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### School Health Services for Handicapped Children: The Door Opens No Further: *Irving Independent School District v. Tatro*, 104 S. Ct. 3371 (1984)

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Note

# School Health Services for Handicapped Children: The Door Opens No Further

*Irving Independent School District v. Tatro*, 104 S. Ct.  
3371 (1984).

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## I. INTRODUCTION

In 1975 Congress passed the Education for All Handicapped Children Act (EAHCA) to provide funds that would encourage states to ensure an education for handicapped children.<sup>1</sup> Congress declared the purpose of the Act to be:

[T]o assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.<sup>2</sup>

Implementation of the Act has spawned numerous administrative and legal actions. Generally, the parent of the handicapped child has requested services, damages, and/or attorneys' fees that the state feels its own regulatory interpretations of the Act do not require it to provide.<sup>3</sup>

The Supreme Court gave its first interpretation of a provision of the EAHCA in 1982 in *Hendrick Hudson District Board of Education v. Rowley*.<sup>4</sup> At issue in *Rowley* were definitions of the "free appropriate public education" guaranteed to handicapped children by the EAHCA, and the role of the courts when an "individualized educational program" (IEP)<sup>5</sup> approved by state educational authorities is ap-

1. 20 U.S.C. §§ 1401-61 (1982). See also The Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 580.

Congress first became involved with educating handicapped children in 1966 when it amended the Elementary and Secondary Education Act of 1965 to provide grants to assist states in initiating and improving programs for education of the handicapped. Pub. L. No. 89-750, § 161, 80 Stat. 1204 (1966). In 1970, that legislation was replaced by the Education for the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970), which contained a similar grant program to encourage the States to provide programs, educational resources, and trained personnel for educating handicapped children. In 1974 Congress determined that additional federal impetus and assistance were needed to enable the states to meet handicapped children's needs and passed Pub. L. No. 93-380, 88 Stat. 579 (1974), for the first time requiring states to set goals for providing full educational opportunities to all handicapped children as a prerequisite to receiving federal funds. For a history of legislative action in passing the EAHCA, see Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979).

2. 20 U.S.C. § 1401(c) (1976). See also *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) ("The Act represents an ambitious federal effort to promote the education of handicapped children . . .").

3. See *infra* note 30.

4. 458 U.S. 176 (1982).

5. The term "Individualized Educational Program" means a written statement prepared by qualified educational representatives, a child's teacher, parents or guardian, and the child when appropriate, setting forth an instructional plan specially designed to meet that handicapped child's unique needs. The IEP is to include: (1) the child's entry level of performance; (2) annual goals and short-term

pealed. Unfortunately, the *Rowley* decision spawned as many questions as it answered, and left unexamined other basic and controversial provisions of the Act.<sup>6</sup>

Among the questions continuing to generate conflicts among state agencies, schools, and the handicapped students they serve has been the scope and type of support services that schools must provide. That issue reached the Supreme Court in the spring of 1984 in *Irving Independent School District v. Tatro*.<sup>7</sup> The court held that the EAHCA's promise to provide the "related services"<sup>8</sup> necessary for a handicapped child to benefit from her guaranteed education<sup>9</sup> obligates a school system to provide catheterization<sup>10</sup> services to a child born with a condition preventing voluntary emptying of the bladder.<sup>11</sup> Following upon the Court's decision in *Rowley*, which limited the rights of the handicapped under the EAHCA,<sup>12</sup> and the Court's decision the same day as *Tatro* to disallow recovery of attorneys' fees in actions to secure appropriate education,<sup>13</sup> the unanimous opinion granting CIC support services to Amber Tatro was surprising.

This Article will examine briefly the Supreme Court's decisions construing the EAHCA prior to *Tatro*, analyze the Court's contribution to EAHCA interpretation in *Tatro*, and, finally, consider issues that remain troublesome to handicapped students and schools. The *Tatro* opinion has shed some light on the post-*Rowley* murkiness surrounding what will constitute sufficient benefit from special education, and regarding challengeability of state officials' determinations of what is beneficial education in a particular case. However, a number of questions remain. Despite the seeming gain in right to edu-

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instructional objectives; (3) the extent to which the child can be served in the regular classroom and educational services to be provided to achieve objectives and goals; (4) a date for initiation of the program and its projected duration; and (5) evaluation procedures to determine whether instructional objectives and goals are being reached. See 20 U.S.C. § 1401(19) (1982).

6. See generally Note, *Are Handicapped Children Entitled to Equal Educational Opportunities?*, 20 CAL. W.L. REV. 132 (1983); Note, *Landmark, Roadblock or Another Signpost on the Road to State Courts?*, 16 CONN. L. REV. 149 (1983) [hereinafter cited as Note, *Landmark*]; Note, *A Confusion of Rights and Remedies: Tatro v. Texas*, 14 CONN. L. REV. 585 (1982); Note, *Utter Chaos*, 12 J. L. & EDUC. 233 (1983); Note, *Crippling the Education for All Handicapped Children Act*, 12 STETSON L. REV. 791 (1983) [hereinafter cited as Note, *Crippling*]; Note, *Building an Appropriate Education From Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983); Note, *What's Left After Rowley?*, 19 WILLAMETTE L. REV. 715 (1983).
7. 104 S. Ct. 3371 (1984).
8. See *infra* text accompanying note 19.
9. See *infra* note 12 and accompanying text.
10. See *infra* note 70.
11. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).
12. See *supra* note 6.
13. *Smith v. Robinson*, 104 S. Ct. 3457 (1984).

cational support services made in *Tatro*, the decision in fact provides a mere doorstopper to the schoolhouse door opened so narrowly in *Rowley*.<sup>14</sup> A juxtaposition of the decisions still reveals the Court to be more protective of state finances and school districts than of opportunities for handicapped students.

## II. BACKGROUND: THE EAHCA AND SUPREME COURT INTERPRETATION PRIOR TO *TATRO*

### A. The EAHCA

To receive federal funds to supplement its expenditures for the education of handicapped children, a state must outline procedures it will undertake to assure a free appropriate public education to all handicapped children.<sup>15</sup> The EAHCA defines "free appropriate public education" as "special education and related services" that are provided at public expense and under public supervision, meet the state educational agency's standards for preschool, elementary, or secondary school, and conform to the requirements of the individual educational program<sup>16</sup> prepared for the individual handicapped child.<sup>17</sup>

"Special education" is defined as instruction (at no cost to parents or guardians) specially designed to meet the unique needs of a handicapped child.<sup>18</sup> The term "related services" means:

transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) 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.<sup>19</sup>

While school districts are required to provide special education to handicapped children at home or in hospitals or institutions when nec-

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14. See *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982) ("[T]he intent of the Act was more to open the door of public education to handicapped children . . . than to guarantee any particular level of education once inside.").

15. See 20 U.S.C. § 1412(1), (2) (1982).

16. See *supra* note 5 and accompanying text.

17. See 20 U.S.C. § 1401(18) (1982), which provides that:

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.

18. See *id.* at § 1401(16).

19. *Id.* at § 1401(17).

essary,<sup>20</sup> the intent of the special education *and* related services requirement is to enable handicapped children to attend regular classes in neighborhood schools, with the schools responsible for modifying environments and programs to make such "mainstreaming" possible.<sup>21</sup> Special classes or schools are only an option when the nature or severity of a handicap prevents instructional goals from being achieved with the aid of related services in a regular classroom.<sup>22</sup>

The EAHCA also offers detailed procedures through which a parent or guardian of a handicapped child may invoke administrative and judicial review of the child's educational program.<sup>23</sup> To the parents' right to participate in the development of their child's annual IEP,<sup>24</sup> the "procedural safeguards" add the rights to: examine records regarding their child's evaluation and placement, and secure an independent evaluation;<sup>25</sup> receive prior written notification when a change in their child's evaluation or placement is proposed or refused by the educational agency;<sup>26</sup> present complaints with respect to the education of their child in an impartial due process hearing conducted by the local, intermediate, or state educational agency;<sup>27</sup> and appeal a lower agency finding to a higher agency.<sup>28</sup> A parent or guardian dissatisfied with the results of an administrative review may bring a civil action in either state or federal court.<sup>29</sup>

Despite Congress' attempted definition of major terms of the EAHCA, vague language used within those very definitions<sup>30</sup> has prompted persistent disagreement regarding inclusiveness, scope, and specific application of the EAHCA's guarantees.<sup>31</sup>

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20. *See id.* at § 1401(16).

