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ROWLEY: THE COURT'S FIRST INTERPRETATION OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

In the 1970's, American society witnessed an explosive growth in the recognition of the rights of handicapped persons.[1] This growth was triggered in part by the realization that millions of handicapped children were not receiving an appropriate public education.[2] Consequently, federal and local governments, encouraged by two federal court decisions establishing a right to public education for handicapped children,[3] made a concerted effort to provide public education to handicapped children.[4] Following the lead of the states and the courts,[5] Congress confirmed a national com-

1. William Johnson, former president of the Council for Exceptional Children, describes the decade as "a period where a field of human endeavor accomplished a level of change unparalleled in the history of education, and perhaps of society, for the benefit of a group of children." Johnson, *Up Front with the President*, 1 UPDATE, Dec. 1980, at 2. (Copy on file with Cath. U.L. Rev.).

2. *See* S. REP. NO. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432 [hereinafter cited as SENATE REPORT]. Of the approximately eight million handicapped children in the United States in 1975, roughly one-half were receiving no education at all, while many others were "sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H.R. REP. NO. 332, 94th Cong., 1st Sess. 2 (1975) [hereinafter cited as HOUSE REPORT].

3. Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972).

4. In 1971, only seven states had enacted statutes requiring education for one or more types of handicapped children. *See* HOUSE REPORT, *supra* note 2, at 10. By 1975, 41 states had enacted full-service type statutes requiring the provision of education to all handicapped children. *See* SENATE REPORT, *supra* note 2, at 20-21, Table 2. In 1976, states reported that 3.48 million children received special education and related services. J. ZETTEL, *Implementing the Right to a Free Appropriate Public Education*, in SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 25-28 (1982). The number of children served increased to 3.93 million in the 1980-81 school year. *Id. See also* DEPARTMENT OF EDUCATION, FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 1 (1982) [hereinafter cited as FOURTH ANNUAL REPORT].

5. The legislation which ultimately became the Education for All Handicapped Children Act of 1975 was introduced as S. 3614 on May 16, 1972, shortly after the decision in *PARC* but before the decision in *Mills*. SENATE REPORT, *supra* note 2, at 6. The legislative history frequently refers to the importance of these two cases. *E.g., id.* For a more in-depth examination of these pre-EAHCA cases, see *e.g.*, Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMPLE L.Q. 961, 964-84

mitment[6] to these children by enacting the Education for All Handicapped Children Act of 1975 (EAHCA).[7]

The EAHCA provides financial assistance to states that establish procedures to assure every handicapped child a "free appropriate public education."[8] The EAHCA however, does not address what functional standards are to be used to determine whether an education is "appropriate."[9] Controversies regarding the quality of education a school must provide in order to meet the EAHCA's requirements have been resolved primarily through state administrative procedures.[10] The most important administrative procedure required by the EAHCA is the individualized education program (IEP).[11] The IEP is a process by which the school administration,

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(1977); Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40 (1974).

6. For a description of laws in existence prior to the enactment of the EAHCA, see Note, *The Education for All Handicapped Children Act of 1975*, 10 U. MICH. J. L. REF. 110, 118-20 (1976). *See also* Stafford, *Education of the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72-73 (1978). (Senator Stafford was one of the principal sponsors of the EAHCA in the Senate and currently serves on the Senate Subcommittee on the Handicapped.)

7. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1232, 1400-1402, 1405, 1406, 1411-1420, 1453 (1976 & Supp. V 1981)).

8. 20 U.S.C. § 1412(1) (1976). The EAHCA is an enabling act which provides funds to qualifying states. These federal funds serve only to supplement state funding, not to independently meet the cost of educating handicapped children. "It is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the State in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws." SENATE REPORT, *supra* note 2, at 13. *See also* 20 U.S.C. § 1414(a)(2) (1976):

> Federal funds . . . shall be used to pay only the excess costs directly attributable to the education of handicapped children, and . . . shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds . . . .

9. 20 U.S.C. § 1401(18) (1976) states:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an *appropriate* preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. (emphasis added).

It is this tautological use of the word "appropriate" in subsection (C) to define "appropriate" that may have caused difficulties in the interpretation of the concept. *See also* R. MARTIN, EDUCATING HANDICAPPED CHILDREN—THE LEGAL MANDATE 57 (1979). ("It is a common feeling among educators that no one can accuse them of not offering an appropriate education because no one can define 'appropriate.' ")

10. 20 U.S.C. § 1415 (1976) contains the EAHCA's procedural requirements. *See infra* notes 71-76 and accompanying text.

11. For a discussion of the importance of the IEP to the operation of EAHCA, see Note,

and the child's parents and teachers design a plan to meet the special needs of the child. If a satisfactory agreement concerning the child's educational program cannot be reached, the EAHCA provides for administrative hearings[12] and judicial review by state or federal courts of those administrative decisions.[13] Because the majority of controversies thus far have been resolved through the administrative process, the opportunities for judicial interpretation of the EAHCA have been rare.[14]

Recently, in *Hendrick Hudson District Board of Education v. Rowley*,[15] the Supreme Court interpreted the EAHCA for the first time. In *Rowley*, the parents of an exceptionally bright and talented deaf child sought to have a sign-language interpreter provided in school for their daughter.[16] The parents believed that she needed this support to take advantage of the educational opportunity afforded through attendance in the regular public school classes.[17] Although the school agreed to provide some specialized services for the child, it did not believe that an interpreter was needed.[18] The Rowleys brought suit in a federal court after exhausting the administrative review process.[19] The district court held that an appropriate education is that which gives each child an "opportunity to achieve his [or her] full potential commensurate with the opportunity provided to other children."[20] The United States Court of Appeals for the Second Circuit af-

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Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education, 56 ST. JOHN'S L. REV. 81, 96-98 (1981). *See also infra* notes 66-70 and accompanying text.

12. *See* 20 U.S.C. § 1415(b)(2) (1976).

13. *See* 20 U.S.C. § 1415(e)(2) (1976).

14. Between 1977 and 1981, approximately 756 cases involving handicapped students were brought in federal and state court. NATIONAL CENTER FOR STATE COURTS, STUDENT LITIGATION: A COMPILATION AND ANALYSIS OF CIVIL CASES INVOLVING STUDENTS, 1977-1981 at 23 (1981) [hereinafter cited as STUDENT LITIGATION]. Of the 756 cases, only 39 reached appellate court level. *Id.* at 19. In comparison, there were 1,166 local and 1,418 state level due process hearings under EAHCA during 1979-80 school year alone. *See* FOURTH ANNUAL REPORT, *supra* note 4 at 45.

15. 102 S. Ct. 3034 (1982).

16. *Id.* at 3039-40.

17. Initial testing indicated that Amy recognized approximately 59% of the words spoken to her in the classroom. With a sign language interpreter, she comprehended 100% in the same tests. Rowley v. Hendrick Hudson Dist. Bd. of Educ., 483 F. Supp. 528, 532 (S.D.N.Y. 1980).

18. *Id.* at 530.

19. The Rowleys rejected the initial decision of the school district's Committee on the Handicapped to provide considerable special services, but not an interpreter. Upon reconsideration, the Committee adhered to its original recommendation. The Rowleys demanded and received a hearing by an independent examiner. After the hearing examiner agreed with the school board, the Rowleys sought review by the Commissioner of Education for New York. The Commissioner also decided in favor of the school board. *Id.* at 530-31.

