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### Clovis Unified School District v. California Office of Administrative Hearings: Restricting Related Services Under the Individuals with Disabilities Education Act

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## NOTE

### ***CLOVIS UNIFIED SCHOOL DISTRICT v. CALIFORNIA OFFICE OF ADMINISTRATIVE HEARINGS: RESTRICTING RELATED SERVICES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT***

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>1</sup>

In 1975 Congress enacted the Education for All Handicapped Children Act (EAHCA)<sup>2</sup> to ensure that children with disabilities, like all other children, are provided an opportunity for "free appropriate public education."<sup>3</sup> This goal was reaffirmed by the 1991 amendment, Individuals with Disabilities Education Act (IDEA).<sup>4</sup> By requiring an appropriate education, the IDEA emphasizes the need to provide special education and related services designed to accommodate the unique demands of children with disabilities.<sup>5</sup> To achieve this goal, the IDEA provides federal funds to state and local educational agencies<sup>6</sup> and regulates special educational services for millions of disabled children.<sup>7</sup>

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1. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

2. 20 U.S.C. §§ 1400-1461 (1988), amended as Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400 (Law. Co-op. 1991) (IDEA). Throughout this Note, all references to the Act, before and after the 1991 amendment, are to the IDEA. All sources cited in this paper were written prior to the amendment; as such, they refer to the IDEA as EAHCA.

3. 20 U.S.C.S. § 1400(c) (Law. Co-op. 1991).

4. 20 U.S.C.S. § 1400 (Law. Co-op. 1991).

5. *Id.* See generally 20 U.S.C.S. § 1401(a)(1) (Law. Co-op. 1991). For purposes of the Act, the term "children with disabilities" means "children with mental retardation, hearing impairment, including deafness, speech or language impairments, visual impairments, including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, or other health impairment, or specific learning disabilities; and who by reason thereof need special education and related services." *Id.*

6. *Id.* §§ 1411-1414 (Law. Co-op. 1991).

7. Perry Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 466-67 (1983).

It is impossible to list every situation or service combination necessary to provide an appropriate education for disabled children. Consequently, many of the laws and regulations enacted by the U.S. Department of Education and state educational agencies to guide administrators in implementing the requirements of the IDEA are vague.<sup>8</sup> As a result, courts are often required to make determinations as to the meaning of the Act's provisions on a case-by-case basis.<sup>9</sup>

One provision of the IDEA that has created difficulty in both interpretation and administration is the requirement to provide related services.<sup>10</sup> Courts have been left in the untenable position of determining which services Congress intended to fund under the IDEA and which services too heavily burden the limited resources of those subject to the Act.<sup>11</sup> This Note explores the ambiguous wording of the related services provision of the IDEA<sup>12</sup> and how it has been interpreted by the judiciary.<sup>13</sup> In particular, this Note focuses primarily on residential placements which, as related services, are frequently denied to handicapped children<sup>14</sup> because of the astronomical costs involved.<sup>15</sup> This Note looks at the Supreme Court's approach to the related service wording of the Act and analyzes the tests employed in distinguishing between those services which are related and those which are

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8. Allan G. Osborne, Jr., *The Supreme Court's Interpretation of the Education for All Handicapped Children Act*, 9 REMEDIAL & SPECIAL EDUC. 21 (1988).

9. Henry A. Beyer, *Education for All Handicapped Children Act 1975-1989: A Judicial History*, EXCEPTIONAL PARENT, Sept. 1989, at 52; see also Osborne, *supra* note 8, at 23 (noting the difficulty in drawing a line between school health services which are appropriate related services, and medical services which are not part of the disabled child's educational needs).

10. "It is the purpose of this Act to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . ." 20 U.S.C.S. § 1400(c) (Law. Co-op. 1991).

11. Dixie S. Huefner, *Special Education Residential Placements Under the Education for All Handicapped Children Act*, 18 J.L. & EDUC. 411 (1989).

12. 20 U.S.C.S. §§ 1400(c), 1401(a)(17) (Law. Co-op. 1991).

13. See, e.g., *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981) (holding that the responsibility of a child's residential placement is placed upon the State Board of Education); *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443 (3d Cir. 1981), *cert. denied sub nom.*, *Scanlon v. Tokarcik*, 458 U.S. 1121 (1982) (holding that clean intermittent catheterization is a related service); *Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984) (holding that state has no duty to fund placement in a private institution where child is provided a free, appropriate education); *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981) (holding that related services includes providing air conditioning to a nine-year-old boy unable to control his body temperature).

14. See, e.g., *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990); *Vander Malle v. Ambach*, 667 F. Supp. 1015 (S.D.N.Y. 1987); *McKenzie v. Jefferson*, 566 F. Supp. 404 (D.D.C. 1983).

15. Huefner, *supra* note 11, at 413 (stating that expenses for residential placement typically range from \$20,000 to \$75,000 per year for each student).

medical and therefore outside the intended scope of the IDEA.<sup>16</sup> Next, this Note explores the reasoning of the Ninth Circuit Court of Appeals in *Clovis Unified School District v. California Office Of Administrative Hearings*,<sup>17</sup> which rejected the previous tests of other circuits and the Supreme Court in favor of its own test for determining the services provided for or excluded from the scope of the IDEA.<sup>18</sup> Finally, this Note concludes that the test employed by the *Clovis* court, finding placement of a psychologically handicapped child in an acute care psychiatric hospital to be outside the scope of the IDEA,<sup>19</sup> is too restrictive an interpretation of related services considering the findings and purposes of Congress in passing the IDEA and in later reaffirming its position in the Americans with Disabilities Act.<sup>20</sup>

### I. STATUTORY FRAMEWORK

The IDEA is primarily funding legislation that conditions receipt of federal funds on the states acceptance and compliance with the regulatory provisions of the Act.<sup>21</sup>

[T]he impetus for the Act came from two federal-court decisions . . . which arose from the efforts of parents of . . . children [with disabilities] to prevent the exclusion or expulsion of their children from the public schools. Congress was concerned about the apparently widespread practice of relegating . . . children [with disabilities] to private institutions or warehousing them in special classes.<sup>22</sup>

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16. See, e.g., *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (holding that clean intermittent catheterization is a related service). *But see* *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) (denying request for sign-language interpreter for deaf student).

17. 903 F.2d 635 (9th Cir. 1990).