21. The state must assure that the child is placed in the least restrictive environment. To the maximum extent possible the handicapped child is to be educated in the regular classroom with nonhandicapped children. *Id.* at § 1412(5)(B). In other words, the child is to be "mainstreamed." Congress first sanctioned the practice of mainstreaming as a means to integrate the handicapped in the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484.

22. *See* 20 U.S.C. § 1412(5)(B) (1982).

23. *See id.* at § 1415.

24. *See id.* at § 1401(19).

25. *See id.* at § 1415(b)(1)(A) (1982).

26. *See id.* at 1415(b)(1)(C).

27. *See id.* at §§ 1415(b)(1)(E), 1415(b)(2), 1415(d).

28. *See id.* at §§ 1415(c), 1415(e).

29. *See id.* at §§ 1415(e)(2), 1415(e)(4).

30. There are several reasons for the lack of specificity in EAHCA definitions other than oversight. These may include Congress' recognition that education is primarily a state and local concern, that handicapped children evince a tremendous variety of needs, and that educators themselves do not agree upon what programs are most effective. *See* Note, *supra* note 1, at 1108-09.

31. For example, the phrase "free appropriate public education" had been interpreted variously by courts. *See, e.g.,* Kruelle v. New Castle School Dist., 642 F.2d 687 (3d Cir. 1981) (appropriate education means realization of the individual child's learning potential). *But see* Springdale School Dist. No. 50 v. Grace, 656

*B. Hendrick Hudson District Board of Education v. Rowley*

The Supreme Court's first attempt at clarifying provisions of the

F.2d 300, 304 (8th Cir. 1981) (appropriate education means that handicapped child must be given opportunity to achieve full potential commensurate with opportunity provided other children), *cert. denied*, 103 S. Ct. 2086 (1983). *See also* Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 875 (S.D. Tex. 1981) (appropriate education is one that provides opportunity to achieve full potential equal to that provided nonhandicapped children); *Armstrong v. Kline*, 476 F. Supp. 583, 603 (E.D. Pa. 1979), *remanded sub nom. Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom. Scanlon v. Battle*, 452 U.S. 968 (1980) (Congress intended that each handicapped child achieve self-sufficiency). *But see* *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981) (maximization of potential to the extent possible is the meaning of appropriate education).

The phrase "related services" has been tested in many different jurisdictions. *See, e.g.,* *Department of Educ. v. Katherine D.*, 727 F.2d 809 (9th Cir. 1984) (school must provide trained person to maintain tracheostomy tube); *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443 (3d Cir. 1981) (catheterization must be provided as related service), *cert. denied*, 458 U.S. 1121 (1982); *Kruelle v. New Castle County School Dist.*, 489 F. Supp. 169 (D. Del. 1980) (when educational and medical needs seem unseverable, medical services must be provided to assist the child to benefit from special education), *aff'd*, 642 F.2d 687 (3d Cir. 1981). *See also* *Cohen v. School Bd.*, 1984-85 E.H.L.R. Dec. 556:162 (Fla. Dist. Ct. App. June 5, 1984) (round trip transportation for parents to visit child in residential facility three times per year is related service); *Woods v. Pittman*, 3 E.H.L.R. 552:442 (N.D. Miss. June 17, 1981) (services provided by nurses are related rather than medical).

*See also In re* *Educ. Assignment of Dwight W.*, 1984-85 E.H.L.R. Dec. 506:138 (Pa. State Educ. Agency Case No. 232 June 14, 1984) (speech therapy is a related service); *In re* *Los Angeles Unified School Dist.*, 3 E.H.L.R. 502:321 (Cal. State Educ. Agency Dec. No. 20 July 8, 1981) (autistic child requires sensory integration therapy as a related service); *In re* *Robin S.*, 3 E.H.L.R. 502:232 (Ga. State Educ. Agency Dec. No. 1980-31 Jan. 13, 1980) (visual computer and optometric services not necessary for visually handicapped child to benefit from education); *Joseph L. v. Boston Pub. Schools*, 3 E.H.L.R. 501:133 (Mass. State Educ. Agency Dec. No. 1554 Jan. 25, 1979) (music therapy is a related service required for autistic child); *In re* *Capistrano USD*, 3 E.H.L.R. 502:129 (Cal. State Educ. Agency Dec. No. SH.176 July 25, 1980) (detoxification is related service required for student to benefit from education); Cal. State Educ. Agency Dec. No. 107, 3 E.H.L.R. 502:101 (June 11, 1980) (myofunctional therapy not a required related service when not necessary for child to receive benefit from special education).

Whether psychological services are "related services" is unsettled. *See* *Max M. v. Thompson*, 1984-85 E.H.L.R. Dec. 556:227 (N.D. Ill. Aug. 13 1984) (psychotherapy and similar services that can be provided by psychologists, social workers, or guidance counselors are related services, but services of a psychiatrist are medical services). *But see In re* *Lorrie v. Natick Pub. Schools*, 3 E.H.L.R. 501:366 (Mass. State Educ. Agency Dec. No. 2309 1980).

Jurisdictions also disagree on whether physical or occupational therapy is a "related service." *See In re* *Lori B.*, 1984-85 E.H.L.R. Dec. 506:101 (Sept. 16, 1983) (occupational and physical therapy are related services for child with orthopedic impairment). *But see In re* *Solana Beach Elem. School Dist.*, 1984-85 E.H.L.R. Dec. 506:189 (Cal. State Educ. Agency Dec. No. SE 84242 June 19, 1984) (occupational therapy not required when student is making progress in motor skills and is successful in academic program); *Thomas B. v. Radnor Township School Dist.*, 3 E.H.L.R. 502:176 (Pa. State Educ. Agency Dec. No. 147 Sept. 5, 1980) (while

EAHCA was less than complete.<sup>32</sup> In *Rowley* the Court held that a deaf child was receiving an "appropriate education" without the sign language interpreter her parents requested. The Court's decision was based on the fact that instruction in a regular classroom with an FM hearing aid, supplemented by work with a speech therapist and a tutor for the hearing impaired,<sup>33</sup> was allowing her to achieve higher than average marks and to pass easily from grade to grade.<sup>34</sup>

When Amy Rowley began first grade, a new annual IEP was prepared for her by school personnel as required by the EAHCA.<sup>35</sup> The IEP provided that Amy be educated in the regular classroom, aided by the supportive services of an FM transmitter and hearing aid, a tutor for the deaf, and a speech therapist.<sup>36</sup> Amy's parents requested that Amy also be provided the services of a sign-language interpreter.<sup>37</sup> When their request and two administrative appeals were denied,<sup>38</sup> the Rowleys brought a civil action claiming that, because Amy would not obtain the fullest benefit from her education without an interpreter, she was being denied the "free appropriate public education" the EAHCA guarantees.<sup>39</sup> The Supreme Court granted certiorari with the dual purposes of clarifying the substantive meaning of "free appropriate public education," and answering the procedural question of whether courts may change decisions and policies of state educational agencies when parents have voiced complaints about the substance of their child's special education via a civil action.<sup>40</sup>

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some children could require special physical education, physically impaired child functioning capably in regular physical education class did not require special physical education at elementary school level).

32. See *infra* note 52 and accompanying text. See also *supra* note 6 and accompanying text.

33. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 184 (1982).

34. *Id.* at 204.

35. *Id.* at 184. See also 20 U.S.C. § 1401(19) (1982).

36. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 184 (1982).

37. *Id.*

38. *Id.* at 185.

39. *Id.*

40. *Id.* at 186. Parents' right to bring a civil action is provided in EAHCA § 1415(e)(2). The U.S. District Court for the Southern District of New York had interpreted "a free appropriate public education" as giving a handicapped child "an opportunity to achieve full potential commensurate with the opportunity provided to other children . . ." and ordered the school district to provide the interpreter. *Rowley v. Board of Educ.*, 483 F. Supp. 528, 529 (S.D.N.Y. 1980). The Court of Appeals agreed with the standard applied by the District Court and affirmed. *Rowley v. Board of Educ.*, 632 F.2d 945, 947 (2d Cir. 1980). Judge Mansfield dissented, however, on two bases: that "appropriate education" does not require equal educational opportunity, and that courts do not have the expertise in educational matters to redesign a child's educational program and should accept the judgment of educational authorities. *Id.* at 951-53 (Mansfield, J., dissenting).



