EDUCATION—HANDICAPPED CHILDREN—THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT ENTITLES HANDICAPPED CHILDREN TO INDIVIDUALLY, BENEFICIALLY, DESIGNED EDUCATION PROGRAM; REVIEWING COURT TO DETERMINE REASONABLENESS OF PROGRAM FORMULATION AND PROCEDURAL COMPLIANCE WITH ACT—*Hendrick Hudson Central Board of Education v. Rowley*, 102 S. Ct. 3034 (1982).

Before Amy Rowley, a deaf child,[1] entered kindergarten at Furnace Woods School in Hendrick Hudson Central School District, Peekskill, New York, her parents[2] met with school administrators to explore options regarding Amy's education.[3] At that time, the parties agreed that Amy would attend kindergarten at the Furnace Woods School in a regular[4] classroom for the purpose of identifying supplemental services which might be required to educate her.[5] Several school administrators attended sign language interpretation courses in preparation for Amy's enrollment and the school installed a teletype phone machine (TTY)[6] for use in communicating with the Rowleys.[7]

---

[1] Amy is prelingually deaf (deaf before the age of two years) but she has residual hearing which means that she can identify sounds below the frequencies of human speech, e.g., a dog barking or a car backfiring. On the basis of extensive evidentiary proceedings, the District Court for the Southern District of New York found that Amy's residual hearing lent considerable aid to her lipreading skills despite respondent's claim that she was unable to distinguish those sounds. Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 529 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 1034 (1982). Although the parties disagreed about Amy's residual hearing capabilities, this point was not directly argued before the Supreme Court. Therefore, for the purposes of this Note, the district court's findings of fact will be accepted as conclusive.

[2] Both of Amy's parents are deaf and college educated. Clifford Rowley is a research chemist. Nancy Rowley has a master's degree in special education and is a certified teacher of the deaf. Brief for Respondents at 1, Hendrick Hudson Central Board of Education v. Rowley, 102 S. Ct. 3034 (1982) [hereinafter cited as Brief for Respondent].

[3] Hendrick Hudson Cent. Bd. of Educ. v. Rowley, 102 S. Ct. 3034, 3039 (1982).

[4] The term "regular" is a term of art used in the education field to distinguish between classrooms that are used exclusively for the education of handicapped children (special classes) and those classrooms not used to instruct the handicapped (regular class). Amy's placement in a regular classroom is representative of the "mainstreaming" philosophy in the special education field. For a discussion of the issues and problems of mainstreaming, see J. PAUL, A. TURNBULL & W. CRUICKSHANK, MAINSTREAMING: A PRACTICAL GUIDE (1977).

[5] Hendrick Hudson Cent. Bd. of Educ. v. Rowley, 102 S. Ct. 3034, 3039 (1982).

[6] The teletype phone machine (TTY) is similar to a telegraph machine. When connected with the telephone circuits, this device functions like a typewriter and allows a deaf individual to communicate over the phone through typing or receiving a printed message. Both parties must have a TTY. Interview with Diana Strauss, M.A.C.C.C.-A., Supervisor of Audiology, Mt. Carmel Guild, Newark, New Jersey (November 18, 1982) [hereinafter cited as Interview with Diana Strauss].

[7] Hendrick Hudson Cent. Bd. of Educ. v. Rowley, 102 S. Ct. 3034, 3039 (1982).

The evaluation commenced with a trial period during which Amy was without supportive services.[8] At the conclusion of this phase, the school administrators decided to provide her with an F.M. wireless hearing aid.[9] In the course of the evaluation period, the school also provided the services of a sign language interpreter on a two week trial basis.[10] The interpreter reported that Amy did not require his services at the time.[11]

The Education for All Handicapped Children Act of 1975[12] (EAHCA) requires that an individual education program (IEP)[13] be

---

[8] Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 530 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[9] Hendrick Hudson Cent. Bd. of Educ. v. Rowley, 102 S. Ct. 3034, 3039 (1982). The F.M. wireless is a hearing amplification device that operates on the same principle as a car radio. Sound is transmitted and amplified through a transmitting device into a receiver. Interview with Diana Strauss, *supra* note 6. The receiver is attached to the hearing aid of the individual recipient. *Id.* Generally, individual hearing aids are superior to the F.M. wireless in sound amplification and reproduction. *Id.* The F.M. wireless, however, does amplify sound from one source directly to the individual. *Id.* In Amy's classroom, the amplification device was passed around the room to the main speaker. Brief for Petitioner at 7, Hendrick Hudson Central Board of Education v. Rowley, 102 S. Ct. 3034 (1982).

[10] Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 530 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[11] *Id.* The interpreter reported that his services were unnecessary because of the teacher's depth of sensitivity towards Amy's deafness and Amy's own resistance to follow his signing. *Id.*

[12] Pub. L. No. 94-142, 89 Stat. 773 (amending Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970), *amended by* Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, §§ 611-621, 88 Stat. 484, 579-85)) (codified at 20 U.S.C. §§ 1400-1420 (1976 & Supp. IV 1980). The Acts are intended

> to 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.

20 U.S.C. § 1400(c) (Supp. IV 1980) (emphasis added).

> Under the EAHCA, handicapped children
> means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

Id. § 1401(1) (1976).

[13] The IEP is defined as:

> a *written* statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, *the parents or guardian of such child* . . . which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate

established annually for every handicapped child.[14] In order to comply with this requirement, the school administrators began preparing Amy's first grade IEP[15] in the fall following her completion of kindergarten.[16] The school first obtained a recommendation from the district Committee on the Handicapped (Committee).[17] The Committee received testimony from individuals familiar with Amy's educational experience.[18] This testimony included evidence regarding the importance of interpretive services.[19] The Committee recommended continued use of the F.M. wireless, provision of specialized tutorial services for one hour daily, and speech therapy for three one-hour sessions weekly.[20] The Committee also determined that an interpreter's services were not required, despite the Rowley's request that the IEP

---

in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Id. § 1401(19) (emphasis added).

[14] *Id.* § 1414(a)(5).

[15] The school administration formulated an IEP for Amy's kindergarten year with which the Rowleys fully concurred. Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 530 n.2 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[16] *Id.*

[17] *Id.*

[18] *Id.* at 530-31.

[19] *Id.* The Rowleys use a method of communication known as "total communication" (TC). *Id.* at 530. There are four basic communication philosophies pertaining to education of the deaf: manual communication, oral and aural instruction, cued speech, and total communication. Large, *Special Problems of the Deaf Under the Education For All Handicapped Children Act of 1975*, 58 WASH. U.L.Q. 213, 229 (1980).

Manual communication, or sign language, is probably the method most lay persons associate with communication for the deaf. Utilizing hand signals for entire concepts and for individual letters, this method does not rely on oral speech. *Id.* at 229. Oral instruction involves the total absence of manual signing, while emphasizing the use of residual hearing and lipreading. *Id.* at 232-33. Cued speech is a manual modification of the oral method involving the use of first letter signs with voiced speech to alleviate the difficulties encountered in lipreading (many sounds look similar on the lips). *Id.* at 237.

