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MAXIMIZING POTENTIAL FOR SELF-SUFFICIENT LIVING AFTER *BOARD OF EDUCATION V. ROWLEY*

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INTRODUCTION

The Education of the Handicapped Act[1] (EHA or Act) requires school districts to provide all handicapped children with a free appropriate public education.[2] The meaning of appropriate, however, is not clear. Thus, courts are unable to agree on the level of educational benefit that schools must provide in order to satisfy this statutory requirement.[3]

Courts generally agree that schools are not required to "maximize" the educational potential of all handicapped children.[4] A potential-maximization standard would require schools to provide each handicapped child with the education and related services necessary to maximize the child's learning potential. This standard has been rejected because it would place a heavy burden on school systems, and because it could actually require schools to provide handicapped children with a higher quality education than that available to non-handicapped children.[5]

Courts also generally agree that the EHA's appropriate education mandate does not mean that schools must teach all handicapped children to become self-sufficient. A self-sufficiency standard would require training in the basic care skills and vocational skills necessary to eliminate dependence on support from social services.[6] This standard has been rejected because it is too easy to achieve for some handicapped students, and impossible to achieve for others.[7]

The Supreme Court's decision in *Board of Education v. Rowley* provides lower courts

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1 Education of the Handicapped Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) 20 U.S.C. § 1400 *et. seq.* (1988). The title of the Act was originally The Education for All Handicapped Children Act of 1975. 20 U.S.C. §§ 1400 *et. seq.* (1976). This title was changed to the Education for the Handicapped Act when the Act was amended to cover persons through 21 years of age. The name of the EHA has recently been changed to the Individuals with Disabilities Education Act. Pub. L. No. 101-476, 104 Stat. 1103 (1990) (to be codified at 20 U.S.C. §§ *et. seq.*). However, this article will continue to refer to the Act as the EHA, as do all of the cases and papers that will be discussed.

2 20 U.S.C. § 1412(1) (1988).

3 *See infra* notes 91-106 and accompanying text.

4 *See infra* notes 105-106 and accompanying text.

5 *See infra* note 80 and accompanying text.

6 *See* I. DICKMAN, INDEPENDENT LIVING: NEW GOAL FOR DISABLED PERSONS (1975).

7 *See infra* notes 94 - 97 and accompanying text.

with some guidance in determining the definition of an appropriate education.[8] However, circuit courts of appeals do not agree on the meaning of the *Rowley* standard.[9] Some courts have interpreted *Rowley* to mean that all handicapped students must be given an education which allows them to achieve educational progress.[10] These courts would require a school to develop a program aimed at maximizing a child's potential when that is the only way the child can make educational progress.[11] Other courts interpret *Rowley* to mean that as long as schools provide each handicapped student with a basic floor of educational opportunity, they have satisfied the EHA's requirements even if the child has actually regressed under that program.[12] These courts view programs aimed at maximizing a child's potential as exceeding the requirements of the EHA.

This article argues that *Rowley* does not apply to children with handicaps that are more severe than that of the *Rowley* plaintiff. Thus, *Rowley* does not strip schools of the responsibility to maximize the learning potential of severely handicapped children when maximization is the only way to increase the child's potential for self-sufficient living. Part II of this article summarizes the requirements of the EHA and the purposes for its enactment. Part III explores the *Rowley* decision and argues that it leaves ample room for imposing a different substantive standard in cases involving children with more severe handicaps. Part IV discusses cases that have taken the first step in that direction by finding that an educational program which maximizes a child's potential is permitted when it occurs as an incidental result of an otherwise appropriate educational program. In addition, Part IV concludes that the EHA mandates a standard of potential-maximization to the extent that it enhances a child's ability to achieve self-sufficiency.[13]

I. THE EDUCATION OF THE HANDICAPPED ACT

The Education of the Handicapped Act was enacted in 1975, in response to a

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[8] 458 U.S. 176 (1982).

[9] *See infra* notes 85-97 and accompanying text.

[10] Some courts distinguish between educational progress and educational benefit, and conclude that the EHA and *Rowley* require only that schools offer the special education and related services necessary to provide children with an opportunity to benefit. These courts seem to reject the progress language in order to avoid imposing too heavy a burden on schools. *See, e.g.*, Polk v. Central Susquehanna, 853 F.2d 171, 184 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (adopting a "meaningful benefit" standard because requiring educational progress may in some cases impose a burden on the state of requiring "optimal benefit" rather than just "some benefit").

[11] *See, e.g.*, Abrahamson v. Hershman, 701 F.2d 223, 227 (1st Cir. 1983) (affirming a trial court decision ordering residential placement because "the district court did not order residential placement to maximize [the child's] potential. Rather the court found that educational benefits which could only be provided through residential care were essential if [the child] was to make *any* progress at all").

[12] *See, e.g.*, Burke County Board of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990). *But see* Alamo Heights v. State, 790 F.2d 1153 (5th Cir. 1986) (no regression is allowed under the "some benefit" standard).

[13] Application of this standard would leave intact the *Rowley* standard to the extent that it applies to children whose handicaps do not interfere with their ability to achieve self-sufficiency.

growing judicial recognition of a right to education for handicapped children.[14] Congress concluded that it was in the national interest to provide proper educational programs for handicapped children.[15] Further, Congress was persuaded that providing handicapped children with a proper education would eventually save the government money by decreasing the dependency of such individuals on state welfare and institutional services.[16]

The Supreme Court's decision in *Brown v. Board of Education*[17] was used to support the argument that handicapped children, like racial minorities, are entitled to an education in public schools.[18] In *Brown*, the Supreme Court recognized the value of education in preparing individuals for dealing with life's challenges:

> [Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. 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.[19]

Later, in *Wisconsin v. Yoder*,[20] the Court reaffirmed its view that "education prepares

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[14] *See* S. REP. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430.

[15] 20 U.S.C §1400(b) (1988). Congressional findings concluded that:

> (1) there are more than eight million handicapped children in the United States today;
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> (2) the special educational needs of such children are not being fully met;
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> (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
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> (4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
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> (5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;
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> (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;
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> (7) development 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 handicapped children;
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> (8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children.

Id.

[16] *See* S. REP. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

[17] 347 U.S. 483 (1954).

[18] *Id.*

[19] *Id.* at 493.

