Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor

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OF EDUCATION V. ROWLEY: RAZING THE DOOR
AND RAISING THE FLOOR

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In recent years special education has been one of the most active areas of litigation in school law. This activity has been based in large part on the Education for All Handicapped Children Act of 1975 (EAHCA or Act), which has been described by contemporaneous commentators in effusively expansive terms. In the years immediately preceding and succeeding the Act, lower court decisions focused not on the substantive quality of education that handicapped children ought to receive, but rather on the fact that an estimated 1.75 million handicapped youngsters were excluded from any educational facilities at all. These decisions required the state to provide these unserved

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5. The two major cases, whose principles were expressly incorporated in the legislative history of the EAHCA, were Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (PARC), and Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972). See infra note 130; S. Rep. No. 168, 94th Cong., 1st Sess. 6-8 (1975). In the years immediately preceding the Act, more than thirty court decisions also acknowledged the rights of handicapped children to an appropriate education. Id. at 7.


7. The 1974-75 estimates of 1.75 million handicapped children receiving no educational services and 2.5 million handicapped children receiving inappropriate education were repeated throughout the legislative hearings for the EAHCA. See S. Rep. No. 168, 94th
youngsters with access to school by means of procedural relief, such as due process hearings. The "second generation" of court decisions represented a transition to substantive questions, such as the quality of education to which the estimated 2.5 million handicapped youngsters receiving inappropriate educational services are entitled.

In Board of Education v. Rowley,11 its first case to interpret any provision of the EAHCA,12 the Supreme Court addressed the meaning of "free appropriate public education" (FAPE) in relation to a bright, high achieving deaf child. Rejecting the more rigorous standard that


A more recent report estimated that 4.2 million children (8.5% of the school age population) are receiving a special education and that the two priorities of the EAHCA — (1) providing special education to the unserved and (2) providing it to the most severely handicapped among the underserved — have been realized. See EHLR Special Report: GAO Report, 3 Education for the Handicapped Law Report [EHLR] (CRR) ACIO (Supp. 60 Nov. 13, 1981).

8. Rebell, Implementation of Court Mandates Concerning Special Education: The Problems and the Potential, 10 J.L. & Educ. 335, 346 (1981). This term, borrowed from desegregation litigation, covers a broad range of cases. Rebell used it to include Jose P. v. Ambach, id. at 346, which stems from exclusion and focuses on procedure. At the other edge of this broad category are cases dealing with the limits of residential placements and related services. See, e.g., Mooney & Aronson, Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements, 14 Conn. L. Rev. 531 (1982); Note, Residential Placement of Handicapped Children: Altering the Scope of a Public Education, 43 U. Pitt. L. Rev. 789 (1982).

9. "Substance" and "procedure" are inevitably overlapping terms, and — as the participants in these cases have noted — the courts are more comfortable dealing with the latter. See, e.g., Kirp, Buss & Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 Cal. L. Rev. 40, 81 (1974).

10. See supra note 7.

11. 102 S. Ct. 3034 (1982).

12. Id. at 3041.

For recent Supreme Court decisions involving handicapped persons within other institutional contexts and statutory schemes, see Southeastern Community College v. Davis, 442 U.S. 397 (1979) (college's refusal to admit a deaf student to a nursing program does not violate § 504 of the Rehabilitation Act of 1973); University of Texas v. Camenisch, 451 U.S. 390 (1981) (found moot whether a university must provide a sign language interpreter for deaf students under § 504 but remanded on damages issue); Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1982) (the Developmentally Disabled Assistance and Bill of Rights Act did not create in favor of the mentally retarded any substantive right to appropriate treatment in the least restrictive environment); see also Parham v. J.R., 442 U.S. 584 (1979); Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979) (both upholding constitutionality of state statutes that provided for involuntary commitment of children under 18 to hospitals by their parents without a hearing); Youngberg v. Romeo, 102 S. Ct. 2452 (1982) (involuntarily committed mentally retarded person has a constitutionally protected liberty interest in minimally adequate or reasonable training to ensure safety and freedom from undue restraint).

had been enunciated by the lower courts in this case, the Supreme Court ruled that appropriateness under the Act requires "providing personalized instruction with sufficient support services to permit the child to benefit from that instruction." Finding that Amy Rowley's individualized educational program (IEP) met this standard, the Court reversed the lower court's judgment that had provided her with a full-time sign language interpreter in her classroom.

The Rowley decision, coming on the heels of Supreme Court decisions generally adverse to the rights of the handicapped, appears at first glance to present a potential for mischief. Although the reaction of many commentators has been noticeably mild, and even reassuring, their response may be more reflective of a desire to avoid lending credibility to an adverse reading of the case. In any event, some advocates of handicapped children have viewed the opinion as a significant step backwards. One need not look too far into the court and hearing officer decisions since Rowley to find support for this view.

For example, in a case decided one month after Rowley, a state court sympathized with the four-year fight of a 16-year-old profoundly deaf student for a change in his program, but rejected his claim, stating: "Frankly, the majority decision in Rowley is devastating to the Petitioner's position and it is that decision which this court is required to follow." Similarly, at the hearing officer level, parental objections to an IEP for a mildly handicapped child were rather summarily rejected with citation to Rowley. Signs in the allied areas of federal funding

14. See infra text accompanying notes 57 and 59.
15. 102 S. Ct. at 3049. See infra notes 63-86 and accompanying text for a discussion of the Rowley opinion.
16. See supra note 12. Romeo was not a major step forward because the Court abstained from according a general constitutional right to training per se, adopting instead a limited review standard, deferential to the professional judgment of institutional authorities. 102 S. Ct. at 2459, 2461-62.
19. Frank v. Grover, No. 81 CV 6003 (Wis. Cir. Ct. July 30, 1982), reprinted in 3 EHLR (CRR) 554:148 (Supp. 82 Oct. 15, 1982); cf. Springdale School Dist. No. 50 v. Grace, 693 F.2d 41, 43 (8th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3583 (U.S. Jan. 20, 1983)(No. 82-1292) ("the act does not require ... the best possible option"); Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982) (citing Rowley as construing EAHCA to "impose a substantive duty ... only to afford an adequate education").
and regulations also seem at least potentially to point backwards.

Upon closer examination, however, Rowley represents no more than a limited loss, leaving ample room and providing footholds for further advances in the educational reform movement on behalf of handicapped youngsters. This Article argues that the Rowley decision, properly understood, does not necessarily erode the legal rights of the handicapped. Part I summarizes the EAHCA and lower court interpretations of FAPE. Part II analyzes the Supreme Court and lower court decisions in Rowley. Part III advances the arguments that Rowley represents a notably narrow decision and that ambiguity and latency in the opinion provide room for rigor in the substantive interpretation of "appropriate education." Part IV predicts an upswing in activity stemming from alternative legal bases, particularly in the area of state statutes. The underlying thesis of this Article is that the foray into the substantive area is necessary, but that the bewildering variation among the handicapped and the infant state of the art of special edu-


23. This Article does not focus on procedural aspects of the Rowley decision, although its emphasis on compliance with the procedural requirements of the EAHCA can serve as an alternate avenue for special education suits. See, e.g., Lang v. Braintree School Comm., 545 F. Supp. 1221 (D. Mass. 1982); Appel v. Ambach, No. 78 Civ. 2892 (S.D.N.Y. Nov. 6, 1982), reprinted in 3 EHLR 554:236 (1982) (remanded for failure to provide IEP). See also infra notes 125-129 and accompanying text.