Total communication is a combination of all communication philosophies and can be compared with a multilingual approach to speech. *Id.* at 236. It strives to expose an individual to all forms of communication with the individual eventually selecting the method most appropriate for his environment. *Id.* at 235-36. Since the Rowleys had employed TC successfully with Amy in social, as well as other learning environments, they believed continuation of TC in the classroom would be the best approach to educating Amy in a regular classroom. Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 530 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[20] Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 531 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

include this service.[21] The school administration followed the recommendations of the Committee.[22]

Pursuant to specific procedural guarantees established by the EAHCA,[23] the Rowleys challenged the school's refusal to include interpretive services in Amy's IEP.[24] Accordingly, they received a hearing before an independent examiner who decided against the Rowley's position on the basis of Amy's academic achievement and social interaction.[25] The Rowleys appealed the examiner's decision to the New York Commissioner of Education who affirmed the decision on the basis of substantial evidence from the record below.[26] The Rowleys then sued the Board of Education and the New York Commissioner of Education in the United States District Court for the Southern District of New York,[27] alleging that the refusal to provide

---

[21] *Id.*

[22] *Id.*

[23] 20 U.S.C. § 1415(b)(1)(E), (b)(2) (1976).

[24] Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 531 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[25] *Id.* Judge Broderick of the district court also found that Amy was bright, eager, well adjusted, and cooperative with her peers. *Id.* Moreover, he concluded that she responded accurately to instructions and even helped classmates with assignments. *Id.*

[26] *Id.* This appeal was taken pursuant to New York law. As specified in 20 U.S.C. § 1415(b)(1) (1976), the administrative remedies are not limited to the single review procedure. New York has expanded its procedure to include appeals from the hearing officer to the State Commissioner of Education. The Commissioner is to conduct an impartial review and render an independent decision. N.Y. EDUC. LAW § 4404(2), (3) (McKinney 1981). *But see* Monahan v. Nebraska I, 645 F.2d 592 (8th Cir. 1981) (review by State Commissioner of Education may constitute conflict with federal statute).

[27] The Rowleys exhausted their administrative remedies with respect to the 1978-1979 IEP. Rowley v. Hendrick Hudson Cent. Bd. of Educ. II, 483 F. Supp. 536, 537 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982). Prior to trial, however, the 1979-1980 school year began and a new IEP was developed. *Id.* at 537-38. The Education Commissioner challenged the jurisdiction of the court, maintaining that the Rowleys had not exhausted their administrative remedies for the 1979-1980 IEP. *Id.* at 538. Since the 1979-1980 IEP rendered the 1978-1979 IEP ineffective, the Commissioner alleged that while the court had jurisdiction to review the 1978-1979 IEP, that IEP was now moot. *Id.*

Judge Broderick held that the substantial time lapse between the formulation of the IEP and the end of the school year, and between then and the trial, could continually render the IEP moot. *Id.* Therefore, he invoked the exception to the mootness doctrine. *Id.* (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)) (conduct "capable of repetition yet evading review" creates exception to mootness doctrine). The doctrine of exhaustion of administrative remedies has been heavily litigated under the EAHCA. *E.g.*, McGovern v. Sullins, 676 F.2d 98 (4th Cir. 1982) (plaintiff's suit dismissed for failure to exhaust administrative remedies when no formal complaint filed against local education agency); Monahan v. Nebraska I, 645 F.2d 592 (8th Cir. 1981) (exhaustion not required when futile or administrative remedy inadequate); Scruggs v. Campbell, 630 F.2d 237 (4th Cir. 1980) (federal action premature when plaintiff filed prior to final administrative disposition).

interpretive services in Amy's 1978-1979 IEP violated the EAHCA's guarantee of a "free appropriate public education."[28]

After an extensive hearing, Judge Broderick of the district court granted preliminary injunctive relief by providing Amy with a sign language interpreter.[29] Although Judge Broderick found that Amy was receiving an " 'adequate' education,"[30] he held that this was not the proper test to determine compliance with the EAHCA.[31] Rather, he found that the operative standard of an appropriate education was the opportunity for a handicapped child "to achieve his full potential commensurate with the opportunity provided to other children."[32] Given Amy's ability to comprehend only fifty-nine percent of the words spoken to her, i.e., her speech discrimination level,[33] Judge Broderick determined that "she [was] not learning as much, or performing as well academically, as she would without her handicap."[34] Thus, the school was not providing Amy with the same level of educational opportunity afforded to the nonhandicapped children. According to the district court's standard, Amy's education could not equal her classmates' unless she were provided the opportunity to have a one hundred percent speech discrimination level.[35] Therefore, the school had denied Amy a free appropriate education as guaranteed under the EAHCA.[36]

---

[28] Hendrick Hudson Cent. Bd. of Educ. v. Rowley, 102 S. Ct. 3034, 3040 (1982).

[29] Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 529 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

Judge Broderick also rejected the Commissioner's claim that 20 U.S.C. § 1415(e)(2) (1976) limited the court's scope of review to the issue of a state's procedural compliance. *See Rowley I*, 483 F. Supp. at 533. Rather, he viewed the EAHCA more expansively and found that the Act "left entirely to the courts and the hearing officers" the task of "giv[ing] content to the requirement of an 'appropriate education.' " *Id.*

[30] Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 534 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982). Judge Broderick determined the adequacy of Amy's education by evaluating her performance in the classroom. Because her performance was above average and she advanced from grade to grade, he concluded that the school was providing Amy with an adequate program. *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 532. Speech discrimination ability was measured by the Goldman-Fristoe-Woodcock Test of Auditory Discrimination. This test evaluates "speech sound discrimination ability while minimizing the influence of variables such as abstractness or familiarity with the vocabulary and illustrations used." Goldman, Fristoe & Woodcock, *A New Dimension in the Assessment of Speech Sound Discrimination*, 4 J. OF LEARNING DISABILITIES 364, 364 (1971).

[34] Rowley v. Hendrick Hudson Cent. Bd. of Educ. I, 483 F. Supp. 528, 532 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[35] *Id.* The district court stated that "[w]ith the use of 'total communication' [Amy] can identify 100% of the words spoken to her." *Id.*

[36] *Id.* at 534.

The Court of Appeals for the Second Circuit affirmed the lower court's decision.[37] After stating that section 1415(e)(2) of the Act required the reviewing court to base its decision "on the preponderance of the evidence,"[38] the court held that the decision below[39] met this standard,[40] but then limited its holding to the "unique" facts of the case.[41]

In *Hendrick Hudson Central Board of Education v. Rowley*,[42] the United States Supreme Court reversed the court of appeals' decision and denied Amy the services of a sign language interpreter.[43] In so doing the Court held that the "basic floor of opportunity" intended under the EAHCA was a program of specialized instruction combined with related services;[44] the program must be individually designed to enable the student to benefit educationally.[45] Moreover, it must be provided by the state at public expense.[46] Thus, an appropriate education is provided when a program includes personalized educational services.[47]

Further, the majority stated that the program "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."[48] Finally, the Court opined that the program was to comply

---

[37] Rowley v. Hendrick Hudson Cent. Bd. of Educ., 632 F.2d 945, 947 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[38] 20 U.S.C. § 1415(e)(2) (1976) provides in pertinent part that "[i]n 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." As the court of appeals noted, this standard differed from the one which the EAHCA originally contained. Initially, the House of Representatives proposed that the standard of proof be one of "substantial evidence." Rowley v. Hendrick Hudson Cent. Bd. of Educ., 632 F.2d 945, 948 n.5 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982); *see also* H.R. REP. No. 332, 94th Cong., 1st Sess. 56 (1975) [hereinafter cited as H.R. REP. No. 332].

[39] See *supra* notes 29-36 and accompanying text.

[40] Rowley v. Hendrick Hudson Cent. Bd. of Educ., 632 F.2d 945, 948 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[41] *Id.* In fact, the court invoked a Second Circuit rule which precluded courts from citing the decision as authority in any subsequent case. *Id.* at 948 n.7.

[42] 102 S. Ct. 3034 (1982).

[43] *Id.* at 3052-53.