[20] 406 U.S. 205 (1972).

individuals to be self-reliant and self-sufficient participants in society."[21] It was against this backdrop that Congress enacted the EHA.[22]

The Act operates primarily as a funding statute. States participate in the program on a voluntary basis.[23] The government provides each participating state with federal funds to aid the state in educating handicapped children. In return, the state must develop an educational plan that complies with the Act's guidelines.[24] The Act details the necessary content of the state plan, outlines the goals, programs, and timetables it must include.[25] As a whole, the plan must show that the state has a "policy that assures all handicapped children the right to a free appropriate public education."[26]

As defined in the Act, the term "free appropriate public education" is used to refer to the special education and related services that must be provided in conformity with the individualized education program (IEP) developed for each child.[27] An IEP is a statement of the educational program which must be written for each child and designed to meet each child's unique needs.[28]

The term "special education" means instruction that is specially designed to meet the unique needs of a handicapped child. This may include classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.[29] The

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[21] *Id.* at 221.

[22] Also cited in the EHA's legislative history are the landmark cases of Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972), and Pennsylvania Association for Retarded Citizens v. Pennsylvania, (PARC) 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972). Both of these cases acknowledge the right of handicapped children to an appropriate education. *Mills*, 348 F. Supp. at 874-76; *PARC*, 343 F. Supp. at 295-97. *See* S. REP. No. 168, 94th Cong., 1st Sess. 6-7, 22-23, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430-31, 1446-47.

[23] All states now participate in the program.

[24] 20 U.S.C. §1413(a)(1)-(12) (1988).

[25] 20 U.S.C. §§1412, 1413 (1988).

[26] 20 U.S.C. §1412(1) (1988).

[27] 20 U.S.C. §1401(a)(18) (1988)

> 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 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.

Id.

[28] 20 U.S.C. §1401(19) (1988). The IEP must include a statement of the child's present levels of educational performance; a statement of annual goals, including short-term instructional objectives; a statement of the specific special educational services to be provided to the child and the extent to which the child will be able to participate in regular educational programs; projected dates for initiation and anticipated duration of the services; and appropriate objective criteria and evaluation procedures and schedules for determining whether instructional objectives are being achieved. 20 U.S.C. §1401(a)(19) (1988). Rather than mandating specific methods and services to be provided by the schools, the EHA seeks to ensure that each child receives a free appropriate public education by requiring schools to develop and implement IEPs for each child. 20 U.S.C. §1401(a)(19) (1988).

[29] 20 U.S.C. §1401(a)(16) (1988); 34 C.F.R. §300.14.

term "related services" is used to refer to a broad array of supportive services that may be required to assist a handicapped child to benefit from special education.[30] The EHA also provides a procedural framework by which handicapped children and their parents may challenge educational decisions made by the schools.[31]

Congress' unwillingness to prescribe the specific special education programs schools should provide has been attributed to the varying needs of each child and to disagreement on which programs are most effective in any given situation.[32] In addition, decisions relating to matters of educational policy have traditionally been left to state and local entities.[33] These considerations explain the EHA's failure to provide a clear definition of

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[30] 20 U.S.C. §(a)(17) (1988). Related services include:

> transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services . . .) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Id.

This provision has been interpreted to include a broad spectrum of services. *See, e.g.*, Stacey G. v. Pasadena Indep. School Dist., 547 F. Supp. 61 (S.D. Tex. 1982) (ordering a school district to provide behavioral training to a handicapped child's parents).

[31] Any state receiving financial assistance under the Act must establish procedural safeguards to protect the statutory rights of handicapped children and their parents. 20 U.S.C. §1415(a) (1988). Thus a state must provide for parental notification of any change in a child's educational program, notification of the parents' procedural rights, an opportunity for an impartial due process hearing, and an appeal to a district court of the United States or to a state court of competent jurisdiction. 20 U.S.C. §1415 (1988). In 1986, Congress enacted the Handicapped Children's Protection Act, which amended the EHA to include a provision for an award of attorney's fees to prevailing parents. 20 U.S.C. 1415(e)(4)(B)-(G).

[32] *See* S. REP. No. 168, 94th Cong., 1st Sess. 10, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1434. *See also* Polk v. Central Susquehanna, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (finding that the EHA's requirement of individualized education plans had been violated where the school had a general policy of refusing to provide handicapped students with physical therapy); Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1570 (11th Cir. 1983) (EHA requires state to meet each child's unique educational needs); Battle v. Pennsylvania, 629 F.2d 269, 280 (3rd Cir. 1980) (state's policy of refusing to provide special education programs during the summer recess is inconsistent with the Act's emphasis on developing programs individually designed to meet each child's unique needs). *See also* Note, *The Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1109 (1979); Dilkes, *Board of Education v. Rowley: Handicapped Children are Entitled to a Beneficial Education*, 69 IOWA L. REV. 279, 282 (1983).

[33] Congress has expressed this same interest in other education statutes. *See, e.g.*, 20 U.S.C. §3403(a) (1988) (federal authority over local education will not increase with the establishment of the Department of Education); 20 U.S.C. §1232a (1988) (prohibiting the Department of Health, Education, and Welfare from exercising any supervision or control over local educational matters). *See also* Millikin v. Bradley, 418 U.S. 717, 741-42 (1974) ("no single tradition is more deeply rooted than local control over operation of schools; local autonomy has long been thought essential both to maintenance of community concern and support for public schools and to the quality of the educational process"); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 42-43, 49-50 (1971) (local authority over the educational process affords citizens an opportunity to participate, allows the school system to tailor itself to local needs, and encourages innovation and healthy competition); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (public education is primarily committed to the control of state and local authorities); 121 Cong.

an appropriate education.

However, the legislative history of the Act makes it clear that Congress intended to further the national goal of self-sufficiency for handicapped Americans.[34] By simply requiring an "appropriate" education for handicapped children, Congress adopted a standard flexible enough to be applied to all handicapped children.[35] This standard may be applied to children who will never be able to become completely self-sufficient, to children who may become self-sufficient only with the aid of appropriate educational services, and to children who will be able to attain independence with or without special education or related services. By adopting such a flexible standard, Congress left it to the educators and the parents[36] to make the initial determination of what constitutes an appropriate education, and to the administrative and judicial courts to review those decisions.[37]

II. *BOARD OF EDUCATION V. ROWLEY*

A. Factual background

In 1982, the United States Supreme Court heard the case of Amy Rowley, a deaf child attending a regular class in a regular elementary school in New York.[38] Amy had some residual hearing, and was able to distinguish vowel sounds at lower frequencies.[39] She was an excellent lip reader.[40] In preparation for Amy's entry into the school, several members of the school administration attended a sign language course in order to facilitate communication with Amy.[41] In addition, a teletype machine was installed in the principal's office to provide a means of communicating with Amy's deaf parents.[42]

Amy was initially placed in a regular kindergarten class without any support services.[43] School administrators and Amy's parents agreed to this placement for a trial period to determine which supplemental services would be necessary for Amy's education.[44] At the end of the trial period, the school district provided Amy with an FM

Rec. 19,498 (1975) (remarks of Sen. Dole); Dilkes, *supra* note 32, at 282.

