MANDATE FOR A FREE & APPROPRIATE PUBLIC EDUCATION

A. Main Points in the Federal Statute

I will often refer to the “Act” as shorthand for the IDEA and its predecessor.⁵⁴ The Act is a funding statute, meaning that the states can receive federal funds for special education only by complying with its requirements. States can receive federal funds if they develop educational plans that are in accordance with the Act’s requirements. What follows is an overview of the Act as a preparation for discussing state and federal cases that interpret and apply its requirements.⁵⁵

While the Act is intricate, there are six *concepts* of special significance for this article. I could say six *rights* of special significance but will avoid doing so because the word *right* is not universally affixed to each of the six concepts, and because the obligations of parents and guardians (such as meeting time limits) are inextricably connected to rights for children with disabilities. The six concepts are as follows: (1) Free and appropriate public education (FAPE); (2) Written individualized educational program (IEP); (3) Least restrictive environment (LRE); (4) Related services, meaning that an IEP must include services such as physical and occupational therapy, therapeutic recreation, counseling, and assistive technology services if these are appropriate for a FAPE; (5) Due Process, meaning that a parent or guardian who rejects an IEP (or a change in placement) has a statutory right to an administrative due process hearing; and (6) Judicial Review, meaning that the Act allows for judicial review of administrative decisions in either state or federal

⁵⁴ Under the Act, there are re-authorizations at intervals. There were amendments with the 1997 re-authorization as there will be with the pending re-authorization. The amendments that will accompany the 2004 re-authorization will probably not diminish the substantive rights that are the focus of this article except for students with disabilities subject to expulsion for disciplinary reasons. Special education advocates rightly have expressed concerns about this area.

⁵⁵ Experienced educators know the many facets of this statute well and need no tutelage; moreover, lawyers practicing in this area seem comfortable with most aspects of the Act. However, for readers not familiar with the Act or those with only a passing familiarity, a discussion of case law arising from the Act will be largely unintelligible without an overview of its main provisions.

courts. Understanding the case law requires a familiarity with the foregoing concepts. For each, I will set forth the pertinent statutory language and follow up with summary comments and occasional cross-references.⁵⁶

B. A Summary Analysis of the Main Concepts

1. Free and appropriate public education (FAPE)

According to the federal statute,

The term “free and appropriate public education” means special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.⁵⁷

Subsection (A) is not especially problematic and need not detain us. Subsection (B), with its *incorporation of state standards*, has proved interesting and challenging. In subsection (B), Congress provided an open door to heightened state-created mandates. Thus, if a state legislature or a state department of education creates a standard for the education of children with

⁵⁶ See generally Laura Ketterman, Comment, *Does the Individuals with Disabilities Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L. J. 913, 921–27 (2001) (explaining the statutory history and main provisions of the law). In the course of making re-authorizations and amendments over the past twenty-five years, some subsections have been moved so citations in the textual discussion may not correspond to citations made in some of the judicial opinions which follow. However, with respect to rights discussed in the text, the substance has been more or less constant, with a few enhancements, since EAHCA, now IDEA, was enacted.

⁵⁷ 20 U.S.C. § 1401(8) (2003) (defining “free and appropriate public education” through four different elements).

special needs, that standard becomes part of the state's *federal obligation* because the state standard is incorporated by subsection (B) into the federal requirements for a FAPE. Subsection (B) should be read in close conjunction with the introductory word "appropriate" and in conjunction with the definition of "special education" in §1401(25) which states:

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.⁵⁸

In light of this language, while trying to define in varied contexts what the right to a FAPE means, two questions have arisen: (1) What substantive requirements for a child's education are implicit in the word "appropriate" in this federal mandate? (2) To what extent can standards in state legislation and regulations lift the substantive requirements for a child's education above the federal mandate? Several states, by statute or regulation created language with the potential to raise the requirements for the education of disabled children above the FAPE mandate.⁵⁹ In hundreds of reported cases, courts have struggled to find a workable substantive meaning of "appropriate" to flesh out the full meaning of FAPE. In a lesser number of cases courts have struggled to discern the correct meaning of state mandates which are incorporated into the foregoing federal definition of a FAPE.

Subsection (C) of 20 U.S.C.A. § 1401(8) quoted *supra*, simply points toward the breadth of the FAPE requirement from preschool through completion of secondary school. Subsection (D) states explicitly that a FAPE requires an education and related

⁵⁸ 20 U.S.C. § 1401(25) (2003) (identifying which types of instruction qualify as "special education").

⁵⁹ The states wherein the courts have detected higher mandates are Massachusetts, Michigan, Missouri, North Carolina, and New Jersey. The case law from each is discussed later in this article. Other states have statutory language susceptible to interpretation as a heightened mandate but the courts have made nothing of it. See *infra* note 104 and accompanying text.

services in conformity with an individualized education program, a concept fundamental to the Act.⁶⁰

2. Individualized education program (IEP)

It is impractical to quote the whole definition. What follows are the most salient requirements:

The term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes:

(i) a statement of the child’s present levels of educational performance. . . .

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to –

(I) meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child’s other educational needs that result from the child’s disability;

(iii) A statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child -

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities. . . .

(iv) an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class and in the activities described. . . .⁶¹

For parents, schools, and children with disabilities, the IEP requirement is the core of the Act. Rightly drawn, an IEP

⁶⁰ See 20 U.S.C. § 1401(8) (D) (2003) (requiring that free appropriate public education is provided in conformity with the individualized education program required under section 20 U.S.C. § 1414(d)).

⁶¹ 20 U.S.C. § 1414(d) (2003) (defining and explaining the features and requirements of Individualized Education Programs).

accurately describes a child's unique needs and charts an appropriate path for meeting those needs. The IEP is inextricably interwoven with the placement decision, e.g. regular classroom, segregated classroom, out-of-district placement. Critical to the development of a good IEP is the "IEP team" also defined in 20 U.S.C. § 1414(d) to include: the parents of a child with a disability, a regular education teacher of the child (if any), a special education teacher of the child, a representative of the local educational agency (LEA), a person who can interpret child evaluations for pedagogical purposes, the child (when appropriate) and, in the discretion of the parents and LEA, other persons who have special knowledge or expertise regarding the child with disabilities.⁶² The development of an IEP is critical. My wife and I have tried to attend all IEP meetings together. In our experience, the IEP teams have varied greatly, but have nearly always consisted of persons of integrity and expertise who have made good partners in working toward IEPs for our children. However, case reports illustrate that the IEP development stage is where relationships between parents and schools commonly break down, resulting often in parental rejections of IEPs ultimately proposed by the remainder of the team consisting of the school personnel and often consultants.⁶³

3. The least restrictive environment (LRE)

20 U.S.C. § 1412(a) (5) slips in this requirement as a condition for federal funding with the words:

A state is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions. . . .

(5) Least Restrictive Environment

⁶² See 20 U.S.C. § 1414(d) (B) (2003). Note that the person required for interpreting evaluation results can be one of the teachers or someone with special expertise brought in from the outside.

⁶³ But see Judith Deberry, Comment, *When Parents and Educators Clash; Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L. J. 503, 505-07 (2003) (noting that conflicts often arise when school districts reject a parental request for a specific IEP for their child).

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁶⁴

This least-restrictive-environment (LRE) requirement (which can also be labeled as a child's right) has played a powerful role in channeling placements, hence, in influencing IEP development. It arose as an amendment to the Education of the Handicapped Act (EHA) of 1974 introduced by Senator Robert Stafford of Vermont and was later incorporated into the Act.⁶⁵ Schools must make a good faith effort to place and keep special education students in the least restrictive setting compatible with meeting their special needs. Two words, "mainstreaming" and "inclusion" are often used interchangeably with the phrase "least restrictive environment" but this is misleading. "Mainstreaming" and "inclusion" both refer to placement of children with disabilities in regular education classrooms with children without disabilities. Regular classrooms are deemed the mainstream. "Inclusion" implies the opposite of segregation, hence, "mainstreaming" and "inclusion" can rightly be viewed a synonymous but they are narrower than "least restrictive environment" which can have many meanings, depending upon the placements which are possible for a disabled child.⁶⁶ For a child with severe physical or mental impairments, a hospital room might be the least restrictive environment available, but this would not be inclusion or mainstreaming. As case law will show, the LRE rule has often resulted in the validation of schools'

⁶⁴ 20 U.S.C. § 1412(a)(5)(A) (2003) (requiring that children with disabilities be placed in the least restrictive environment which includes placing children with disabilities in classes with non-disabled children when appropriate and removing disabled children from these classes only under certain circumstances).

⁶⁵ YELL, *supra* note 38, at 244.

⁶⁶ The textual discussion of terms is largely derived from Mitchell Yell's discussion. *See id.* at 244-45.

plans for mainstreaming against the protests of parents and occasionally, on parental insistence, has resulted in mainstreaming against the protests of educators. In my view, the least-restrictive-environment requirement is not always beneficial to children with disabilities, but it plays a very important role in contemporary judicial reasoning, and I think, on the whole it has had a positive influence on schools.

4. Related services

A FAPE may require “related services” defined in § 1401(22) as follows:

The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.⁶⁷

As the teenagers would say, this list is *awesome*. Developing an IEP to provide a FAPE may require a great deal more than simply figuring out the right placement for a child. The unique needs of a child may require any imaginable combination of related services in order for an IEP to provide a FAPE. Hence, the IEP team may need to include persons with expertise on related services. It ought not be forgotten that the definition of a FAPE in 20 U.S.C.A. § 1401(8) specifically includes a reference to “related services.” Developing a reasonable combination of “related services” can be a major part of developing an acceptable IEP.

⁶⁷ 20 U.S.C. § 1401(22) (2003). Related services include a broad range of supportive services designed to further enhance the education of a child with disabilities. For a discussion of related services at length, see YELL, *supra* note 38, at 195–18.

5. The right to a due process hearing

20 U.S.C. § 1415 contains a well-developed array of procedural rights, including most importantly parental rights to notice at various points. I have decided to pluck from the myriad strands of this section one right important for understanding case law, namely, the right to a due process hearing.

Section 1415 states in pertinent part:

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies. . . .

(b) Types of procedures

The procedures required by this section shall include. . . .

(6)an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provisions of a free appropriate public education to such child. . . .

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received. . .the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by state law or by the State educational agency.⁶⁸

It is evident that the right to a due process hearing, e.g. when parents reject a proposed IEP, is a federal right, but the due process tribunal and any reviewing processes must be created by state law. Special education law, procedurally as well as substantively, is an exercise in *cooperative federalism*. States have handled the due process hearing requirement differently. Massachusetts, for example, has created a Bureau of Special

⁶⁸ 20 U.S.C. §§ 1415 (a), (b), (f) (2003) (highlighting various important procedural rights).

Education Appeals (BSEA). A well-trained lawyer serves as a hearing officer who hears the case in the first instance.⁶⁹ In New Jersey administrative hearing officers play the same role, but may hear other kinds of cases as well.⁷⁰ In Missouri, a panel of three members, generally composed of two educators and one lawyer, hear evidence and arguments.⁷¹

As to administrative appeals, § 1415(g) states in relevant part, “If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the state educational agency.” Many states provide for administrative review though this is not required if a state agency provides personnel to hear the case in the first instance. Fundamental fairness requires that hearing officers and reviewing officers be independent of administrative and policy making personnel in the state departments of education.⁷²

6. The right to judicial review

Section 1415 (i) (2) allows:

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section [subsection k deals with placement changes] who does not have the right of appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any state court of competent jurisdiction

⁶⁹ See Seth Stern, *Circuits Divided On Disability Education Action; The 1st Circuit Held FERPA Does Not Guarantee a Private Right of Action*, W. MASS. L. TRIB., Jan. 2002, at 2 (stating that in Massachusetts, the Bureau of Special Education handles due process appeals from administrative hearings concerning IDEA).

⁷⁰ See *Geis v. Bd. of Educ.*, 774 F.2d 575, 578 (3d Cir. 1985) (explaining independent agency, New Jersey Office of Administrative Law, hears due process hearings, including those involving educational issues).

⁷¹ See *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610–11 (8th Cir. 1997) (noting Clyne’s administrative hearing in Missouri, panel of two educators and one lay person “applied the federal legal standard under IDEA”).

⁷² See, e.g. *supra* Part VII where North Carolina law is discussed in detail.

or in a district court of the United States without regard to the amount in controversy.⁷³

(B) Additional requirements

In any action brought under this paragraph, the court—

- (i) shall receive the records of the administrative proceedings;
- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.⁷⁴

The right to judicial review in state and federal courts has proved to be very important for the implementation of the Act. The federal courts have played a major role, probably more than state courts. In this context, it is important to remember that the EACHA was a radical statute, designed to reach millions of children. It was a significant extension of civil rights to children with disabilities, as accorded to persons of minority races. Viewed from a political perspective, it was an attempt to alter a nation's views and practices with respect to a significant part of its population. As with other statutes aimed at serious societal change, the tasks of interpretation and meaningful implementation became tasks for state and especially federal judges. When the first case requiring a judicial interpretation of the Act's FAPE mandate was decided by the Supreme Court, there was widespread disappointment, and in some cases pessimism, anger and even despair.

C. The Rowley Decision: The Supreme Court Allows Access and Waffles on Substantive Requirements

*Board of Education v. Rowley*⁷⁵ is necessarily the starting point for discussing the meaning of a FAPE. The factual summary

⁷³ 20 U.S.C. § 1415(i) (2) (A) (2003). Subsection (i) (1) (B) makes it clear that an aggrieved party may file a civil action after a final administrative decision under subsection (g).

⁷⁴ 20 U.S.C. § 1415(i) (2) (A), (B) (2003) (mandating that any party who is dissatisfied with the proceedings may file a civil action which has additional requirements that must be complied with).

⁷⁵ 458 U.S. 176 (1982). For the district court's findings and disposition of the case, see *Rowley v. Bd. of Educ.*, 483 F. Supp. 528 (S.D.N.Y. 1980) and *Rowley v. Bd. of Educ.*, 483

which follows is based mainly upon the district judge's findings.⁷⁶ Amy Rowley was "handicapped" within the meaning of the Act. She was deaf from birth, albeit with some residual hearing in lower frequencies. Her measured IQ as a child beginning elementary school was 122. Her parents were both deaf and speedily became her able advocates and tutors. They raised Amy with the use of "total communication" involving a wide range of communicative methods including amplification, signing, touching, visual cues, and mouthing words. During the year preceding kindergarten, Amy's parents alerted their local public school (where Amy's brother with normal hearing was enrolled) about Amy's needs. The school's personnel responded positively and constructively. A number of teachers and administrators took a mini-course in sign language interpretation. They conferred with Amy's parents to work out a program for her. The school installed a teletype phone in the principal's office to facilitate home-school communications.

By agreement, Amy started kindergarten in a regular classroom for a trial period without any support services. This was intended as a data-gathering time. At the end of this trial period, it was mutually agreed to provide Amy with a wireless hearing aid. In the middle of her kindergarten year, the school placed a full-time sign language interpreter with Amy for a two-week trial period. The interpreter concluded that Amy did not need his services.⁷⁷

Amy went into first grade without the sign interpreter in class. Her parents worked as part of a Team to develop an IEP.⁷⁸ The IEP draft presented in December of Amy's first grade year placed her in a regular classroom, required continued use of the wireless hearing aid, provided the services of a tutor for the deaf for one class hour per day, and speech therapy for three one-hour

F. Supp. 536 (S.D.N.Y. 1980). The Second Circuit's opinion is *Rowley v. Bd. of Educ.*, 632 F.2d 945 (2d Cir. 1980).

⁷⁶ *Rowley*, 483 F. Supp. at 529-31 (detailing plaintiff's handicap and educational history).

⁷⁷ *Id.* at 530 (mentioning that this interpreter limited his conclusion to the particular class in which he served, basing it upon the extraordinary sensitivity of the teacher and Amy's resistance to the interpretive services, and not ruling out the advisability of a sign interpreter in other classes or later years).

⁷⁸ *Id.* at 530-31 (noting that the team was made up of a psychologist, an educator, a physician and the parent of a handicapped child, but did not include a sign interpreter).

sessions per week. The proposed IEP did not provide for a sign language interpreter for Amy in her classroom. On this point Amy's parents and the school came to loggerheads.

Amy's parents demanded a due process hearing as allowed by the Act. When the decision went against them, they appealed to the New York Commissioner of Education who upheld the initial examiner's decision. Having exhausted their administrative remedies, Amy's parents went to federal district court where their case came before an able and attentive judge. Taking account of current scholarship, the judge wrestled with the meaning of the FAPE mandate.⁷⁹ The judge set up the interpretive problem and a workable solution as follows:

An "appropriate education" could mean an adequate education - that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. Since some handicapped children will undoubtedly have the intellectual ability to do better than merely progress from grade to grade, this standard requires something more than the "adequate education" described above. On the other hand, since even the best public schools lack the resources to enable every child to achieve his potential, the standard would not require them to go that far.⁸⁰

Applying this equal-opportunity-to-achieve standard, the judge found for Amy and her parents. It seemed to the judge that Amy was channeling much of her energy in class into compensating for her deafness, and accordingly, "if the need for some of that

⁷⁹ *Id.* at 533-35 (citing the very fine article, *Enforcing the Right to An Appropriate Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1125-27 (1979)) (pointing out that it has been left entirely to the courts and the hearing officers to give content to the requirement of "appropriate education").

⁸⁰ *Id.* at 534 (citation omitted).

compensation were eliminated, her energy could be channeled into greater excellence in classroom performance. It is unfair and contrary to law to penalize her for her own efforts and those of her parents, by which she has remained slightly above the median in her class.”⁸¹ In the judge’s view, it was Amy’s handicap (not any lack of energy or eagerness) that prevented her from fully understanding what was said in class. According to the judge, this was “precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education.”⁸² The gap between perceived potential and measured achievement impressed the judge even though Amy was doing better than average in her peer group, and was occasionally helping other students.

The case went on appeal to the Second Circuit which affirmed with a succinct and deferential majority opinion.⁸³ There was a dissent that ran several pages.⁸⁴ The judges voting to affirm agreed with the trial court that the interpreter was necessary “to bring her [Amy’s] educational opportunity up to the level of the educational opportunity being offered to her non-handicapped peers.”⁸⁵ The majority believed that the decision was clearly supported by a preponderance of the evidence.⁸⁶ However, considering the unique facts of the case, the affirming judges expressly limited the holding to the facts of the case and stated

⁸¹ *Id.* at 535.

⁸² *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 535 (S.D.N.Y. 1980).

⁸³ *Rowley v. Bd. of Educ.*, 632 F.2d 945 (2d Cir. 1980) (noting that not only were the district court’s findings of fact *not* clearly erroneous, but that they are adequately supported by the evidence) (emphasis added).

⁸⁴ *See id.* at 948-55 (Mansfield, J., dissenting) (promulgating the theory that the act in question already defines a “free appropriate public education”, that the standard adopted by the district court was erroneous and impractical, and that state education authorities should have been able to submit their own determination before the case was decided).

⁸⁵ *Id.* at 948 (quoting *Rowley*, 483 F. Supp. at 535).

⁸⁶ *See id.* at 948 (stating that “[s]ection 1415(e) (2) provides that the district court’s decision must be based on a preponderance of the evidence,” and proffering the opinion that the decision in this case was not only clearly supported by such evidence, but that the judge weighed and evaluated that evidence with great care and meticulously applied the standard prescribed by Congress)

⁸⁶ *See id.* at 948 n.7 (reaffirming the panel’s May 1, 1980 decision to preclude citation of this decision as authority in any other case, recognizing what they believed to be the “lack of precedential character” of the decision in view of the unique facts of the case).

that the decision was not intended to have precedential value.⁸⁷ The dissenting judge thought that the district court ignored statutory language and federal regulations, had not exhibited sufficient respect for the educational expertise of state educational authorities, and had improperly considered affidavits.⁸⁸ The Supreme Court then granted *certiorari*.

Five justices voted to reverse and joined in Justice Rehnquist's opinion; Justice Blackmun concurred, and Justice White dissented, joined by Justices Brennan and Marshall. Justice Rehnquist insisted that the Act itself defines "free and appropriate public education."⁸⁹ Moreover, said Justice Rehnquist, "[L]ike many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent."⁹⁰ His opinion exhibits an attempt to parse the statutory language, but also turns to legislative history in the quest for intent, implicitly acknowledging interstices or at minimum an ambiguity. In the legislative history, Justice Rehnquist discerned a heavy stress upon allowing access to public schools.⁹¹ In short, "Congress' desire to provide specialized educational services, even in furtherance of 'equality', cannot be read as imposing any particular substantive educational standard upon the States."⁹² Accordingly:

⁸⁷ See *id.* at 948 n.7 (reaffirming the panel's May 1, 1980 decision to preclude citation of this decision as authority in any other case, recognizing what they believed to be the "lack of precedential character" of the decision in view of the unique facts of the case).

⁸⁸ See *id.* at 948 (Mansfield, J., dissenting) (proffering an evidentiary error regarding what the dissenting judge considered "crucial hearsay affidavits" as additional justification for the dissenting opinion).

⁸⁹ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 186 (1982) (citing 20 U.S.C. § 1401(18)) (rejecting explicitly the conclusions or assumptions which had driven the lower courts, stating: "We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define 'free and appropriate public education'").

⁹⁰ *Id.* at 188.

⁹¹ See *id.* at 191-200 (citing *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971)); *Mills v. Bd. of Educ. of the District of Columbia*, 348 F. Supp. 866 (D.C. 1972) (explaining that the relevant legislation followed these landmark court cases establishing in law the right to education for all handicapped children, but not imposing equal opportunity substantive requirements on educational programs for the handicapped).

⁹² *Rowley*, 458 U.S. at 200.

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that is satisfies this requirement by 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. 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.⁹³

Justice Blackmun concurred in the result, but he contended that the legislative history stressed equality of educational opportunity in a way the majority opinion denied.⁹⁴ Justice White’s dissent was strong, strident at times, especially where he stressed that the majority had not taken seriously the Congressional intent “to give handicapped children an educational opportunity commensurate with that given other children” and had allowed an inappropriately low substantive standard to pass muster.”⁹⁵ Justice White wrote scathingly:

Because Amy was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education.

⁹³ *Id.* at 202 (*emphasis added*).

⁹⁴ Indeed, Justice Rehnquist’s opinion evidences a deep conflict on reading the legislative history. The opinion concludes:

Assuming that the Act was designed to fill the need identified in the House Report - that is, to provide a “basic floor of opportunity” consistent with equal protection - neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress’ desire to provide specialized educational services, even in furtherance of “equality,” cannot be read as imposing any particular substantive educational standard upon the States.

Id. at 200-01.

⁹⁵ *Id.* at 214.

This falls short of what the Act intended. The Act details as specifically as possible the kind of specialized education each handicapped child must receive. It would apparently satisfy the Court's standard of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child," . . . for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service. The Act requires more.⁹⁶

Justice White's dissenting words with his italicized emphasis on *some* benefit portended the anger generated in the communities of persons who cared about special education. Perhaps more than the fact that federal law did not require an interpreter for Amy, the language which seemed to approve a *minimalist substantive standard* was the major cause of distress.

D. Reaction to Rowley: Anger and Seeds for Fresh Growth

Many observers thought the Act had been gutted by a judicial majority which read legislatively history selectively and refused to accept the radical implications of the Act. For example, a practicing lawyer from Arizona wrote in the Journal of Law and Education:

The obvious 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. Although the ultimate effects of requiring the states to comply with the Act may, indeed, have served to place overwhelming constraints on the states' ability to provide educational services to all children, the Court is not empowered to ignore the clear legislative mandate recognized by the district court, the Second Circuit and the one concurring and three dissenting members of the Supreme Court.⁹⁷

This angry lawyer was not alone in her strong criticisms of the majority opinion. A student commenting in the Rutgers Law

⁹⁶ See *id.* at 214-15 (emphasis in original).

⁹⁷ See Bonnie Poitras Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley: *Utter Chaos*, 12 J.L. & EDUC. 235 (1983).

Journal concluded: "The Supreme Court's decision in *Rowley* that handicapped children receive a free and appropriate public education under the EAHCA when they benefit from specialized instruction is likely to have a negative and far-reaching impact on the rights of the handicapped."⁹⁸ Other commentary expressed caution and concern.⁹⁹ Summing it up several years later, Professor Mark Weber wrote:

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 for handicapped children, who had worked so hard for change, exulted in their congressional victory.

Seven years later the Supreme Court turned that enthusiasm into despair. In *Board of Education v. Rowley*, 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." The Court found that "the intent of the Act was more to open the doors of public education to handicapped children . . .

⁹⁸ See Patricia L. Arcuri, Comment, 14 RUTGERS L.J. 989, 1010 (1983). The whole of the comment takes issue with the majority opinion's interpretation of legislative intent. Arcuri concludes, "[t]he conservative posture of the Court in *Rowley* seems inconsistent with the aggressive judicial and legislative activity which preceded it." *Id.* at 997. Later she reiterates, "[t]he Court's conservative posture, influenced by fiscal and federalism concerns, has resulted in an uncertain standard for future litigants and reviewing courts . . . *Rowley* seriously undercuts Congress' intent to provide equal educational opportunity to the handicapped through the EAHCA; although there are practical policy reasons for the court's decision, the Court has exceeded its authority in rewriting that congressional intent." *Id.* at 1010.

⁹⁹ See Margaret Corning Brodrick, *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 (1983) (arguing that that the Court's failure to set substantive standards by which to analyze laws that disadvantage handicapped children, in conjunction with their refusal to delineate "handicapped" as a suspect classification under the Equal Protection clause of the Fourteenth Amendment, strips the class of judicial safeguards); see also Kathryn M. Coates, Comment, 69 MARQ. L. REV. 51 (1985); Elena Gallegos, *Beyond Board of Education v. Rowley: Educational Benefit for the Handicapped?*, 97 AM. J. EDUC. 258 (1989); Martha McCarthy, *The Pennhurst and Rowley Decisions: Issues and Implications*, 49 EXCEPTIONAL CHILDREN 517 (1983); Karen Meador, *What's Left After Rowley: The Future of Advocacy in Special Education*, EXCEPTIONAL PARENT 59 (1983); John Myers, *The Meaning of Appropriate Educational Programming Under the Education for All Handicapped Children Act*, 9 S. ILL. U. L.J. 401 (1984); Mark Yudof, *Education for the Handicapped: Rowley in Perspective*, 92 AM. J. EDUC. 163 (1984).

than to guarantee any particular level of education once inside." Handicapped persons and advocates were aghast at the decision. Prominent scholars complained that the Court had gutted the statute¹⁰⁰

Looking back more than twenty years later, viewing *Rowley* from a father's perspective, not only as a lawyer, I think much of the rhetoric was a little overheated. True, there was unfortunate limiting language in Justice Rehnquist's opinion, but there was also language in his opinion indicating openness to results tailored to the nuances of fresh facts. For example, Justice Rehnquist stated:

The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with non-handicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. *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 substantially 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.¹⁰¹

These words could be construed as signals recognizing possibilities for fresh developments in case law as new fact patterns challenged courts to further draw forth the meaning of the Act in changed circumstances. One person who perceived fresh possibilities was Professor Perry Zirkel who wrote in the *Maryland Law Review*:

¹⁰⁰ See Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 351-52 (1990).

¹⁰¹ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982).

At first reading, the Supreme Court's decision in *Rowley* seems to sound a dramatic retreat, if not all-out defeat, for the advocates of handicapped students. Upon closer examination, however, the majority opinion provides the elements for the common law evolution of a multifactor test for determining the meaning of "appropriate education." This test might include such factors as the nature and severity of the handicap, the level of local resources and results, and the evaluation by educational experts.

Thus, rather than ignoring the rights of handicapped children, in crafting a narrow and ambiguous decision the Court provided room for full and timely interpretation. An agenda-setting case like *Rodriguez*, *Rowley* invites immediate experimentation and variation at the state level, *based primarily on state education statutes*. It also allows eventual expansion and consolidation at the federal level by legislative, administrative, or judicial action.¹⁰²

Hence, Professor Zirkel and others who shared his view perceived grounds for positive lines of evolution in case law, and noted also that some state statutes with mandates more challenging than the federal mandate post-*Rowley* invited experimentation.¹⁰³ When *Rowley* was decided, several states including, Massachusetts, Michigan, Missouri, New Jersey, and North Carolina appeared to have heightened mandates in their special education statutes.¹⁰⁴ For example, Massachusetts required that an IEP be designed and implemented to provide the *maximum possible development* for each handicapped pupil.¹⁰⁵ This statutory formulation and similar phraseology in other state statutes seemed to aim higher than Justice Rehnquist's "some benefit" requirement so understandably, advocates looked to these statutes and argued for particular

¹⁰² See Perry Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 494-95 (1983).

¹⁰³ See Part II. B, *supra* (noting that the federal FAPE definition incorporated state educational requirements that in several cases demanded, or appeared to demand, more than the Supreme Court's majority opinion in *Rowley*).

¹⁰⁴ See Parts III through VII of this article, *infra*, which discuss the five states' mandates.

¹⁰⁵ See MA. GEN. LAWS. ch. 71B, § 2 (1999), *amended by* MA. GEN. LAWS. ch. 159, § 154 (making the state mandate equal to the federal mandate); *see also* Part III, *infra*, (discussing the heightened mandate and Massachusetts' legislative repeal thereof).

placements and services for handicapped children that went beyond the minimalist interpretations of the *Rowley* requirements.¹⁰⁶ Thus, advocates for disabled children in states with heightened mandates placed their hopes on the state mandates as a means of lifting special education requirements above the minimum "some benefit" in *Rowley*. Parts III through VII of this article consist of a comparative study of cases arising from five states with heightened mandates.¹⁰⁷

In portraying the results of my study, I have gone case by case identifying each child involved as set forth in the reported opinions because I want to center the inquiry upon the children with disabilities.¹⁰⁸ I have provided a description of the child's diagnosis and practical learning difficulties as well as a procedural history leading to the court opinion(s) that resulted. I confess that putting forth many case histories makes a heavier burden for a reader than abstract summation does. Yet, in my own inquiries as a father, two works which mainly set forth cases proved exceptionally instructive. The first was Leo Kanner's article entitled "Autistic Disturbances of Affective Contact."¹⁰⁹ Dr. Kanner shared in detail his observations of eleven children (eight boys and three girls) whose behaviors were extraordinary. The children had been presented as idiots, imbeciles, feeble-minded, or schizophrenic. It was Leo Kanner's genius to discern something different from those labels, namely, a rare syndrome which came to be described by the word *autistic* which appears in the title of his article. For me the value of the article lies mainly

¹⁰⁶ See generally Zirkel, *supra* note 102 at 476 (stating that many advocates considered the *Rowley* guidelines insufficient to the point of being a "step backwards" for the rights of handicapped children).

¹⁰⁷ The states in order of consideration are Massachusetts, Michigan, Missouri, New Jersey, and North Carolina. I have placed somewhat more stress on Massachusetts than the other states for two reasons. First, our family's experiences with special education have been mainly in Massachusetts and I feel comfortable writing about our state's law. Second, the Massachusetts cases, including federal cases decided on the basis of Massachusetts law, cover nearly every major issue that surfaces in other states; hence, a study of case law in this jurisdiction is a solid introduction for study of case law elsewhere.

¹⁰⁸ In a few of the cases "young adult" would be more descriptive than "child." For example, in *David D. v. Dartmouth School Comm.*, 615 F. Supp. 639 (D. Mass. 1984), the plaintiff was seventeen years old at time of the grievance that spurred his lawsuit.

¹⁰⁹ See LEO KANNER, *Autistic Disturbances of Affective Contact*, THE NERVOUS CHILD (1941), available at <http://www.ama.org.br/kannereng12.htm> (detailing case studies of autistic children).

in its detailed accounts of the eleven children's behaviors. No abstract summation could replace the stories of those eleven children. Later, preparing for my normal daughter's (Eleanor's) entry into the teenage years, I read the classic, *Reviving Ophelia*, by Dr. Mary Pipher.¹¹⁰ The power of this book lies in its concrete and often gritty stories of the lives of girls and young women.

I am under no illusions that my storytelling, or re-rendering of stories told in courts, will be as interesting as the works mentioned above. But, I mention these works as examples of truth-telling through simple stories. The most important truths about children with disabilities cannot be captured in statistics. To rely heavily upon statistics in ignorance of the children's stories is to substitute cheap abstractions for very rich realities. The abundance of stories that follow carry their own truths. The conclusions I draw can have no meaning apart from the concrete stories.

III. MASSACHUSETTS: THE "MAXIMUM POSSIBLE DEVELOPMENT" MANDATE

A. *The Beginning: Enactment of Chapter 766*

The Massachusetts legislature acted earlier than did Congress to meet the educational needs of children with disabilities in a comprehensive way. The special education statute commonly known in Massachusetts as Chapter 766 was enacted in 1972, effective September 1, 1974.¹¹¹ Its language in relevant part required the state Department of Education (DOE) in cooperation with other departments to promulgate regulations designed "to assure the *maximum possible development*" of children with

¹¹⁰ See MARY PIPHER, *REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS*, (Ballantine Publishing Co. 1994) (looking at the myriad social evils that plague teenage females).

¹¹¹ MA. GEN. LAWS. ch. 71B, § 2 (1999). For early cases discussing the enactment and earlier implementation of this act, see *Stock v. Mass. Hosp. School*, 467 N.E.2d 448, 452 (Mass. 1984); *Amherst-Pelham Regional School Comm. v. Dep't of Educ.*, 381 N.E.2d 922, 928 (Mass. 1978); *Isgur v. School Comm. of Newton*, 400 N.E.2d 1292, 1296 (Mass. App. Ct. 1980).

special needs.”¹¹² Naturally, the meaning of “maximum possible development” required interpretation in the courts. The judges who were confronted with this language took it seriously, but never literally. The resulting body of case law, state and federal, grew increasingly nuanced from the 1970’s through the turn of the Century.

B. Developing the Mandate: Cases from 1980 – 1992

1. John Isgur and the School Committee of Newton¹¹³

Although John went through his first and second grades before Chapter 766 became effective, his teachers recognized that he had perceptual problems; and accordingly, his school provided him with special help in reading and math. Soon after Chapter 766 became effective, John’s parents requested a full “core evaluation” under regulations promulgated by the state DOE.¹¹⁴ The school instead made an intermediate “core evaluation” which was less extensive.¹¹⁵ Thereafter, the IEP team,¹¹⁶ without the parents’ agreement, recommended an IEP by which John would continue in a regular classroom with special assistance in reading and math. John’s parents rejected the proposed IEP and demanded a due process hearing before an officer of the Bureau of Special Education Appeals (BSEA). Pending a final decision, they placed John in a private school and sought reimbursement for tuition.

The BSEA’s hearing officer decided that the IEP as proposed was overly vague and general, but that these deficiencies had been partially rectified by explanations to John’s parents, and

¹¹² MA. GEN. LAWS. ch. 71B, § 2 originally required “maximum possible development.” It was modified to follow the federal standard in 2000 by ch. 159, § 154. This is addressed in Part III.E of this article.

¹¹³ See *Isgur*, 400 N.E.2d at 1293 (holding that intermediate core evaluation was adequate in determining the classroom needs of the disabled plaintiff).

¹¹⁴ See *id.* at 1294 n.4 (explaining the requirements for a full core evaluation as per regulations).

¹¹⁵ The intermediate core evaluation as done was fairly extensive inasmuch as it involved John’s parents, the school psychologist, the principal, and three of his teachers. *Id.* at 1294 n.5.

¹¹⁶ 20 U.S.C. § 1414(d) (2003) (setting forth required team composition). See Part II.B. *supra*.

that the IEP would be satisfactory with modifications.¹¹⁷ The State Advisory Commission on Special Education (Commission) affirmed whereupon John's parents filed an action in the state Superior Court. The court entered a judgment sustaining the Commission's decision. John's parents appealed to the Massachusetts Appeals Court which took up the main issue: Whether failure to do a full core evaluation rendered the BSEA hearing officer's decision about the IEP invalid. The court decided that, "a failure to comply with the regulation requiring a full core evaluation upon the parent's request goes to the essence of rights protected by ch. 766."¹¹⁸ The court went on to decide, however, that no prejudice had resulted from the intermediate core evaluation, that the plan that would have emerged from a full core evaluation would have resembled the plan actually proposed, and that the IEP requiring a placement in the Newton public school was consistent with the law.¹¹⁹

The case would be mildly interesting as an early application of Chapter 766; however, it would not merit full consideration in this article, except for the following *dictum*:

Of course, it is possible that he might have made greater progress in the presumably smaller classes at the private school, just as we assume that many non-special needs children would make greater progress in smaller classes if there were resources to provide them, but this is not the test for determining prejudice to John and his parents.

[T]he language "maximum extent feasible" as used in the statute must be interpreted in light of the clear preference under the statutory and regulatory scheme for keeping the child wherever possible in a regular education program or the least restrictive alternative placement

¹¹⁷ *Isgur*, 400 N.E. 2d at 1295 (recounting the details of the BSEA hearing, specifically that the hearing officer assumed the power to order the modifications necessary to make the IEP acceptable).

¹¹⁸ *Id.* at 1296 (reviewing the evaluation requirements of Chapter 766 and comparing to the tests actually done; noting that a deviation from the statutory test set is only a violation if the child's rights are prejudiced).

¹¹⁹ *Isgur*, 400 N.E. 2d at 1298 (holding that since the board apparently acted in good faith and the parents failed to present evidence contradicting the board's conclusions regarding the child's strengths, the board's decision would stand).

Applying these principles to the facts found by the hearing officer, we conclude that the plaintiffs did not sustain their burden of establishing that the Newton program as modified could not benefit John to the "maximum extent feasible" while retaining him in the least restrictive alternative to the regular education program.¹²⁰

It followed that John's parents were not entitled to reimbursement for tuition paid to the private day school.¹²¹ More importantly, the *maximum possible development* mandate - two years prior to *Rowley* - was already being judicially rendered as a *maximum-extent-feasible* mandate. A common dictionary definition of "feasible" opens the door to flexibility, suitability, and practicality.¹²²

The linguistic shift was sufficient to blunt the sharp edge of the utopian words *maximum possible development* before those words took on much meaning. Maybe the court was on solid ground since the word "feasible" did appear in another section of the statutory scheme pertaining to the evaluation of special education programs.¹²³ On the other hand, one can argue cogently that the different word choices in different sections of the state act indicated a legislative intent to make a distinction in the requirements embedded in those separate sections. Nonetheless, the formulation "maximum feasible" soon replaced "maximum possible" in judicial opinions. In 1984, the Supreme Judicial Court of Massachusetts adopted the phrase "maximum feasible benefit" in the case of *Stock v. Massachusetts Hospital School*.¹²⁴ The federal courts picked it up.¹²⁵ Thus, within a

¹²⁰ *Id.*

¹²¹ *Id.* (denying reimbursement largely based on lack of reversible error on the part of the school). *Cf. Amherst-Pelham Regional Sch. Comm. v. Dep't. of Educ.*, 381 N.E.2d 922, 933 (Mass. 1978) (authorizing the Bureau of Child Advocacy to refer a child to an alternative program despite any judgment by committee and granting reimbursement to parents for the costs of a necessary and appropriate private school).