[44] *Id.* at 3048. See *infra* notes 70 & 71.

[45] 102 S. Ct. at 3049.

[46] *Id.*

[47] *Id.*

[48] *Id.* The requirements that the program "meet the State's educational standards" and that it "comport with the child's IEP" are found in the Act itself. *See* 20 U.S.C. §§ 1401(18), 1412(6) (1976). The requirement that the program "approximate the grade levels in the State's regular education" system was not further explained by the Court, nor are the words drawn from the Act

with the requirements of the EAHCA, and be "reasonably calculated" to allow the child to achieve passing grades and advance from grade to grade.[49] In evaluating whether an IEP met this standard, a reviewing court would be limited to a determination of whether the state had complied with the EAHCA procedures and whether the IEP was reasonably calculated to benefit the child educationally.[50]

Justice Rehnquist, writing for the majority, began the Court's opinion with an overview of the legislative schemes preceding the enactment of the EAHCA. In 1966, Congress first attempted to organize federal efforts to aid handicapped children by amending Title VI[51] of the Elementary and Secondary Education Act of 1965.[52] These amendments authorized appropriations "in the form of a grant program[53] 'for the purpose of assisting the States in the initiation, expansion and improvement of programs and projects . . . for the education

---

or the federal regulations. Since the word approximate means to "come near or nearly resemble," WEBSTER'S NEW INTERNATIONAL DICTIONARY 107 (3d ed. 1979), it is reasonable to conclude that the Court intended that the education program have a graduated structure which allows the measurement of a handicapped child's intellectual advancement to reasonably correspond to a nonhandicapped child's advancement.

[49] 102 S. Ct. at 3042, 3049; *see* Kruelle v. New Castle County School Dist., 642 F.2d 687 (3d Cir. 1981) (no substantive mandate to states in EAHCA regarding content of IEP); *cf.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980) (congressional intent that establishment of specific educational goals and methods strictly province of states), *cert. denied*, 452 U.S. 968 (1981). *But see* Springdale School Dist. v. Grace, 656 F.2d 300 (8th Cir. 1981) (state to give each handicapped child opportunity to achieve full potential commensurate with opportunity provided other children), *vacated and remanded*, 102 S. Ct. 3054 (1982).

[50] 102 S. Ct. at 3051. *But see* Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) (court has power to devise any program to ensure appropriate individualized education program).

[51] *See* Act of Nov. 3, 1966, Pub. L. No. 89-750, 80 Stat. 1204 (repealed 1970).

[52] 102 S. Ct. at 3037; *see* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27. Although the legislative history of the 1966 amendment sheds no light on congressional motivation, a 1970 Senate Committee on Labor and Public Welfare characterized the 1966 legislation "as a major step in making special education services available to handicapped children in elementary and secondary schools." S. REP. No. 634, 91st Cong., 2d Sess. 1, 90, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 2768, 2832 [hereinafter cited as S. REP. No. 634]. The Committee further stated that the 1966 amendment was a response to a recognition that existing programs were administratively fragmented and ineffective. *Id.* The amendment was directed at alleviating these problems by:

> 1) assist[ing] the States [in] initiating, expanding, and improving education programs designed to serve handicapped children,
>
> 2) creat[ing] a Bureau of Education for the Handicapped to administer special programs for handicapped children, and
>
> 3) establish[ing] a National Advisory Council on Handicapped Children to advise the Commissioner, the Secretary, and the Congress on the educational needs of the handicapped.

Id.

[53] 102 S. Ct. at 3037.

of handicapped children.' "[54] In 1970, Congress enacted the Education of the Handicapped Act[55] which repealed the 1966 Act, but left the grant structure of the Title VI legislation intact.[56] As Justice Rehnquist noted, however, neither of these legislative schemes had set forth specific guidelines as to the manner in which states were to utilize the grant funds.[57] Following two district court decisions holding that "handicapped children should be given access to a public education,"[58] Congress passed the Education of the Handicapped Amendments of 1974[59] which amended the Education of the Handicapped Act.[60] These amendments provided for additional funding,[61] and additional state plan requirements,[62] one of which was that states establish "a goal of providing full educational opportunities to all handicapped children."[63] As the 1974 amendments were only interim

---

[54] *Id.* (quoting Act of Nov. 3, 1966, Pub. L. No. 89-750, § 601(a), 80 Stat. 1191, 1204 (repealed 1970)).

[55] Pub. L. No. 91-230, 84 Stat. 175 (1970) (amended 1974, 1975).

[56] 102 S. Ct. at 3037; *see also* S. REP. No. 634, *supra* note 52, at 92, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS at 2834.

[57] 102 S. Ct. at 3037.

[58] *Id.*; *see* Mills v. District of Columbia Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972) (consent agreement modified upon rehearing) [hereinafter *PARC*]. *Mills* and *PARC* are watershed cases because they established that handicapped children have a right of access to a state's public school system. *See* 102 S. Ct. at 3044.

Both *Mills* and *PARC* were resolved by consent decrees. 348 F. Supp. at 871; 343 F. Supp. at 285. The decree in *PARC* enjoined application of the state statute and required the defendants "to provide . . . access to a free public program of education and training appropriate to [the child's] learning capacities." 343 F. Supp. at 302. The *Mills* court identified the state's interest in educating handicapped children as paramount and directed the state to provide all children with a publicly supported education consistent with a child's "needs and ability to benefit therefrom." 348 F. Supp. at 876. *See generally* Haggerty & Sacks, *Education Of The Handicapped: Towards A Definition Of An Appropriate Education*, 50 TEMP. L. Q. 961 (1977).

[59] Pub. L. No. 93-380, §§ 611-621, 88 Stat. 484, 579-85 (amended 1975).

[60] *See* 102 S. Ct. at 3037 n.2.

[61] Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, § 611, 88 Stat. 484, 580-81.

[62] *Id.* § 612, at 581-82.

[63] *Id.* § 612, at 582. As Justice Rehnquist noted, this was the first time such a requirement was imposed on participating states. 102 S. Ct. at 3037.

[64] 102 S. Ct. at 3037 (citing H.R. REP. No. 332, *supra* note 38, at 4). Despite the interim nature of the 1974 amendments, the legislation set forth extensive due process procedures to be followed by participating states and required that states submit detailed plans for identifying, locating, and evaluating handicapped children within the state. S. REP. No. 168, 94th Cong., 2d Sess. 1, 7, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1431 [hereinafter cited as S. REP. No. 168]. *See generally* Comment, *The Education Of All Handicapped Children Act Of 1975*, 10 MICH. J.L. REFORM 110, 116, 120 (1976).

[65] S. REP. No. 168, *supra* note 64, at 7, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 1431.

measures,[64] Congress continued to study the problem of publicly educating the handicapped,[65] and finally enacted the EAHCA.[66]

The Court began its construction of the EAHCA by rejecting the lower court's finding that free appropriate public education was not defined in the Act.[67] The majority stated: "It is beyond dispute that contrary to the conclusions of the courts below, the Act does expressly define 'free appropriate public education.' "[68] To support this statement, the majority pointed to the section of the EAHCA which states that a " 'free appropriate public education' means *special education* and *related services*."[69] The Court then combined the statutory definitions of special education[70] and related services[71] and concluded that a " 'free appropriate education' consisted of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."[72]

In determining who was entitled to a free appropriate education, the Court noted the relevance of several congressional findings included in the EAHCA. 1) There were approximately eight million handicapped children in the United States;[73] 2) one million of these

---

[66] Pub. L. No. 94-142, 89 Stat. 773 (1975).

[67] 102 S. Ct. at 3041.