24. Limits of the power of the procedural approach in this area are pointed out by both observers and participants. See, e.g., Kirp, Buss & Kuriloff, supra note 9, at 77; see generally Weatherley & Lipsky, Street Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform, 47 HARV. EDUC. REV. 171 (1977).

Although the concern with judicially discoverable and manageable standards is a cautionary one, the courts cannot use it as an excuse to avoid sensitive and complex issues. See Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 53 (N.D. Ala. 1981); Bazelon, Implementing the Right to Treatment, 36 U. CHI. L. REV. 742 (1969).

25. Several commentators have pointed out the definitional complexity and variety of handicapping conditions in terms of such variables as source, severity, and kind. See, e.g., Finn, Advocating For The Most Misunderstood Minority: Securing Compliance With Special Education Laws, 14 SUFFOLK U. L. REV. 505, 514-15 n.65 (1980); Kirp, Buss & Kuriloff, supra note 9, at 41. This point was at least alluded to in the legislative history of the Act. See, e.g., 121 CONG. REC. 23,707 (1975). A common error in the legal literature is focusing on one type of handicap and generalizing a standard therefrom. See, e.g., Handel, The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education, 36 OHIO ST. L.J. 349 (1975) (the mentally retarded).

A related problem is conceiving of the handicapped in terms of the physical stereotype (e.g., wheelchair bound), and ignoring the more slippery categories of learning disabled
cation \(^{26}\) defy a single substantive standard and require instead experimentation, variation, and evolution of a multifactor concept of appropriateness.

I. STATUTORY AND JUDICIAL BACKDROP

A. **The EAHCA**

The Education for All Handicapped Children’s Act of 1975 is primarily funding legislation, with comprehensive regulatory conditions attached to a state’s acceptance of supplementary federal fiscal assistance. The three key technical terms in the Act are “free and appropriate public education” (FAPE), “least restrictive environment” (LRE), and “individualized education program” (IEP). \(^{27}\)

The primary purpose of the Act is “to assure that all handicapped children have available to them . . . a [FAPE].” \(^{28}\) This term is cryptically defined as:

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 . . . . \(^{29}\)

To qualify for assistance, a state must have in effect approved policies, plans, and procedures that assure all handicapped children the right to

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\(^{26}\) See, e.g., Halligan, *The Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice*, 45 Mo. L. Rev. 667, 681 (1980); Kirp, Buss & Kuriloff, *supra* note 9, at 47, 50.  
Extensive regulations have been adopted pursuant to the Act. See 34 C.F.R. \S 300 (1982).  
\(^{28}\) 20 U.S.C. \S 1400(c) (Supp. V 1982).  
\(^{29}\) 20 U.S.C. \S 1401(18) (1976). The accompanying definition of special education focuses on “meet[ing] the unique needs of a handicapped child,” whereas that for “related services” is rooted in “assist[ing] a handicapped child to benefit from special education.” *Id.* \S 1401 (16), (17).
a FAPE.\textsuperscript{30} "Handicapped children" is defined broadly to include "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."\textsuperscript{31}

Popularly known as "mainstreaming,"\textsuperscript{32} LRE refers to the requirement that "to the maximum extent appropriate, handicapped children . . . [must be] educated with children who are not handicapped."\textsuperscript{33} Nevertheless, the Act acknowledges that in certain circumstances handicapped children need to be educated in separate classes or special schools.\textsuperscript{34}

The fundamental procedure for meeting the FAPE and LRE requirements is the formulation of an IEP by a team consisting, at a minimum, of a qualified representative of the local district or intermediate unit,\textsuperscript{35} the child's teacher, the child's parents or guardian, and, where appropriate, the child.\textsuperscript{36} Developed at a meeting of this team, the IEP is a written statement including:

(A) . . . the present levels of educational performance of such child, (B) . . . annual goals [and] short-term instructional objectives, (C) . . . the specific educational services to be provided to such child, and the extent to which such child will be able to participate 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.\textsuperscript{37}

Under the Act, parents have the right to challenge the IEP at an impartial due process hearing, which is in turn subject to judicial review in state or federal court.\textsuperscript{38}

\textsuperscript{30} \textit{Id.} § 1412.
\textsuperscript{31} \textit{Id.} § 1401(1).
\textsuperscript{32} "Mainstreaming" refers to the degree of contact with nonhandicapped children that a handicapped child experiences as part of the educational process.
\textsuperscript{34} "[S]pecial classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." \textit{Id.}
\textsuperscript{35} In some states, special education reviews are provided by intermediate units that typically serve several small school districts.
\textsuperscript{37} \textit{Id.} The IEP must be reviewed and, when appropriate, revised at least annually. \textit{Id.} § 1414 (a)(5).
\textsuperscript{38} \textit{Id.} §§ 1415(b)(2) and (e)(1). If the impartial due process hearing is conducted by the
B. Case Law: Appropriate Education

As a result of hearing officer or state education agency decisions, at the instance of parents or school districts, courts have attempted substantively to elucidate the meaning of "appropriate" in FAPE. These substantive formulations vary widely. Although conveniently conceived of as a continuum from minimal adequacy on the one extreme to potential maximization on the other, courts have not been limited to selecting standards neatly arrayed on the line between these two points.

Examples of standards that fit along the continuum abound. The pre-Act seminal consent decree of Mills v. Board of Education, arguably fits close to minimal adequacy, although the court used qualifiers such as "suitable" and "appropriate," rather than "minimum," along with "adequate." At the other extreme, a few lower courts have erected a potential maximization standard, which was typically replaced by a lower standard on appeal. Equal opportunity standards, in terms of either approximate overall comparability or specific shortfall comparability, fit in the intermediate range.

Several other courts have formulated standards of differing degrees and dimensions. As an extreme example, one federal district judge applied a "best interest of the child" standard, only to have his decision vacated on appeal. Another standard that some courts have used is a balancing test, which weighs the personal needs of the individual child against the limited funding of local districts for all handi-

local school district or intermediate unit, it shall be subject to independent review by the state education agency prior to suit in federal or state court. Id. § 1415(c).

39. See Note, Enforcing The Right To An "Appropriate" Education: The Education For All Handicapped Children Act of 1975, 92 HARY. L. REV. 1103, 1125-26 (1979). This bipolar conception was used by the district court in Rowley to specify its standard, and by the Supreme Court majority to obscure it. See infra notes 57-58, 69 and accompanying text.


43. See infra notes 80-82 and accompanying text (Justice Blackmun's concurrence).

44. See infra notes 57-58 and accompanying text (Judge Broderick's district court opinion). This decision was summarily endorsed on appeal by the Second Circuit majority and the Supreme Court dissent, see infra notes 59-60, 84-86 and accompanying text, and it was variously applied by several other courts. See infra notes 144-48 and accompanying text. Technically, it might be considered closer to the maximum extreme than Justice Blackmun's test. See infra note 80.