18. *Id.* at 642-43. The court rejected as arbitrary, *Tatro*, which held that medical services are only those services which must be provided by licensed physicians. It also rejected *Vander Malle v. Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987), which ruled that where medical, social, or emotional problems requiring hospitalization create, or are intertwined with, the educational problem, the states remain responsible for the entire cost of the placement. *Clovis*, 903 F.2d at 642-43.

19. *Clovis*, 903 F.2d at 645.

20. Americans With Disabilities Act of 1990, Pub L. No. 101-336, 104 Stat. 327 (to be codified at 42 U.S.C.).

21. 20 U.S.C. § 1413(a) (1990); see also Charlotte J. Fraas, P.L. 94-142, *The Education For All Handicapped Children Act: Its Development, Implementation, and Current Issues*, (Feb. 10, 1986) (unpublished manuscript on file with Congressional Research Service). In fiscal year 1985, \$1.135 billion was appropriated for the EAHCA, an amount which is only approximately 9.7% of the national average per pupil expenditure (APPE), but the authorization level was roughly \$5 billion or 40% of APPE. *Id.*

22. *School Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359, 373 (1985) (referring to *Pennsylvania Ass'n. for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972)).

Congress enacted the IDEA in response to its findings that there were a substantial number of children with disabilities in the United States<sup>23</sup> whose special educational needs were not being met,<sup>24</sup> and that approximately one-half of the children with disabilities in the United States were not receiving appropriate educational services which would enable them access to equal opportunities.<sup>25</sup> This means that all disabled children ages three through twenty-one should be given access to public education that is appropriate for their special needs and conducted in the least restrictive environment.<sup>26</sup>

Congress concluded that it is in the national interest to meet the educational needs of children with disabilities.<sup>27</sup> Congress believed that these educational programs would increase the personal independence and the productive capacities of disabled citizens.<sup>28</sup> It further theorized that it could avoid burdening public agencies and taxpayers with the staggering costs necessary to support lifelong, dependent individuals, by providing the special educational and support services needed to help foster independent and productive citizens.<sup>29</sup>

Through the provisions of the IDEA, Congress placed the burden on state and local educational agencies to provide all special educational and related services, except medical treatment, to disabled students, without charge.<sup>30</sup> The IDEA provides for the mainstreaming<sup>31</sup> of handicapped children so that they can become productive and integrated citizens. This ensures that the child is placed in the least restrictive environment by requiring that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled."<sup>32</sup> The Act also recognizes that for

23. 20 U.S.C.S. § 1400(b)(1) (Law. Co-op. 1991) (noting that there are more than eight million children with disabilities in the United States).

24. 20 U.S.C.S. § 1400(b)(2) (Law. Co-op. 1991).

25. 20 U.S.C.S. § 1400(b)(3) (Law. Co-op. 1991).

26. Fraas, *supra* note 21, at 1; *see also* REED MARTIN, EDUCATING HANDICAPPED CHILDREN: THE LEGAL MANDATE 85-95 (1979) (explaining that least restrictive means a setting which deviates least from a regular, nondisabled program).

27. 20 U.S.C.S. § 1400(b)(9) (Law. Co-op. 1991).

28. *See* S. REP. NO. 168, 94th Cong., 1st Sess. 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433; *see also* Pennsylvania Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279, 296 n.50 (E.D. Pa. 1971) (stating that the President's Committee on Mental Retardation estimates that seventy-five percent of the nation's mentally disabled citizens could support themselves if proper training is given to them early in their lives).

29. S. REP. NO. 168, 94th Cong., 1st Sess. 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433-34.

30. 20 U.S.C.S. § 1412(6) (Law. Co-op. 1991).

31. Mainstreaming refers to the level of contact with nondisabled people that children with disabilities experience as part of the educational process. Laura Gangemi, Comment, *After Rowley: The Handicapped Child's Right to an Appropriate Education*, 38 U. MIAMI L. REV. 321 (1984).

32. 20 U.S.C.S. § 1412(5)(B) (Law. Co-op. 1991). The state must adopt procedures to

some special education students, the least restrictive environment is a private school or facility rather than a day school program.<sup>33</sup>

The IDEA defines special education as "specially designed instruction, at no cost to the parents or guardians, 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."<sup>34</sup> Related services are those necessary to allow a disabled child to benefit from special education.<sup>35</sup> Examples of such services include transportation, physical therapy, and medical and counseling services.<sup>36</sup> However, medical services are limited to those necessary for diagnostic and evaluation purposes.<sup>37</sup>

State and local educational agencies have been reluctant to recommend and pay for residential programs because the costs of such programs burden already tight educational budgets.<sup>38</sup> However, the IDEA requires the school system to pay for public or private residential placement, including room and board and other nonmedical expenses, if the program is necessary to deliver special education to a disabled child.<sup>39</sup> Consequently, when residential placement is deemed necessary, school officials frequently argue that the placement is not necessary to provide special education. They contend that although the special education must be delivered in a residential setting, the

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assure that disabled children are mainstreamed to the maximum extent possible. Any other alternative is restrictive. A restrictive environment limits the way teachers and students view the child and can injure the child's chances of becoming self-sufficient. MARTIN, *supra* note 26, at 85. Mainstreaming is a response to the practice of placing handicapped children in institutions. *Id.* at 86-89.

33. 20 U.S.C.S. § 1413(a)(4)(B)(i) (Law. Co-op. 1991). The Act requires private schools and facilities to be provided at no cost to the parents or guardians as long as the children are placed in the institutions by the state or the appropriate educational agency as a means of providing special education and related services to all children with disabilities. *Id.*

34. *Id.* § 1401(a)(16).

35. *Id.* § 1401(a)(17).

36. *Id.*

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services, including rehabilitation counseling, 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. . . .

*Id.*

37. *Id.*

38. Huefner, *supra* note 11, at 413; see also Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 639 (9th Cir. 1990) (cost of residential placement for the disabled child at the psychiatric hospital was \$150,000 per year).