[68] *Id.* The Court determined that although the term "appropriate" did not express any precise standard, Congress' use of the word established definite settings and services which are essential for an education to be appropriate. *Id.* at 3046 n.21. Thus, concluded the Court, Congress' use of appropriate "seem[ed] to reflect . . . [a] recognition that some settings simply are not suitable environments for the participation of some handicapped children." *Id. But cf.* Hyatt, *Litigating The Rights Of Handicapped Children To An Appropriate Education: Procedures And Remedies*, 29 U.C.L.A. L. REV. 1, 7 (1981) (Congress' use of term "appropriate," purposely imprecise, thus enabling states to respond to large spectrum of individual handicaps).

[69] 102 S. Ct at 3041 (quoting 20 U.S.C. § 1401(18) (1976)) (emphasis in original).

[70] Special education is defined as: "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16) (1976).

[71] Related services are defined as:

> 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.

Id. § 1401(17).

[72] 102 S. Ct. at 3041.

[73] *Id.* at 3042 (citing 20 U.S.C. app. § 1401, at 1094 (1976)). Congress subsequently incorporated this appendix into the statute. *See* 20 U.S.C. § 1400 (Supp. IV 1980).

children "were 'excluded entirely from the public school system' ";[74] 3) approximately four million were receiving an "inappropriate education."[75] The Court concluded that the congressional findings,[76] elaborate procedural requirements of the Act,[77] and definition of free appropriate public education contained therein,[78] indicated that the EAHCA on its face revealed Congress' intent to bring previously excluded handicapped children into the public education system[79] and to require procedures according individualized planning for their education.[80]

Next, the Court turned to the legislative history of the EAHCA to determine whether a particular substantive standard for educating handicapped children was inferrable therefrom. The House Report,[81] observed the Court, demonstrated Congress' desire to provide handicapped children with a " 'basic floor of opportunity' consistent with equal protection."[82] According to the Court, this goal was satisfied when handicapped children were given equal access to public education.[83] The Court stated, however, that "[i]t 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."[84] Nevertheless, the Court maintained that once given access to public education, handicapped children were entitled to receive no more than "some form of specialized education."[85] The Court primarily relied upon a Senate Report[86] which reproduced

---

[74] 102 S. Ct. at 3042.

[75] *Id.*

[76] *See supra* notes 73-75 and accompanying text.

[77] *See* 20 U.S.C. §§ 1415, 1416 (1976).

[78] *See supra* notes 67-72 and accompanying text.

[79] 102 S. Ct. at 3042; *see also id.* at 3043 (construing H.R. REP. No. 332, *supra* note 38, at 2) (emphasis on exclusion from and misplacement within public school system of handicapped children "confirms the impression" that Congress' primary goal in passing Act was to give handicapped children access to public education).

[80] 102 S. Ct. at 3042.

[81] H.R. REP. No. 332, *supra* note 38.

[82] 102 S. Ct. at 3047 (quoting H.R. REP. No. 332, *supra* note 38, at 14).

[83] *Id.* Although the Court recognized that this access was to be "meaningful," the Court did not affirmatively define "meaningful." Rather, it negatively couched the term by stating that once a handicapped child was given access to a public education program, there was no guarantee of any particular level of education beyond accessibility. *Id.* at 3043 (citing S. REP. No. 168, *supra* note 64, at 11, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS at 1435).

[84] *Id.* at 3048 n.23.

[85] *Id.* at 3045. The Court determined that this specialized program required a state to design a handicapped child's IEP so that the child would benefit from specialized education. *Id.* at 3048 & n.23.

[86] S. REP. No. 168, *supra* note 64, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425.

statistics detailing the number of handicapped children unserved by the states' education systems.[87] The Court decided on the basis of this report that Congress equated the receipt of some special educational services, i.e., those "served," with an appropriate education.[88] Thus, the Court decided that the purpose of the EAHCA was to make available to all handicapped children a personalized, publicly funded educational program,[89] which would be educationally beneficial to them.[90]

The Rowleys had argued that the aim of the EAHCA was to achieve equal education opportunity for handicapped children " 'commensurate with the opportunity provided other children.' "[91] Although the Court agreed that one purpose of the EAHCA was to extend equal protection to handicapped children,[92] it distinguished this concept from that of "strict equality of opportunity or services."[93] The Court deemed this latter notion to be an "entirely unworkable standard" since each child's ability to learn is influenced by countless factors.[94] Moreover, the Court reasoned that since it had previously ruled that equal protection does not mean equal per pupil expenditure,[95] Congress could not have intended to impose this standard upon the states in providing appropriate education to handicapped chil-

---

[87] 102 S. Ct. at 3045; *see also* H.R. REP. No. 332, *supra* note 38, at 11-12.

[88] 102 S. Ct. at 3045. The Court found further support for its conclusion from two additional sources: 1) a House Committee letter to the United States Commissioner of Education requesting identification of children served by special education programs, and 2) comments of Senator Randolph, a principal sponsor of the EAHCA, estimating the number of handicapped children receiving special education services. *Id.* at 3045 & n.20.

[89] *Id.* at 3046.

[90] *Id.* at 3048.

[91] *Id.* (quoting Brief for Respondent, *supra* note 2, at 35, 41).

[92] *Id.* at 3047. The Court determined that Congress had not intended that equal protection ensure the maximum development of each handicapped child's intellectual potential. *Id.* at 3047, 3049 & n.26. Assuming *arguendo* this to be the standard under the EAHCA, the Court found that Congress could not have successfully imposed such a burden upon the states.

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."

Id. at 3050 n.26 (quoting Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981)).

[93] *Id.* at 3047. The Court concluded that the phrase "free appropriate public education" was "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." *Id.*

[94] *Id.*

[95] *Id.*; *see* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); *see also* McInnis v. Olgive, 394 U.S. 322 (1969), *aff'g* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968).

dren.[96] The majority concluded that "neither [the EAHCA] nor its history persuasively demonstrated that Congress thought that equal protection required anything more than equal access."[97]

The Court next considered the power which a reviewing court possessed under the EAHCA. The Court observed that the EAHCA grants to an aggrieved party a civil cause of action which 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.' "[98] The complaint "may concern 'any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.' "[99] Additionally, the EAHCA directs "a court '[to] receive the record of the [state] administrative proceeding, [to] hear additional evidence at the request of a party,[100] and, basing its decision on the preponderance of the evidence, [to] grant such relief as the court determines is appropriate.' "[101] Relying on this language, the School Board argued that courts were confined to review state programs for procedural compliance and had no authority to review these programs for substantive content.[102] Conversely, the Rowleys maintained that the EAHCA "requir[ed] a court to exercise *de novo* review."[103] The Court adopted neither petitioners' nor respondents' position in full; rather, it held that a court's proper scope of review under the EAHCA was twofold. 1) Had the state complied with the procedures set forth under the EAHCA, and 2) was the developed IEP reasonably calcu-

---

[96] *See* 102 S. Ct. at 3047.

[97] *Id.* The Court stated:

> "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system 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 and ability to benefit therefrom."

Id. (quoting Mills v. District of Columbia Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972)).

[98] *Id.* at 3050 (quoting 20 U.S.C. § 1415(e)(2) (1976)).

[99] *Id.* (quoting 20 U.S.C. § 1415(b)(1)(E) (1976)).

[100] Judge Broderick of the district court allowed the Rowleys to submit additional evidence supporting the merits of the total communication technique. *See* Rowley v. Hendrick Hudson Cent. Bd. of Educ. II, 483 F. Supp. 536, 538-39 (S.D.N.Y.), *aff'd per curiam*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, 102 S. Ct. 3034 (1982).