45. See infra note 142 and accompanying text.
capped children. As a more typical example, several courts have used a self-sufficiency standard, aimed at independence rather than institutionalization in adulthood. For example, the federal district court in *Armstrong v. Kline* used a self-sufficiency standard to determine that a school year beyond the customary 180 days may be appropriate for certain severely handicapped students. On appeal, the Third Circuit reached essentially the same result, but the majority opinion refused to adopt a single substantive standard, suggested that self-sufficiency and equal educational opportunity standards were premature, and implied that multiple goals might be likely. Indeed, some courts have combined more than one standard.

Most of these standards are considered in the various opinions of the *Rowley* case. What emerges is a flexibly formulated new standard.

**II. ANALYSIS OF THE ROWLEY CASE**

**A. Factual Background**

Amy Rowley is a deaf child attending a regular elementary school in the Hendrick Hudson Central School District in Peekskill, New York. She has limited residual hearing, but is an excellent lip reader. Preparatory to Amy's entry into school, several members of the administrative and teaching staff took a sign language course to facilitate conversation with her. Also, a teletype machine was installed in the principal's office to facilitate communication with her parents, who were also deaf.

As agreed with Amy's parents, the kindergarten year began with a trial period during which she was placed in a regular class without support services. At the end of the period, the school district provided her with an FM wireless hearing aid. The school district also arranged for a sign language interpreter to be in Amy's class full time for two

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49. See, e.g., Stacey G. v. Pasadena Indep. School Dist., 547 F. Supp. 61, 78 (S.D. Tenn. 1982); see also infra note 62. The lower courts' *Rowley* standard is arguably a hybrid of equal opportunity and potential maximization.
50. The initial factors of the sign language course and the teletype machine not only established the tone but also introduced the narrowness of the Court's decision. What proportion of the nation's public schools have the time and resources, much less the willingness and commitment, to make such preparations for a single student?
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Weeks. At the end of the period, the interpreter concluded that his services were not needed at that time. Amy completed her kindergarten year successfully.

Under the EAHCA’s requirements for an IEP, the district’s multidisciplinary evaluation team met during the fall of Amy’s first-grade year and recommended that she be provided with: (1) continued use of the wireless hearing aid, (2) the services of a tutor for the deaf for one hour daily, and (3) the services of a speech therapist for three hours per week. In addition to taking other testimony and visiting a class for the deaf, the team received expert evidence from Amy’s parents about the importance of the services of a sign language interpreter but concluded that such services were not needed.

Amy’s teacher and the school administration adopted the team’s recommendation in her IEP. Amy’s parents requested a due process hearing. The independent hearing examiner agreed with the administration that an interpreter was not necessary because “‘Amy was achieving educationally, academically, and socially’ without such assistance.” The examiner’s decision was affirmed on appeal to New York’s Commissioner of Education.

B. Lower Court Decisions

Amy’s parents then brought suit in the U.S. District Court for the Southern District of New York, claiming that the school district’s refusal to provide a full-time interpreter violated the FAPE requirement of the EAHCA. The district court found that Amy was remarkably well-adjusted, got along well with her peers and even better with her teachers. The trial court also found that she was performing better than the average child in her class, advancing easily from grade to grade although she understood considerably less than she would have if she were not deaf. The disparity between her achievement and her

51. This extra effort further narrowed the factual flexibility for the courts’ decision-making.
52. 102 S. Ct. at 3040.
54. The district court reported that she was sometimes called upon by her teacher to help other students with their assignments. Id. at 531.
55. Her achievement test scores were all above grade level, by about one year on one standardized test and — significantly enough — by about three years on a standardized test that had been administered to her in sign language. Another fact not included in the Supreme Court’s opinion was that her IQ was 122. Id. at 532. The typical guideline score in states that include special education status for gifted students, at least to the extent that IQ is relied upon, is 130.
56. The district court found that with lip reading and the hearing aid, Amy could iden-
potential performance without the handicap led the trial court to decide that she was not receiving an appropriate education, which it defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." Such a standard, explained the court, required comparing the differential between performance and potential — or "shortfall" — for the handicapped child with that of his or her nonhandicapped peers.

The Second Circuit Court of Appeals, in a 2-to-1 decision, affirmed the district court's judgment. The majority took pains to emphasize the narrowness of the holding, stating that "our decision is limited to the unique facts of this case, and is not intended as authority beyond this case." The dissenting judge pointed to the "Herculean efforts" of the school district and the erroneous premises of the district judge, adopting instead a self-sufficiency standard based on various...
statements in the Senate debates.\textsuperscript{62} Amy’s IEP obviously met this standard.

C. \textit{Supreme Court Decision}

A divided Supreme Court reversed the lower court’s decision, enunciating not only a different view of appropriate education, but also a specific standard of judicial review under the EAHCA.\textsuperscript{63} The majority opinion was authored by Justice Rehnquist and subscribed to by four other justices. Justice Blackmun reached the same result based on different standards of appropriate education and judicial review. Justice White’s dissent was joined by Justices Marshall and Brennan.

The Rehnquist majority pointed out, like the Second Circuit dissent, the unexplained failure of the district court to recognize the statutory definitions\textsuperscript{64} and pieced together a composite test from separate segments of statutory language.\textsuperscript{65} Before hardening the test into a holding, the majority analyzed the Act’s legislative history in search of field’s assertion that “[n]o support for this [commensurate opportunity] definition is to be found in the Act, its legislative history, or in regulations promulgated thereunder,” \textit{id.} at 952, is not on target. \textit{See supra} note 57.

\textsuperscript{62} 632 F.2d at 951-52. The dissenting judge did not completely reject the comparative approach, stating that the self-sufficiency standard “would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates.” \textit{id.} at 953.

\textsuperscript{63} Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982).

\textsuperscript{64} \textit{Id.} at 3040 n.8. Inasmuch as the Act defines FAPE in terms of “special education” and “related services” that meet certain conditions, the majority recited and spliced in the definitions of these two terms in tandem with the list of conditions, finding the standard of educational benefit in the rather remote definition of “related services.” \textit{Id.} at 3041-42 \& 3048. \textit{See infra} note 65.

\textsuperscript{65} The Court went through three iterations of the test, incorporating successive and subtle changes in form. Appearing early in the opinion, the first form was as follows: [FAPE] consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary as to permit the child “to benefit” from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s IEP.

102 S. Ct. at 3041-42. A difference between the statutory definition and the Court’s iteration is that the Court expanded the statutory language (“the standards of the State educational agency”) to require that the instruction meet “the State’s educational standards.” Dropping the “agency” broadens the scope of the standard, allowing for state statutory variation as delineated \textit{infra} part IV.

The second iteration, which immediately followed the first, was:

Thus, 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.
"some additional substantive standard." Finding a repeated emphasis on access and procedures as being more important than substance and outcome, the majority successfully rejected equal educational opportunity and self-sufficiency as each demanding too little or too much depending on the situation. For example, the Court rejected both the input and the output extremes of the equal educational opportunity standard, correctly concluding that "to speak in terms of 'equal' services in one instance [i.e., equal input] gives less than what is required by the Act and in another instance [i.e., equally potential-maximizing output] more." Similarly, looking at the application of the self-sufficiency standard to degree only, not also kind, of handicap, the majority concluded that "'self-sufficiency' as a substantive standard is at once an inadequate protection [for the mildly handicapped] and an overly demanding requirement [for the severely handicapped]."