20. *Id.* at 534.

firmed the district court's decision in a per curiam opinion.[21]

On appeal, the Supreme Court addressed two issues: 1) the substantive standard for a "free appropriate public education" and 2) the courts' role in the review of state decisions regarding the education of handicapped children.[22] The Court rejected the district court's substantive standard for "free appropriate public education."[23] Instead, the Court stated that an education is "appropriate" when a state provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[24] The Court further held that the scope of judicial review is properly limited to two questions: 1) whether the State has complied with the procedural requirements of the EAHCA; and 2) whether the IEP is reasonably calculated to enable the child to benefit from the educational opportunity.[25]

This Note will examine the *Rowley* Court's interpretation of the EAHCA and its standards for "free appropriate public education" and judicial review. It will question whether the Court has provided sufficient guidelines for interpreting these critical aspects of the EAHCA and analyze the potential impact of *Rowley* on EAHCA litigants. The Note will conclude by suggesting that, although the Court affirmed the EAHCA's substantive and procedural requirements, it did not provide an adequate functional standard for courts to apply in the future.

I. The Recognition of the Rights of the Handicapped: An Agonizingly Slow Process

A. Early Development of a "Right" to Education

Early court decisions reflected society's fear of and disdain for physically and mentally handicapped people.[26] In one of the earliest decisions

21. Rowley v. Board of Educ. of Hendrick Hudson Cent. School, 632 F.2d 945 (2d Cir. 1980). The court of appeals sought to limit the precedential value of its decision by invoking a provision of its rules of court, 2d. Cir. R.O. 23, to limit the decision to the unique facts presented. It thus would preclude any court in the Second Circuit from relying on this decision. 632 F.2d. at 948 n.7.

22. 102 S. Ct. at 3040.

23. The Court concluded that "[c]ertainly the language of the statute contains no requirement like the one imposed by the lower courts . . . ." *Id.* at 3042.

24. *Id.* at 3049.

25. *Id.* at 3051.

26. *See, e.g.*, Colley, *The Education for All Handicapped Children Act (EHA) A Statutory and Legal Analysis*, 10 J. L. & Educ. 137, 137-8 (1981); Large, *Special Problems of the Deaf Under The Education for All Handicapped Children Act of 1975*, 58 Wash. U.L.Q. 213, 215-16 (1980). *See also*, Buck v. Bell, 274 U.S. 200, 207 (1927) in which Justice Holmes, writing for the Court, stated that "[t]hree generations of imbeciles is enough," in deciding that the state could order the sterilization of a mentally retarded woman.

regarding the education of handicapped children, *Watson v. City of Cambridge*,[27] a mentally retarded child was denied a public education because the school decided that he was troublesome and could not benefit from the instruction.[28] In *State ex rel Beattie v. Board of Education*,[29] the Wisconsin Supreme Court approved of a decision to exclude a child with cerebral palsy from public school because his physical condition and actions disturbed the teacher and other students.[30]

Handicapped children were thus summarily denied equal educational opportunities.[31] For at least one group of disadvantaged children, black school children, judicial approval of unequal treatment ended in 1954. In *Brown v. Board of Education*,[32] the Supreme Court held that the doctrine of "separate but equal"[33] does not apply in the field of public education. The Court recognized the critical role education has in a child's development. It held that public education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[34]

Although the *Brown* Court did not hold that education is a fundamental right guaranteed by the Constitution, the Court's reasoning subsequently provided impetus for advocates asserting the rights of handicapped children. The equal protection basis for requiring an equal educational opportunity for *all* children, if the state provides it for any children, was the underpinning of the subsequent suits brought on behalf of handicapped children.[35] With the growing recognition that handicapped children could benefit from education,[36] concerned parents began to demand public edu-

27. 157 Mass. 561, 32 N.E. 864 (1893).

28. *Id.* at 561-62, 32 N.E. at 864.

29. 169 Wis. 231, 172 N.W. 153 (1919).

30. *Id.* at 232-35, 172 N.W. at 154-55. *Compare* Cooper v. Aaron, 358 U.S. 1 (1958) (Hostility to racial desegregation was held not to be a basis to halt desegration).

31. *See* Large, *supra* note 26, at 216.

32. 347 U.S. 483 (1954).

33. This doctrine was first discussed in Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850), where a black child was denied admission to the school nearest her home because the school was all-white. The court found it sufficient that an all-black school one-quarter mile further from her home could provide her education. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court upheld a Louisiana statute requiring railway companies to provide separate, but equal, accommodations.

34. 347 U.S. at 493. *Cf.* Plyler v. Doe, 457 U.S. 202, 221 (1982), in which the Court stated that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."

35. *See, e.g.*, S. SAROSON & J. DORIS, EDUCATIONAL HANDICAP, PUBLIC POLICY AND SOCIAL HISTORY 2 (1979); Stafford, *supra* note 6, at 73.

36. Several experts on special education testified in *Pennsylvania Ass'n of Retarded Citizens v. Pennsylvania* that all mentally retarded persons are capable of benefiting from educa-

cation for their children.

In *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*,[37] a class action was brought on behalf of all mentally retarded children in Pennsylvania who had been statutorily excluded from public schools.[38] The statutes allowed schools to exclude children deemed untrainable or uneducable.[39] *PARC* was resolved by a pretrial consent decree, so the court did not reach a decision on the merits of the constitutional issues presented.[40] The consent decree affirmed Pennsylvania's obligation to provide all mentally retarded children a public education *"appropriate to the child's capacity."*[41] It also delineated requirements with which Pennsylvania school districts had to comply. These included provisions for administrative hearings prior to a decision on placement and a preference for placement in a regular classroom rather than in special classes. Since the decree recognized that all retarded children can benefit from education, it dispelled the notion that they were uneducable.[42]

Shortly after *PARC* was decided, the "right to education" was extended to children with other handicaps. In *Mills v. Board of Education*,[43] the United States District Court for the District of Columbia stated that the Constitution required the school system to provide a "free and suitable" public education for these "exceptional" children.[44] The court order defined extensive procedural requirements similar to those delineated in *PARC*.[45] The *Mills* court also held that the additional expense of educat-

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tion. 343 F. Supp. 279, 296-97 (E.D. Pa. 1972); Kirp, Buss & Kuriloff, *supra* note 5, at 42. In fact, seven expert witnesses were scheduled to testify, but after the testimony of the first four, both parties agreed that further testimony was unneccessary. L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION—ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN 28, 29 (1973).

37. 343 F. Supp. 279 (E.D. Pa. 1972).

38. *Id.* at 281-83. 24 PA. CONS. STAT. ANN. §§ 13-1304, 13-1375 (Purdon 1981-82) stated that children certified as "uneducable" or "untrainable" or with a mental age less than five years old were not entitled to public education. Prior to *PARC*, these statutes denied over 70,000 children "any public education services in schools, home or day care or other community facilities, or state residential institutions." 343 F. Supp. at 296.

39. *Id.*

40. *Id.* at 299. For an analysis of the constitutional issues presented in *PARC* and *Mills*, see H. TURNBULL, LEGAL ASPECTS OF EDUCATING THE DEVELOPMENTALLY DISABLED 14-15 (1975).

41. 343 F. Supp. at 307 (emphasis added).

42. *Id.*

43. 348 F. Supp. 866 (D.D.C. 1972). Plaintiffs in the class action included children classified as brain damaged, hyperactive, epileptic and mentally retarded.

44. *Id.* at 878.