[101] 102 S. Ct. at 3050 (quoting 20 U.S.C. § 1415(e)(2) (1976)).

[102] *Id.*

[103] *Id.* A *de novo* trial is defined as:

> [t]rying anew the matter involved in an administrative determination the same as if it had not been heard before and as if no decision had been previously rendered, the hearing being upon the record made before the administrative agency and such further evidence as either party may see fit to produce.

BALLANTINES LAW DICTIONARY 1299 (3d ed. 1969).

lated to benefit the child educationally.[104] In rejecting the School Board's argument that courts could only review programs for procedural compliance, the Court observed that the original wording of the Act rendered the state administrative proceedings "conclusive if supported by substantial evidence."[105] Congress, however, rejected this language, and provided that courts were required "to make 'independent decisions based on a preponderance of the evidence.' "[106] The Court determined that this language empowered courts to review and weigh the evidence presented from the state administrative proceedings.[107] The Court reasoned, however, that Congress' emphasis upon procedure throughout the EAHCA and particularly its placement of the review provision within a section of the EAHCA entitled "Procedural Safeguards" constituted an implied limitation upon a court's authority to review substantively the educational policy of the states.[108] The Court stated that although permitted to weigh the evidence and to review programs for procedural compliance, courts did not possess freedom to substitute their own educational philosophies for those set forth by the state.[109] Further, in the court's view, the express directive in the EAHCA requiring the states to gather information relevant to educating the handicapped and distribute it to educators, illustrated Congress' intent to allow the states to control the selection of educational methodology.[110]

---

[104] 102 S. Ct. at 3051.

[105] *Id.* at 3050. This standard requires a court to uphold the findings of the administrative body unless those findings are arbitrary or clearly erroneous. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112-13 (1956); *see* Steadman v. SEC, 450 U.S. 91, 97-104 (1981).

[106] 102 S. Ct. at 3050 (quoting S. CONF. REP. No. 455, 94th Cong., 1st Sess. 50, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS, 1480, 1503). The preponderance of the evidence standard relates to the weight, value, and credibility of the proofs and is the traditional standard used in civil and administrative proceedings. Steadman v. SEC, 450 U.S. 91, 100 n.20 (1981).

[107] *See* 102 S. Ct. at 3050-51. The Court recognized "that § 1415(e) require[d] that the reviewing court 'receive the records of the [state] administrative proceedings'" which implied that a court give due weight to these proceedings. *Id.* at 3051 (quoting 20 U.S.C. § 1415(e) (1976)). The Court failed to put forth an exact standard to measure due weight, therefore, the due weight standard is subject to judicial discretion.

[108] *Id.* at 3050-51. The Court viewed Congress' emphasis upon the parties' full participation in the IEP development and state plan submittal requirements as evidence that state procedural compliance "would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 3050.

[109] *Id.* at 3052; *see* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (courts lack specialized knowledge and expertise necessary to resolve difficult questions of educational policy).

[110] 102 S. Ct. at 3051 (citing 20 U.S.C. § 1413(a)(3) (1976)). The Court also determined that allowing states to select the education theory and methodology for a handicapped child would not leave a child without protection under the EAHCA. *Id.* at 3052. Parental involvement during the entire IEP development process and the EAHCA's requirement that recipient states

Justice Blackmun, concurring in the Court's result, disagreed with the majority's approach in determining whether a state was complying with the appropriate education mandate.[111] He concluded that Congress had "intended to 'take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children [were] provided *equal education opportunity*.' "[112] He maintained that the proper inquiry was whether the IEP "*viewed as a whole*, offered . . . an opportunity to understand and participate in the classroom that was substantially equal to that given . . . nonhandicapped classmates."[113] Justice Blackmun opined that his "total program" approach more accurately effectuated congressional intent to guarantee equal education opportunity to handicapped children.[114] He maintained that a handicapped student's "total package of services" should be evaluated in terms of whether the student's opportunity to participate and understand was substantially equal to that of nonhandicapped students.[115]

Justice White, writing for the dissent, agreed with the majority's finding that the EAHCA contained no substantive prescriptions respecting the level of education which the states were to provide handicapped children.[116] Nevertheless, he disputed the majority's interpretation of the legislative history and concluded that "the Act intend[ed] to give handicapped children an educational opportunity commensurate with that given other [nonhandicapped] children."[117] The dissent also accepted the majority's statutory definition of free appropriate education, but emphasized that the purpose of "special education," was to provide " 'specially designed instruction . . . to *meet the unique needs* of a handicapped child.' "[118] Justice White maintained

---

form an advisory committee, in the Court's view, were adequate assurances that a child would receive all services to which he was entitled. *Id.*

[111] *Id.* at 3053 (Blackmun, J., concurring).

[112] *Id.* (quoting S. REP. No. 168, *supra* note 64, at 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS at 1433) (emphasis in original).

[113] *Id.* (emphasis in original).

[114] *Id.* Justice Blackmun criticized the majority's "reasonably calculated to benefit" standard because this standard concentrated upon a student's particular achievements. *Id.*

[115] *Id.* He offered two suggestions for the reviewing court. First, greater deference should be given to the findings of the impartial hearing officer and the State's Commissioner of Education. *Id. But see* Monahan v. Nebraska I, 645 F.2d 592 (8th Cir. 1981) (review by State Commissioner of Education may constitute conflict with federal statute). Second, the reviewing court should evaluate the entire package of services offered to the student rather than focus on the provision of one particular service. 102 S. Ct. at 3053 (Blackmun, J., concurring).

[116] 102 S. Ct. at 3054 (White, J., dissenting).

[117] *Id.* at 3054-55 (White, J., dissenting).

[118] *Id.* at 3055 (White, J., dissenting) (quoting 20 U.S.C. § 1401(16) (1976)).

that the majority had focused on the part of the definition providing that an appropriate education consisted of the provision of related services necessary "to assist a handicapped child to benefit from special education."[119]

Accordingly, Justice White posited that the EAHCA was "intended to eliminate the effects of the handicap, at least to the extent that the child [would] be given an equal opportunity to learn if that is reasonably possible."[120] In his view, the majority had constructed a standard which allowed for a deaf student (Amy Rowley) to be adjudicated as receiving an appropriate education although she was comprehending less than half of the classroom discussion.[121] Justice White concluded that "[t]his [was] hardly an equal opportunity to learn, even if Amy [made] passing grades."[122]

In analyzing the scope of judicial review, Justice White found unpersuasive the majority's emphasis upon the placement of the judicial review provision within the procedural safeguard section of the EAHCA.[123] He found this placement quite logical and without particular significance.[124] Further, Justice White stated that the legislative history indicated judicial review was not limited to procedural matters.[125] He specifically relied upon the substitution of language made in Conference Committee[126] to support his conclusion that Congress intended the courts to consider *de novo* any issues involved in litigation under the EAHCA.[127] Thus, the Court could conduct "a full and searching inquiry into any aspect of a handicapped child's education."[128] It was his opinion that under the majority's standard a complainant would be precluded from challenging portions of the IEP, presumably because the content of the IEP would be considered substantive.[129] Continuing, Justice White argued that the mere delegation of responsibility of IEP development to the state—giving the

---

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* Justice White was especially critical of the way in which the majority had "purportedly" clarified its definition of "appropriate" by determining that congressional intent was to make public school access "meaningful" to the handicapped child. *Id.* He found meaningful no more enlightening than appropriate. *Id.*

[123] *Id.* at 3056 (White, J., dissenting).

[124] *Id.*

[125] *Id.*

[126] *See supra* notes 105-07 and accompanying text.