Rather, restricting itself to Amy Rowley's situation, the Court looked to the mainstreaming preference in the Act and to the prevailing practices in the schools, and concluded that for handicapped children who are being educated in regular classrooms, "[t]he grading and advancement system" is one, although not the only, factor for deter-

Id. at 3042. Subtle transformations again can be detected. For example, the qualified characterization of "[almost as a checklist" (emphasis added) has lost its qualifier.

The significance of these language changes remains to be seen. For the final iteration, see infra note 73 and accompanying text.

66. Id. at 3042. By means of alluringly quotable and metaphorical dicta, the majority erected the mirage/image of the public school as a house of opportunity, containing not only the proverbial door, but also a slippery floor:

Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

We therefore conclude that the basic floor of opportunity . . . consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id. at 3043, 3048 (footnote omitted) (emphasis added).

67. Id. at 3047.

68. Id. at 3048 n.23.

69. Id. at 3047. The Court deftly ignored the lower courts' intermediate output standard (maximizing potential commensurate with other students). Justice Rehnquist similarly slighted the lower courts' standard by cloaking it under the false label of "strict equality of opportunity or services." Id. (emphasis added).

70. Id. at 3048 n.23.

71. Id. at 3049.

72. Id. at 3049 n.25 (emphasis added):

We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the . . . school administrators, to be dispositive.
mining appropriateness. The majority then arrived at the finalized form of its answer to the appropriateness issue in this case:

[W]e hold that it satisfies [the FAPE] requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. 73

As for the issue of the proper standard of judicial review under the Act, the majority steered an intermediate course between the Rowley's arguments for a de novo posture and the school district's advocacy of a markedly deferential standard. 74 Interpreting Congress' replacement of the substantial evidence standard with language that courts were to make "independent decision[s] based on a preponderance of the evidence" 75 as clear legislative rejection of that standard, the majority viewed Congress' placement of the relevant language in the "Procedural Safeguards" section 76 and the general emphasis of the Act on administrative procedures as offering sufficient counterweight to yield this two-fold standard:

73. Id. at 3049 (footnote omitted). Following the flow of the earlier iterations, see supra note 65, this final formulation adds only a circular and superfluous caveat about procedural compliance and, for the mainstreamed child, subtly yet suddenly recasts the grade advancement criterion in the school district's favor. Rather than grade advancement being something actually obtained, it seems sufficient for the district to make it reasonably attainable; for under the majority's holding, the child's program needs to be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 102 S. Ct. at 3049.

74. The school authorities argued that the Act accorded the courts limited authority with regard to procedural compliance and no authority with regard to substantive matters. Id. at 3050. This standard would seem to provide even more deference than the traditional substantial evidence test for administrative decisions.

75. Id. at 3050-51 (citing S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 50 (1975), and 20 U.S.C. § 1415(e) (1976)).

76. This is a makeweight argument. As the dissent aptly asked: "[W]here else would a provision for judicial review belong?" Id. at 3056 (White, J., dissenting).

The real concern of the majority may well have been the proverbial parade of horribles. Justice Stevens is reported to have remarked during oral arguments in Rowley: "The problem I see with this case is that once you acknowledge that there are some substantive matters that a court can review, where do you stop?" See EHLR Special Report: The Rowley Argument in the U.S. Supreme Court, 3 EHLR (CRR) AC105 (Supp. 68 March 19, 1982).
First, has the State complied with the procedures set forth in the Act? And second, is the \([\text{IEP}]\ldots\) reasonably calculated to enable the child to receive educational benefits?\(^{77}\)

The majority closed with a lesson in our federalism in relation to public education, including a reading from the text of \textit{San Antonio School District v. Rodriguez},\(^{78}\) and with a paean to the parents of handicapped children, expressed faithful reliance on their ardent advocacy.\(^{79}\)

In his sole concurrence, Justice Blackmun reached the same result by employing a totality-of-the-circumstances, equal-educational-opportunity approach. He stated the standard as follows:

[W]hether Amy's program, \textit{viewed as a whole}, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates.\(^{80}\)

Adapting the comparison component of the lower court's test, Justice Blackmun adopted a more ad hoc approach, narrow in its factual boundaries\(^{81}\) yet flexible within them.\(^{82}\) As for judicial review, he stressed deference to the quasi-judicial levels of the administrative pro-

\(^{77}\) 102 S. Ct. at 3051 (footnotes omitted). The first prong of this test is tied to the aforementioned penchant for proceduralism. \textit{See supra} notes 8-9. The second prong is a clever combination of the first and last elements of the majority's appropriateness test: "educational benefits" from the initial definition of related services and "reasonably calculated" from the additional criterion for mainstreamed youngsters. \textit{See supra} notes 64, 73 and accompanying text. Thus, although there is some basis for the parts, there seems to be some alchemical prestidigitation rather than reasoned elaboration in their placement.

Some commentators see this review standard as virtually encompassing de novo review. \textit{E.g.}, author's conversation with Michael Rebell, Nov. 30, 1982. But the majority's specific refusal to give reviewing courts a "free hand" and the dissent's counter-argument for a de novo standard suggest a more limited view. \textit{Id.} at 3050-51, 3056-57. The limit would appear to lie between the introduction of evidence and its evaluation in terms of policy or law. Doe v. Anrig, 692 F.2d 800, 806 (1st Cir. 1982).

\(^{78}\) 411 U.S. 1, 42 (1973) (involving "the most persistent and difficult questions of educational policy. . . . in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels") (emphasis added to show the words specifically quoted in Rowley).

\(^{79}\) 102 S. Ct. at 3052. \textit{But see} Bales v. Clarke, 523 F. Supp. 1366, 1372 (E.D. Va. 1981) (judge criticized parent's adversarial attitude toward school officials). \textit{See also} Weinstein, \textit{Education of Exceptional Children}, 12 CREIGHTON L. REV. 987, 1033 (1979) ("In many cases, parents are either not equipped, or simply refuse, to represent what society sees as the best interests of their handicapped children."). In one case, Judge Weinstein found that the parents of culturally disadvantaged children were not adequately served by technical compliance with the Act's notice requirements. \textit{See} Lora v. Board of Educ., 456 F. Supp. 1211, 1288 (E.D.N.Y. 1978), \textit{vacated and remanded}, 623 F.2d 248 (2d Cir. 1980).

\(^{80}\) 102 S. Ct. at 3053 (Blackmun, J., concurring). Justice Blackmun found "equal protection" language in the legislative history of the Act. Colley cited an article by Senator Stafford and the Act's "Statement of Findings and Purpose" to support further this point of view. \textit{See} Colley, \textit{supra} note 27, at 143.

\(^{81}\) The emphasis on understanding and on nonhandicapped classmates at least implicitly suggests the narrow context of a deaf child in a mainstream placement.
cess and a focus on the “total package of services.”

As in Rodriguez, Justice White authored Rowley’s three-man dissent. Relative to the majority, the dissent had some worthwhile insights, and others that were inaccurate. The dissent embraced the lower courts’ standard of appropriate education without reciting it and enunciated a de novo review standard without the lower courts’ having stated it.