45. *Id.* at 880-84. *See PARC*, 343 F. Supp at 279, 304-05 (E.D. Pa. 1972). The procedural requirements included: written notice of the proposed action; an opportunity for a

ing children was not a valid reason to deny them a public education. It reasoned that no single group should bear the brunt of the shortage of public resources.[46] After *PARC* and *Mills* at least it was clear that a state which provided public education could not deny this educational opportunity to handicapped children.

In *San Antonio Independent School District v. Rodriguez*,[47] the Supreme Court applied reasoning which appeared to limit the judicial expansion of the right to education. The Court upheld a Texas system for financing schools through local property taxes. This system resulted in a disparity between wealthy and poor school districts in resources expended per pupil. The Court first determined that education is not a fundamental constitutional right. It reasoned that even if some minimal level of education is necessary to exercise other fundamental rights, there is no indication that the state's system failed to provide this level.[48] Justice Powell, writing for the majority, refused to accept the proposition that equal education required the equal expenditure of funds.[49] The Court also recognized the federalism issues inherent in judicial interference with a state's decisions regarding education, an area of responsibility that had been predominantly regarded as a state function.[50]

B. The EAHCA: Legislative Response to a Public Demand

Most states enacted legislation[51] in response to numerous decisions in state and federal courts requiring states to provide handicapped children

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hearing before an independent hearing officer; the right to present evidence, an opportunity to cross examine witnesses and the right to have legal counsel during the hearing; access to all records and information held by the school, as well as the record; and a decision based solely on the record of the hearing. These requirements resembled the expansive view of due process taking place in other areas of administrative law at that time. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (full due process hearing required before removal of Aid to Families with Dependent Children benefits); Goss v. Lopez, 419 U.S. 565 (1975) (states with compulsory education laws must recognize the property interest of the student in a public education as protected by the due process clause prior to expelling the student from school).

46. 348 F. Supp. at 876.

47. 411 U.S. 1 (1973).

48. 411 U.S. at 36-37. For a discussion of the impact of *Rodriguez*, see Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriquez*, 59 CORNELL L. REV. 519 (1974).

49. *See* 411 U.S. 42-43 & n.86.

50. 411 U.S. 40-44. The Court stated that "the judiciary is well advised to refrain from imposing on States inflexible constitutional restraints." *Id.* at 43. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); *but see* Plyler v. Doe, 102 S. Ct. 2382 (1982) where the Court required Texas to provide public education to illegal aliens within the state.

51. *See* SENATE REPORT, *supra* note 2, at 20-21, Table 2.

with a public education.[52] Many states, however, did not have sufficient financial resources to carry out these plans. In many instances, handicapped children were still deprived of an equal educational opportunity.[53] The Education for All Handicapped Children Act of 1975[54] was enacted to assist states in their funding of the education of handicapped children through provision of supplemental federal funds.[55]

Congress recognized that adherence to the requirements of the EAHCA could be very expensive.[56] In order to gain compliance, Congress relied upon its spending power,[57] and provided federal funds only to states that met the prerequisites of the EAHCA.[58] This approach has resulted in nearly uniform implementation of the EAHCA requirements throughout the nation.[59] Funding is provided on a basis that creates incentives for the state to identify and evaluate all children requiring special education, and to place them in an appropriate program.[60] The funding formula also discourages inflated state reporting by limiting a state's total reimbursement

52. By 1975, there had been some 46 cases involving the education of handicapped children. 121 CONG. REC. 37,023 at 37,025 (1975) (remarks of Rep. Brademas).

53. HOUSE REPORT, *supra* note 2, at 11.

54. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1232, 1400, 1401, 1405, 1406, 1411-1420, 1453 (1976 & Supp. V 1981)).

55. 20 U.S.C. § 1412(1) (1976). *See supra* note 8. For a description of previous federal legislation, see Stafford, *supra* note 6, at 72-73. For a discussion of the perceived defects in previous legislative attempts, see Note, *supra* note 6, at 119-20.

56. Congress estimated that the average cost of educating a handicapped child would be twice that of a "normal" child. *See* SENATE REPORT, *supra* note 2, at 15. In fact, it has proven to be difficult to determine the additional costs. *See* FOURTH ANNUAL REPORT, *supra* note 4, at 12-14 ("No one knows for certain how much special education programming costs."). It has been suggested that the failure to provide appropriate education to handicapped children ultimately results in greater requirements for expenditures to provide for their support and care as they grow older without developing adequate skills for self-sufficiency. *See, e.g.*, L. LIPPMAN & I. GOLDBERG, *supra* note 36, at 63-64; H. TURNBULL, *supra* note 40, at 32-33.

57. The spending power of Congress originates in U.S. CONST., art. I, § 8, cl. 1, which states that "Congress shall have the Power To . . . provide for the common Defence and General Welfare of the United States."

58. *See* 20 U.S.C. § 1412(1) (1976). *See also* 34 C.F.R. § 300.110 (1982).

59. All but one state (New Mexico) now receives federal funds under the EAHCA. 102 S. Ct. 3034, 3039 (1982). *But see* J. ZETTEL, *supra* note 4, at 25-28, for a presentation of the large variances between states in percentages of their students classified as handicapped. *See also* P. JONES, A PRACTICAL GUIDE TO FEDERAL SPECIAL EDUCATION LAW UNDERSTANDING AND IMPLEMENTING PL 94-142 at 40 (1981).

60. 20 U.S.C. § 1414(a)-(g) (1976 & Supp. V 1981). *See also* 34 C.F.R. § 300.180-186 (1982). For a description of the EAHCA funding scheme, see Note, *supra* note 6, at 124-28. The EAHCA is a permanent authorization for expenditures, but the amount appropriated each year has not met the level that was authorized when the EAHCA was first enacted. For a discussion of the growing gap between authorization and appropriation under the EAHCA, see E. LEVINE & E. WEXLER, PL 94-142 AN ACT OF CONGRESS 186-90 (1981).

under the EAHCA to a fixed percentage of its total student population.[61] In order to qualify for federal funding under the EAHCA, a state must assure the Secretary of Education that it has a policy in effect which assures all handicapped children the right to a free appropriate public education.[62] The EAHCA directs the Secretary of Education to develop regulations to ensure the accomplishment of these objectives.[63]

The principal substantive requirement of the EAHCA is a "free appropriate public education." Other than somewhat vague definitions of the term,[64] the EAHCA provides minimal guidance in specifying what constitutes such an education. The drafters were aware of the impossibility of legislatively directing the interactions of *all* school systems with *all* handicapped children.[65] Instead, the Individualized Education Plan (IEP) has been relied upon to translate the EAHCA's requirement for a "free appropriate public education" into a concrete program for each child.[66] An IEP is normally prepared by the child's teacher in conjunction with a representative of the school administration, and the child's parents or guardian.[67] The plan addresses the child's present abilities and special needs. It specifies objectives to be achieved and the support services and instruction necessary to reach those objectives.[68] The EAHCA, however, does not require the school to guarantee the achievement of these objectives.[69] Rather, they

61. 20 U.S.C. § 1411(a)(5)(A) (1976 & Supp. V 1981) provides that no more than 12% of all children aged 5 to 17, inclusive, within a state may be counted as handicapped and eligible for funding because they are handicapped.

62. 20 U.S.C. § 1412(1) (1976 & Supp. V. 1981).

63. *See* 20 U.S.C. § 1417(b) (1976 & Supp. V 1981); 34 C.F.R. § 300.123 (1982).

64. *See supra* note 9. The EAHCA evinces a more precise standard for the environment in which the education should be given. It states that handicapped children will be educated with nonhandicapped children "to the maximum extent appropriate." *See* 20 U.S.C. § 1412(5)(A) (1976 & Supp. V. 1981).