[34] *See infra* notes 125-136 and accompanying text.

[35] *See* Comment, *Self-Sufficiency under the Education for All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516, 523.

[36] *See* Dilkes, *supra* note 32, at 287-88 for a discussion of the "bargaining imbalance" that favors the decision made by the school board from the time the IEP is developed all the way through the administrative process and the judicial system. *See also* Burlington School Committee v. Dept. of Educ., 471 U.S. 359, 368 (1985) (recognizing that "in any disputes the school officials would have a natural advantage").

[37] *See* Note, *supra* note 32, at 1109.

[38] Board of Educ. v. Rowley, 458 U.S. 176 (1982).

[39] Rowley v. Board of Educ., 483 F. Supp. 528, 529 (S.D.N.Y. 1980), *aff'd* 632 F.2d 945 (2d Cir. 1980), *rev'd* 458 U.S. 176 (1982).

[40] 458 U.S. at 184.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

wireless hearing aid.[45]

The school district also arranged for a sign language interpreter to accompany Amy for a two week trial period.[46] At the end of this period, the interpreter and the school administrators concluded that the interpreter's services were not necessary for Amy.[47] Amy completed her kindergarten year successfully.[48]

As required by the EHA, an IEP was prepared for Amy during the beginning of her first grade year.[49] This IEP provided for Amy's continued education in a regular classroom. It also recommended the continued use of the FM hearing aid.[50] In addition, it provided for instruction from a tutor for the deaf for one hour each day, and a speech therapist for three hours each week.[51]

Amy's parents objected to the IEP because it did not provide a sign language interpreter for all of Amy's academic classes.[52] They requested and received a due process hearing before an independent examiner. The examiner denied the parents' request because "'Amy was achieving educationally, academically, and socially' without such assistance."[53] The New York Commissioner of Education affirmed the hearing examiner's determination and entered a final order in favor of the school board.[54]

B. Lower courts' decisions

Having exhausted administrative remedies, the Rowleys brought suit in the United States District Court for the Southern District of New York, claiming that the school district's refusal to provide Amy with a sign language interpreter deprived her of the appropriate education required by the EHA.[55] The district court found that Amy was remarkably well-adjusted, got along fairly well with her peers, and extraordinarily well with

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[45] *Id.* This hearing aid worked by amplifying the sounds spoken directly into a portable transmitter. 483 F. Supp. at 536; 632 F.2d at 950.

[46] 458 U.S. at 184.

[47] *Id.* at 185. The interpreter's recommendation was based on the "extraordinary sensitivity" of Amy's teacher to Amy's needs and on Amy's reluctance to use the interpreter's services. 483 F. Supp. at 530.

[48] 458 U.S. at 184.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 185.

[54] *Id.* Not all states provide this two-tiered administrative review. Florida, for example, offers only a single administrative hearing. This hearing is conducted by an administrative hearing officer who is not an expert in educational matters. Fla. Stat. §230.23(4)(m)(4). The hearing officer enters a final order that is not reviewed by the state educational agency. *Id.* Appeals are taken either to the state trial or appellate court, or to the federal district court. *Id.*

[55] 483 F. Supp. 528 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982). 20 U.S.C. §1415(e)(2) requires that appellate review of trial court determinations be based on "the preponderance of the evidence."

her teachers.[56] The trial court also found that Amy was a very bright child who was performing above the average in her regular classroom and was advancing easily from grade to grade.[57] However, the court concluded that Amy's education would have been "more appropriate" with the aid of an interpreter.[58]

The court found that the EHA did not adequately define the term "appropriate education," thus leaving it "entirely to the courts and hearing officers to give content" to the term.[59] The court then defined appropriate education as "an opportunity to achieve . . . full potential commensurate with the opportunity provided to other children."[60] The proper analysis, stated the court, requires a comparison of Amy's performance to that of non-handicapped students of similar intellectual capacity, energy, and initiative.[61] Since Amy was only able to discriminate approximately 59% of what was spoken in class, she was at a disadvantage when compared to her non-handicapped peers.[62] In addition, Amy was further disadvantaged by the fact that she was forced to channel much of her energy that might otherwise have been available for learning into compensating for her handicap.[63] This disparity between Amy's achievement and her potential led the trial court to conclude that she was not receiving an appropriate education.[64]

A split panel of the Second Circuit Court of Appeals affirmed the district court's decision.[65] However, that court explicitly limited the case to its facts, and even invoked a provision of its rules which precludes citation of the decision as authority in any other case.[66]

The dissenting judge disagreed with the majority ruling on several points. He criticized the definition of appropriate education used by the district court as having no foundation in the EHA or its legislative history.[67] The dissent also disagreed with the district court's conclusion that the goal of the EHA was to provide handicapped children with an opportunity to achieve full potential commensurate with the opportunity provided to other children.[68] Rather, the dissent felt that the purpose of the EHA was to develop

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[56] 483 F. Supp. at 531.

[57] *Id.* at 531, 534.

[58] *Id.* at 536.

[59] *Id.* at 533.

[60] *Id.* at 534. The court declined to define appropriate education as an education substantial enough to allow progress from grade to grade. *Id.*

[61] *Id.* The standard adopted by the court "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." *Id.*

[62] *Id.* at 532, 534.

[63] *Id.* at 535.

[64] *Id.* at 536.

[65] 632 F.2d 945 (2d Cir. 1980), *rev'd* 458 U.S. 176 (1982).

[66] 632 F.2d at 948, n.7.

[67] *Id.* at 948-49 (Mansfield, J., dissenting).

[68] *Id.* at 952. The dissent might have found Amy's education appropriate even under the standard adopted by the district court. *Id.* at 953 (emphasizing that although Amy may hear only 59% of the words spoken in class, her non-handicapped peers may also miss much of what is said due to inattention, daydreaming, and other

a child's productivity and self-sufficiency, so that handicapped children may learn to live "as free as reasonably possible from dependency."[69] Since there was no question that Amy had met this standard, the dissent concluded that the services of a sign language interpreter were not required by the EHA.[70]

Further disagreeing with the district court's conclusion that Amy would benefit from an interpreter, the dissenting judge pointed to evidence in the record indicating that Amy regularly refused to watch the interpreter, relying instead on her lip reading abilities and her residual hearing.[71] In addition, the dissent felt that provision of an interpreter may in fact be detrimental to Amy, encouraging her to rely on a service that will not be regularly available later in life.[72] Encouraging Amy's dependence on the services of the interpreter undermined the purpose of the EHA by interfering with her ability to become self-sufficient.[73]

C. Supreme Court opinion

The United States Supreme Court reversed the lower court's decision. Unlike the district court, the Supreme Court had no difficulty finding a statutory definition for an appropriate education.[74] Piecing together the language from various sections of the EHA, the Court concluded that "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child."[75]

The Court noted that the language of the statute fails to enunciate any "substantive standard prescribing the level of education to be accorded handicapped children."[76]

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causes).