III. ROOM FOR RIGOR WITHIN AND BEYOND ROWLEY

A. Notable Narrowness

The majority opinion in Rowley — like the alternative approaches of the concurrence and, via the dissent, the Second Circuit — was notably narrow. First, the unusual circumstances of the school district’s preparations and the plaintiff’s performance implicitly set narrow boundaries for these alternative opinions. Second and more important, the Court expressly demarcated a restricted perimeter for its decision, prefacing its holding with this caveat:

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

82. In contrast to the lower court approach, there is no hint of quantifiable objectivity. 102 S. Ct. at 3053 (Blackmun, J., concurring).

83. Id.

84. See, for example, the dissent’s observation that the “full opportunity” and “equal opportunity” references were too frequent to be merely passing references, and the point that Mills stands for proportional, not “some,” education. Id. at 3054 & 3055 n.2. See also supra note 76.

85. Compare 102 S. Ct. at 3055 (White, J. dissenting) (“Amy Rowley, without a sign language interpreter, comprehends less than half of what is said in the classroom”) with supra note 56. Similarly, the dissent’s reading of Senator Williams’ statements confused scope of review with standard of review. Id. at 3056.

86. Id. at 3056-57. In response to the majority’s metaphorical constructions, see supra note 66, the dissent repainted the “floor of opportunity” as “intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible.” Id. at 3055.

87. See supra note 81.

88. See supra text accompanying note 86.

89. See supra note 60 and accompanying text.

90. See supra notes 50-51 and accompanying text.

91. See supra notes 55-56.

92. 102 S. Ct. at 3049. The Court’s caveat is more severe than the factual limitations
Finally, the only element of the holding that was not drawn directly from the statutory definitions, that of grade advancement, was added only and explicitly for mainstreamed students — and even then, the Court avoided generalizing to all such students, finding it to be dispositive only in the limited circumstances of Amy’s case.\footnote{32}

The narrowness of the \textit{Rowley} decision, and thus its amenability to being distinguished from other cases, is demonstrated by two recent hearing officer decisions in Massachusetts. In the first case,\footnote{94} although faced with a child of the same type and severity of handicap,\footnote{95} the hearing officer found \textit{Rowley} to be readily distinguishable because the child was not advancing easily from grade to grade.\footnote{96} In the second case,\footnote{97} another hearing officer similarly found the circumstances of a severely multi-handicapped student in a private placement to be “clearly distinguishable from those presented by \textit{Rowley}.”\footnote{98} As is evident from the foregoing discussion, the \textit{Rowley} Court implicitly and explicitly left several hooks on which to hang such a factual distinction, and thus to climb beyond and above its confines.

\textbf{B. Ambiguous and Latent Standard}

The majority’s standard in \textit{Rowley} clearly permits and implicitly anticipates the Court’s future forays into the substantive area as this area matures.\footnote{99} In stating that “[w]e do not attempt \textit{today}”\footnote{100} to establish any single test for all handicapped children beyond the admittedly “cryptic”\footnote{101} statutory definition, the Court left open the possibility of later establishing a higher and broader-based standard, and the probability of adding a ramp to the second floor of opportunity at least for some handicapped children.\footnote{102} Further, the Court expressly issued

\begin{footnotes}
32. See supra note 72.
95. The child was a moderately to profoundly deaf six-year-old.
96. The hearing officer failed to point out that the major distinction between \textit{Brockton} and \textit{Rowley} is that the child in \textit{Brockton} attended a private school for deaf children whereas the \textit{Rowley} holding was limited to children in regular classrooms. See supra text accompanying notes 92-93.
98. \textit{Id.} at 504:169.
99. See supra note 78 and accompanying text.
100. 102 S. Ct. at 3049 (emphasis added). For the complete quote, see supra text accompanying note 92.
101. \textit{Id.} at 3041.
102. \textit{Cf.} Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982) (“As plaintiffs point-
an invitation for experimentation and formulation beyond its stated statutory minimum by "state and local educational agencies in cooperation with the parents or guardian of the child." At the confluence of the parent-school planning and placement process stand the impartial hearing officers, who at local or state levels are left with broad discretion to develop and to apply substantive standards within and beyond Rowley. Moreover, the Act's requirement of centralized reporting of hearing officer decisions favors and facilitates the development of a common law in this area. The national collection and dissemination of these local and state quasi-judicial decisions by a commercial clearing house further promotes this development.

A close reading of the Court's opinion reveals that it is not limited to access and procedures. Notwithstanding the majority's assertion that "[n]oticeably absent from the language of the statute is any substantive standard," the Court in effect accorded substantive status to its purportedly procedural standard by searching in the legislative history for "some additional substantive standard." Similarly, in stating that "the intent of the Act was more to open the door of public edu-
tion . . . on appropriate terms than to guarantee any particular level," the Court not only left open the meaning of "appropriate," but also implicitly recognized that Congress intended a particular substantive level. This use of relative rather than exclusive language permeates the Court's opinion.

Furthermore, a careful reader of Rowley notices that at times the Court accords the substantive aspects of the EAHCA the same status as the Act's procedural aspects. Thus, for example, when the Court suggested that "Congress used the word [appropriate] as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education," the Court gave equal force to the substantive services issues that it gave to the procedural access questions. Similarly, when the Court stated that "Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard," it seems to be no exaggeration to say that Congress placed every bit as much emphasis upon judicial review of substantive matters as it did upon that of procedural matters. Thus, the substantive component of the majority's decision lies there half-hidden in the answers to both appropriateness and judicial review issues, waiting to be uncovered by hearing officers and judges who wish to look beyond the dark surface for the proverbial diamonds in the rough.

Moreover, when the Court did point to substantive standards, it phrased them so ambiguously that they are susceptible to stretching by


112. 102 S. Ct. at 3043 (emphasis added). For the complete quotation, see supra note 66. Similarly, in the companion quote about Congress not "impos[ing] upon the States any greater substantive educational standard than would be necessary to make . . . access meaningful," the Court imposed the substantive standard of "meaningful" educational opportunity. Id.

113. At other times, as in the foregoing instances, the Court does not accord the substantive standard equal weight, but nevertheless does not exclude it. For further examples, see id. at 3043 ("Congress sought primarily to make public education available to handicapped children") (emphasis added); id. at 3050 ("adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP") (emphasis added); id. at 3051 ("[the Act's] obligations [are] largely procedural in nature") (emphasis added).

114. Id. at 3046 n.21 (emphasis added).

115. Id. at 3050.

116. One commentator speculated that Justice Rehnquist was compelled to provide such half-hearted indications of a substantive standard, and not merely rely on equal access, in order to attract sufficient support for a majority opinion. See EHLR Analysis: What Rowley Means, 3 EHLR (CRR) SA29, SA35 (Supp. 84 Nov. 12, 1982).
an activist judge or hearing officer. For example, when the Court ruled
that the "access . . . provided be sufficient to confer some educational
benefit," it did not foreclose artful advocates from convincing hear-
ing officers and courts that "some" means more than the minimum.
Similarly, when the Court essentially stated that programmatic access
would have to be provided at a "meaningful" level it left open what
one commentator called the "64,000 dollar question." The afore-
mentioned Massachusetts cases again point the way: the hearing of-
ficers decided that even if Rowley had not been distinguishable, the
school districts' proposed placements did not meet the Court's
standard.