¹²² 1. Capable of being done, executed, or effected: possible of realization. . . .
2. Capable of being managed, utilized or dealt with successfully: suitable. . .
3. Reasonable, likely (gave an explanation that seemed [feasible enough]).

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 831 (3d ed. 2002).

¹²³ MASS. GEN. LAWS ch. 71B, § 3, ¶ 16 (2003) (pertaining to assessments of children and programs requiring reassignment of a child if an evaluation of the child's program demonstrated that the program was not benefiting the child "to the maximum extent feasible"; amended in 1989 to add a qualifier about least restrictive environment).

¹²⁴ *Stock v. Mass. Hosp. Sch.*, 467 N.E.2d 448 (Mass. 1984) (relaxing "possible" to "feasible").

decade of its enactment, the Massachusetts mandate was routinely articulated by a combination of words less utopian than the statutory language of ch. 71B, § 2 where the mandate was codified.¹²⁶ In meetings bearing upon special education, parents and school personnel usually spoke of maximum feasible benefit or MFB as the operative mandate. But, the words *maximum possible development* did not disappear from judicial opinions entirely.¹²⁷

In addition to the linguistic softening of the mandate, on close parsing, the case of John Isgur discloses three limitations on private placements: the least restrictive alternative requirement, the allocation of the burden of proof to John's parents in the judicial action (with an implicit presumption in favor of the BSEA's decision), and an explicit recognition that scarcity of resources may play a role in deciding whether an IEP meets the state mandate.¹²⁸ These limitations recur in later cases; consequently, I will not develop them further at this time.

¹²⁵ See *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 423 (1st Cir. 1985) (showing the willingness of the First Circuit to use this phrasing of the standard).

¹²⁶ This was recognized in a DOE study of the Special Education Standard for Services wherein the department rendered its own conclusions about the evolution of the operative formula in Massachusetts:

The term "maximum feasible benefit" does not appear as such in G.L. c. 71B. The term came into use after decisions of the Massachusetts Supreme Judicial Court (*Stock v. Massachusetts Hospital School*, 392 Mass. 205 (1984) and the U.S. Court of Appeals for the First Circuit (*David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985)) referred to language in G.L. c. 71B mandating that the Individual Educational Plan developed for a student with disabilities must "benefit the child to the maximum extent feasible." That phrase still appears in c. 71B, § 3, paragraph 16, but it was amended in 1989 to state that the program must "benefit the child to the maximum extent feasible in the least restrictive environment." The *Stock* and *David D.* decisions also referred to the phrase in G.L. 71B, § 2 that called for the "maximum possible development" of a child with special needs. That provision, too, was amended in 1989 so that it now reads, "maximum possible development in the least restrictive environment."

Massachusetts Department of Education, *Preliminary Study of the Special Education Standard for Services*, (2000) available at <http://www.doe.mass.edu/sped/2000/sfs/intro.html>.

¹²⁷ See *David D. v. Dartmouth Sch. Comm.*, 615 F. Supp. 639, 645 (D.C. Mass.1984) (framing the issue as whether the school "addresses plaintiff's special educational needs so as to assure his maximum possible development in the least restrictive environment").

¹²⁸ Both special needs children and non-special needs children might make greater progress in smaller classes if there were resources to provide them. However, the Supreme Judicial Court later explicitly rebuffed a claim by the School Committee of Brookline that it could not fund a private placement because of Proposition 2 1/2, a state statute that limits increases in property taxes. *Sch. Comm. of Brookline v. Bureau of Special Educ. Appeals*, 452 N.E. 2d 476, 481 (Mass. 1983).

2. Margaret Lang and the Braintree School Committee¹²⁹

Margaret was diagnosed as mentally retarded, mentally ill, epileptic, and seizure prone. During her pre-school and elementary school years, her parents lived in Boston, and the Boston School Department provided funding that enabled Margaret to attend a private school, St. Coletta Day School. Her years at St. Coletta's were not trouble-free as she suffered many seizures,¹³⁰ and only gradually learned to relate to teachers and other children. When Margaret was in her teens, her parents moved to Braintree and requested that the Braintree School Committee assume the financial obligations for Margaret's continuing placement at St. Coletta's. The school committee declined and instead offered a public school placement with special services.

Margaret's parents rejected the plan, and mediation failed, so a due process hearing before a BSEA officer was held. The hearing officer issued a decision declaring that the school had offered an appropriate educational plan.¹³¹ This decision was affirmed by the Commission.¹³² Margaret's parents challenged the BSEA decision in federal district court as was their right under 20 U.S.C. § 1414(e).¹³³ The parents argued two main points: that the public school would be unsafe on account of Margaret's physical problems,¹³⁴ and that the shock of transition would be positively harmful. The parents were able to muster some expert opinions

¹²⁹ Lang v. Braintree Sch. Comm. 545 F. Supp. 1221 (D. Mass. 1982).

¹³⁰ *Id.* at 1225 (noting that the child's seizures were controlled with medications adjusted over time enabling her to perform such tasks as using stairs safely but not sufficiently to allow her to participate in a regular public education program).

¹³¹ *Id.* at 1224 (noting also that the school committee's plan was less restrictive than placement at St. Coletta's Day School).

¹³² *Id.* at 1223 n.2 (discussing the details of the IEP created for the child by the Braintree School Committee, and approved by the BSEA and Commission).

¹³³ See generally *id.* at 1221 (listing the Massachusetts Commissioner of Education and the Braintree School Committee as defendants; for the purposes of this article only 'the school committee' or 'the school' will be referred to as the Langs' adversary, since the naming of the commissioner as a defendant made no difference in the issues raised in the case).

¹³⁴ *Id.* at 1228 (rejecting this part of the plaintiff's argument, since the child would have to face stairs not only at the public school, but also at the St. Coletta school and even the plaintiff's own home: "It is clear to the court that the safety hazards intrinsic in the Braintree program are no greater than those existing in the St. Coletta program or, in fact, in the Langs' home").

in support of their arguments, especially the later one.¹³⁵ The school committee contended with expert opinions that its proffered placement was equally strong and less restrictive; hence, it ought to be acceptable. In view of the Act's preference for maintaining the status quo,¹³⁶ the judge placed the burden of establishing the sufficiency of the IEP upon the school committee, but easily determined that the burden had been met stating, "Braintree is clearly offering Margaret an educational program designed to benefit her, and numerous professionals testified that this program embodies sound educational thinking."¹³⁷ In a more complete justification of this decision, the judge wrote:

[T]here is every reason to believe, that Margaret's placement in a public school setting, with the proper special education and support services, would be of greater benefit to her than remaining in a private school setting. The court gives particular credence to the testimony of Braintree's school nurse, the only witness who is personally familiar with both programs, and to Dr. Rosenberger, who treated Margaret for several years and is acquainted with the Langs. Their testimony strongly suggests that at least at this point in her life, Margaret will benefit more from the program Braintree offers through its IEP than from the St. Coletta's program. While the change from St. Coletta's to Braintree might be a difficult one, the court does not view it as devastating, as plaintiffs suggest. Inasmuch as the Braintree IEP relies on legitimate educational philosophy *akin to the mainstreaming approach preferred by the Act*, and will provide to Margaret what this court views as an education that benefits her within the meaning of the Act, the IEP must be deemed satisfactory under the Act.¹³⁸

The least-restrictive-environment (LRE) requirement tilted the judge toward sustaining the BSEA decision even though the

¹³⁵ *Id.* at 1228 (conceding, in light of plaintiff's expert testimony, that the transition to a public school might be traumatic for the child but ultimately holding from the evidence that the child would be better suited "at this point in her life" in a public school catering to her needs).

¹³⁶ *Id.* (explaining 20 U.S.C. § 1415(e)(3) contains preference for maintaining the status quo in situations where child is currently receiving "an appropriate education").

¹³⁷ *Id.*

¹³⁸ *Id.*

school had violated procedural requirements of the Act.¹³⁹ On this point, the case is consistent with the case of John Isgur.¹⁴⁰ But, on close scrutiny, Margaret's case reveals something more: the absence of any argument based upon the higher mandate of Massachusetts state law even though John Isgur's case was in the reports. This serves as a reminder of the importance of advocacy in the early stages of any contested placement.¹⁴¹ I doubt, however, that a strong argument based upon the state mandate would have made any difference once the judge was convinced that a placement less restrictive than St. Coletta's was best for Margaret.¹⁴²

3. David D. and the Dartmouth School Committee¹⁴³

David D. was born with Down Syndrome. Through his elementary, middle school, and early high school years, David attended the Dartmouth public schools where he received special educational services. Unfortunately, David developed abnormal sexually aggressive behaviors as a teenager. His parents felt strongly that he needed a residential program to educate him in appropriate self-control; therefore, they rejected a proposed IEP

¹³⁹ For a discussion of the appropriateness of the IEP established by the school system which implemented the goal of mainstreaming children when there was legitimate basis, see *Id.* at 1228. For an explication of the least-restrictive-environment requirement under federal law, see Part II of this article. On the application of the least-restrictive-environment requirement, compare *Isgur v. Sch. Comm. of Newton*, 400 N.E.2d 1292, 1297 (Mass. App. Ct. 1980) (ruling hearing officer was correct in finding the public system was least restrictive option and appropriate to meet the child's needs).

¹⁴⁰ See *id.* at 1297 (ruling hearing officer was correct in finding the public system was least restrictive option and appropriate to meet the child's needs).

¹⁴¹ The absence of any argument rooted in the state mandate might have been an oversight on the part of Lang's lawyer, or it might have been due to a belief that compliance with the state mandate could not be litigated in federal court. The question of whether or not the Eleventh Amendment to the United States Constitution barred suits in federal court to enforce students' rights created by state law was a live question in the First Circuit until the decision in *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 420-21 (1st Cir. 1985), the next case discussed in the text.

¹⁴² The opinion also discloses a deference to the educational philosophy espoused by the school committee, a deference which we will see again. I also note that the judge was very humane in not allowing the school's reimbursement claim. The judge justified this by reference to the procedural errors made by the school establishment: "Given the significant procedural defects in the development of the IEP, and the fact that Margaret remained in a setting which Braintree concedes offered her a beneficial educational and social experience, the Langs should not be required to reimburse Braintree for the amounts expended to keep Margaret at St. Coletta's." 545 F. Supp. at 1228.

¹⁴³ *David D. v. Dartmouth Sch. Comm.*, 615 F. Supp. 639 (D. Mass. 1984), *aff'd*, 775 F.2d 411 (1st Cir. 1985).

that would have kept him in a public high school. After a due process hearing, the BSEA hearing officer decided in favor of the school committee's proposed IEP, finding that David's breaches of socially acceptable behavioral conventions outside of school were isolated, that the primary goal for David's IEP must be to maximize his ability for independence, and that supportive counseling for David and his family members - as offered by the school committee in a proposed IEP modification - rendered the IEP adequate and appropriate. David's parents filed an action challenging the BSEA decision in federal district court.

The arguments, as set out in an opinion by the district judge, disclose a very sophisticated contest between opposing lawyers each parsing the statutes and case law trying to gain an appropriate advantage: the school committee's lawyer laid the stress on the mainstreaming requirement by contending that if a student is benefiting from a program, that student cannot lawfully be placed in a more restrictive program; and the parents' lawyer laid the stress upon language in the *Burlington II*¹⁴⁴ opinion which said that the LRE requirement could not be employed to cure an otherwise defective placement. The parents' lawyer strongly argued for the application of the state mandate that presumably hoisted the demands of state law above the federal FAPE requirements. Counsel could rightly point to recent *dicta* from the Supreme Judicial Court of Massachusetts describing state special education law as law mandating that the department shall administer special education programs so as to "assure the maximum possible development of a child with special needs."¹⁴⁵

¹⁴⁴ For a discussion of the least restrictive environment as a federal right, see *Town of Burlington v. Dep't. of Educ.*, 736 F.2d 773, 789 n.19 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). This case eventually went to the Supreme Court which decided that the EAHCA (later IDEA) granted courts the equitable power to order reimbursements to parents who unilaterally made acceptable placements when a school district or committee proposed an IEP that was found inadequate. 471 U.S. 359, 370 (1985). *Burlington I and II* could have been presented fully in the text, and do constitute a big piece of the Massachusetts' contribution to the law of special education, but I have avoided doing so because there is an abundance of simpler case that well illustrate the trends I want to describe.

¹⁴⁵ *David D. v. Dartmouth Sch. Comm.*, 615 F. Supp. 639, 645 (D. Mass. 1984) (quoting *Stock v. Mass. Hosp. Sch.*, 467 N.E.2d 448, 53 (Mass. 1984). The Supreme Judicial Court was interpreting MASS. GEN. LAWS ch. 71B, § 2 as amended by St. 1978, ch. 552, § 19. The court in *Stock* decided that the school had wrongly graduated a student thereby cutting him off from special education services, and accordingly ordered the diploma rescinded. However, in *Stock* the court also employed the "maximum feasible

In this case, the higher state standard almost certainly made a difference to the federal district judge since he ruled for the parents stating:

The state standard mandates that an IEP assure plaintiff's maximum possible development. I find persuasive the unanimous opinion of plaintiff's experts that plaintiff requires a residential training program in order to achieve the maximum progress in the development in his ability to function as independently as possible and that a residential setting is the least restrictive environment in which plaintiff's educational needs could currently be met. Therefore, I conclude that plaintiff has met the burden of proving that the Dartmouth IEP for 1982-83 (as amended) is inadequate; and I find that placement in a residential school... is the educational placement appropriate for plaintiff.¹⁴⁶

So, the federal judge ordered that the Dartmouth School Committee must place David into a residential school. A predictably unhappy school committee appealed. The Court of Appeals for the First Circuit had "no difficulty affirming [the district court's decision] in its entirety."¹⁴⁷ This court fixed its approval of the district judge's reasoning upon the Massachusetts mandate, stating in pertinent part:

...the district court stated the issue as "whether Dartmouth's IEP addresses plaintiff's special education needs so as to assure his maximum potential development in the least restrictive environment consistent with that goal." We think the court both phrased and answered the question correctly.¹⁴⁸

The case of David D. is one case - *perhaps the main appellate case* - where the Massachusetts mandate appears to have tipped the balance against the school committee resulting in the overturning of a BSEA decision.¹⁴⁹ This case was litigated long

benefit" language which takes the hard edge off of maximum possible development. *Mass. Hosp. Sch.*, 467 N.E.2d at 453-54.

¹⁴⁶ *Dartmouth Sch. Comm.*, 615 F. Supp. at 647-48 (citation omitted).

¹⁴⁷ *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 423 (1st Cir. 1985).

¹⁴⁸ *Id.*

¹⁴⁹ Obviously, it is not possible to state for certain whether the district judge or the First Circuit would have ruled differently without the heightened state mandate. But, at

before the scandals in Boston involving sexual improprieties of priests came to light, but I have wondered whether a sub-text in David D's case was other children's safety. The district court and appellate decisions requiring a residential placement might well have been based in part upon a genuine judicial concern to avoid possible sexual exploitation if it could be avoided by more intense training for David D. In my view the disposition in this case was eminently sensible.¹⁵⁰

4. Matthew M. and the Concord School Committee¹⁵¹

Matthew suffered from deficiencies in fine and gross motor coordination, visual motor coordination, and had trouble relating to his peers. He was easily distracted. He may have suffered from Attention Deficit Disorder (ADD).¹⁵² In any event, Matthew was a child who needed special education. He went through his elementary school years in the Concord public schools, my hometown, under yearly IEPs. The dispute between Matthew's parents and the school district broke out when he was entering middle school.

The school offered an IEP for the 1986-1987 academic year, placing Matthew in a public school classroom with supports. His parents rejected the proposed IEP, demanded a due process hearing, and unilaterally placed Matthew at the Landmark School, a private school for especially challenged children. The BSEA hearing officer's decision (issued in June 1987 after the academic year had ended) went in favor of the school district with a proviso, namely, that an after-school socialization

this stage of the evolution of the federal mandate, I think the outcome *probably* would have been different in the absence of a strong state mandate. The First Circuit opinion is also important because the majority decided that the Eleventh Amendment to the United States Constitution does not bar suits in federal court to enforce rights created by state law. *Dartmouth Sch. Comm.*, 775 F.2d at 423. For a discussion of the Eleventh Amendment implications, see *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 20-30 (1981).

¹⁵⁰ The First Circuit opinion is also important because a child's right to an IEP empowers him or her to attain the maximum possible development under a state mandate. *Dartmouth Sch. Comm.*, 775 F.2d at 423. The federal Act is deemed to incorporate the state mandate making it federal law. There was a strong dissent. *Id.* at 420.

¹⁵¹ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990).

¹⁵² Matthew's parents hired a neurologist who was prepared to testify before a federal judge that Matthew suffered from ADD, but judge excluded the testimony. See *id.* at 988 n.1. The exclusion was not deemed to be error. *Id.*

component must be added.¹⁵³ Since the Landmark placement had been made by the parents in good faith, the hearing officer ordered reimbursement for one semester's costs. Matthew's parents filed for review in federal court.¹⁵⁴

Meanwhile, the school's representatives worked up an IEP for the 1987-1988 school year, apparently without help from Matthew's parents. This proposed IEP was similar to the 1986-1987 proposal and Matthew's parents rejected it. The federal court stayed the action for review of the 1986-1987 IEP to allow time for a due process hearing on the proposed 1987-1988 IEP. A second hearing officer approved this IEP, partly on the grounds that the Landmark placement was not the least restrictive environment for Matthew as required by federal and state law. The federal judge allowed leave to amend so that Matthew's parents could challenge both BSEA decisions in one judicial action. The judge accepted the administrative records as evidence, took no new evidence¹⁵⁵ and decided that both proposed IEPs as offered were appropriate.¹⁵⁶

The First Circuit opinion which followed is one of the most closely reasoned and enlightening opinions issued on the meaning of the Massachusetts mandate. The court commenced by asserting that the parents (complaining parties) had the

¹⁵³ See *id.* at 989 n.2 (noting that school district had engrafted this component onto its proposed IEP in January, 1987, which was prior to the beginning of the due process hearing).

¹⁵⁴ The child's parents wanted a declaration that the hearing officer had erred in approving Concord's placement and wanted all costs for the Landmark placement. *Id.* at 989. The district cross-claimed against the Department of Education claiming that the BSEA had exceeded its authority in the circumstances by ordering any reimbursement. *Id.*

¹⁵⁵ The judge's refusal to take new evidence was something vigorously complained about on appeal. The refusal is understandable in light of what happened in the second due process hearing. Plaintiffs' lawyer admitted that he had three expert witnesses favorable to Matthew's case "squirreled away," as the First Circuit noted, for the anticipated court trial. *Id.* at 996. The hearing officer implored counsel to produce these witnesses for the hearing to avoid undermining the administrative process. Apparently not trusting the administrative process, counsel refused to produce the witnesses. When the second BSEA decision went against his clients, counsel brought out the experts and proffered their testimony to the federal judge in the case where review of both BSEA cases was now consolidated. The judge refused to hear any of the expert testimony. The First Circuit panel approved stating, "We refuse to reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial *de novo*. Where parties could have, but purposely chose not to, call certain witnesses at the administrative hearing, the district court has discretion to exclude testimony on judicial review." *Id.* at 997.

¹⁵⁶ See *id.* (reversing the BSEA order that Concord was required to pay for Matthew's first semester at Landmark because his parents had made the placement in good faith).

burden of proving that the BSEA's decisions were wrong.¹⁵⁷ The court acknowledged that the case argued for Matthew's parents turned mainly on the meaning of the Massachusetts mandate. Describing the parents' case, the court stated:

In storming these ramparts, appellants [parents] rely heavily on the particulars of Massachusetts' requirement that its special education programs "assure the maximum possible development" of handicapped students. This substantive standard is admittedly higher than the federal "educational benefit" floor, and makes the formulation and evaluation of IEPs a more complicated task in the Commonwealth than elsewhere. Be that as it may, the parents' claim that their son's academic progress at Landmark necessarily demonstrated the inadequacy of Concord's IEPs will not wash: even under the Massachusetts standard a program which maximizes a student's *academic* potential does not by that fact alone comprise the requisite "adequate and appropriate" education. In a nutshell, appellants' *per se* approach is far too simplistic.¹⁵⁸

Thus, Matthew's academic achievement in the private placement was relevant, but not dispositive; rather, it was one factor to be considered in judging an IEP. Other aspects of a child's development are also important, hence, "purely academic - progress-maximizing academic potential - is not the only indicia of educational benefit implicated either by the Act or by state law."¹⁵⁹ Moreover, an IEP should not be judged exclusively in hindsight. Judicial review should take into account what was objectively reasonable when the IEP was promulgated. A court should not impose its own judgment in the place of any educational agency's judgment, at least where "the IEP proposed by the school district is based upon an accepted, proven methodology."¹⁶⁰ An IEP must be in accord with the LRE

¹⁵⁷ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) (detailing who has the burden and the extent of the burden before confronting the appellants' particularized challenges).

¹⁵⁸ *Id.* (citations omitted).

¹⁵⁹ *Id.* at 992.

¹⁶⁰ *Id.* (citing *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988)).

requirements of both federal and state law.¹⁶¹ Finally, a district court should give "due weight" to the administrative hearing officers' judgments.¹⁶²

Within these carefully stated guidelines, the First Circuit opinion concluded:

[T]he court obviously agreed with the BSEA hearing officers that Matthew required not only academic help but also socialization training and motor skills assistance. Having canvassed the evidence presented by Matthew's teacher, his parents, and the treating professionals, we cannot say that such a conclusion constituted clear error. As a matter of maximizing Matthew's educational benefit, those special needs were properly considered by the IEP team, notwithstanding the parents' rather single-minded focus on academic results. . . . The IEP ensured socialization therapy with a psychologist and occupational therapy to improve Matthew's social skills. Landmark's regimen provided no motor skills training and no specific program of socialization therapy. It follows that Concord should lawfully implement an educational plan which it reasonably considered more appropriate and well-rounded than the Landmark program, especially when its IEP explicitly provided for more, and better diversified, "related services" keyed to Matthew's specific handicaps.¹⁶³

The LRE requirement was a major factor in sustaining the appropriateness of Concord's proposed IEPs.¹⁶⁴ The court created an image of balancing interests on a fulcrum: on one side is maximum benefit and on the other is least-restrictive-environment, and in this case, taking into account the totality of Matthew's needs, the school district "struck an adequate and appropriate balance."¹⁶⁵ Clearly, the Massachusetts mandate was

¹⁶¹ See *id.* (stating the pedagogical format must be such that a handicapped student is educated, as much as possible, with children *sans* handicaps).

¹⁶² See *id.* (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)) (stating in fact the district court was *bound* to this duty).

¹⁶³ *Id.* at 993.

¹⁶⁴ The court's opinion detailed Concord's proposed IEP for 1986-1987 as well as the later proposed IEP for 1987-1988 which involved a combination of regular and segregated classroom experiences during the course of Matthew's school day. *Id.* "In contrast, as a residential school catering to a learning-disabled clientele, Landmark posed a much more restrictive environment and afforded decreased prospects for mainstreaming." *Id.*

¹⁶⁵ See *id.* (sustaining district court's affirmative conclusion).

neither self-defining nor simple; rather, the court saw it as a supple concept the meaning of which must shift from case to case, always qualified by the federal Act's requirements. No doubt due to its precision and balance, the case of Matthew M. has wielded an enormous influence. It set the tone and established an analytical style for much subsequent litigation, such as the case that follows.

At this point, however, I want to avoid creating a false impression of unqualified enthusiasm for the choices of the Concord school personnel and the judicial decisions which sustained those choices. The school personnel, the BSEA hearing officer, and the judges seem to have made their decisions with such care and attention to detail, that it is easy to be mesmerized by process and professionalism, and to forget the impact of the disposition. Matthew was doing well at Landmark, and his parents really did want to make his academic progress *the priority*. Given the intense competition for schools of higher education, parents cannot reasonably be faulted for attempting to give a child every reasonable advantage in that competition, even if the child has reduced chances of gaining social skills or being exposed to "normal" students. While the LRE requirement is generally laudable, it should be recognized that it can operate as a weapon that can preclude conscientious parents and guardians from selecting the programs that seem best on balance for their children in the race toward college or other post-high school environments. The question that lingers in my mind after reflection on Matthew's case is this: was the law interpreted with such stress upon inclusion that parental judgment about Matthew's unique needs was obliterated? I suspect the same question could be raised in thousands of cases where the LRE requirement has been determinative.

5. Steven P. and the Norton School Committee¹⁶⁶

Steven's mother recognized his developmental problems when he was one, and he was evaluated at Children's Hospital in Boston. At age three, upon his mother's request, the Norton public schools began providing speech therapy and did a core

¹⁶⁶ Norton Sch. Comm. v. Steven P., 768 F. Supp. 900 (D. Mass 1991).

evaluation. School personnel determined that Steven was a child with special educational needs, so he received special services from grades one through five.¹⁶⁷ His mother became very concerned when Steven did poorly on standardized tests at the end of fifth grade, and these concerns increased when his academic performance and attitude toward school plummeted during sixth grade. This was the situation when the team met to plan an IEP for his seventh grade year.

At the meeting, his guidance counselor recommended an evaluation at Kennedy Memorial Hospital (KMH), an evaluation that eventually resulted in a recommendation for more intense services. Meanwhile, however, the Norton public schools developed an IEP that actually reduced special services.¹⁶⁸ Steven's parents rejected it, but his placement remained the same. Steven, parents, and the school personnel muddled through the year with the help of mediation. After seventh grade, the school presented an IEP for eighth grade that was substantially similar to the seventh grade IEP, offering slightly more than five hours of special education services per week. His parents promptly rejected it, and acting on the advice of an educational consultant, placed Steven at the Landmark school where his achievements and attitudes turned upward.¹⁶⁹ Steven's parents and their lawyer thereafter met with school personnel in an effort to work out an agreement about Steven's education, but no consensus was reached.

When Steven was beginning his ninth grade at Landmark,¹⁷⁰ without giving notice to Steven or his parents, the school developed and proposed a ninth grade IEP (quite similar to the IEP which had been rejected for his eighth grade year) and proposed it to Steven's parents. It was rejected. In the due process hearing that followed, the hearing officer sided with

¹⁶⁷ See *id.* at 904 (receiving services under "502.2" prototype, meaning he did not spend more than 24% of his school week outside of his regular classroom).

¹⁶⁸ See *id.* at 905-06 (creating an IEP under a 502.3 prototype, which meant regular classroom placement with academic support three periods per week, along with language therapy twice per week).

¹⁶⁹ See *id.* at 906 (enrolling Steven in Landmark was the immediately precipitating event of this litigation).

¹⁷⁰ See *id.* (rejecting this proposal, Steven P was subsequently enrolled in Landmark's equivalent of a middle school).

Steven's parents for the two years under review¹⁷¹ finding that the district's proposed IEPs were inappropriate, that Landmark was an appropriate placement, and that the school district was obligated to reimburse Steven's parents. Norton public schools contested the decision in federal court.

The district court granted summary judgment against the school district for the 1988-1989 school year, but decided that the record was not sufficient for summary consideration of the IEP for the 1989-1990 year. With several citations to the case of *Matthew M. & the Concord School Committee*,¹⁷² the court sustained the hearing officer's conclusion that "Norton never came close."¹⁷³ Although Steven was demonstrating deficiencies in reading and language skills up to five years below grade level, the school proposed to keep him in a regular education placement with minimal supplementary services. Thus, on this record, a decision opposite to Matthew M's case was warranted.

The court explained:

To be sure, the academically superior school is not automatically the appropriate placement under the EHA, given the act's emphasis on mainstreaming. Likewise, as the BSEA found, the 502.6 residential placement at Landmark was more restrictive than would optimally be necessary for Steven as it did not provide the mainstreaming required under the EHA. The First Circuit has held, however, that "the least restrictive environment guarantee. . . cannot be applied to cure an otherwise inappropriate placement. . ." Moreover, as discussed above, it is not necessary for a parent, when faced with a pressured decision of where to place her child to seek out the perfect alternative placement. . . Norton had ample opportunity at the BSEA hearing to demonstrate that there were more appropriate, less restrictive, placements available for Steven, yet came up with none. Thus, having reviewed the extensive record, and giving "due weight" to the state agency, it is apparent that

¹⁷¹ See *id.* (reviewing the school years of 1988-1989 and 1989-1990).

¹⁷² See *e.g. id.* at 907 (citing *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 1000 (1st Cir. 1990)) (detailing that "parents are not automatically barred from receiving reimbursement simply by virtue of their unilateral decision to change their child's school during the pendency of the placement review).

¹⁷³ See *id.* at 909 (holding Norton's IEPs fell far short of Steven's needs).

the BSEA was correct in its determination that Landmark North was an appropriate placement.¹⁷⁴

The school's failure to follow the procedural aspects of state and federal law certainly did not help its case. There is no reported opinion thereafter, indicating that the Norton public schools probably took a fresh look at Steven P's case, and probably altered their approach to IEP preparation.¹⁷⁵ The image that comes to my mind is the fulcrum from Matthew M's case. In Steven P's case, the Massachusetts mandate helped to tip the scale against the weight of the LRE requirement because the school never developed a realistic IEP in light of Steven's unique needs. Whether the balance would have tipped differently without the Massachusetts mandate, I cannot say for certain, but I doubt that the Massachusetts mandate was a necessary underpinning for the ruling.

6. Christopher Amann and the Stow School System¹⁷⁶

Christopher Amann was diagnosed in kindergarten as having a learning disability. The Stow school personnel developed an IEP which Christopher's parents accepted, as they did three subsequent revisions. By the time Christopher was entering the fourth grade, his parents, upset with his lack of progress, placed him in the Carroll School, a private school designed especially for children with learning disabilities. Apparently assuming this was a private placement at the parents' expense, the Stow schools ceased preparing any IEPs. The school's operating assumption was in error, for in the middle of Christopher's fifth grade, his parents wrote to the Stow schools requesting an IEP for the following year; they also requested reimbursement for Christopher's tuition at the Carroll School.

¹⁷⁴ *Id.* at 910 (citations omitted).

¹⁷⁵ I do not mean to judge the Norton School District or any person associated with the district in a negative way. The laws are intricate and the judgments difficult and it is not possible to be sure that a careful reading of the opinions enables anybody to grasp fully the dynamics in the team meetings that preceded the due process demands. However, it does seem from the reported opinion that the school's lack of any meaningful investment in trying to help Steven P. when he was obviously falling far behind his classmates weighed heavily with the court. It seems to me that good faith efforts or the lack thereof often make a difference in court.

¹⁷⁶ *Amann v. Stow Sch. Sys.*, 982 F.2d 644 (1st Cir. 1992).

Thus the quarrel began. Ultimately, Christopher's parents rejected an IEP prepared for his seventh grade year which would have mainstreamed him in the Stow public schools for social studies, science, music, art, physical education and industrial arts.¹⁷⁷ Christopher would have received language arts and mathematics instruction from a special education teacher in a daily academic support class. The school seems to have made a reasonably designed plan to meet Christopher's particular needs. Nonetheless, his parents initiated a due process hearing seeking reimbursement for their son's continuing enrollment at Carroll School.

The hearing officer decided for the school, ordering slight IEP modifications for Christopher's safety.¹⁷⁸ Mr. Amann took his son's case to federal court where the district judge sustained the hearing officer's decision, albeit with the application of the federal FAPE standard rather than Massachusetts mandate.¹⁷⁹ On appeal, the First Circuit panel stated that although the district judge had articulated an erroneous standard, the BSEA officer had applied the correct standard; hence, the district court's decision sustaining the hearing officer's decision should be affirmed.¹⁸⁰ The Stow school system was right, even under the Massachusetts mandate.

The First Circuit opinion stated:

The Amanns have, in essence, repeated an argument made and rejected in *Roland M. v. Concord School Committee*. [Matthew M's case] There, we noted that "purely academic progress -maximizing academic potential - is not the only indicia of educational benefit implicated either by the Act or by state law." Rather, under the IDEA, "[a]n IEP must prescribe a pedagogical format in which 'to the maximum extent appropriate,' a handicapped student is educated 'with

¹⁷⁷ *Id.* at 648 (describing reaction of Christopher's parents upon proposal of new IEP for their son).

¹⁷⁸ A few unusual procedural twists followed, e.g. a motion to reconsider because the IEP did not require a mainstream facilitator, a compliance hearing to challenge Stow's implementation of the IEP, and a motion to re-open the administrative proceedings so that Chris's parents could assert a claim that his school had lead contamination. *Id.*

¹⁷⁹ *Id.* at 649 (noting court's insistency on applying relaxed federal standards instead of stringent state standards).

¹⁸⁰ *Id.* (rationalizing why district court reached proper outcome despite improper application of federal standards).

children who are not handicapped.” Massachusetts law states the same requirement in different terms; it calls for “maximum possible development in the least restrictive environment.” Federal and state law, therefore, both dictate a policy of “mainstreaming.” “[T]heir common objective is the provision of needed services promptly to learning handicapped children through the free, local public school system except where the resources of those schools cannot appropriately meet the children’s needs.”

On this record, and taking the relevant legal principles into account, we find ample reason to affirm. There was substantial proof from which the BSEA could have rationally concluded that the IEP was adequate and appropriate. First there is no question that Stow’s plan envisioned a less restrictive environment for Christopher’s education. Its program would have enabled Christopher to spend much of his school day learning alongside non-handicapped children. This opportunity was not available at Carroll School.

Second, even giving full credit to the Amanns’ allegation that Christopher enjoyed better academic progress at Carroll School than he would have had he returned to Stow, “there was considerable room for the BSEA, and the district court, to find that the advantages inherent in the IEP did not severely compromise educational benefits.”¹⁸¹

Once again the Massachusetts mandate was qualified by the LRE requirement. Also discernible is the maneuvering room allowed for the BSEA and, ultimately, for the school systems, in developing appropriate IEPs when the court discerns good faith efforts. The school districts which have fared poorly in litigation have generally failed to show good faith and serious commitment toward building meaningful and workable IEPs. As for Christopher Amann, his parents tried to challenge the next IEP presented by Stow, but their case was dismissed for failure to meet the applicable statute of limitations.¹⁸²

¹⁸¹ *Id.* at 649-50 (citations omitted) (offering several reasons why application of state standard would reach same outcome as applied federal standards in light of plaintiffs’ arguments).

¹⁸² *Amman v. Stow Sch. Sys.*, 991 F.2d 929, 931 (1st Cir. 1993) (concluding that the district court properly dismissed claim since Ammans sued seven months after the statute of limitations expired).

C. Refining the Mandate: Cases 1998 - 2002

From Christopher's case against the Stow School District decided in 1992 to 1998, there was a dearth of interesting case law bearing on the meaning of the Massachusetts mandate. Starting with three federal cases reported in 1998, the reports become interesting and informative for my purposes in this article.

1. Matthew J. and the School Committee of Granville¹⁸³

Matthew's principal diagnosis was schizotypal personality disorder. He attended Granville public schools from kindergarten through eighth grade, with the exception of fourth grade when his parents enrolled him at the Master's School in Simsbury, Connecticut. From fifth grade through eighth grade, he received special education services. The relationship between Matthew's parents and the school system began to deteriorate during Matthew's eighth grade year. After a brief trial period, his parents rejected a behavior-based program.¹⁸⁴ Through mediation, his parents and the school developed an agreement for an in-district placement, but, according to the case report, the school failed to implement what was agreed upon. The Granville schools proposed no IEP for Matthew's freshman year; instead, personnel provided a list of special education schools, presumably approved for placement.

Matthew's parents did not pick from the list. Rather, they enrolled him again in the Master's School in Connecticut,¹⁸⁵ where he stayed on for his high school years and did reasonably well. From his tenth grade onward, the Granville District paid for some special educational services, and at one point appeared to acquiesce in the placement by listing the school on Matthew's IEP.¹⁸⁶ When the parents eventually sought reimbursement for

¹⁸³ Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 (D. Mass. 1998). According to the court, "For Matthew this illness manifested itself as excessive social anxiety, magical thinking, poor internal controls and inappropriate effect." *Id.* at 391. As a consequence of his illness, Matthew had continuing learning difficulties. *Id.*

¹⁸⁴ Maybe a little too brief since he left after one day. *Id.* at 384.

¹⁸⁵ This was a private, sectarian school. *Id.* at 383.

¹⁸⁶ School officials may have been ambivalent on account of the sectarian nature of the school, a matter earlier litigated in Massachusetts. *See id.* at 386.

tuition, the school resisted, claiming that the placement was not in accord with federal or state mandates and that reimbursement for the costs of sending Matthew to a sectarian school was barred by law.¹⁸⁷

A BSEA officer ordered reimbursement for certain special education costs, but denied tuition reimbursement, generally on grounds urged by the school.¹⁸⁸ A federal magistrate judge allowed reimbursement for Matthew's freshman year *only* on equitable grounds, since the school had presented no IEP for that year, but otherwise denied reimbursement.¹⁸⁹ A federal district judge overturned the BSEA officer's decision, declaring that the private placement was appropriate in the circumstances even though the private school had not provided anything designated as "special education."¹⁹⁰ Neither the First Amendment nor state constitutional law barred reimbursement.¹⁹¹ Nor did the record sustain the school's contention that Matthew's parents had sabotaged the school's efforts to create or locate an appropriate program.¹⁹² Consequently, the court ordered tuition reimbursement for all four years, no doubt a hard blow to the school budget. Yet, it is doubtful that the disposition would have

¹⁸⁷ The Granville District relied upon the First Amendment to the U.S. Constitution and the Anti-aid provisions of the Massachusetts Constitution. *Id.* at 390.

¹⁸⁸ *Id.* at 382 (outlining decision of BSEA officer with regards to two types of costs incurred by plaintiffs).

¹⁸⁹ *Id.* (distinguishing federal court's conclusion upon appeal from decision of BSEA officer regarding tuition reimbursement for child's first year of secondary education).

¹⁹⁰ The fact that the Master's School did not have anything amounting to a special education program was not troublesome. The judge wrote:

Neither the statutes, nor the decisions construing them hold, or even suggest, that a school must have a program formally designated a "special education" program in order to constitute a proper placement for a student with special needs. Although Master's does not explicitly offer "special education" services, this fact alone is not dispositive. Instead, the court must look to whether the services Master's did provide were appropriately responsive to Matthew's educational needs (footnote omitted).

