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Schools - Nature of the Right to Instruction - The Substantive Requirements of Free Appropriate Public Education under the Education for All Handicapped Children Act of 1975

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SCHOOLS—NATURE OF THE RIGHT TO INSTRUCTION—THE SUBSTANTIVE REQUIREMENTS OF "FREE APPROPRIATE PUBLIC EDUCATION" UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

The parents of Amy Rowley, a deaf student in a public elementary school,[1] alleged that the school board had denied Amy[2] a "free appropriate public education,"[3] which the Education for All Handicapped Children Act of 1975 guarantees to all handicapped children.[4] The plaintiffs requested that the school provide Amy with the services of a qualified sign language interpreter in all of her academic classes.[5] The school

1. Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982). Amy Rowley was in second grade at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, New York, when her parents filed the present suit on her behalf. Rowley v. Board of Educ., 483 F. Supp. 528, 530-31 (S.D.N.Y.), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 102 S. Ct. 3034 (1982).

2. 102 S. Ct. at 3039. Despite her handicap Amy Rowley retained minimal residual hearing and had become an excellent lip reader. *Id.*

3. *See* 20 U.S.C.A. § 1401(18) (West 1978). The Education for All Handicapped Children Act of 1975 defines "free appropriate public education" as follows:

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

Id.

4. *Id.* § 1412(1). Section 1412 states in part: "In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met: (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education." *Id.*

5. 102 S. Ct. at 3039. The school provided Amy Rowley with a sign language interpreter during a two week experimental period in her kindergarten year. The interpreter reported that Amy did not

administration denied that request[6] and approved an Individualized Education Plan[7] (IEP) for the child's first grade year that did not include such services.[8]

A local independent examiner upheld the school administration's decision.[9] The parents unsuccessfully appealed to the New York Commissioner of Education.[10] After a review of these administrative decisions,[11] the federal district court entered judgment for the plaintiff.[12] The Court of Appeals for the Second Circuit affirmed.[13] The United States Supreme Court granted certiorari and *held* that the provision of personalized instruction with sufficient support services to permit the handicapped child to

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need his services in that class because her teacher was extraordinarily sensitive to Amy's needs and Amy resisted the interpreter's efforts. Rowley v. Board of Educ., 483 F. Supp. at 530.

6. 102 S. Ct. at 3039. The administration decided not to provide an interpreter after consulting with the district's Committee on the Handicapped, which had received evidence from Amy's parents, her teacher, and others familiar with her academic and social progress. *Id.*

7. 20 U.S.C.A. § 1401(19) (West 1978). Section 1401(19) defines "individualized education program" in part as follows:

> [A] written statement for each handicapped child developed in a meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, [and] the parents or guardian of such child . . . .

Id.

8. 102 S. Ct. at 3039. Amy's first grade IEP provided for placement in a regular classroom with the provision of a special FM wireless hearing aid, which could amplify the sound of the teacher's voice to assist Amy's limited hearing capacity. In addition, the plan provided special instruction from an instructor for the deaf for one hour each day and from a speech therapist for three hours each week. *Id.*

9. *Id.* at 3040. Under the Act parents of handicapped children may bring their complaints with respect to the child's identification, evaluation, and placement, or with respect to the provision of a free appropriate public education to the child, before an impartial due process hearing at the local level. 20 U.S.C.A. § 1415(b)(2) (West 1978).

10. 102 S. Ct. at 3040. The Act provides that following a local due process hearing "any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review." 20 U.S.C.A. § 1415(c) (West 1978).

11. 102 S. Ct. at 3040. The Act provides that any party aggrieved by the decision reached in administrative appeal who has exhausted the right to further administrative appeal shall have the right to bring a civil action with respect to the complaint in either a state or federal court. 20 U.S.C.A. § 1415(e)(2) (West 1978).

12. Rowley v. Board of Educ., 483 F. Supp. 528, 529 (S.D.N.Y. 1980). In defining "appropriate education," which the Education for All Handicapped Children Act of 1975 guarantees, the court rejected standards based on merely adequate education or an education to enable the child to attain his full potential. *Id.* at 534 (construing 20 U.S.C.A. § 1412(1) (West 1978)). Rather, the federal district court chose a standard between the two extremes that "would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children." 483 F. Supp. at 534. The district court's standard of "appropriate education" could be applied by comparing the performance of a handicapped student with that of a non-handicapped student of comparable ability. *Id.* The district court ruled that the school should provide Amy with the services of a sign language interpreter because it found that "Amy's academic education would be more 'appropriate' with than without an interpreter." *Id.* at 536.