Finally, when the majority established a grade attainment crite-
rion for mainstreamed placements, the Court may have erected a
higher standard than it expected, notwithstanding its "reasonably cal-
culated" qualifier. Reflecting the preference of the Act for the "least
restrictive environment," over ninety percent of school-aged handi-
capped children currently are being educated in regular public schools
and over seventy percent are being educated in classrooms with non-
handicapped youngsters. For a substantial segment of these handi-
capped pupils, grade attainment may be a difficult achievement. A
recent trend toward minimum competency tests such as promotion and
graduation prerequisites illustrates and even aggravates this diffi-
culty. Indeed, for many handicapped children educated in regular
classrooms, even a standard somewhat lower than grade attainment
may be excessive.

117. 102 S. Ct. at 3048 (emphasis added).
118. See supra note 112. Characterizing the majority opinion as open to two interpreta-
tions — meaningful education and minimum benefits — a recent analysis construed the
opinion to stand for the meaningful education standard. See The Supreme Court, 1981
Term, 96 Harv. L. Rev. 9, 303 (1982).
119. Stotland & Mancuso, supra note 17, at AC162.
120. See supra notes 94-98 and accompanying text.
121. See supra notes 73, 77 and accompanying text.
122. See, e.g., supra notes 32-34 and accompanying text.
84 Nov. 12, 1982).
124. See generally Stroup & Zirkel, A Legal Look at the Retention — Promotion Contro-
versy, 21 J. School Psych. (forthcoming, 1983). For decisions sustaining the use of compe-
tency tests as a diploma requirement for handicapped as well as other students after
sufficient notice, see Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179 (7th Cir. 1983);

The other edge of the sword is represented by the prior trend toward liberal "social
promotion," which lowers the standard for handicapped students — like the lower court
Rowley test — commensurate with that of their nonhandicapped peers.
C. Incidental Effects

In addition to the latent meaningfulness of Rowley for the cases that have issues of appropriate education and judicial review, the decision also provides some leverage with respect to other issues, such as the burden of proof. Lang v. Braintree School Committee provides an example. In that case, the federal district court in Massachusetts — where the law, like that of approximately half of the other states, is silent on the burden of proof issue — found that Rowley "provides significant guidance" in determining who had the burden of proof with respect to the appropriateness of the proposed placement. The parents sought a continuation of the child's placement in a private special education facility, while the school district proposed that she be placed in one of its regular classrooms. The district had committed a technical irregularity by amending the child's IEP without the parents' participation. Given Rowley's emphasis on procedural compliance and the Act's seeming preference for maintaining the status quo, the court decided that the burden must rest with the defendant school board.

Even where procedural irregularities are absent, Rowley still might affect the allocation of the burden. It could be argued that Rowley interpreted the Act as incorporating the major principles of the right-to-education cases. Inasmuch as one of these principles was placing the burden on the school district, federal policy — as thus incorporated in the Act and as reflected in the vast majority of states that have addressed this issue pursuant to the Act — arguably dictates by implication or preemption this result, even in the negligible minority of states that place the burden on the parents (New York) or the moving party (Connecticut).

126. See L. Kotin & N. Eager, supra note 104, at 18, 102.
127. 545 F. Supp. at 1227.
129. Nevertheless, aided by the hearing officer's determination, the court concluded that the defendant school district had met its burden. 545 F. Supp. at 1228.
130. 102 S. Ct. at 3044 (noting such language in the legislative history and stating that "the principles which [PARC and Mills] established are the principles which, to a significant extent, guided the drafters of the Act"). For further reference to these cases, see supra note 5.
132. See infra note 159 and accompanying text.
133. L. Kotin & N. Eager, supra note 104, at 122. The New York City hearing office, which holds at least half of New York State's hearings, clearly places the burden on the board. Author's conversation with Michael Rebell (Jan. 14, 1983).
134. E.g., Conn. Agencies Regs. § 10-76h-2(f)(4).
The *Rowley* decision's affirmation of several of the major provisions of the Act, and its incorporation of the bulk of the prior cases' principles, provides other handles for extending *Rowley*'s impact to further issues relating to the handicapped. For example, it may be argued that the Court provided an opportunity — within or beyond the confines of the decision — to use a multifactor, ad hoc test for determining the meaning of appropriate education. The argument for employing such a standard within the confines of the decision is based upon the substantive ambiguity and latency in the majority's opinion.\textsuperscript{135} The argument for using it beyond the confines of the decision is that *Rowley* is distinguishable\textsuperscript{136} or otherwise not controlling.\textsuperscript{137}

In any event, a clue that the Court contemplated such an ad hoc approach is that the Court vigorously avoided establishing a single substantive standard, expressly limiting its analysis to Amy Rowley's situation.\textsuperscript{138} Stating that "a myriad of factors . . . might affect a particular student's ability to assimilate information presented in the classroom,"\textsuperscript{139} the Court emphasized that a single standard would be particularly inappropriate. For example, as the Court recognized, a self-sufficiency standard might make sense for a mildly handicapped child, whereas the same standard would be unreachable for one who is severely handicapped.\textsuperscript{140}

Some commentators have analogized this ad hoc approach to the best-interests-of-the-child standard that is typical of juvenile justice and custody.\textsuperscript{141} The decision of a federal district judge in Pennsylvania, who borrowed on his prior experience as a juvenile judge to uphold the private school placement of a deaf child, serves as a colorful illustration of this approach.\textsuperscript{142} To those who would decry the unpredictable subjectivity of this totality-of-the-circumstances test, it can be counterargued that at least this approach can evolve openly toward rational predictability, while the seemingly objective standard of the

\textsuperscript{135} See *supra* 99-124 and accompanying text. The concurrence explicitly embraced such a holistic approach. See *supra* notes 80-83 and accompanying text.

\textsuperscript{136} See *supra* notes 87-98 and accompanying text.

\textsuperscript{137} See *infra* notes 149-171 and accompanying text.

\textsuperscript{138} See *supra* note 93 and accompanying text.

\textsuperscript{139} 102 S. Ct. at 3047.

\textsuperscript{140} Id. The Court also pointed out that similar problems exist when other standards are used. See text accompanying notes 69-70.

\textsuperscript{141} See, e.g., Stotland & Mancuso, *supra* note 17, at AC163.

Rowley lower courts\textsuperscript{143} has been belied by its bewildering application. For example, the lower courts’ decision in Rowley was interpreted to support claims of plaintiff parents in some cases,\textsuperscript{144} but it was found not to apply in other cases,\textsuperscript{145} and supportive of the positions of school districts in still others\textsuperscript{146} without any detectable consistency and predictability. Thus, in one of the latter decisions, the Iowa Supreme Court cited the Second Circuit’s Rowley ruling on the way to this ad hoc conclusion: “Whether equality of education is actually realized depends on the nature of the handicap, availability of resources, and what effort is reasonable in the context of the individual case.”\textsuperscript{147}

IV. ALTERNATE BASES

A. State Statutes

The principal avenue for reaching a broader and higher standard beyond the confines of Rowley is the special education legislation in some states. For example, one of the previously mentioned cases\textsuperscript{148} that employed a multifactor approach, was decided under an Iowa statute requiring that special education students “shall, if reasonably possible, receive a level of education commensurate with the level provided each child who does not require special education.”\textsuperscript{149} This statutory standard resembles the lower courts’ Rowley standard reborn.