...

Putting aside for the moment the First Amendment issue, the court finds that the Master's school was an appropriate placement for Matthew. . . The services Master's provided responded to Matthew's special needs in that he maintained adequate grades and successfully graduated from high school in four years (citation omitted). *Id.* at 390-91.

¹⁹¹ *See id.* at 391-93 (discussing how tuition reimbursement under present circumstances violates neither federal constitutional law nor Massachusetts statutory law).

¹⁹² *Id.* at 393 (noting that plaintiff's parents, while not entirely blameless, took no action that constitutes deliberate intent to disrupt appropriate program placement for plaintiff).

been different if the federal mandate had applied. The district might well have avoided the result with aggressive planning and sustained meaningful communications when Matthew's parents began to search for an appropriate high school placement.

2. Daniel H. and the Mansfield Public Schools¹⁹³

Daniel suffered from a language-based learning disorder and was the recipient of special education services during his elementary school years. He did well and moved toward increased mainstreaming as the years passed.¹⁹⁴ For Daniel's sixth grade IEP, the school proposed a regular classroom with one-half hour per week of speech and language monitoring, as well as an information exchange by notebook between home and school. Daniel's parents deferred a decision on the IEP pending an evaluation of Daniel by the New England Medical Center (NEMC). Daniel remained in his public school classroom. The NEMC diagnosed Daniel's difficulties in processing auditory information and word retrieval and, accordingly, made recommendations that went a little beyond the proposed IEP.¹⁹⁵ In this time-frame, Daniel began to experience significant difficulties, including exhausting struggles to get his homework completed and disciplinary infractions at school. Daniel's parents requested that the Mansfield school system incorporate NEMC's recommendations into his IEP. The school declined, but as a practical matter, *offered to provide* virtually every recommended service soon after receiving NEMC's report. Daniel's parents did not respond to the offer.

¹⁹³ Kathleen H. v. Mass. Dep't of Educ., 154 F.3d 8 (1st Cir. 1998). Kathleen and Larry H. were the parents of Daniel H. *Id.* at 8. An exceptionally succinct and clear statement of the requirements of IDEA and state special education law appear in *Kathleen H. Id.* at 10-11.

¹⁹⁴ According to the factual narrative in the First Circuit's opinion:

From kindergarten through the sixth grade, Daniel attended Mansfield public schools. In the first, second and third grades, Daniel received special education services in accordance with his IEP with a 502.4 prototype. In the fourth grade, Daniel's TEAM modified his IEP to a 502.3 prototype, and he was mainstreamed for mathematics. In the fifth grade, Daniel was mainstreamed in all content areas after he successfully completed the Stevenson Reading and Literature Program, a special education curriculum, in accordance with his 1992-1993 IEP.

Id. at 11.

¹⁹⁵ Specifically, "NEMC recommended small group speech therapy as well as weekly consultations between a speech pathologist and Daniel's classroom teacher." *Id.* at 12.

For Daniel's seventh grade IEP, the school again proposed a regular classroom (mainstreaming) and special sessions for speech and language, along with consultation and instruction for Daniel's classroom teachers by speech and language providers. The Mansfield schools also agreed to implement NEMC's recommendations "where appropriate" and appended the recommendations to the proposed IEP.¹⁹⁶ Daniel's parents rejected the proposed IEP, enrolled him in the Learning Prep School, and requested a due process hearing wherein they sought reimbursement. The BSEA officer approved the school's proposed IEPs for the sixth and seventh grades, with some modifications for the future and decided that, in any event, the private school in which Daniel was enrolled was overly restrictive. Therefore, the parents had no just claim for reimbursement.¹⁹⁷

Daniel's parents went to federal court where a judge upheld the BSEA decision. On appeal, the First Circuit affirmed with citations to *Roland M. v. Concord School Committee*¹⁹⁸ [Matthew M's case] and *Amann v. Stow School System* [Christopher's case].¹⁹⁹ The court stated that, "even if the IEP was initially deficient, our focus in assessing its adequacy is on the IEP as it emerges from the administrative review process."²⁰⁰ Moreover, the procedural mistakes had neither hampered the parents' opportunity to participate in formulating an IEP "nor caused a deprivation of educational benefits."²⁰¹ Thus, the parents had no claim; they had mistakenly gambled that the court would approve the propriety of a unilateral private placement. Using

¹⁹⁶ *Id.* (noting school's willingness to adhere to NEMC regulations, despite prior constant refusal).

¹⁹⁷ The BSEA officer acknowledged that the school district had made some procedural mistakes, but found that the errors were "not grave enough to assume that [Mansfield] lacks the capacity to develop or implement a special education program for Daniel." *Id.*

¹⁹⁸ *Id.* at 13 (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990)) (requiring a clearly erroneous holding on the part of the District Court in determining if the IEP is adequate).

¹⁹⁹ *Kathleen H. v. Mass Dep't Educ.*, 154 F.3d 8, 13 (quoting *Amann v. Stow School System*, 982 F.2d 644 (1st Cir. 1992)) (holding local school district followed proper procedures in IEP, and parents were provided due process in administrative challenge).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 14 (stating further that parents ability to participate in formation process must be seriously hampered, resulting from inadequate procedures in addition to compromising the pupils education).

the same authorities cited in Matthew J's case [the preceding case against the Granville District], the court had no trouble sustaining a mainstream placement with reasonable and common sense adjustments to meet Daniel's particular needs. Perhaps Daniel's success in his elementary years tended to justify the school's approach. As distinguished from Matthew J's school, Daniel's school appears in the case report as pro-active, ready to address issues, and receptive to outside recommendations. It does appear that the judges will more readily defer to local choices when the record creates confidence in the good faith of a school system. This view is buttressed in the next case involving Frank S.

3. Frank S. and the School Committee of Dennis-Yarmouth²⁰²

Frank S. was a young man of at least average intelligence, driven to achieve. He was diagnosed as suffering from Pervasive Developmental Disorder (PDD). As a practical matter, his challenges in school derived from a cluster of language related-disabilities. He was generally mainstreamed, and received special educational services in elementary school, in middle school, and through his first three years of high school. By his junior year, Frank's record was enviable: he was mainstreamed for all classes; he took honors courses in algebra, chemistry, statistics, and trigonometry. He earned A and B grades. Against his school counselor's recommendations, he took and succeeded in Honors English. Frank ended up taking the Scholastic Aptitude Test (SAT) and getting a 700 in math and a 550 in verbal.²⁰³ Frank participated in a concert band, jazz band, the chess club, a writer's forum, and the drama club. He played saxophone in the All Cape and Islands Music Festival.²⁰⁴ His high school career would be the envy of many.

The downside was that he had trouble organizing his time, agonized over the details of his homework, and developed a tendency toward depression and slightly deviant behavior. He

²⁰² Frank S. v. Sch. Comm. of the Dennis-Yarmouth Reg'l Sch. Dist., 26 F. Supp. 2d 219 (D. Mass. 1998) (holding IEP prepared by district satisfied Individuals with Disabilities Education Act, relieving school districts financial responsibility).

²⁰³ *Id.* at 222-23 (noting test was taken untimed).

²⁰⁴ *Id.* at 223 (stating during this time Frank ranked 28 out of 208 students).

was deemed eligible for special educational services. He took the anti-depressant (Zoloft) to assist him in day- to- day functioning. The disagreement with the school district came about when the team worked up an IEP for Frank's senior year. Understandably, Frank's parents aimed beyond high school. They wanted a transition plan whereby Frank would participate in the 1996 graduation exercises with his classmates, yet remain at the high school for another year.²⁰⁵

The school would not allow this. Frank could not go through with a graduation ceremony and also have transitional services. There may have been an underlying cost-savings motive behind the school policy, but lawfully, once a student graduates from high school, he or she is no longer eligible for special educational services.²⁰⁶ Frank's parents rejected the IEP proposed for Frank's senior year, enrolled him at the Pine Ridge School, a residential school in Vermont,²⁰⁷ and requested a due process hearing seeking reimbursement. The BSEA officer denied their claim.²⁰⁸

Frank's parents filed suit in the federal court. By agreement, their case was heard by a Magistrate Judge who decided that the school's proposed IEP met Frank's needs "as guaranteed by state and federal law."²⁰⁹ Plaintiffs appealed to a federal judge, as then allowed.²¹⁰ The judge noted that the Magistrate Judge had applied an erroneous standard:

²⁰⁵ Frank might have been ambivalent. The District Judge's opinion noted that there was evidence suggesting that Frank did not want to stay at the high school after his friends left, but rather wanted his transition to involve classes at Cape Cod Community College. *Id.* at 224 n.6.

²⁰⁶ A point not lost of the federal court, which specifically noted the end of special services with formal graduation. *Id.* at 224 n.9. However, the court also notes that Frank's parents decided that he should not enroll in an American history course which was a prerequisite for graduation, so graduation with his class of 1996 became a moot point. *Id.*

²⁰⁷ The school is located in Williston, Vermont. *Id.* at 224. Frank's parents were concerned when earlier considering the school that it might not meet his academic needs. *Id.* at 224 n.10.

²⁰⁸ *Id.* at 224-25 (stating because of progress Frank made previously through district programs, there was no reason to believe similar progress would not be made if he stayed).

²⁰⁹ *Id.* at 225 (quoting Magistrate Judge who held Frank's developing to his full potential was not responsibility of Commonwealth).

²¹⁰ In discussing standard of review, the court specifically notes:
The parties elected to proceed before the Magistrate Judge pursuant to 28 U.S.C. § 636(c)(1). Section 636(c) (4) at the time of the parties' election permitted an appeal of the Magistrate Judge's decision to a district judge. Is this circumstance, a district judge is to review the Magistrate Judge's decision for clear error.
Id. (citing *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 990 (1st Cir. 1990)).

It is apparent that the Magistrate Judge failed to differentiate the more strict Massachusetts IDEA standard from the less stringent federal mandate. Under IDEA, a state is permitted to adopt a more exacting standard than the one mandated by federal law. Massachusetts has done so. Under Massachusetts law, an IEP must provide for the child's maximum possible development, not merely for an "adequate" education.²¹¹

Rather than remand, however, the judge conducted his own review as urged by the parties. With very careful attention to the details of the record, especially the testimony of Frank's mother at the BSEA hearing, the judge concluded that Frank's parents failed to carry their burden in proving that the proposed IEP was inadequate. A slight frustration is discernible in the judge's summing up:

The responsibilities that Frank's parents sought to place on the district exceeded even the very stringent demands imposed by Massachusetts law. The District had given Frank an exemplary education in a supportive environment sensitive to his special needs. The parties agree that Frank succeeded academically in this environment. Frank's parents' expectation that the District would be able to mold Frank into "a responsible and independent individual capable of interacting with the material and social world around him" . . . while understandable, was unreasonable, given Frank's innate disabilities. The District's responsibility was to exert its best efforts to maximize Frank's *possible* developmental potential. I see no evidence that it did less.²¹²

Obviously, Frank's parents gained no reimbursement. Most interesting to me in the language quoted is an implied limitation on the Massachusetts mandate: *reasonableness*, including a recognition of inherent student limitations. Frank's parents

²¹¹ *Id.* at 225-26 (citation omitted). A footnote to the court's opinion noted the Magistrate Judge relied on the interpretation of "adequate and appropriate" given by the First Circuit, which stated the state must only confer "some" benefit on the child. *Id.* at 225 n.13.

²¹² *Id.* at 231 (emphasis in original). The judge explained his reasoning before summing up by describing several instances where the parents' requests were honored, or attempted to be honored as best as possible, despite their numerous complaints. *Id.* For example, the district funded Frank's tutoring at a Sylvan Learning Center so that after school activities were not interfered with, the district assessed Frank's levels of functioning, and attempted to supply him with summer employment. *Id.* at 231.

were perceived as overreaching and unreasonable. A reasonableness limitation will turn up in Michigan case law and elsewhere. Less evident, and perhaps a little questionable, is the judge's assumption that the personal development sought by the parents was really *not possible* for Frank, and that their aspirations (and Frank's) were consequently unreasonable. Taking the judge's language seriously, it appears that a *diagnosis* could serve to limit what a school should be expected to do. While that may seem innocuous and logical, it could be dangerous by planting firm limits against achievement on the basis of a diagnosis. But, overall, the opinion radiates common sense in a situation where parental concerns outstripped the reasonable limits of a decent public school system, something good parents may do from time to time.²¹³ Reason tugged the other way in the case that follows.

²¹³ This seems to have been true in the case of *Douglas W. v. Greenfield Public Schools*, 164 F. Supp. 2d 157 (D. Mass. 2001). Douglas was described by his parents as a boy of average intelligence with attention deficit hyperactivity disorder (ADHD) and mixed receptive-expressive language disorder. *Id.* at 161. During his first grade, Douglas was on an IEP and did receive special services. *Id.* Before his second grade year commenced, his parents had him evaluated at Tufts New England Medical Center which recommended a substantially separate classroom with speech and language therapy. *Id.* at 162. While Greenfield's school personnel sought to assure Douglas's parents that the team could develop an appropriate IEP with appropriate related services, they also informed his parents that a substantially separate classroom was not an option. *Id.* Before an IEP could be developed, Douglas's parents placed him at Eagle Mountain, a small private school in Greenfield. *Id.* The team [without the benefit of parental assistance] developed an IEP and proposed it. *Id.* at 163. Douglas's parents rejected it, and demanded a due process hearing seeking reimbursement. *Id.* The BSEA officer held for the school district. *Id.* at 164. This decision was sustained by a federal magistrate judge who stated:

[T]he hearing officer found, given the totality of evidence, that Greenfield's IEP did indeed provide Douglas with a FAPE in the least restrictive setting . . . [t]he parents have not demonstrated that the hearing officer committed any legal error in reaching that decision. At bottom, the court finds, based upon the preponderance of the evidence, that the IEP proposed by Greenfield, as polished over the course of the administrative hearing, was adequate and appropriate for Douglas.

Id. at 171. The language employed is obviously from the federal mandate. We can only infer that on these facts the Massachusetts mandate required no more than did the federal mandate. *See also* *Frank S. v. Sch. Comm. of the Dennis-Yarmouth Reg'l Sch. Dist.*, 26 F. Supp. 2d 219, 225 (D. Mass. 1998).

4. Shaun D. and the Mohawk Trail Regional School District²¹⁴

Shaun D. had a rough start, and his story is more heart-rending than most in this collection of cases. At age eight, the Department of Social Services (DSS) removed him from his biological mother on account of abuse and neglect. DSS placed him with Linda D. and her husband in Shelburne Falls, Massachusetts. The records showed multiple diagnoses including, post-traumatic stress disorder, head trauma, mild mental retardation, obsessive-compulsive disorder, static encephalopathy as well as pedophilia and paraphilia.²¹⁵ Pursuant to recommendations accompanying a neuropsychological evaluation, the Mohawk District developed an IEP that placed Shaun in a substantially separate classroom, a placement with which Linda D. agreed. Shaun seemed to adjust reasonably well. School troubles started in May 1994 when the IEP team began to plan an IEP for the 1994-1995 school year,²¹⁶ and it was reported that Shaun inappropriately touched a student confined to a wheelchair. Shaun was put into a counseling program. The new IEP, and amendments thereto, which Linda D. approved, required close adult supervision at all times. Thereafter, Shaun's behavior in school was appropriate.

When it came time for developing the 1995-1996 IEP, the school proposed basically the same plan. This time Linda D. withheld approval, pending an evaluation from the Franklin Medical Center. The evaluation which followed acknowledged significant academic progress and good adaptation to living with Linda D. and her husband on their farm, but also recognized a "significant sexual disorder" and recommended a residential placement "until Shaun's pedophilia was brought under control."²¹⁷ The team was also provided with an alarming risk assessment from a social worker who opined that Shaun "had difficulty controlling his sexual impulses, was at risk for sexually

²¹⁴ Mohawk Trail Reg'l Sch. Dist. v. Shaun D., 35 F. Supp. 2d 34 (D. Mass. 1999) (holding district financially responsible for residential placement of child which was necessary due to child's combination of emotional, social, and behavioral conditions).

²¹⁵ *Id.* at 37 (noting Shaun's condition and history are not in dispute).

²¹⁶ Since Shaun was not moving grade to grade in the ordinary manner, calendar years and not grades are used to designate the IEPs in dispute. *See id.*

²¹⁷ *Id.* at 38-39 (discussing Shaun's problems in part as staring at young children, and difficulty restraining his sexual behavior).

acting out behavior and should not be left unsupervised with children."²¹⁸

Nonetheless, the school proposed an IEP that called for placement in a substantially separated classroom and provided that Shaun would be under the visual supervision of a responsible adult at all times. Linda D. rejected it, but not before Shaun had taken a turn for the worse. In September 1995 Shaun was hospitalized at the Franklin Medical Center. Upon discharge and return to his home, his discharge papers showed that he was anoretic, had sexually assaulted at least six children, and had stopped eating.²¹⁹

Shaun was referred to a treatment center which described him as a "sexually deviant youth" who "needed treatment in an intensive residential setting."²²⁰ Nonetheless, he continued in the Mohawk public school placement (apparently without an agreed-upon IEP) where he demonstrated academic progress and some growth in peer relations. However, his out-of-school behavior deteriorated badly. Understandably overwhelmed, Linda D. and her husband petitioned DSS to take custody of Shaun. DSS took custody and immediately placed Shaun in a residential treatment center for three months. Thereafter, in April, 1996, DSS placed him at the Whitney Academy, a school designed to help students who display sexually offending behaviors. Representatives of the Mohawk school system had neither knowledge of nor participation in the residential placement.

While Shaun remained in this residential placement, Mohawk once again developed an IEP proposing to keep him in the public system with special services. In a due process hearing initiated by the Mohawk system, the question of paying for the residential placement was adjudicated. The hearing officer determined that Mohawk should pay for Shaun's residential placement at Whitney Academy,²²¹ relying in part on *David D. v. Dartmouth School Committee*.²²²

²¹⁸ *Id.* at 39.

²¹⁹ *See id.* (detailing Shaun's psychiatric discharge summary).

²²⁰ *Id.* at 39.

²²¹ *See id.* at 40 (holding Mohawk responsible for placing Shaun at Whitney).

²²² 775 F.2d 411 (1st Cir. 1985) (holding the educational plan insufficient and requiring plaintiff to be schooled in a residential private school).

The school district took the case to federal court where its lawyer argued primarily that the services for which payment was sought were not truly *educational*, and that the school was being asked to assume the cost of medical services, including psychiatric care, which was beyond the scope of the federal and state mandates for schools.²²³ The argument in federal court turned on the meaning of “special education.” The judge did not accept the school’s argument.

The district court’s opinion states in pertinent part:

In the court’s opinion, the law does not support the delineation which Mohawk seeks to draw, particularly in the case of a severely impaired student like Shaun. “The concept of education is necessarily broad with respect to some severely or profoundly retarded children.” Similarly here, Shaun had educational goals and objectives that were not simply academic in nature. As the First Circuit acknowledged, such educational goals can relate to behavioral controls and other non-academic tasks. Given Shaun’s unique combination of needs, special education services may reasonably include counseling and therapy, the very services offered by Whitney, but not by Mohawk. . . . Interestingly enough, Mohawk itself historically defined Shaun’s educational needs as including the very goals and objectives which it now claims are excluded under its more limited definition of educational services. . . .

However, as described, Shaun not only presents a unique situation but, in accord with the IEPs which Mohawk itself previously formulated, had educational goals which went beyond simply preventing the reoccurrence of sexually offensive behavior. Those goals included his understanding appropriate social conduct and forming appropriate peer relationships.²²⁴

²²³ The school’s lawyer might have overshot a little:

Mohawk goes so far as to argue that, if the court were to embrace the regulatory scheme as interpreted by Defendants, “all angry and aggressive behavior outside of school, including murder, rape, gang violence, drug related activity, assault and battery, robbery, kidnapping, and sexually inappropriate behavior, which did not affect the child’s educational performance, would become the responsibility of local school districts.”

Mohawk Trail Reg’l Sch. Dist. v. Shaun D., 35 F. Supp 2d. 34, 41 (D. Mass. 1999) (quoting Pl. Reply Mem. at 5 (No. 97-30099-KPN)).

²²⁴ *Id.* at 42-43 (citations omitted).

Thus, the case of Frank S. [a brilliant high school student in Mansfield] was easily distinguishable, and the case of David D. [a young man prone to sexual aggressiveness] was analogous. As in the case of David D., it was the non-academic piece or the behavioral component that made the residential placement the least restrictive environment. In Shaun's case, as with David D., the court faced a question of how to educate a sexually aggressive, sometimes out-of-control male in his teens. For both David D. and Shaun D., the courts ordered residential placements at school expense contrary to strong protests from the schools and in spite of their apparent willingness to work in good faith with difficult young men. I sense a public policy concern about the safety of children woven into the judicial concerns that led to an order of a residential placement. Sensibly applied, the federal mandate should have required no less, even if there had been no heightened mandate in Massachusetts.

D. Conclusions

The foregoing is a little shy of an exhaustive survey of the cases arising from Massachusetts during the years of the *maximum-possible-development* mandate,²²⁵ but it is more than a fair sampling.²²⁶ This case law can teach us something if we can hear it, namely, that the Massachusetts mandate never required in any literal sense the *maximum possible development* of any real child. It is doubtful that the mandate's most hostile accusers really read the cases. Reading the cases shows the limitations that the courts placed upon the state mandate.

On the basis of the reported case law, I conclude:

1. The most powerful and frequently recurring limitation on the Massachusetts mandate is the requirement that every child must be placed in the least restrictive environment available, providing that child's special needs can be addressed in that

²²⁵ Also commonly referred to as the MFB or maximum-feasible-benefit mandate. See *supra* Part III. A.

²²⁶ I have not included any discussion of cases where the mandate is mentioned, but nothing respecting the mandate seems in issue. I am confident that the cases selected reasonably and accurately cover the development of the pertinent law for the years from 1982 through 2001.

environment.²²⁷ This limitation pertains to movement from one kind of classroom to another, but has had more particular application when parents have sought private out-of-district placements in private schools or on occasion have sought private residential placements. More often than not, if a school district acts reasonably, follows the procedural requirements of state and federal law, and then presses its case, the courts will approve an in-district placement under the Massachusetts mandate even if the child demonstrably can learn particularized skills better, or is happier, in a private placement.

2. Judicial deference to pedagogical expertise of public school personnel has been another limitation on the Massachusetts mandate. When educational methodology has been in issue, the courts have avoided entering the fray and have deferred to the judgment of school personnel. Some of that deference is allowed to the decisions of the administrative hearing officers also, and rightly so, because *Rowley* requires that due weight be given to administrative decisions.²²⁸

3. A third limitation is a little harder to define, but it does spring up, namely: a *reasonableness* limitation that takes into account the nature of a disability, the progress a child (or older student) has made, and the requests which led to conflict with the school. Nothing in the text of the Massachusetts mandate ever stated that parents were supposed to be reasonable or that the costs of programs should be reasonable in relation to a child's unique needs. But, the courts have been wary of parental demands when they have seemed manifestly unreasonable. Perhaps the early judicial adoption of the term "maximum feasible benefit," which in many minds became a shorthand description of the Massachusetts mandate, stands as linguistic evidence of a reasonableness limitation assumed by the courts,

²²⁷ If the state requirement for the least restrictive environment were repealed, the federal requirement would remain (unless Congress acted) thereby leaving results in the cases the same. See Peter T. Kachris, Editorial, *Maximizing a Student's Potential Will Help Lawyers, Not Students*, ST. LOUIS POST-DISPATCH, Mar. 4, 2002, at B7 (arguing that the change from the Massachusetts standard to federal standard made little difference in the quality of services provided to special education services).

²²⁸ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982) (noting requirement of reviewing court to receive administrative hearing records implies that weight be given to those records).

both state and federal. The mandate has *never* been judicially applied to require utopian or ideal placements or programs.

4. An aspect of reasonableness has been a sense of *balancing* academic achievement with other requirements for a child's development. In the case of Matthew M., one could say the First Circuit required a holistic approach.²²⁹ Nothing in the state mandate required such an approach, but it is consistent with the LRE requirement and is implied in the federal emphasis on related services. Parental stress upon academic progress has been squelched often-times by judicial resort to the LRE requirement.

5. In my opinion, judicial construction of the Massachusetts mandate by state and federal judges was generally sensible and faithful to the text in context, and made the mandate workable. In a few cases, the mandate *might have* resulted in placements more expensive than *might have occurred* under the federal mandate, notably the cases of *David D. and Shaun D.*, where the school districts were liable for residential placements. While reasonable people might differ about the necessity of residential placements, these decisions can hardly be characterized as wild-eyed demands for unreasonable placements. Issues of public safety and parental sanity may have played an unarticulated role in the decision-making. If so, we should laud the courts for taking account of these concerns.

6. In my own family, I can state unequivocally, that neither of my daughters with disabilities was ever provided with a program that provided in any high philosophical sense for her *maximum possible development*. For Josephine and Ingrid, in their worst days, that standard *literally applied* would have required a team of medical specialists to keep them primed for education and multiple educational specialists to meet their physical, emotional, and behavioral challenges, as well as their physical, intellectual, musical, and vocational potentials. On a most basic level, both Josephine and Ingrid swim well and could benefit greatly from substantial time in the water each day. No program, public or private, has ever included that component. We never

²²⁹ The term "holistic" was never employed. Yet, it seems appropriate since the First Circuit chastised the parents for their "single-minded focus on academic results." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1st Cir 1990).

sought a utopian approach nor did anybody ever suggest any such thing. As presumably sane parents,²³⁰ we assumed that a cluster of reasonableness limitations hovered over the Massachusetts mandate, and acting on that assumption, we were well served generally. Most parents portrayed in the reported cases were reasonable too, though a few overshot and were checked judicially.

7. The state and federal courts both played significant roles in developing the meaning of the Massachusetts mandate. While the federal courts worked out the implications in greater detail than the state courts, given greater opportunity in the fact patterns, I can discern nothing disjointed or adverse, comparing federal and state court opinions. Judges in both systems recognized limitations on the state mandate.

E. Legislative Reaction

In light of the case law applying the Massachusetts mandate, there was no just reason to tamper with it. But, case law aside; there was a reaction against it, resulting ultimately in its modification to make it co-equal to the federal FAPE mandate. I recognize that case law is merely the tip of an iceberg. The school culture, and consequently educational costs, may have been influenced by the Massachusetts mandate more than the cases illustrate. Whatever the underlying reality, dissatisfaction was manifested from several quarters, not surprisingly from some school administrators. Leaders in the Massachusetts legislature, in response, commissioned McKinsey & Company,²³¹ private consultants, to do a study of special education in Massachusetts. The study addressed three main questions, one of which was the following: "What would be the impact of moving from maximum feasible benefit (MFB) to free and appropriate

²³⁰ An assumption for which I offer no documentation. As any parent of a seriously disabled child will no doubt admit, there are days when the thought of relief parenting for a substantial period of time might seem to be in the child's best interest.

²³¹ The study was commissioned by Thomas F. Birmingham, President of the Senate; Thomas M. Finneran, Speaker of the House of Representatives; Robert A. Antonioni, Senate Chairperson of the Joint Committee on Education, Arts, and Humanities; and Lida E. Harkins, House Chairperson of the Joint Committee on Education, Arts, and Humanities. See generally Ed Hayward, *Report on Special Education Gets Flunked By BU Professor*, BOSTON HEARLD, Apr. 4, 2000, at 022 (reporting that the report was commissioned by Massachusetts state legislative leaders).

public education (FAPE)?”²³² Notice that McKinsey & Company’s study assumed the applicability of the maximum feasible benefit [MFB] standard instead of the statutory maximum possible development [MPD] standard. The answer provided was the following:

According to an analysis of prototype data, moving the special education standard from MFB to FAPE could, at full implementation, shift between 2,200 and 35,000 students into different educational environments (prototypes) and could make between \$36 million and \$8 million of the special education budget available for reallocation. The specific results are dependent on the impact of FAPE on inclusion and whether eligibility changes are implemented. The range is provided because there is no definitive evidence about whether MFB plays a role in keeping children in the least restrictive environment.²³³

McKinsey & Company specifically noted, “Data does not exist that would enable the comparison between Massachusetts and FAPE states for specific services and for special education costs.”²³⁴ In the absence of such data, inferences could be made based only on probable shifts in placements. As noted above, the consultants thought shifts could number between 2,200 and 35,000, an amazingly wide range. McKinsey & Company should be commended for honesty in reporting: the report forthrightly acknowledged that changes in placements following a mandate change would be speculative, as would projected savings from a

²³² The other two questions were: “What would be the impact of moving to different eligibility evaluation rules and criteria (e.g., those that are consistent with other states/Federal approach)?” and “How can Massachusetts manage large swings in local special education budgets?” MCKINSEY & CO., REPORT ON SPECIAL EDUC. IN MASS. 2 (2000) [hereinafter REPORT].

²³³ *Id.* at 26.

²³⁴ There were other key findings which were:

Massachusetts currently places a higher percentage of special education children in both the least and the most restrictive educational environments relative to peer group states who have FAPE.

Experts are in general agreement that the steady state standard of FAPE is close to that of MFB; however, there is broad disagreement about what would happen during a transition from MFB to FAPE.

If the standard is changed, steps would be needed to manage the transition (e.g., training oversight).

Id. at 26.

change in state mandate.²³⁵ The truth was that nobody really knew what would happen if the Massachusetts mandate were changed or repealed.

It is very difficult to see how the study made a compelling case for legislative change of the mandate. A study done within the state DOE during the same time-frame came to similar conclusions. Not deterred, the legislative leaders acted swiftly and a proposal for a legislative change from “maximum potential development” or “maximum feasible benefit” (whichever one chooses)²³⁶ to FAPE was soon in the works.²³⁷ In fairness to legislators, a driving force and the main thrust of the proposed changes had to do with *limiting eligibility* for special education rather than changing the mandate. The over-arching goal was, of course, to save money. The change in the mandate was swept into a larger legislative package.

Parents and advocacy groups reacted strongly and predictably in a negative way. A release from the State House News Service on March 15, 2000 included the following:

Despite a personal appeal from Natick native and Buffalo Bills quarterback Doug Flutie today, lawmakers say they expect to reduce special education eligibility or benefits in an effort to reduce the program’s \$1.7 billion price tag.

More than 600 people - including Flutie, whose 8-year-old son is autistic - flooded Beacon Hill and Gardner Auditorium to protest a pair of bills reducing the number of students who receive special help.

South Boston mother Kathleen Barry said she hopes legislators have the courage to resist making changes, which

²³⁵ In fairness, changes in eligibility requirements and increasing consistency in the eligibility requirements were projected to make for greater savings, which seem to have been reasonably projected. *Id.* at 14.

²³⁶ Still statutorily “maximum possible benefit” until the change in 2001. See Doreen Iudica Vigue, *State Proposes Tightening Rules on Special Ed*, BOSTON GLOBE, Mar. 27, 1999, at B3 (observing that state legislators would have to choose between current state law standard of “maximum possible benefit” and federal standard of “free and appropriate public education”).

²³⁷ See Ed Hayward, *Officials Calm Fears of Special Ed Change*, BOSTON HERALD, July 19, 2000, at 3 (discussing plan proposed in the Massachusetts House of Representatives to switch to the federal standard).

she said would hurt kids like her 8-year old son, who has trouble seeing and is dyslexic.

“He totally lost his first year of school because they didn’t know how to deal with it,” Barry said. Experts said her son’s vision problems masked his dyslexia during 1st grade; Barry said she only discovered the problem because she demanded the “maximum feasible help” for him. “Changing the standard would have held me back from getting that second opinion.”²³⁸

In the 2000 edition of *The Summer Advocate*, a publication of the Arc of Massachusetts, the following “Special Education Alert” appeared:

The budget released by the House Ways and Means Committee and later adopted by the full House could drastically alter the landscape for Massachusetts special education programs. Most legislators, citing data contained within the recently released McKinsey & Co. study (although the study commissioned by the legislature did not recommend any change to “maximum feasible benefit”) voted to accept language that would among other things: Change state law from requiring schools to provide the standard of “Maximum Feasible Benefit” to the federal standard of “Free and Appropriate” education.²³⁹

The apprehension among many parents and advocates was palpable. Resistance notwithstanding, the Massachusetts legislature changed the state mandate to FAPE in July 2000 by amending § 2 of 71B of the Massachusetts General Laws to substitute “a free and appropriate public education” for “maximum possible development.”²⁴⁰ The change was effective January 1, 2002.²⁴¹ *The Advocate*, in its Fall 2000 issue, mourned the change as a “significant disappointment”²⁴² and published the

²³⁸ She may have been making reference to the legislative proposal that eliminated a right to a second independent evaluation of a child.

²³⁹ THE ADVOCATE (The ARC of Mass., Waltham, Mass.), Summer 2000, at 9.

²⁴⁰ MASS. GEN. LAWS ANN. ch. 71B, § 2 (2001) (noting that from and after January 1, 2002, the first paragraph of section 2 was amended to change the words “assure maximum possible development” to “assure a free and appropriate public education”).

²⁴¹ *Id.*

²⁴² *Legislative Session Ends on Bittersweet Note*, THE ADVOCATE (The ARC of Mass., Waltham, Mass.), Fall 2000, at 3.

vote of every state representative on the issue.²⁴³ The heightened mandate had been the law for about twenty-five years,²⁴⁴ probably a good run for a noble legislative experiment. My wife and I wondered, as did many others, whether or not the change would impact our children's IEPs and, if so, what the impact would be.²⁴⁵

IV. MICHIGAN: THE "MAXIMUM POTENTIAL" MANDATE

In 1976 the Michigan legislature enacted Public Act No. 451 which was subsequently codified as § 380.1701 of the Michigan Compiled Laws.²⁴⁶ In relevant part, § 1701 mandates that the state board of education shall:

(A) Develop, establish, and continually evaluate and modify in cooperation with intermediate school boards, a state plan for special education which shall provide for the delivery of special education programs and services *designed to develop the maximum potential of every handicapped person.*²⁴⁷

It reads like a ripple from the old Massachusetts mandate. Perhaps popular support for special education in combination with altruistic legislators played a role in enacting this lofty mandate in Michigan. It is probable, on the other hand, that a separate driving force was a lawsuit in federal court in which a federal judge was about to give the state a firm directive on the basis of an equal protection challenge.²⁴⁸ Whatever the genesis,

²⁴³ *Maximum Feasible Benefit Falls Victim to Legislative Process*, THE ADVOCATE (The ARC of Mass., Waltham, Mass.), Fall 2000, at 4.

²⁴⁴ Richard J. Robison, *Maximum Feasible Benefit: What's All the Fuss?* (Jan. 1998), available at <http://www.fcsn.org/execdire2.htm> (describing the comprehensive special education law passed by Massachusetts in 1976, which set high standards by requiring schools to educate students with disabilities so they could achieve their "maximum possible development.").

²⁴⁵ A major BSEA decision following the change to FAPE will be the subject of Part VIII, Section C of this article. Largely because of positive developments in federal case law, the change of the Massachusetts statutory mandate has not made much difference, to date at least.

²⁴⁶ MICH. COMP. LAWS § 380.1701 (2003) (noting in the "History" section that § 380.1701 arose from Public Act 451, which passed in 1976 and became effective on Jan. 13, 1977).

²⁴⁷ *Id.*

²⁴⁸ See *Harrison v. State of Mich.*, 350 F. Supp. 846, 846 (E.D. Mich. 1972) (showing that a viable equal protection claim on behalf of children with alleged mental, behavioral, physical, and emotional handicaps who had been denied access to public schools was

the legislature appears to have outrun federal constitutional requirements with its "maximum potential" mandate. On its face, the italicized language certainly implies a higher obligation than the Supreme Court subsequently required in *Rowley*.²⁴⁹ As in Massachusetts, the case law tended to constrict the mandate.

A. *Explaining and Limiting the Michigan Mandate*

1. Debra Nelson and the Southfield Public Schools²⁵⁰

Although earlier decisions made reference to M.C.L. § 380.1701,²⁵¹ the first case of consequence, decided in 1986, involved Debra Nelson. Debra suffered a stroke at age ten. Her school developed an IEP placing her in a classroom for educable, mentally impaired children. Dissatisfied, Debra's parents rejected this IEP and requested a due process hearing. After a hearing officer found the school's placement appropriate, Debra's parents sought an administrative review at the state level. The reviewing official reversed, finding that Debra needed a more

pending when the Michigan legislature acted to address the needs of handicapped children).

²⁴⁹ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982) (holding that a state required to provide a handicapped child with a "free appropriate public education" satisfies the requirement by providing personalized instruction with support services sufficient to permit the child to benefit educationally from that instruction and that such instruction and services must be provided at public expense, meet state educational standards, approximate grade levels used in the state's regular education program, comport with the IEP formulated in accordance with requirements of the act and, if the child is being educated in regular classrooms, be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade).

²⁵⁰ *Nelson v. Southfield Pub. Sch.*, 384 N.W.2d 423, 426 (Ct. App. Mich. 1986) (holding that a Michigan special education state review official abused his discretion in not allowing the appellant school district to file briefs or present oral arguments in an appeal of a decision to modify the educational program it had developed for a mentally impaired ten-year-old student).

²⁵¹ The *Flint* court held that the defendant school district did not violate a hearing-impaired student's civil rights by refusing to provide in-class cued speech services. *Flint Bd. of Educ. v. Williams*, 276 N.W.2d 499, 502 (Ct. App. Mich. 1979). Furthermore, the *Woolcott* court held that a school board may petition the probate court to take jurisdiction over a handicapped student under M.C.L. § 712A.2(a)(4) only after administrative proceedings under the school code's special education provisions have terminated and a final decision has been made that no program within the school system can adequately address the child's special needs and satisfactorily develop the child's maximum potential. *Woolcott v. Mich. Bd. of Educ.*, 351 N.W.2d 601, 607 (Ct. App. Mich. 1984). Neither appellate court discussed the heightened standard under Michigan law; but each noted in the context of related issues that the Michigan statute required school districts to provide education plans to develop the maximum potential of handicapped students.

specialized program. A state circuit court affirmed, so the school district appealed.