13. Rowley v. Board of Educ., 632 F.2d 945, 948 (2d Cir. 1980). Affirming the district court ruling, the circuit court cautioned that its holding was narrow in scope and limited to the facts of the case. *Id.*

benefit educationally from that instruction satisfied the requirement of "free appropriate public education."[14] *Board of Education v. Rowley*, 102 S. Ct. 3034 (1982).

Prior to the sixteenth century teachers made little effort to educate deaf children since society classified the deaf as mentally retarded.[15] In the eighteenth century public education of the deaf began in Germany and France.[16] The French school of deaf education emphasized a manual approach that involved hand signals.[17] The German school tended to emphasize oral instruction that relied on the use of speech.[18] Advocates of these two diverse approaches transplanted the sharp division in deaf educational methodology to the United States in the nineteenth century,[19] and it has persisted to the present.[20]

Deaf children in public schools face special problems not encountered by other handicapped children.[21] Because deafness is not a visible handicap, there is a tendency for educators and the

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14. Board of Educ. v. Rowley, 102 S. Ct. 3034, 3049 (1982). The Court further held:

> [S]uch 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.

Id.

15. Large, *Special Problems of the Deaf Under The Education for All Handicapped Children Act of 1975*, 58 WASH. U.L.Q. 213, 223 (1980). Statements attributed to Aristotle that persons born deaf became incapable of reason only strengthened the popular conviction that the deaf were uneducable. *Id.* One of the earliest efforts to educate the deaf began during the 16th century when a monastery of San Salvador in Spain established a school to educate a select group of wealthy deaf pupils. *Id.*

16. *Id.* at 224. The first teachers of the deaf were trained in Spain, but it was in France and Germany that the first public education of the deaf, including the poor, began. *Id.*

17. J. PAHZ & C. PAHZ, TOTAL COMMUNICATION 15-18 (1978). Abbe de l'Epee, a French priest who established the first free school for deaf students in Paris in 1755, was the originator of the French school of deaf education. De l'Epee used sign language based on a single-handed alphabet as the medium of communication for education of the deaf. The French priest trained a cadre of teachers who carried on his approach to education of the deaf. This sign language or manual method became the standard approach in France and wherever the influence of the French method traveled. *Id.*

18. *Id.* at 18-20. In Germany Samuel Heinicke developed a method of education for the deaf that emphasized speech and speech reading. This oral approach discouraged the use of sign language as harmful to the education of the deaf. The oral approach became the standard German method. *Id.*

19. Large, *supra* note 15, at 226-27. Thomas Gallaudet, a minister who had studied education of the deaf in France, set up the first permanent school for deaf children in the United States at Hartford, Connecticut, in 1817. Gallaudet used the manual method of communication, and his pioneering work gave the manual approach a firm head start at the many public schools for the deaf that sprang up in the following years. Manualism, however, did not remain unchallenged in the United States. After visiting European schools that employed the oral approach in 1843, Horace Mann returned to the United States as a strong apostle of oralism. His influence, along with the advocacy of Alexander Graham Bell, helped to popularize the use of oral education for the deaf in the United States. *Id.*

20. *Id.* at 229. The battle over methodology in education of the deaf has persisted at least in part because no method has worked sufficiently well to gain the uncritical support of educators. *Id.*

21. *Id.* at 238. The special problems of deaf children presently are of greater importance because of the move toward mainstreaming handicapped children in regular classrooms. *Id.* at 244-45.

public not to recognize it as a major handicap.[22] As a result of this lack of recognition the educational system has frequently neglected to provide the time and resources needed to help deaf children compensate for their handicap.[23] The invisible nature of deafness may lead to neglect of the special needs of the deaf child mainstreamed in a regular classroom.[24] This neglect can occur because the unusually quiet but normal-appearing deaf child is likely to lose out in the competition for the teacher's time and attention to other more visibly handicapped children and to unhandicapped children.[25]