[69] *Id.* (Mansfield, J., dissenting).

[70] *Id.* The dissent also pointed out the "Herculean efforts" of the school board to accommodate Amy and her parents. *Id.* at 950. *See supra* text accompanying notes 38-51.

[71] 632 F.2d 945, 950 (2d Cir. 1980) (Mansfield, J., dissenting).

[72] *Id.* at 953.

[73] *Id.*

[74] 458 U.S. 176, 186 n.8 (1982). It is interesting to note that the United States was amicus curie on behalf of the Rowleys, arguing that the district court was correct in concluding that appropriate education was not adequately defined in the EHA. *Id.* at 187.

[75] *Id.* at 189 (emphasis in original). The Court later referred to this as the "basic floor of opportunity" required by the EHA. *Id.* at 201. This language has been used incorrectly by courts to avoid imposing *any* substantive standard on school districts. *See, e.g.,* Dept. of Educ. v. Katherine D., 727 F.2d 809, 813 (9th Cir. 1984) (*Rowley* requires only that schools make those efforts that are "within reason" to accommodate a handicapped child's needs).

[76] 458 U.S. at 189. This language of the Rowley opinion has also been improperly used by lower courts to conclude that the EHA imposes no substantive requirements on the states. *See, e.g.*, Lang v. Braintree School Committee, 545 F. Supp. 1221, 1227 (D. Mass. 1982) (*Rowley* indicates that the main purpose of the EHA is to "assure that handicapped children receive some beneficial education at public expense, instead of remaining at home or in institutions without any educational experience whatsoever").

However, the Court found that the legislative history of the Act indicated a clear congressional intent to impose a substantive standard upon the schools.[77] The Court was persuaded that the EHA was enacted to ensure that all handicapped children receive a proper and meaningful education.[78] The Court's view that the EHA was intended to provide something more than mere access to educational services was further supported by Congress' emphasis on education as a means of attaining self-sufficiency.[79]

Considering the EHA in light of its legislative history, the *Rowley* Court held that the Act's requirement of a free appropriate education is satisfied

> by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.[80]

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[77] 458 U.S. at 190.

[78] *Id.* at 195-98. Congressional findings indicated that of the 8 million handicapped children in the US, over one-half were receiving an inappropriate education, and 1.75 million were receiving no public education at all. H. R. REP. NO. 332, 94th Cong., 1st Sess. 11-12; S. REP. No. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432.

[79] 458 U.S. 176, 201 n.23 (1982) (noting that Congress' desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that the state educational programs would confer educational benefits upon such children). Another goal of the Act was to encourage local inventiveness. *See* Loughran v. Flanders, 470 F. Supp. 110, 115 (D. Conn. 1979) (federal legislation in the field of special education is designed in part to serve as a catalyst for innovation and research); H. R. REP. NO. 805, 93rd Cong. 2d Sess., 54-55, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4093, 4139 (a goal of all federal special education is to initiate, expand, and improve local education efforts).

[80] 458 U.S. at 203-04. The Court rejected a standard requiring strict equality of opportunity or services for two reasons. First, strict equality in educational opportunity would be virtually impossible to attain. The same educational program will provide different opportunities to different children, depending on each child's individual ability to assimilate information. Second, the Court rejected the equality of opportunity standard because providing handicapped children with only those services offered to non-handicapped children would invariably deprive handicapped children of their statutory right to a free appropriate public education. *Id.* at 198-99. Here the Court implicitly recognized the reality that education costs are higher for handicapped children than for non-handicapped children. *Id.*

The Court also rejected potential-maximization as the standard for the education of all handicapped children because it would be too expensive, and because it would exceed the standard required for non-handicapped children. *See Id.* at 198-99 (rejecting potential-maximization goal); *Id.* at 201 n.23 (comparing self-sufficiency goal to potential-maximizing goal).

Applying this standard to Amy Rowley, the Court concluded that the lower courts erred in finding that the school district failed to comply with the substantive requirements of the Act.[81] Amy was receiving personalized instruction and related services calculated to meet her educational needs, as evidenced by her above-average performance and her promotion from kindergarten to first grade.[82]

Recognizing that a child's ability to benefit from education will invariably depend on the type and severity of the handicap, the Court warned that its holding was limited to the unique facts of the case under consideration:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.[83]

The Court thus declined to predict what level of educational benefits the EHA requires schools to confer upon children who have handicaps that are more severe than Amy Rowley's.[84]

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[81] *Id.* at 209. The case was remanded to the district court for consideration of the Rowleys' contention that the school district failed to comply with the procedural requirements of the Act. *Id.* at 210 n.32.

[82] *Id.* at 209-10. *See Id.* at 203 n.25 (warning schools that advancement from grade to grade is not the only yardstick courts may use). *Accord* Hall v. Vance, 774 F.2d 629 (4th Cir. 1985) (handicapped student who has been advancing from grade to grade is not necessarily receiving an appropriate education).

[83] 458 U.S. 176, 202 (1982). In another section of its opinion, the Supreme Court also enunciated a two-prong standard of judicial review under the EHA: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-07 (footnotes omitted). The Court cautioned courts against substituting their view of proper educational methods for that of the states' educational agencies. *Id.* at 207.

[84] *Id.* at 202.

D. Impact of Rowley

Although *Rowley* has been read by many courts[85] and most commentators[86] as having gutted the force of the EHA, such pessimism is unwarranted. The facts of *Rowley* are very different from those of most cases brought on behalf of handicapped children because Amy was performing above the average in a regular classroom with non-handicapped children.[87] Additionally, the extraordinary effort of the school board to prepare for and accommodate Amy is sufficient to separate *Rowley* from most other EHA cases that enter the court system.[88] Because the facts of *Rowley* are so unique, and because the *Rowley* Court specifically limited its holding to those facts, most cases brought under the EHA may be easily distinguished from *Rowley*.

In fact, the *Rowley* Court's holding, and its express limitation on the reach of that holding, may reflect both a reluctance to punish a school that had made such "Herculean efforts"[89] to accommodate a handicapped student, and a warning to the more recalcitrant schools that this ruling should not be used to justify any further denial of the education rights of handicapped children. The notable narrowness of the *Rowley* holding minimizes the impact the decision should have on the availability of special education and related services for children who are more severely handicapped than Amy Rowley.