### 1. *The Court's Definition of "Appropriate Education"*

The Rowleys contended that the statutory definition of "free appropriate public education" was not functional because it did not define "appropriate."<sup>41</sup> The Court disagreed and held that the four requirements listed in the EAHCA definition were Congress' checklist for adequacy. A child's special education and related services are appropriate when they: (1) are provided at public expense and under public supervision; (2) meet state educational agency standards; (3) include appropriate preschool, elementary, or secondary school education as normally required in that state; and (4) conform to the child's IEP.<sup>42</sup> The Court concluded that "if personalized instruction is being provided with sufficient supportive services to permit the child to *benefit from* the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act."<sup>43</sup>

The Court then considered whether there was a substantive standard against which "benefit" should be measured.<sup>44</sup> The majority held that the equal protection Congress intended in passing the EAHCA was only equal *access to* public education,<sup>45</sup> with the implicit

41. Specifically, they argued that:

Respondents agree that the Act defines "free appropriate public education," but contend that the statutory definition is not "functional" and thus "offers judges no guidance in their consideration of controversies involving the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education."

Brief for Respondents at 28, *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The United States, appearing as amicus curiae on behalf of respondents, stated that "[a]lthough the Act includes definitions of a 'free appropriate public education' and other related terms, the statutory definitions do not adequately explain what is meant by 'appropriate.'" Brief for United States as Amicus Curiae at 13, *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 187 (1982).

42. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982). See *supra* note 17 and accompanying text.

43. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982) (emphasis added).

44. The Court found Congress' intent in passing the EAHCA was not to mandate a potential-maximizing education, as lower courts had interpreted "appropriate education" to substantively require, but to accomplish integration, and require states to adopt *procedures* for individualizing educational programs for handicapped children so that public education would be accessible to them. *Id.*

45. *Id.* at 192. Three important judicial precedents to the EAHCA upon which the Court based its determination that the equal protection intended was equal access were *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

For a more extensive analysis of the Court's discussion of legislative and judicial history of the EAHCA than is within the scope of this Article see generally Note, *Landmark, supra* note 6; Note, *supra* note 1; and Note, *Crippling, supra* note 6.

requirement that such access be "meaningful."<sup>46</sup> If a handicapped child has access to public education and receives "some educational benefit" from it, Congress' intent has been met.<sup>47</sup> The Court refused to establish a line to be crossed in every case before a child can be said to have benefited; the test is more some *amount* of achievement that is subjectively sufficient in each individual case.<sup>48</sup> The Court held that in the particular case of a mainstreamed child being educated in the regular classroom, such as Amy Rowley, the IEP will be considered beneficial if it is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."<sup>49</sup>

## 2. *Scope of Judicial Review of Educational Decisions*

The Court also held that judicial review of state educational decisions is limited to two determinations: (1) whether the child's IEP is "reasonably calculated to enable the child to receive educational benefits"; and (2) whether the state has complied with the procedures mandated by the EAHCA.<sup>50</sup> If the IEP's combination of special education and related services allows the child "some benefit," if the IEP was developed with involvement of both educational personnel and parents, and if required procedures for annual review and response to parental complaint were followed, then "the State has complied with the obligations imposed by Congress and the courts can require no more."<sup>51</sup> Since the district had implemented the required procedural

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46. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982).

47. *Id.*

48. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

*Id.* at 202.

49. *Id.* at 204.

50. *Id.* at 206-07. Petitioners had contended that courts may not review the substance of the educational program offered by the state, only whether the state followed the proper procedural safeguards. Respondents contended that courts are to exercise *de novo* review over state educational decisions and policies, as well as processes. *Id.* at 205.

51. *Id.* The Court reasoned that questions of educational policy and methodology are traditionally reserved to the states, and that by guaranteeing parents recourse to a civil action if dissatisfied with the results of state administrative proceedings over their child's IEP, Congress did not intend to displace the primacy of States in the field of education. The Court cited its previous caution in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973), that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982). See also *id.* at 208 n.30.

safeguards, since Amy's special education and related services had been calculated to meet her educational needs, and since the Court found factually that Amy was benefiting from her education, the Court held that the school district had provided Amy an "adequate education."<sup>52</sup>

### C. Concerns of Educators and Parents After *Rowley*

*Rowley* gave parents and educators an approach with which to determine if a handicapped child is receiving an appropriate education. The Court told some of the questions to ask. Has the child been afforded meaningful access to the public school, or placed in the least restrictive setting that will afford him an education that can be meaningful? Has an IEP been prepared that sets forth special education and related services calculated by school personnel to enable the child to receive educational benefit? Is the mainstreamed child receiving high enough marks on class work to pass from grade to grade? Was the IEP prepared for the child at a conference of educators and parents? Has the state established and followed the required procedural safeguards?

However, answers to whether a particular child was receiving the type of special education and all the services that child should remained elusive.<sup>53</sup> The Court had defined "appropriate" with other

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52. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 209-10 (1982).

53. A commentator who presaged additional litigation following *Rowley* took no risk. See, e.g., Note, *Landmark*, *supra* note 6, at 176: "*Rowley* has not provided final clarification of either the substantive or procedural mandate of the EAHCA. There will be more litigation under the Act."

Courts have had various difficulties applying the *Rowley* interpretations. In *Lang v. Braintree School Comm.*, 545 F. Supp. 1221 (D. Mass. 1982), the court applied *Rowley* to determine extent of judicial review and appropriateness of the child's IEP. The court found that review should lie somewhere between a trial de novo and absolute deference to the state hearing officer. The court approved the IEP since it was based on legitimate educational philosophy and would provide educational benefit.

In *Adam Cent. School Dist. v. Deist*, 214 Neb. 307, 334 N.W.2d 775 (1983), *reh'g*, 215 Neb. 284, 338 N.W.2d 591 (1983), *cert. denied*, 104 S. Ct. 239 (1984), the Supreme Court of Nebraska reheard a case it had decided under the Eighth Circuit's interpretation of a free appropriate public education. See *Springdale School Dist. No. 50 v. Grace*, 656 F.2d 300 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 2086 (1983). While the court substituted "sufficient support services to permit the child to benefit educationally" for the *Springdale* standard of "opportunity to achieve full potential" in its opinion in three places, the court reached exactly the same conclusion under either standard: the school district was required to pay for residential placement near the handicapped child's home even though the boy had been making progress in a more distant state facility.

In dismissing *Appel v. Ambach*, E.H.L.R. Dec. 554:236 (S.D.N.Y. Nov. 6, 1982), a federal district court of New York interpreted *Rowley* as limiting courts to examining an IEP for procedural regularity if it appears to have been calculated to benefit the child in some way. The court felt precluded from making an in-

amorphous terms: "meaningful,"<sup>54</sup> "some educational benefit,"<sup>55</sup> and reasonably calculated."<sup>56</sup> The original question was simply divided and subdivided into sets of questions. What is the amplitude of "meaningful" access? Presumably this means a handicapped child cannot simply be allowed into the public school building and then left to flounder with instruction beyond his mental comprehension or a physical plant he is unable to maneuver. The child must be furnished with materials and a setting through which he can receive meaning from what is being taught. But it is apparently not necessary that he understand fully or be able to participate in all or even most of the school setting. If access is "meaningful" so long as there is "some benefit," how much or how little benefit will suffice?<sup>57</sup>

Almost any educational program would seem to provide some ben-

dependent finding on whether the child was receiving an appropriate education without residential placement, and remanded the case to the state educational agency. In *Frank v. Grover*, E.H.L.R. Dec. 554:148 (Wis. Cir. Ct., Dane County, Branch 11 July 30, 1982), the Judge admitted personal agreement with a parental request for services, but felt compelled to dismiss the claim since the school district had shown by a preponderance of the evidence that it had complied with the procedures of the EAHCA and had reasonably calculated the IEP to provide educational benefit.