Academic education depends on the communication of ideas through the vehicle of spoken or written language.[26] Since deaf children often have difficulty acquiring the use of language, the handicap may seriously impede or block their academic education.[27] Too often teachers and peers have labeled such children slow learners or mentally retarded and have treated them accordingly.[28]

A deaf child in a regular classroom who does not have the use of language becomes socially isolated and thereby loses one of the major advantages of mainstreaming.[29] While specialized education has become more available to handicapped children in recent decades, in 1975 nearly one-half of the estimated eight million handicapped children in the United States were not receiving specialized education.[30]

Two landmark federal court cases in 1971 and 1972 provided

22. *Id.* at 238. It is commonly thought, for example, that blindness is a more difficult handicap to overcome than deafness. This view overlooks the fact that for most white collar professionals the ability to communicate verbally is more important than the ability to see. *Id.*

23. *Id.* at 248. Actual experience with mainstreaming of handicapped children has not always achieved the hopes of its advocates. To have a reasonable chance of success, mainstreaming requires changes in class size, teacher preparation, and provision of special support services. *Id.* at 246.

24. *Id.* at 248. The deaf child's educational deficiency may not be apparent in the lower grades in which learning is more visually oriented. The deficiency will more likely appear in the fourth or fifth grades when the child cannot keep up with the reading and writing demands because of a deficiency in language development. *Id.*

25. *Id.*

26. *Id.* In the education process, the ability to communicate is more important than the ability to see, touch, or walk. The infirmities of the blind or paraplegic child are less crucial to the learning process than those of the deaf child. *Id.*

27. J. BIRCH, HEARING IMPAIRED CHILDREN IN THE MAINSTREAM 11-13 (1975). At least five factors affect the educability of the hearing impaired child: the degree of the hearing defect, the degree of hearing impairment within the speech range, the age of onset of the hearing loss, the child's intelligence, and the instruction the child received in his very early years. *Id.*

28. *Id.* at 13-14. Children who are hearing impaired are frequently thought to be mentally retarded. This type of inaccurate assessment may lead to serious curtailment of the child's educational opportunities. *Id.*

29. Large, *supra* note 15, at 249-50. The deaf child is less likely than other handicapped children to integrate socially in a class. *Id.*

30. S. REP. NO. 168, 94th Cong., 2d Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432. In 1975 only 71% of the deaf children and a mere 18% of the hard-of-hearing children received specialized education. *Id.*

the major impetus toward the legal guarantee of specialized public education to all handicapped children.[31] *Pennsylvania Association for Retarded Children v. Pennsylvania*[32] and *Mills v. Board of Education*[33] were significant cases in which federal district courts found a constitutional basis for guaranteeing the right to a suitable public education for handicapped children.

The plaintiffs in *Pennsylvania Association for Retarded Children*[34] alleged that Pennsylvania had denied them due process and equal protection of the law[35] under Pennsylvania statutes that allowed officials to exclude retarded children classified as uneducable from public schools. While the federal district court resolved the case by enforcing a consent decree, it also discussed and commented favorably on the plaintiffs' claims.[36] Although *Pennsylvania Association for Retarded Children* did not provide binding precedent on the question of the constitutional rights of handicapped children to public education, the court's extensive and detailed decree did provide the basis for later court decisions and legislation.[37]

The federal district court in *Mills v. Board of Education*[38] ruled that the school district's exclusion of handicapped children from

31. *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (equal protection requires provision of public education to mentally retarded children); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) (due process requires provision of public education to handicapped children on an equal basis with nonhandicapped children).

32. 334 F. Supp. 1257 (E.D. Pa. 1971).

33. 348 F. Supp. 866 (D.D.C. 1972).

34. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971). The federal district court certified the suit as a class action on behalf of all mentally retarded persons in Pennsylvania to whom the state had denied or would deny access to a free public education while under the age of 21. *Id.*

35. *See* U.S. CONST. amend. XIV. This amendment states in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

36. 334 F. Supp. at 1259. The court found that all mentally retarded persons can benefit from education and training. *Id.* With respect to the plaintiffs' equal protection claim the court commented: "Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training." *Id.*

37. *Id.* at 1260. The court ordered Pennsylvania "to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity" with mainstreaming such a child in a regular classroom the preferred approach. *Id.* The court also ordered that the state provide notice and due process hearings before a change in the educational placement of any retarded child. *Id.* at 1259.