39. Huefner, *supra* note 11, at 416 (citing 34 C.F.R. § 300.302 (1991)).

setting is required primarily for medical or family reasons and not for educational reasons.<sup>40</sup> If the educational agency is successful with this argument, the cost of the placement will be borne by the parents of the child with a disability.<sup>41</sup>

## II. EARLY ATTEMPTS AT DEFINING RELATED SERVICES

Since the IDEA was first passed in 1975, courts have attempted to devise a standard for defining appropriate education in accordance with Congressional intent so that they may ultimately determine which services are within the scope of the IDEA and which are not.<sup>42</sup> One area that causes many problems for courts is determining whether residential placement is a special educational necessity, and therefore the responsibility of state education agencies, or a placement primarily for noneducational purposes, and thus the responsibility of the disabled child's parents.<sup>43</sup> For children suffering from severe emotional disturbances or multiple disabilities, application of the related services provision of the IDEA, particularly separating medical and therapeutic needs from educational requirements, is extremely difficult.<sup>44</sup>

In *North v. Board of Education*,<sup>45</sup> the court considered whether residential placement was necessary, and if so, whether the District of Columbia Board of Education was required to pay for the placement.<sup>46</sup> Ty North was a multiply disabled sixteen-year-old who had a severe emotional disturbance, learning disabilities, and experienced epileptic seizures.<sup>47</sup> Ty's Individualized Education Program (IEP)<sup>48</sup> recommended residential placement where

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40. *Id.* at 414; see also *McKenzie v. Jefferson*, 566 F. Supp. 404 (D.D.C. 1983) (holding that where placement in the residential hospital was for medical and not educational reasons, student's hospitalization was not a related service which school system was required to fund).

41. Huefner, *supra* note 11, at 416.

42. Zirkel, *supra* note 7, at 472-73.

43. See generally Huefner, *supra* note 11, at 411 (discussing special education residential placements).

44. *Id.* at 414.

45. 471 F. Supp. 136 (D.D.C. 1979).

46. *Id.* at 139.

47. *Id.* at 137-38.

48. IEP's must outline the educational goals of the child, as well as the instructional methods and supplementary related services to be used in meeting the child's special educational needs. 20 U.S.C. § 1401(a)(19) (1990); see also Martin Gerry, *Procedural Safeguards Insuring that Handicapped Children Receive a Free Appropriate Public Education*, 7 NAT'L INFO. CENTER FOR HANDICAPPED CHILDREN & YOUTH 1, 2 (1987). Direct participation by parents in the development of the IEP and annual review of the IEP is also required. Written, informed parental consent is required before the school conducts a formal evaluation and assessment prior to placing a child in a program which provides special education and related services. Additionally, parents have the right to inspect and review any educational records

educational opportunities<sup>62</sup> mandated by *Brown v. Board of Education*.<sup>63</sup> Second, the provision of educational services was intended to increase the productive capacities of those with disabilities.<sup>64</sup> Third, the Act acknowledged the need for the federal government to expand its fiscal role in order to protect the rights of children with disabilities.<sup>65</sup> The court stated that Congress recognized the "broad range of special needs presented by . . . children [with disabilities], the lack of agreement within the medical and educational professions on what constitutes an appropriate education, and the tradition of state and local control over educational matters . . . ."<sup>66</sup>

The eleven-year-old boy in *Kruelle* suffered physical and mental disabilities<sup>67</sup> and needed full-time care in order to learn.<sup>68</sup> The *Kruelle* court, agreeing with *North*, held that the unseverability of the child's emotional, social, medical, and educational disabilities was the "very basis for holding that the services are an essential prerequisite for learning."<sup>69</sup> The *Kruelle* court further stated, that "[w]here basic self-help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point."<sup>70</sup>

The court placed the burden for coordinating efforts and financial arrangements on the State Board of Education.<sup>71</sup> The IDEA explicitly mandates that the primary responsibility for providing a free, appropriate, public education for children with disabilities rests with the state.<sup>72</sup> "The legislative history indicates that . . . [Congress] considered the establishment of a single agency on which to focus the responsibility for assuring the right to education of all . . . children [with disabilities] to be of paramount impor-

62. *Id.* at 690.

63. 347 U.S. 483 (1954).

64. *Kruelle*, 642 F.2d at 691 (citing S. REP. NO. 168, 94th Cong., 1st Sess. 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433).

65. *Id.* (citing S. REP. NO. 168, 94th Cong., 1st Sess. 7 (1975), reprinted in 1975 U.S.C.C.A.N., 1425, 1431).

66. *Id.*

67. *Id.* at 688. The child suffered from profound retardation and cerebral palsy. He had social skills of a six-month-old and an I.Q. below 30. He could not walk, dress himself, or eat unaided. He was not toilet trained, and could not speak. *Id.*

68. *Id.* at 694.

69. *Id.*; see also *North v. Board of Educ.*, 471 F. Supp. 136 (D.D.C. 1979).

70. *Kruelle*, 642 F.2d at 693 (citing *Battle v. Commonwealth*, 629 F.2d 269, 275 (3d Cir. 1980)).

71. *Id.* at 696.

72. 20 U.S.C.S. § 1412(6) (Law. Co-op. 1991).

The state educational agency shall be responsible for assuring that . . . all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency. . . .



he could receive medical supervision, special education, and psychological support.<sup>49</sup> By order of a hearing officer, Ty was placed in a private residential treatment facility by the educational agency in charge.<sup>50</sup> However, he soon had to be discharged due to his severe emotional problems.<sup>51</sup> His family then placed him in a different residential setting that provided the necessary therapy, education, and medical attention.<sup>52</sup>

The Education Board argued that it was Ty's emotional problems which necessitated the residential placement, and that the Board was only responsible for meeting his educational needs.<sup>53</sup> The Board maintained that Ty's educational requirements could be satisfied in a less restrictive,<sup>54</sup> special education day program.<sup>55</sup>

The court interpreted the IDEA as requiring the Board to administer all educational programs for children with disabilities within its jurisdiction.<sup>56</sup> Furthermore, the court held that where residential care was required to accommodate Ty, it must be at no cost to his parents.<sup>57</sup> Finally, the court held that where Ty's needs for his social, emotional, medical, and educational problems were so intertwined,<sup>58</sup> the school system was required to pay for the residential academic program.<sup>59</sup>

In *Kruelle v. New Castle County School District*,<sup>60</sup> the Third Circuit Court of Appeals expanded the *North* court's holding. The *Kruelle* court discussed three reasons for the passage of the IDEA.<sup>61</sup> First, the Act was intended to secure for children with disabilities the right to publicly-supported equal ed-

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maintained by the school district. The school must also give written notice to the parents before initiating or changing the identification or educational placement of a child. *Id.*

49. *North*, 471 F. Supp. at 138.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 140.