Some states have held *Rowley* is not controlling when the state constitution or a state statute mandates a higher substantive standard. See *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982) (*Rowley* does not control state courts' interpretation of a separate state statute which requires that each handicapped child be provided an opportunity to achieve full potential commensurate with that given other children), *cert. denied*, 460 U.S. 1012 (1983); *In re Traverse Bay Area Inter. School Dist.*, Mich. State Educ. Agency Case No. 82-0143, E.H.L.R. Dec. 504:140 (Aug. 9, 1982) (Michigan law mandates more stringent standard than *Rowley* decision and handicapped child's educational program in Michigan should allow child to develop to maximum potential).

A bill requiring the state's public schools to provide handicapped children with equal educational opportunity, rather than simply some benefit, was introduced during the 1985 session of the Nebraska Legislature. L.B. 254, 89th Leg., 1st Sess., 1985. However, the bill was killed by the Education Committee.

For a list of states that have such statutes and citations to those statutes, see Note, *Landmark*, *supra* note 6, at 174-75 n.129-30 and accompanying text.

54. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982). See *supra* note 39 and accompanying text.
55. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982).
56. *Id.* at 204. See *supra* note 42 and accompanying text.
57. Justice White voiced some of these questions in his dissent:

While "meaningful" is no more enlightening than "appropriate," the Court purports to clarify itself. Because Amy was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education. . . . It would apparently satisfy the Court's standard of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child," *ante* at 201, for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service.

efit. Will educational authorities' opinion that an IEP provides "some benefit" always defeat a parent's view that the child is not benefiting enough, so long as the school implemented the procedural requirements? Passing from grade to grade is "one important factor"<sup>58</sup> when determining whether a child is receiving some benefit. Must parents then wait until it is clear that their child will fail to pass before they can prove the IEP's inappropriateness? If a child is not mainstreamed, what criteria will tell that the child is receiving sufficient benefit?

Are parents unable to have a single addition or deletion made to the IEP if the program as a whole is found to be reasonably calculated to benefit the child?<sup>59</sup> How large is the margin for error the Court seems to be allowing educators through the words "reasonably calculated" to enable the child to receive educational benefits? How independently can courts decide reasonableness of a school district's plan based upon a preponderance of the evidence, within the two-point review delimited by *Rowley*?<sup>60</sup>

The Court's decision also left the impression that it would continue to follow its previous rulings emphasizing state and local control of educational decisions<sup>61</sup> and its restrictive interpretation of legislation granting rights to handicapped persons.<sup>62</sup> The decision seemed to en-

Hendrick Hudson Dist. Bd. of of Educ. v. Rowley, 458 U.S. 176, 214 (1982) (White, J., dissenting) (footnote omitted) (emphasis in original).

58. *Id.* at 207 n. 28.

59. In his dissent, Justice White argued "[t]he Court's standard . . . would not permit a challenge to part of the IEP; the legislative history demonstrates . . . that Congress intended such challenges to be possible, even if the plan as developed is reasonably calculated to give the child some benefits." *Id.* at 218 (White, J., dissenting).

60. *Id.* at 204.

61. The Court cited *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education is not a fundamental right evoking strict judicial scrutiny of state educational decisions; courts lack the specialized knowledge to resolve questions of educational policy that therefore must be left to the state and local educational agencies), and *Epperson v. Arkansas*, 393 U.S. 97 (1968) ("public education in our Nation is committed to the control of state and local authorities"). See also *Plyler v. Doe*, 457 U.S. 202 (1982) (state educational decisions can only be judged with the rational basis test of constitutionality since education is not a fundamental right).

62. The Court has considered handicapped persons' rights four times since 1979: *Youngberg v. Romeo*, 457 U.S. 307 (1982) (mentally retarded individual was entitled to training sufficient to allow freedom from unnecessary restraint; decision should not be construed as recognizing a constitutional right to training— courts must respect judgments by professionals in individual cases); *Mills v. Rogers*, 457 U.S. 291 (1982) (federal Constitution imposes only "minimal" rights, handicapped petitioner should first look under state constitution for more extensive substantive rights); *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) (Developmentally Disabled Assistance and Bill of Rights Act of 1975 could not impose affirmative obligations since Congress cannot create federal substantive rights unless it does so "unambiguously"); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (§ 504 of the Rehabilitation Act of 1973 does not require af-

courage local school boards to resist parental demands for changes in the school's prescribed program.<sup>63</sup> Advocates of handicapped children were left with the apprehension that the only time they might win a claim would be if educational authorities had flaunted EAHCA procedural safeguards.<sup>64</sup>

### III. THE *TATRO* DECISION

#### A. Administrative and Lower Court Action

The persistent questions remaining after *Rowley* led the Supreme Court to grant certiorari to consider what "related services" schools must provide to enable handicapped children to benefit from their guaranteed free appropriate public education.<sup>65</sup> The narrow issue in *Tatro* was whether Irving School District was required to provide Clean Intermittent Catheterization (CIC)<sup>66</sup> for an eight-year-old girl as a related service of her individualized educational program.

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firmative action on behalf of handicapped persons, but only absence of discrimination and does not require a professional school to eliminate all physical qualifications for admission; applicant can be refused admission on basis that deafness would impair ability to function as a nurse). See also Note, *Landmark*, *supra* note 6, at 166.

63. Note, *Landmark*, *supra* note 6, at 168.

64. *Id.*

65. Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984). The Court disposed of the second issue brought before the Court, the availability of attorneys' fees under § 504 in an action to secure educational services for the handicapped, by citing its decision in *Smith*. *Id.* at 3379. Therefore, analysis of the *Tatro* decision can focus solely on what it added to the interpretation of the above provisions of the EAHCA. See generally Note, *A Confusion of Rights and Remedies: Tatro v. Texas*, 14 CONN. L. REV. 585 (1982).

66. CIC was described variously in the lower court opinions and the briefs for either side as being anything from a simple procedure performable in a few minutes, to a medical procedure requiring medical supervision of twenty-two detailed steps. See *Tatro v. Texas*, 516 F. Supp. 968, 970 n.1 (1981). The definition finally accepted by the Supreme Court was "a procedure involving the insertion of a catheter into the urethra to drain the bladder. . . . The procedure is a simple one that may be performed in a few minutes by a layperson with less than an hour's training." Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371, 3374 (1984). Amber's parents, teenaged brother, and babysitter provided her with CIC at home.

See *supra* note 30 for cases evidencing the confusion in the lower courts and administrative bodies in defining "related services." The EAHCA definition of "related services" is illustrated by a list of such services, but these are not meant to be exclusive. 20 U.S.C. § 1401(17) (1982). The Department of Education's interpretive regulation adds that "the items named are not all of the possible items that are covered, whether like or unlike the ones named." 34 C.F.R. § 300.6 (1982). See also Note, *supra* note 65, at 592 nn. 37-43 and accompanying text. See generally Mooney & Aronson, *Solomon Revisited: Separating Education and Other than Educational Needs in Special Educational Residential Placements*, 14 CONN. L. REV. 531 (1982); Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477 (1982).

Amber Tatro was born with spina bifida, which caused orthopedic and speech impairments, and a bladder condition that prevents her from voiding voluntarily.<sup>67</sup> To prevent injury to her kidneys, she requires catheterization every three to four hours.

When Amber was three years old her parents met with school personnel to prepare an IEP that would have placed Amber in early childhood development classes in the public school. The IEP also provided special services such as physical and occupational therapy. The school district refused, however, to provide CIC, maintaining that CIC was medical treatment since it required a prescription by a physician, training that the school's nurse did not have, and instruments the school did not have ready access to. The Tatros argued that, under EAHCA, CIC was a related service necessary for Amber to benefit from her special education, and requested a hearing. The hearing officer found that the school was required to provide CIC services, as did the Texas State Commissioner of Education upon the school board's appeal.<sup>68</sup> The school district appealed to the State Board of Education, which reversed the Commissioner's finding.<sup>69</sup>

The Tatros filed a civil suit in federal court, requesting a mandatory injunction.<sup>70</sup> The district court issued a memorandum

67. Spina bifida is the more common name for myelodysplasia, or "open spine."

68. Brief for Respondents at 5, *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371 (1984) (citing *Amber T. and Mary T. v. Irving Indep. School Dist.*, Texas Educ. Agency Docket No. 115-SE-579 (Aug. 6, 1979)).