38. 348 F. Supp. 866 (D.D.C. 1972). The District of Columbia Board of Education had excluded the original plaintiffs, seven black children, from public schools because of various alleged mental and emotional deficiencies. Mills v. Board of Educ., 348 F. Supp. 866, 870 (D.D.C. 1972). The *Mills* court certified the suit as a class action on behalf of all school aged residents who were eligible for free public education but who had been or would be excluded from such education. *Id.* Because the defendants admitted that they had affirmative duties to the plaintiffs that they had failed to perform, the court ordered summary judgment for the plaintiffs. *Id.* at 871.

access to public education violated equal protection of law, which the fifth amendment's due process clause guarantees.[39] The *Mills* court also ruled that the school district's failure to provide the handicapped plaintiffs with adequate hearings and periodic review with respect to their educational status violated their right to procedural due process.[40] The *Mills* court held that the school district's inadequate finances could not excuse the denial of educational rights to handicapped children.[41] If existing funds were inadequate, "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."[42]

The *Pennsylvania Association for Retarded Children* and *Mills* cases stirred hopes among advocates of rights for the handicapped that a constitutional guarantee of appropriate specialized education for all handicapped children would gain judicial acceptance.[43] The Supreme Court partially dashed those hopes in 1973 when it held in *San Antonio Independent School District v. Rodriquez*[44] that education was not a constitutionally protected fundamental right.[45] The *Rodriquez* Court found that the equal protection clause did not

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39. *Id.* at 875. The *Mills* court adopted the reasoning of *Hobson v. Hansen* to find that "the doctrine of equal educational opportunity — the equal protection clause in its application to public school education — is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment." *Mills,* 348 F. Supp. at 875 (quoting Hobson v. Hansen, 268 F. Supp. 401, 493 (D.D.C. 1967)). In applying the equal protection component of the due process clause, the *Mills* court found that denying the plaintiffs a publicly supported education while providing such education to other children violated the due process clause. 348 F. Supp. at 875. *See* U.S. CONST. amend. V. The fifth amendment states in part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." *Id.*

40. 348 F. Supp. at 875. In part the *Mills* court found that many plaintiffs and their class are expelled or suspended from schools or instruction without any prior hearing or subsequent review. *Id.* The *Mills* court held that due process requires a hearing prior to exclusion from school or classification into a special program. *Id.* The court ordered the District of Columbia to give advance notice to parents or guardians and, if there is an objection, to provide adequate hearings whenever handicapped children are transferred, given a new placement, or denied a requested placement. *Id.* at 880.

41. *Id.* at 876. The *Mills* court ordered the District of Columbia to provide to each child of school age a suitable publicly-supported education regardless of the child's mental, physical, or emotional disability or impairment. *Id.* at 878.

42. *Id.* at 876. The *Mills* court concluded that the inadequacies of the District of Columbia Public School System could not be permitted to bear more heavily on the handicapped child than on the normal child. *Id.*

43. *See* Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate,* 1976 U. ILL. L.F. 1016, 1023-63 (1976) (an examination of various constitutional theories and judicial precedents for establishing the right to a free public education for handicapped children).

44. 411 U.S. 1 (1973). Plaintiffs in *Rodriquez* challenged the Texas system of financing public schools based partially on the proceeds of an *ad valorem* tax on property within each school district. The system resulted in unequal per pupil expenditures for public education between wealthier and poorer districts. As residents of a poor district, the plaintiffs claimed that the school finance system violated their right to equal protection. San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 4-6 (1973).

45. *Id.* at 35. *See* Roos, *The Potential Impact of Rodriquez on Other School Reform Litigation,* 38 LAW & CONTEMP. PROBS. 566, 567 (1973) (author maintains that the holding that education is not a fundamental interest was the greatest loss to education reform advocates).

require equal expenditure of public funds or provision of qualitatively equal education to children attending schools in the same state.[46]

The Court implied, however, that an absolute deprivation of public education might trigger judicial intervention.[47] The *Rodriquez* decision and the passage of the Education for All Handicapped Children Act of 1975 by Congress have directed attention away from a constitutional basis and toward a statutory basis for establishing the right of handicapped children to an appropriate public education.[48]