The damaging effect of *Rowley* is further limited by the Court's recognition that the EHA does impose substantive requirements on school boards.[90] Admittedly, the *Rowley* Court is somewhat ambiguous in its attempt to define this substantive requirement. This ambiguity is permitted because the facts of the case did not require the Court to confront squarely the question of how much benefit the EHA requires. Since Amy Rowley was clearly receiving substantial benefit from her education, the Court was able to avoid articulating a standard which could be applied in cases with more difficult fact patterns. However, the Court is clear in its conclusion that the EHA mandates something more than

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[85] *See, e.g.*, Burke County Board of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990) (applying *Rowley* standard to an autistic and mentally retarded child with severe behavioral problems, and refusing to order home habilitative services because "*Rowley* makes clear that the EHA requires only that the child be able to benefit from the instruction"); Frank v. Grover, No. 81 CV 6003 (Wisc. Cir. Ct. July 30, 1982), *reprinted in* 3 EDUCATION FOR THE HANDICAPPED LAW REPORT [*hereinafter* EHLR] 554:148 (rejecting a profoundly deaf student's request for a change in his program, stating "the majority decision in *Rowley* is devastating to the Petitioner's position").

[86] *See, e.g.*, McCarthy, *The Public School's Responsibility to Serve Severely Handicapped Children*, 48 W. EDUC. L. REP. 453 (1989); Comment, *An 'Appropriate' Education for the Handicapped - Board of Education v. Rowley*, 26 HOW. L.J. 1644 (1983). *But see* Comment, *supra* note 35.

[87] *See supra* text accompanying notes 56-57. In fact, Amy had an IQ of 122, which is just short of the IQ typically required for eligibility for placement in classes for gifted students. 632 F.2d at 953; Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 473-474, nn.50-51.

[88] *See supra* text accompanying notes 38-51. *See also* Zirkel, *supra* note 87, at 474 n.55.

[89] *See* 632 F.2d 945, 950 (2d Cir. 1980), *rev'd, 458 U.S. 176 (1982)*.

[90] *See supra* notes 77-79 and accompanying text.

mere compliance with the Act's procedural requirements.[91] Further, although the decision does contain language to which unsympathetic courts may cling,[92] a thorough reading of the opinion reveals an unmistakable intent to require school districts to provide a meaningful and beneficial education for its handicapped students.[93]

The *Rowley* decision is also valuable by virtue of its implicit recognition that self-sufficiency may be a valid educational goal for some handicapped children.[94] The legislative history of the Act contains numerous references to the billions of public dollars that were being spent to support handicapped persons who remain dependent on social services, and the potential for cost savings that would result from providing the educational services designed to enhance self-sufficiency.[95] The *Rowley* Court acknowledged that the EHA was enacted in part because of its potential for long-term cost savings.

The court properly rejected self-sufficiency as the substantive standard for the education of *all* handicapped children. Many mildly handicapped children, like Amy Rowley, can achieve self-sufficient status with little or no special education, while severely handicapped children may never be able to attain such independence. However, a handicapped child's ability to attain self-sufficiency does not relieve the state of its obligation to provide special education and related services. Similarly, the state will not be excused from its statutory obligation to educate those children who are so severely handicapped that they will never achieve self-sufficiency. Thus, "'self-sufficiency' as a substantive standard is at once inadequate protection and an overly demanding requirement."[96] Although the Court declined to adopt a standard, applicable to all handicapped children, which would require schools to provide an attainable degree of personal independence, the Court nonetheless left room for the application of such a standard to those children who would benefit from such an objective.[97]

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[91] *See* 458 U.S. 176, 200 (1982).

[92] *Id.* at 201. *See* Ahern v. Keene, 593 F. Supp. 902 (D. Del. 1984) (refusing to order school to pay for a residential program that had dramatically improved on the child's emotional problems and her potential for independent living. "Undoubtably, more can be done for children like Alicia," however, the EHA and *Rowley* require only that the school provide a program which permits the child to benefit).

[93] 458 U.S. at 200-01 ("It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education"); *Id.* at 200 (mere access to education is not enough; the access must be "sufficient to confer some educational benefit"); *Id.* at 201 ("the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child").

[94] *Id.* at 201 n.23.

[95] *See* legislative history cited in 458 U.S. at 201 n.23.

[96] 458 U.S. at 201 n.23.

[97] *Id.* This self-sufficiency analysis in Rowley also helps lower courts answer the question of whether teaching a child basic self-help skills such as dressing, feeding, toilet training, behavior modification, and communication constitute proper educational programs for some handicapped children. *See, e.g.*, Brown v. Wilson County School Board, 16 EHLR 718 (M.D. Tenn. 1990) (behavioral treatment program is educational); Tolland v. Connecticut State Bd. of Educ., 556 EHLR 412 (D. Conn. 1985) (educational benefit is a concept which embraces more than ordinary academic subjects such as social learning and personal independence); Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3rd Cir. 1981) (education includes training in basic

The *Rowley* Court made clear that it was confining its analysis to the facts of a bright, mildly handicapped child who was receiving substantial specialized instruction and related services, and who was performing above average in a regular classroom and advancing easily from grade to grade.[98] Beyond its recognition of the importance of fostering handicapped children's potential for independent living, the *Rowley* decision has very little to offer courts struggling to develop a rule for the level of educational benefit which must be accorded to children with handicaps which are more severe than Amy Rowley's.

III. MAXIMIZING A HANDICAPPED CHILD'S POTENTIAL UNDER *ROWLEY*

A. Incidental maximization

The *Rowley* Court declined to hold that the EHA requires school boards to maximize the educational potential of handicapped children like Amy Rowley.[99] However, the Court did not go so far as to state that potential-maximization may never be used as the standard for defining an appropriate education.

In a case like *Rowley*, it is relatively easy to see why the Court refused to require maximization. Amy was only mildly handicapped; she was intelligent, well adapted, and highly motivated.[100] Maximizing the educational potential of children like Amy would place a very heavy burden on school districts. Further, it would effectively require schools to provide mildly handicapped children with a higher quality education than that offered to non-handicapped children. The Court was understandably reluctant to require potential-maximization for all handicapped children.

Most of the nation's handicapped children, however, do not face a future as bright as Amy's. For some children, potential-maximization may mean learning the skills necessary to obtain a job bagging groceries or cleaning tables at a local restaurant, thus enhancing the child's ability to achieve full or partial independence.[101] For more severely handicapped children, potential-maximization may simply mean learning basic care skills,[102] or learning

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self-help and social skills).

[98] *See supra* text accompanying note 83.

[99] 458 U.S. at 197 n.21, 204 n.26. In order to reject the potential-maximization standard, the Court relied on a canon of construction which requires that when legislating under Article I spending power, Congress may not impose conditions on the grant of federal money unless it does so unambiguously. *Id.* at 204 n.26.

[100] *See supra* text accompanying notes 56-57.