54. *Id.* at 139; see also 20 U.S.C.S. § 1412(5)(B) (Law. Co-op. 1991); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 880 (D.D.C. 1972) (contemplating that children should be educated in the least restrictive environment that appropriately meets their needs).

55. 471 F. Supp. at 139.

56. *Id.* at 141. The school district argued that Ty's disabilities were emotional and therefore the responsibility of the Department of Human Resources; the Department of Human Resources argued that Ty's disabilities were educational in nature and therefore the responsibility of the School District. *Id.* See generally 20 U.S.C.S. § 1412(6) (Law. Co-op. 1991) (describing educational agency responsibilities towards children with disabilities).

57. 471 F. Supp. at 142; see also 34 C.F.R. § 300.302 (1991).

58. "Realistically it [was] not possible for the court to perform the Solomon-like task of separating them." 471 F. Supp. at 141.

59. *Id.* at 140.

60. 642 F.2d 687 (3d Cir. 1981).

61. *Id.* at 690-91.

IEP.<sup>103</sup>

This line of Supreme Court decisions affirmed the right of students with disabilities to receive appropriate special education and related services.<sup>104</sup> Interpreting the Statute rather strictly, the Court held in each case that students with disabilities must have meaningful access to educational programs<sup>105</sup> even though school districts are not required to maximize disabled students' potential.<sup>106</sup> Interpreting the related services provision broadly, the Court in *Tatro* affirmed the IDEA's guarantee of a free appropriate public education for all children with disabilities.<sup>107</sup> As Justice Rehnquist stated in *School Committee*, "The Act was intended to give . . . children [with disabilities] both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives."<sup>108</sup> Despite the Supreme Court's broad interpretation of the IDEA's related services requirement, state and federal courts are still struggling to determine the scope of this provision.

In *Doe v. Anrig*,<sup>109</sup> the father of a twelve-year-old boy, Timothy, sought reimbursement from the school board for the cost of placing him in the hospital.<sup>110</sup> As a result of illicit drug abuse, the young boy was unable to perform in school and was voluntarily admitted to a private psychiatric hospital.<sup>111</sup> He was diagnosed as a chronic schizophrenic, undifferentiated type.<sup>112</sup> Treatment at the hospital included medication to control the boy's self-destructive behavior, individual psychotherapy, group therapy, and physical education.<sup>113</sup> The Board of Special Education denied the reimbursement request because the placement and the related services provided, mainly psychotherapy, were not primarily for the purpose of enabling him to benefit from educational tutoring. The Board based its findings on the fact that Timothy was so ill that education was not a serious possibility.<sup>114</sup>

The court rejected the Board's reasoning, stating that there is no federal or

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103. *Id.* at 370-71.

104. *See generally* *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

105. *See generally* *Tatro*, 468 U.S. 883 (1984); *Rowley*, 458 U.S. 176 (1982).

106. *Rowley*, 458 U.S. at 199.

107. Osborne, *supra* note 8, at 23-24.

108. *School Comm. of Burlington v. Dept. of Educ.*, 471 U.S. at 373.

109. 651 F. Supp. 424 (D. Mass. 1987).

110. *Id.* at 426-28.

111. *Id.* at 426.

112. *Id.* at 427. Timothy was hearing voices, clearly psychotic, unable to perform in school, and physically self-destructive. *Id.* at 426-27.

113. *Id.* at 427.

114. *Id.* at 430-31.

that this access was to be meaningful.<sup>91</sup> In *Tatro*, the Court created a two-part test to determine which services are related services. First, to be a related service, a service must assist the disabled child in benefiting from special education.<sup>92</sup> Second, the service must not be a medical service *going beyond diagnosis or evaluation*<sup>93</sup> which is specifically excluded by the IDEA.<sup>94</sup> Under this test, a service that enables a child to remain in school during the day is a related service required by the IDEA because it allows for meaningful access to public education.<sup>95</sup>

Applying this test, the Court determined that CIC did assist Amber in benefiting from special education and that while a health service performed by a licensed physician would be excluded,<sup>96</sup> catheterization, because it can be performed by a lay person or school nurse, qualifies as a related service under the IDEA.<sup>97</sup> The Court recognized that Congress did not intend to exclude traditional school health services as medical services.<sup>98</sup> "Services like [catheterization] that permit a child to remain at school during the day are no less related to the effort to educate than are [diagnostic and evaluative] services that enable the child to reach, enter, or exit the school."<sup>99</sup>

Finally, the Supreme Court, in *School Committee v. Department of Education*,<sup>100</sup> held that reimbursement of expenses is generally available to parents who unilaterally place their disabled child in a private school that is later determined to be an appropriate placement for the child.<sup>101</sup> This case arose when the parents of a learning disabled child unilaterally placed the child in a private school for children with such disabilities after disagreeing with the school board's proposal to place the child in public school.<sup>102</sup> The Court reasoned that reimbursement merely required the school system to pay expenses that it should have been paying all along if it had developed a proper

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91. *Id.* at 891 (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 192 (1982)).

92. *Id.* at 890 (citing with approval, the Court of Appeals in *Tatro v. State of Texas*, 703 F.2d 823, 831 (1983)) (CIC is a supportive service required to assist a disabled child in benefiting from special education.).

93. *Id.* at 891-93.

94. 20 U.S.C.S. § 1401(a)(17) (Law. Co-op. 1991).

95. *Tatro*, 468 U.S. at 891; *see also Rowley*, 458 U.S. at 192. Congress intended to make public education available to disabled children. The burden imposed on the state is to make access to education meaningful. *Id.*

96. *Tatro*, 468 U.S. at 892-93.

97. *Id.* at 893-94.

98. *Id.*

99. *Id.* at 891. The Court interpreted the EAHCA, which defines related services. For a definition of related services, *see supra* note 36.

100. 471 U.S. 359 (1985).

101. *Id.* at 361-63.