[127] 102 S. Ct. at 3056 (White, J., dissenting).

[128] *Id.* at 3057 (White, J., dissenting).

[129] *Id.*

state control over substantive decisions—did not limit a court's scope of review even if the IEP was reasonably calculated to confer educational benefits.[130] This standard, he maintained, would defeat the intent of both Congress and the EAHCA.[131]

There is no question that the EAHCA embodied a multiplicity of concerns.[132] It is agreed, however, that the legislation evidences a general desire to facilitate the achievement by handicapped individuals of a more active and productive status in their daily lives.[133] In the struggle for legal recognition and protection, advocates for the handicapped have founded their positions on various theories. The right to due process and equal protection,[134] the right to achieve self-sufficiency,[135] the right to an equal opportunity,[136] and the right to achieve maximum intellectual potential[137] are representative of some of the more prevalent theories. Since the enactment of the EAHCA, the concentration of litigation has shifted from the constitutionally based theories of due process and equal protection to the latter theories.[138]

First and foremost, *Rowley* forecloses litigation based on the theory that the EAHCA mandates that handicapped children achieve their maximum intellectual potential.[139] Second, by concluding that the level of complexity embodied in the concept of equal opportunity rendered this standard unavailing,[140] the Court eliminated the feasi-

---

[130] *Id.*

[131] *See id.* at 3056-57 (White, J., dissenting).

[132] *E.g.*, Mills v. District of Columbia Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972) (state must provide all handicapped children with public education consistent with child's needs and ability to benefit therefrom); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972) (state must provide access to public education and training appropriate to handicapped child's learning capacities); S. REP. NO. 168, *supra* note 64, at 9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS at 1433 (educating handicapped to productive level cost beneficial to society); 121 CONG. REC. 19,492 (1975) (remarks of Sen. Williams) (educating handicapped will ensure that handicapped children become productive members of society); *id.* at 19,494 (remarks of Sen. Javitz) (legislation intended to ensure that handicapped children not denied opportunity of adequate education).

[133] *See* Haggerty & Sacks, *supra* note 58, at 963.

[134] Handel, *The Role Of The Advocate In Securing The Handicapped Child's Right To An Effective Minimum Education*, 36 OHIO ST. L.J. 349, 358-67 (1975).

[135] Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *see* Comment, *Self-Sufficiency Under The Education For All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516, 520-26.

[136] Brief for Respondent, *supra* note 2, at 21-54. One commentator has cautioned against confusing the standard of equal education opportunity with identical education opportunity because of variables affecting educational performance. *See* Handel, *supra* note 134, at 354-56.

[137] Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979).

[138] Hyatt, *supra* note 68, at 1-2.

[139] *See supra* notes 92-97 and accompanying text.

[140] *See id.*

bility of that theory as well. Third, by observing the vast differences between handicapping conditions, the Court found the self-sufficiency standard inadequate as a criterion for measuring the requirements of the EAHCA.[141] Thus, the Court's decision in *Rowley* has narrowed a litigant's choice of theories upon which to proceed to either due process or equal protection.

The Court has not accepted the right to education as fundamental, beyond at least a heretofore undefined level of minimum adequacy.[142] Thus, for the EAHCA to withstand an equal protection challenge, the classification established by the legislative scheme need only rationally relate to a constitutionally legitimate end.[143] Most certainly, in light of the difficulties in structuring education programs for the handicapped, the goal of providing a public education could not be accomplished without such classification. Accordingly, the EAHCA, as the legislation implementing public education for the handicapped, bears a rational relation to a legitimate purpose. Ultimately, therefore, there is no choice under *Rowley*. A claim involving due process rights is the only viable means of proceeding under the EAHCA.

By concentrating on the procedural aspects of the EAHCA, the *Rowley* Court has extinguished the use of a court's substantive discretion in formulating the content of an IEP. In so doing, the Court has left intact an area traditionally regulated by the states,[144] while adhering to previously enunciated principles regarding equal education opportunity.[145] Coterminous with the traditional state regulation of education is expenditure of state and local education funds. Although the Court failed to discuss this issue in *Rowley*, it was implicit in the Court's refusal to extend the standard of free appropriate education

---

[141] 102 S. Ct. at 3048 n.23. The Court found the attainment of self-sufficiency an inadequate standard for those children who were able to achieve this status without state aid. *Id.* Concurrently, for those children whose handicaps were so severe as to preclude them from ever attaining this status, to require a standard of self-sufficiency would be overly burdensome to the state. *Id.*

[142] *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973).

[143] Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971). *See generally* Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

[144] 102 S. Ct. at 3051 n.30; *see* Epperson v. Arkansas, 393 U.S. 97 (1968) (public education committed to control of state and local authorities); 121 CONG. REC. 19,498 (1975) (remarks of Sen. Dole) (states have primary responsibility in elementary and secondary education). *See generally* Note, *Enforcing The Right To An "Appropriate" Education: The Education For All Handicapped Children Act Of 1975*, 92 HARV. L. REV. 1103, 1109 (1979).

[145] *See generally* Haggerty & Sacks, *supra* note 58; Note, *The Right Of Handicapped Children To An Education: The Phoenix Of* Rodriguez, 59 CORNELL L. REV. 519 (1974).

beyond the formulation of a program "reasonably calculated to benefit" the child.[146] Under this standard, a state would not be required to provide any service beyond the minimum beneficial program. The state, therefore, could presumably guard against expending funds above the amount needed to meet this threshold level when developing the IEP.[147] As it stands, *Rowley* leaves the states to determine the extent of educational benefit to be afforded beyond the threshold requirement and to grapple, therefore, with conflicting educational philosophies regarding the handicapped.[148]

The Court's emphasis in *Rowley* on procedural due process affects two additional areas: the proposed regulatory amendments to the EAHCA[149] and remedies available under the Act. The proposed regulatory amendments, according to representatives of the Department of Education, are designed to increase administrative flexibility and reduce paperwork.[150] These goals would be accomplished by allowing the states more autonomy in complying with procedures under the EAHCA.[151] The regulatory amendments impact considerably upon the EAHCA's general goal to mainstream handicapped children as well as the Act's specific procedural guarantees of due process. In particular, the mainstreaming concept is affected by allowing the education agency to consider whether placement of a handicapped child in a regular classroom setting will disrupt the provision of services to other children in the class.[152] Although the new guideline states that the education agency cannot speculate as to the disruption, there is no further specification beyond the determination that the disruption be "clearly ascertainable."[153]

The mainstreaming goal is affected further by a change in the definition of "related services." The state is given even more subjectiv-

---

[146] *See* Comment, *supra* note 64, at 124-28 (discussing potentially oppressive fiscal burdens present in educating handicapped).

[147] *See* Stacey G. v. Pasadena Indep. School Dist., 547 F. Supp. 61 (S.D. Tex. 1982) (realities of limited education funding necessitate balancing of competing interests to reach fair and reasonable accommodation).

[148] *See* Note, *supra* note 144, at 1108-09 & n.39. *See generally* Hyatt, *supra* note 68, at 43 n.209; *supra* note 19.

[149] Proposed Amendments to Assistance to States for Education of Handicapped Children, 47 Fed. Reg. 33,836 (1982) (to be codified at 34 C.F.R. pt. 300) (proposed Aug. 4, 1982). These proposals were the product of a rule review directive, Exec. Order No. 2291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 84, to the Department of Education.

[150] 47 Fed. Reg. 33,836 (1982).

[151] *Id.*

[152] *Id.* at 33,859; *see* H.R. REP. No. 906, 97th Cong., 2d Sess. 1, 4 (1982) [hereinafter cited as H.R. REP. No. 906].