In *Board of Education v. Rowley*,[49] the subject of this Comment, the Supreme Court for the first time set out to provide an operational definition of "free appropriate public education," which the Education for All Handicapped Children Act of 1975 requires.[50] In addition, the Court sought to define the extent of the review powers conferred on state and federal courts under the Act.[51] The Court looked first to the face of the Act for an operational definition of "free appropriate public education."[52] While admitting that the statutory definition was more cryptic than clear,[53] the Court reasoned that the definition provided by the Act was the best indicator of legislative intent.[54]

The *Rowley* Court noted that the language of the statute lacked a substantive standard prescribing the level of education that public schools must provide to handicapped children.[55] The Supreme Court rejected the standard set forth by the lower courts that required states to maximize the potential of handicapped children

46. 411 U.S. at 24. The Court in *Rodriquez* held that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense." *Id.*

47. *See id.*

48. *See* Large, *supra* note 15, at 219.

49. 102 S. Ct. 3034 (1982).

50. Board of Educ. v. Rowley, 102 S.Ct. 3034, 3040 (1982) (construing 20 U.S.C.A. § 1401(18) (West 1978)).

51. 102 S. Ct. at 3040.

52. *Id.* at 3041-42.

53. *Id.* The Court criticized the district court's finding that "the Act itself does not define 'appropriate education,' " but leaves the responsibility of giving content to the appropriate education requirement "to the courts and hearing officers." *Id.* (quoting Rowley v. Board of Educ., 483 F. Supp. 528, 533 (S.D.N.Y. 1980)).

54. 102 S. Ct. at 3041-42. For the statutory definition of "free appropriate public education," see *supra* note 3. Section 1401(16) defines "special education" 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.A. § 1401(16) (West 1978). Section 1401(17) defines "related services" as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education. . . ." *Id.* § 1401(17).

55. 102 S. Ct. at 3042.

"commensurate with the opportunity provided to other children."[56] Based on its examination of the Act's definitions the Court concluded that if schools provided personalized instruction with sufficient supportive services to permit the child to benefit from the instruction and satisfied the other items on the definitional checklist, the child was receiving the "free appropriate public education," which the Act required.[57]

The *Rowley* Court examined the Act's legislative history to determine the intended meaning of "free appropriate education."[58] The Supreme Court found that the major concern of Congress was to provide access to public education for the many handicapped children that were excluded or misassigned.[59] The Court held that "in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."[60]

Noting that the *Pennsylvania Association for Retarded Children* and *Mills* cases had provided a major impetus for passage of the Act, the *Rowley* Court asserted that neither case required any particular substantive level of education.[61] In the Court's view both cases relied primarily on procedural safeguards in formulating personalized educational programs for the handicapped.[62] Since these two cases played a seminal role in the development of the Act, the Court reasoned that Congress intended to incorporate the major principles of these cases into the Act.[63]

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56. *Id.* (quoting *Rowley,* 483 F. Supp. at 534). The New York federal district court set forth its standard of "appropriate education" as one that would give each child "an opportunity to achieve his full potential commensurate with the opportunity provided to other children." *Rowley,* 483 F. Supp. at 534. *See* Note, *Enforcing The Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103, 1125-26 (1979) (proposing a standard that would require "service aimed at developing the child's intellectual capacity to the same degree that the school sought to develop the 'normal' abilities of its nonhandicapped students").

57. 102 S. Ct. at 3042. The Court provided a "definitional checklist" requiring "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." *Id.* at 3041-42.

58. *Id.* at 3042-46.

59. *Id.* at 3043. For Congressional findings on the status of education for handicapped children, see S. REP. No. 168, 94th Cong., 2d Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432.

60. 102 S. Ct. at 3043. The Court summarized its findings on congressional intent with respect to a substantive educational standard required by the Act: "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." *Id.*

61. *Id.* at 3044. For a review of the relevant findings of the *Pennsylvania Ass'n for Retarded Children* and *Mills* cases, see *supra* notes 31-42 and accompanying text.

62. 102 S. Ct. at 3044. *See* Keim, *The Education of All Handicapped Children Act of 1975,* 10 U. MICH. J.L. REF. 110, 134-36 (1976) (points out problems with judicially formulated substantive educational standards and favors the procedural path to adequate education).

63. 102 S. Ct. at 3044.