102. *Id.* at 369.

state requirement that related services be primarily for educational purposes.<sup>115</sup> Instead, the court relied upon *Tatro*, which held that a service need only enable a child to benefit from special education to be a related service, and required the school board to reimburse the boy's father for psychotherapy expenses.<sup>116</sup> This treatment enabled Timothy to benefit from special education and was therefore a related service under federal and state law.<sup>117</sup> However, room and board costs were not reimbursed because the hospital was not a state approved special education facility as required by the state statute.<sup>118</sup>

Following the reasoning of *Kruelle*,<sup>119</sup> the Eleventh Circuit Court of Appeals in *Drew P. v. Clarke County School District*<sup>120</sup> held that in order for a school district to discharge its duty of educating an autistic child suffering from severe mental retardation, it must provide a setting in which the child can receive an educational benefit.<sup>121</sup> Evidence was presented that autistic children require around-the-clock expert educational supervision so that they can progress.<sup>122</sup> The court determined an appropriate educational setting to be residential placement<sup>123</sup> and required the school district to reimburse the parents of the child for costs of previous placements.<sup>124</sup>

In *Vander Malle v. Ambach*,<sup>125</sup> a psychologically disabled child required residential placement in a psychiatric hospital.<sup>126</sup> The school district argued that because the child's behavioral and emotional disability prevented him from attending the school located on the hospital grounds, the child was uneducable. Therefore, the district had no responsibility for any of the costs of the placement.<sup>127</sup> The school district claimed that it satisfied the requirements of the IDEA by arranging to provide educational services free of charge.<sup>128</sup>

The *Vander Malle* court held that a "[s]tate may not escape responsibility

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115. *Id.* at 431.

116. *Id.* (citing *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984)) (holding that clean intermittent catheterization (CIC) was a related service even though the primary purpose of the procedure was not educational).

117. *Id.*

118. *Id.* at 430.

119. *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981).

120. 877 F.2d 927 (11th Cir. 1984).

121. *Id.* at 928, 930.

122. *Id.* at 930-31.

123. *Id.* at 931.

124. *Id.*

125. 667 F. Supp. 1015 (S.D.N.Y. 1987).

126. *Id.*

127. *Id.* at 1036-37.

128. *Id.*

for the costs properly associated with a residential placement simply by stating that the placement addresses physical, emotional, psychological, or behavioral difficulties rather than or in addition to educational problems."<sup>129</sup> The true question, the court found, was whether placement was necessary for educational purposes, or solely a response to medical, social, or emotional problems that are separate from learning.<sup>130</sup> The court held that the State could not satisfy its duty by making available, in another setting, precisely the form of instruction which was not previously effective.<sup>131</sup> Cognizant that Congress explicitly did not intend for school districts to bear the medical costs of children with disabilities,<sup>132</sup> the court remanded the case to determine what fraction of the total costs of placement was purely medical services and thus not chargeable to the school district under the IDEA.<sup>133</sup>

#### IV. CLOVIS: RESTRICTING RELATED SERVICES

The majority of cases until recently had two tests for determining what constitutes related services under the IDEA. The first test, devised by the Supreme Court in *Tatro*, is two pronged: is the service a support service which assists the child with a disability in benefiting from special education?; if so, is the service a medical service that goes beyond diagnosis or evaluation?<sup>134</sup> To apply this test, it is necessary to determine if the service required must be performed by a licensed physician. If so, the service is presumed to go beyond diagnosis and evaluation and is not covered under the IDEA. If the service can be provided by a layperson or school nurse, then it is considered a support service and therefore covered by the Act.<sup>135</sup>

The second test, suggested in *North*<sup>136</sup> and applied in *Kruelle*,<sup>137</sup> determines whether the disabled child's emotional, social, medical, and educational needs are so intertwined that they are to be treated as unseverable.<sup>138</sup> In this case, if the appropriate placement is a residential setting, it is a related service.<sup>139</sup> Rejecting the tests used by other courts, the Ninth Circuit

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129. *Id.* at 1039.

130. *Id.* at 1040 (citing *School Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985)).

131. *Id.* at 1041.

132. 20 U.S.C.S. § 1401(a)(17) (Law. Co-op. 1991).

133. 667 F. Supp. at 1042.

134. 468 U.S. at 890. In *Tatro*, the Court deferred to Department of Education regulations. *Id.* at 892. The regulations define related services to include school health services. 34 C.F.R. § 300.13(a) (1991). School health services are defined as services provided by a qualified school nurse or other qualified individual. 34 C.F.R. § 300.13(b)(4) (1991).

135. *Tatro*, 468 U.S. at 893.

136. 471 F. Supp. 136, 141 (D.D.C. 1979).

137. 642 F.2d 687, 693 (3d Cir. 1981).

138. Huefner, *supra* note 11, at 411.

139. *Id.*

out in *Tatro*.<sup>154</sup> The court believed that the supportiveness criteria of the first part of the *Tatro* test was far too inclusive in light of the IDEA's explicit exclusion of medical services.<sup>155</sup> The court reasoned that under the *Tatro* test, all medical services could be considered support services which assist a child with a disability in receiving a special education.<sup>156</sup> Furthermore, the court rejected the second prong of the *Tatro* test—that services provided by a licensed physician are deemed to be medical, but if provided by a layperson or nurse, they are related services.<sup>157</sup> The court reasoned that this distinction was too arbitrary to be useful.<sup>158</sup>

*Clovis* rejected the reasoning of the prevailing weight of authority, that where medical, social, or emotional disabilities requiring hospitalization are intertwined with the educational disabilities, the entire cost of the placement remains the responsibility of the school district.<sup>159</sup> Prior to *Clovis*, courts were unwilling if not unable to make a distinction between psychological and physiological disabilities in determining which services are related and which are medical.<sup>160</sup> The reasoning was that the purpose of the IDEA is to

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154. *Id.* at 643; see *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 (1984) (holding that clean intermittent catheterization is a related service, even though the primary purpose of the procedure was not educational); see also *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983); *Papcode v. Connecticut*, 528 F. Supp. 68 (D. Conn. 1984); *Christopher T. v. San Francisco Unified Sch. Dist.*, 553 F. Supp. 1107 (N.D. Cal. 1982). All of these cases found that the handicapped plaintiff needed continuous and consistent programming around the clock. The underlying notion is that some children have educational needs that far exceed the need for academic programming, and when that is the case, the academic, emotional, and social needs are unseverable. *But see Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984); *McKenzie v. Jefferson*, 566 F. Supp. 404 (D.D.C. 1983); *Cain v. Yukon*, 556 F. Supp. 605 (W.D. Okla. 1983), *aff'd*, 775 F.2d 15 (10th Cir. 1985). In *Ahern*, a child with Down's Syndrome was placed in a residential program by her parents. The court concluded that the residential aspect of the placement was not designed to carry out specific educational objectives, but was rather intended to provide social and recreational activities. The court also found that the school district was prepared to address the child's emotional and social needs, and that her emotional needs were segregable from the learning process. Thus, the residential placement was not required in order to deliver an appropriate education. *Ahern*, 593 F. Supp. at 913-14. In *McKenzie*, the court concluded that the decision to hospitalize was made so that the child could obtain medical treatment for acute mental illness and not to support a special education program. *McKenzie*, 566 F. Supp. at 411-12.