65. *See* Stafford, *supra* note 6, at 72.

66. For a description of the EAHCA's reliance on the procedural mechanisms, see Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1106 (1979).

67. Current regulations require parental approval of the IEP. 20 U.S.C. § 1401(19) (1976 & Supp. V 1981); 34 C.F.R. §§ 300.344(a)(3), 300.345 (1982). As part of the administration's regulatory reform effort, the Department of Education has, however, introduced revisions to the regulations which would relax these and other procedural requirements. *See* 47 Fed. Reg. 33,836 (1982) (to be codified at 34 C.F.R. pt. 300) (proposed Aug. 4, 1982), *amended by* 47 Fed. Reg. 39,652 (1982) and 47 Fed. Reg. 40,815 (1982). These proposed rules were harshly criticized during the initial phases of the comment period. Wash. Post, Sept. 30, 1982, at A1, col. 2. Six of the most criticized proposals were withdrawn pending reformulation. 47 Fed. Reg. 49,871-72 (1982). (As of this writing, the revision of these rules is still forthcoming.)

68. 20 U.S.C. § 1401(19) (1976 & Supp. V 1981); 34 C.F.R. § 300.341-.349 (1982). For an analysis of the IEP process, see Note, *supra* note 11, at 96-98.

69. 34 C.F.R. § 300.349 (1982) states that "the Act does not require that any agency,

are used as a means to plan and periodically re-evaluate the progress of the child.[70]

If the parents disagree with any provision of the child's IEP, the EAHCA provides for a hearing before an impartial examiner.[71] At this hearing, parents are given extensive due process protection.[72] They are given the right to counsel, an opportunity to present evidence, the right to cross-examine and call witnesses, and are guaranteed access to the school's records of the child.[73] If the parents disagree with the results of the hearing at the local level, the EAHCA entitles them to appeal to the state educational authority for review of the decision. Similar due process safeguards are provided at this level.[74] The IEP process and these provisions for administrative review were intended to accommodate most disputes concerning placement decisions and the structure of educational programs.[75] If a satisfactory agreement cannot be reached through the administrative appeals process, the EAHCA creates jurisdiction for judicial review in either state or federal court.[76]

C. Litigation Since the EAHCA: The Struggle to Find Meaning Where None is Apparent

Although the EAHCA has now been in place for eight years, appellate court interpretation of the EAHCA has been rather limited.[77] One of the most frequently arising issues in litigation under the EAHCA is the ques-

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teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives."

70. Evaluations must take place at least once each year. 20 U.S.C. § 1414(a)(5) (1976 & Supp. V 1981); 34 C.F.R. § 300.342 (1982).

71. 20 U.S.C. § 1415(b)(2) (1976).

72. *See* 20 U.S.C. §§ 1415(b)(1), 1415(d) (1976). For an in-depth analysis of due process protections under the EAHCA, see generally, J. SHRYBMAN & G. MATSOUKAS, DUE PROCESS IN SPECIAL EDUCATION (1982).

73. *See* 20 U.S.C. §§ 1415(b)(1), 1415(d) (1976).

74. 20 U.S.C. §§ 1415(c), 1415(d) (1976).

75. *See* Note, *supra* note 6, at 1108-10; Stafford, *supra* note 6, at 75. *But see* J. ZETTEL, *supra* note 4, at 36-37. The author discusses the high costs of due process hearings. He points out that studies indicate that hearings are primarily being pursued by parents with above average educations and incomes. Legal costs for parents were found to average $800 to $1,000 for a local level hearing. He suggests that negotiation in lieu of hearings has been successful in Massachusetts. *Id.* at 37 (citing NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION [NASDSE], REPORT ON THE IMPLEMENTATION OF P.L. 94-142 (1980)).

76. 20 U.S.C. § 1415(e)(2) (1976).

77. Only 39 appellate court decisions involving the rights of handicapped children were noted in a comprehensive report examining student litigation during the period of 1977-1981. *See* STUDENT LITIGATION, *supra* note 14, at 19. This relatively small number of cases may be partially attributable to the fact that the EAHCA was only fully implemented on

tion of whether the "free appropriate education" requirement has been met.[78] The vagueness of the requirement has resulted in considerable discussion by courts and commentators.[79] Attempts to attach a functional meaning to this elusive phrase have resulted in the emergence of a broad spectrum of definitions.[80] The minimal standard of self-sufficiency[81] suggests that an education program is appropriate if a child is taught the skills essential to being independent. At the opposite end of this spectrum are standards which suggest that a "free appropriate public education" is achieved only if the goal is to optimize the child's development.[82]

The difficulty courts have encountered in interpreting the EAHCA was evident in *Battle v. Pennsylvania*.[83] In *Battle*, a class action was brought to challenge the 180-day limitation placed on the length of the academic year by a Pennsylvania statute.[84] The suit sought to compel the state to provide training for handicapped children throughout the calendar year. The long interruptions caused by summer vacation led to deterioration in the children's skill levels. The district court reasoned that the EAHCA required

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Sept. 1, 1978 for all children ages three to eighteen. *See* 20 U.S.C. § 1412(2)(B) (1976 & Supp. V 1981).

78. Of approximately 756 cases brought on behalf of handicapped children, 352 involved placement outside public school, 146 involved the appropriateness of the program, and 66 involved the least restrictive alternative or "mainstreaming." *See* STUDENT LITIGATION, *supra* note 14, at 25.

79. *E.g.*, J. SHRYBMAN & G. MATSOUKAS, *supra* note 72, at 14; Note, *supra* note 11; R. MARTIN, *supra* note 9, at 57-75; Haggerty & Sacks, *supra* note 5; Note, *supra* note 6.

80. For a discussion of recent trends in interpreting the term "free appropriate public education", see *Analysis and Comment*, 4 EDUC. OF THE HANDICAPPED L. REP. (CRR) 5 (1982).

81. In Armstrong v. Kline, 476 F. Supp. 583, 604 (E.D. Pa. 1979), *modified sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), a federal court concluded that the EAHCA requires states to provide an education which would develop maximum self-sufficiency, considering the child's handicaps. *See* Harrison, *Self-Sufficiency Under the Education for All Handicapped Children Act of 1975: A Suggested Judicial Approach*, 1981 DUKE L.J. 516. *See also* Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975), in which an action was brought under the due process and equal protection clauses of the Constitution, rather than under the EAHCA. The *Fialkowski* court held that a child with multiple handicapping conditions has a colorable equal protection claim where the state failed to teach such self-sufficiency skills as eating, walking, and dressing, even though academic courses were offered. *Id.* at 958. It found that this is consistent with *Rodriguez*, reasoning that some minimal level of education is a constitutional entitlement. *Id.*

82. *See, e.g.*, Eberle v. Board of Pub. Educ., 444 F. Supp. 41, 42 (W.D. Pa. 1977), *aff'd*, 582 F.2d 1274 (3rd Cir. 1978) (a child with average intelligence and profound hearing loss required special instruction to enable him to reach his optimal development).

83. Battle v. Pennslyvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), *modifying* Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979).