[153] *Id.*

ity in this area as the proposals will give the education agency the authority to set "reasonable limitations" upon those services.[154] This discretion could affect not only the level of services provided in the regular classroom but also placement of a child.[155]

The proposed changes in the procedural aspects of the regulations demonstrate the degree to which concentration of decisionmaking is taking place through transfer of authority to state agencies. This centralization will be accomplished by two mechanisms. First, by relaxing IEP formulation timelines and parental notification requirements, the proposed regulations permit the states to adopt a self-imposed "reasonable" time.[156] Second, the proposals allow an education agency to impose the same disciplinary sanctions upon handicapped children as it would impose on nonhandicapped children in similar disciplinary proceedings.[157] The prerequisite for the imposition of sanctions under the proposals is that the agency determine, by its own appropriate procedures, that the child's behavior was not caused by the handicapping condition.[158] Thus, the proposals significantly extend the subjective discretion of state agencies in procedural areas.[159]

---

[154] *Id.* at 33,846; *see* H.R. REP. No. 906, *supra* note 152, at 4.

[155] *See id.*

[156] *Id.* at 33,847. In contrast, the current regulations require strict adherence to a stringent time frame. *See* 34 C.F.R. § 300.343(c) (1981).

[157] 47 Fed. Reg. 33,854 (1982). The due process standard for disciplinary proceedings is set forth in Goss v. Lopez, 419 U.S. 565 (1975) (in suspension of 10 days or less due process requires at least oral or written notice of charges and, if denied, explanation and opportunity to be heard). Under the current regulations, several courts have held that expulsion of a handicapped child, for example, constitutes a change in educational placement under the EAHCA, which triggers all the due process guarantees of § 1415. Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978).

[158] 47 Fed. Reg. 33,854 (1982).

[159] The concentration in *Rowley* on the procedural aspects of the EAHCA elevates the importance of the determination by the hearing officer. Section 1415(b)(2) protects a complainant from the potential for bias which may result from a hearing officer's employment by the state. The § 1415(c) review provision, however, merely provides for a self-imposed impartiality and independence of decision. Moreover, neither section sets forth any requirements concerning the professional qualifications of the hearing officer. In effect, therefore, the state is left with substantial control over the review proceeding of an IEP formulated by a local branch of a state agency. Comment, *supra* note 64, at 141-42 & n.197; *see* Hyatt, *supra* note 68, at 8 & n.34. This control over the review provision breeds a situation ripe for abuse and has been subject to challenge in EAHCA litigation. *E.g.*, Monahan v. Nebraska I, 645 F.2d 592 (8th Cir. 1981); *see* N.Y. Times, Jan. 30, 1983, at 29, col. 2 (on remand, *Rowley* district court to consider challenge based on alleged bias of hearing officer); *see also* Colin K. v. Schmidt, 536 F. Supp. 1375, 1385 (D.R.I. 1982) (emphasizing congressional intent to protect handicapped children and parents through impartiality in review proceedings).

Although *Rowley* supports the general proposition of local autonomy in substantive education decisions, the Court's emphasis on the state's compliance with the EAHCA's procedures is a basis for attacking any alteration of those safeguards and may be a vehicle for striking those regulations if promulgated. Thus, *Rowley* is a double edged sword, precluding judicial expansion of substantive rights beyond a state's determination, yet preventing the state from diluting judicially determined procedural guarantees. Moreover, public response to the proposals is a strong indication of a refusal to accept any extension of the state's authority beyond *Rowley* and will militate against adoption of the proposals.[160]

When a state is adjudged to have violated the procedural guarantees provided by the Act, the remedy can range from a relatively simple form of injunctive relief to the more complex damage recovery. If a state denies a hearing by an independent examiner or fails to produce evaluation records, on initial impression, it appears that injunctive relief is an appropriate remedy. There are situations, however, which present problems not adequately covered by this remedy. First, if a state denies due process, and as a result, a child is not properly identified, evaluated, or placed, injunctive relief cannot compensate that child for the loss of time incurred since the learning process is progressive. Second, and closely interrelated with state denials of due process, the EAHCA does not expressly address compensating parents who have decided to provide a child with private services at their personal expense while awaiting judicial determination of their EAHCA claim. Since *Rowley* did not address these issues, future litigation will focus on whether Congress intended a damage remedy to be an appropriate form of relief under the EAHCA.[161]

---

[160] *See* N.Y. Times, Oct. 21, 1982, at A26, col. 4 (proposed regulations encounter immediate, widespread protests within Congress, from educators, parents and children's interest groups); N.Y. Times, Sept. 30, 1982, at A1, col. 5 (proposed regulations subject to severe criticism by Congress and parents of handicapped children); *see also* H.R. Res. 558, 97th Cong., 2d Sess. (1982); H.R. REP. No. 906, *supra* note 152, at 4-5 (proposed regulations inconsistent with EAHCA; final regulations to be reviewed with particular care).

[161] The complexity of the damage issue reaches beyond the determination of availability under the EAHCA. Litigants have utilized other statutes as a basis for their cause of action. Courts, however, have differed with respect to whether the EAHCA provides a litigant with an exclusive remedy. *Compare* Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) (exclusivity of remedy under EAHCA precludes availability of § 1983 damages) *with* Miener v. Missouri, 673 F.2d 969 (8th Cir.) (although not recoverable under EAHCA, damages available for violating § 504 of 1973 Rehabilitation Act), *cert. denied*, 103 S. Ct. 215 (1982) *and* Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981) (plaintiff entitled to award of attorney's fees under 20 U.S.C. § 794a(b) (1976) as failure to provide service under EAHCA violated § 504 of 1973 Rehabilitation Act). *See generally* Hyatt, *supra* note 68.

In *Stemple v. Prince George's County Board of Education*,[162] the Court of Appeals for the Fourth Circuit considered whether a damage recovery in the form of tuition reimbursement existed for private placement.[163] In a literal construction of statutory language,[164] the court found a duty on the part of parents to retain their child in his current program during the pendency of the due process proceedings.[165] According to the court, the existence of this duty precluded parents from recovering tuition costs for unilaterally placing their child in a private education program.[166]

In *Anderson v. Thompson*,[167] although recognizing that damages are not generally available under the EAHCA, the Court of Appeals for the Seventh Circuit declined to accept the analytical framework of *Stemple*.[168] In the view of the Seventh Circuit court, the statutory language had not created a duty but rather, represented a congressional preference that parents refrain from moving their child during the proceedings.[169] Furthermore, the court determined that the damage issue was to be resolved in light of another section of the statute.[170] Specifically, the question for decision was whether damages were appropriate relief under section 1415(e)(2).[171] Emphasizing the detailed procedural mechanisms of the EAHCA, the court concluded that the general congressional intent was to provide injunctive relief rather than to create an action for educational malpractice.[172] Fur-

---

[162] 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 103 S. Ct. 215 (1982).

[163] *Id.* at 894; *cf.* Amherst-Pelham Regional School Comm. v. Department of Educ., 376 Mass. 480, ___ 381 N.E.2d 922, 930-31 (1978) (state law entitlement to tuition reimbursement when parents rejected committee's proposed placement and continued initial private placement and ultimately prevailed on appropriateness of initial placement).

[164] 20 U.S.C. § 1416(e)(3) (1976) provides:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Id.

[165] 623 F.2d at 897.