From its examination of the Act's legislative history, the Court concluded that Congress had equated the provision of some specialized educational services with "appropriate education."[64] The Court interpreted the congressional finding that of the more than eight million handicapped children "only 3.9 million such children are receiving appropriate education" to mean that Congress intended to equate the provision of any specialized education with an "appropriate education."[65] From this premise the *Rowley* Court reasoned that Congress required no more than personalized education to meet the Act's standard.[66]

The Act does not impose a standard of educational equality for the handicapped, the Court argued, because such a standard would be unworkable and unmeasurable.[67] In the Court's view, the mere equal provision of services to handicapped and nonhandicapped would fall short of the Act's requirement.[68] A standard based on maximizing each handicapped child's potential, however, would exceed the intent of Congress.[69] The Court's analysis found no equal educational opportunity requirement in the *Pennsylvania Association for Retarded Children* and *Mills* cases.[70] The Court noted that in two previous cases it had rejected the argument that the equal protection clause required equal expenditure on the education of each child.[71]

The *Rowley* Court found that Congress had intended that a "free appropriate public education" include a requirement to confer some educational benefit upon the handicapped child.[72] Acknowledging the difficulty of formulating a general standard of

64. *Id.* at 3045-46. Observing that the Senate report had characterized the 3.9 million children receiving specialized education as "receiving an appropriate education," the Supreme Court concluded that Congress had viewed children "served" by specialized education as receiving an "appropriate education." *Id.* (quoting S. REP. No. 168, 94th Cong., 2d Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432).

65. 102 S. Ct. at 3045-46.

66. *Id.* at 3046. The *Rowley* Court found that by characterizing handicapped children who were "served" as children "receiving an appropriate education," the Senate and House reports indicated that Congress believed that a school district provides an appropriate education when it provides personalized educational services. *Id.*

67. *Id.* at 3047. In the Court's view, "[t]he theme of the Act is 'free appropriate public education,' a phrase which is too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." *Id.*

68. *Id.* In rejecting an equality-based standard the Court asserted that "to speak in terms of 'equal' services in one instance gives less than what is required by the Act and in another instance more." *Id.*

69. *Id.*

70. *Id.* The *Rowley* Court noted that *Mills* and *Pennsylvania Ass'n for Retarded Children* held simply that handicapped children may not be excluded entirely from public education and that the decisions did not mandate absolute equality of opportunity regardless of capacity. *Id.*

71. *Id.* For a discussion of the Court's holding that the equal protection clause does not require equal expenditure on each child's education, see *supra* note 46 and accompanying text.

72. 102 S. Ct. at 3048.

educational benefit, the Court declined to establish such a test.[73] The Supreme Court found, however, that for a handicapped child mainstreamed in a regular classroom, the school's system of grading and advancement constitutes an important factor in determining educational benefit.[74]

The *Rowley* Court concluded that a state satisfies the requirement of a "free appropriate public education" when it provides a handicapped child with the following elements. First, the state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. Second, the state must provide instruction and services that are at public expense, that meet the state's educational standards, that approximate the grade levels used in the state's regular education, and that comport with the child's IEP. Third, the state must provide an IEP and personalized instruction that are in conformance with the Act's requirements and that are reasonably calculated to enable a child who is mainstreamed in a regular classroom to achieve passing marks and to advance from grade to grade.[75]

The Court next turned to the second issue raised by the *Rowley* case: the role of state and federal courts in exercising the review powers granted by section 1415 of the Education for All Handicapped Children Act.[76] While Congress intended the authority of courts to stretch beyond mere review of state compliance with the Act's procedural requirements, in the Court's view Congress had not intended that courts have a free hand to impose substantive standards of review not derived from the Act itself.[77] The *Rowley* Court reasoned from the Act's procedural

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73. *Id.* at 3049. Rather than establishing a general standard of educational benefit, the Court chose to confine its inquiry to the specifics of the case before it. *See id.* The *Rowley* Court found that the plaintiff had received substantial specialized instruction and related services and had performed above average in regular classrooms. *Id.*

74. *Id.* The Court clarified its position on its standard of educational benefit for mainstreaming handicapped children in the following note:

> 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 Furnace Woods school administrators, to be dispositive.

Id. n.25.

75. *Id.* at 3049.