The Court of Appeals of Michigan vacated the circuit court's decision on account of a procedural error, reversed the state reviewing official, and remanded for further proceedings.²⁵² This was no victory for Debra's parents. But, the importance of the case for posterity was in the court's comments on the Michigan mandate. In explaining the rationale for its decision, the Michigan Court of Appeals commented upon § 1701 as follows:

M.C.L. § 380.1701 . . . does not define the phrase "maximum potential". We believe that there is some limitation on what kind of a program is required. When two competing educational programs which meet the child's requirements are evaluated, the needs of the handicapped child should be balanced with the needs of the state to allocate scarce resources among as many handicapped children as possible. *Age v. Bullitt County Public Schools*, 673 F.2d 141, 145 (6th Cir. 1982). However, assuming in this case, that funds are available for two proposed educational programs, each suitable to enable the child to reach her maximum potential, it would appear reasonable to adopt the program requiring lesser expenditure.²⁵³

The court did not say that something less than a program designed to develop a student's maximum potential was acceptable, but it did inject *cost* as a legitimate consideration very early in the development of the mandate. For years to come,

²⁵² *Nelson*, 384 N.W.2d. at 426 (finding that the state review official had not allowed the defendant district to file a brief or to present oral argument on appeal while it had allowed argument by the parent appellees and requiring that on remand both plaintiff and defendants be allowed oral argument).

²⁵³ *Id.* at 425. The citation to *Age v. Bullitt County Pub. Sch.*, 673 F.2d 141, 145 (6th Cir. 1982) is curious. The case arose in Kentucky, which did *not* have a heightened mandate. The case was decided favorably to the school district at the administrative hearing level, on administrative review, at the federal district court, and by the Court of Appeals for the Sixth Circuit, all acting under the FAPE standard. *Id.* at 145. Michael Age, the child on behalf of whom suit was brought, suffered from a profound hearing loss. *Id.* at 142. Expert opinion supported the viability of the school's proposed placement. *Id.* at 143. In a *dictum*, near the end of the Sixth Circuit's opinion, the court made the following statement: "we cannot say that the State has failed to reconcile satisfactorily Michael Age's need for a free, appropriate public education with the need for the State to allocate scarce funds among as many handicapped children as possible." *Id.* at 145. In this judicial recognition of fiscal realities in Kentucky, the Michigan court found some justification for injecting fiscal concerns into decisions in Michigan even though Michigan had the heightened mandate and Kentucky did not. *Nelson*, 384 N.W.2d. at 425.

Nelson provided judges with a basis upon which the maximum potential mandate could be qualified and constricted.

2. Jennifer Kulmacz and the Northview Public Schools²⁵⁴

Jennifer was severely hearing impaired. Her mother enrolled her in the Northview public schools where she participated in a Total Communication Program (TCP) through the fifth grade. Jennifer's mother then placed her at the Michigan School for the deaf for one year after which she returned to Northview district where she again participated in the TCP²⁵⁵ program.²⁵⁶ Believing that her daughter could achieve more in a segregated setting, Jennifer's mother next enrolled her in the Model Secondary School for the Deaf (MSSD), a federally funded school in Washington, D.C. While MSSD offered free tuition and residence the dormitory facilities were closed several times during the year, so the students needed to go elsewhere. For these breaks, Jennifer's mother brought her home, and requested that her school district pay for transportation to and from Washington, D.C. The district refused.

The request for reimbursement for transportation expenses forced the issue of whether or not the school's proposed IEP, which would have continued Jennifer's placement in the public schools, met the federal and state mandates. A local hearing officer held for the district. A state reviewing officer agreed that the district's proposed IEP met federal and state requirements. Jennifer's mother went to federal court challenging this denial of her request for transportation costs.²⁵⁷ On the question of whether or not the district's proposed IEP met state and federal

²⁵⁴ See *Barwacz v. Mich. Dep't of Educ.*, 674 F. Supp. 1296, 1308 (W.D. Mich. 1987) (dismissing the plaintiff parent's claim under Michigan Mandatory Special Education Act for failure to state a claim); see also *Barwacz v. Mich. Dep't of Educ.*, 681 F. Supp. 427, 437 (W.D. Mich. 1988) (holding that the plaintiff parent had failed to prove that the individualized education program developed for her severely handicapped daughter failed to meet the standard set forth in the Michigan Mandatory Special Education Act).

²⁵⁵ The TCP involved simultaneous use of speech, finger spelling, and sign language.

²⁵⁶ See *Barwacz*, 674 F. Supp. 1296 at 1299 (showing the point at which defendant Kent Intermediate School District, which assumed responsibility for special education cases originating in the Northview district where Jennifer and her mother resided, became involved in the case).

²⁵⁷ *Id.* at 1299 (showing that, among other claims, the plaintiff parent sought reimbursement of approximately \$2,500 in annual expenses she expected to incur in transporting her daughter from Washington, D.C. to Michigan).

standards, the district judge denied summary judgment believing there were facts in dispute.²⁵⁸

It is clear to the Court upon reviewing the provisions of the Michigan statutes and rules in conjunction with the EAHCA, that the applicable standard for schools in Michigan is that schools shall, to the maximum extent appropriate, provide special education programs and services that are designed to develop the maximum potential of each handicapped person within the least restrictive environment. Further, it is also clear that special classes, separate schooling, or other removal of handicapped children from the regular education environment should occur 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.²⁵⁹

Plaintiff maintains that her arguments do not turn on a philosophical disagreement with the concept of "mainstreaming." However, the Court believes that no matter in what terms plaintiff's argument is couched, it ultimately is grounded in and turns upon a discussion of the merits of mainstreaming versus placement in some sort of segregated setting. The testimony of plaintiff's expert supports that conclusion. Indeed, plaintiff's argument that MSSD is more appropriate because of the presence of hearing-impaired teachers and teachers that sign at MSSD ultimately turns on the notion that mainstreaming is inappropriate or to some extent ineffective.²⁶⁰

It may well be that if the Court were to substitute its judgment for that of the school board, it would choose to send Jennifer to the MSSD. Jennifer has certainly demonstrated to this Court, to use a contemporary metaphor that she is in no sense "a child of a lesser god." Moreover, it is evident that her self-proclaimed "pride in her deafness" will help her to attain whatever goals she has set for herself. However, under the limited type of review which the Supreme Court

²⁵⁸ *Id.* at 1302 (showing that the *Barwacz* Court found that there were material facts in dispute with respect to the issue of whether the administrative record established that Jennifer's program met the substantive requirements of the Michigan Education of the Handicapped Act).

²⁵⁹ *See Barwacz*, 681 F. Supp. at 433-34.

²⁶⁰ *See id.* at 435.

has indicated is appropriate here, I conclude that the plaintiff has not met her burden of proving that the IEP designed and approved by the defendants fails to meet the requirements of the EACHA – even allowing that the State standard which requires the board of education. . . to “provide special education programs and services designed to develop the maximum potential of each handicapped person” is incorporated into the EACHA.²⁶¹

Federal and state LRE requirements trumped all competing arguments. As the judge acknowledged, the LRE requirement to an extent constitutes a legislative choice of educational philosophy. Because of that legislative choice, neither Jennifer’s well-stated desires, nor her mother’s strong preference, nor expert testimony, nor the judge’s apparent affinity for the MSSD program, would override the requirement that Jennifer’s education be in the least restrictive environment in which her education could reasonably be carried out. Assigning the burden of persuasion to Jennifer’s mother also made a difference also. As in Massachusetts cases, the assignment of burdens in court and the least-restrictive-environment requirement chipped away at the heights of the state mandate.

B. Quarrels About Educating Autistic Children

While the causes of the nationwide increase in diagnosed cases of autism are hotly disputed, there is no doubt that this disorder has become the focus of much media attention and is of profound concern to parents and guardians of several hundred thousand children diagnosed as autistic. When our Ingrid was diagnosed as autistic in 1989, this neurological disorder, especially amongst females, was quite rare. Over the past fifteen years, the situation has changed profoundly.²⁶² Figuring out a meaningful

²⁶¹ See *id.* at 437.

²⁶² *Autism Levels are ‘Ten Times Higher’*, BBC NEWS (London) (Feb. 27, 2001) available at <http://news.bbc.co.uk/1/hi/health/1193046.stm> (quoting Mr. Shattock, the vice-president of the World Autism Organization, who stated that “[o]ur early data does suggest that there is a big increase and tenfold over 10 years is the figure we have at the moment”); Ed Edelson, *Study Confirms Marked Rise in Autism*, HEALTH SCOUT NEWS, ¶ 2 (Jan. 2, 2002) available at http://abcnews.go.com/sections/living/Healthology/HS_511049.html. (citing the U.S. Centers for Disease Control and Prevention that stated that “the overall rate is 10 times higher than rates from three other U.S. studies that used similar,

program for an autistic child, especially when a parent can sense the intelligence within awaiting some connection to the outside world, can be a nerve-wracking and tedious business. There is mystery about autism, but no mystery as to the reason for disputes regarding the appropriate programs and placements for autistic children. Michigan has quite a few of its own.

1. Martin (Marty) Renner and the Public Schools of Ann Arbor²⁶³

Marty was diagnosed as autistic at age two. His parents placed him in an early intervention program, and in due course worked with school personnel to develop an IEP. The parents also began consultations with Dr. Patricia Meinhold, a behavioral psychologist, who was a devoted follower of Dr. Ivan Lovaas. The Lovaas method is an intensive and comprehensive behavioral program with heavy stress upon discrete trial training (DTT). A DTT program requires repetitive stimuli or requests followed by immediate positive, negative, or re-directive responses designed to modify the autistic child's behavior. Marty's parents initiated a home-based DTT program when he was three, and the school district agreed to pay for it. Marty developed rapidly. They increased the DTT program from ten to twenty-five hours per week. Dr. Meinhold concluded that Marty was making progress and therefore recommended an increase to thirty-five hours per week.

In this time-frame, with the Renners' agreement, the school implemented an IEP that involved substantial classroom time apart from one-to-one training, and because some DTT was incorporated into part of each school day, the paid-for DTT hours at home were reduced. This reduction of home DTT hours eventually resulted in a conflict between Marty's parents and school personnel and subsequently ended in the parents' rejection of the IEP. The administrative hearings and litigation that followed led to an exceptionally powerful Sixth Circuit opinion

specific criteria to identify children with autism and pervasive developmental disorders in the 1980's and early 1990's").

²⁶³ See *Renner v. Bd. of Educ. of the Pub. Sch. of Ann Arbor*, 185 F.3d 635, 637 (6th Cir. 1999) (bringing suit on behalf of their autistic son, the United States District Court for the Eastern District of Michigan granted summary judgment to defendant public school district).

bearing upon the requirements of the federal law and the Michigan special education law.²⁶⁴

The heart of the conflict can be grasped by comparing Dr. Meinhold's view that Marty's program should consist of an uncompromising use of DTT²⁶⁵ and school personnel's view that the Lovaas method should be combined with less rigidly managed time in school. For the due process hearing, the school hired an expert, Dr. Gary Mesibov, who expressed concerns about total reliance on the Lovaas method. The hearing officer put the burden on the school to prove that its IEP met state and federal standards. The officer took evidence and concluded that the school failed to carry its burden, and consequently decided in favor of Renners. He ordered one-to-one DTT sessions over an extended school year, relying heavily upon Dr. Meinhold's recommendations.

On appeal, the state hearing review officer ("SHRO") put the burden on the Renners to establish that the proposed IEP was *inappropriate*, and promptly reversed, since they failed to carry their burden.²⁶⁶ The Renners sued in federal district court claiming violations of state and federal law. When each side moved for summary judgment, the file was referred to a magistrate judge who recommended summary judgment in favor of the defendant (school). The federal district judge adopted the report and recommendation and thus sustained the state hearing review officer's decision. Due to this particular procedural history, the Renners' appeal to the Sixth Circuit required a review of the magistrate judge's report. In that report, the Sixth Circuit judges found ample basis to sustain the school's position.

²⁶⁴ See *id.* at 645 (affirming the district court's decision, the court of appeals held that the defendants did provide a "free, appropriate, public education for Marty within the meaning of the statute").

²⁶⁵ Dr. Meinhold proposed:

- (1) forty hours of DTT a week, divided between the home and school environments;
- (2) an extended school year;
- (3) weekly team meetings between the school, the parents, and the tutors;
- (4) staff training and supervision by a consultant with experience in implementing DTT with young, autistic children;
- (5) recorded trial-by-trial data on Marty's responses to DTT; and
- (6) appropriate interactions with non-handicapped peers.

Id. at 640.

²⁶⁶ See *id.* at 643 (concluding, after examination of the record and the qualifications of those involved in the IEP, that "there [was] abundant nontestimonial and extrinsic evidence in the record to justify a contrary decision" from that reached by the LHO [Local Hearing Officer]).

First, the court adopted the view that “the parents had the burden of proving by a preponderance that the proposed IEP was inadequate.”²⁶⁷ Second, the court did not accept the thesis that Marty’s success under the Lovaas method proved that the school’s IEP was inappropriate; rather, the court found that the Lovaas method was a one-size-fits-all approach to autism. Therefore, it was, incompatible with the state and federal mandates. In the court’s language: “[w]ith respect to ‘special needs,’ it appeared to the magistrate judge that Dr. Meinhold’s recommendations of 40 hours of one-to-one DTT per week was her usual and customary program for all young autistic children with general needs commensurate with this problem, and not geared to Marty specifically.”²⁶⁸ The magistrate judge was persuaded that the IEP did provide for an *appropriate* educational opportunity taking into account Marty’s unique and particular needs.²⁶⁹

Whether the judges were being a little cynical about the Lovaas method or were sincere is not clear to me, but since Section 1400(c) of the IDEA requires a free and appropriate education designed to meet the *unique* needs of each child,²⁷⁰ it follows that the *standard* 40 hour per week one-to-one Lovaas treatment could fall short of the state and federal mandates. Obviously, the court was hesitant to take sides in a debate about the most acceptable pedagogical method for teaching autistic children, agreeing with the magistrate judge’s opinion “that there is simply no consensus within the educational or medical communities on the most effective way to treat autism in preprimary age children.”²⁷¹ With regard to the heightened mandate of Michigan state law, the court had this to say:

Michigan has chosen to enhance IDEA’s requirements . . . by requiring that an IEP be ‘designed to develop the maximum

²⁶⁷ See *id.* at 642 (citing *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990)).

²⁶⁸ See *id.* at 643.

²⁶⁹ See *id.* (noting that nothing in the record indicates anything “unique about Marty’s autism,” and “we find no error in his conclusion that his particular needs were addressed in the IEP”).

²⁷⁰ See *id.* at 644 (stating that “Section 1400(c) of the IDEA was intended to ensure that a child with a disability has ‘a free appropriate public education . . . designed to meet [the] unique needs’ of that child”).

²⁷¹ See *id.* at 646.

potential' of the handicapped child. The term 'maximum potential' has not been well defined in Michigan law. Further, the standard may be more precatory than mandatory; it does not necessarily require the best education possible. Michigan standards, moreover, do not require 'a model education, adopting the most sophisticated pedagogical methods without fiscal or geographic constraints. . . .' We have already concluded that the procedural requirements of both federal and state acts were met. . . . Plaintiffs are not entitled to prescribe or require a specific desired methodology under these circumstances.²⁷²

This language is hard on advocates who try to fight for a particular pedagogical method through judicial actions. This language made it clear that under the Michigan mandate, the school districts still have a choice of pedagogical methods.²⁷³ Moreover, the "maximum potential" mandate simply does not require a model education but an education tailored for the unique needs of the child. Especially intriguing is the court's use of the word "precatory." It appears that the judges of the Sixth Circuit thought that the Michigan mandate, relied upon by Marty's advocates, may have stated a legislative aspiration, not a standard *literally* binding on school districts. According to the court, state law assuredly required something above a *de minimis* effort, but not the Lovaas method or any other method sought by the parents, the qualifications of their expert notwithstanding.

²⁷² *Id.* at 645 (citations omitted). The court went on to conclude that:

Under the higher Michigan standards, then, defendant [school district] proposed an adequate and sufficient plan to provide Marty a free and appropriate public education offering to meet and develop the "maximum potential" of this child in light of his abilities and needs. There was attention given to "mainstreaming" and to developing communication and relational skills with regard to other children. Finally, we conclude that defendant met Michigan standards.

Id. at 646.

²⁷³ *See id.* at 645. The court noted, quoting *Barwacz v. Mich. Dept. of Educ.*, 674 F. Supp. 1296 (W.D. Mich. 1987) that "Michigan standards, moreover, do not require 'a model education, adopting the most sophisticated pedagogical methods without fiscal or geographic constraints. . ..'" *Id.* at 1302. However, it may be noted that a student of special education law can easily conjure up an extreme case where this would not be true, e.g. severe corporal punishment or extended deprivation of life's necessities as behavioral modifiers.

2. The case of Lisa Dong & the Rochester Community Schools²⁷⁴

Lisa Dong entered an early intervention program at age three. At four, upon parental request, the school placed her in a program for autistic children. Lisa's parents began consultations with Dr. Meinhold (from *Renner*), who strongly recommended the Lovaas method. The parents began DTT implementation at home starting with ten hours per week. Eventually a quarrel broke out. When Lisa was five, the school proposed a twenty-seven and a half hour per week TEACCH2 Program,²⁷⁵ and Lisa's parents demanded forty hours of the Lovaas program. When negotiations proved unsuccessful, Lisa's parents removed her from school and began a forty hour per week Lovaas program in their home and sought reimbursement. In the due process hearing that followed, the local hearing officer ruled that the school's proposed IEP was appropriate, and a state hearing review officer agreed.

Lisa's parents filed an action in federal court, where the federal district judge decided for the school district and other defendants.²⁷⁶ The Sixth Circuit panel affirmed, citing *Renner*. Recognizing that this was another fight about pedagogical methods, the court stated:

The SHRO's ["state hearing review officer's"] decision, which is entitled to due weight, found that *both* the Lovaas-style DTT program of 40 hours per week and the District's TEACCH influenced language based autistic impaired program of 27.5 hours per week would provide Lisa with a FAPE designed to maximize her potential. Comparing these two appropriate teaching methodologies, the SHRO further found that the IEP was designed to maximize her potential in the least restrictive environment. The district court went a step further to conclude that, taking into account the IDEA's goal of providing services in the least restrictive

²⁷⁴ See *Dong v. Bd. of Educ. of the Rochester Cmty. Sch.*, 197 F.3d 793, 796 (6th Cir. 1999) (acting on behalf of their daughter Lisa, plaintiffs-parents challenged the IEP developed for Lisa, arguing that it failed to provide a free, appropriate public education).

²⁷⁵ See *id.* at 798 (describing the program, the court noted that TEACH programs present a competing method for educating autistic children, stressing classroom work as opposed to home-based work, and a cognitive as opposed to behavioral approach).

²⁷⁶ See *id.* at 799 (noting that the "district court conducted an independent examination of the record and properly decided the case at that juncture under the appropriate 'modified *de novo*' review applicable to IDEA claims").

environment, the District's program was better designed to develop Lisa's potential than the more restrictive DTT program.²⁷⁷

Along with the restraints on the maximum potential mandate so clearly articulated in *Renner*, the court decided that the LRE requirement, well explored in *Barwacz* (the case of Jennifer Kulmacz), had rightly tipped the lower court and hearing officers away from an exclusive adherence to the Lovaas method.

C. *The Renner/Dong Legacy*

Perhaps because of rich and colorful judicial language and interesting fact patterns, *Renner* and *Dong* became guiding stars in the Sixth Circuit. *Renner* was cited as controlling in an unpublished Sixth Circuit opinion, *Soraruf v. Pinckney Community Schools*,²⁷⁸ where the court came close to obliterating any difference between the federal FAPE mandate and Michigan law. *Renner* reappeared as authoritative in *Burilovich v. Board of Education*²⁷⁹ wherein the parents sought Lovaas treatment for their autistic son ("B.J.") and the school district resisted, arguing that mainstreaming in a kindergarten class with special assistance was appropriate.²⁸⁰ The Sixth Circuit in pertinent part stated:

²⁷⁷ *Id.* at 803.

²⁷⁸ No. 98-2052, 2000 U.S. App. LEXIS 3216, at *10 (6th Cir. Feb. 23, 2000) (per curiam). Matthew Soraruf was described as autistically impaired and when his case made it to the Sixth Circuit, the court stated:

Under Sixth Circuit precedent, an appropriate public education 'does not mean the absolutely best or 'potential-maximizing' education for the individual child.'

Furthermore, interpretation of Michigan's standard 'is left in the reasonable discretion of the state officials.'

Soraruf, at *10 (citations omitted). The court then concluded that "[a]ccordingly, we will require only that Pinckney Schools' placement provided Matthew with a free appropriate education that was reasonably calculated to provide him with educational benefits." *Id.* The last sentence comes very close to the phrasing of Justice Rehnquist in *Rowley*, which would tend to obliterate any distinction between FAPE and the Michigan maximum potential standard. *See supra* notes 89 & 94 and accompanying text.

²⁷⁹ 208 F.3d 560, 562-63 (6th Cir. 2000).

²⁸⁰ *See id.* at 560. The court noted that the special education director tried to avoid a due process hearing, but reconciliation proved impossible. *Id.* In the due process hearing the familiar characters played their appointed roles. *Id.* Dr. Patricia Meinhold testified for B.J. and his parents, while Dr. Mesibov testified in favor of the school's proposed mainstreaming placement. *Id.* The local hearing officer decided for B.J.'s parents, and the state hearing officer reversed. *Id.* The district court sustained the state reviewing officer's judgment, and the Sixth Circuit affirmed. *Id.*

Given the differing opinions on both sides as to the best program for B.J. and the reasonable bases in the record for the opinions, we emphasize that courts should not “substitute their own notions of sound educational policy for those of the school authorities which they review.” Rowley, 458 U.S. at 206, 102 S. Ct. 3034. Giving due weight to the SHO’s [State Hearing Officer’s] decision, we conclude that the IEP was designed to allow B.J. to achieve his maximum potential. *Cf.* Renner, 185 F.3d at 644-46 (finding IEP substantively valid under similar circumstances).²⁸¹

The decision was one more victory for the LRE requirement since the Lovaas method would have been incompatible with a kindergarten placement where B.J. would spend significant time with his classmates. It was, of course, another endorsement of school choice of pedagogical methods and another defeat for uncompromising Lovaas partisans.

D. Does the “Least Restrictive Environment” Mean the Neighborhood School?

The case of *McLaughlin v. Bd. of Educ. of Holt Public Schools*²⁸² illustrates a foiled parental attempt to employ the LRE requirement as a means of gaining their daughter’s placement at a neighborhood elementary school. In comparison with the foregoing cases, the case of Emma McLaughlin represents a role reversal of sorts, as it has usually been school personnel who have sought support in the LRE requirement. Emma was a child with Down syndrome. During her kindergarten IEP, her parents and the school agreed that she should be mainstreamed for half of her school day. The narrow question relating to the second half of her school day was: “whether Emma should receive special education services in a categorical classroom or in a resource room in order to achieve the goals in her IEP, goals that had been agreed upon by school officials and Emma’s parents.”²⁸³ Her parents pressed to have her placed in her neighborhood school, which only allowed access to a resource room. The school district

²⁸¹ *Id.* at 572.

²⁸² 133 F. Supp.2d 994 (W.D. Mich. 2001), *rev’d. on appeal*, *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663 (6th Cir. 2003).

²⁸³ *McLaughlin*, 320 F.3d at 670.

insisted upon placing Emma in a distant in-district elementary school, where she could receive services in a *categorical*, i.e. segregated, classroom.²⁸⁴ Emma's parents fought the battle as an access issue, demanding access to the closest regular elementary school.²⁸⁵ When school officials disagreed, they went to a due process hearing. The local hearing officer ruled that the school's proposal was appropriate. A state reviewing officer agreed.

Emma's parents went to federal court, where the judge held in their favor, basing his decision on the LRE requirement. The judge relied heavily upon *Roncker v. Walter*,²⁸⁶ an earlier Sixth Circuit decision that stressed mainstreaming as the basis for vacating a judgment made in the Southern District of Ohio. Applying the *Roncker* holding to Emma McLughlin's case, the district court judge declared that there was only one rightful conclusion: services necessary for Emma to achieve her IEP goals "can feasibly be provided at Dimondale [her neighborhood elementary school]."²⁸⁷ The fact that those special services could be provided "more effectively and successfully" in a categorical

²⁸⁴ See *id.* at 668. The court explained that "categorical classrooms" are segregated classrooms designed for children with special needs. *Id.* According to the reported opinion, Emma's parents were actually dealing with two school districts, namely, the Holt Public Schools and the East Lansing Public Schools, both having proposed a similar IEP that did not keep Emma in a regular classroom of her neighborhood school. *Id.* By focusing upon the proposed Holt IEP, nothing is lost in the explanation. It is not apparent from the opinion why one case or the other was not rendered moot.

²⁸⁵ See *id.*; see also *supra* Part I.A. (discussing the fight for access to public schools and historical instances where access was denied).

²⁸⁶ 700 F.2d 1058, 1061 (6th Cir. 1983). The procedural history of *Roncker* included: Neill Roncker was severely mentally retarded. *Id.* The Cincinnati School District proposed to place Neill in a county school run exclusively for the mentally handicapped. *Id.* His parents fought for placement in a special education class in a local elementary school. *Id.* at 1063. After a due process hearing, the hearing officer held for the parents. *Id.* A reviewing officer for the Ohio state Board of Education reversed, providing "some provision was made for him [Neill] to receive contact with non-handicapped children." *Id.* Neill's mother sued in federal court, where the judge held for the school district, finding that the record supported the district's claim that Neill could make no meaningful progress in a regular school setting. *Id.* The Sixth Circuit reversed with a strong statement of the Congressional intent behind the LRE requirement. The court stated:

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. . . . 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.

Id.

²⁸⁷ *McLaughlin*, 133 F. Supp.2d at 1005.

classroom in a different elementary school did not trump what the judge perceived to be the mainstreaming requirement.²⁸⁸ He plainly acknowledged that this view of the LRE requirement seriously impacted the discretion of local and state officials, and in Emma's case, it arguably collided with Michigan's "maximum potential" requirement.²⁸⁹

The school district appealed. The Sixth Circuit reversed and strongly emphasized a school's discretion in determining the correct *location* for a placement, once the child's needs and a classroom were matched. The court was convinced that the trial judge had simply phrased the issue incorrectly, thereby creating an LRE issue where none needed to be addressed.²⁹⁰

In the court's own language:

In this case, numerous school officials testified that the categorical classroom placement was necessary based upon Emma's goals and needs and based on a comparison of the teaching methodologies. We need not detail that evidence here, because there is no dispute about the facts that support

²⁸⁸ See *id.* at 1005 (arguing that categorical classroom benefits do not far outweigh benefits of mainstream schooling).

²⁸⁹ See *id.*

The Court is not oblivious to the fact that this conclusion is at odds with the decisions of the IEP Team, the local hearing officer, and the state hearing review officer, all of whom enjoy greater expertise than this Court in matters of special education. Yet, while the Court is obliged to defer to their judgment on matters requiring educational expertise, the present conflict is driven by the law.

This Court does not take issue with the conclusion that special education services might in fact be more successfully and effectively provided to Emma in a categorical classroom. This appears to have been the decisive rationale for the IEP's proposed placement at Sycamore Elementary School and for the hearing officers' affirmances. It is a rationale derived from Michigan law's "maximum potential" requirement. Yet, as laudatory as this requirement may seem to be in the abstract, in practice, it eludes precise definition. Moreover, its particular definition in any given case cannot be made without proper respect for Congress' strong preference for placement in the least restrictive environment.

Id.

²⁹⁰ The Sixth Circuit opinion seems a little uncharitable toward the district judge's reading of *Roncker v. Walters* illustrated by the following language:

The district court may have gotten off track early, by beginning its analysis based on the incorrect premise that at the administrative hearings "both sides agreed, in the abstract, that Dimondale Elementary represented the least restrictive environment." In fact . . . the local hearing officer determined that the issue of least restrictive environment was not relevant because the parties had agreed about the extent to which Emma would be in a general education classroom. The least restrictive environment analysis is relevant when there is a question of mainstreaming; generally - it does not address the question of mainstreaming at a particular school.

McLaughlin, 320 F.3d at 671.

the experts' testimony. It is sufficient to note that, giving the appropriate deference to the findings of the administrative hearing officers, the plaintiffs did not meet their burden of proving that the 1999 IEP plan was inappropriate for Emma. . . . From the outset, the parties had agreed that Emma would be fully included in the half-day mainstream kindergarten class, and they also agreed that Emma needed a full-day program. The disagreement centered on what type of special education classroom was appropriate for the second part of Emma's day. Because the Holt school system has certain types of special education classrooms at certain elementary schools, the decision about the type of classroom would necessarily determine which elementary school Emma would attend. The McLaughlins wanted Emma to attend Diamonddale and have gone to great effort to contend that the resource room at Diamonddale could be adapted to serve Emma's goals and needs. However, the hearing officers decided, and an independent review of the record reveals, that a categorical classroom is best designed to serve the needs of students like Emma. In the end, the plaintiffs have failed to meet their burden of demonstrating that a categorical classroom is an appropriate placement.²⁹¹

Thus, the parents lost the war for placement at their neighborhood school. The Michigan mandate played no discernible role in the Sixth Circuit's decision. Rather, the court set a clear boundary on the use of the LRE requirement: it pertains to the child's classroom, not the location of the facility in which the classroom is situated. The school had no obligation to bring the appropriate classroom or a variation thereof into Emma's neighborhood school.

E. Conclusions

The Michigan legislature nobly entered the special education field with a *maximum potential* mandate for each child's placement. In approximately three decades since the passage of Public Act No. 501, the statutory language has repeatedly encountered the sharp edges of restricting realities, both legal and non-legal. While my examination of case law has not been exhaustive, it presents a reasonably full and fair portrayal of the

²⁹¹ *Id.* at 673.

implementation of the Michigan mandate in the state and federal courts. In light of case law, several conclusions can be drawn, some parallel to conclusions drawn from implementation of the Massachusetts mandate, others not.

My conclusions are as follows:

1. The federal LRE requirement has had a powerful mitigating effect on the maximum potential mandate. Especially in cases involving autistic children, it has been the primary conceptual tool used by the courts to keep children in regular classrooms and away from home-based forty hour per week DTT programs. In cases involving the autistic children, the LRE concept has seriously limited parental choices.

2. The LRE requirement does not require school modifications to bring an appropriate program to the physical plant nearest a child. In Emma's case, the parents were unable to employ the LRE rule to their advantage to obtain their daughter's entry into a neighborhood school against the resistance of the school officials. The LRE requirement has not proved to be empowering for parents.

3. So long as the LRE requirement has not been offended, the courts have bowed to educators' choices on conflicts in pedagogical methods. Hard-core Lovaas advocates suffered a series of defeats in the Sixth Circuit because they were unable to convince the courts that their methodology was *the one and only methodology* for seriously treating autism and therefore imperative under the Michigan mandate. The Sixth Circuit turned to the federal requirement that an IEP must be tailored to the *unique needs of each child* and rejected the Lovaas methodology for its apparent standardization. Here the federal requirement for a tailored education limited parental preference.

4. The courts, starting with *Nelson*, recognized a reasonableness limitation, noting that relative cost may be a factor in choosing programs. Thereafter, the courts repeatedly stated that the maximum potential mandate does not mean model programs or the best possible programs that can be imagined. The maximum potential mandate has been tempered to require realistic on-the-ground choices.

5. The Sixth Circuit creatively played with Michigan's statutory language considering that it might be *precatory* which

certainly takes the sharp edge off of *mandatory*. This is reminiscent of the Massachusetts' courts' use of the term *maximum feasible benefit* as a substitution for the statutory term *maximum possible development*.²⁹² The term *precatory* signaled a Sixth Circuit belief that the legislative purpose behind Michigan's mandate was something less than the language literally would have required. I have found no case in which any Michigan state court took issue with the Sixth Circuit's characterization of the Michigan mandate.

6. As noted in investigating the Massachusetts mandate, the assignment of a burden of proof or persuasion to parents in the administrative process and the due weight given to administrative decisions (as required by *Rowley*), often combine to sustain a school's plan. Parents simply cannot muster the evidence to carry their assigned burdens. In this context, I again stress that advocacy is often a major factor in the resolution of these cases.

7. As a distant observer, it is not possible to know what effect the Michigan mandate has had on the *educational culture* within the state of Michigan. But judging by the results reported and the language employed in case reports, it appears that the limitations noted above have *probably* leveled the maximum potential mandate so that it is not readily distinguishable from the federal FAPE mandate as developed by those judges who have been *reasonably progressive* in interpreting and implementing the Act.²⁹³ Generally speaking, the Sixth Circuit's constructions of the federal mandate seem quite progressive.□ If this is due even in part to a sort of fertilizing effect from judging cases under Michigan's heightened state mandate, the mandate might be serving a positive purpose not expressly stated in the case reports.

In my view, the Michigan mandate has been applied with such caution that there is no just cause for its modification or repeal. In a rare case, it might be employed to assist parents or

²⁹² See *supra* Part III. A. 1 (discussing Massachusetts legislature actions to meet the educational needs of children with disabilities in comprehensive ways).

²⁹³ See *infra* Part VIII (exploring case law development of FAPE mandates).

²⁹⁴ See *generally* *Peck v. Lansing Sch. Dist.*, 148 F.3d 619, 629 (6th Cir. 1998) (extending school district funded physical and occupational therapy sessions for disabled students to both private homes as well as private parochial schools).

guardians in gaining an appropriate program where the FAPE mandate might not be so employed, if a court were inclined to take a *de minimis* view of the federal mandate. As a parent of two children with disabilities, I do not want to advocate for any reduction in any mandates, state or federal. I would rather use my own skills to demonstrate that the mandates do not require things, which critics will on occasion charge, e.g., utopian placements, at unlimited costs to the public. The case reports are clear enough: the federal LRE requirement coupled with burdens of proof and the good sense of judges, state and federal, have made the Michigan mandate workable.

V. MISSOURI: THE MANDATE TO "MAXIMIZE THE CAPABILITIES OF THE HANDICAPPED"

A. *The Mandate and Early Cases*

Missouri's legislature enacted a special education statute in 1973, well before Congress entered the field.²⁹⁵ In its statement of policy, the legislature declared:

...it is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, special education services sufficient to meet the needs and *maximize the capabilities of handicapped and severely handicapped children.*²⁹⁶

The potential within the italicized language lay dormant for more than twenty-five years. In 1981's *Mallory v. Drake*,²⁹⁷ when a court noticed the statutory language, its implications were not explored. In fairness, the state Court of Appeals cited the statute only in the course of explaining Missouri's eligibility for federal funds.²⁹⁸ Fourteen years later, the Supreme Court of Missouri

²⁹⁵ See 11 MO. REV. STAT. § 162.67 (2003) (requiring public schools to provide all handicapped children free appropriate education consistent with provisions set forth in state and federal regulations).

²⁹⁶ *Id.* (emphasis added).

²⁹⁷ 616 S.W.2d 124 (Mo. App. 1981).

²⁹⁸ The Court of Appeals explained

cited the mandate in *Fort Zumwalt School District v. State*,²⁹⁹ a case wherein taxpayers and a school district charged that the state had failed to fund special education in accordance with state statutory law and precedent.³⁰⁰ Establishing the statutory context for its decision, the court noted:

Mindful of the federal carrot, Section 162.670, RS Mo 1994, announces the policy of the state 'to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein . . . special education services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children.'³⁰¹

As in *Mallory v. Drake*, the meaning of the state mandate was not developed, no doubt because it was unnecessary to develop it to decide the case. When the federal courts had an opportunity to explicate the meaning of the statute, the results were unhelpful to the children with disabilities, probably because nobody raised the argument for a higher state mandate, as the next case illustrates.

The case arises under the federal statute, Assistance for Education of All Handicapped Children, Pub. L. 94-142, 20 U.S.C. sec. 1411, et. seq., and the implementing Missouri statute Section 162.670 et. seq. The federal statute grants funds to the states for assistance in educating the handicapped. 20 U.S.C. § 1411. To be eligible for those grants, the state must meet certain eligibility requirements set forth in 20 U.S.C. Section 1412. The first of those arguments is that the state must have in effect a policy that assures all handicapped children the right to a "free appropriate public education." This educational requirement has been met in Missouri by Section 172.670, which declares it to be the policy of this state to provide to all handicapped children "special education services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children."

Id. at 125.

²⁹⁹ 896 S.W.2d 918 (Mo. 1995).

³⁰⁰ *Id.* at 918 (noting that plaintiffs prevailed except on claims for money damages and noting possible distinctions between FAPE and state requirements for special education had nothing to do with this case).

³⁰¹ *Id.* at 920.

B. Federal Courts and the Missouri Mandate

1. Nicholas Clynes and the Fort Zumwalt School District³⁰²

When he was in kindergarten, Nicholas was diagnosed as having a learning disability in reading and math. Thereafter, teams developed IEPs for each school year, keeping Nicholas with non-disabled peers while offering him individualized instruction in reading and math. When a team met to develop an IEP for Nicholas's fourth grade, his parents put off any agreement and placed him in a private summer program at Churchill School. This summer placement worked out to their satisfaction, so they left him at Churchill School for his fourth and fifth grades, and in due course, sought reimbursement that their school district resisted.

Nicholas's parents went to a due process hearing before a three-person panel.³⁰³ The panel denied any reimbursement on the grounds that Nicholas had been making progress in the public school, that the private placement was unduly restrictive, and that the district continued to offer a FAPE for Nicholas.³⁰⁴ A state level review officer reversed, describing the IEPs as "hit and miss" attempts which had not met the FAPE requirements.³⁰⁵ A federal district judge agreed, and accordingly ordered reimbursement for the fourth and fifth grade costs as well as summer school at Churchill.

The school district took an appeal to the Court of Appeals for the Eighth Circuit. After a careful review of the district judge's findings, the court reversed, concluding that the district judge

³⁰² Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607 (8th Cir. 1997); Fort Zumwalt Sch. Dist. v. Mo. State Bd. of Educ., 923 F. Supp. 1216 (E.D. Mo. 1996).

³⁰³ See 11 MO. REV. STAT. § 162.961 (2003) (providing that within 45 days of receipt of a request of a due process hearing the hearing panel will reach a decision on the matter in question and forward that decision to the parents or guardian of the child and the president of the appropriate local board of education and/or responsible educational agency and to the department of elementary and secondary education).

³⁰⁴ See *Fort Zumwalt Sch. Dist.*, 119 F.3d at 610-11 (showing that the panel in this case consisted of two educators and someone else described simply as a "lay person," contrary to Missouri law).