155. *Clovis*, 903 F.2d at 643; see 20 U.S.C.S. § 1401(a)(17) (1991).

156. 903 F.2d at 643.

157. 468 U.S. at 893.

158. *Clovis*, 903 F.2d at 643.

159. *Id.* (quoting *Vander Malle v. Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987)).

160. *Id.* at 644.

We can not accept as reasonable a definition of "medical" which ultimately turns on the distinction between physiological illness and mental illness. Such a definition would mandate huge expenditures by local school boards aimed at "curing" psychiatric illness but not require similar expenditures for treating children with physical problems who require the more traditional "medical" services.

Court of Appeals in *Clovis Unified School District v. California Office of Administrative Hearings*,<sup>140</sup> formulated a new test which considerably restricts the related services that a school district must supply for a student with a disability.<sup>141</sup>

*Clovis* focused on the nature of the services provided to a young girl, Michelle Shorey, in an acute care psychiatric hospital.<sup>142</sup> As a result of early childhood abuse and neglect, Michelle developed serious emotional disabilities.<sup>143</sup> Michelle's parents enrolled her in a mental health day program, but, because of her destructive behavior, she was moved to a mental health residential treatment program.<sup>144</sup> While Michelle performed adequately in the classroom, her emotional condition continued to deteriorate.<sup>145</sup> Within a year, the Mental Health Director informed Michelle's parents that her behavior had deteriorated to the extent that the staff could no longer control her.<sup>146</sup> They recommended placement in an acute care facility.<sup>147</sup> Michelle was discharged from the mental health facility and placed at King's View Hospital, an acute care psychiatric hospital.<sup>148</sup>

Michelle's parents paid the costs of her placement through their private medical insurance until that coverage was exhausted.<sup>149</sup> Personnel from the Clovis Unified School District recommended two schools for Michelle, the State Diagnostic School and Re-Ed West, a residential school in Sacramento, California.<sup>150</sup> Michelle's parents did not believe that either school could provide Michelle with an appropriate education and rejected both proposals.<sup>151</sup> Instead, they requested that the School District pay for Michelle's placement at King's View,<sup>152</sup> but it refused.<sup>153</sup>

In determining whether hospitalization at King's View constituted either residential placement or a related service for which the School District was required to pay for under the IDEA, the court rejected the two part test set

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140. 903 F.2d 635 (9th Cir. 1990).

141. *Id.* at 643-44.

142. *Id.* at 645. At King's View Hospital, Michelle's program consisted of a residential, therapeutic program coordinated with on-grounds classroom program; she received individual therapy from licensed or trained medical staff. *Id.*

143. *Id.* at 639.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* The School District's recommendation would cost approximately \$50,000, while the King's View placement cost about \$150,000 per year.

153. *Id.*

provide access to education for all handicapped children on an equal basis, even to the extent of providing for support services traditionally not considered to be educational.<sup>161</sup>

The *Clovis* court, however, focused on whether Michelle's placement was necessary for educational purposes, or whether it was in response to medical, social, or emotional disabilities that were distinguishable from the learning process.<sup>162</sup> Application of this analysis resulted in a determination that Michelle's placement was not a related service within the scope of the Act for several reasons.<sup>163</sup> First, Michelle's hospitalization was caused by an acute psychiatric crisis, which rendered her uncontrollable and unable to benefit from education.<sup>164</sup> Second, the program at the hospital implemented for Michelle was not established according to an IEP, but was determined by a medical team, supervised by a licensed physician. The amount of time that Michelle spent in the classroom was decided by the hospital staff and depended upon her other treatment needs.<sup>165</sup> Because of the intensity of the psychotherapy provided to Michelle,<sup>166</sup> the court found these services addressed a medical crisis.<sup>167</sup> Third, the court placed great weight on the fact that the cost of King's View, one hundred fifty thousand dollars per year, was due to its status as a medical facility and not an educational establishment.<sup>168</sup> Finally, the court found that the hospital did not provide any educational services to Michelle. Instead, it found that her educational needs were addressed by a tutor sent to the hospital by the Clovis School District.<sup>169</sup> The court concluded that the lack of educational services provided by King's View indicated that the room and board were for medical reasons as opposed to educationally related needs.<sup>170</sup>

Understandably, Michelle had medical needs, but if these needs could not be addressed separately from her educational demands, then a physician—not an educator—is in the better position to supervise a comprehensive program that satisfies all of her special requirements. Despite the Supreme

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*Id.*

161. *Id.*

162. *Id.* at 643. The court dismissed the line of reasoning that there is no way for a court to separate educational from noneducational needs when educational, social, physical, and medical needs are intertwined, by simply shifting its focus away from this inquiry without answering the underlying problem. *Id.* (citations omitted).

163. *Id.* at 645.

164. *Id.*

165. *Id.*

166. Michelle received six hours of intensive psychotherapy each day. *Id.*

167. *Id.*

168. *Id.* at 639, 645.

169. *Id.* at 646.

170. *Id.* at 647.