69. Texas has established a two-tiered review system, as have many other states, to comply with the EAHCA's procedural safeguard requirements:

Whenever a complaint has been received . . . the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency.

20 U.S.C. § 1415(b)(2) (1982). The statute provides further that:

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing.

20 U.S.C. § 1415(c) (1982). See TEX. EDUC. CODE ANN. § 16.104 (Vernon 1979).

70. *Tatro v. Texas*, 481 F. Supp. 1224 (N.D. Tex. 1979). The statute provides that:

Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

opinion denying the injunction. In the opinion Judge Higginbotham stated that if CIC were deemed a medical service, the school could not be required to perform it, since only medical services for diagnosis of the handicapping condition must be provided under the EAHCA.<sup>71</sup> While CIC might fit within the "school health services"<sup>72</sup> included in the definition of "related services" in United States Department of Education regulations, the judge ruled that mere agency regulations cannot create additional duty. The opinion concluded that "school health services," performed by a nurse or other qualified person in the school,<sup>73</sup> are no more than the related services delineated in the EAHCA.<sup>74</sup>

Judge Higginbotham then ruled that because Amber needed CIC whether or not she was in school, the need for the service did not arise from the effort to educate. CIC, therefore, was not related to Amber's special education. The judge reasoned that there is a difference between such maintenance of life systems and enhancing a handicapped person's ability to learn.<sup>75</sup>

On appeal, the Fifth Circuit (*Tatro I*) vacated Judge Higginbotham's memorandum opinion and supplied its own interpretation of when a needed service fits the EAHCA definition. The court held that

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20 U.S.C. § 1415(e)(2) (1982). The *Tatros'* initial suit also requested damages and attorneys' fees. See *supra* notes 65 and 71.

71. The medical services required are illustrated by a variety of specific services, but all carefully limited by Congress to diagnostic and evaluation purposes. Judge Higginbotham held that this explicit qualification prohibits "finding a congressional intent to furnish all support services needed by persons during school not because of the schooling but because that care is always required." *Tatro v. Texas*, 481 F. Supp. 1224, 1227 (N.D. Tex. 1979).
72. The Secretary of Education is empowered to issue such regulations as may be necessary to carry out the provisions of the EAHCA. 20 U.S.C. § 1417(b) (1982).  
The regulations, 34 C.F.R. § 300.13(a) (1984), define "related services" as transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.
73. "School health services" are defined as "services provided by a qualified nurse or other qualified person." 34 C.F.R. § 300.13(a)(10) (1984). "Medical services" are defined by the Department's implementation regulations as "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services." *Id.* at § 300.13(a)(4).
74. *Tatro v. Texas*, 481 F. Supp. 1224, 1228 (N.D. Tex. 1979).
75. The court held that the plaintiffs could not convert a statute (Rehabilitation Act § 504) prohibiting discrimination in certain governmental programs into a statute requiring the setting up of governmental health care for people seeking to participate in such programs.



if Amber could be present in a classroom only with CIC, then CIC is a related supportive service necessary for her to "benefit from the special education to which she is entitled . . . ."76 The court remanded the case to be tried under this new definition.

Judge Higginbotham applied the Fifth Circuit's new rule to the facts of the case. Since the Fifth Circuit determined that CIC was a supportive service necessary for Amber to benefit from her individualized educational plan, then the school would have to supply CIC unless it were a medical service. The court found that under Texas law a physician does not have to be present during CIC so long as the physician in charge of the case so prescribes.<sup>77</sup> Therefore, under the Department of Education definitions, CIC is not a medical service,<sup>78</sup> but is a school health service that could be required of the school as part of Amber's IEP.<sup>79</sup> The Fifth Circuit Court of Appeals (*Tatro II*) affirmed.<sup>80</sup>

## B. The Supreme Court Opinion

The Supreme Court combined the questions asked by the two courts below, creating a two-part approach to "related services" actions. The Court first considered whether CIC was required to assist a handicapped child to benefit from special education. The Court then asked whether CIC was excluded from required related services because it was a medical service for a purpose other than diagnosis or evaluation.

In a short, unanimous opinion,<sup>81</sup> the Court affirmed the Fifth Circuit's opinion that, without CIC services during the school day, Amber could not attend school and could not benefit from special education at all. The Court restated its ruling in *Rowley* that "'Congress sought primarily to make public education available to handicapped children' and 'to make such access meaningful.'"<sup>82</sup> The Court continued:

A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The Act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class . . . and the Act specifically authorizes grants

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76. *Tatro v. Texas*, 625 F.2d 557, 562 (5th Cir. 1980).

77. See TEX. REV. CIV. STAT. ANN. art. 4495-4512 (Vernon 1976). See *infra* note 123 and accompanying text.

78. See *supra* note 73.

79. *Tatro v. Texas*, 516 F. Supp. 968, 977 (1981).

80. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983).

81. Justices Stevens and Brennan each wrote a short opinion concurring with the majority on the "related services" issue, but dissenting on the issue of attorneys' fees. Justice Marshall joined with Justice Brennan. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3379-80 (1984) (Brennan, J., dissenting).

82. *Id.* at 3377 (quoting *Hendrick Hudson Dist. Bd of Educ. v. Rowley*, 458 U.S. 176, 192 (1982)).

for schools to alter buildings and equipment to make them accessible to the handicapped. . . . Services like CIC that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.<sup>83</sup>

The Court held, therefore, that CIC is a " 'supportive servic[e] . . . required to assist a handicapped child to benefit from special education.' " <sup>84</sup>

The Court drew its circle around the "related services" that schools must provide with CIC inside. The school district had argued that any service requiring a physician's prescription and ultimate superintendence is a "medical service."<sup>85</sup> The Court pointed out that, under the lower court's interpretation of Texas state law, CIC may legally be administered by a nurse or trained layperson. The Court saw no distinction between a school nurse's providing CIC for a handicapped child, and the routine practice of dispensing prescription medications to nonhandicapped children.<sup>86</sup> The Court instead accepted the Department of Education's distinction between "medical services" and "school health services" that are to be provided when they are related to a child's receiving educational benefit: "the Secretary has determined that the services of a school nurse otherwise qualifying as a 'related service' are not subject to exclusion as a 'medical service,' but the services of a physician are excludable as such."<sup>87</sup>

The Court interpreted the intent of the Secretary of Education and of Congress based on dollars and cents.<sup>88</sup> The Court reasoned that school nurses are already a part of school systems and would not be the sort of financial burden that Congress was concerned with when it

83. *Id.*

84. *Id.*

85. *Id.* at 3378. See *infra* note 86.

86. The Court found that: "The regulations define 'related services' for handicapped children to include 'school health services,' . . . which are defined in turn as 'services provided by a qualified school nurse or other qualified person, . . . . 'Medical services' are defined as 'services provided by a licensed physician.'" *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3378 (1984). The Court noted that the regulations define only those "medical services" that are actually owed to handicapped children, which are services provided by a physician "to determine a child's medically related handicapping condition which results in the child's need for special education and related services." *Id.* at 3378 n.10.

87. *Id.* at 3378. The Court's decision was also influenced by a Department of Education ruling that had found CIC to be a "related service." See 46 Fed. Reg. 4912 (1981). While the Department had indefinitely postponed the date on which this ruling would take effect, it had been consistently accepting CIC as an allowable expense on schools' applications for funds under Part B of the EAHCA. See *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3377 n.7 (1984).

88. "Although Congress devoted little discussion to the 'medical services' exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3378 (1984).

excluded medical services.<sup>89</sup> Additional financial burden, of course, was a primary concern of the states and school districts watching the case.<sup>90</sup> With these concerns in mind, the Court attempted to narrow its ruling, emphasizing that only school health services that otherwise qualify as related services must be provided. In other words, entitlement to any "related service" is prefaced on a child's being handicapped, requiring special education, and *needing* the service in order to benefit from his special education. The Court thus excluded any services that could be performed outside of the school day, no matter how easily a school nurse or layperson could provide them.<sup>91</sup> The Court pointed out that respondents were not asking the school to provide medical instruments or equipment for Amber's CIC, only services of a qualified person.<sup>92</sup>

#### IV. THE *TATRO* DECISION'S CONTRIBUTION TO EAHCA INTERPRETATION AND APPLICATION

##### A. Questions Answered by *Tatro*

Education officials and advocates of handicapped persons had awaited the Supreme Court's decision of the *Tatro* case with equal interest. Both groups not only wanted a functional distinction between required related services and medical services, but also hoped that the Court had recognized the obscurity of its definitions in *Rowley* and would clarify them.<sup>93</sup> The Court did draw a clear line between required school health services and medical services. The Court also expressly affirmed its restrictive stance toward interpretation of legislation granting rights to the handicapped. And the Court did answer directly the question created by its decision in *Rowley* regarding judicial review of state educational decisions.