84. The Pennsylvania statutes limited the length of the school year to 180 days and placed an annual ceiling on expenditure per student. 24 PA. CONS. STAT. ANN. §§ 13-1376, 13-1377 (Purdon 1982).

an education oriented towards creating maximum self-sufficiency in the students within the constraints of their handicaps.[85] The court held that the 180-day limitation was invalid because it interfered with this goal.[86] The United States Court of Appeals for the Third Circuit affirmed the decision, but on completely different grounds.[87] It emphasized the individualized nature of the EAHCA's requirements and held that a state statute which precludes consideration of the individual child's needs conflicts with the EAHCA.[88]

Reflecting this concern for the needs of the individual, the United States Court of Appeals for the Eighth Circuit applied the reasoning of *Battle* and concluded that the "best" education is not necessarily the most appropriate.[89] In *Springdale School District No. 50 v. Grace*,[90] a deaf child's parents sought to compel the local public school to provide their daughter with a certified teacher of the deaf in the regular classroom.[91] The school board recommended that she attend the Arkansas School for the Deaf, where she would receive the "best" education. The child had attended both the local public school and the state's School for the Deaf in Little Rock. Her parents maintained that she would become better integrated into the hearing world by attending the regular public school in Springdale.[92]

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85. 476 F. Supp. at 604.

86. *Id.* at 605.

87. 629 F.2d at 269.

88. *Id.* at 280-81. However, Judge Sloviter suggested that the ultimate goal of Congress in the EAHCA was to provide maximum self-sufficiency, tempered with the recognition that the states were required to operate within the reasonable constraints of their limited resources. *Id.* at 284 (Sloviter, J., concurring in part and dissenting in part).

89. Springdale School Dist. No. 50 v. Grace, 656 F.2d 300 (8th Cir. 1981), *aff'g* 494 F. Supp. 266 (D.N.D. Ark. 1980), *vacated*, 102 S. Ct. 3504 (1982). The Supreme Court's memorandum opinion vacated the Eighth Circuit's decision with instructions to remand to the lower court for further consideration in light of *Rowley*. 102 S. Ct. 3504 (1982). Upon rehearing, the Eighth Circuit affirmed and the school district's subsequent petition for certiorari was denied. 693 F.2d 41 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2086 (1983).

90. 656 F.2d 300 (8th Cir. 1981), *vacated*, 102 S. Ct. 3504 (1982), *aff'd on rehearing*, 693 F.2d 41 (8th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3825 (U.S. May 16, 1983).

91. It has been suggested that both *Springdale* and *Rowley* should have been considered together by the Court in order to give a more meaningful opinion. *See EHLR Analysis: Grace, Rowley and "Appropriate" Education*, EDUCATION OF HANDICAPPED L. REP. (CCR) Supp. 63, at AC-64 (Jan. 8, 1982).

92. The child's parents had moved to Little Rock, which is 200 miles from Springdale, so that she could attend the special school there. For personal reasons, they moved back to Springdale and sought to enroll their daughter in the public school. The school recommended that she attend the Arkansas School for the Deaf because she would receive the "best" education there. Her parents appealed the decision successfully and the school was directed to provide a certified teacher for the deaf. *Springdale*, 656 F.2d 300 (8th Cir. 1981),

The *Springdale* court concluded that *Battle* suggested a three-step analysis to determine whether an education is appropriate under EAHCA. This consisted of first assessing the child's individual needs. Second, the IEP developed in accordance with the educational goals set by the state is examined. Finally, the program created under the IEP is reviewed to determine whether it conflicts with any requirements in the EAHCA.[93] Where no conflict exists, the program is "appropriate." The Eighth Circuit held that the EAHCA's requirements for providing an education in the least restrictive environment outweighs the nonetheless desirable goal of providing the "best" education.[94]

D. Recent Supreme Court Decisions Affecting the Mentally Retarded

Recently, the Supreme Court decided two cases which significantly affect the rights of mentally retarded persons. In *Pennhurst State School and Hospital v. Halderman*,[95] the Court examined the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (Developmentally Disabled Assistance Act)[96] to determine whether acceptance of federal funding under the Developmentally Disabled Assistance Act imposed its findings[97] upon the state and thus created a private right of action when "rights" in the findings were denied. This legislation was essentially a gap-filler, addressing the needs of people not covered by either the EAHCA or

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vacated, 102 S. Ct. 3504 (1982), *aff'd on rehearing*, 693 F.2d 41 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2086 (1983).

93. In *Battle*, the court held that the 180-day statute interfered with the intent of the EACHA by applying a blanket rule which ignored the individual consideration of each child. 629 F.2d at 280-81.

94. The Arkansas state plan, like the EAHCA, required that the education be conducted in the least restrictive environment. In *Springdale*, the court determined that the least restrictive environment requirement could be best met by the regular classroom in the local school. *But see*, Stafford, *supra* note 6, at 76 (suggesting that the least restrictive environment is not necessarily mainstreaming into the regular classroom). *See also* Large, *supra* note 26, at 269-72, (arguing that strict application of mainstreaming may be harmful in the case of deaf children.)

95. 451 U.S. 1 (1980).

96. 42 U.S.C. §§ 6000-6081 (1976 & Supp. IV 1980).

97. 42 U.S.C. § 6010 (1976) states in relevant part:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

the Rehabilitation Act of 1973.[98] The "right" sought in *Pennhurst* was to receive "appropriate" treatment in the least restrictive environment. Specifically, the parents sought treatment which would habilitate their daughter, rather than "warehouse" her in the state hospital.[99]

In a six-to-three decision,[100] the Court concluded that legislation enacted pursuant to Congress' spending power is analogous to a contract between the states and the federal government.[101] Where no clear obligation is evident from the language of a particular section or its legislative history, the Court determined that it should not be construed to be binding on the states.[102] Justice Rehnquist followed an eleventh amendment analysis[103] to conclude that there must be a knowing acceptance of a condition in order to bind the state.[104] In *Pennhurst*, the Court determined that it was not clear that the Developmentally Disabled Assistance Act's findings[105] were a condition precedent to entitlement for federal funding. Therefore, no right to appropriate treatment in the least restrictive environment was imposed when Pennsylvania accepted federal funds under the statute because the state did not knowingly enter into an agreement to create this "right." The Court was thus able to avoid deciding whether such a right would be enforceable under the Civil Rights Act.[106]

In the following Term, the Court examined the constitutional rights of an institutionalized mentally retarded person. In *Youngberg v. Romeo*,[107] the Court unanimously held that the Constitution entitled a severely re-

98. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701-796 (1976 & Supp. V 1981)).

99. The suit was later joined by other residents of Pennhurst, residents of other institutions, and the Pennsylvania Association of Retarded Citizens, and was certified as a class action. 451 U.S. at 6-7.

100. Each Justice voted the same way in both *Rowley* and *Pennhurst*. Justice Stewart, no longer on the Court, was replaced in the majority by Justice O'Connor.

101. 451 U.S. at 17, 25 (1980). For an in-depth discussion of *Pennhurst*, see Baker, *Making the Most of Pennhurst's "Clear Statement" Rule*, 31 CATH. U.L. REV. 439 (1982).

102. The Court stated that there is "no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." 451 U.S. at 17.

103. *Id.* Justice Rehnquist cited two cases involving eleventh amendment sovereign immunity issues: Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973) and Edelman v. Jordan, 415 U.S. 651 (1974). Justice White, in his dissent, criticized the Court for applying the stricter eleventh amendment standard to a situation involving the eighth amendment. 451 U.S. at 48 (White, J., dissenting).

104. 451 U.S. at 17.

105. 42 U.S.C. § 6010 (1976).

106. 42 U.S.C. § 1983 (1976). The suit sought damages from state officials for having denied the plaintiffs their "rights" guaranteed under federal law. Since the Court found that no substantive rights had been denied, it did not have to rule on this issue. 451 U.S. at 27-28, 28 n.21.