[101] *See, e.g.*, St. Louis Developmental Disabilities Treatment Center Parents Ass'n v. Mallory, 591 F. Supp. 1416 (W.D. Mo. 1984) (approving of a school program that provided training in functional skills, generalization of those skills to other environments, and social and job-related skills).

[102] *See, e.g.*, Timothy W. v. Rochester School Dist., 875 F.2d. 954 (1st Cir. 1989) *cert. denied*, ___ U.S. ___, 110 S.Ct. 519 (1989). In *Timothy W.*, the First Circuit Court of Appeals reversed a district court decision which relieved the school district of any duty to provide special education for a very severely handicapped child. The district court had concluded that Timothy did not qualify for special educational services because he would not be able to benefit from them. The appellate court reversed the district court, emphasizing that appropriate education may include training in improving self-care and communication skills. *Id.*

to control self-destructive behaviors,[103] thus obviating the need for round-the-clock restraint or supervision. Surely the Supreme Court did not have these children in mind when it drafted the *Rowley* opinion.[104]

Unfortunately, the language of *Rowley* is rather ominous, forcing most lower courts to shy away from even an appearance of endorsing a potential-maximization standard.[105] Only a few courts have even been bold enough to hold that an IEP which maximizes a child's potential is permitted when it occurs as an incidental result of a program which provides an otherwise appropriate education.[106]

This timid willingness to stray from the perceived *Rowley* holding typically arises in cases concerning severely handicapped children seeking residential placement or other round-the-clock supervision.[107] For example, in *Board of Education v. Diamond*,[108] the

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[103] *See, e.g.*, Lisco v. Woodland Hills School Dist., 734 F. Supp. 636 (W.D. Pa. 1989) (at times, academics must come second to behavior control); B.G. v. Cranford Board of Educ., 702 F. Supp. 1140, 702 F. Supp. 1158 (D.N.J. 1988), *aff'd* 882 F.2d 510 (3rd Cir. 1989) (approving of a residential program that will provide the constant, consistent behavior modification program is necessary as a prerequisite to learning).

[104] *See, e.g.*, Battle v. Pennsylvania, 629 F.2d 269, 280 (3rd Cir. 1980) (as the handicap changes, so does the level of the floor of opportunity).

[105] *See, e.g.*, Polk v. Central Susquehanna, 853 F.2d 171, 184 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (adopting a "meaningful benefit" standard rather than an "educational progress" standard because requiring educational progress may, in some cases, force states to provide "optimal benefit" rather than merely the "some benefit" required by Rowley).

[106] *See* Board of Educ. of E. Windsor School Dist. v. Diamond, 808 F.2d 987, 992 (3rd Cir. 1986) (allowing maximization that occurs as a result of an otherwise appropriate educational program); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983) (affirming a district court order for residential placement, emphasizing that the residential program was not ordered to maximize the child's potential, but was ordered because it was necessary for the child to make any educational progress at all).

[107] The EHA does not specify residential placement as a required service, but it qualifies as a "related service" when necessary to provide educational benefit. *See, e.g.*, Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983); Ahern v. Keene, 593 F. Supp. 902 (D. Del. 1984). Courts are therefore often required to determine whether a requested residential program is necessary in order for the child to benefit from the educational services, or is required for purely medical, social, custodial, or other non-educational purposes. If residential placement is necessary for learning, or if it is necessary for both educational and non-educational purposes, courts generally require schools to pay for the residential program. In other words, unless the need for residential placement is created solely by problems completely unrelated to educational needs, the school will be required to pay for the program. *See, e.g.*, Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985) (school not required to pay for residential program because the need for the program was entirely due to the child's developmental disability, and was not related to his need for special education); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983) (school required to provide residential program because only such a program could provide the continuity and consistency necessary for the child to benefit from his educational training); Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3rd Cir. 1981) (since the child's educational needs were not severable from his medical, emotional, and social problems, the school must pay for a residential program).

An educational need for residential placement frequently arises in cases concerning children who require intensive behavior modification programs. Residential placement is necessary in these cases because the effectiveness of a behavior modification program can depend entirely on the ability to apply that program continuously and consistently throughout all of the child's waking hours. *See, e.g.*, *Abrahamson*, 701 F. 2d at 223.

Residential placement has also been required for children who need training in generalizing behavior

Third Circuit Court of Appeals addressed the *Rowley* standard in the context of a child with severe congenital neurological disabilities.[109] The school district asked the court to read *Rowley* to mean that schools need provide no more than will be "of benefit" to the child.[110] This test was unacceptable to the Third Circuit because it would allow for approval of any educational plan under which less regression occurred than would occur if the child were simply left to vegetate.[111] Instead, the court interpreted *Rowley* to require an educational plan "under which educational *progress* is likely."[112]

The *Diamond* court recognized that a school may be required to maximize the learning potential of some children in order to meet this burden.[113] However, the court was careful to point out that it was not holding the school to a potential-maximizing standard. If, incidentally, the program deemed appropriate "does in fact 'maximize' [the child's] potential, so much the better; however, this court has not measured the inadequacy of [the school board's] plan against any maximization standard."[114] Thus, the court was willing to allow incidental maximization, but apparently felt that a standard requiring maximization would violate the holding of *Rowley*.

Similarly, in *Drew P. v. Clarke County School District*,[115] the Eleventh Circuit Court of Appeals recently upheld a district court order requiring residential placement for a severely disabled autistic child.[116] The child in this case was not progressing under the educational program provided by the school. In fact, although Drew's behavior may have been making some progress at school, his behavior at home was regressing. He was becoming increasingly aggressive, and he was no longer able to transfer what he learned at

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controls learned in the school environment to other environments. *See* David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

[108] *Diamond*, 808 F.2d 987 (3rd Cir. 1986).

[109] The child in *Diamond* was classified as neurologically impaired and trainable mentally retarded. His impairment interfered with his ability to walk and to communicate. *Id.* at 989. The facts of *Diamond* are easily distinguished from the facts of *Rowley*. The *Diamond* plaintiff's handicap was far more severe than Amy Rowley's. Further, the defendant school board in *Diamond* showed little willingness to accommodate the handicapped child. *Id.* at 989. Nonetheless, the *Diamond* court made no attempt to rely on these factual differences to avoid the holding of *Rowley*.

[110] *Id.* at 991.

[111] *Id.*

[112] *Id.* (emphasis in original). The court also noted that the *Rowley* standard requiring a program "reasonably calculated to enable the student to advance from grade to grade" was useless in a situation concerning a child like Andrew Diamond, who was never able to attend classes in a regular classroom. *Id.*

[113] *Id.* at 992. The plaintiff's educational and behavioral responses to the different educational programs he experienced demonstrate the profound effect that the consistency available only through residential placement can have on a child's ability to learn. *See Id.* at 990-91.