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89. *Id.* The Court did not address the figures introduced by the National School Boards Association stating that while approximately 86,000 facilities are being used in the United States to educate public school students, only about 30,000 school nurses are employed by public school systems. Brief of Amicus Curiae, Nat'l School Bds. Ass'n, *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371 (1984).

90. See Brief for Petitioners, *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371 (1984) [hereinafter cited as Brief for Petitioners]; Brief of Amicus Curiae, Nat'l School Bds. Ass'n, *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371 (1984) [hereinafter cited as Nat'l School Bds. Brief].

91. The Court stated: "For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it." *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3379 (1984). See *infra* note 104 and accompanying text.

92. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3379. See *infra* text accompanying note 97.

93. Statement of Gwendolyn Gregory, Deputy Legal Counsel for National School Bds. Ass'n, at Nebraska Council of School Attorneys School Law Seminar, University of Nebraska College of Law (June 15, 1984) [hereinafter cited as Gregory].

First, the Court made a bright distinction between medical services and related services. The two-question approach modeled by the Court can be applied by lower courts and state administrative agencies when services related to special education are difficult to separate from medical services. If a service is *not* necessary for the child to benefit from public education, or *is* a medical service by a physician for purposes other than diagnosis or evaluation of the handicapping condition, then a school need not provide it.<sup>94</sup>

The Court's holding dissolved the spectres being conjured by school officials that a decision in favor of Amber would be the beginning of national health care through the schools.<sup>95</sup> Schools are required to provide "related services" *only* when a child is handicapped so as to require special education, *only* when the services are needed for the child to benefit from his special educational program, and *only* when they can be delegated by a prescribing physician to a nurse or other qualified person.<sup>96</sup> Any services that can be provided outside of school hours will not be provided at school. The Court's note "that respondents are not asking petitioner to provide equipment that Amber needs for CIC"<sup>97</sup> seems to be a statement that schools are also not responsible for the medical instruments or equipment required, even when the service is found to be related to the child's education. Therefore, to the extent that any true medical services are required in order for the child to receive the school health services, e.g., the medical prescription, equipment, and ongoing monitoring, such services are obtainable outside the school setting and will be the responsibility of the child's guardians.<sup>98</sup>

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94. See *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3379 (1984).

95. One commentator has observed: "The 5th Circuit approach in *Tatro* 'was so broad that anything the kid needed during the school day had to be provided,' including provision of equipment such as wheelchairs and eyeglasses." Gwendolyn Gregory to *School Law News* at 3, July 13, 1984. See *infra* note 104. *But see supra* note 95.

96. The Court stated: "In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act." *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3379 (1984). See *infra* note 129 and accompanying text.

97. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3379 (1984).

98. Kidney dialysis had been the school district's spectre of things to come should the Court require schools to perform CIC. Brief for Petitioner, *supra* note 90, at 37. Similar fears were expressed by others:

Under the lower court decision, schools would be obligated to provide insulin injections, kidney dialysis, and maintain tracheostomies. Colostomy, ileostomy, and urethrostomy care may be needed by students. Students may also require naso-gastric tube feedings, treatment for pressure sores, or use of a respirator during the course of the day.

Nat'l School Bds. Brief, *supra* note 90, at 33. The Court did not expressly address any services other than CIC. Kidney dialysis in most cases could be accomplished other than during the school day. Brief of Amicus Curiae New York State Comm'n on the Quality of Care for the Mentally Disabled at 3, *Irving Indep.*

Second, the Court affirmed directly its general restrictive stance toward interpretation of legislation granting rights to handicapped children. The Court restated its view that equal *access* had been the goal of Congress in adopting the EAHCA.<sup>99</sup> The Court compared the school health services that must be provided to transportation and barrier removal "that do no more than enable a child to be physically present in class . . . ."<sup>100</sup> In *Rowley* the Court had held that the public school door must merely be opened to give handicapped children access to appropriate public education. The services and personnel required by *Tatro* need only be sufficient to prop that door open throughout the school day.

Finally, in a footnote to the case, the Court answered the question regarding the extent of judicial review of state educational decisions after *Rowley*.<sup>101</sup> The Irving School District read *Rowley* as limiting judicial inquiry to whether a school district had created an IEP according to state policy, and followed the Act's procedural requirements.<sup>102</sup> The school district contended that substantive educational judgments are out of the realm of the courts under *Rowley* and *San Antonio School Dist. v. Rodriguez*.<sup>103</sup> The Court cited a footnote in *Rowley* as containing the accurate statement of the Court's rule:

[W]e held in *Board of Education of Hendrick Hudson Central School District v. Rowley* . . . that a court is required "not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an [individualized education plan] for the child in question which conforms with the requirements of § 1401(19) [defining such plans]." Judicial review is equally appropriate in this case, which presents the legal question of a school's substantive obligation under the "related services" requirement of § 1401(17).<sup>104</sup>

The fact that the *Tatros* were able to win a challenge of a singular provision of their daughter's IEP illustrates the Court's answer to commentators' concerns.<sup>105</sup> Though school officials have followed procedural requirements, and claim that the child's IEP as a whole is reasonably calculated to benefit the child, a singular deficiency can be attacked and changed through a civil action.

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School Dist. v. *Tatro*, 104 S. Ct. 3371 (1984). But the other services listed by the National School Boards Association arguably could be required to allow a child to remain in school for the entire school day. All are services for which state law generally does not require physician performance. See AM. NURSES ASS'N, SCHOOL NURSES WORKING WITH HANDICAPPED CHILDREN 3 (1980).

99. See *supra* note 82 and accompanying text.

100. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3377 (1984).

101. *Id.* at 3376.

102. *Id.* See Brief for Petitioners, *supra* note 90, at 33.

103. See *supra* notes 45 and 61 and accompanying text.

104. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3376 n.6 (1984) (citation omitted).

105. See *supra* notes 6, 53, 59-61 and accompanying text.

## B. Questions *Tatro* Did Not Answer and New Grey Areas

### 1. "Meaningful Access" and "Some Benefit"

Disappointingly, the Court did not shed any real light on the phrases "meaningful access" and "some benefit." The Court's rule in *Rowley* was that if a handicapped child is given access to public education and receives some educational benefit, then Congress' intent has been accomplished.<sup>106</sup> Under that standard, it seems the Court could have decided that the half day Amber might attend school without CIC provided the intended access and some educational benefit. The Court did not explain whether it was raising its standard or how it determined that the educational benefit of a half day's access would not be sufficient. The rule that the door not only must be opened to handicapped children, but now must remain open throughout the normal school day may indicate that the *Rowley* standard is not as minimal as commentators believed.<sup>107</sup> Or, the Court may have been silently applying its rule in *Rowley* that the IEP of a mainstreamed child is adequate only if it is calculated to enable the child to achieve passing marks and advance from grade to grade.<sup>108</sup> Attending school half days would probably not have allowed Amber to pass to the next grade within one year. If the Court was applying that rule, or intending to broaden the standard of "some benefit," it would have been helpful for the Court to have explained its action. Instead, the Court merely stated that CIC is one provision Congress would have intended as a way to provide meaningful access.

### 2. *The Court's Conflicting Attitudes Toward Schools' Financial Burdens*

There will be new problems in applying the Court's directives in *Tatro*. One area of confusion will be the Court's use of expense as a standard in interpreting Congress' intent in the EAHCA. The Court emphasized financial burden several times in determining what services Congress would have intended to require schools to provide and what services were excluded.<sup>109</sup> The Court first stated that it was reasonable to construe that Congress intended to exclude services of a physician or a hospital, but not school nursing services, because of the expense of the former compared to the latter.<sup>110</sup> The Court also noted that the school was not being asked to bear the expense of medical

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106. See *supra* notes 43-49 and accompanying text.