107. 102 S. Ct. 2452 (1982). Specifically at issue were the fundamental liberty interest

tarded resident of Pennhurst State School to freedom from unreasonable physical restraint and to care which ensured his personal safety.[108] The more difficult issue presented to the *Romeo* Court was whether institutionalized mentally retarded people have a per se constitutional right to some level of training. Romeo sought only that minimal level of training necessary to ensure his safety and freedom from undue restraint.[109] Therefore, the Court was able to defer the decision regarding a right to training for other purposes, such as to achieve maximum potential or self-sufficiency.[110]

II. *Hendrick Hudson District Board of Education v. Rowley*: An Attempt to Discover Functional Standards for Application to the EAHCA

Only ten days after the decision in *Romeo* was announced, the Court addressed the rights of handicapped children under the Education for All Handicapped Children Act of 1975. In *Hendrick Hudson District Board of Education v. Rowley*,[111] the Court examined the requirements for free appropriate public education and judicial review under the EAHCA. It held that the EAHCA does not require that any particular substantive standard be used to measure when the education provided is appropriate. The Court also held that the EAHCA does not impose a broad scope of judicial review upon the states.[112]

The controversy in *Rowley* began when Amy Rowley was in kindergarten. She was initially placed, for a trial period, in a regular kindergarten class with no specialized support services.[113] She was then provided with a hearing aid and, for a two week trial period, a sign language interpreter.[114] An IEP was prepared for her entry into first grade.[115] An extremely intelligent child, Rowley was progressing in the regular classroom without the services of a sign language interpreter.[116] The school complied with the

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and right to safe confinement of an individual involuntarily committed to a state mental hospital. *Id.*

108. The Court found that a retarded citizen has at least as much of a fundamental right to liberty and safe confinement conditions as a prisoner who has committed a crime. *Id.* at 2461.

109. *Id.* at 2460.

110. *Id.* at 2457-58.

111. 102 S. Ct. 3034 (1982).

112. *Id.* at 3050-51.

113. 483 F. Supp. at 530.

114. *Id.*

115. *Id.* An IEP must be prepared upon entry to the first grade and revised at least annually thereafter. 20 U.S.C. § 1414(a)(5) (1976); 34 C.F.R. § 300.342 (1982).

116. Although tests showed that she was able to comprehend only 59% of the words

procedural requirements of the EAHCA and state regulations and evaluated Rowley. Although the school agreed to provide considerable specialized services, it determined that an interpreter would not be required to provide her with a "free appropriate public education."[117] Her parents disagreed and, after exhausting their administrative remedies, sought review in federal court.[118] The district court determined that an interpreter should be provided so that Rowley would have "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[119] The United States Court of Appeals for the Second Circuit affirmed in a per curiam opinion.[120] The school board appealed the decision to the Supreme Court. The Court's decision centered on two issues—the meaning of "free appropriate public education" and the proper scope of judicial review under the EAHCA.[121]

Writing for the majority, Justice Rehnquist criticized the lower courts for overlooking the statutory definition of "free appropriate public education," which, he maintained, was readily discernable from the language of the EAHCA.[122] He combined the EAHCA's definitions of "free appropriate public education," "special education," and "related services."[123] He

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spoken in class, Amy was achieving passing grades in the regular classroom. She was even able to help her classmates with their work and did so occasionally at the request of her teachers. Both of Amy's parents are deaf. Shortly after Amy was born, it was discovered that she was nearly totally deaf. Her parents have raised her since birth using a technique known as "total communication," which entails the use of a broad variety of communicative methods, including: signing, mouthing words, touching, and visual cues. This technique has gained considerable acceptance among educators of the deaf. 483 F. Supp. at 529-31. *But see* Large, *supra* note 26, at 255, which suggests that there is considerable controversy over the best technique for the education of deaf children.

117. In order to meet Amy's needs, the school proposed to provide: a) continued use of an FM wireless hearing aid; b) the services of a tutor for the deaf for one class hour every day; and c) the services of a speech therapist for three hour-long sessions per week. Amy's mother spends at least an hour daily working with Amy on her schoolwork. In addition, the special tutor goes over Amy's upcoming lessons with her each day during their hour-long session. 483 F. Supp. at 530-31.

118. Prior to appealing to a federal court, an appellant must exhaust all administrative remedies. 20 U.S.C. § 1415(e)(2) (1976); 34 C.F.R. § 300.512 (1982).

119. 483 F. Supp. at 534. The only controversy at issue was the appropriateness of the substantive standard by which it was determined that an interpreter was not necessary. There was no complaint by the Rowleys that the school had not followed the proper procedures as required by the EAHCA. *Id.* at 529.

120. 632 F.2d 945 (2d Cir. 1980).

121. 102 S. Ct. 3034 (1982).

122. *Id.* at 3041.

123. *Id.* Justice Rehnquist derived the definition which the Court applied in this case by combining three statutory definitions found at 20 U.S.C. § 1401 (1976). Section 1401(18) defines "free appropriate public education", in pertinent part, as "special education and related services;" § 1401(16) defines "special education" as "specially designed instruction

concluded that instruction designed to address the unique needs of the child meets the requirements of the EAHCA if support services and "other items on the definitional checklist" are provided to allow the child to receive *some* benefit from the instruction.[124] The Court noted that it could find no standard in the EAHCA prescribing the minimum level of education to be accorded handicapped children,[125] nor any language to support the district court's requirement that the child's potential be maximized.

In an effort to determine whether Congress impliedly required some substantive level of education, Rehnquist examined the legislative history of the EAHCA. He also considered *PARC* and *Mills*, the two cases which prompted the EAHCA. In this examination of sources of legislative intent, Justice Rehnquist encountered considerable difficulty in articulating any substantive definition of the term "free appropriate public education."[126]

Rehnquist interpreted both *PARC* and *Mills* as requiring only access to public education, without imposing any particular substantive standards.[127] The Court rejected the suggestion that the EAHCA requires strict equality in either opportunity or services. It maintained that equality of opportunity would be too difficult to measure.[128] Further, equality of services might yield less than the EAHCA requires in some instances, while requiring too much in other situations.[129] Similarly, the Court dismissed the self-sufficiency standard on the same basis as the equality of services standard. It reasoned that in many cases sufficiency was an unrealistic goal, and, in others, self-sufficiency was easily achieved and a self-sufficiency standard would be too limiting.[130] Through this analysis, Justice Rehnquist concluded that Congress was primarily interested in identifying and evaluating handicapped children and providing them with *access* to public education.[131]

The Court also implied a standard for determining when educational benefits are sufficient to meet the requirements of the EAHCA.[132] The

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. . . to meet the unique needs of a handicapped child;" § 1401(17) defines "related services" as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education."

124. 102 S. Ct. at 3041-42.

125. *Id.* at 3042.

126. *Id.* at 3042-49.

127. *Id.* at 3044.

128. "The requirement that States provide 'equal' educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurement and comparisons." *Id.* at 3047.

129. *Id.*

130. *Id.* at 3048 n.23.

131. *Id.* at 3048.