³⁰⁵ See *id.* at 611 (describing the prior IEP's as "not having produced a demonstrable plan of progress").

had required too much.³⁰⁶ The court fell back upon the *Rowley* requirements and declared that the methods used by the public school “were reasonably likely to confer an educational benefit.”³⁰⁷ Furthermore, the school personnel had indicated a willingness to make adjustments based upon insights gained from the private school. The court stated:

After studying the underlying factual findings of the district court in light of the record and legal standards under IDEA, we conclude that the school district did offer Nicholas a free appropriate public education as required by Congress. Although Nicholas may well have benefited more from his education at Churchill [private school] than at Hawthorne [public school], and he did not read as well as his non-disabled peers or as his parents hoped, IDEA does not require the best possible education or superior results. The statutory goal is to make sure that every affected student receives a publicly funded education that benefits the student.³⁰⁸

The court noted elsewhere that “[u]nder IDEA a school district is not required to maximize a student’s potential.”³⁰⁹ This language arguably ran contrary to the Missouri statute but according to the case report, nobody tried to argue the Missouri mandate. There was a lengthy and, in my opinion, compelling dissent by Judge Floyd R. Gibson who did not believe that a FAPE was being offered nor that due deference was being given to the state level review officer.³¹⁰ Yet, Judge Gibson did *not* argue that the Missouri mandate required reversal. Therefore, twenty-four years after its enactment, the state mandate had impacted neither state nor federal cases in a manner helpful to children with special needs.

³⁰⁶ See *id.* at 613 (stating “the court erred by requiring a program to maximize Nicholas’ ability, by comparing his progress to non-disabled students, and by failing to examine the IEP’s from the perspective of the time when they were written”).

³⁰⁷ *Id.* (relaxing the standards required by the District Court).

³⁰⁸ *Id.* (indicating that the educational opportunities to be offered to Nicholas did not meet Congressional requirements).

³⁰⁹ *Id.* at 612 n. 2 (showing the “best that can be expected from him” standard is not the proper standard under IDEA).

³¹⁰ See *id.* at 613-18 (relaying his belief that the “district court properly decided that the 1991-1992 IEP was deficient . . . [and that] the Churchill School was without a doubt an appropriate placement for Nicholas”).

2. Danny D. and the Special School District of St. Louis County³¹¹

In Danny D.'s case, the advocates squarely presented a federal district judge with an issue that required a decision on the meaning of the Missouri mandate. As early as kindergarten, Danny had trouble paying attention in school. When he was in second grade, his mother requested an evaluation by the Special School District, a district charged with the responsibility of providing special education and related services to eligible students within St. Louis County where Danny's family resided.³¹² Danny was diagnosed as suffering from Tourette's Syndrome, attention deficit disorder, obsessive-compulsive disorder, learning disabilities and depression.³¹³

For his fifth grade year, Danny entered a public school classroom pursuant to an IEP under which he received resource room services every day. He grew increasingly unhappy.³¹⁴ Test results in the spring of Danny's fifth grade year were unimpressive, and consequently, his parents privately hired a tutor for after-school instruction and arranged for counseling sessions with a psychologist. With these supplements, Danny successfully finished the fifth grade. The crunch came about when Danny entered the middle school, described as innovative. His sixth grade IEP provided for mainstreaming with team teaching, resource room services, shortened math and language assignments, extended time to complete assignments, and accommodations for testing.³¹⁵ It did not work as well as everyone had hoped. During his resource room time, Danny was often off-task, easily distracted, and "into his own thing."³¹⁶

³¹¹ Carl D. v. Special Sch. Dist. of St. Louis County, Mo., 21 F. Supp.2d 1042,1053-54 (E.D. Mo. 1998) (holding that Carl D. and Gail. D. were not entitled to reimbursement from the Special School District for the cost of unilaterally enrolling Danny in a Metropolitan private school).

³¹² See *id.* at 1048 n.6 (indicating that after an evaluation the Special School District determined that Danny was learning disabled in math and language skills, and therefore certified that he was eligible for special education services).

³¹³ See *id.* at 1047 (confirming that Danny suffers from Tourette's Syndrome, Attention Deficit Disorder and obsessive-compulsive disorder).

³¹⁴ See *id.* at 1048 (detailing that Danny was experiencing depression, feelings of worthlessness and sadness, and difficulties with school and social interaction).

³¹⁵ See *id.* at 1049 (clarifying that testing accommodations included alternative environments for testing and the ability to dictate answers to essay questions).

³¹⁶ See *id.* (observing that Danny was independent yet not disruptive during class).

Though his grades were passing, his mother and his tutor became suspicious about whether the grades really reflected progress. Moreover, Danny frequently refused to do his homework, told his mother that he hated school, said he wanted to drop out, and engaged in destructive behavior at home. Finally, he wrote a letter - which his mother discovered - on methods for committing suicide. His parents understandably sought an alternative placement.

Approximately two and one-half months into his sixth grade year, Danny's parents unilaterally enrolled him at the Metropolitan School, a private school, where he was placed with multi-modal learners who each received significant individual attention. He attended mainstream classes in history, sciences, and social studies. On the whole, the placement was successful, at least in channeling Danny's energies, because he adjusted socially, made friends, quit complaining about school, and his destructive behaviors at home subsided. To a parent, this would seem like a great success. Meantime, however, the public school personnel developed a new IEP (approximately two months after his departure) in which the school proposed increased resource room time, an after-school math tutorial, and counseling sessions. Danny's parents rejected this proposed IEP and insisted on his continuation at Metropolitan School. The school disagreed and proposed a similar IEP for Danny's seventh grade year, which would have kept him in the public middle school. Danny's parents rejected this proposed IEP also. The public school versus parental private placement dispute was ripe for consideration.

After a due process hearing, the three member panel decided that the Special School District had offered a FAPE on both IEPs, i.e. for the sixth and seventh grades. A state administrative review officer affirmed in all respects.³¹⁷ Danny's parents filed suit in federal court where their lawyer argued that the Missouri mandate required more than the federal mandate.³¹⁸ Recognizing

³¹⁷ See *id.* at 1053 (affirming the lower court's decision which included a finding that the decision to place Danny at Metropolitan was "more a matter of choice than educational necessity").

³¹⁸ See 11 MO. REV. STAT. § 162.670 (2003) (distinguishing between the standard imposed by federal law and that which is required by Missouri state law).

that some state mandates had been construed to require more than the federal mandate, the district court with reference to Missouri law stated:

The Eighth Circuit has yet to decide this issue, and the Court found no Missouri state court case which articulates the standard of special education required by Mo. Rev. Stat. § 162.670. In the absence of any binding or persuasive authority, this court is reluctant to impose upon Missouri public agencies substantive requirements in excess of those specifically mandated by IDEA. Accordingly, federal substantive standards govern plaintiffs' claim.³¹⁹

Thus, when the issue was first squarely presented in a federal court, the judge discerned no heightened mandate under Missouri law and held a rather low vision of the federal mandate; accordingly Danny's parents lost their claim for reimbursement.³²⁰ On the one hand, the judge's deference to state decision-makers seems to respect federalism. On the other hand, given the Missouri mandate's similarity to the Michigan mandate, the ruling seems awfully timid. The state mandate did nothing for Danny or his parents who, hopefully, could afford to keep him at Metropolitan School.

3. Matthew Gill and Columbia 93 School District³²¹

Matthew's parents moved from Montana to Missouri when he was two. Matthew, born prematurely, suffered from multiple developmental impairments and received services early in life.³²² When Matthew was three, specialists suggested that his impairments were consistent with autism, and at four, he was formally diagnosed as autistic.³²³ As was evident in several Michigan cases, Matthew's parents discovered the Lovaas method and came to believe that it was right for their son. Therefore, they privately began Lovaas therapy at home,

³¹⁹ *Carl D.*, 21 F. Supp.2d at 1054.

³²⁰ *See id.* at 1059 (ruling the plaintiffs were not entitled to reimbursement for sending Danny to the private Metropolitan school).

³²¹ *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000) (deciding to deny rehearing and rehearing En Banc).

³²² *See id.* at 1031. A team developed an IEP before his third birthday. *Id.*

³²³ *See id.* at 1031-32 (summarizing circumstances leading to diagnosis of Matthew's with autism).

increased it to thirty five hours per week, and reduced Matthew's time in school accordingly. Matthew's verbal skills increased, but his social skills declined. Nonetheless, his parents soon sought forty hours per week of Lovaas home therapy for which they wanted reimbursement.

The special education director thought a school-based program with some one-to-one DTT training would be appropriate, and that the home-based program isolated Matthew inappropriately. The school's legal counsel may have been reading Sixth Circuit opinions.³²⁴ After nearly a year of discussions, the parents and school district reached an impasse, so the parents demanded a due process hearing.³²⁵ A panel³²⁶ decided that the IEP offered by the school was appropriate although it ordered that the IEP be modified to incorporate additional one-to-one therapy.³²⁷ Matthew's parents sought review in federal court.³²⁸ The federal judge granted summary judgment for the school. Matthew's parents appealed to the Eighth Circuit, arguing, *inter alia*, that the state mandate should have been applied.³²⁹

To this argument, the Eighth Circuit panel responded:

Our court has previously applied the federal standard when evaluating a special education program in Missouri. The Gills argue that *Clynes* should not control because it did not discuss all the points of state law they cite. The application

³²⁴ See *supra* Part IV.

³²⁵ See *Gill*, 217 F.3d at 1033 (reviewing events leading up to demand of due process hearing).

³²⁶ See *id.* at 1033. With a panel consisting of two educators and one lawyer, the court explained:

Under Missouri law, an administrative panel reviewing the results of an IEP meeting must be made up of three individuals with expertise or training in special education. The Missouri scheme permits the parents to select one member of the panel, the school district to select another, and the state education department to appoint an attorney to serve as the chairperson.

Id. at 1035 (citation omitted).

³²⁷ See *id.* at 1033. The opinion states that, "Two of the three panel members voted for funding ten hours of weekly one-to-one training at home." *Id.* Whether that vote required any action by the district is unclear from the opinion.

³²⁸ See *id.* at 1037. It is unclear why the parents were not required to make an appeal first to a state level review officer. The court discusses exhaustion of administrative remedies, but only to explain why the district court could properly consider Gill's arguments against two IEPs. *Id.* at 1038 n.6. Nowhere does the opinion explain why the Gills were allowed to go straight to federal court from the three member panel decision.

³²⁹ See *id.* at 1035-36 (setting out clearly argument for state mandate); see also MO. REV. STAT. §§ 162.670; MO. REV. STAT. 162.675(2); MO. REV. STAT. 162.675(4) (defining terms for argument of state mandate).

of the federal standard in *Clynes* was part of the court's holding rather than dicta, however, and in our circuit only the court en banc can overrule a precedent.³³⁰

I am suspicious of strict adherence to the Lovaas method for many children. But, I can appreciate the frustration of Matthew's parents and their lawyer. Indeed, in *Clynes*, an Eighth Circuit panel held that the federal mandate was satisfied by the IEPs prepared for Nicholas, but so far as the opinion discloses, the application of the higher state mandate was *not considered by the court*. So, Matthew and his parents were stuck with the federal mandate, and as to whether or not the district had offered Matthew a FAPE, the court stated:

Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives *some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible*. Here, Matthew's program was modified in response to the Gills' requests to provide more one-to-one therapy, but the district believed that the proposed private program would deprive him of social interaction necessary for his intellectual development. Parents who believe that their child would benefit from a particular type of therapy are entitled to present their views at meetings of their child's IEP team, to bring along experts in support, and to seek administrative review. The statute set up this interactive process for the child's benefit, but it does not empower parents to make unilateral decisions. . . . Since Matthew received a free appropriate public education, the Gills have not made out a claim against the District or the Department.³³¹

Hence, in the year 2000, twenty-seven years after enactment, the Missouri mandate had empowered neither parents nor guardians in advocating for any disabled children. But, the world of special education in Missouri was about to change abruptly with an opinion in the case of Dennis Lagares, Jr. published by the Missouri Court of Appeals in December 2001.

³³⁰ *Gill*, 217 F.3d at 1036 (citation omitted) (explaining rationale for holding was res judicata).

³³¹ *Id.* at 1038 (emphasis added) (explaining reasoning behind application of federal mandate).

C. *Discovering Power and Promise in the Mandate*

The case of *Lagares v. Cambenton R-III School District*³³² brought forth a persuasive and powerful appellate opinion. Dennis started out well in kindergarten, but by first grade was having trouble with reading, spelling and math. In second grade, the school placed him in a special reading program, with which he continued in third grade, and the school passed him into fourth grade. Before commencement of his fourth grade year, however, Dennis's mother became concerned because he had done poorly on standard statewide achievement tests, so she arranged for a psychologist to assess his educational problems. After receiving the psychologist's report, Dennis's mother asked the school to do its own evaluation. On doing so, the school determined that Dennis suffered from learning disabilities in reading and written expression. Therefore, the school district proposed an IEP under which Dennis would be mainstreamed with supplementary services, including some one-to-one every day with a special education teacher.³³³ His parents apparently agreed since the reported opinion makes references to repeated meetings to review the IEP during the spring of Dennis's fourth grade. The clash occurred when Dennis's parents requested tuition for a private summer school,³³⁴ and the district offered its own public placement instead. Dennis's parents sent him to the private school for the summer. He came back into the public school for the fall for fifth grade. As he began fifth grade, the school modified his IEP to incorporate recommendations from his private summer school, and he began the year doing satisfactory work.³³⁵ Nonetheless, his parents soon pulled him out, began home schooling,³³⁶ and sought reimbursement for *summer school*, which they deemed a success.

³³² 68 S.W.3d 518 (Mo. Ct. App. 2001).

³³³ See *id.* at 521 (examining circumstances leading to diagnosis of learning disability and proposal of IEP for Dennis).

³³⁴ See *id.* The parents put Dennis into the Churchill School, the same school attended by Nicholas Clynes in *Fort Zumult Sch. Dist.*, 119 F.3d at 610.

³³⁵ See *Lagares*, 68 S.W.3d at 521-22 (reviewing methods used and places where Dennis was educated).

³³⁶ What his parents did for Dennis's sixth grade year is not clear in the opinion. This seems a little strange because the due process hearing panel did not take evidence until after his sixth grade year had passed.

A due process panel denied relief finding that the school had offered a FAPE. The panel refused to consider whether or not the Missouri mandate required more because the issue was raised for the first time in a post-hearing brief. The parents filed a petition for review in the state circuit court where their lawyer pressed the argument that the Missouri mandate should be considered.³³⁷ After briefs and oral arguments, the circuit judge ruled that the federal standard governed and had been correctly applied. On this appeal, the Lagareses' lawyer again pressed for application of the Missouri mandate, and this time found receptive judicial minds. The resulting opinion is notable for its integrity and simplicity.

The court first quoted the pertinent statutory language setting forth the state's declared policy "to meet the needs and maximize the capabilities of handicapped and severely handicapped children."³³⁸ The court next turned to the question of legislative intent stating, "to determine the intent of the legislature from statutory language, this court considers 'the words used in their plain and ordinary meaning'."³³⁹ And, further, "the plain and ordinary meaning is generally derived from the dictionary."³⁴⁰ A dictionary definition of "maximize" is "to increase to the highest degree."³⁴¹

Consequently, the Missouri mandate came to life as the following quotation illustrates:

³³⁷ See *id.* The court stated:

In their petition, the Lagareses asked the circuit court to set aside the panel's order and find that the District denied Dennis a free appropriate public education and, thus, violated the IDEA. Specifically, the Lagareses alleged, *inter alia*, that the panel's decision was unauthorized by law because the panel applied the wrong standard to Dennis. The Lagareses claimed that the panel should have applied the standard set forth in § 162.670, which states that it is the policy of the State of Missouri to require public schools to provide "special educational services sufficient to meet the needs and maximize the capabilities of the handicapped and severely handicapped children."

Id. at 523.

³³⁸ See *id.* at 525 (quoting MO. REV. STAT. § 162.670 (2000)) (reciting policy of Missouri legislature in providing aid for handicapped children).

³³⁹ See *Lagares*, 68 S.W.3d at 525 (quoting *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. 1995)) (referring to maxims of statutory interpretation).

³⁴⁰ See *Lagares*, 68 S.W.3d at 525 (finding that dictionaries are used in determining plain meaning of words used in statutes)

³⁴¹ See *id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396 (1971)) (providing definitions for words "benefit" and "maximize").

Applying the dictionary definitions of these terms to the articulated standards, Missouri's policy is to provide special educational services sufficient to meet the needs and increase to the highest degree the capabilities of handicapped children. In contrast, the standard set by the IDEA is that the special educational services be useful to, or aid, advance, or improve handicapped children. Considering the plain meaning of the terms "maximize" and "benefit," Missouri's maximizing standard for determining the sufficiency of special educational services for disabled or handicapped children is higher than the educationally benefit standard set by the IDEA.³⁴²

The court went on to consider sections following §162.670, which were to be read *in pari materia*, and discerned that the relevant statutory provisions were replete with language about *maximizing* the capabilities of the handicapped. The school district's lawyer made two arguments against the statutory meaning sought by Dennis's parents including: (1) an argument that the power to define the meaning of the mandate had been delegated to the state board of education, and (2) that the meaning of the state mandate had already been defined by the Court of Appeals for the Eighth Circuit. As to the first argument, the court declared, that the state board of education had no authority "to promulgate regulations and standards that conflict with or modify the maximizing standard set forth in §162.670 and §162.675."³⁴³ As to the second argument, the court rightly observed that while federal cases interpreting state law may be persuasive, they are not binding on the state courts.³⁴⁴ Therefore, the circuit court's decision was reversed and the case was remanded for consideration in light of the Missouri mandate for maximization.

³⁴² *Id.* at 525 (citations omitted) (comparing Federal and Missouri policies in providing aid for handicapped people).

³⁴³ *Id.* at 527 (indicating that any regulation generated by an administrator is limited to the authority conferred to the agency by statute).

³⁴⁴ *See id.* at 527-28. It seems fair to say that the court was also skeptical of the Eighth Circuit's reasoning in *Gill* where the court inferred that since the enactment of the state mandate preceded the enactment of the federal mandate, the state legislature could not have been attempting to raise a standard higher than the federal mandate. The resort to plain meaning rendered such inferences unnecessary.

D. Legislative Reaction to the Judicial Perception of a Heightened Mandate

Dennis's parents, and their lawyer, must have been jubilant inasmuch as they had pumped life into a dormant statute. But, the victory for plain meaning and children with disabilities was short-lived. Less than two months after the appellate court decision in the case of Dennis Lagares, the Missouri legislature acted by revising §162.670 to read in pertinent part as follows:

it is hereby declared to be the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, a free appropriate education consistent with the provisions set forth in state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et. seq. and any amendments thereto.³⁴⁵

So Missouri followed the same path as Massachusetts albeit it at an accelerated pace. The change was immediately implemented. In *Reese v. Board of Education of Bismarck R-V School District*,³⁴⁶ decided in September 2000, the federal mandate was applied as the controlling law. The district court, in recognition of recent history with reference to §162.670, stated:

This statute now comports with similar statutes in the majority of other states in that Missouri public schools must provide a FAPE which meets state and federal regulations implementing the IDEA. In light of the Missouri legislature's clear intent not to override the federal standard, this court will adhere to the holdings of *Gill* and *Clynes* as to the applicable standard when evaluating educational services provided to Spencer Reese.³⁴⁷

³⁴⁵ 11 MO. REV. STAT. § 162.670 (2003) (as amended by A.L. 2002 H.B. No. 2023).

³⁴⁶ 225 F. Supp. 2d 1149 (E.D. Mo. 2002).

³⁴⁷ *Id.* at 1155 n.12. Note 12 in summary fashion traces the most pertinent points in the interpretation of MO. REV. STAT. § 162.670 prior to its revision. *Id.*

E. Conclusions

As was the case with Massachusetts and Michigan, it is possible to derive some conclusions out of the Missouri experience. On the basis of the case law and the legislative reaction, I offer the following:

1. It is possible that the legislators in 1973 did not intend what the statute literally stated. Perhaps the lofty statutory words about state policy were, as the Sixth Circuit said about Michigan law, "precatory" rather than "mandatory".

2. There was no strong support from the state educational establishment for a heightened mandate. The state board of education interpreted the mandate in a very restrictive manner; otherwise, its regulations would have been more expansive and would have provided a basis for parental arguments. The federal courts, looking for guidance from the state, found nothing in state regulations that gave life to the maximizing language of §162.670.

3. The Court of Appeals for the Eighth Circuit did not develop the federal mandate in a very creative way. The judges in the main appear to have accepted a minimalist reading of *Rowley*. In any event, the results of the reported cases show nothing beyond a minimalist requirement under federal law.

4. It took a good advocate to press the matter in a state appellate court before the state legislative policy linguistically embedded in the statute was truly crystallized. This once more underscores the extreme importance of strong advocacy and also bolsters the argument that the courts must play a central role in making the mandates, state or federal, meaningful.

5. As in Massachusetts, legislators made no effort creatively to cut a new path short of *maximization* but well above *de minimis*. The federate mandate served in both states as a refuge for lawmakers bent on economizing. To me it seems especially disappointing that in Missouri there was no attempt to chart a mid-way course by application of the state mandate given the Eight Circuit's minimalist interpretation of the federal Act.

6. Once the legislature discovered what it had done in 1973 – or what a state appellate court deemed it to have done – the

legislators swiftly reversed course without any popular uprising in favor of the heightened mandate.

7. As a parent and a lawyer, I would not recommend re-introducing any bill for a heightened mandate in either Missouri or Massachusetts in the current climate of severe economic stress. The predictable result would be two-fold: the bill would fail, and the wrath of special education opponents would be aroused to unprecedented heights. If this is a correct reading of the signs of the times, battles for children with disabilities should be joined on other fronts, a matter to be explored in Part IX of this article.

VI. NEW JERSEY: THE "BEST-ABLE-TO-ACHIEVE SUCCESS" MANDATE

A. *Statutory and Regulatory Basis*

The state of New Jersey entered into the field of special education with the passage of L. 1954, c. 79 more than twenty years before Congress acted in any significant way.³⁴⁸ In relevant part the statute stated:

It shall be the duty of each board of education to provide *suitable facilities and programs* of education for all the children who are classified as handicapped under this chapter. The absence or unavailability of a special class facility in any district shall not be construed as relieving a board of education of the responsibility for providing education for any child who qualifies under this chapter.³⁴⁹

For more than twenty five years, the statute generated no litigation elucidating the meaning of the word *suitable* in connection with special education. Judicial interpretation of the statutory term *suitable* came about only after the enactment of the federal mandate to which New Jersey subscribed by

³⁴⁸ See N.J. STAT. ANN. §§ 18A:46-1, 46-9, 46-13 (West 2003); Patricia A. Russo, *Education of Handicapped Children*, 116 N.J.L.J. 473 (1985) (citing historical and statutory notes).

³⁴⁹ N.J. STAT. ANN. § 18A:46-13 (West 2003) (emphasis added). There have been amendments to this section but so far as I can ascertain, the language quoted was part of the original statute enacted in 1954.

submitting a plan and receiving federal funds for special education.³⁵⁰ The first case of consequence focusing upon the interpretation of N.J.S.A. 18A: 46-13 arose in light of a regulation adopted by the state DOE which in relevant part required that districts, "must provide each handicapped pupil a special educational program and services according to how the pupil can best achieve educational success."³⁵¹ As will be evident in the cases following, this language proved to be the source of a heightened mandate when interpreted by the judges of the Third Circuit Court of Appeals. This heightened mandate judicially gleaned from the regulations was deemed consistent with the legislative language quoted above wherein the operative words were "suitable facilities and programs."

B. Judicial Development of the Mandate

1. S.G. and the Board of Education of Parsippany-Troy Hills³⁵²

S.G.'s parents were Robert and Loretta Geis, hence, the opinions involving S.G. are cited as *Geis v. Board of Education* or simply *Geis* in many later reported cases. S.G. suffered from multiple handicaps including, "neurological dysfunction, mental retardation, communication disorders, and chronic illness with emotional overtones."³⁵³ At age five, he went into an out-of-state residential placement at Woods School in Pennsylvania under an IEP agreed upon by his parents and school district.³⁵⁴ Thereafter, his parents moved to a second school district in New Jersey³⁵⁵ that continued his placement at Woods School. When S.G. reached the age where children are usually entering junior high school, his district proposed bringing him back into the public

³⁵⁰ See generally N.J. STAT. ANN. § 18A: 46-19.1 (2003) (addressing the New Jersey legislature's significant additions to special education law made by the enactment).

³⁵¹ 6 N.J. ADMIN. CODE § 6:28-2.1 (1978) (incorporating the regulation into the state administrative code).

³⁵² *Geis v. Board of Education*, 774 F.2d 575 (3d Cir. 1985); *Geis v. Board of Education*, 589 F. Supp.269 (D.N.J. 1984).

³⁵³ *Geis*, 774 F.2d at 578 (enumerating the handicaps suffered by the appellee).

³⁵⁴ See *id.* (discussing the appellee's attendance at the Woods School in Langhorne, Pennsylvania).

³⁵⁵ See *Geis*, 589 F.Supp. at 270 (detailing the circumstances of the families move to Parsippany-Troy Hills, Morris County).

school system. His parents resisted and eventually demanded a due process hearing.

The classification officer (hearing officer) decided in favor of the district,³⁵⁶ a decision that S.G.'s parents challenged in federal court.³⁵⁷ The district judge concluded that the proposed public school placement met the federal standard enunciated in *Rowley*; however, under the New Jersey *regulatory standard*, the school's plan failed. According to the district judge:

. . . New Jersey's own program goes beyond the minimum established by Congress. It creates considerably higher standards. Under N.J.A.C. 6:28-2.1 and 2.2 a local public school district must provide each handicapped pupil a special education program and services according to how the pupil can *best achieve educational success*. A handicapped pupil must be placed in the program option which is determined to be the least restrictive environment in view of the pupil's educational handicap and every effort must be made to place the pupil in an educational setting as close to his or her home as possible. . .

It was the Board of Education's position based on the opinions of some of its experts that S.G. should be brought back into a home and school setting, because there is a danger that S.G. will develop a dependence on an institution and will never be able to move out of it. It is plaintiffs' position, supported by their professional witnesses, that S.G.'s continued progress depends upon the concentrated form of education provided by a residential school such as the Wood School, and that he would be unable to cope with the substantial amounts of unstructured time.

Thus, the experts, all of whom are sincere and competent, disagree. I have evaluated the experts' opinions, the reasons

³⁵⁶ See *id.* at 271. The Hearing Officer was referred to in the opinion as a classification officer. See also *Geis*, 774 F.2d at 578. New Jersey's initial three-tiered review process was struck down in *East Brunswick Board of Education v. N.J. State Board of Education*, No. 81-3600 (D.N.J. 1982), because it ran afoul of 20 U.S.C. § 1415(b)(2) which requires that due process hearing officers be independent of the state educational agency. New regulations giving the responsibility for due process hearings to the New Jersey Office of Administrative Law went into effect in March 1983.

³⁵⁷ See *Geis*, 774 F.2d at 589 (indicating that the parties agreed to treat this decision as final for purposes of appeal since the avenue for an administrative appeal was deemed unlawful and an acceptable administrative structure was not yet in place).

given for them and the other evidence in the case and conclude that plaintiffs have established by a preponderance of the evidence that *continued attendance at the Wood School will enable S.G. to achieve success in learning and that placing S.G. in his home and in local schools would have an adverse effect on his ability to learn and develop to the maximum possible extent.*³⁵⁸

The school district appealed to the Court of Appeals for the Third Circuit, which affirmed.³⁵⁹ In its opinion, the court noted that shortly after the district court's decision, the special education chapter of the New Jersey Administrative Code upon which the district judge had relied, was extensively revised.³⁶⁰ In that revision, the best-able-to-achieve success standard was deleted because the state officials thought that the trial judge in S.G.'s case had gone beyond the meaning of the state regulation.

Apparently assuming that the regulatory change *would not be retroactive*, the school board's lawyer argued that while the district court had ruled in accordance with the regulation, the regulation was invalid because it went beyond the scope of the statute.³⁶¹ The lawyer drew the court's attention to N.J. Stat. Ann. § 18A:46-13 which in relevant part stated, "[i]t shall be the duty of each board of education to provide *suitable* facilities and programs of education for all the children who are classified as handicapped"³⁶² and argued that *suitable* under state statutory law was functionally equivalent to *appropriate* under federal law. It followed that the district judge had erred by following an invalid state regulation.

The court replied to the school board's argument with the following:

But even if the New Jersey statute had used the word "appropriate", we would not be persuaded that it prevents the State Board of Education from imposing a standard higher than the "some benefit" standard of *Rowley*. Both

³⁵⁸ *Geis*, 589 F.Supp. at 272-73 (emphasis added).

³⁵⁹ *See Geis*, 774 F.2d at 577 (affirming the judgment of the district court).

³⁶⁰ *See id.* at 582 n.3 (discussing the implications of 16 N.J. Admin. Reg. 1970(a) (1984)).

³⁶¹ *See id.* at 582 (indicating the school board's application of the regulatory change).

³⁶² *Id.* The statute has not been amended in any relevant way as of April 2003. As to facilities and programs, the duty is still to provide something *suitable*.

“appropriate” and “suitable” are vague terms that must be given content by administrative and judicial interpretation. We do not see any statutory impediment to the State Board of Education concluding that an “appropriate” or “suitable” educational program is one that best helps a pupil to achieve success in learning.³⁶³

The court found additional statutory language that arguably undergirded or at least was consistent with the regulation.³⁶⁴ Refusing to invalidate the regulation as it existed when the suit was filed, the appellate court affirmed the district court’s requirement that the residential placement be made. Consequently, in S.G.’s case, New Jersey’s special education regulation with its best-able-to-achieve-success mandate made a difference, but with the regulatory change in place, the future development of the state mandate was uncertain.

2. Andrew Diamond and the East Windsor Regional School District³⁶⁵

Andrew was born with several congenital physical abnormalities and a neurological impairment that inhibited his ability to communicate or walk.³⁶⁶ Early on, his school district placed him at Midland School, a private day school. When he was nine, Midland School officials advised his parents that his learning skills were declining, that his behaviors were deteriorating, and consequently, the placement was no longer appropriate. Nevertheless, Andrew remained at Midland, probably because nobody could immediately come up with an acceptable alternative. Eventually, Andrew’s parents placed him in a residential school of their own choosing and began footing

³⁶³ *Id.* at 582 (stating legislative test to require that all school-age children be assured the fullest possible opportunity to develop their intellectual capacities by requiring that state and local communities identify and provide remedial services for handicapped children in both public and nonpublic schools).

³⁶⁴ See N.J.S.A. § 18A:46-19.1 (stating that initial child evaluation and classification is conducted by multi-disciplinary child study teams, which then develop individualized education programs in consultation with parents and teachers).

³⁶⁵ *Bd. of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986) (affirming award of expenses for one full year residential program for defendant parents’ son because both federal and state statutes required plaintiff board of education to provide some plans calculated to produce educational progress, not trivial educational advancement).

³⁶⁶ See *id.* at 988 (showing extent of child’s disability).

the bill;³⁶⁷ however, they demanded a due process hearing in which they sought tuition reimbursement.³⁶⁸ At the private school, Andrew began to make progress described as remarkable.

The hearing officer decided that Andrew required reclassification³⁶⁹ which would require a residential placement "if no suitable day placement could be found."³⁷⁰ The board proposed a day school which Andrew's parents deemed unsuitable, so they kept him in the residential program until they ran out of money at which point they brought Andrew home. Still wanting reimbursement and a continuing residential placement, they requested another due process hearing. While Andrew was at home, the school paid for 1 to 1 ½ hours of home instruction per day, but he regressed. After a hearing, the officer ordered a continuation of Andrew's prior residential placement and reimbursement of previous residential costs to his parents.³⁷¹ Resisting reimbursement and seeking to reverse the placement directive, the school district went to federal court. At the district court, there was a replay of S.G.'s case insofar as the court determined that the residential placement was appropriate, that the school district's proposed day program was not, and that reimbursement owed.

The school board appealed to the Third Circuit. The school district's lawyer argued that according to *Rowley*, so long as the school provided some benefit to Andrew, its legal duty was accomplished.³⁷² The court rebuffed the argument in the following language:

³⁶⁷ See *id.* at 988-89 (stating that Andrew's parents felt state-selected school inadequate, and placed him in Rhode Island's Behavior Research Institute in June, 1981).

³⁶⁸ See *id.* at 989 (noting that it appears that Andrew's parents demanded their due process hearing before they made their son's placement, but prior private placement decision necessarily channeled inquiries in their due process hearing).

³⁶⁹ See *id.* (explaining, without reference to prior classification, how aforementioned New Jersey Department of Education hearing officer determined that Andrew Diamond should be reclassified as neurologically impaired and trainably mentally retarded).

³⁷⁰ See *id.* (describing result of Andrew's reclassification as neurologically impaired and trainably mentally retarded).

³⁷¹ See *id.* (specifying consequence of school board's failure to pay for Andrew's placement at said Behavior Research Institute).

³⁷² See *id.* at 991 (showing how each state is required to provide handicapped children with free appropriate public education, and that requirement is satisfied by providing personalized instruction with sufficient support services to permit children to benefit educationally).

But *Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely. The School District's "of benefit" test is offered in defense of an educational plan under which educational regression actually occurred. Literally, the School Board's plan might be conceived as conferring some benefit to Andrew in that less regression might occur under it than if Andrew Diamond had simply been left to vegetate. The Act, however, requires a plan likely to produce progress, not regression or trivial educational advancement.³⁷³

Accordingly, the court affirmed the district court's finding that a residential placement was required under the federal FAPE standard as articulated by the Supreme Court in *Rowley*, thus signaling a development of the meaning of FAPE which I will explore in greater detail in Part VIII of this article.³⁷⁴ As a second ground for affirming, the court turned to New Jersey special education law and put forth the following analysis:

Moreover, Andrew Diamond, as a resident of New Jersey, was entitled to a standard of service exceeding that set by the Education of the Handicapped Act itself. In *Geis v. Board of Education of Parsippany-Troy Hills*. . . we held that federal law incorporated the standard of service set forth in former N.J.A.C. 6:28-2.1, which exceeds that of the federal act. The regulation provided local school boards to provide educational services according to how the student can be achieve success in learning. This regulation was operative at the time Andrew Diamond was placed in a residential program and at the date of the decision by the New Jersey Department of Education. It was amended effective June 29, 1984; however, the agency's statement in the New Jersey Register indicates no intention to lower expectations for educating disabled children. Besides the regulation, we noted in *Geis* that a program which assures children the fullest opportunity to develop their intellectual capacities is consistent with the New Jersey Legislature's findings. . . Thus, even if the district court had not correctly applied the Education of the Handicapped Act standard for free

³⁷³ *Id.* (citations omitted) (discussing how New Jersey requires states to provide an appropriate free education to every child, and thus requires plans of instruction in which educational progress is likely, as opposed to regression or trivial advancement).

³⁷⁴ *See id.* (holding that residential placement is sometimes the only appropriate placement for those with severe disabilities).

appropriate education, the higher standard adopted by New Jersey in implementing the Act would in any event require an affirmance.³⁷⁵

It takes a moment's reflection to understand fully what the court said about state law. First, the mandate as explicated in S.G.'s case pertained to Andrew because the regulation was still in effect when Andrew went into his residential program. Second, language in the state's special education statute, codified at N.J.S.A. § 18A:46-19.1, required "that all school-age children be assured the fullest possible opportunity to develop their intellectual capacities."³⁷⁶ Therefore, even if the state's *regulatory* standard no longer required more than *Rowley*, the cited state statute did, and consequently the disposition of the case could not be correctly made without reference to state law. One can fairly state on the basis of the foregoing quotation that in 1986 the Third Circuit panel determined that the New Jersey mandate required more than the federal mandate even though the federal mandate required the residential placement in Andrew's case. The federal appellate judges could scarcely have missed the intent of the state DOE's regulatory change; rather, they were willing to rest upon their own views about the meaning of New Jersey's special education statutes. The district also made an argument that the federal LRE requirement made the day program preferable to the residential placement, an argument the board characterized as "specious". It is unnecessary to consider other case law of the 1980s because the picture is reasonably clear from the *Geis* and *Diamond* cases discussed above.³⁷⁷

³⁷⁵ *Id.* at 992 (citations omitted) (discussing various standards for educating disabled children).

³⁷⁶ N.J.S.A. § 18A:46-19.1 (West. Supp. 1985) (discussing least restrictive environments, depending upon the particular disability in question).

³⁷⁷ See also *B.C. by F.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1140, 1148-49 (D.N.J. 1988) (showing clear statement of New Jersey's heightened mandate of "free appropriate public education").

C. *A Victory for the State Department of Education: Lowering its Mandate*

1. John Lascari and the Ramapo Indian Hills Regional High School District³⁷⁸

John Lascari attended his local public school from kindergarten through eighth grade. In the seventh and eighth grades he was placed in a class for the “perceptually impaired.”³⁷⁹ A Child Study Team (CST) evaluated John as he was about to enter high school and provided a diagnosis that included the terms, “neurologic dysfunction in the form of a marked dyslexia. . . associated difficulties in auditory perceptual skills.”³⁸⁰ As anyone familiar with such a diagnosis can testify, dyslexia can be brutal for a child’s school experience, and it was for John Lascari. With an I.Q. of 126, as he was about to start high school, John was reading at a second grade level. Not surprisingly, his self-esteem was low.³⁸¹

John started high school under an IEP that placed him in a class for persons perceptually impaired. When it came time to plan an IEP for John’s sophomore year, tests showed that his progress during his first year of high school had been insignificant; consequently, his parents requested that vocational training be dropped and that more stress be placed upon his academic skills. However, on a change of mind before commencement of his sophomore year in high school, John’s parents announced an intention to place him at the Landmark School in Massachusetts³⁸² and requested a due process hearing seeking full reimbursement.

³⁷⁸ *Lascari v. Bd. of Educ.*, 560 A.2d 1180 (S.Ct. N.J. 1989) (holding that appellant parents were entitled to reimbursement from respondent school district for cost of private school tuition but not room and board).

³⁷⁹ *Id.* at 1184 (stating that John graduated from grade school in June 1980).

³⁸⁰ *Id.* (discussing John’s evaluation by a child-study team, consisting of learning-disability specialists, social workers, and psychologists, in anticipation of his enrollment at Ramapo).

³⁸¹ *Id.* (noting that although tests revealed his I.Q. was 126, John read at second-grade level and felt segregated from other students because of his placement in his school’s perceptually-impaired program).

³⁸² *See id.* at 1184-85 (discussing John’s placement; however, records were unclear whether his parents made their unilateral placement and then simply announced it, or whether they presented their plan and their school rejected it).

Thus began the hearings and appeals that ultimately took the case to the New Jersey Supreme Court. Omitting the considerable procedural complexity of this case,³⁸³ I want to focus only on what the state Supreme Court did and said as it applied and discussed the New Jersey mandate. With a citation to *Geis v. Board of Education* [S.G.'s case] the now familiar standard was reiterated:

[W]hen the due process hearing began in January 1982, the board was obligated to provide John with an education that would allow him to best achieve success in learning.