[114] Board of Educ. of E. Windsor Reg. School Dist. v. Diamond, No. 83-2364 at 12-13 (D.N.J. 1985), quoted in *Diamond*, 808 F.2d 987, 992 (3rd Cir. 1986). *See also* Chris D. v. Montgomery County Board of Educ., No. 89-T-1165-N (M.D. Ala. July 2, 1990) (relying on *Diamond* to allow incidental maximization).

[115] Drew P. v. Clarke County School Dist. 877 F.2d 927 (11th Cir. 1989).

[116] *Id.*

school to the home environment.[117] The district court had questioned the plaintiff's expert witness extensively about whether the requested placement was the optimum situation for a child like Drew, or was merely the minimum educational service necessary for Drew to make any educational progress. The witness responded that the proposed IEP was both minimal and optimal:

> In one sense it's optimum because I think you can't do better than having twenty-four hour [placement]. On the other hand, I think it's realistic and apropriate [sic]. So, optimum may imply that it's ideal. I would argue that it's not a question of ideal, it's a question of what's needed.[118]

Persuaded by this testimony, the district court concluded that residential placement was necessary for Drew to achieve educational benefit.[119] Like the court in *Diamond*, this court was very careful to avoid any implication that it might be imposing a potential-maximization standard on the school board.[120]

Affirming the trial court's ruling, the United States Court of Appeals for the Eleventh Circuit also relied on the expert testimony: "The evidence at trial demonstrated that autistic children require constant, round the clock, expert educational supervision in order to progress. . . . [T]estimony by [plaintiff's expert] made clear that residential placement was necessary in order for Drew to receive *any* educational benefit."[121] Thus, the fact that the residential program ordered by the trial court incidentally maximized Drew's educational potential was not fatal to the program since it was also necessary to confer benefit. Like the district court, the appellate court made it clear that it was not imposing a potential-maximization standard on the school district.[122]

Like *Rowley*, the *Drew P.* court failed to articulate a clear standard for defining an appropriate education. The court enunciated the *Rowley* standard as requiring states to "provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[123] However, the court later suggested that educational benefit requires "meaningful educational progress."[124] Like *Rowley*, this ambiguity leaves lower courts with plenty of leeway to choose the language that best supports their conclusions.

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[117] *Id.* at 929; 676 F. Supp. 1559, 1564 (M.D. Ga. 1987), *aff'd*, 877 F.2d 927 (11th Cir. 1989).

[118] 676 F. Supp. at 1565.

[119] *Id.* at 1568-69.

[120] *See Id.* at 1565 (reviewing the testimony of the plaintiff's expert witness where he agrees that residential placement is the bare minimum required for a child like Drew); *Id.* at 1570-71 (reiterating that the court is ordering residential placement only because Drew could not progress without it).

[121] 877 F.2d 927, 930-31 (emphasis in original).

[122] *Id.* at 930 n.4.

[123] *Id.* at 930.

[124] *Id.* at 931. *See supra*, note 106.

B. Maximizing potential to achieve self-sufficiency

The proper substantive standard for the education of handicapped children would require states to provide the special education and related services that are reasonably necessary to maximize the child's potential for achieving a self-sufficient lifestyle. The implicit recognition by *Drew P.* and a few other courts that under certain circumstances schools may be required to maximize the learning potential of its handicapped students is consistent with Congress' desire to increase the self-sufficiency of handicapped individuals.[125] However, these courts invariably stop short of holding that potential-maximization may serve as the yardstick for measuring the appropriateness of an educational program.

This failure to require maximization of potential where necessary to increase the independence of handicapped children runs contrary to a primary purpose of the EHA. When the EHA was enacted, Congress was concerned about the millions of handicapped children that were not only being denied a fundamental educational opportunity, but were also destined to remain dependant on society for welfare and institutional services for the rest of their lifetimes.[126] Congress felt that with proper educational services, many of these children would be able to become independent, productive citizens, contributing to rather than remaining burdens on society.[127] Further, Congress felt that education geared toward self-sufficiency would circumvent the minimally acceptable lifestyle and the loss of human dignity that can go hand in hand with dependence on public assistance or life in an institutional setting.[128] Congress was fully aware of the fact that educating all of the nation's handicapped children would place a financial strain on school systems.[129]

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[125] *See infra* notes 126-130 and accompanying text. Congress' determination to enhance the self-sufficiency of handicapped individuals is further reflected in §1405 of the EHA, which mandates that each state receiving federal funds "shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted" under the EHA. 20 U.S.C. §1405 (1988). *See also* S. REP. No. 168, 94th Cong., 1st Sess. 55, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1507. This provision may not confer on handicapped individuals any greater protections than those available under Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. §794. However, it exemplifies the common theme underlying the EHA. Congress clearly anticipated that the Act would enable many more handicapped individuals to become independent and productive members of society. *See also* SEN. CONF. REP. NO. 455, 94th Cong. 1st Sess., 54, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1507.

[126] *See* H. R. REP. NO. 332, 94th Cong., 1st Sess. 11; S. REP. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

[127] H. R. REP. NO. 332, 94th Cong., 1st Sess. 11; S. REP. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

[128] *See* S. REP. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433. *See also* 121 CONG. REC. S37416 (1975) (remarks of Sen. Williams) (encouraging passage of the EHA in order to allow handicapped individuals to gain "the self-respect and pride which they so rightly deserve").

[129] *See, e.g.*, H. R. REP. NO. 332 94th Cong., 1st Sess. 12 (acknowledging that the average cost of educating handicapped children is approximately 1.9 times the average cost for nonhandicapped children). The Act provides for federal funding to help states with this added financial burden. 20 U.S.C. §1411 (1988).

However, the EHA was seen as a long-term investment that would yield future savings by decreasing the demand for social services such as welfare and institutional programs.[130]

In cases involving severely handicapped children, maximizing potential serves the same purposes served by striving toward self-sufficiency: it eases the long-term financial burden on the states by decreasing dependency on state support services, and it enhances the handicapped individual's feelings of dignity and self-worth. Further, a potential-maximizing program is often the *only* way to enable certain children to make any progress at all toward that self-sufficiency goal.[131]

The *Rowley* Court concluded that self-sufficiency is not a substantive standard under the EHA, but only evidence of Congress' intention that handicapped children should receive educationally beneficial services.[132] This decision was correct to the extent that it rejected self-sufficiency as a substantive standard for mildly handicapped children like Amy Rowley. Amy clearly did not need any special help achieving independence.[133] However, the *Rowley* Court was wrong to the extent that it implied it was extending its rejection of the self-sufficiency standard to encompass handicapped children for whom full or partial independence is an essential educational goal.