132. *Id.* at 3048-49. Justice Rehnquist reasoned that Congress must have implied that

Court concluded that establishing a test for all children covered by the EAHCA would be too difficult, and confined its analysis to Rowley's unique circumstances.[133] Rehnquist reasoned that if a child is being educated in a regular classroom, "the system itself monitors the educational progress of the child."[134] He thus implied that the education must be appropriate if the child is achieving passing marks and advancing from grade to grade.[135]

Having addressed the "free appropriate public education" requirement, the Court then considered the role of state and federal courts under section 1415 of the EAHCA.[136] In the Court's view, the suggestion that judicial review should be restricted to a determination of whether a school's decision-making process complied with the EAHCA procedural requirements is too narrow.[137] The Court was unwilling, however, to accept the expansive view that all substantive matters, such as the specialized services provided to a child, were valid considerations for judicial review.[138]

The Court recognized the importance which Congress attached to due process safeguards and involvement of parents or guardians in every aspect of the administrative process. It interpreted this as an indication that Congress intended that, in most cases, the administrative process would adequately define the substantive content of a child's education.[139] The Court examined the EAHCA's provision which required a reviewing court to base its decision on a "preponderance of the evidence."[140] In view of the perceived importance of compliance with the EAHCA's procedural requirements, the Court construed this provision to be limited by the implied requirement that the courts give "due weight" to state administrative pro-

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some benefit be derived from access to education or Congress would not have spent money to achieve access. To what minimum level this "some benefit" rationale could be extended is not clear from the opinion. *Id.* at 3048-49.

133. The Court limited the situation to a handicapped child receiving substantial special instruction and services, who is performing above average in a regular classroom. *Id.* at 3049.

134. *Id.*

135. *Id.* The Court declined the intimation that its standard is a per se standard. *Id.* at 3049 n.25.

136. 20 U.S.C. § 1415(e)(2) (1976).

137. 102 S. Ct. at 3050.

138. *Id.* at 3050-51. The federal government filed an amicus curiae brief which suggested that 20 U.S.C. § 1415(b)(1)(E) implies that the scope of review reaches *any* area pertaining to the appropriateness of the child's education. Brief for the United States as Amicus Curiae at 10-11, Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 102 S. Ct. 3034 (1982).

139. 102 S. Ct. at 3050.

140. 20 U.S.C. § 1415(e)(2) (1976).

ceedings.[141] Justice Rehnquist defined a two-pronged approach to judicial review: first, a court must determine whether the EAHCA procedural requirements have been met; second, the court should examine the IEP to determine if it was "reasonably calculated to enable the child to receive educational benefits."[142] According to the majority, the court must end its inquiry when these conditions are satisfied.[143]

After elucidating the proper scope of review, the Court cautioned courts against imposing their views on educational methods upon the states and emphasized the limited role of courts in state educational decisions.[144] The Court also sought to dispel the fear that limiting the scope of review would leave the rights of handicapped children unprotected. It noted that the parents of handicapped children would assert the rights of their children through the administrative hearings and the courts when necessary.[145]

Justice Blackmun concurred in the result only.[146] He focused on the concept of equal educational opportunity and reiterated the argument he had made in *Pennhurst*.[147] In *Pennhurst*, Blackmun suggested that when Congress drafted the Developmentally Disabled Assistance and Bill of Rights Act of 1975,[148] it sought to do more than make politically self-serving statements.[149] In *Rowley*, Blackmun interpreted Congress' use of "equal educational opportunity" in the legislative history of the EAHCA to evince a different standard from the majority's "some benefit" standard.[150] He would have focused more on the whole program provided to Amy, and inquired whether it offered her an opportunity for an education that was *substantially equal* to that provided to her non-handicapped classmates.[151] Blackmun favored using the input provided to the child, rather

141. 102 S. Ct. at 3051.

142. *Id.*

143. *Id.*

144. *Id.* The Court cited San Antonio v. Rodriguez, 411 U.S. 1 (1973), and Epperson v. Arkansas, 393 U.S. 97 (1968), as support for the notion that education is primarily a state concern. *Id.* at 3051 n.30, 3052. Although the Court in *Epperson* struck down a state law which prohibited the teaching of evolution, it stated that education is mainly committed to the control of state and local authorities.

145. 102 S. Ct. at 3052. The recent proposed changes to the regulations appear to weaken this argument. *See supra* note 67.

146. 102 S. Ct. at 3053 (Blackmun, J., concurring in result).

147. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 32 (Blackmun, J., concurring in part).

148. 42 U.S.C. §§ 6001-6081 (1976 & Supp. IV 1980).

149. 451 U.S. 1, 32 (Blackmun, J., concurring in part).

150. Hendrick Hudson District Bd. of Educ. v. Rowley, 102 S. Ct. at 3053 (Blackmun, J., concurring in result).

151. *Id.*

than the child's performance, to measure an education.

With respect to judicial review, Justice Blackmun suggested that courts should give greater deference to the findings of the impartial hearing officer and the state's Commissioner of Education.[152] Because Justice Blackmun believed that the educational opportunity offered to Rowley was substantially equal to that provided to her non-handicapped classmates, he maintained that the state had fulfilled its requirements under the EAHCA.[153] Blackmun agreed that the lower courts' decisions should be reversed, but his approach to the issue of judicial review suggests somewhat of a compromise between the strict limits suggested by the majority and the broad scope of review espoused by the dissent.

Writing for the dissent, Justice White went considerably further than Blackmun in criticizing the standards which the Court developed. Although White agreed that the language of the EAHCA does not contain a substantive standard beyond "appropriate," he maintained that the Court's standards fell far short of Congress' intent in the EAHCA.[154] He mocked the majority by suggesting that a "teacher with a loud voice" would fulfill the Court's standard.[155] White appeared to agree with Blackmun that the EAHCA requires equal educational opportunity.[156] He gave more weight than the majority gave to language in the legislative history which suggested that the purpose of the EAHCA was to enable each child to maximize his or her potential.[157] He also stressed the importance of the phrase "to meet the unique needs of a handicapped child" as used in the EAHCA's definition of "special education."[158] White interpreted the use of this phrase to imply a higher standard than that suggested by the Court's "some benefit" standard.[159]

Justice White also sharply disagreed with the Court's narrow scope of review. He interpreted the legislative history to indicate that Congress sought to substantially reduce judicial deference to the states. White suggested that when the conference committee replaced language which would have sharply restricted the role of the reviewing court with the broader language of the present section 1415(e)(2), it clearly evinced a con-

152. *Id.*
153. *Id.*
154. 102 S. Ct. at 3055 (White, J., dissenting).
155. *Id.*
156. *Id.* at 3054 n.1. Justice White noted that the phrase "is repeated throughout the legislative history, in statements too frequent to be 'passing references and isolated phrases.'"
157. *Id.* at 3054-55.
158. 20 U.S.C. § 1401(16) (1976). *See supra* note 123.
159. *See* 102 S. Ct. at 3056-57 (White, J., dissenting).

gressional intent that courts review substantive decisions rather than defer to the conclusions of the state agency.[160] Unlike the majority, White could find no limits on the scope of judicial review in either the EAHCA or its legislative history. He would not limit the court's inquiry merely to whether the child is receiving passing marks and advancing from grade to grade.[161] Instead, he maintained that the EAHCA permits a full examination of *any* aspect of the child's education.[162] Based on this interpretation of the judicial review provisions of the EAHCA, the dissent approved of the lower courts' examination of the substantive issues in *Rowley*.[163]

III. The Impact of *Rowley*: Is It to be Limited to the Particular Facts or Given Broad Application?

In *Rowley*, the Court did not establish a uniform test for application to all children covered under the EAHCA.[164] The Court's first interpretation of the EAHCA, however, undoubtedly will be of great significance to courts faced with a broad variety of cases involving handicapped children. The Court essentially affirmed that the EAHCA imposes considerable requirements on states as they carry out their responsibility to educate handicapped children.[165] In addition, *Rowley* provides interpretations of two of the most important aspects of the EAHCA.