The classification officer, the trial court, and the Appellate Division applied the "best achieve success-in-learning" test, and the Board did not cross-petition from the Appellate Division's recourse to that standard. At oral argument, moreover, the board conceded that the higher standard was in effect when the Lascaris leveled their challenge.³⁸⁴

Applying this standard, without any separate consideration of the *Rowley* standard, the court sustained the trial court's award of reimbursement for tuition costs at the Landmark School and the trial court's denial of the costs of room and board.³ So far, the case merely restated the principles evident in *Geis* and *Diamond* and applied them to a gifted young man suffering from dyslexia. But, the court did much more where, in *dicta*, the court expressly negated the heightened mandate discerned by the Third Circuit and for New Jersey adopted the *Rowley* standard on account of the regulatory *clarification* made by the state department of education.

The court in relevant part stated:

For the future, we note that the Department of Education has adopted new regulations, which took effect after oral

³⁸³ See *id.* at 1181-82, 1184-87 (stating the procedural history from the first due process hearing through the grant of certification by the New Jersey Supreme Court).

³⁸⁴ *Id.* at 1189.

³⁸⁵ See *id.* at 1190-93. The trial court had engaged in some weighing of the equities, wherein the trial judge was comfortable with the Landmark School's academic program but was not convinced that the out-of-state private placement, or for that matter, any residential placement was necessary for John to have an appropriate IEP, and the Supreme Court agreed. *Id.* A little more clarity in communications between parents and school district, and a clear demonstration by John's parents of continuing attempts to clarify and to cooperate might have helped the parents' reimbursement cause.

argument on May 15, 1989. One of those regulations, N.J.A.C. 6:28-1.1, adopts the federal standard, which *Rowley* defines as an education from which the child could benefit. Previously, the United States Court of Appeals for the Third Circuit had interpreted the New Jersey statutory and regulatory scheme as providing a higher standard of education. As the comments to the 1989 regulations make clear, the Department of Education disagrees with that interpretation. The relevant comment states that “it is necessary to clarify that the standard in N.J.A.C. 6:28 has been the same as the Federal standard.”³⁸⁶

Here the state’s highest court declared that the federal district judges and the Third Circuit judges had misunderstood the New Jersey mandate, which correctly understood, had been in accord with the *Rowley* standard all along. The regulation effective May 15, 1989, *did not change the law* but clearly stated the true meaning of the law. This regulatory *clarification* of the law has remained, notwithstanding amendments to the administrative code, to the time of this writing. As of December 2003, the administrative code stated in relevant part:

General requirements

(a) The rules in this chapter supersede all rules in effect prior to July 6, 1998 pertaining to students with disabilities.

(b) The purpose of this chapter is to:

1. Ensure that all students with disabilities as defined in this chapter, including students with disabilities who have been suspended or expelled from school, have available to them *a free, appropriate public education as that standard is set under the Individuals with Disabilities Act (IDEA)* and, in furtherance thereof to:

i. Ensure that the obligation to make a free, appropriate public education available to each eligible student begins no later than the student’s third birthday and that an individualized education program is in effect for the student by that date;

³⁸⁶ *Id.* at 1189 (citations omitted) (quoting 21 N.J.R. §§ 1385, 1391 (May 15, 1989)).

ii. Ensure that a free, appropriate public education is available to any student with a disability who needs special education and related services, even though the student is advancing from grade to grade;

iii. Ensure that the services and placement needed by each student with a disability to receive a free, appropriate public education are based on the student's unique needs and not on the student's disability.³⁸⁷

It is abundantly clear that the state DOE did not want a heightened mandate, and eventually the Supreme Court of New Jersey put its power behind the department's interpretation of state law. Despite the Supreme Court's adoption of the department's clarification, the effect of the earlier Third Circuit's decisions lingered, as is evident in the next case.

2. S.V. and the Ewing Township Board of Education³⁸⁸

S.V. was neurologically impaired, had difficulty learning, and suffered emotionally on that account. He attended public school from kindergarten through fourth grade, and received supplemental special educational services. From fifth grade through ninth grade, he attended different schools outside of his district where he continued to experience learning problems. After his ninth grade year, S.V.'s parents placed him in a residential school, the Pathway School, in Pennsylvania and requested that his school district pay for this placement. The district countered with a proposed placement into a motivational program in the public high school.³⁸⁹ Unable to reach an

³⁸⁷ N.J. ADMIN. CODE 6A §14-1.1 (2004) (citation omitted) (emphasis added). I want to thank Kristin McCarthy of the New England School of Law library staff for her efforts in locating state administrative law materials used for this article and for background material.

³⁸⁸ Ewing Township Bd. of Educ. v. S.V., No. CIV. 89-462, 1991 WL 186691 (D. N.J. Sept. 16, 1991).

³⁸⁹ The court also stated:

This was a special program designed for students achieving at an average level who wanted to go to college. This program was not specifically designed for handicapped students, but was intended for students who had difficulty in their study skills. The students in this program were to attend regular education programs for English, math, and biology, but additional time in English and math would be provided, as would additional counseling, help and instruction.

Id. at *4 (citations omitted).

agreement with the school district, S.V.'s parents demanded a due process hearing.

An administrative law judge awarded reimbursement for costs expended in placing S.V. at the Pathway School, using as a rationale the "can-best-achieve-success" standard.³⁹⁰ The school district went to federal court seeking to overturn this decision, arguing, *inter alia*, that a mistaken interpretation of the state mandate had been applied against it. On that point, the district judge agreed (in light of John Lascari's case),³⁹¹ but the rejection of New Jersey's so-called heightened mandate did not require reversal, in the judge's opinion, where a preponderance of credible evidence established "that the IEP proposed by plaintiff [school district] was inappropriate under the FAPE standard, and that the residential placement was the least restrictive environment for S.V."³⁹² Hence, in S.V.'s case the fact that New Jersey was operating under FAPE made no difference. This interpretation of FAPE strikes me as considerably above *de minimis*.

An evolving understanding of the FAPE mandate filled the space left by the New Jersey Supreme Court's decision in *Lascari*. Differently stated, when the power went out of the state mandate, the courts made the FAPE mandate do what the state mandate had done. This growth of the meaning of the federal mandate in the Third Circuit decisions is a phenomenon readily observable in subsequent cases.³⁹³ I will return for an

³⁹⁰ See *id.* at *6 (stating the findings of the administrative law judge).

³⁹¹ The court also stated:

Defendants [parents] argue that New Jersey, in implementing the Act, did adopt a higher, "can-best-achieve-success-in-learning" standard that this court should apply to determine whether plaintiff provided appropriate educational services for S.V. in 1987. The court in *Parent Information Ctr. v. New Jersey State Bd. of Educ.*, determined that it was irrelevant whether previous New Jersey statutes provided for a higher level of education than that required under the Act; the new regulations clearly indicated that any such interpretation was erroneous. This court agrees.

Ewing, 1991 WL 186691, at *5 (citation omitted).

³⁹² *Id.* at *8.

³⁹³ See *e.g.*, *Bernardsville Bd. of Educ. v. J.H.*, 817 F. Supp. 14, 14-16, 19 (D.N.J. 1993); *aff'd in part*, 42 F.3d 149, 161, n.11 (3d Cir. 1994). In a story reminiscent of the case of John Lascari, J.H. languished for years in a public school system that did not meet his needs. His parents eventually placed him at Landmark School in Massachusetts and demanded a due process hearing wherein they sought reimbursement. After an ALJ held for the parents the school district went to federal court, but the district judge affirmed. Because of the parents' tardiness in demanding due process, the Third Circuit disallowed two years reimbursement but affirmed as to third year. The court plainly acknowledged

examination of Third Circuit cases, and selected cases from other circuits, bearing upon the meaning of FAPE in Part VIII of this article.

D. Conclusions

1. The first lesson to glean from the foregoing study of case law is that it is difficult for a heightened state mandate on special education to survive the disapproval of a state educational establishment. It would be interesting to study internal memoranda generated within the New Jersey DOE while the meaning of its own regulation was in issue. Whether the regulatory "clarification" was driven chiefly by economic concerns or something else, I cannot state on the basis of materials readily available, but I can conclude that if any state legislature wants a heightened mandate, the terms thereof must be stated with unmistakable clarity in enabling legislation.

2. Parents and guardians of special needs children should not necessarily assume that the state DOEs are fighting for their interests. We should remember that the DOEs were created to serve the needs of all children, not only children with disabilities. If funding is tight, DOE personnel will be tempted to lower the mandate, which means that we should therefore be vigilant about proposed state regulations bearing upon children with disabilities.

3. The FAPE mandate is neither self-defining nor limited to the minimalist interpretations some feared in the wake of *Rowley*. The federal district judges and appellate judges of the Third Circuit proved to be perceptive, creative, and maybe a little devious, first in their interpretation of state law, and second in their adjustment of the FAPE mandate to fill the space left after

that the ALJ had wrongly used the discarded regulatory language relied upon in *Geis v. Board of Education*, but further stated that the federal FAPE standard justified the result stating, "Because we agree with the district court that the Board of Education failed under either standard, we need not address the parties' contentions as to which standard applies." See also *J.C., M.C. and G.C. ex rel J.C. v. Central Regional School District*, 81 F.3d 389, 392-93, 397 (3d Cir. 1996). J.C. was a young man with a serious mental handicap. An ALJ denied a residential placement. A federal district judge reversed and the Third Circuit upheld the reversal because the ALJ had required too little, namely, "some educational benefit" under the *Rowley* case. The Third Circuit anchored its ruling in *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986).

the limiting decision of the New Jersey Supreme Court in *Lascari v. Board of Education*.³⁹⁴

4. In this context, it may be appropriate to mention that in other circuits, federal courts failed to develop state legislative mandates embedded in language sufficiently strong to sustain holdings requiring more than *Rowley*. Apart from the states discussed in the text of this article, there are at least four states in which the legislatures enacted language susceptible of interpretation as heightened mandates, namely: Kansas, Minnesota, Oklahoma, and Tennessee.³⁹⁵ With respect to school obligations in each of these states, federal district judges (in three cases affirmed by federal appellate judges) held that the state's obligations did not exceed the federal FAPE mandate.³⁹⁶ The state courts did not develop the mandates either.

5. In light of the legislative repeals of the heightened mandates in Massachusetts and Missouri, and the regulatory *clarification* coupled with the Supreme Court of New Jersey's decision in *Lascari*, parents and advocates for children with

³⁹⁴ 560 A.2d 1180 (S.Ct. N.J. 1989); see Weber, *supra* note 100, at 353. When I use the word "devious" I do not mean to imply something repugnant; rather, the lower courts have displayed a marvelous creativity in probing for Congressional purpose and discerning sensible social policy in a manner that goes far beyond what one can find on the surface of *Rowley*. There is an interesting process at work here described by Professor Weber with reference to the Act as "deradicalizing" by the Supreme Court and "reradicalizing" by the lower courts.

³⁹⁵ See KAN. STAT. ANN. § 72-962(f) (2002) (specifying the state's policy on special education); 70 OKLA. STAT. §13-101 (1989) (defining the state's duty to provide education to children with disabilities); MINN. STAT. § 125A.03 (2003) (defining special education); TENN. CODE ANN. § 49-10 (2003) (codifying the state's education for children with disabilities policy).

³⁹⁶ See *Johnson v. Indep. Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1030 (10th Cir. 1990). *Johnson* involved a young woman suffering from autism and retardation. The district court held, and the Tenth Circuit affirmed, an administrative decision denying year-around programming. In the course of its opinion, the Tenth Circuit judges stated that the Oklahoma requirements were equivalent to the FAPE mandate. In *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692, 699-701 (10th Cir. 1998), the panel reached the same result with respect to a Kansas statute. The case involved a girl with a severe hearing loss. The district court overturned an administrative decision favorable to the disabled girl and the Tenth Circuit affirmed stating that the Kansas statute in question did not bind the state to anything higher than a FAPE. In *Indep. Sch. Dist. No. 283 v. S.D. by J.D.*, 948 F. Supp. 860, 884-88 (D. Minn. 1995), a federal district judge in Minnesota adopted a Magistrate's report holding that under Minnesota law the school district was under no obligation to go beyond the federal standard for the education of a student with dyslexia. In *Doe v. Tullahoma City Schs.*, 9 F.3d 455, 457-58 (6th Cir. 1993), the Sixth Circuit upheld a district court decision that disallowed reimbursement for private placement of a young man with learning disabilities. The panel decided that the special education laws of Tennessee did not require more than the federal mandate required.

disabilities must not over-estimate popular sentiments as being favorable to our children. While special education and the quality thereof is of great importance to several million Americans who are either disabled or whose families have disabilities, the cause of special education does not especially dazzle or attract either the right or the left in the current political climate.

6. After examining the law arising from four states with legislative mandates susceptible of interpretations outrunning FAPE, we have found that in three of these four, the higher mandate disappeared by legislative reaction or was *clarified* out of existence when it was discovered to be a law with teeth. Advocates for children with disabilities should not naively place undue hope in linguistic formulae, whether statutory or regulatory, that appear to chart loftier goals than a FAPE.

VII. NORTH CAROLINA: THE MANDATE FOR A "FAIR AND FULL OPPORTUNITY TO REACH HIS FULL POTENTIAL"

A. *The Mandate*

The North Carolina legislature acted to implement the federal mandate by enacting a special education law codified at G.S. § 115-363 (1977). Chapter 115 provided that, "[t]he policy of the State is to provide a free appropriate publicly supported education to every child with special needs." At this point there was no discernible heightened state mandate. Later, by Chapter 423, § 1, Session Laws 1981, special education law was rewritten and codified at Chapter 115C. Section 115C-106 states in relevant part:

The General Assembly of North Carolina hereby declares that the policy of the State is to ensure every child *a fair and full opportunity to reach his full potential* and that no child as defined in this section and in G.S. 115C-122 shall be excluded from service or education for any reason whatsoever.

By setting a statutory *full potential mandate*, the legislature arguably intended to push the state's mandate above the federal

mandate. If one were to inquire whether or not this apparent legislative intention was accomplished, only a good reading of the case law can give an answer.

B. Recognizing the Higher State Mandate

1. Marguerite Harrell and the Wilson County Schools³⁹⁷

Although Marguerite was hearing impaired, her school district proposed an IEP placing her in a regular sixth grade class with support services. Her parents requested that the school district finance her education for a year at the Central Institute for the Deaf (CID) in St. Louis, Missouri. The school district refused, so Marguerite's parents sought a due process hearing. The hearing officer held for the school district, a decision was affirmed on administrative appeal.

Marguerite's parents filed suit in the Superior Court in Wilson County, North Carolina, where the trial judge affirmed the administrative decision to place Marguerite in the public school. Marguerite's parents sought review by the North Carolina Court of Appeals.³⁹⁸ The parents' lawyer argued, *inter alia*, that federal and state law required that "[t]he local school agency . . . provide a handicapped student with the *most appropriate* education."³⁹⁹ The argument may have been a linguistic formulation that attempted to combine the state and federal mandates. The court recognized a heightened state mandate but rejected the parents' position in the following language:

Although our statute was designed, in part, to bring the state to conformity with the federal statute, the *Rowley* Court's interpretation of Congress' intent does not control our interpretation of our General Assembly's intent. We believe that our General Assembly "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." Under this standard a handicapped child should be given an opportunity to achieve his full

³⁹⁷ Harrell v. Wilson County Schs., 293 S.E.2d 687 (N.C. Ct. App. 1982).

³⁹⁸ See *id.* at 688-89 (stating the numerous appeals Marguerite's parents presented).

³⁹⁹ See *id.* at 689 (emphasis added) (highlighting the parent's argument).

potential commensurate with that given other children. Nothing we have said, however, helps the plaintiff on the facts of this case. Our statute, as progressive as it may be, was not designed to require the development of a utopian educational program for handicapped students any more than the public schools are required to provide utopian educational programs for non-handicapped students. We believe that the Wilson County School System has fulfilled its obligation to provide Marguerite with a free appropriate education.⁴⁰⁰

By this language, in North Carolina's first appellate opinion attempting to blend state and federal special education law, the appellate court significantly limited the impact of the state's full potential mandate, and ironically did it by borrowing from the dissent in *Rowley*. The opinion is reminiscent of the *Nelson* opinion from a Michigan appellate court.⁴⁰¹ By plucking the equality strand from Justice White's dissent in *Rowley*, and weaving that strand with the language of the state statute, the North Carolina court blunted the "full potential" language of the state statute, making the mandate subservient to the equal opportunity theme. Despite an overt acknowledgment that the state standard was *progressive*, the court found no requirement that made any difference for Marguerite.⁴⁰² The disposition of the case coupled with the language quoted, *supra*, tended thereafter to dampen the development of the state mandate somewhat.

⁴⁰⁰ *Id.* at 690-691 (citations omitted).

⁴⁰¹ See *Nelson v. Southfield Pub. Schs.*, 384 N.W. 2d 423, 426 (Ct. App. Mich. 1986) (holding that the state review official abused his discretion by refusing to hear arguments from the school district).

⁴⁰² See generally *Harrell*, 293 S.E.2d 687, at 690-91 n.1. After several readings, the court's explanation of the 1981 legislative change remains puzzling:

Chapter 115, under which this action was brought, was rewritten by Session Laws 1981, c. 423, s.1, effective 1 July 1981, and has been recodified as Chapter 115C. In Chapter 115C, the General Assembly clearly spelled out its intent by declaring "that the policy of the State is to ensure every child a fair and full opportunity to reach its full potential . . ." *Harrell*, 293 S.E.2d 687, at 690-91 n.1; see also N.C. GEN. STAT. §115C-106 (2003). The reference to "spelling out" legislative intent may mean that the revision was a clarification, not really a change, in which event free and appropriate always meant something more than the *Rowley* majority required. On the other hand, the statutory revision may have intended a heightened standard tied to Justice White's dissent.

2. James Hall and the Vance County Board of Education⁴⁰³

An appellate judge described James as a “bright sixteen year-old boy of above average intelligence” who “at age eleven, as he prepared to enter the fifth grade. . . was functionally illiterate, unable to distinguish between the words ‘ladies’ and ‘gentlemen’ on restroom doors, or to go to the store to make small purchases for his mother.”⁴⁰⁴ James’s troubles with school started early. He had trouble learning to read, and consequently repeated second grade. His third grade teacher, recognizing his learning difficulties, recommended an evaluation. When James was diagnosed as learning disabled, his school recommended an IEP which his parents accepted, keeping James in a regular classroom for his third and fourth grades. He made no meaningful progress.⁴⁰⁵ As he was about to enter fifth grade, as a functional illiterate, the school presented an IEP with no meaningful changes from prior years at which point his parents understandably grew very frustrated.

So James’s parents placed him in a private school. Unfortunately, this school proved unequipped to handle his disability, and he left after two months with the school’s recommendation that he have further testing. At this point, James was finally diagnosed as dyslexic.⁴⁰⁶ Not surprisingly, his repeated failures at school had caused him emotional harm, and he had developed a genuine fear of school. In this context, the Halls learned of Oakland School, a private school in Virginia, which accepted learning disabled children such as James. While they awaited an opening, James’s parents tutored him at home and made multiple requests that the school district fund the Oakland School residential placement when became available. School officials rebuffed them, but when a opening arose, the Halls placed James at Oakland where he began to make progress.

⁴⁰³ Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

⁴⁰⁴ *Id.* at 630. This description did not bode well for the school that James had attended.

⁴⁰⁵ *See id.* at 631 (discussing James also received special services at a resource room four times a week for thirty minute periods during his fourth grade year).

⁴⁰⁶ *See id.* at 630 (explaining “James suffers from dyslexia, a severe learning disability that hinders his ability to decipher written symbols”).

No doubt concerned about the costs of an out-of-state placement, the district countered with a proposed IEP pursuant to which James would return to his district and spend most of his time in specialized classes. Satisfied with the Oakland School placement the Halls resisted and rejected the proposed IEP, and went to a due process hearing. The hearing officer decided that the school's proposed IEP was appropriate, with modifications. A state reviewing officer agreed.⁴⁰⁷ The upshot of the administrative process was that Halls should bring James home to his public school where he had always been a failure as a student.

The Halls filed an action in federal district court. The federal judge turned the administrative decision around by ruling that (i) the district's current proposal would not provide a FAPE; (ii) the district was liable for the costs of sending James to Oakland School for that year; (iii) the district had failed to provide a FAPE at any time up to the due process hearing and; (iv) the parents were entitled to reimbursement for costs previously incurred.⁴⁰⁸ The Court of Appeals for the Fourth Circuit affirmed in all respects against the arguments of the school district and state defendants both of which argued that the district judge had erred "by disregarding *Rowley's* rule that the EAHCA does not require schools to provide an education that will allow a handicapped child to fulfill his maximum potential."⁴⁰⁹

In essence, the defendants argued that it was error for a trial judge to apply any standard other than the minimum *Rowley* requirement, a strained argument it would seem in light of North Carolina G.S. s. 115C-106. The Court of Appeals replied:

Nowhere, however, does the district court's opinion suggest that it held the defendants to the *impermissible* standard. Instead, it properly considered the evidence introduced at trial, including two independent evaluations and the results of several standardized tests, in determining that James' education was not reasonably calculated to enable him to receive educational benefits, as required by the Act and

⁴⁰⁷ See *id.* at 632 (stating the reviewing officer acknowledged that the school district had failed to meet its obligations in earlier years but believed he had no authority to provide any relief for those failures).

⁴⁰⁸ See *id.* at 632-33 (summarizing the trial court's decision).

⁴⁰⁹ *Hall*, 774 F.2d at 635.

Rowley. . . *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. Clearly, Congress did not intend that a school system could discharge its duty under the EAHCA by providing a program that produces minimal academic advancement, no matter how trivial. . .⁴¹⁰

Whether the judges believed that North Carolina had a heightened mandate is not apparent, but it is certain that the court did not need anything beyond FAPE to affirm the district court's decision against the school system. By stressing that the trial judge had not used an impermissible standard, the court might have been casting doubt on whether North Carolina did have a higher mandate that applied to the case. In any event, the court reached an excellent result by raising the *Rowley* standard above the minimum "some benefit" test.

C. *Autistic Children: The Mandate and Competing Pedagogical Theories*

1. Christian Lee Denton and the Burke County Board of Education⁴¹¹

This case takes us once more into an extended quarrel about what is appropriate for an autistic child.⁴¹² Christian (Chris) was described as having severe problems in communication and self-control.⁴¹³ He resided in a home for autistic persons where he received educational services at a nearby school. The residential and school programs were coordinated and highly structured. Chris made progress in learning and controlling his aggressions. As he neared age eighteen, and funds for his placement were about to cease, Chris's parents began planning his return to the

⁴¹⁰ *Id.* at 635-36 (emphasis added).

⁴¹¹ *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990).

⁴¹² See *supra* Part IV. B. & C. for a review of cases arising in Michigan involving the educational programs for autistic children and more particularly, the Lovaas method.

⁴¹³ See *Denton*, 895 F.2d at 975 (asserting "Chris cannot manage his own behavior; his behavior at all times must be managed by others").

family home and therefore sought a workable IEP.⁴¹⁴ The district developed an IEP that in most respects replicated the school program from which Chris was being transferred, including a one-to-one aid. The sticking point was this: Chris's parents requested in-home services for 24 hours a day, 365 days a year, asserting that such services were appropriate for Chris and were required under federal and state law.⁴¹⁵ At this request, the school district balked.

Chris's parents went to a due process hearing where the hearing officer determined that the district's proposed IEP was sound with certain minor modifications.⁴¹⁶ Critically, the hearing officer did not order 24-hour home care services. A state reviewing officer accepted the facts as found by the hearing officer but made an opposite conclusion, granting everything that Chris's parents wanted.⁴¹⁷ In effect, the reviewing officer ordered a "residential placement" with the Denton home being the "residence" staffed by aides at the school district's expense. The school board went to federal court as the "party aggrieved" under 20 U.S.C. § 1415(e)(2); Chris's parents counterclaimed "seeking 365-day services during Chris' waking hours. . ." ⁴¹⁸

The district judge reinstated the hearing officer's decision, which had allowed something short of a "residential" placement.⁴¹⁹ Chris's parents appealed to the Fourth Circuit, which upheld the trial court by focusing mainly upon statutory definitions.⁴²⁰

⁴¹⁴ See *id.* (noting Chris was included in the "Willie M" class which by consent decree, was entitled to funding for certain services, but because funding under the "Willie M" decree ran out at eighteen, Chris's parents began to plan for means of otherwise funding appropriate services).

⁴¹⁵ See *id.* at 977 (emphasizing the fact that the "Willie M" funds for residential services were ending must have been a factor in the parents' request).

⁴¹⁶ See *id.* at 977-98 (clarifying the hearing officer ordered the school to establish a mechanism to facilitate the exchange of information in order to coordinate the home and school environments, for example, a notebook going back and forth would probably suffice).

⁴¹⁷ See *id.* at 978 (granting the parents their claim of full time in-house care).

⁴¹⁸ *Id.*

⁴¹⁹ See *Denton*, 895 F.2d at 978. Two facts were crucial for the trial judge: first, Chris was making progress, and second, the home aides were not strictly following behavioral modification techniques, but were simply taking ordinary care of Chris. *Id.* Thus, the parents had really set up a childcare system rather than a truly educational plan.

⁴²⁰ See *id.* at 980 (highlighting the requirement of the statute is met by "providing personalized instruction with sufficient support services to permit the child to benefit

The court stated that in light of the *Rowley* standard:

The question in this case is, then, whether the Board's IEP, which does not include a home instruction component, is reasonably calculated to enable Chris to receive educational benefits. Congress recognized that in some instances home instruction or residential placement would be required for the handicapped child to benefit educationally. . . . Where medical, social, or emotional problems are intertwined with educational problems, courts recognize that the local education agency must fund residential programs if the requirements of the EHA [sic] and *Rowley* are to be met. The determination whether services beyond the regular school day are essential for the child to receive any educational benefit is necessarily fact and case specific. . . .

The district court found that since Chris returned home and enrolled in a Burke County school, he has continued to make educational progress despite the failure of the home care aides to follow rigorously the successful behavior management program. This finding was not clearly erroneous. . . and undermines the Dentons' factual premise that an absolutely consistent in-home behavior management program is required for Chris to make educational progress *and is therefore an educational expense*.⁴²¹

By sustaining the finding that educational progress had been accomplished without a rigorous behavioral management program at home, the court not only decided that the *Rowley* standard was met but also decided that the home services were not essentially *educational* in nature. The court stated explained, "If residential placement is necessitated by medical, social, or emotional problems that are *segregable from the learning process*, then the local education agency need not fund the residential placement."⁴²² Legal counsel's fallback to procedural arguments also failed.⁴²³

educationally from that instruction") (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982)).

⁴²¹ *Id.* at 980 (emphasis added).

⁴²² *Id.* (emphasis added).

⁴²³ *See id.* at 981-82. Counsel argued that the district court had failed to give due weight to the decision of the state reviewing officer and, further, that monetary costs to the school district had wrongfully influenced the decision. *Id.* Nevertheless, the court

Regarding the state mandate, Denton's lawyer argued that North Carolina law required an IEP designed so that Chris had an opportunity to reach his "full potential." But again, the court's careful differentiation of educational and rehabilitative services helped to sustain the trial court's decision.⁴²⁴ The court concluded:

North Carolina apparently does require more than the EHA [sic]. The special education program must provide the child with an equal opportunity to learn if that is reasonably possible, ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children. But, North Carolina law still recognizes the difference between special education services and habilitation services. Although the state statutory definitions of "special education" and "related services" are more expansive than the EHA definitions of those terms, the services the Dentons seek do not fall within the definitions. Special education is defined to include certain services categorized as related services under federal law; "related services includes" "school social work services, parent counseling and training, providing parents with information about child development and assisting parents in understanding the needs of their child." *The district court's factual findings compel the conclusion that the in-home services sought by the Dentons are not the kind of services which must be provided, under federal or North Carolina law, by the local education agency.*⁴²⁵

Thus, Chris's parents lost their claim for in-home services because the Fourth Circuit judges deemed the services requested to be habilitation, not education. The tone of the appellate opinion leaves me with the impression that the judges thought the parents were overreaching.⁴²⁶ In any event, Chris Denton's

determined that, in sum, Chris was benefiting under his IEP without the 24-7 services demanded. Consequently, the federal mandate was met.

⁴²⁴ See *id.* at 982-83 (acknowledging, however, more stringent North Carolina mandate).

⁴²⁵ *Id.* at 983 (referring to North Carolina statutory language). See N.C. GEN. STAT. § 115C-108 (2003) (defining "special education" and "related services").

⁴²⁶ See *id.* The opinion, for example, discusses the Dentons' application for a license to operate their home as a residential care facility pursuant to the state law governing Human Resource programs. The court referred to this evidence as "confirming the appropriate categorization of the home care services sought for Chris as habilitation, not education."

case illustrates yet another limiting technique, to wit: a careful judicial construction of statutory definitions to push the requested services outside the realm of special education.

2. C.M. and the Board of Education of Henderson County⁴²⁷

The opinions generated in C.M.'s case and in the related case of C.E., joined on appeal, would be sufficient for a course in special education law, partly because an especially able trial judge delved deeply into both the facts and the law,⁴²⁸ and partly because the parents of each child fought heart and soul - perhaps obsessively - for the Lovaas approach. The judicial resolution of these intense conflicts about pedagogical methods can be very enlightening on the meaning of FAPE and the North Carolina mandate. I will concentrate only on C.M., an autistic girl, inasmuch as a separate discussion of C.E.'s case would add nothing enlightening. Moreover, the parents' struggle to find the right program for C.M. resonates with me because it parallels the struggles my wife and I had to find the best program for our autistic daughter, Ingrid.

When C.M. was of pre school age, her parents moved from New Hampshire to North Carolina so that C.M. could gain an educational advantage under the innovative TEACCH program developed at the University of North Carolina.⁴²⁹ Soon after

⁴²⁷ Due to the multiple opinions generated in the litigation and administrative processes, this North Carolina special education case presents significant analytical difficulty. The following cases underlie this textual treatment: *CM v. Bd. of Educ. of Henderson County*, 1999 WL 33117438, at *1 (W.D. N.C. Jan. 4, 1999); *CM v. Bd. of Educ. of Henderson County*, 85 F. Supp. 2d 574 (W.D. N.C. 1999); *CM v. Bd. of Educ. of Henderson County*, 241 F.3d 374 (4th Cir. 2001), *cert. denied*, 534 U.S. 818 (2001); *CM v. Bd. of Pub. Educ. of Henderson County*, 184 F. Supp. 2d 466 (W.D. N.C. 2002); and *ME v. Bd. of Educ. for Buncombe County*, 186 F. Supp. 2d 630 (W.D. N.C. 2002).

⁴²⁸ The presiding judge in the following cases was Judge Lacy H. Thornburg: *CM v. Bd. of Educ. of Henderson County*, 1999 WL 33117438, at *1 (W.D. N.C. Jan. 4, 1999); *CM v. Bd. of Educ. of Henderson County*, 85 F. Supp. 2d 574 (W.D. N.C. 1999); *CM v. Bd. of Pub. Educ. of Henderson County*, 184 F. Supp. 2d 466 (W.D. N.C. 2002); and *ME v. Bd. of Educ. for Buncombe County*, 186 F. Supp. 2d 630 (W.D. N.C. 2002).

⁴²⁹ See *CM*, 85 F. Supp. 2d at 578. Judge Thornburg summarized the TEACCH program based upon testimony provided in CM's case by Dr. Lee Marcus, then director of the TEACCH center in Chapel Hill, North Carolina. See 184 F. Supp. 2d at 474-76. While the summary is lengthy, I emphasize only that TEACCH is distinguished from the Lovaas method by the requirement of structuring an environment based upon a child's assessed needs and does not rely upon Discrete Trial Training (DTT) as does the Lovaas technique. It is fair to say that the differing techniques are based upon differing views about the nature of autism and that implementation of a TEACCH program is generally cheaper than implementing a Lovaas program.

moving, C.M.'s parents discovered the Lovaas program and began Discrete Trial Training (DTT) in their home.⁴³⁰ In the months following, C.M.'s parents became increasingly convinced of the efficacy of the Lovaas method and sought district funding for its fuller implementation. The school district was generally accommodating until C.M.'s parents became convinced that Lovaas was the *only* acceptable method. Their conviction led to an impasse, their own funding for DTT, consequent demands for reimbursement, complicated administrative hearings, and finally lengthy litigation - all of which is difficult to understand fully due to the multiple and complicated reported opinions. Fortunately, the federal district judge who presided wrote two good opinions, one of which makes the main points readily discernible.⁴³¹

It appears that, in 1996, as negotiations between the parents and school broke down, C.M.'s parents filed two requests for due process hearings. The first sought reimbursement for the costs of an Independent Educational Evaluation (IEE). The second sought reimbursement for Lovaas therapy provided to C.M. during previous years,⁴³² and also sought a placement with a stress on Lovaas therapy during the 1996-97 school year, or what remained of it. The petitions were consolidated. For purposes of this article, only one ruling was critical: that the school district had offered an appropriate IEP for the 1996-97 school year under federal and state law.⁴³³ Plaintiffs filed an administrative appeal. The state review officer affirmed.

Plaintiffs then filed their action in federal court.⁴³⁴ In a pretrial ruling, the trial judge disposed of everything except the core question: Had the school district proposed an appropriate IEP for the 1996-97 school year?⁴³⁵ In a very careful analysis, Judge

⁴³⁰ Compare this case with those arising in Michigan, discussed *supra* in Part IV. B. & C.

⁴³¹ See *CM*, 184 F. Supp. 2d at 468-69 (summarizing procedural history of case).

⁴³² See *id.* at 468 (seeking reimbursement for Lovaas treatment during 1993-94, 1994-95, and 1995-96 school years).

⁴³³ See *id.* at 489; see also *CM*, 85 F. Supp. 2d at 577. The opinion does not so state, but as a practical matter this claim had turned into a claim for reimbursement inasmuch as the year had passed before the decision was made. With regard to the other requests in the consolidated petitions, an ALJ denied reimbursement of over \$1200 for an IEE and ruled all reimbursement claims prior to 1996-97 were time-barred.

⁴³⁴ See *CM*, 85 F. Supp. 2d at 576-577 (noting procedural history of case).

⁴³⁵ See *id.* at 577. The judge sustained the administrative ruling that limited reimbursement for the IEE to \$1200 and agreed that claims for the years prior to 1996-97

Thornburg decided that C.M.'s parents had not met their burden of showing that a Lovaas program (as opposed to TEACCH) was required under federal or state law, and therefore affirmed the administrative decision that through the IEP proposed for 1996-97 the school district had met its obligations.⁴³⁶

CM's parents took an appeal to the Fourth Circuit where the case was consolidated with another appeal by parents of an autistic boy identified only as C.E.⁴³⁷ The issue in common was procedural, namely: "whether a state statute, providing that a request for a due process hearing must be filed within sixty days of an agency decision, is inconsistent with the Individuals with Disabilities Act (IDEA)."⁴³⁸ Behind the procedural question lurked a common substantive question: Did state or federal law allow the parents to insist upon Lovaas instead of TEACCH and

were time-barred. As to the main issue, the question of the appropriateness of the 1996-97 IEP raised subsidiary questions about process, i.e., the timeliness of the administrative decisions and the alleged "vagueness" of the school's proposed IEP. Instead, the court rather summarily dispensed with these questions, concentrating on the proposed placement and support services.

⁴³⁶ The judge's frustration with CM's parents, legal counsel, and the Lovaas proponents seems evident at several points in the opinion, especially in the strong language favorable to the school district:

Finally, in the third meeting for the 1996-1997 school year, the County basically offered the plaintiffs everything they had requested: CM would go into a regular classroom despite Ms. McDanel's [special education teacher's] misgiving that she could handle the size of the class. She would receive one-on-one and guided instruction for a total of 12.5 hours per week, a figure close to the 15 hours suggested by Dr. Boyle. Her speech services would be increased. And, an aide would accompany CM at all times while she was in the kindergarten class. . . .

The fact that the Lovaas program may be better than TEACCH or provide the maximum opportunity for CM's development does not mean that the IEP offered would not have provided a FAPE.

The undersigned finds the Plaintiffs have failed to carry their burden of establishing a violation of the IDEA. The preponderance of the evidence supports the findings of fact and conclusions of law of the ALJ and SRO.

Plaintiffs also allege a claim pursuant to N.C. Gen. Stat. § 115C-106(b) . . . this higher standard does not require a school district to develop a "utopian educational program" for the student with special needs any more so than would be required if the student were not handicapped. *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982). To the extent reasonably possible, the student with special needs should be given an equal opportunity to learn.

Id. at 577.

⁴³⁷ See *CM*, 241 F.3d at 379. The State of North Carolina intervened, arguing for the validity of the sixty day limitation period, and the United States also intervened, arguing against the limitation period. *Id.*

⁴³⁸ *Id.* at 376. Stated differently: Within what time limit must a demand for a due process hearing be filed?

require reimbursement when the school districts refused?⁴³⁹ On the procedural question, the court decided that the sixty day period for filing a request for a due process hearing was valid, provided the parents had adequate notice. However, in neither C.M.'s case nor C.E.'s case did the record establish adequate notice to trigger the sixty day period; hence, an issue about proper notice had to be resolved on remand.⁴⁴⁰ Near the end of the opinion, the court affirmed Judge Thornburg's decision that C.M.'s district had proposed an appropriate IEP for the 1996-97 school year, but contingent on a decision regarding notice of the filing time, there remained the question of whether the district in the prior years had complied with federal and state requirements with its proposed IEPs.⁴⁴¹

On remand, Judge Thornburg determined that the school district had not provided any due process notice for the years 1993-1994 and 1994-1995,⁴⁴² but went on to find that the parents had not met their burden of showing that any notice was owing.⁴⁴³ The parents had consented to an IEP in 1993, and after three months had unilaterally removed C.M. to implement the Lovaas program. Yet, they had not revoked consent nor made any demands challenging the approved IEP until November 1996.⁴⁴⁴ Hence, failure of a due process notice for those years caused no harm. The parents' unilateral action without complaint precluded their claim. Moreover, the court found that

⁴³⁹ *Id.* at 377. In CE's case, the reimbursement for the Lovaas therapy was the *only* issue since the parents and schools officials agreed that CE had fully recovered and was no longer disabled.

⁴⁴⁰ *See id.* at 384-85. The court stated that the North Carolina legislature had explicitly selected the sixty day period for demanding a due process hearing by cross-reference to the state administrative procedures act. However, the sixty day period was not triggered until notice to the parents of appeal rights was clearly given.