At least one circuit court has relied on Congress' desire to increase the independence of handicapped children to guide its interpretation of both *Rowley* and the EHA.[134] In *Polk v. Central Susquehanna*, the Third Circuit Court of Appeals concluded that Congress' emphasis on self-sufficiency at least indicates the quantum of benefits anticipated by Congress. Since *Rowley* is narrowly confined to its facts, the *Polk* court stated that its decision was guided by the text and legislative history of the EHA as well as by *Rowley*.[135] Implicit in the legislature's strong emphasis on self-sufficiency, the court found an intention that "significant learning," and "more than de minimis benefit" would be required.[136]

The *Polk* court also avoided the harsh holding of *Rowley* by relying on factual differences between the two cases.[137] The *Polk* plaintiff was requesting a service that was

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[130] *See, e.g.*, S. REP. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433. *See also* 121 CONG. REC. S19492 (1975) (remarks of Sen. Williams) ("Failure to provide appropriate educational services for all handicapped children results in public agencies and taxpayers spending billions of dollars over the lifetime of these individuals to maintain them as dependents in minimally acceptable lifestyles"); *Id.* at H25541 (remarks of Rep. Harkins) ("With proper educational services provided now, at a young age, these children can become productive citizens contributing to society instead of being left as burdens on our society"); *Id.* at H37025 (remarks of Rep. Brademas) (this failure to educate handicapped children is "a waste of one of our most valuable resources, our young people and the potential they possess to become contributing and self-sufficient members of this society").

[131] *See supra* notes 102-103 and accompanying text.

[132] 458 U.S. 176, 201 n.23 (1982).

[133] *See supra* notes 56-57, 69-70 and accompanying text.

[134] Polk v. Central Susquehanna, 853 F.2d 171, 180-85 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 838 (1989).

[135] *Id.* at 181.

[136] *Id.* at 185.

[137] *Id.* at 182. First, the plaintiff in *Polk* was requesting the services of a physical therapist. While the service requested in *Rowley* might be considered extraordinary, physical therapy is an integral part of the type of services Congress intended to have schools provide. *Id. See also* 20 U.S.C. §1401(17). Second, the *Polk*

clearly anticipated by Congress as a related service that would be required by many handicapped children.[138] In addition, the *Polk* plaintiff was much more severely handicapped than Amy Rowley.[139] Congress explicitly recognized that it was most important to meet the educational needs of severely handicapped children.[140] Since *Rowley* was grounded firmly on its facts, the *Polk* court relied on these factual distinctions to justify affording the handicapped child educational benefits that were arguably greater than those required by *Rowley*.[141]

CONCLUSION

Congress believed the EHA would save the government money by decreasing dependance on public welfare and institutional services.[142] Congress recognized that public costs associated with providing long-term care for handicapped individuals could be diminished by investing in the education of these individuals, and by gearing that training,

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plaintiff was not being educated in a regular classroom. 853 F.2d at 182. Therefore, *Rowley* is inapplicable because it is confined to the facts involving a child who was advancing from grade to grade in a regular classroom. Finally, the severity of the *Polk* plaintiff's disabilities distinguishes *Polk* from the facts of *Rowley*. The *Polk* plaintiff was severely developmentally disabled and mentally retarded. *Id.* at 173. Because of the severity of his handicap, the standards used to measure Amy Rowley's progress are inapplicable. The *Polk* plaintiff's progress cannot be measured by grade advancement or by the acquisition of academic skills. *Id.* at 182.

[138] 853 F.2d at 182. In fact, as the court points out, Congress cited physical therapy as an example of the type of related service that is available under the EHA. *Id.*; 20 U.S.C. §1401(17).

[139] 853 F.2d at 173.

[140] *Id.* at 182-83. The EHA requires that states must meet the needs of the most severely handicapped children first. *Id.* at 183. *See* 20 U.S.C. §1412(3).

[141] 853 F.2d at 182-83. The court also stated that it did not believe that its conclusion was contrary to its reading of *Rowley*. *Id.* at 183. The court did not reach the question of the appropriateness of the plaintiff's education, but reversed and remanded, concluding that the district court had applied the wrong standard in granting summary judgment for the defendant. *Id.* at 185-86.

[142] *See supra* notes 126-130 and accompanying text. Because the Act does not pay for the entire cost of a handicapped child's education, a decision that a handicapped child must be given a particular educational service can diminish the resources available for the education of nonhandicapped children. However, the Supreme Court has recognized that the burden of limited resources cannot be allowed to fall more heavily on handicapped children than it does on nonhandicapped children. *Rowley*, 458 U.S. 176, 186 (1982). *See also Mills*, 348 F. Supp. 866, 876 (D.D.C. 1972) ("[i]f sufficient funds are not available ... then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs"); Crawford v. Pittman, 708 F.2d. 1028, 1035 (5th Cir. 1983) (funding limitations cannot limit the availability of special education services to handicapped children any more severely than it does to nonhandicapped children); Yaris v. Special School Dist. of St. Louis County, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd* 728 F.2d 1055 (8th Cir. 1984) (inadequacy of funds does not relieve the state of its burden to provide handicapped children with a free appropriate public education). *See generally*, Starke, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477 (1982) (addressing the effects of financial limitations on school districts when implementing the objectives of the EHA). *But see* McCarthy, *supra* note 86, at 462 (noting that federal courts have recently been more willing to consider costs when determining whether specific programs are appropriate under the EHA).

where appropriate, toward the skills required for a more independent lifestyle.[143] Thus, the proper substantive standard for the education of handicapped children would require states to provide the educational services that are reasonably necessary to maximize the child's potential for achieving a self-sufficient lifestyle. Without an educational focus on self-sufficiency, Congress will never realize the cost savings that served as the impetus for the passage of the Act.

Since its 1982 decision in *Rowley*, the Supreme Court has consistently denied certiorari in EHA cases addressing the level of benefit required for children who are more severely handicapped than Amy Rowley.[144] Until the Supreme Court enunciates a clear standard for the educational benefit which must be afforded moderately and severely handicapped children, lower courts are free to follow the lead of cases like *Polk* and *Drew P.* to read *Rowley* as firmly grounded on its unique facts. Lower courts should therefore be less timid about relying on factual distinctions to justify straying from the narrow holding of *Rowley*. The Education of the Handicapped Act was meant to do far more than merely provide moderately and severely handicapped children with access to the school house door. In order to comply with the underlying purpose of the Act, courts should require schools to provide the special education and related services that are reasonably necessary to maximize potential for independent living.

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143 S. REP. No. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433.

144 *See, e.g.*, Polk v. Central Susquehanna, 853 F.2d 171, 184 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52 (8th Cir. 1986), *cert. denied*, 480 U.S. 936 (1987); David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986); Springdale School Dist. v. Grace, 693 F.2d 41 (8th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981).