107. See *supra* notes 6, 53, 56-57 and accompanying text.

108. See *supra* note 49 and accompanying text.

109. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3378 (1984).

110. "[T]he Secretary could . . . reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude . . ." *Id.*

equipment the child needed for the related service.<sup>111</sup> The footnote concluding the Court's analysis of whether CIC is a related service indicates a factor in the Court's decision was that "it would be far more costly to pay for Amber's instruction and CIC services at a private school, or to arrange for home tutoring, than to provide CIC at the regular public school placement provided."<sup>112</sup> Finally, the Court protected schools from having to pay attorneys' fees.<sup>113</sup>

But contravening any use of "expense" as a guideline is the Court's note that expense will not keep schools from having to provide instruction in hospitals and at home to children with serious medical needs.<sup>114</sup> In addition, the Court found that Congress intended that schools hire "specially trained personnel to help handicapped children, such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.'"<sup>115</sup>

The Court based the reasonableness of its construction of Congressional intent to provide school nursing services on the fact that "[s]chool nurses have long been a part of the educational system . . . ."<sup>116</sup> The Court ignored, however, the paucity of school nurses in many school systems.<sup>117</sup> For many school districts now sharing one nurse between buildings there may be a very real expense involved in hiring additional school nurses to meet needs of particular handicapped students. The Court's limitation of required related services to those that could be provided by a school nurse or "layperson," to defray the cost of additional employees,<sup>118</sup> was also not fiscally realistic in light of grievances over such assignments filed by teachers' unions. When school employees' contracts defeat support service assignments, the recourse will be for the school to hire additional individuals just to perform related services, according to the Ninth Circuit Court of Appeals.<sup>119</sup>

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111. "[W]e note that respondents are not asking petitioner to provide *equipment* that Amber needs for CIC." *Id.* at 3379 (emphasis added).

112. *Id.* at 3379 n.13.

113. *Id.* at 3379 (citing *Smith v. Robinson*, 104 S. Ct. 3457 (1984)).

114. *Id.* at 3378 n.11.

115. *Id.* at 3378 (citation omitted).

116. *Id.*

117. See *White, Are You Ready to Provide the Health Services Demanded of the Schools?*, AM. SCHOOL BD. 25, 26 (June 1981).

118. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3771, 3379 (1984).

119. In *Department of Educ., State of Hawaii v. Katherine D.*, 531 F. Supp. 517, 520 (D. Hawaii 1982), *amended*, 727 F.2d 809 (9th Cir. 1984), the Hawaii Department of Education offered public school placement and training of all school personnel expected to be in the vicinity of a child with cystic fibrosis. As well as medication and suctioning of mucus, school personnel had to be trained to respond to accidental dislodgement of the child's tracheotomy tube. After the first training session, three unions representing teachers and principals filed grievances charging

The Court also discounted the costs of additional liability insurance or of judgments when schools and teachers are not exempted from liability by state law or covered by school or union policies for services performed outside their contracts.<sup>120</sup> Irving School District had attempted to distinguish a school nurse's administering prescription drugs from administering CIC because Texas state law limits the liability of school personnel administering prescription drugs, but does not for unspecifically defined school health services.<sup>121</sup> The Court found that:

[P]ossibility of liability bears no relation to whether CIC is a 'related service.'  
 . . . Congress assumed that states receiving the generous grants under the Act

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"violation of their contracts of employment by being required to perform duties of a medical nature outside the scope of their contractual duties." *Id.* at 520. The employees expressed "fears that they could not perform the medical procedure correctly . . . fear of the personal aspects of the procedure . . . and fear of being sued if something untoward occurred during the procedure." *Id.* The grievances were not settled at the time of either the district court or court of appeals decisions.

The federal district court had held that the IEP was inadequate since no school personnel would administer the necessary health services. *Id.* at 528. The Court of Appeals for the Ninth Circuit reversed this part of the case, holding that the school board could arrange for special personnel to provide the services if the union prevailed in the contract dispute. A plan proposing a homebound program could not solve the personnel problem as it would not satisfy the concept of the "least restrictive environment" prescribed by the federal regulations. By requiring the school to provide the services even if it meant hiring special personnel, the court also ruled implicitly that tracheotomy maintenance is a "related services," not a "medical service."

In Wisconsin, the parents of a child susceptible to allergic reaction if stung by a bee asked the school to store allergy medication and to provide someone to administer an injection if necessary. Because the child's school had no health aide or nurse, a teacher was asked to perform the service. The teacher refused, and the teacher union filed a grievance, claiming that to train the teacher would exclude him from protection from liability under state medical practices statutes. An administrator finally volunteered to perform the service. In a similar case in Montgomery County, Maryland, both teacher and principal refused because of lack of coverage under their N.E.A. liability insurance. *See infra* note 121 and accompanying text. The school system finally hired a teacher aide who was willing to administer the shot. *See White, supra* note 117, at 26.

120. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3378 (1984).

121. *Id.* at n.12. Teacher union liability insurance policies limit the health procedures teachers may perform. Insurance carried by the National Education Association excludes teachers from coverage if they administer medication in a nonemergency situation. *White, supra* note 117, at 27. Liability insurance through the American Federation of Teachers covers teachers "only for those tasks they are authorized [in writing] to do." *Id.* The A.F.T. advises teachers to refuse to perform noninstructional tasks. If teachers agree to dispense medication or render other health services, the union advises them to make sure that what they are doing is permitted by state law and is spelled out as part of their jobs in school system policy. As more sophisticated health care is added to the list of services schools are expected to provide, school boards will need to review their liability coverage. *See also supra* note 119.



were up to the job of managing these new risks. Whether petitioner decides to purchase more liability insurance or to persuade the state to extend the limitation on liability, the risks posed by CIC should not prove to be a large burden.<sup>122</sup>

On the whole, the Court's "financial burden" analysis is too contradictory to be used by schools, administrative agencies, or lower courts as a test of whether Congress would have intended a service or not. It is unknown to what extent a school might use expense to draw the line between what it will provide a handicapped child and what it will not provide.

### 3. *Reliance on State Medical Practices Statutes*

Another prospective problem area is that state regulations may differ regarding what care nurses and laypersons can provide and what services may be provided only by a licensed physician. The federal district court recognized this difficulty in *Tatro*:

Congress, by defining the Act's reach by definitions locatable only in the law of the respective States, perforce intended, at least to this extent, that its construction be parochial. A contrary view would require a finding that Congress intended to alter patient-doctor relations in the several States. . . . The types of medical treatment that can be performed by nonphysicians, and the extent to which any treatment must be under the control and supervision of a licensed physician, are regulated by State law. And the courts must look to State law to determine whether a service is a medical service. To the extent of the accommodation of varying practices, the Act tolerates non-uniform application. A given service, therefore, may be a related service in one State and an exempt medical service in another.<sup>123</sup>

122. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371, 3378 n.12 (1984).

123. *Tatro v. State of Tex.*, 516 F. Supp. 968, 975 (1981). The school district had contended that school employees furnishing CIC would be guilty of unlawful practice of medicine under the Texas Medical Practice Act, TEX. REV. CIV. STAT. ANN., arts. 4495, 4510, 4510a & 4510b (Vernon 1976). But Texas law allows a physician to prescribe that treatment be performed by another individual believed competent to provide the service. Such treatment by a delegate does not constitute the unlawful practice of medicine. This construction is confirmed in the Texas Nursing Practice Act, TEX. REV. CIV. STAT. ANN. arts. 4513 (Vernon 1976). As the district court noted: "[P]rofessional nurses may administer medications and treatments on a physician's prescription . . . without any statutory requirement of direct supervision by the physician." *Tatro v. State of Tex.*, 516 F. Supp. 968, 976 (1981) (quoting Op. Tex. Att'y Gen. No. H-1295 (Dec. 28, 1978)). The Supreme Court accepted this interpretation of state law.

Whether a particular service can be delegated by a physician will be a question of state law interpretation. Whether a delegate is indeed competent will be a question of fact. Under most general medical practice statutes, nurses and other qualified persons can lawfully perform medical functions delegated to them by physicians. If there is no statute directing otherwise for a particular illness or physical infirmity, then once a physician has determined that CIC or any other treatment is appropriate for a patient, the physician may delegate performance of the treatment. See Brief for Amicus Curiae Texas Medical Ass'n and Dallas County Medical Soc'y, *Tatro v. State of Tex.*, 516 F. Supp. 968, 989 (1981).