Court's broad definition of related services under the IDEA, and some school district's willingness to pay for services required for children with disabilities,<sup>171</sup> decisions such as *Clovis* indicate that the standard for determining what constitutes adequate special education is beginning to vary from jurisdiction to jurisdiction. Consequently, courts must determine a uniform standard as to the scope of related services that must be provided by the school.<sup>172</sup>

## V. CONCLUSION

*Clovis* narrowly interprets the residential placement provisions of the IDEA.<sup>173</sup> In so doing, the court has restricted the related services that would otherwise be available to children with disabilities. The court ignored previous precedent by denying a disabled child's placement as a related service. The court rejected the supportive services test developed in *Tatro* by reasoning that although a child requiring constant medical attention cannot be educated without such services, it is not the responsibility of the school district to provide this maintenance care.<sup>174</sup> The court then dismissed the line of cases holding that where a child's physical, social, emotional, and educational needs are so intertwined that they are unseverable, the school district shall remain responsible for providing the needed services. The court reasoned that it would not accept a definition of medical that distinguishes between physiological illness and mental illness because this definition mandates huge expenditures by schools aimed at curing psychiatric illness, but does not require similar expenditures for treating children with physical problems. This contravenes the IDEA's goal of treating all children with disabilities equally.<sup>175</sup>

The *Clovis* court developed a test that focuses on whether the programs administered by the residential facility are controlled by an educational agency or a medical staff.<sup>176</sup> The court's test necessitates that the placement be primarily for special education reasons.<sup>177</sup> The court believed that if the primary services are medical or therapeutic and that specially designed instruction has become a supplementary service, then the placement should

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171. Cf. Renee Sanchez, *D.C. Will Pay For Girl to Attend Private School in Maryland*, WASH. POST, Oct. 8, 1990, at B4 (stating that the District of Columbia agreed to pay \$12,000 in tuition for child with learning disability).

172. Beyer, *supra* note 9, at 58.

173. *Clovis*, 903 F.2d at 643-47.

174. *Id.* at 643.

175. *Id.* at 644.

176. *Id.* at 645-47.

177. *Id.* at 647.

not be considered a special education residential placement.<sup>178</sup>

The reasoning applied in *Clovis* is inconsistent with the purposes and findings of Congress in enacting the IDEA.<sup>179</sup> Congress was concerned with the lack of educational opportunities available to children with disabilities.<sup>180</sup> In mandating that disabled children be provided special education and related services, the Act requires that state and local educational agencies provide individualized education, tailored to meet the unique needs of each child.<sup>181</sup> Family members seeking to improve the education of students with severe disabilities have long realized that the concept of special education

178. Huefner, *supra* note 11, at 437.

179. 20 U.S.C.S. § 1400(b)-(c) states that:

- (b)(1) there are more than eight million children with disabilities in the United States today;
- (2) the special educational needs of such children are not being fully met;
- (3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
- (4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
- (5) there are many children with disabilities throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;
- (6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;
- (7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;
- (8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and
- (9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

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

20 U.S.C.S. § 1400(b)-(c) (Law. Co-op. 1991).

180. *See id.* § 1400(b).

181. *See id.* § 1401(a)(20).

and related services encompasses the development of self-care skills.<sup>182</sup> The question we should ask is what is the appropriate educational program, and how such a program can be provided to meet the needs of the student.<sup>183</sup> The IDEA is regarded as a landmark law in the establishment of equal education for school-aged children with disabilities.<sup>184</sup>

Even though more disabled children are now receiving special education than ever before, access for some is a matter of chance. Some disabled children are still excluded from special education because not enough programs are available, local school districts limit their programs because of funding problems, and state eligibility standards for special education are sometimes inconsistent with the IDEA.<sup>185</sup> The intent of Congress in enacting the IDEA was to encourage educational equality for disabled children through a permanent, broad-scale federal assistance program.<sup>186</sup>

The findings and purposes of Congress when enacting the Americans With Disabilities Act (1990)<sup>187</sup> illustrate the continuing problems that people with handicaps face in the United States. Approximately forty-three million Americans have physical or mental disabilities.<sup>188</sup> Historically, society has isolated and segregated disabled individuals and, despite some improvements, such discrimination continues to be a serious and pervasive social problem.<sup>189</sup> This discrimination persists in critical areas such as employment, housing, public accommodations, and *education*, among others.<sup>190</sup> Individuals who experience discrimination on the basis of their disability often have no legal recourse and continue to encounter discrimination in various

182. 134 CONG. REC. S16,242 (daily ed. Oct. 14, 1988) (statement of Senator Harkin expressing his concern over the ruling in *Timothy W. v. Rochester School District*, 875 F.2d 954 (2d Cir. 1988), which found that a public school district is not required to provide educational programming and services to a severely disabled child because of the severity of his disability).

183. *Id.* at S16,243.

We find it a particularly grave cause for concern that more than a dozen years after enactment of Public Law 94-142 a Federal judge would exclude a severely disabled child in need of special education and related services from public education. No disabled child is too retarded, too physically disabled, or too much of a behavior problem to be excluded from or denied his or her right to a free, appropriate public education on the basis of the severity of his or her disability.

*Id.*

184. Fraas, *supra* note 21, at 1.

185. *Id.* at 42-43 (citing U.S. GENERAL ACCOUNTING OFFICE, IPE-81-1, DISPARITIES STILL EXIST IN WHO GETS SPECIAL EDUCATION, (1981) (Report to the Chairman, Subcommittee on Education and Labor, House of Representatives)).

186. *Id.* at 5.

187. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)-(b), 104 Stat. 327, 328-29 (1988) (to be codified as amended at 42 U.S.C.).

188. *Id.* § 2(a)(1).

189. *Id.* § 2(a)(2).

190. *Id.* § 2(a)(3).

forms, including: intentional exclusion; architecture, transportation, and communication barriers; overprotective rules and policies; and segregation.<sup>191</sup> Disabled individuals are often relegated to lesser services, programs, activities, benefits, jobs, or other opportunities.<sup>192</sup> The continued existence of discrimination and prejudice denies disabled people the opportunity to compete on an equal basis.<sup>193</sup> This denial results in dependency and non-productivity of disabled persons, costing the United States billions of dollars in unnecessary expenses.<sup>194</sup>

By enacting the Americans With Disabilities Act, Congress has provided a clear and comprehensive national mandate for eliminating discrimination against individuals with disabilities. In addition, it has set forth clear, strong, consistent, and enforceable standards addressing discrimination against disabled individuals and has ensured that the federal government play a central role in enforcing the standards established. Congress has invoked its authority, including the power to enforce the Fourteenth Amendment and regulate commerce, to address the major areas of discrimination faced daily by people with disabilities.<sup>195</sup>

The strong mandate of the Americans With Disabilities Act coupled with the IDEA demonstrate clear Congressional intent to provide for the needs of disabled persons.<sup>196</sup> This mandate, along with the weight of case authority, demands a broad reading of the provisions of the IDEA to accomplish the Congressional purpose of providing a free, appropriate, public education to children with disabilities.<sup>197</sup>

Great strides have been made in opening doors that previously have been closed to the disabled.<sup>198</sup> *Clovis* provides a foothold for those who would deny services and opportunities to disabled individuals, while hiding behind the cause of fiscal responsibility.<sup>199</sup> "Together, these last two years, we've

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191. *Id.* § 2(a)(4)-(5).