⁴⁴¹ *See id.* at 388 n.12. C.E.'s case was also remanded. The Supreme Court of the United States denied *certiorari*. 534 U.S. 818 (2001). Trials were held on remand.

⁴⁴² *See C.M.*, 184 F. Supp. 2d at 483-84 (finding that written notice to the parents of a child is required when the school "proposes to initiate or change or refuses to initiate or change the identification, evaluation, or educational placement of the child. . . or the provision of a free appropriate public education to the child. . .").

⁴⁴³ *See id.* at 483 (reasoning that the withdrawal of C.M. from school and the request for additional speech therapy by C.M.'s parents was insufficient to trigger a requirement of due process notice by the school).

⁴⁴⁴ *Id.* at 484 (finding the November 1996 petition for a contested hearing did not revoke consent retroactively and thus did not apply to the previous years in question).

the district had offered a FAPE for the years in which due process notice was lacking.⁴⁴⁵

Finally, with painstaking close attention to the details of C.M.'s program, the judge made conclusions with respect to the 1995-1996 year, assuming a timely claim, and stated:

The fact that the Lovaas program may be better than TEACCH or provide the maximum opportunity for CM's development does not mean that the IEP offered would not have provided a FAPE. The undersigned therefore concludes that a FAPE was offered to CM for the 1995-1996 school year and the Plaintiffs are not entitled to reimbursement.

And with respect to the requirements of the North Carolina statute, Judge Thornburg wrote in relevant part:

However, "North Carolina apparently does require more than the [IDEA]. The special education program must provide the child with an equal opportunity to learn if that is reasonably possible, ensuring that the child has an opportunity to reach her full potential commensurate with the opportunity given other children." Nonetheless, this higher standard does not require a school district to develop a "utopian educational program" for the student with special needs any more so than would be required if the student were not handicapped. To the extent reasonably possible, the student with special needs should be given an equal opportunity to learn. The Court finds that the Plaintiffs were offered an educational program which would have provided CM an equal opportunity to reach her full potential commensurate with the opportunity given other children. Indeed, it may well be that the TEACCH program would have provided a superior model for CM's emotional and social development.⁴⁴⁶

With this, the long-enduring quarrel over C.M.'s program reached closure.⁴⁴⁷ Once again, parents had insisted upon Lovaas

⁴⁴⁵ See *id.* at 485. The undersigned therefore concludes that the IEP for the 1993-1994 and 1994-1995 school years would have provided CM with a FAPE.

⁴⁴⁶ *Id.* at 489 (citations omitted) (reasoning that the Board of Education of Henderson County followed the requisite North Carolina laws and thus dismissed the plaintiffs' complaint in its entirety).

⁴⁴⁷ See *M.E. v. Board of Education*, 186 F. Supp. 2d 630, 642 (W.D.N.C. 2002). Judge Thornburg also disposed of the parents' reimbursement claim in the case involving C.E., which had been consolidated with C.M.'s case on appeal to the Fourth Circuit.

treatment to the exclusion of any other approaches and had failed to make their case successfully in court under the federal or state mandates.

More case law could be examined but I have found nothing that contradicts or further illumines the meaning of the state and federal mandates as explicated in the foregoing decisions.

D. Conclusions

After studying cases from the North Carolina courts and the federal courts, the limitations judicially placed upon the North Carolina mandate are few but significant.

1. The courts applied the *equality* theme in special education law in a way that parallels the emphasis on *access* in *Rowley*. According to the courts, North Carolina special education law was designed to equalize opportunities for gaining an education, and since non-handicapped students are not entitled to a utopian or model educational programs, it follows that the opportunities for the children with disabilities may be accordingly limited. Thus, the equality theme worked in two ways. First, the quest for equal opportunity well grounded in the state mandate, helped a little to raise the minimum requirement. On the other hand, it did take force out of claims for the maximum possible benefit.

2. The opinions show a judicial deference to schools on pedagogical methods, a factor which figured prominently in C.M.'s case and the related case involving autism. Recognizing that the courts should leave decisions about pedagogical methods to the educational experts, the courts simply refused to choose one program over another, most notably Lovaas over TEACCH. This deference, in combination with the requirement of giving due weight to administrative decisions, made the parents' burdens to prove that proposed IEPs did not meet the mandates nearly impossible to carry. In this the Fourth Circuit reviewing cases from North Carolina took the same path as the Sixth Circuit reviewing cases from Michigan.

3. In the case of Chris Denton, courts carefully parsed the language of the definitions in state and federal statutes and thereby pushed the parents' claims beyond the range of special education into the categories of medical and habilitation services.

I do not suggest that any judge parsed wrongly, but do stress that the definitions can be a powerful source for limitations as well as expansions of obligations of schools toward children with disabilities.

4. The courts have imposed a *reasonableness limitation* as a limit upon against over- zealous parents. Eschewing any meaningful dialogue about pedagogical adjustments that might help their children, perhaps at reduced costs to the districts, did not help the parents' cases. Attitudes perceived as parental zealotry hurt the causes and children for whom they advocated. On this theme, there is a parallel to the First Circuit case law applying Massachusetts law.⁴⁴⁸

5. The "full potential" mandate did not lead to unreasonable decisions. Moreover, in the decisions, which I have analyzed and others reported from North Carolina, I doubt that the state mandate was *essential* for any decision made favorable to a child with a disability. People within the educational culture in North Carolina might see it differently since it is quite possible that the state mandate enriched that educational culture in ways not easily quantified or documented.

6. Through state and federal opinions, the state mandate was leveled off to be virtually indistinguishable from the FAPE mandate as interpreted by the best decisions of the Fourth Circuit. That could explain why there has been no political push to repeal the state mandate in North Carolina. As this comparative study has demonstrated, of the five states studied, only two, North Carolina and Michigan, still have heightened statutory mandates, and in those states the courts have made the mandates workable by making them reasonable.

7. We should not conclude that the North Carolina mandate has failed to achieve any worthwhile purpose. But case law does suggest that state legislation designed to outreach the federal mandate, whether in North Carolina or elsewhere, is of limited impact - far less than commonly perceived. To an advocate for

⁴⁴⁸ See e.g., *Frank S. v. Sch. Comm. of the Dennis-Yarmouth Regional Sch. Dist.*, 26 F. Supp.2d 219, 231 (D. Mass. 1998) (affirming the magistrate judge's decision, finding that the Massachusetts standard was more strict than the IDEA standard, and holding that plaintiffs did not meet their burden of showing that the IEP was inadequate under Massachusetts or federal law).

children with special needs, these developments are not on first glance necessarily inspiring. But, it is important to observe, that while state mandates were being repealed or leveled, some federal judges were pumping life into the federal FAPE mandate, a laudable development worthy of investigation and comment.

VIII. POST-*ROWLEY* DEVELOPMENT OF THE FEDERAL MANDATE

The judges of the Court of Appeals for the Third Circuit have been most notable in developing the meaning of FAPE as a matter of federal law.⁴⁴⁹ In writing this part, I owe a debt to Professor Mark Weber, who more than a decade ago discerned the beginning of this very positive trend in federal case law.⁴⁵⁰

A. *Third Circuit Cases*

1. Christopher Polk and the Central Susquehanna Intermediate Unit 16⁴⁵¹

The case arose from a simple question arising from Christopher's need for physical therapy: Did the federal mandate require hands on physical therapy or was a consultative model whereby a physical therapist instructed his teacher in the techniques of physical therapy sufficient? The case arose in Pennsylvania, which did not have a heightened state mandate. At the age of seven months, Christopher contracted encephalopathy; he was also mentally retarded.⁴⁵² By his mid-teens, his mental development and functional abilities were those

⁴⁴⁹ In discussing New Jersey law, I have previously considered the Third Circuit case *Diamond v. Board of Education* (see discussion at Part VI.B.2. of this article). Here, I will take up three more Third Circuit cases important for the development of FAPE and will then make brief references to selected cases from other circuits.

⁴⁵⁰ See Weber, *supra* note 100 (discussing the Supreme Court's decision in *Board of Education v. Rowley*, how the ruling restricted the purpose of the Education for the Handicapped Act, and how lower courts have reacted to the ruling).

⁴⁵¹ *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 172 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (reversing a summary judgment in favor of the school district, reasoning that a genuine issue of material fact still existed as to whether the school district violated the procedural requirements of the Education of the Handicapped Act by refusing to consider direct physical therapy for Christopher Polk). The case arose in Pennsylvania which did not have a heightened mandate.

⁴⁵² See *id.* at 173. Though unclear from the opinion, I believe his mental retardation preceded the infection at seven months old. Of course, the sequence of events leading to his troubles really made no difference for his special education needs.

of a normal toddler. Christopher needed help developing basic life skills, such as feeding himself, dressing, and using the toilet.

While the record is not totally clear, it appears that Christopher's school provided one-to-one physical therapy by a licensed physical therapist in his early years, and in 1980 switched to the consultative model.⁴⁵³ Because Christopher's parents believed that he had made dramatic improvements when he received direct one-to-one services from the physical therapist, they objected to the change and sought at least one session per week with a licensed therapist. When the school district refused, they hired a therapist privately and challenged the school district's refusal in a due process hearing.⁴⁵⁴

A hearing officer determined that Christopher was gaining *some benefit*, and was therefore receiving a FAPE as required by *Rowley*. On administrative appeal, the Pennsylvania Secretary of Education affirmed. Christopher's parents brought suit in federal court. The judge granted summary judgment for the

⁴⁵³ See *id.* at 174 n.2. The court provides the following description of the consultative model, and noted that the record was fuzzy about the school's provision of direct physical therapy and its cessation:

In the consultation model, the therapist interacts with the classroom teacher and/or other educators who deal with the child on a regular and consistent basis and who are ultimately responsible for the child's educational performance. The therapist as a consultant increases the teacher's awareness of a handicapped child's need. The therapist instructs the teacher on appropriate methods and strategies to attain both physical therapy/occupational therapy goals and enhance the child's ability to benefit from classroom educational experiences.

Id.

⁴⁵⁴ See *id.* at 174 summarizing the parents' position:

In support of this position, plaintiffs adduced evidence that direct physical therapy from a licensed physical therapist has significantly expanded Christopher's physical capacities. In the summer of 1985, Christopher received two weeks of intensive physical therapy from a licensed physical therapist at Shriner's Hospital in Philadelphia. According to Christopher's parents, this brief treatment produced dramatic improvements in Christopher's physical capabilities. A doctor at Shriver's prescribed that Christopher receive at least one hour a week of direct physical therapy. Because the defendants were unwilling to provide direct physical therapy as part of Christopher's special education program, the Polks' hired a licensed physical therapist, Nancy Brown, to work with Christopher at home. At the time of the hearing, she was seeing Christopher twice a week.

Plaintiffs acknowledge that the school program has benefited Christopher to some degree, but argue that his educational program is not appropriate because it is not individually tailored to his specific needs. . . . plaintiffs have maintained that to comply with the EHA [IDEA] defendants must provide, as part of Christopher's "free appropriate public education," one session a week with a licensed physical therapist.

Id.

school defendants⁴⁵⁵ because "Christopher derived *some* educational benefit."⁴⁵⁶ Thus, the district court tracked Justice Rehnquist's language from *Rowley* and applied it literally. The Third Circuit reversed with a lengthy and piercing opinion that revisited *Rowley* in light of Christopher Polk's special needs and declared in eloquent language why a *de minimis* standard missed the Act's purpose.

The clash between Christopher's parents and his school district was set forth as follows:

Plaintiffs argue on appeal that the district court applied the wrong standard in measuring the educational benefit of Christopher's program and that the case should be remanded for further proceedings consistent with the correct standard, one that requires more than a *de minimis* benefit. Defendants rejoin that *Rowley's* announcement of a "some benefit" test precludes judicial inquiry into the substantive education conferred by the Act, so long as the handicapped child receives any benefit at all. Noting that Christopher's parents acknowledge that he derives some benefit from his education, defendants submit that the inquiry is over and that the district court's summary judgment must be affirmed.⁴⁵⁷

Here, the court had to consider the question of what the Act required under the word "appropriate" and could take no refuge in a heightened state mandate.⁴⁵⁸ In revisiting *Rowley* to flesh out the meaning of "appropriate" in Christopher's case, the court picked up linguistic strands from *Rowley* and produced an opinion that has provided guidance for subsequent cases. First, the court focused upon the word "meaningful" and quoted the *Rowley* decision as follows: "By passing the Act, Congress sought primarily to make public education available to handicapped children . . . Congress did not impose upon the states any greater substantive educational standard than would be necessary to

⁴⁵⁵ *Id.* at 172. Summary judgment was ordered for the defendants, who included the local school district and an intermediate administrative unit that covered a five county area for the supervision of special education programs.

⁴⁵⁶ *Id.* at 172.

⁴⁵⁷ *Id.* at 180-181.

⁴⁵⁸ See Education of the Handicapped Act, 20 U.S.C. § 1412(2)(c) (1982). Pennsylvania has never had any mandate more demanding than the federal mandate.

make such access *meaningful*.”⁴⁵⁹ Second, the court focused upon the fact that the Supreme Court had explicitly acknowledged that the Act requires services as necessary to assist a child *to benefit* from special education.⁴⁶⁰ Meaningful access means of necessity, not merely a chance to be physically present, but a chance to gain a meaningful benefit from schooling. Third, upon entry into a public school system a handicapped student is entitled to an *individualized* program.⁴⁶¹ Finally, the court called attention to the narrowness of the *Rowley* holding and the Supreme Court’s self-limiting language: “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.”⁴⁶²

With that perspective the court stated explicitly that the Act “calls for more than a trivial educational benefit.”⁴⁶³ On the contrary, “. . . *Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely”.⁴⁶⁴ Applying this understanding of a FAPE to Christopher’s case, the court reversed and remanded thus

⁴⁵⁹ *Polk*, 853 F.2d at 179 (emphasis added) (quoting *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982)). Later in the opinion, the court again came around to the idea that the education offered must be meaningful: “Implicit in the legislative history’s emphasis on self-sufficiency is the notion that states must provide some sort of meaningful education - more than mere access to the schoolhouse door.” *Polk*, 853 F.2d at 182.

⁴⁶⁰ The court stated:

It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no educational benefit from that education. The statutory definition of “free appropriate public education,” in addition to requiring that States provide each child with “specially designed instruction, “expressly requires the provision of “such. . .supportive services. . .as may be required to assist a handicapped child *to benefit* from special education.” s. 1401(17). We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized education and related services which are individually designed to provide educational benefit to the handicapped child.

Id. at 179 (quoting *Board of Education v. Rowley* 458 U.S. 176, 200-01(1982)).

⁴⁶¹ See *id.* at 179 (noting that a program must be designed to target the specific needs of the individual student and that courts must ensure a basic “floor of opportunity” under the Act).

⁴⁶² *Id.* at 180 (quoting *Board of Education v. Rowley* 458 U.S. 176, 202 (1982)) (emphasis added) (commenting on the narrow holding of the Supreme Court in *Rowley* and affirming that each circumstance must be determined on its own merits).

⁴⁶³ *Polk*, 853 F.2d at 180 (holding “that the EHA [EAHCA] calls for more than a trivial educational benefit. That holding rests on the Act and its legislative history as well as an interpretation of *Rowley*.”).

⁴⁶⁴ *Id.* at 183 (quoting *Bd. of Educ. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986)) (emphasis in the original).

opening the door to a possible fact finding that the federal mandate would require one-to-one physical therapy for Christopher.⁴⁶⁵ So the narrow question whether or not federal law required hands on physical therapy, as opposed to consultation, gave rise to an opinion that has invigorated the federal mandate.

2. M.E. and the Ridgewood Board of Education⁴⁶⁶

M.E. and his parents resided in New Jersey. As early as second grade, M.E.'s public school teachers noticed that his skills were below those of his classroom peers. However, throughout his elementary school years, for reasons not entirely clear, his school district resisted classifying him as learning disabled.⁴⁶⁷ Concerned about poor performance on standardized tests, M.E.'s parents asked to have him transferred to a different public elementary school (Ridge School) for third grade. The district agreed, and he went to Ridge School, but his troubles with schoolwork continued. An independent consultant hired by M.E.'s parents found that his intelligence was at the 95th percentile, but that his reading skills were at the 2nd percentile, and therefore concluded that he suffered from a learning disability.⁴⁶⁸ A child study team (CST) at the school recommended increased support and counseling but refused to recognize any disability that would have qualified M.E. for special education.

M.E. struggled on into seventh grade where he failed English and received incomplete marks in other classes. Understandably, his self-image suffered. His parents requested an evaluation by an independent CST to which the district agreed only after the parents filed for a due process hearing. An

⁴⁶⁵ See *id.* at 186-87 (applying the new and proper standard announced by the circuit court precludes summary judgment).

⁴⁶⁶ *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999).

⁴⁶⁷ *Id.* at 243 (having recognized M.E.'s learning disabilities and a great discrepancy between his abilities and performance in school Ridgewood encouraged M.E.'s parents to enroll him in their summer program, which they did, however, Ridgewood's Child Study Team still refused to classify M.E. as learning disabled because they believed he was not "perceptually impaired" under controlling state law).

⁴⁶⁸ See *id.* at 243 (stating the independent learning disabilities consultant concluded that the great discrepancy between M.E.'s intellectual abilities and academic performance was a result of being learning disabled).

independent team diagnosed M.E. with a learning disability in reading and writing and recommended that he be classified as perceptually impaired. The district's personnel agreed with the diagnosis and developed an IEP for M.E.'s eighth grade year (1995-1996) under which M.E. was placed in a regular classroom with supplementary aids.⁴⁶⁹ He made only minimal improvements. His parents regarded the IEP as a failure.⁴⁷⁰ The school's proffered IEP for M.E.'s ninth grade year provided resource room instruction for all of his required academic work coupled with regular classroom instruction for electives and physical education. Believing that this proposed IEP was inadequate, M.E.'s long-suffering parents demanded a due process hearing.

They specifically requested a private placement at Landmark School in Massachusetts at public expense,⁴⁷¹ and soon after, they started M.E. in summer school at Landmark. An ALJ took evidence during the summer. No decision having been rendered when his ninth grade year was about to begin, M.E. came back to the Ridgewood District. In November, the ALJ held for M.E. and his parents and determined, (i) that the district's proposed IEP 1996-1997 (ninth grade) did not provide a FAPE, (ii) that the

⁴⁶⁹ See *id.* at 244. The school district seems to have engaged in incredible foot-dragging as indicated in the court's summary:

Concerned that Ridgewood's CST had erred in failing to classify M.E. as perceptually impaired, M.E.'s parents asked Ridgewood to provide an evaluation by an independent child study team. After the parents filed for an administrative hearing, Ridgewood agreed to the request and contracted with Bergen Independent Child Study Teams for the evaluation. Ridgewood Director of Special Programs John Campion ordered Bergen not to recommend whether M.E. should be classified as perceptually impaired or how he should be educated. M.E.'s parents strongly disagreed with these limitations and asked the Parent Information Center of New Jersey to intervene. After the Parent Information Center determined that Bergen could make classification and placement recommendations, Bergen agreed to make these recommendations in the final team report it would provide to Ridgewood but not in the preliminary evaluation reports individual team members would prepare.

Bergen's team staffing report diagnosed M.E. with a learning disability in reading and writing and recommended that Ridgewood classify him as perceptually impaired. M.E.'s parents allege that Ridgewood intentionally withheld this report from them despite their repeated requests and that Ridgewood gave them the team staffing report only after the New Jersey Department of Education ordered it to so.

Id.

⁴⁷⁰ *Id.* at 244-45 (describing how M.E.'s parents objected to the IEP and contended that the IEP was inadequate as evidenced by the school placing M.E. on a pass-fail grading system to minimize the negative impact on his self-esteem).

⁴⁷¹ *Id.* at 245 (indicating that M.E.'s parents requested that Ridgewood pay for his attendance at Landmark's summer program).

Landmark School would provide a FAPE, (iii) that the district was liable for tuition for summer school at Landmark, and (iv) that the district would be liable for tuition at Landmark unless and until the district came up with an alternative appropriate placement.⁴⁷² M.E.'s household must have rejoiced.

The school district sued in federal court. The district judge reversed, finding that the proffered IEP provided "more than a trivial educational benefit" and therefore satisfied the federal mandate.⁴⁷³ M.E.'s parents took an appeal to the Third Circuit. After carefully reviewing the procedural history and the record showing the facts about M.E.'s frustrating school experiences, the court turned to fresh review of *Rowley* and earlier Third Circuit case law.⁴⁷⁴ In light of that review, the court stated:

[T]he District Court held that an IEP need only provide "more than a trivial educational benefit" in order to be appropriate, equating this minimal amount of benefit with a "meaningful educational benefit." But the standard set forth in *Polk* requires "significant learning" and "meaningful benefit." The provision of merely "more than a trivial educational benefit" does not meet these standards.

It appears also that the District Court may not have given adequate consideration to M.E.'s intellectual potential in arriving at its conclusion that Ridgewood's IEP was appropriate. Although its opinion discussed the IEP in considerable detail, it did not analyze the type and amount of learning of which M.E. is capable. As we have discussed, *Rowley* and *Polk* reject a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities.

⁴⁷² See *id.* at 245 (discussing the holdings of the Administrative Law Judge (ALJ) in favor of M.E. as well as the ALJ's refusal to order the district to pay non-tuition costs associated with M.E.'s enrollment at Landmark, or to order compensatory education).

⁴⁷³ See *id.* at 245-46 (stating the holdings of the district judge).

⁴⁷⁴ See *id.* at 247 (applying a plenary standard of review the court distinguishes the case law).

Therefore, we vacate the judgment of the District Court on this issue and remand for proceedings consistent with this opinion.⁴⁷⁵

To a parent of children with disabilities, these are words of great encouragement. A court that follows this analytical style must put the question about required educational services upon a sliding scale, the answer contingent upon evaluating each child's abilities. The IEP which provides an answer to the question, "what services are required?", must provide more than services slightly above *de minimis*. Tailored to a child's abilities, the IEP must aim for *significant learning, a truly meaningful educational benefit*. While these words and phrases do not reach the heights of some precatory state mandates, e.g. maximum possible development, the words from M.E.'s case make for a practical and flexible federal mandate with which reasonable parents and educators should be able to live peaceably and work constructively.⁴⁷⁶ The Third Circuit panel went on to decide more questions that naturally followed from a reversal in M.E.'s case, e.g. the appropriateness of the Landmark placement, the claim for compensatory education, the claim for costs and fees, and other matters.⁴⁷⁷ None of these matters need detain us as none delete from the court's decision about the meaning of a FAPE.

3. I.H. and the State-Operated School District of the City of Newark⁴⁷⁸

Because I.H. suffered severe to profound sensorineural hearing loss, she was identified at age two as a child entitled to special education. Finding nothing in-district that was appropriate, school officials placed her out-of-district when she was three at the Lake Drive School for Deaf and Hard of Hearing children in Newark. For the year following, beginning in September 1998,

⁴⁷⁵ *Id.* at 247-48.

⁴⁷⁶ Of course, the reference to the sliding scale related to a child's potential could be grounds for abuse were a child of low intellectual ability on that account deprived of a meaningful IEP. But, the language in this case should be read with an eye to the infinite variations of children with disabilities. A child of low intellectual potential should have services reasonably tailored to that persons needs and potential, not per se lesser services.

⁴⁷⁷ *See id.* at 248-54 (describing the ancillary holdings of the court).

⁴⁷⁸ *S.H. ex rel. I.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260 (3d Cir. 2003).

the Newark district developed an IEP placing I.H. at the Bruce Street School, an in-district school for the deaf located within the George Washington Carver School, the school I.H. would have attended, had she not been hearing impaired.⁴⁷⁹ I.H.'s mother protested. Following mediation, I.H. was allowed to remain at the Lake Drive School through the 1998-1999 school year. When it was time to prepare an IEP for I.H.'s kindergarten, the school district, once again, proposed an IEP placing I.H. at Bruce Street School with the justification that this was the least restrictive environment for an appropriate education. The argument seems plausible when one considers the district's contentions, namely: that Bruce Street School was near I.H.'s home and that she would naturally interact with non-handicapped children between classes, e.g. at lunch and recess. I.H.'s mother protested, and ultimately there was a due process hearing.

In an exceedingly careful analysis, the ALJ decided that the district had *not* carried its burden of establishing by a preponderance that its proposal would provide a FAPE.⁴⁸⁰ However, since the ALJ did not award her costs and fees for the administrative hearing, I.H.'s mother filed an action in federal district court. The school district belatedly counterclaimed, challenging the ALJ's decision on placement. The case was referred to a Magistrate Judge who took no further evidence, and summarily ruled for the school district holding, "It is entirely clear to me that a free and appropriate public education will be provided at Bruce Street while affording the least restrictive environment for I.H. . . ." ⁴⁸¹ I.H.'s mother appealed.

The Third Circuit was not favorably impressed with the breezy approach of the Magistrate Judge. The court in pertinent part declared:

⁴⁷⁹ See *id.* at 265-66 (listing I.H.'s progression within N.J. public school system and noting, "The Bruce Street School was available for I.H.'s initial placement in 1997, and the School District explains neither why it was not appropriate for the initial placement, nor what changed in the interim making it appropriate").

⁴⁸⁰ See *id.* at 267-68 (discussing the conclusions of the ALJ and placing the burden of showing that the placement is appropriate on the school district in accordance with the holding of *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1034-35 (3d Cir. 1993)).

⁴⁸¹ *I.H.*, 336 F.3d at 269 (quoting *S.H. v. State-Operated Sch. Dist. of Newark*, No.00-2559, Mag. R & R. at 18-19 (D. N.J. Mar 13, 2001)).

As the School District correctly points out, the issue is not a comparison between the Lake Drive School and the Bruce Street School. The IDEA does not require the School District to provide I.H. with the best possible education. However, the school district does not meet its burden by simply showing that an appropriate program may be available. Instead, the School District must show that the proposed IEP will provide I.H. with a meaningful educational benefit. This is an individual determination personal to I.H. The Lake Drive School and its program are only an issue as far as they relate to I.H.'s specific situation. Here, the school district initially placed I.H. in the Lake Drive School. Now, one factor of I.H.'s individual situation is her placement at Lake Drive. In other words, if a change in her placement will be detrimental, this is a factor in determining whether the new placement will achieve a meaningful educational benefit.⁴⁸²

After discussing the school district's argument about the least restrictive environment and with a focus upon I.H.'s particularized needs, the court summarized:

The School District's witnesses testified that Bruce Street employs the same philosophy of total communication, but did not contradict the ALJ's conclusions that there may be significant differences in the details of the language used. Coupled with the ALJ's finding that I.H. is at an important stage in her language acquisition, the record supports the ALJ's conclusion that differences in the program may be detrimental to I.H. . . . In light of his factual findings, the ALJ's conclusion that the School District did not prove by a preponderance of the evidence that the proposed IEP would convey a meaningful educational benefit is not in error.⁴⁸³

The result and the language may be partly attributable to the magistrate judge's casual approach, especially in comparison to the diligence of the ALJ. The allocation of the burden of proof, and the deference assigned to the ALJ's findings helped considerably also, but the underpinning of this case is the Third Circuit's insistence, citing to *Ridgewood* (M.E.'s case), that the IEP must be seriously individualized, focusing on the abilities of

⁴⁸² I.H., 336 F.3d at 271-72 (citation omitted).

⁴⁸³ I.H., 336 F.3d at 273.

the child and what will be appropriate to bring about a *meaningful educational benefit*. In the normal course this will mean demonstrable progress taking into account the disability and the child's capabilities. With the careful inquiry demanded by the Third Circuit, the FAPE mandate works to the advantage of disabled children, in my opinion, rendering resort to any state mandates unnecessary.

B. Beyond the Third Circuit: Positive and Negative Interpretations of Rowley

While the judges of the Third Circuit have blazed a trail that leads to a positive and meaningful application of the federal mandate, bright spots elsewhere should not be ignored. The Fourth Circuit's work cited in the cases arising from North Carolina and the Sixth Circuit's work in cases arising from Michigan have already been mentioned. Over the past twenty years, especially in hard cases, federal district and appellate judges working in these and other circuits have sometimes creatively used the federal mandate in the service of children with severe needs. An example is the First Circuit case that follows.

1. Daniel Hershman and the Sharon School Committee⁴⁸⁴

Daniel Hershman was severely retarded and needed help to learn basic skills in toileting, recognizing danger, and exercising expressive and receptive communication. In due course, his parents sought a residential placement. The Sharon School Board (Massachusetts) resisted. A BSEA hearing officer denied relief, partly because the services sought were not "educational". The State Advisory Commission agreed that a day school placement met the federal mandate.⁴⁸⁵ But, a federal district judge reversed and ordered a residential placement.

⁴⁸⁴ *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983).

⁴⁸⁵ *See id.* at 231. There is no indication in the case report that the Massachusetts mandate was argued as a basis for relief. However, in the last paragraph of its opinion, the First Circuit did make reference to the Massachusetts special education statutes noting, "The district court's decision is entirely consistent, moreover, with Massachusetts legislation authorizing residential placements for the handicapped." *Id.* (citation omitted).

The First Circuit sustained the district judge with this explanation:

[W]e think that the district court supportably construed Daniel's needs for a residential placement as "educational" within the meaning of the Act. And in so doing, we find no lack of due deference to the state, even though the BSEA held to a contrary opinion. The construction of a statutory term traditionally falls within the scope of judicial review.⁴⁸⁶

So, the results were favorable to the child without any resort to the then existing Massachusetts mandate.

2. Blaise Stockton and the Barbour County Board of Education⁴⁸⁷

In the context of my earlier discussion of the North Carolina mandate,⁴⁸⁸ I reviewed *Hall v. Vance County Board of Education*⁴⁸⁹ where the Fourth Circuit required that under the federal mandate an individualized program must produce more than a "minimal academic advancement."⁴⁹⁰ Many years later, *Hall* proved very helpful to parents in West Virginia struggling with the issues arising from their son's Tourette's Syndrome and serious behavioral disorders in the reported case of *Stockton v. Barbour County Board of Education*.⁴⁹¹ Due to the severity of his issues, Blaise's mother home-schooled her son through the sixth grade. Since Blaise's entry into seventh grade in a public school proved disastrous, his parents reverted to home schooling, but sought a residential placement at the school's expense. A due process hearing officer decided that the residential placement

⁴⁸⁶ *Id.* at 231.

⁴⁸⁷ *Stockton v. Barbour County Bd. of Educ.*, 1997 U.S. App. LEXIS 9877, at *1 (4th Cir. May 5, 1997) (holding school board required to bear cost of disabled student's private education, since public school did not have appropriate educational resources for student).

⁴⁸⁸ See Part VII, *supra*, for a study of cases arising from the North Carolina mandate.

⁴⁸⁹ 774 F.2d 629, 636 (4th Cir. 1985) (holding federal statute permitted parents of a handicapped child to recover for tuition reimbursement costs when transferring child from public to private school).

⁴⁹⁰ *Id.* at 636.

⁴⁹¹ 1997 U.S. App. LEXIS 9877, at *2. The court's summation of the facts shows a very serious set of disorders. The court stated: "Karl Blaise Stockton suffers from a number of disabilities including Tourette's syndrome (a neurological disorder), obsessive-compulsive disorder, and attention deficit hyperactivity disorder. He has specific learning disabilities related to spelling and mathematics. Blaise also becomes easily depressed, to the point of being suicidal." *Id.*

would be unnecessary, provided the public school furnished appropriate therapy and instructors. Somehow, the school could not create a program that met Blaise's needs, or so his parents felt.⁴⁹² Yet, a second hearing officer found that a residential program was unnecessary. Frustrated, his parents enrolled him in a private school where he began to perform very well.

When the family's money ran out, Blaise's mother filed suit in federal court to maintain her son's private placement at the public school's expense. A federal district judge issued a preliminary injunction whereby the school district was required to pay for the private placement pending a final resolution.⁴⁹³ The Fourth Circuit affirmed and in so doing employed language lifting the meaning of FAPE above the minimalist interpretation.⁴⁹⁴ When the need was severe, the court found flexibility in the FAPE mandate to meet the need.

3. Drew P. and the Clarke County School District⁴⁹⁵

The Eleventh Circuit responded to severe needs in the case of Drew P., an autistic and severely mentally retarded young man who resided with his parents in Georgia.⁴⁹⁶ When Drew was three, a diagnostician at Emory University recommended a residential placement. Indeed, from an early age, Drew was in residential placements, but except for one year, he never received help from anyone with experience in working with autistic

⁴⁹² *Id.* at 2-5. A reasonably careful reading of the Fourth Circuit's opinion leaves the impression that school officials were either confused or very apathetic about the school's obligations to Blaise. Consultants necessary for his program were not even contacted by the time their services were required. Multiple IEP meetings were unfruitful.

⁴⁹³ *Id.* at 1, 5. The parents and school must have reached a settlement after the Fourth Circuit decision because nothing appears in the subsequent case reports showing further litigation.

⁴⁹⁴ The court stated:

The record here supports the district court's conclusion that Pathway [private school] was an appropriate placement while the public school was not. A "free appropriate public education" is one "sufficient to confer some educational benefit upon the handicapped child," but it must produce more than "some minimal academic advancement." Furthermore, an IEP must be "reasonably calculated to enable the child to receive educational benefits." Blaise's public school education and the August 1994 IEP fell discernibly short of the *Rowley* standards.

Id. at 9-10 (citations omitted).

⁴⁹⁵ *Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 931 (11th Cir. 1999) (holding federal statute required school district to provide autistic child with education and placement at residential facility).

⁴⁹⁶ *See id.* at 928-29 (providing background facts).

children.⁴⁹⁷ When his behaviors at home became unacceptably aggressive, his parents placed him in a residence for the severely mentally retarded because the state did not have residential facilities for the autistic. Yet, his school district refused to reimburse Drew's parents for the residence's expense.

Drew's parents demanded a due process hearing. The hearing officer and a state reviewing officer denied reimbursement finding a residential placement was unnecessary. Meanwhile, Drew's parents placed him in Tokyo, Japan, at the Hagashi School designed for autistic children, where he resided for two years, until he was transferred to a newly opened sister school near Boston. Drew's parents went to federal court and sought, *inter alia*, reimbursement for tuition and fees paid to the schools in Tokyo and Boston. Although the judge was a little troubled about the 8000 mile trip to the first residential placement, since Georgia offered nothing comparable, he ordered appropriate reimbursement. Rejecting a minimalist reading of *Rowley*, the Fourth Circuit affirmed and referred to the federal requirement of "personalized instruction" and "meaningful educational progress."⁴⁹⁸

By positive comment on this case, I do not mean to imply that courts ought be expected routinely to approve placements in East Asia; rather, I mean that the Fourth Circuit's approach was in these limited circumstances appropriate and that it struck a hard blow against an overly pragmatic and minimalist reading of *Rowley*.

4. Rosalind Fox and the County of San Diego⁴⁹⁹

More recently, decisions from the Ninth Circuit illustrate a judicial willingness to invigorate the federal mandate, as in the

⁴⁹⁷ See *id.* (pointing out that Drew received training from an individual with experience in working with autistic children in just one year).

⁴⁹⁸ *Id.* at 930-31. For these requirements, the court cited to its prior decision in *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1998), *reh'g denied* 864 F.2d 795 (11th Cir. 1988), and stressed that the school must provide a *setting* in which the child can receive an educational benefit.

⁴⁹⁹ *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458 (9th Cir. 1996). Rosalind Fox appears in the insufferably long and complex caption as counter-defendant/appellee.

case of Rosalind Fox.⁵⁰⁰ Rosalind suffered severe emotional problems that were intertwined with school difficulties. A psychiatrist diagnosed her as having intermittent explosion disorder and dysthymia, defined as a "morbid anxiety and depression accompanied by obsession."⁵⁰¹ During eighth grade, her emotional issues led to hospitalization in a psychiatric unit. In her high school years, her life took a terrible downturn as evidenced by her IEP goals which included: "decreased inappropriate behavior such as lying, stealing, and truancy; improved self-concept and social self-esteem; and increased ability to handle academic work."⁵⁰²

Rosalind's behavior ran afoul of these goals when she physically abused her mother, damaged the family home, avoided school, lied, sometimes stole, and finally was arrested for shoplifting.⁵⁰³ Eventually, her mother acted unilaterally and made a residential placement and sought reimbursement.⁵⁰⁴ When mediation failed, Rosalind's mother filed for a due process hearing. The hearing officer agreed with her, and decided that Rosalind "required residential placement for educational purposes."⁵⁰⁵ The school district (San Diego County) brought an action in federal court against the California Special Education Hearing Office, which raised the issue of whether or not the residential placement was properly ordered.⁵⁰⁶

⁵⁰⁰ See *id.* at 1468 (holding county does not have right to challenge child's emotionally disturbed classification or residential treatment status where county financially obligated to pay for child's expenses).

⁵⁰¹ The court stated:

In January 1990, at the beginning of the second semester of Rosalind's eighth grade year, her mother, Paula Tanner, hospitalized Rosalind in the psychiatric unit of Mesa Vista Hospital for violent outbursts related to preparing a school science report. Rosalind's frustration with the assignment led her physically to abuse her mother and to break windows in the family's home.

Id. at 1462.

⁵⁰² *Id.* at 1463.

⁵⁰³ See *id.* at 1463 (discussing Rosalind's behavior, including instances when she was arrested for shoplifting, threw tantrums, broke windows, made threats to damage the home, and physically assaulted her mother and younger sister).

⁵⁰⁴ See *id.* (noting that Rosalind's mother successively placed her into two residential centers, the first for a month and the second for about six months, from September 20, 1991, to June 10, 1992).

⁵⁰⁵ *Id.* at 1464 (stating that the hearing officer's decision agreed with Rosalind's mother's opinion and suggested residential placement for educational purposes).

⁵⁰⁶ See *id.* (noting that an action was filed by the County of San Diego challenging Rosalind's classification, which the hearing officer had rebuffed).