Thus the possibility of revitalizing the rigor of the lower courts’ view of Rowley in at least some areas of the country via a shift to state standards is the most probable, and perhaps the most powerful, course of related litigation in the near future. The pattern of this predicted movement is demonstrated by the flow of activity after Rodriguez\textsuperscript{150} in the analogous area of school finance. Although based on a shift from

\begin{enumerate}
\item[143.] See supra note 58 and accompanying text.
\item[146.] See, e.g., Bales v. Clarke, 523 F. Supp. 1366, 1370 (E.D. Va. 1981); Buchholtz v. Iowa Dep’t of Pub. Instruction, 315 N.W.2d 789, 793-94 (Iowa 1982).
\item[147.] Buchholtz, 315 N.W.2d at 793.
\item[148.] Id.
\item[149.] IOWA CODE ANN. § 281.2(2)(West Supp. 1982-83). This statute also requires school districts to provide “special education opportunities sufficient to meet the needs and maximize the capabilities of children requiring special education.” Id. For a related law review article, see Contemporary Studies Project, supra note 4.
\item[150.] See supra note 78 and accompanying text.
\end{enumerate}
federal to state constitutional, rather than statutory, provisions, the general result of the post-*Rodriguez* litigation should be the same after *Rowley*: state-to-state variation.151 As after *Rodriguez*, this variation will likely be based not only on differences in the language of the relevant state provisions,152 but also on a result-oriented reading of legislative history and other sources of interpretation.153

The raw material of state statutory provisions relating to the mandatory quality of special education varies widely. The language of "appropriate" education appears in approximately one half of the states, sometimes in combination with other standards such as "competent" (Alaska), "needs" (California and Delaware), "meaningful" (Nebraska), and "maximize" (Tennessee).154 Similarly, Maryland's statutory standard combines "compensatory" with "appropriate" in describing the free special educational services available to each handicapped child.155 Other statutory standards include maximum-type language in approximately six states,156 language relating only to needs in approximately nine states,157 and further miscellaneous formulations in approximately nine states.158

151. Approximately half of the twenty or so school finance cases since *Rodriguez* have been decided in favor of a more rigorous result, striking down the constitutionality of the applicable state statutes. *See*, e.g., *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1444-59 (1982).


153. *See*, e.g., *Weinstein*, *supra* note 79, at 994 ("Given the inconclusive results reached by attempted application of any equal protection or jurisprudential principle, it is not surprising that in the final analysis these questions are decided on public policy grounds, as shaped by political pressures.").


156. *E.g.*, *ARK. STAT. ANN.* § 80-2116 (1980) ("to meet the needs and maximize the capabilities"); *IDAHO CODE* § 33-2002 (1981) ("to develop to their fullest capacity"); *MASS. GEN. LAWS ANN.* ch. 71B § 2 (West Supp. 1981) ("to assure the maximum possible development of a child with special needs").


The argument for state judicial processing of this raw material into a more rigorous result is that, in contrast to situations where the state statutes conflict with the EAHCA and thus have been subordinated to its standards via the supremacy clause, state standards may go beyond those of the EAHCA without running afoul of *Rowley*. Examples of this approach already have surfaced at the hearing officer, state education agency (SEA) review, and judicial appeal levels. The *In re Brockton Public Schools* case mentioned above, again exemplifies the way to move beyond, as well as around, *Rowley*. In upholding the parents' claim for a private placement for their six-year-old deaf child, the hearing officer stated:

*Rowley* deals with a question of statutory interpretation of the Federal special education law, and is largely based upon an analysis of Federal Congressional history. Such analysis cannot presume to be a determinative reading of the Massachusetts' statute and its legislative history. Insofar as my conclusion in this case is based upon Massachusetts as well as Federal law, the *Rowley* decision is not controlling. Indeed the Court repeatedly stresses the paramount role of the States in the area of education.

At the SEA level, a review officer in a Michigan case ruled that the state statutory provision requiring that the child's program be "designed to develop the maximum potential" was more stringent than the federal statutory standard, and thus had to be separately addressed. Finding such decisions to merit an individual case-by-case approach based on multiple factors, the SEA review officer overturned a hearing officer decision which had ruled that the district must provide a cued-speech interpreting service during the child's part-time regular class placement.

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160. See *supra* notes 94-96 and accompanying text.


163. See *supra* text accompanying notes 135-42.

164. Similar to Amy Rowley, this deaf child had an IQ of 125. The *Rowley* decision was not specifically mentioned in the review officer's opinion. Although the standard seemed to be more rigorous than that in *Rowley*, the result reflects the pattern of result-oriented variation. See *supra* notes 151-153 and accompanying text.
Similarly siding with the school district, the Court of Appeals of North Carolina\(^{165}\) interestingly concluded that the state statutory provision for an "appropriate publicly supported education" intended the standard enunciated by the lower courts\(^{166}\) — and Justice White's dissent — in Rowley. Citing the maximum-type prefatory language in the state's statute,\(^{167}\) the North Carolina court reasoned as follows:

Although our statute was designed, in part, to bring the State in conformity with the federal statute . . . the Rowley Court's interpretation of Congress' intent does not control our interpretation of our General Assembly's intent. We believe that our General Assembly "intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible." Under this standard a handicapped child should be given the opportunity to achieve his full potential commensurate with that given other children.\(^{168}\)

Nevertheless, as another example of the standard's bewildering unpredictability, the Harrell court decided that the plaintiff parents did not meet this higher standard.

This post-Rodriguez-like resort to state standards beyond the federal minimum\(^{169}\) would seem to have at least seeds in the express as well as the implicit intent of the majority opinion in Rowley\(^{170}\) and in related decisions.\(^{171}\) Such a step may eventually lead, after appropriate


167. "[T]he policy of the State is to ensure every child a fair and full opportunity to reach his full potential . . . ." N.C. GEN. STAT. § 115C-106 (1981).

As a result of Rowley, some North Carolina legislators have moved to replace this language with the Supreme Court's definition of FAPE. See Educ. Week, Feb. 2, 1983, at 4, col. 1.

168. 293 S.E.2d at 690 (citation to Rowley dissent omitted). Cf. Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982) ("The State is given proper leeway to establish the appropriate educational standard.") (citation of EAHCA omitted). See supra text accompanying note 143.


170. See, e.g., supra note 65.

171. See, e.g., Battle v. Pennsylvania, 629 F.2d 269, 281 (3d Cir. 1980) ("[W]e are hopeful that the states, in cooperation with the Commissioner of Education, will establish acceptable guidelines to aid in that most difficult decision [of evaluating the substantive meaning of appropriate education]"), cert. denied, 452 U.S. 968 (1981).
innovation and experimentation, to revised standards at the federal level via legislation or regulations.