192. *Id.* § 2(a)(5).

193. *Id.* § 2(a)(9).

194. *Id.*

195. *Id.* § 2(b).

196. *Federal Ruling Requires Transit Vehicle Access*, BALTIMORE SUN, Oct. 4, 1990, at 13A (stating that the Department of Transportation, acting to implement the Americans with Disabilities Act, requires that transit authorities across the country now purchase only buses, vans, and rail cars that are accessible to the disabled).

197. 134 CONG. REC., *supra* note 182, at S16,243.

198. Emily Van Ness, *For the Learning Disabled, College Can Be As Easy As 1-2-3*, N.Y. TIMES, April 9, 1989, § A4 (Education Life), at 47.

199. Huefner, *supra* note 11, at 436-37.

... unshackled the potential of Americans with disabilities.”<sup>200</sup> Now is not the time to slow this progress.

*David C. Donohue*

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200. President George Bush, State of the Union Address (Jan. 29, 1991) (text available in WASH. POST, Jan. 30, 1991, at A14).

tance . . . ."<sup>73</sup> When the school officials in *Kruelle* attempted to defer responsibility by saying that the Developmentally Disabled Assistance and Bill of Rights Act<sup>74</sup> provided the appropriate funding source, the court determined that Congress intended to use federal funds to assist the States in meeting the requirements of the IDEA.<sup>75</sup> This additional funding alleviates the perceived inequities of placing the financial burden on the educational authorities alone.<sup>76</sup>

### III. SUPREME COURT DECISIONS AND THE CONTINUING PROBLEM OF DEFINING RELATED SERVICES

*Board of Education v. Rowley*<sup>77</sup> was the first case in which the Supreme Court interpreted any provision of the IDEA.<sup>78</sup> The Court in *Rowley* found that the IDEA did not require a sign language interpreter to be provided to a hearing-impaired child where the child was able to perform better than the average student in her class and easily advanced from grade to grade without the service.<sup>79</sup> The Court determined that the intent of the IDEA was "more to open the door of public education to . . . children [with disabilities] on appropriate terms than to guarantee any particular level of education once inside."<sup>80</sup> The Court held that if instruction was provided with sufficient support services to permit the disabled child to benefit from the education,

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73. S. REP. NO. 168, 94th Cong., 1st Sess. 24 (1975), reprinted in 1975 U.S.C.A.N. 1425, 1448.

[W]ithout this requirement, there is an abdication of responsibility for the education of . . . children [with disabilities] . . . . While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of . . . children [with disabilities], so that failure to deliver services or the violation of the rights of . . . children [with disabilities] is squarely the responsibility of one agency.

*Id.*

74. 42 U.S.C. §§ 6000-6083 (1991).

75. *Kruelle*, 642 F.2d at 691.

76. *Id.* at 698 (citing S. REP. NO. 168, 94th Cong., 1st Sess. 23 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1447). Congress did not intend to remove from the disabled the burden of insufficient funds and to place it upon the local school boards. Rather, it pinpointed \$161.7 million in alternative federal funds available to the states to aid in fulfilling its responsibilities of educating those with disabilities. *Id.*

77. 458 U.S. 176 (1982).

78. Zirkel, *supra* note 7, at 467.

79. *Rowley*, 458 U.S. at 210.

80. *Id.* at 192. The Court looked into the legislative history and found a repeated emphasis on access and procedures. It then looked at the mainstreaming preference in the Act and to the prevailing practices in the schools, concluding that where a child is educated in a regular classroom, the grading and advancement system is a factor in determining appropriateness of placement. *Id.*; see also Zirkel, *supra* note 7, at 477-78.

the child received a free appropriate public education.<sup>81</sup>

As a result of the Court's interpretation of the IDEA, the School Board was not required to maximize the potential of each disabled child.<sup>82</sup> Rather, the School Board met its obligation under IDEA by providing personalized instruction and services reasonably calculated to bring about educational benefit to the child.<sup>83</sup> However, *Rowley* affirmed the educational rights of disabled children. These rights include: (1) attending public schools free of charge; (2) individualized, beneficial, and meaningful services; (3) mainstreaming where possible; (4) instructional programs that approximate the grade levels used in the education program for nondisabled children; (5) provision of related and supportive services necessary for the children to benefit from their special education; (6) active involvement by parents or guardians in the planning of their child's education; (7) the opportunity to challenge the adequacy of education programs in school hearings; and (8) the ability to challenge in federal court the substance of the IEP and the procedures afforded for its development and review.<sup>84</sup>

In *Irving Independent School District v. Tatro*,<sup>85</sup> the Supreme Court addressed the issue of whether clean intermittent catheterization (CIC)<sup>86</sup> should be considered a related service under the IDEA.<sup>87</sup> The plaintiff, Amber, was an eight-year-old student suffering from spina bifida. As a result, she had a neurogenic bladder, preventing her from emptying her bladder voluntarily, and had to be catheterized every three to four hours.<sup>88</sup> Amber was too young to perform the procedure of CIC herself and needed the assistance of a trained school nurse.<sup>89</sup>

The Court found that, without help in performing this procedure, Amber was unable to attend class, and thus did not have access to the education that she was entitled to.<sup>90</sup> The Court looked to *Rowley* and noted that Congress intended to make public education available to disabled children and

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81. *Rowley*, 458 U.S. at 189.

82. *Id.* at 199. "Whatever Congress meant by an appropriate education, it is clear it did not mean a potential-maximizing education." *Id.* at 197 n.21.

83. Osborne, *supra* note 8, at 22.

84. Beyer, *supra* note 9, at 52. See generally Henry A. Beyer, *A Free Appropriate Public Education*, 5 W. NEW ENG. L. REV. 363 (1983); Zirkel, *supra* note 7; Gerry, *supra* note 48, at 2 (1987).

85. 468 U.S. 883 (1984).

86. CIC is a simple procedure performed to avoid kidney injury which can be performed in a few minutes by a layperson with less than an hour's training. *Id.* at 883.

87. *Tatro*, 468 U.S. at 885.

88. *Id.*

89. *Id.*

90. *Id.* at 895.