76. *Id.* at 3050. The scope of judicial review under the Act is set forth in § 1415(e) (2), which states in part: "In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C.A. § 1415(e) (2) (West 1978).

77. 102 S. Ct. at 3050-51. The Supreme Court warned that the provision that a reviewing court

specificity and substantive imprecision that adequate compliance with the procedures prescribed would in most cases assure much, if not all, of what Congress intended in the way of substantive content in an IEP.[78]

Following its discussion of judicial review powers, the Court held that in suits under section 1415(e) (2) courts should confine their inquiry to two issues: whether the state has complied with the procedures set forth in the Act[79] and whether the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits.[80] The Court held that when these two requirements are met the state has complied with the obligations imposed by Congress and courts can require no more.[81] Finally, the Court cautioned lower courts against imposition of their preferences in educational methodology upon the states.[82]

Thus, the Court in *Rowley* held that a state satisfies the Education for All Handicapped Children Act's requirement of a "free appropriate education" when it provides personalized instruction with sufficient support services, in conformance with a procedurally-correct IEP, to permit the child to benefit educationally from the instruction.[83] The *Rowley* Court also held that a court acting under section 1415(e) (2) of the Act should limit its inquiry to procedural compliance with the Act and to determination that the IEP is reasonably calculated to enable the

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must base its decision on the preponderance of evidence did not allow the courts to substitute their own notions of sound educational policy for those of school authorities. *Id.* at 3051.

78. *Id.* at 3050. Noting that the judicial review powers are found in § 1415 of the Act, entitled "Procedural Safeguards," the Court found this placement an indication of legislative intent to emphasize judicial review of procedural compliance. *Id.*

79. *Id.* at 3051. The Court delineated the extent of the procedural inquiry in the following note:

> This inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401(19).

Id. n.27.

80. *Id.* at 3051. The Court clarified its educational benefit standard in the following note: "When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Id.* n.28.

81. *Id.* at 3051.

82. *Id. See also* Large, *supra* note 15, at 229-38 (comparing various methods of educating the deaf and noting the controversy between adherents of the various methods).

83. 102 S. Ct. at 3052. Noting that the courts below had failed to find any procedural noncompliance, the *Rowley* Court held that "the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act." *Id.* The Court further held that because Amy was receiving personalized instruction and related services calculated to meet her educational needs, the Act did not require the provision of a sign language interpreter. *Id.* The Court reversed the decision of the appeals court and remanded the case for further proceedings consistent with the opinion. *Id.*

child to receive educational benefits.[84]

Since the *Rowley* case is the first in which the Court has interpreted any provision of the Education for All Handicapped Children Act of 1975,[85] and since the *Rowley* decision set forth some rather specific guidelines to schools and courts, this decision may have far-reaching implications for public education of handicapped children. It is too early to say with any certainty what these implications may be, but some guarded speculation may be in order.

In formulating a fairly restrictive standard of "appropriate education," the Court foreclosed claims that the Act requires specific services and methods of instruction beyond those required to permit the child to benefit educationally.[86] This does not mean that existing federal, state, and school system substantive standards for education of handicapped children will automatically decline.[87] The maintenance and improvement of those standards, however, probably now will depend to a greater extent on the political process than on judicial intervention.

The *Rowley* decision appears to limit the range of discretion available to courts in their review of disputes arising under the "appropriate education" standard of the Act.[88] The *Rowley* standard seems to limit judicial inquiry to questions concerning procedural compliance and the adequacy of an IEP to confer educational benefit in a particular case.[89] Courts may not substitute their judgments in educational methodology for those of states and schools.[90] Since the Supreme Court rejected any single measurable

84. *Id.* at 3051. The dissenters found the majority's standard for an "appropriate education" inadequate. *Id.* at 3054-56 (White, Brennan, & Marshall, J.J., dissenting). While agreeing that the Act lacks a good substantive standard of "appropriate education," the dissenters argued for a broad interpretation of that term, since an intent to restrict the meaning of the term was not apparent from the face of the statute or its legislative history. *Id.* at 3054. In the dissenters' view, the legislative history revealed an intent "to give handicapped children an educational opportunity commensurate with that given other children." *Id.* at 3055. The dissenters found the Court's standard of "appropriate education" so inadequate that it apparently would be sufficient "for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service." *Id.* The dissenters also challenged the Court's standard of judicial review as too restrictive and not in keeping with the intent of Congress. *Id.* at 3056. Congress intended the courts to undertake a substantive review and to consider the issues under review de novo, instead of relying on the conclusions of the state agency, according to the dissenters. *Id.* Also, in the dissenters' view, courts must inevitably make judgments under the Act as to whether a given educational method is "appropriate" for a particular handicapped child. *Id.* at 3057.