B. Section 504 of the Rehabilitation Act of 1973

Section 504 is broad civil rights legislation prohibiting discrimination against handicapped individuals involved in federally funded activities, including education. Although the section 504 regulation that also determines what constitutes an appropriate education was mistakenly relied upon in the district court decision in Rowley, section 504 suits by deaf students for the services of an interpreter at the post-secondary level point to an alternate approach for resuscitating the lower court standard. Although both section 504 and the EAHCA have been characterized as legislative reactions to Rodriguez on behalf of the handicapped, the differences in the scope of appropriate education under the two statutes have been recognized by commentators.


173. 29 U.S.C. § 794 (Supp. V 1982). The exact language provides: "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."


175. 45 C.F.R. § 84.33(b)(1)(i) (1982) ("designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.") See supra notes 57 and 61. A federal district court recently cited the majority's decision in Rowley to sustain the nondiscrimination - and to reject the comparability - obligations of the § 504 regulations. See Phipps v. New Hanover County Bd. of Educ., 551 F. Supp. 732 (E.D.N.C. 1982).


and the then Secretary of Health, Education, and Welfare. Other advantages of section 504 include a broader definition of "handicapped," the broader coverage of section 504's funding link and the availability of attorney's fees.

Bringing a Rowley-type action based on section 504 is not, however, without its problems. Although the predominant weight of judicial authority overwhelmingly favors implying a private right of action under section 504, courts have not agreed upon how to resolve other issues under the statute. Among these issues are: (1) whether such a suit requires exhaustion of administrative remedies and application of the related doctrine of primary jurisdiction, (2) whether this basis is preempted by the comprehensive statutory scheme of the EAHCA, and (3) whether monetary relief is available to individual plaintiffs under section 504 as an alternative to the remedy of terminating a

182. As recognized in Rowley, New Mexico is the only state that to date has declined federal funding under the EAHCA. 102 S. Ct. at 3039 (citing Brief for the United States as Amicus Curiae at 2 n.2). Thus, § 504 was the basis for the suit in New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (D.N.M. 1980), rev'd and remanded, 678 F.2d 847 (10th Cir. 1982).
184. Based on such decisions in at least eight circuits and its own decision in an analogous area (Cannon v. University of Chicago, 441 U.S. 677 (1979) (implied private right of action under Title IX)), it is very likely that the Supreme Court would find an implied private right of action under § 504. Various courts and commentators point toward this conclusion. See, e.g., Miener v. Missouri, 673 F.2d 969, 973 (8th Cir. 1982), cert. denied, 103 S. Ct. 215 (1982); Turillo v. Tyson, 535 F. Supp. 577, 584-85 (D.R.I. 1982); Note, supra note 177, at 180 n.57. But see Hyatt, supra note 174, at 14-23. In contrast to § 504, the EAHCA expressly provides a private right of action.
school district's federal funding. Emerging are the overlapping issues of the degree of intent required and the scope of relief available under section 504.

C. Other Approaches

Other legal bases that do not seem as robust or rigorous as the state statutory and section 504 approaches but nevertheless merit mentioning are section 1983 and federal constitutional provisions. Although section 1983 offers possible advantages in terms of exhaustion, damages, and attorney's fees, at this point "uncertainty surrounds these generalities" because section 1983 may be regarded as merged into the EAHCA and section 504 as exclusive remedies. The

187. Characterizing the determination of this question as "indeed a 'delphic task'" and citing the lower courts as being in "hopeless disarray," one district court recently concluded that Congress intended only declaratory and injunctive relief. See Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 470-71 (S.D. Tex. 1982). But, as the Ruth Ann M. decision recognized, a coalescing majority of courts have taken the view that plaintiffs have a limited right to monetary relief for reimbursement of costs under exceptional circumstances, such as those interpreted under the EAHCA in Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir. 1981) (serious health risk to child or bad faith by school district). See Ruth Ann M., 532 F. Supp. at 475. For decisions that have permitted such damages, see Miener v. Missouri, 673 F.2d 969, 979 (8th Cir. 1982), cert. denied, 103 S. Ct. 215 (1982); Department of Educ. v. Katherine D., 531 F. Supp. 517, 529 (D. Ha. 1982); Gregg B. v. Board of Educ., 535 F. Supp. 1333, 1339-40 (E.D.N.Y. 1982). For decisions that have rejected damages under this view, see Manecke v. School Bd. of Pinellas County, 553 F. Supp. 787 (M.D. Fla: 1982); Colin K. v. Schmidt, 536 F. Supp. 1375, 1388-89 (D. Colo. 1982); Reine man v. Valley View Community School Dist. #365-U, 527 F. Supp. 661, 664-65 (N.D. Ill. 1981).

188. See, e.g., Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982); Miener v. Missouri, 673 F.2d 969, 980 (8th Cir. 1982), cert. denied, 103 S. Ct. 215 (1982); Larry P. v. Riles, 495 F. Supp. 926, 979-80 (N.D. Cal. 1979); New Mexico Ass'n of Retarded Citizens v. New Mexico, 495 F. Supp. 391, 398 (D.N.M. 1980), rev'd, 678 F.2d 847, 854 (10th Cir. 1982).


190. The advantages and limitations of this seemingly superfluous basis in relation to the EAHCA and § 504 are discussed comprehensively in Hyatt, supra note 174, at 24-29.


primary problem in the constitutional area is traditional abstention in light of the applicable federal statutes. Other nonetheless difficult problems also are present, including: the limited utility of due process for quality as compared to access issues, the difficulty of establishing a suspect class for equal protection purposes, and the problem of formulating a quality standard under equal protection beyond that of minimal adequacy.

Other suggestions have included the imposition of burden-shifting approaches and the development of national standards. These approaches can, at best, be considered ancillary to the gradual growth of a multifactor standard of appropriate education.

**Conclusion**

At first reading, the Supreme Court's decision in *Rowley* seems to
sound a dramatic retreat, if not all-out defeat, for the advocates of handicapped students. Upon closer examination, however, the majority’s opinion provides the elements for the common-law evolution of a multifactor test for determining the meaning of “appropriate education.” This test might include such factors as the nature and severity of the handicap, the level of local resources and results, and the evaluations by educational experts and — upon judicial review — by the impartial hearing officer.

Thus, rather than ignoring the rights of handicapped children, in crafting a narrow and ambiguous decision the Court provided room for full and timely interpretation. An agenda-setting\textsuperscript{201} case like \textit{Rodríguez}, \textit{Rowley} invites immediate experimentation and variation at the state level, based primarily on state special education statutes. It also allows eventual expansion and consolidation at the federal level by legislative, administrative, or judicial action.\textsuperscript{202}

\begin{footnote}{\textsuperscript{201} Cf. \textit{Rebell}, \textit{supra} note 8, at 344 (“The goal of assuring ‘appropriate education,’ like the goal in other contexts of providing ‘equal opportunity,’ provides no concrete benchmark for assessing progress. Rather, it provides a ‘stimulus’ around which those having a stake in social policy processes can ‘carry on politics’ by another means.”) (footnote omitted). \textsuperscript{202} Cf. \textit{Commissioner v. Duberstein}, 363 U.S. 278, 290 (1960) (“This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area . . . . If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter.”).}