An interesting restriction on the New Jersey Medical Practices statute is a

Thus handicapped individuals may receive more or less services depending on the state in which they reside.

Though CIC has now been expressly placed in the category of "related services" by the Supreme Court, other procedures are still open to question, e.g., insulin injections, tracheostomy maintenance, colostomy, ileostomy, urethrostomy care, naso-gastric tube feedings, treatment for pressure sores, and use of a respirator.<sup>124</sup> State educational agencies may respond to budgetary confines by pressuring state legislators or state agencies to legislate away as many "school health services" as possible by disallowing their delegation to nonphysicians. To assure a minimum, Congress may need to amend the EAHCA to specify some of the procedures that are definitely to be included within the category of "related services."

Under most medical practice statutes, nurses and other qualified persons can lawfully perform medical functions delegated to them by physicians. Usually, unless a specific statute directs otherwise, a physician may delegate performance of part or all of a treatment to an individual believed capable of competently providing the prescribed service.<sup>125</sup> The next question, however, will be whether the physician is "delegating to a competent person" when the physician gives the prescription to the parent, who gives instructions and permission to the principal, who delegates authority to someone in the school to give out the medication, as would be the usual course of events. To keep from running afoul of medical practice statutes in most states, schools will have to tighten procedures to make certain that any delegation to school personnel is made directly by the prescribing physician.

### C. *Smith v. Robinson*

A Supreme Court decision issued the same day as *Tatro* contributes to the overall picture of the Court's attitude toward the conflicting sides in EAHCA cases. In *Smith v. Robinson*,<sup>126</sup> the Court held that attorneys' fees are not available in actions to obtain an appropriate

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state board of nursing ruling that prohibits school employees other than health professionals from delivering health services. The ruling sets penalties for any school administrators, principals, teachers, teachers' aides, secretaries, or clerical personnel who violate the order. White, *supra* note 117, at 26.

124. Nat'l School Bds. Ass'n Brief, *supra* note 90, at 33.

125. See *supra* note 123.

126. 104 S. Ct. 3457 (1984). Parents of a cerebral palsied child had been denied public funding of the child's placement in a special education program at the state administrative level. Whether claimants could obtain attorneys' fees by filing additional or independent claims under § 504 was a major issue argued by petitioners and respondents in *Tatro* as well. See Note, *supra* note 65. The Court chose *Smith* instead as the vehicle for settling confusion over the proper interplay among the various statutory and constitutional bases for relief, and over the effect of that interplay on the provision of attorneys' fees. Petitioners in *Smith* had

education for a handicapped child. The Court reasoned that when the relief sought is, in fact, a grant under the EAHCA, which has no attorneys' fees provision, there can be no recourse to other federal statutes simply to gain a fees award.<sup>127</sup> The majority also concluded that because the rights and remedies set forth in the EAHCA are so comprehensive, Congress did not intend to allow educational needs to be obtained through independent claims under the more general federal statutes that permit fee payment, including § 504 of the Rehabilitation Act,<sup>128</sup> and 42 U.S.C. § 1983 and § 1988 of the Civil Rights Act.<sup>129</sup>

Assessment of attorneys' fees, whether as appropriate relief in an

made not only the § 504 and § 1983 claims made in *Tatro*, but also due process and equal protection claims under the 14th amendment.

The decision in *Smith* is complex, and will be discussed in this article only for what it contributes to a clarification of the Court's general stance toward the substantive and procedural provisions of the EAHCA.

127. Specifically, the Court stated:

[T]he remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education. . . . Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of § 504.

*Smith v. Robinson*, 104 S. Ct. 3457, 3473 (1984). The Court did not decide if Congress also meant the EAHCA to bar constitutional due process claims to special education.

128. Section 504 of the Rehabilitation Act of 1973, as amended by 29 U.S.C. § 794 (1982), states that: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794a(b) (1982), states that: "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as a part of the costs." Petitioners in *Smith* relied on 31 U.S.C. § 1244(e) (1976), now replaced by 31 U.S.C. § 6721(c)(2) (1982), which authorizes a civil action and assessment of attorneys' fees to enforce § 504 against a state or local government receiving federal funds under the State and Local Fiscal Assistance Act of 1972, 86 Stat. 919, amended by 90 Stat. 2341 (1976).

129. 42 U.S.C. § 1983 (Supp. 1982) states:

Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 (1982) provides:

In any action or proceeding to enforce a provision of sections, 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681] or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d], the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorneys' fee as part of the costs.

extreme case, or as mandated by Congress as part of a particular cause of action, has been one means of discouraging acts deemed socially undesirable. The Court's preclusion of attorneys' fees in EAHCA actions contributes to a pessimistic outlook regarding progress toward enforceable rights for the handicapped. Parents considering an action under the EAHCA now have a third reason to hesitate. To the Court's restrictive interpretation of the EAHCA in *Rowley*, and its explicit deference to professional opinions of state educational officials, has been added the knowledge that attorneys' fees will not be available to parents trying to enforce their child's right to an appropriate education.<sup>130</sup>

With the *Smith* decision the Court turned an already difficult maze of judicial and statutory rules into an absolute *Catch 22* for parents of handicapped children. One cannot expect a statute or court decision to address specifically every possible factual situation that may occur in the future. Statutes must be general, providing guidance in the greatest number of factual situations that will arise under them. And judicial propositions of law are bound by the facts of a case before the court.<sup>131</sup> But when a statute's terms are as vague as those in the EAHCA, and when the Court's interpretations provide as little guidance for specific future situations as did *Rowley* and *Tatro*, then adjudication of the individual rights at stake will be necessary and should certainly not be discouraged. The Court should not have limited the opportunity of already disadvantaged individuals to find out what services they are entitled to under the EAHCA by refusing to grant an award of attorneys' fees. Children who found their access to the schools limited will only be disadvantaged further by the resulting loss of access to the courts.

Availability of fees would be an advantage to more than just the family of a child seeking answers to questions regarding their own rights. Increased adjudication of individual cases at this stage in the history of the EAHCA would yield specific answers that Congress and

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130. *Smith v. Robinson*, 104 S. Ct. 3457, 3468 (1984). The Court continued:

Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme. . . . We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

*Id.* at 3470.

131. As the Court has noted: "We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

the Court have to date been unable to give. Future problems could be avoided for many more handicapped children and schools.

In order for the resolution system the EAHCA provides to be viable, Congress should amend the statute with a provision granting attorneys' fees when the state has been shown to have infringed a handicapped child's rights. Any other result is inconsistent with the idea of a complete procedure for determining the special education and services must provide, and with Congress's intent to guarantee handicapped children both access to public schools and access to the courts to resolve disputes.<sup>132</sup>

## V. CONCLUSION

Parents and school officials attempting to predict the outcome of an EAHCA action must balance all three of the Supreme Court's interpretations of the EAHCA. The *Tatro* requirement that meaningful access exist throughout the school day *seems* to expand the *Rowley* standard of meaningful access primarily to achieve integration. The rule in *Tatro*, however, affects only those handicapped children who can otherwise be mainstreamed but who need health services to attend a full day's classes. Ultimately, the gain in school nursing services for the few affected will have a much smaller impact on opportunities for handicapped individuals than will the loss of attorneys' fees in EAHCA actions.

In *Tatro* the Court had an opportunity to explain the delphic definitions given in its first attempt at explicating EAHCA provisions in *Rowley*. Unfortunately, the guarantees of EAHCA are not yet functionally clear. With attorneys' fees now unavailable, it may be some time before the many remaining issues involved in applying the EAHCA guarantees reach the Supreme Court for clarification.

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132. Justice Brennan, joined by Justices Marshall and Stevens in dissent, concluded: [T]he handicapped children of this country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights will have to pay the costs. It is at best ironic that the Court has managed to impose this burden on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children.

*Id.* at 3479 (Brennan, J., dissenting).

The assistant attorney general who argued the case for Rhode Island stated that after the *Smith* ruling attorneys' fees in special education cases will be triggered only by civil rights violations that are not addressed in the EAHCA. *School Law News*, July 13, 1984, at 2.