85. *Id.* at 3041.

86. *See id.* at 3049.

87. *See* Stotland & Mancuso, *The Aftermath of Rowley — Business As Usual*, 1982 ED. HANDICAP. L. REP., July 23, 1982, at AC 159. The commentator believes that the result of *Rowley* may be unfortunate for some exceptionally bright handicapped children, but that its long-term impact on the majority of handicapped children is limited.

88. *See* 102 S. Ct. at 3051.

89. *See id.*

90. *Id.* at 3052.

standard of educational appropriateness for all handicapped children, courts will need to consider the totality of factors in deciding the appropriateness question in each individual case.

The *Rowley* decision did not specifically describe the minimum level of educational benefit required by the Act.[91] While normal progress will be an important criterion of educational benefit for mainstreamed children, it will not be the only factor considered.[92] Since the Supreme Court declined to formulate a standard of minimum educational benefit required by the Act, courts must decide the minimum benefit question on a case by case basis with little guidance from the Supreme Court.

In a 1974 decision the Supreme Court of North Dakota in *In the Interest of G.H.*[93] held that the Constitution of North Dakota guarantees "equal educational opportunity" to a handicapped child.[94] The court also found such a right under the equal protection clause of the United States Constitution.[95] The court was not called upon to provide a substantive standard of "equal educational opportunity" for handicapped children, and it did not offer such a standard.[96] It is, however, readily inferable from the facts of the case that the standard of equal educational opportunity includes specialized education and supportive services.[97] It is possible that the North Dakota Supreme Court may in a future case adopt substantive standards to implement the right of equal educational opportunity for handicapped children under the North Dakota Constitution.

With its decision in *Rowley* the United States Supreme Court has reaffirmed the Act's procedural guarantees and the right to education reasonably calculated to confer educational benefit. In

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91. *See id.* at 3049. In declining to formulate a standard of educational benefit, the Court acknowledged the difficulty of establishing a single general standard. *Id.*

92. *See id.* at 3049.

93. 218 N.W.2d 441 (N.D. 1974). In *Interest of G.H.* a local school district was ordered to pay the educational costs of a handicapped child who was residing and receiving specialized education outside of the district on the theory that if the district had the facilities to educate the child, she would have continued to live there. In the Interest of G.H., 218 N.W.2d 441, 448 (N.D. 1974).

94. *Id.* at 447. The North Dakota Supreme Court asserted that denial of equal educational opportunity violates the equal protection provision and the due process and privileges and immunities clauses of the North Dakota Constitution. *Id. See* N.D. CONST. art. I, §§ 12, 21, 22.

95. 218 N.W.2d at 447. Viewing the child's multiple handicaps as placing her in an inherently suspect classification, the court held that "depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy and sex." *Id. See* U.S. CONST. amend. XIV.

96. 218 N.W.2d at 447. The court was not called on to set forth substantive educational standards because the child was receiving specialized education and related services at a school for crippled children. *Id.*

97. *See id.* The handicapped child in question was receiving specialized education in a special school for crippled children. *Id.* The North Dakota Supreme Court described the type of education guaranteed to the handicapped child as a "meaningful education," although it did not further define the term. *See id.*

the same decision the Court appears to have foreclosed judicial formulation of a standard of appropriate education beyond that immediately derived from the face of the Act. Finally, courts are left to decide the type of education that is sufficient to be appropriate on a case by case basis.

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ADDENDUM

The Court of Claims decision in *Hardee v. United States,* which is the subject of this Case Comment, was reversed by the Court of Appeals for the Federal Circuit subsequent to the writing of this Comment. Thus, the Case Comment discusses the decision of the Court of Claims rather than that of the court of appeals. Because the IRS has not acquiesced in the holding of the court of appeals, the matter of interest-free loans is still likely to be a subject of litigation. Accordingly, the decision of the Claims Court is demonstrative of the reasoning a court may follow in future interest-free loan litigation.