The district judge sustained the hearing officer. The County appealed. One of the County's strong arguments was that the residential placement ran against the least-restrictive-alternative requirement of federal law. The strength of the Ninth Circuit's opinion lies mainly in its careful disposition of that argument in light of its own precedent. The court stated:

The hearing officer's decision also addresses the question of financial responsibility when both educational and non-educational issues compel residential placement. When confronted with the necessity of residential placement where the need involves a mixture of educational and non-educational concerns, the courts have struggled to develop tests to determine when the special education system is responsible for the costs of the placement. In *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990), this circuit identified three possible tests for determining when to impose responsibility for residential placements on the special education system: (1) where the placement is "supportive" of the pupil's education; (2) where medical, social, or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education. The hearing officer applied all three tests to the present case and found that Rosalind's placement at the residential facility satisfied all three.⁵⁰⁷

Rosalind's mother won her reimbursement claim and the case was remanded for a hearing on her award of attorney's fees. So often in earlier cases the least-restrictive-alternative requirement defeated pleas for residential placements, even under heightened state mandates. In Rosalind's case, however, when the need was severe, the Ninth Circuit adroitly overrode that requirement in favor of an educational setting suitable for her particularized needs illustrating that children with disabilities are not in dire need of state mandates (which can help); but far more, they are in need of strong advocacy and perceptive judges who can parse the statutes and discern what is required to build a meaningful program for the unique needs to

⁵⁰⁷ *Id.* at 1468.

each child. Other Ninth Circuit case law has put strength into the federal mandate in other settings.⁵⁰⁸ Moreover, strong Third Circuit case law discussed earlier, especially *Ridgewood*, is being favorably cited within that circuit and beyond.⁵⁰⁹

Some courts have regrettably reiterated a very minimalist view of *Rowley*, dealing with the federal mandate mechanically.⁵¹⁰ The federal circuits are uneven in their approach to the meaning of a FAPE. However, in light of the Third Circuit cases and bright spots elsewhere, there is a possibility of a continuing positive evolution of the law under the federal mandate, given strong advocacy and application of the best of the precedent. A positive evolution of the meaning of FAPE in Massachusetts is a real possibility, as the next case illustrates.

C. Massachusetts Under the FAPE Mandate: A Close-Up Assessment

I concluded Part III. E. with a discussion of the Massachusetts legislature's rejection of the heightened state mandate and the

⁵⁰⁸ See *Amanda J. v. Clarke County Sch. Dist.*, 267 F.3d 877, 895 (9th Cir. 2001) (deciding that when a school district failed to disclose records showing that a child was autistic, the school egregiously failed on its procedural obligations under the Act, as the court held, "because... this failure in and of itself denied Amanda a FAPE, we do not address the question of whether the proposed IEPs were reasonably calculated to enable Amanda to receive educational benefits").

⁵⁰⁹ See *G., ex rel SSGT v. Fort Bragg Indep. Schs.*, 343 F.3d 295, 298 (4th Cir. 2003) (stating that the court remanded for more intensive fact-finding in light of the federal FAPE mandate as authority of awards for compensatory education); see also *Molly L. v. Lower Merion Sch. Dist.*, 194 F. Supp.2d 422, 426-30 (E.D. Pa. 2002) (citing *Ridgewood* as authoritative even though the result went against the child and parents); *Gregory R. v. Penn Delco Sch. Dist.*, 262 F. Supp. 2d 488, 492 (E.D. Pa. 2003) (noting that *Ridgewood* is authoritative on compensatory education law).

⁵¹⁰ See, e.g., *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292-93 (11th Cir. 2001). *Devine* held for the school board in a case involving an autistic child, overturning a due process hearing officer's determination that the school had not provided a FAPE and that a residential placement was required. *Id.* The Eleventh Circuit on appeal affirmed. The tone of the opinion is very disappointing. The parents' main argument was that the IEP did not help their son to generalize across environments, a problem that is severe with many autistic children. The court concluded, "If 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, they are not required by [IDEA] or *Rowley*," (quoting *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991)). The opinion seems to poke fun at the parental claim that respite care would help in their son's education, an unnecessary cheap shot at the parents. See also *supra* notes 301, 306-10 and accompanying text. The majority in *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607 (8th Cir. 1997), joined in a disappointing result and opinion, though the dissent was strong.

substitution of the FAPE standard, a change effective on January 1, 2002. Here I will briefly explore the implementation of that modified state mandate by examining a decision issued by BSEA hearing officer William Crane after a hearing involving a learning disabled girl and the Arlington, Massachusetts, School District. The hearing officer took great care to articulate the meaning of the modified mandate, making the decision worthy of serious consideration.⁵¹¹ Throughout the decision,⁵¹² the girl with the learning disability was referred to simply as “Student” and her mom was referred to simply as “Mother”. I will designate the parties accordingly.

In his profile of the Student, the hearing officer stated: “She is a nine year old, ‘adorable’ and well-adjusted child who has attended the third grade at Arlington’s Hardy School during this past year (2001 - 02). She has a learning disability with deficits in expressive and written language. Her cognitive skills are in the average to low-average range.” He also quoted from a multi-disciplinary evaluation done by Franciscan Children’s Hospital and Rehabilitation Center in Boston: “The evaluation report indicated weaknesses on tasks of verbal reasoning in which increased levels of verbal expression were required, she had difficulty with sequencing and attention to visual detail. . .”⁵¹³

The Arlington District proposed placing Student in a specialized, self-contained classroom in the Dallin Elementary School for her fourth grade year where she would have daily, specialized, multi-sensory services for reading and math. The Student’s Mother pressed for her daughter to repeat third grade, mainstreamed in a regular classroom at Bishop School in Arlington, with limited special services. The Mother’s lawyer argued the case with heavy stress upon the LRE requirement.⁵¹⁴

With an exceedingly careful consideration of the evidence and the law, the hearing officer approved the school’s proposed

⁵¹¹ See *In re Arlington Pub. Schs.*, BSEA #02-1327, 8 MASS. SPECIAL EDUCATION REP. 187 (2002). No judicial action followed this administrative decision.

⁵¹² See *generally id.* The hearing officer wrote a multi-page opinion styled merely a “Decision” so when I refer to the “Decision” in the text the document referred to is akin to a judicial opinion rather than a mere disposition by an order.

⁵¹³ *Id.* at 6.

⁵¹⁴ See *id.* Bishop School was the school closest to home. The argument is reminiscent of that made on behalf of Emma McLaughlin against the Holt Public Schools in Michigan. See also *supra* notes 282-85 and accompanying text.

placement, denying Mother the mainstreaming she sought. The hearing officer justified this decision by reliance upon the substantive requirements for a FAPE. For the purposes of this article, the meaning of the newly adopted state FAPE mandate is of chief importance. The hearing officer introduced his explication of the meaning of the modified mandate as follows:

The Massachusetts legislature recently changed the standard relevant to what special education and related services must be provided to children with disabilities. I have not previously issued a decision governed by the new standard. Therefore, I take this opportunity to identify several principles within the new Massachusetts standard, prior to applying those principles to the dispute in the case before me. . . .

The state and federal statutes defining FAPE provide a useful starting point. Massachusetts law defines FAPE as follows: "Free appropriate public education" - special education and related services as consistent with the provisions set forth in 20 U.S.C. §1400 et. seq. [the IDEA], its accompanying regulations, and which meet the education standards established by statute or established by regulations promulgated by the board of education. . . .

To summarize several of these principles, a free appropriate public education (FAPE) means special education and related services (i) tailored to meet a student's unique needs and (ii) reasonably calculated to permit the student to make meaningful educational progress in the least restrictive environment. . . .As explained above, meaningful educational progress includes "effective results" and "demonstrable improvement", and is evaluated in the context of the student's educational potential.⁵¹⁵

It is immediately self-evident, that after the abolition of the heightened state mandate, providing a FAPE meant more than providing *some educational benefit*, a minimalist reading of *Rowley*. For the requirements listed in the quotation, "meaningful educational progress", "effective results", and "demonstrable improvement", the hearing officer turned to two

⁵¹⁵ *Id.* at 8-10.

sources, namely, a state DOE advisory and federal case law. Reading the cited DOE advisory, I marvel at the manner in which the educational establishment dealt with the change, for example, in the following language:

The FAPE standard has been part of the federal special education law since 1975, and it is well-established in education practice and case law. In amending the Massachusetts special education law to align it with the federal standard, the Massachusetts legislature indicated its intent was to ensure that our public education system provides high standards for *all* students, including students with disabilities. The Education Reform Act underscores the Commonwealth's commitment to assist all students to reach their full educational potential. Improving educational outcomes for students with disabilities is a goal of the state and federal special education laws, and improving educational outcomes for all students, including students with disabilities, is central to education reform.⁵¹⁶

The advisory went on to stress that the "central principles and requirements of state and federal education law in Massachusetts will be unaffected by the change to the FAPE standard in January 2002."⁵¹⁷ There appears to have been a strong effort within the DOE to minimize the impact of the legislative change.⁵¹⁸

⁵¹⁶ See Massachusetts Department of Education, *Administrative Advisory SPED 2002-1*, 4 (providing guidance on the change in special education standard of service from "maximum possible development" to "free appropriate public education" ("FAPE")), at www.doe.mass.edu/sped (last visited Feb. 28, 2003).

⁵¹⁷ *Id.* at 2. See *In re Arlington Pub. Schs.*, BSEA #02-1327, 8 MASS. SPECIAL EDUCATION REP. at 3-4, where the hearing officer stated:

Both the state and federal definitions of FAPE... refer to special education and related services that meet state education standards. The state standards include not only the requirements of the Special Education Regulations (603 CMR 28.00) but also the learning standards that Massachusetts has established through the state curriculum frameworks. All students in the Commonwealth's public education system, including students with disabilities, are entitled to the opportunity to learn the material that is covered by the academic standards in the Massachusetts curriculum frameworks. . . .

State and federal law continue to require school districts to focus on the unique needs and strengths of the individual student through the Team evaluation and IEP process. The change to the FAPE standard maintains that focus. State and federal law have required, and will continue to require, the school to provide a program that will benefit the student educationally.

⁵¹⁸ *Cf. supra* notes 386-87 and accompanying text. While the N.J. DOE successfully lowered the state mandate, the MA DOE has sought to raise FAPE above a *de minimis* level.

Along with reference to the DOE advisory, the hearing officer relied upon federal case law stating, "The lower federal Courts have further articulated their understanding of what minimal benefit or progress is acceptable, typically concluding that FAPE requires the opportunity for meaningful educational benefit or meaningful educational progress."⁵¹⁹ For the expressions "effective results" and "demonstrable improvement," the hearing officer turned to the First Circuit Court of Appeals case of *Lenn v. Portland Schools*.⁵²⁰ By blending the state DOE's advisory with the best of federal case law, the hearing officer developed a respectable mid-level meaning for the state FAPE mandate thereby making it a workable standard.

Recent case law indicates that the BSEA hearing officers are continuing to put teeth into the FAPE mandate as it pertains to school districts in Massachusetts.⁵²¹ There is some cause for alarm about implementation of the mandate on the local level, based upon recent commentary. A practicing lawyer from Boston, Robert K. Crabtree, recently wrote:

Some school systems have flouted special-education students' clear entitlements under IDEA, cynically viewing special education as an area in which to cut funds and services. In

⁵¹⁹ *In re Arlington Pub. Schs.*, BSEA #02-1327, 8 MASS. SPECIAL EDUCATION REP. at n. 16 (citing *Weixel v. Bd. of Educ. of City of N.Y.*, 287 F.3d 138 (2d Cir. 2002)).

⁵²⁰ 988 F.2d 1083 (1st Cir. 1993) ("benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential").

⁵²¹ See *Boston Public Schools*, BSEA # 03-0340, 9 MASS. SPECIAL EDUCATION REP. 324 (2003) (wherein the hearing officer found that the Boston Public Schools had failed to provide a FAPE and ordered that referral forms be sent to potentially appropriate out of district placements); *Concord-Carlisle Regional School District*, BSEA #02-3458, 9 MASS. SPECIAL EDUCATION REP. 364 (2003) (wherein the hearing officer ordered reimbursement for a residential placement because the district's proposed placement at the regional public high school failed to address the young woman's disability which generated a need for a small-class setting with similarly intelligent students). The hearing officer's language in the latter case is especially instructive because two academic years were involved: one before the legislative change (2001-2002) and one after the legislative change (2002-2003). Regarding the change the hearing officer, Sandra Sherwood, stated:

Thus, although C-C's 2001-2002 IEP must be reasonably calculated to maximize Melanie's educational development, its 2002-2003 IEP and Eagle Hill's program must be reasonable calculated to enable Melanie to achieve educational benefits. It must provide for significant learning and confer meaningful benefit through personalized instruction with sufficient support services. Some of C-C's concerns may be justified, however, in weighing the benefits with such concerns, the benefits are clear. This is a setting in which Melanie has an excellent opportunity to further her learning and strengthen her social/emotional skills. As such, it provides her with an appropriate educational program, and the parents should be reimbursed for their out-of-pocket expenses. *Id.* at 378 (citations omitted).

that direction some districts have used the change in legal standard from “maximum possible development” to FAPE as an excuse to cut back, despite the fact that the standard, as it is interpreted by courts and hearing officers, really hasn’t changed all that much. . . . We take heart that, in those cases they do decide, Hearing Officers are insisting on evidence of a student’s meaningful and effective progress in their application of FAPE. Their commitment to a FAPE with teeth is evident in the analyses and good results of several of the decisions issued this quarter.⁵²²

I read this as confirmation that the change of mandate is not inherently problematic. Rather, lack of good faith in developing IEPs to provide a FAPE raises its head when a district is severely squeezed for funds. Our daughters did not suffer any negative impact from the legislative change to FAPE. In developing IEPs subsequent to the change, there has been no attempt whatsoever by our district to reduce services or provide lesser educational opportunities for our daughters than they formerly received. From my perspective, the FAPE language is acceptable when school personnel, the state DOE, and BSEA hearing officers seek in good faith to meet the FAPE mandate in a manner tailored to each child’s unique needs. There can be no substitutes for good faith and adequate resources.

IX. WHERE SHOULD THE BATTLES BE JOINED?

If a person reflects upon the case law discussed in the foregoing parts of this article, several conclusions follow in the natural course. These conclusions are strengthened by considering the Massachusetts experience following the legislative reduction of the state mandate.

A. *Guarding Political Capital: Fighting for Heightened State Mandates Would be an Improvident Course of Action*

Of the five states surveyed earlier in this article, the heightened state mandates survived in only two, Michigan and

⁵²² Robert K. Crabtree, Commentary, 9 MASS. SPECIAL EDUCATION REP. C-11 (2003). Mr. Crabtree is a partner in the firm of Kotin, Crabtree & Strong, LLP concentrating in special education law.

North Carolina. I would not suggest to anyone in those states that they should modify their mandates. While those mandates may not have achieved all that advocates for children with disabilities have sought, nor what critics occasionally suggest, the mandates are positive statements of public policy that can only help (and in no way harm) children with disabilities. On the other hand, in Massachusetts, Missouri, and New Jersey, events indicate a public opinion and legislative consensus against heightened mandates; hence, it would be improvident to expend energies to attempt re-enactments. Such efforts would almost certainly fail. In our current fiscal climate, with horrific stress on state and local budgets, attempting to enact heightened mandates in other states (which have not had heightened mandates) would be quixotic, at best. In any event, in Michigan and North Carolina, where the heightened mandates remain intact, the state and federal courts have resorted to multiple interpretive devices that lessen the fiscal impact of those mandates.

B. Preserving the FAPE Mandate is Imperative

As parents or advocates for children with special needs, we should monitor and be vigilant about Congressional re-authorizations of the IDEA.⁵²³ If tampering or tweaking is suggested with regard to FAPE, it must be toward moving the meaning of the federal mandate above a *de minimis* reading of *Rowley*, never to lower the mandate to mere access. Moreover, we should be vigilant and resist any legislative or administrative movements toward pushing any category of children beyond FAPE whether for disciplinary or medical reasons.⁵²⁴ Wittingly or unwittingly, legislators might yield to pleas that would result in special education legislation aimed at serving “ideal” special education students, ignoring the self-evident fact that children on the fringes need the mandate most. Above all, we should resist

⁵²³ See generally Gregg, Kennedy Introduce Bipartisan Special Education Legislation, News Release Judd Gregg (June 2003) (noting the creation of legislation to reauthorize the IDEA) at <http://gregg.senate.gov/press/press061203.pdf>.

⁵²⁴ See Alan G. Osborne, *Special Issue: Education Law And Policy: Discipline Of Special-Education Students Under The Individuals With Disabilities Education Act*, 29 FORDHAM URB. L.J. 513, 536 (2001) (expressing concern regarding the disciplinary process and loss of educational opportunity under “FAPE”).

to the utmost any and all attempts to repeal the FAPE mandate or to under-fund it to the point of extinction. Let me stress with all the personal conviction that I can bring to bear upon this matter: the continuation and meaningful development of the FAPE mandate is, and will be, vitally important to millions of American children with disabilities. We must not lose the federal mandate!

C. Funding for Special Education: A Modest Proposal

The energies of legislators favorable to the cause of educating children with disabilities should be directed toward increased and equitable funding for special education and related services. Anybody involved on the local level soon realizes that placement fights are mainly about money. Special education directors are not stingy people; they are often squeezed unmercifully between limited funds and children's needs that know no bounds. For school board or school committee members, choices can be agonizing: Which programs for so-called regular education must be trimmed or cut in order to meet the state and federal mandates on special education? In one fashion or another, funding for special education is pitted against funding for all other education, and children with disabilities are made the scapegoats for under-funding the whole educational enterprise. Unless we are of a mind to try lotteries or other gaming, which are notoriously regressive, there must be funding from property taxes, sales taxes, or income taxes or some combination thereof.

Let me in this context suggest a linkage of sorts, which I have not seen explored in any writings, namely, income tax surcharges that link the most fortunate, and the *most challenged* in the lottery of life. Either on the state or federal level (or both) why not consider seriously a surcharge, for example, on personal incomes in excess of \$200,000. Genetic good fortune and an ability for maneuvering around life's most treacherous shoals are not disconnected from life's highest material rewards. To be sure, self-discipline from youth upward and great prudence and self-sacrifice in private affairs play substantial roles in attaining monetary success. Yet, it is an inescapable fact that *generally* the *most gifted* can rise higher on the economic ladder than the

most challenged. Many of the most challenged will never have any idea that there is an economic ladder, which others can climb and they cannot.

I suggest, therefore, that tax-generated trust funds from surcharges at the top should be pooled to enhance the chances of the persons at the bottom by funding experimentation and enhancements in special education. Special education mandates should be funded in a way that reduces competition for funds on the local level and removes critical funding choices a little distance from year-to-year demands upon school administrators and even legislators. In effect, the strongest should be given a responsibility for, and a stake in educating, the most vulnerable for life's battles. Figuring out reasonable and equitable funding plans on the state and federal levels is a legislative task that can occupy the best of minds for a generation or more. Let us hope that our generation proves worthy of the task.⁵²⁵

D. The Need for Advocacy in IEP Development and Due Process Hearings

The genius of IDEA and its predecessor lies in part in the provisions for parents and guardians to be involved in developing an IEP. This piece of the law has made parents and guardians and educators partners in ways that were certainly not the norm before the Act. Hundreds of thousands of parents and guardians - perhaps millions - annually work with educators and as necessary advocate for their disabled children's needs. Many parents and guardians are able and zealous advocates. Yet, given the tremendous variance in economic circumstances, linguistic competence, and self-confidence in speaking to school officials, it is incontrovertible that some disabled children are disadvantaged for want of advocacy in the development of IEPs. The need is

⁵²⁵ See Weber, *supra* note 100, at 952-55. Professor Mark Weber has argued very credibly and persuasively for specific legal changes designed to shift the costs of disabilities to society to a degree that is not done today. His specific proposals include job set-asides, wage subsidies, universal health insurance, and subsidies for accommodations. While these proposals are far beyond the scope of this article, his theoretical underpinnings for such proposals coincide with my views of the justifications for funding special education. See also Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation*, 14 STANFORD L. & POL'Y REV. 241 (2003); Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 MD. L. REV. 162 (2004).

more acute when children are in the custody of state social service agencies. Parents' organizations and organizations established to advocate for the disabled have sought to bridge the gap by providing training.

At this point I believe that the state and local bar associations and the law schools can do more. Neither clinical programs nor internship programs at law schools routinely reach into the area of advocacy for appropriate IEPs for disabled and otherwise disadvantaged children.⁵²⁶ Bar associations often have admirable programs that reach to the indigent, but advocacy for IEPs seems to have slipped by most peoples' attention. The task can be gritty and tedious, but consistent grass roots advocacy for the most disadvantaged children with disabilities in the IEP development process could achieve more than multiple linguistic refinements of state mandates. The possibilities present a special challenge to law schools and the practicing bar. The same need exists for advocacy in due process hearings despite an increasing supply of able lawyers practicing "school law".

E. States Should Continue to Develop Professional and Independent Hearing Officers

The IDEA's requirement that participating states create administrative review tribunals coupled with the exhaustion requirements of state and federal law mean that the trial courts, state and federal, do not see special education cases until they have been processed through administrative law channels. Indeed, state and federal trial judges reviewing cases under the Act have the discretion to take evidence beyond the administrative law record, and as noted in this article, sometimes do so. But, in the main, the records that get into court are developed at the administrative law level, and decisions at that level are entitled to due weight.⁵²⁷ It follows that the expertise and independence of men and women serving as hearing officers or Administrative Law Judges on special

⁵²⁶ See generally April Land, *Dead to Rights: A Father's Struggle to Secure Mental Health Services for His Son*, 10 GEO. J. ON POVERTY L. & POL'Y 279, 283-93 (2003) (discussing challenges of preparing disabled for employment).

⁵²⁷ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982) (establishing strict standard of statutory implications for disabled).

education cases is of prime importance. In this context, the question arises whether specialization is important. That is, should persons hearing special education cases hear other types of cases routinely? Or should panels be chosen from the bar and from educators much as arbitration panels are chosen in construction cases? The cases discussed in Parts III through VIII illustrate a considerable variation from state to state.

Given the intricacies of the state and federal laws, and the desirability of consistency and avoidance of delay, the case for specialization is strong. Specialization will breed independence and confidence as hearing officers or administrative law judges build up a knowledge of statutes, regulations and case law. This may not favor parents and children in every case, but on the whole, deep expertise should prove beneficial and comforting to parents *and* to school districts. Thus, the state legislators who might never dream of voting for a heightened mandate should in good conscience be able to support legislation that undergirds a strong and independent corps of specialists to make the critical decisions about IEPs and placements when schools and parents cannot work things out. This is an area worthy of investigation and possibly changes in some states, and consequently an area where the energies of politically-minded parents and guardians might be invested.

F. Law Schools Can Make a Difference: Training Lawyers for the Task

In countless close cases, *strong advocacy* before a hearing officer or judge can make all the difference. Advocacy has assuredly been a key factor in the development of federal case law fleshing out the meaning of FAPE in many factual variations. Lawyers can, and do, develop knowledge and skills on their own or in continuing legal education programs. However, in the belief that law school courses can make some difference in molding lawyers, especially by instilling attitudes toward areas of the law, I make my plea for law school courses and clinics on special education law. Law schools can enter the area of special education law with more power and vision than

has traditionally been the case.⁵²⁸ Courses and clinics for environmental law and health care law are generally more numerous than those pertaining to education law. Yet, law bearing directly upon education grows more abundant and complex by the day. The interpretation, implementation, and improvement of this law are of great importance to millions of children and their parents, as well as to taxpayers. "Education and the Law" should become a generally available elective in all law school curricula.

G. A Matter of Major Importance: Meaningful Development of the FAPE Mandate in Federal Courts

This sub-part is not intended to disparage any state tribunals. Yet, the case reports show that a huge burden in developing the federal mandate is being carried by the federal judiciary. The results in the several circuits are uneven with some circuits allowing a minimalist interpretation of *Rowley*. Given the necessity of individualizing educational programs to meet the unique needs of millions of children with disabilities, there will be great variations from case to case. However, tone, depth of inquiry, and analytical style in construing the federal mandate for every child is important, and in my view there is an unjustifiable unevenness among the circuits. As I sought to show in Part VIII, the Third Circuit has in several cases outrun others in creatively applying FAPE to serve the children with disabilities. If any federal judge (or a hard working law clerk) finds this article, and pays any heed, my labors will be worthwhile if the Third Circuit cases requiring that a school

⁵²⁸ See e.g., Franklin Pierce Law Center, at <http://www.piercelaw.edu/profs/REDFIELD.htm> (last modified Jan. 1, 2003). This website describes the career of Professor Sarah Redfield, to whom I want to pay my respects. Professor Redfield has labored over a decade to develop a very comprehensive program in Education Law at Franklin Pierce Law Center in Concord, New Hampshire. She has helped me considerably in suggesting materials for starting a course in Education and the Law at New England School. Some courses offered at Franklin Pierce are open to educator-students not pursuing law degrees as well as students pursuing advanced degrees in law. The idea of bringing together school administrators and practicing lawyers in the classroom strikes me as a very valuable enterprise. I am also grateful that the administration at New England School of Law has approved a course in Special Education Law for the 2004 - 2005 academic year as a supplement to my seminar which only provides a survey of a general nature.

provide a meaningful educational benefit are taken seriously where a *de minimis* view has previously held sway.

As a practical matter, the question is whether the federal mandate will be applied mechanically with little regard to what really goes on in school or whether the federal mandate will have teeth that makes it an instrument for the real development of children with disabilities. Phrased another way: Will the federal mandate be implemented to raise expectations and school performance beyond the requirement of "some benefit"? In the years since *Rowley* was decided, there have been developments in state and federal law to which federal judges should look for means of enhancing the meaning of the mandate. On this subject, a recent law review article authored by Scott Johnson Esq., a practicing attorney from Concord, New Hampshire, published in the Brigham Young University Education and Law Journal, is of great value.⁵²⁹ Mr. Johnson argues persuasively that three post-*Rowley* legal developments have greatly changed the legal landscape, namely: (i) developments in state Constitutional law, (ii) the development of content and proficiency standards at the state and national level, and (iii) 1997 amendments to IDEA.⁵³⁰ It will be recalled that the federal definition of a FAPE in part "means special education and related services that . . . meet the standards of the state educational agency."⁵³¹ When a state court determines that a state's constitution requires furnishing an educational opportunity above *de minimis*, that state's raised requirement flows into the federal definition of a FAPE. Likewise, when a state DOE promulgates content and proficiency standards, these will generally will flow into the FAPE definition.⁵³² Finally, as Scott Johnson has stated with reference to the 1997 Amendments

⁵²⁹ See Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 561-85 (2003) (examining the current implications of Supreme Court decision in *Rowley*).

⁵³⁰ See *id.* at 561-84 (discussing evolution in law since *Rowley* decision).

⁵³¹ Education of Individuals With Disabilities, 20 U.S.C. § 1401(8) (2003).

⁵³² See Johnson, *supra* note 529, at 561-87. This section discusses the application of standards and procedures. Moreover, this can be tricky, as we have found with Josephine and Ingrid whose limitations have prevented them from ever doing grade level work or following the prescribed curricula for different grades. Nonetheless, the state created contents and achievement criteria may in many cases be applicable to children being educated under IEPs.

to IDEA, "The statute now explicitly mandates that states establish performance goals for children with disabilities that are consistent with other goals and standards set for all children. The IDEA now requires states to establish performance indicators that assess progress toward achieving these goals."⁵³³ Therefore, judges charged with construing the FAPE mandate must look through the definition into pertinent state law and should likewise blend the definition with subsequent requirements of federal law. In this way the fullness of the meaning of the mandate will be brought to bear upon individual cases. To the extent that the FAPE mandate is construed in state courts, the same pathway ought be followed.

The funding problem is not essentially a judicial problem. It is a problem that needs to be solved politically at the local, state, and federal levels. Yet, the federal bench in applying the Act might point out from time to time just where the funding responsibility lies and should not bow to cries of fiscal woes! Putting real power into the meaning of FAPE is in no sense illicit judicial activism; rather, it is carrying out a Congressional purpose of inestimable importance to millions of children.

X. A PLEA FOR CONTINUING COMMITMENT

Special education has cost lots of money and will continue to be expensive. In this time of severe budget stress on state and local governments, and in light of very high projected federal deficits, it is inevitable that special education programs and services will be subjected to increasing scrutiny. Scrutiny is warranted because the most expensive program is not necessarily the most appropriate for any particular child. Debates about levels of funding and the relative contributions of the local, state, and federal governments will and ought to continue.

It is not beyond imagination, however, that the federal mandate and the state mandates (heightened or not) will be subjected to a re-evaluation in two ways. First, I can foresee attempts to pull back the federal mandate or equivalent state mandates to access and *de minimis* programs, either by under-

⁵³³ *Id.* at 578 (explaining proper application of legislation).

funding or tweaking language in the statutes and regulations. Second, I can foresee a vigorous debate about whether the federal government should be making a less-than-fully-funded mandate or whether the federal government should be funding special education at all. I would rather such debates would never occur, yet in this context, I offer the following reflections and arguments as social and moral justifications for heavy governmental involvement, including federal involvement, in special education.

A. *The Widespread Recognition of Children with Disabilities*

The federal mandate for special education is premised upon the simple fact that our country has millions of person with disabilities. Hearings in Congress prior to the Act demonstrated this clearly.⁵³⁴ The causes of disabilities are multiple, and often the best science is not able to explain causation, or to offer much hope for reduction in rates of occurrence.⁵³⁵ It takes little life experience to understand that children laboring under physical and mental and emotional disabilities will be in our midst whether we choose to acknowledge them or not.

Since the era of President Lyndon Johnson, when federal aid for educating persons with disabilities was initiated,⁵³⁶ rights for children with disabilities has come into focus as never before. There are several reasons for this. First, modern medical practice allows for the survival of many children who would have died as infants in an earlier era.⁵³⁷ For example, our Josephine would probably have died of hydrocephalous if shunts had not been invented and perfected before her birth in 1983. Second, diagnostic criteria for disabilities are more sophisticated.⁵³⁸ For

⁵³⁴ See Education of Individuals With Disabilities, 20 U.S.C. § 1400(c) (2003) (stating Congressional Findings regarding mental disabilities).

⁵³⁵ See generally J. Madeleine Nash, *The Secrets of Autism; The Number of Children Diagnosed With Autism and Asperger's in the U.S. is Exploding. Why?*, TIME, May 6, 2002, at 46 (noting that best scientific research presently cannot fully grasp causes of apparent galloping increase in autism).

⁵³⁶ See generally Kathryn E. Crossley, *Access to Justice: The Social Responsibility of Lawyers: Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms*, 4 WASH. U. J.L. & POL'Y 239, 239-59 (2000) (discussing early efforts in federal funding of mentally disabled).

⁵³⁷ See Jean Seligmann, *An Idea Schools Can Use: Lessons From Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 770-71 (2001) (referring to progressive effects of medicine).

⁵³⁸ See *id.* at 770-71 (noting improvements in educational diagnostic testing).

example, children once described merely as fidgety or naughty will be often be rightly diagnosed as suffering from attention-deficit disorders. Children's issues with learning are seen more in medical terms and less in moral terms than formerly. Thus, children with relatively minor learning disabilities have been added to the pool of children perceived as needing some special education services. Finally, as indicated in the beginning of this article, the Civil Rights Movement, aimed at bringing racial minorities into the educational mainstream,⁵³⁹ inspired advocates to fight for expanding the rights of children with handicaps (later called disabilities) and were quite successful in litigation and with the passage of the Act by Congress. Now the question emerges: Was this success in fighting for educational rights for the children with disabilities a sentimental American journey for prosperous times or is there an *underlying social or moral mandate*?

B. Integration Into Society on Multiple Levels

The quintessential American virtue seems to be participation in the work force. The quest for access to meaningful employment opportunities without regard to race, gender, or sexual orientation has consumed vast legislative and judicial resources. While unhappiness remains in many quarters, who can honestly say that the American workplace has not significantly been altered in the past thirty to forty years? There is greater racial and gender diversity in the work force, including the professions, than in earlier generations. Now we are in the midst of another struggle: How, and to what extent, can persons with disabilities be meaningfully integrated into our work force? The question calls for multiple answers and patient experimentation.⁵⁴⁰

The path to the workplace is through the schools, public and private. Middle class Americans strive and sacrifice heroically to

⁵³⁹ See e.g., *Phylar v. Doe*, 457 U.S. 202, 206-32 (1982) (holding that denial of free public education to undocumented children requires showing of substantial state interest).

⁵⁴⁰ See generally Amy Renee Brown, *Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process*, 8 WASH. U. J.L. & POLY 341-69 (2002) (discussing employment of mentally disabled).

send their children to colleges and universities, often with professional aspirations in mind. Some children with disabilities can be channeled into colleges and universities, given supports at an early age. For example, children with Asperger's Syndrome often display exceptional talent in computer programming. For millions, workplace goals must remain more modest. But, let us make no mistake: a societal system that excludes millions from meaningful participation in the work force condemns itself to carrying long-term, burdens that could be avoided by integrating persons with disabilities into the work force. And, the pathway to meaningful integration is through funding, enhancement, and vigorous implementation of educational programs that can channel disabled young persons toward realistic opportunities for gainful employment.

Our Josephine is twenty-one years old. Her *measurable* I.Q. is not above 50. But, Josephine can do many useful tasks, and she wants to do useful tasks wherever she is placed. As with so many children and adults with disabilities, she displays splinter skills. She has an uncommonly good ability to negotiate her way through the corridors of complex clusters of buildings to make deliveries as assigned. She can read enough words to identify common signs. She helps to clean the apartment that she shares under supervision with three young women with developmental issues. She can do simple cooking and clean-up with help. She is gentle with young children and patient with older people confined to nursing home care. Through years of "production" contracted for by the programs in which she has been placed, Josephine has learned a rudimentary work ethic. She cannot realistically seek employment competitively, but she can work if given the chance and realistic supports. Ingrid is becoming very fast at filing according to letters and numbers. She can type reasonably well. So it is with millions of persons with disabilities: provide a meaningful education and they can be integrated into a workplace.

Without the benefits of special education, it is highly doubtful that Josephine would have the capabilities she exhibits today. Hence, special education and related services can and do prepare

children with disabilities for useful, working lives.⁵⁴¹ Yet, many vocational possibilities need vastly greater exploration and experimentation. Integration of people with disabilities, especially cognitive disabilities, into the workplaces of our country will occur at best sporadically without increasing linkages between thoughtfully constructed special education programs and insightful employers. Basic academic skills, money skills, behavioral controls, habits of working with others, pride in simple achievements, and special vocational training are within the reach of incalculable numbers of children with disabilities. Development of simple strengths and virtues can feed young people into work sites. Programs that result in integration into the workplace can and should continue *because such programs allow people to be useful* and prevent meaningless lives in institutional care, or lives as helpless street people. Thus, an investment in special education rightly made is an investment in our collective future. The yield is unknowable but this investment will not be a loser.

C. Beyond Usefulness: A Moral Argument for the Education of Those Hardest Hit By Life's Assaults

There are those cases, of course, where before birth or otherwise, something went awry, and possibilities of usefulness of a life in any conventional sense are difficult to discern. Severe retardation or physical impairment can render a person so severely impaired that steady employment, or any employment, is not possible. In such a case, why should anyone insist upon a mandate for a special education? Of what services should a program consist? At this point, defending a mandate for special education gets tough.⁵⁴²

I want to tread lightly here because issues about resource allocations are not only politically touchy but also morally difficult. Yet, I believe there is a moral mandate for bringing public money to bear upon the education of persons with very

⁵⁴¹ See generally Land, *supra* note 526, at 283-93 (examining employment for disabled).

⁵⁴² See generally *Timothy W. v. Rochester, N.H., Sch. Dist.*, 875 F.2d 954, 954-73 (1st Cir. 1989) (holding school district required to provide public education to severely handicapped child).

severe disabilities. While I believe that the mandate is broader than any particular faith community,⁵⁴³ I find an anchor in the expressions of a modern theological thinker, namely, Dietrich Bonhoeffer.⁵⁴⁴ So far as I know, Bonhoeffer never wrote anything about special education, yet he wrote extensively about rights inherent in being human, and wrote eloquently that the rights are *not contingent upon perceived social usefulness*. Moreover, tending carefully to lives not useful in any conventional economic sense can bring forth a marvelous flowering of good things.

He wrote:

The idea of destroying a life which has lost its social usefulness is one which springs from weakness, not from strength. But, above all, this idea springs from the false assumption that life consists only in its usefulness to society. . . . We cannot indeed ignore the fact that precisely the supposedly worthless life of the incurably sick evokes from the healthy, from doctors, nurses and relatives, the very highest measure of social self-sacrifice and even genuine heroism; this devoted service which is rendered by sound life to sick life has given rise to real values which are of the highest utility for the community.

From an economic point of view a people's standard of living will never be seriously impaired by providing for these sufferers. A people's expenditure for the care of patients of this kind has never come near to equaling the sums spent on articles of luxury. And, indeed precisely the healthy man will always be ready to make certain limited sacrifices for the sake of the sick, if only because of uncertainty about his own personal future, in other words for quite natural reasons.⁵⁴⁵

The quoted language is aimed mainly at the extreme situations, harder than the more challenging special needs cases discussed in Parts III through VIII of this article. Moreover, Bonhoeffer was writing about care for the severely disabled, that they might live and not be left to a natural but premature

⁵⁴³ See generally Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 599-650 (2000) (discussing notion of autonomy, postulated as a basic good, as grounds for allocating societal resources toward persons with disabilities).

⁵⁴⁴ See DIETRICH BONHOEFFER, *ETHICS* ix-xi (Eberhard Bethge ed., The MacMillan Company 1964) (1955) (discussing life and work of author).

⁵⁴⁵ *Id.* at 163-64.

death.⁵⁴⁶ But, once we grant that conventional usefulness is not the criterion for basic human rights, we move quite naturally to a consideration of participation in the life of the culture. Even when education can only lift a child to rudimentary skills in self-care, minimal interchange with others, and limited access to meaning conveyed by written or spoken words or by pictures and sounds, that education *tends to humanize* both the recipient and the givers. Here, Bonhoeffer's comments about expense of care versus expenditures on luxuries are pertinent.⁵⁴⁷ Private wealth and its abundance at the top end is a self-evident feature of current American society. To foster policies that allow unlimited pursuit of luxury alongside of policies that bar the disabled from lives of any meaning is a sign of cultural sickness, not health. It is a sign of weakness, not of strength, to pretend that the severely disabled either do not exist, or that they ought to have no existence as legal claimants on societal resources beyond that which next of kin can provide.

CONCLUSION

Like the poor, children with a wide spectrum of disabilities will always be with us. The children will grow up to be adults with disabilities. With the Act, our country made a bold stride into a better future for persons with disabilities by opening the schoolhouse doors and otherwise mandating services. Yet, neither the mandate in the Act nor state mandates are self-executing. There is a continuing moral mandate for parents and guardians, legislators, educators and the courts, to pursue the never-ending task of making the FAPE mandate meaningful for every child whatever the disability.

⁵⁴⁶ See generally *id.* at 163-64 (discussing moral implications of care for mentally disabled).

⁵⁴⁷ See generally *id.* at 79-171 (exploring characteristics of ethical life).