The Court fell short of providing a functional definition of "free appropriate public education." Future courts, attempting to apply the *Rowley* standard to varying factual situations, might easily misinterpret the Court's holding. Although the majority opinion faults the equal educational opportunity and self-sufficiency standards as inadequate measures to determine whether an education is appropriate, the Court's "some benefit" standard is, in effect, a hollow euphemism.[166]

160. Justice White found strong support for the proposition that Congress did not intend to limit a court's scope of review. He emphasized the conference committee's elimination of language that would have strictly limited scope of review. *See* S. Rep. No. 455, 94th Cong., 1st Sess. 48 (1975). Justice White interpreted this committee action as support for the proposition that Congress wanted to expand the scope of review. 102 S. Ct. at 3055 (White, J., dissenting).

161. 102 S. Ct. at 3057 (White, J., dissenting).

162. *Id.*

163. *Id.* at 3048-49.

164. *See supra* note 133 and accompanying text.

165. The Court concluded that the EAHCA imposes significant requirements upon the states, which can be enforced through the withdrawal of federal funds. 102 S. Ct. at 3039.

166. Without any guide other than the "some benefit" standard, courts might interpret the standard literally, as they have the "some rational basis" test used in equal protection cases, where any rational basis will sustain a state's action. Because the *Rowley* Court stated that it could find no requirement for a minimum substantive standard or for extending the

The Court frequently cited *PARC* and *Mills* language suggesting that the education provided should be appropriate to the child's capacity.[167] Nevertheless, the Court concluded that the standard implied by these cases was consistent with its interpretation of the EAHCA's requirement.[168] In order for the intent of *PARC* and *Mills* to be satisfied by the *Rowley* "some benefit" standard, the Court's standard should encompass consideration of the child's capacity. The Court's discussion of the standard, however, does not confirm this implication.[169]

The majority may have been correct in its determination that the EAHCA does not require an education which maximizes the child's potential. However, its dismissal of the concepts of equal educational opportunity and self-sufficiency as they apply to the analysis of appropriate education of handicapped children appears unmerited. Justice Rehnquist's simplistic consideration of these concepts ignores the inherent flexibility which makes them valuable. The approach to defining an appropriate education suggested by Justice Blackmun's concurrence appears more reasoned. His suggestion that a program should be viewed as a whole, to determine whether the educational opportunity provided was *substantially equal* to that provided to non-handicapped classmates, harmonizes the *PARC* and *Mills* decisions with the EAHCA and its legislative history. In addition, Blackmun's focus on the opportunity provided, rather than the achievement of a particular outcome, is more consistent with the legislative history's recognition that, in many instances, the provision of this education does not guarantee any particular outcome.[170]

Similarly, the Court's guidance for judicial review is somewhat elusive. The first prong of the test requires a relatively straight-forward analysis. The second prong, however, which dictates an examination of whether the IEP has been reasonably calculated to confer some educational benefit, leaves courts considerable latitude. This guidance does not define any limits which would preclude a court from examining the record of administrative proceedings in an effort to determine whether the administrative decision is reasonable. Thus, despite the Court's admonitions to avoid im-

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reasoning of the "some benefit" test, it is conceivable that a court might find *any* benefit to be sufficient.

167. The Court quoted the same language from *Mills* and *PARC* three times. 102 S. Ct. at 3044 n.15, 3046 n.21, & 3047. The language quoted states that the education will be "appropriate to [the child's] learning capacity." 348 F. Supp. 866, 878 (D.D.C. 1972); 334 F. Supp. 1257, 1258 (E.D. Pa. 1971).

168. The Court distilled the holdings *Mills* and *PARC* to mean "simply that handicapped children may not be excluded entirely from public education." 102 S. Ct. at 3047.

169. *Id.* at 3046-48.

170. SENATE REPORT, *supra* note 2, at 11.

posing judicial preferences for educational methods, a court might easily become involved in the substantive provisions of the child's education.[171]

The dissent's approach to judicial review appears to be a more reasoned and logical interpretation of the requirements of the statute. Justice White found clear language in the EAHCA which gave courts a broad scope of review.[172] His analysis of the legislative history demonstrates that Congress did not intend to limit courts in their scope of review. Under the contract analogy discussed in *Pennhurst*,[173] states are bound to comply with those provisions of statutes which are clearly stated as prerequisites to receipt of federal funding.[174]

Although the Court makes only slight reference to *Pennhurst*, it appears that the majority was strongly influenced by the *Pennhurst* reasoning. The *Rowley* Court was unwilling to impose statutory requirements upon the states unless these requirements are clearly stated by statutory language. Justice Rehnquist appears to have searched extensively to find ambiguity in the judicial review provisions of the EAHCA in order to avoid imposing the broad scope of review on the states.[175]

The reiteration of the *Pennhurst* doctrine should be viewed as a warning to Congress regarding the use of its spending power to accomplish legislative objectives. The *Rowley* decision implies that the Court will not readily assume the role of clarifying ambiguously worded statutory schemes to render them effective. Litigation involving other entitlement or grant statutes might alter the federal-state relationship considerably.[176] This would suggest that statutes which are not clear in their imposition of conditions prerequisite to federal funding should be amended to provide more concise guidelines to the states.

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171. In order to apply the second prong of the *Rowley* Court's test, it is necessary to determine whether the IEP was reasonably calculated to afford some educational benefit. 102 S. Ct. at 3051. It is likely that a court will be forced to consider substantive issues in reaching a conclusion of this nature.

172. 102 S. Ct. at 3056 (White, J., dissenting).

173. *See supra* notes 99-104 and accompanying text.

174. 451 U.S. at 17.

175. *See supra* notes 136-44 and accompanying text.

176. *See* Baker, *supra* note 101, at 441, which suggests that local and state governments might be able to use the canon of statutory construction set forth in *Pennhurst* to avoid the imposition of burdensome federal legislation. Baker also suggested that *Pennhurst* intimates a possible return to invalidation of statutes on the basis of vague delegation. *Id.* at 442-43, 443 n.14. In view of the clarification *Rowley* provides to the "clear statement rule," perhaps it is more appropriate to use an ultra vires approach in analyzing the power granted to executive agencies through entitlement legislation. This approach, rather than invalidating the enabling act, would bar executive agency action which is outside the clearly stated scope of the legislation.

IV. CONCLUSION

In *Hendrick Hudson District Board of Education v. Rowley*, the Supreme Court upheld the validity of the Education for All Handicapped Children Act of 1975, its procedural requirements and its emphasis on involvement of the parents in the formulation of the child's IEP. At the same time, the Court essentially reduced the standards for determining whether a state has provided a "free appropriate public education" as required under the EAHCA. The decision thus, is of mixed value to advocates of the rights of the handicapped. In view of current fiscal restraints, it is highly unlikely that these advocates will seek to amend the EAHCA in an effort to strengthen and clarify its requirements in response to *Rowley*.

Instead, the courts will determine whether the "some benefit" test will be extended to reduce the duties of the states under the EAHCA. In spite of the Court's admonition that substantive educational matters be avoided, future courts will undoubtedly be forced to consider such issues in an attempt to give meaning to the *Rowley* Court's standard. If courts limit the application of *Rowley* to its unique factual situation, the intent of the EAHCA should not be affected. On the other hand, if courts apply *Rowley* literally and conclude that any handicapped child in the regular classroom who is advancing from grade to grade and achieving passing marks is receiving a free appropriate public education, amendment of the EAHCA, ill-timed or not, may be merited.

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