[166] *Id.* at 897-98. *But cf.* Hessler v. Maryland State Bd. of Educ., No. 81-2185 (4th Cir. Feb. 10, 1983) (available March 23, 1983 on LEXIS, Genfed library, Dist file) (statute "appears to draw a distinction between continuance in a current educational placement and an initial admission" in treatment of damages issue).

[167] 658 F.2d 1205 (7th Cir. 1981).

[168] *Id.* at 1209.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 1211; *accord* William S. v. Gill, 536 F. Supp. 505, 512 (N.D. Ill. 1982); Loughran v. Flanders, 470 F. Supp. 110, 114-15 (D. Conn. 1979); *see* Gregg B. v. Lawrence School Dist. Bd. of Educ., 535 F. Supp. 1333, 1339 (E.D.N.Y. 1982).

ther, the court deemed it unlikely that Congress had intended anything other than prospective relief given the legislature's cognizance of budgetary constraints on the states.[173] It was the court's opinion that potential liability of this nature would result in a hesitancy upon the part of state educators to be creative in formulating education programs.[174] The court, however, recognized two exceptional circumstances in which a limited damage recovery might be justifiable.[175] Compensation would be recoverable when parents procured special services which a school refused to provide when the absence of such services presented the possibility of a serious risk of injury to the child's physical health.[176] Damages would also be available upon a showing of an egregious, bad faith failure to comply with the procedural guarantees of section 1415.[177] In either situation, a successful plaintiff is entitled to a money judgment equaling the cost of the substituted services.[178]

Considering the *Rowley* Court's emphasis on the procedural aspects of the EAHCA and the Court's refusal to allow the judiciary to formulate the substantive content of the IEP, it seems unlikely that

---

[173] 658 F.2d at 1212.

[174] *Id.* at 1213.

[175] *Id.*; *accord* Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 468 (S.D. Tex. 1982); Akers v. Bolton, 531 F. Supp. 300, 317 (D. Kan. 1981).

[176] 658 F.2d at 1213-14; *see e.g.*, Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981).

[177] 658 F.2d at 1214; *see, e.g.*, Jose P. Ambach, No. 79 Civ. 270 (E.D.N.Y. Feb. 24, 1983) (available Mar. 23, 1983 on LEXIS, Genfed library, Dist file) (authorizing unilateral placement at public expense for parents waiting more than 60 days for placement); *cf.* Foster v. District of Columbia Bd. of Educ., 523 F. Supp. 1142, 1146 (D.D.C. 1981) (although no absolute bar to retroactive tuition payments exists, tuition reimbursement denied for unilateral placement when parents not diligent in pursuit of due process rights).

[178] 658 F.2d at 1214; *accord* Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707, 711-13 (D. Mass. 1982). Implicit in a claim for damages involving the state is the issue of sovereign immunity under the eleventh amendment. *See* Edelman v. Jordan, 415 U.S. 651 (1974). In Ezratty v. Puerto Rico, 648 F.2d 770 (1st Cir. 1980), the Court of Appeals for the First Circuit observed that absent a finding of implied consent to suit on the part of the state, the eleventh amendment barred recovery of an award from the state treasury. *Id.* at 776. The court noted that the EAHCA's lack of specific reference to monetary suits, its enforcement provision of withholding funds, and its vast scope weighed against a conclusion of implied consent to state liability. *Id.* In Miener v. Missouri, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S. Ct. 215 (1982), the Court of Appeals for the Eighth Circuit stated that Congress had not expressly abrogated the states' immunity to suit by passing the EAHCA. *Id.* at 981; *see supra* note 92. *But see* Parks v. Pavkovic, 536 F. Supp. 296 (N.D. Ill. 1982) (EAHCA's enactment pursuant to § 5 of fourteenth amendment abrogates eleventh amendment immunity). The court did not apply the immunity limitation to an award of damages against the officials in their individual capacities. 673 F.2d at 982 n.11; *see* M.R. v. Milwaukee Public Schools, 495 F. Supp. 864, 867 (E.D. Wisc. 1980); *see also* Monell v. New York Dep't of Social Servs., 436 U.S. 658 (1978).

the Court would permit a general damage recovery under the EAHCA. It is important to note, however, that the Court did remand on the question of whether due process had been violated in the hearing procedures. The Court did not offer analytical guidelines or impose any limitations upon the district court in evaluating the merits of the claim. This lack of guidance suggests that if a court were to find a due process violation, the standard for awarding relief would be based on the principles set forth in *Carey v. Piphus*.[179] In *Piphus*, the Court determined that there is no presumption of injury for deprivation of due process rights.[180] Rather, to be entitled to damages, a plaintiff must prove injury resulting from the deprivation.[181] Accordingly, the availability of compensatory relief should be based upon proof of the injury suffered.

In the special education context, prevailing in the lawsuit should be sufficient proof that both a deprivation and an injury has indeed occurred. The value of the services or program could be measured with specificity by using a market valuation approach. The recovery of the cost of services or placement should be forthcoming regardless of whether parents were able to obtain substitute services during the pendency of their claim. Reflecting upon the goal of the EAHCA to provide *all* handicapped children with an appropriate education, albeit largely through procedural mechanisms, it would seem to emasculate the Act to leave the intended beneficiaries of the legislation without a remedy when injunctive relief cannot compensate the child merely because the EAHCA does not expressly discuss monetary relief.[182] The power of a court to award appropriate relief cannot be construed as limited to the issuance of injunctions. Nor, should the monetary award be limited to compensatory damages. In cases involving egregious bad faith violations of the EAHCA, punitive damages are warranted. If the "all appropriate relief" language is narrowed to encompass only injunctive or compensatory relief, the resulting loopholes merely encourage pre-EAHCA conditions in the

---

[179] 435 U.S. 247 (1978).

[180] *Id.* at 264.

[181] *Id.* Absent proof of actual injury, the Court found the plaintiff would be entitled to nominal damages. *Id.* at 266-67; *see* Jaworski v. Rhode Island Bd. of Regents, 530 F. Supp. 60 (D.R.I. 1981).

[182] *See* C. Carter v. Sequoyah County Indep. School Dist., 550 F. Supp. 172, 174 (W.D. Okla. 1981) (due to passage of time, injunctive relief no longer appropriate); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1112 (N.D. Cal. 1979) (legislative history strongly suggests award of compensatory damages when appropriate).

education of the handicapped. If the EAHCA is to be given full import, there can be no such restraints on the provision of remedies.

In *Rowley*, the Supreme Court construed the EAHCA as a procedural statute requiring states funded under the Act to provide due process rights to handicapped children. The Court imposed upon the states an affirmative duty to educate handicapped children by developing individually oriented programs which are calculated to benefit the child. The scope of judicial review under the Act was limited to consideration of claims involving the aforementioned requirements. In limiting the scope of review, the Court has given the states additional autonomy in educating handicapped children while concurrently emphasizing strict adherence to the procedural safeguards of the Act.

The EAHCA neither expressly creates nor denies a damage recovery for violations of the Act. If the standards of the Act or the education profession are not met, there is a need for compensation, and in especially egregious situations, a need for punitive damages. Currently, protection of handicapped children lies with the professional integrity and motivation of educators, beginning with the classroom teacher and including those responsible for developing the individual program, and ultimately, the reviewing officer. The dependence upon professional integrity is endemic to our education system. Unless the approach to education undergoes major structural changes, this dependency will enhance the need for regular parental involvement in educational programs for the handicapped. Without a damage remedy, parents will be unable to protect the rights of their handicapped children. *Rowley* merely brings forward the problems of the EAHCA. Clarification through subsequent Supreme Court interpretations of the EAHCA is needed to reduce the already devastating impact a child's handicap may have in securing an education for that child.

Honora Keane Hunter