

CASENOTES

Attack on the EHA: The Education for All Handicapped Children Act After *Board of Education v. Rowley*

I. INTRODUCTION

Americans value education. We regard it as essential for success in our society. The stability of our political institutions depends on citizens who are educated so that they may exercise their rights effectively.¹ In recognition of this, every state in the Union operates a public school system. Although the Supreme Court has not held that education is a fundamental right, the Court has said that if a state assumes the responsibility for educating some children, then it must make the opportunity of education available to all.² Until recently, however, handicapped children were completely excluded from our schools.

Prior to 1975, educational opportunities for handicapped children were haphazard, and, more often, nonexistent.³ Congress tried to assist the States,⁴ but these efforts proved unsatisfactory.⁵ To help the States respond more effectively,⁶ Congress

1. See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1972).

2. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

3. Congress found that although nearly all States had laws mandating public education for all handicapped children, there had been little or no enforcement of the mandates. H. R. REP. No. 332, 94th Cong., 1st Sess. 10 (1975).

4. The Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191 (1966) amended the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) by adding a new Title VI. The Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970), codified at 20 U.S.C. § 1401, replaced Title VI, and superseded Title III of the Mental Retardation Facilities Construction Act, Pub. L. No. 88-164, 77 Stat. 282 (1963), the Grants for Teaching in the Education of Handicapped Children Act, Pub. L. No. 85-926, 72 Stat. 1777 (1958), and the Instructional Media for Handicapped Children Act, Pub. L. No. 85-905, 72 Stat. 1742 (1958). The Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972), the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974), and the Education for All Handicapped Children Act of 1975, amended the Education of the Handicapped Act.

5. In 1975, out of more than 8 million handicapped children, 3.9 million were receiv-

passed the Education For All Handicapped Children Act of 1975⁷ (EHA) to assure that every handicapped child⁸ received a "free appropriate public education."⁹ What exactly Congress meant by this phrase¹⁰ has generated considerable debate.

Congress clearly stated, however, that a child's Individualized Education Program¹¹ (IEP) was the cornerstone¹² of a free

ing an appropriate education, 2.5 million were receiving an inappropriate education, and 1.75 million were receiving no educational services at all. S. REP. NO. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432.

6. Congress found that although court decisions were establishing the right of all handicapped children in the United States to a free appropriate public education, state financial resources were frequently inadequate to the task of providing an education for all handicapped children. H. R. REP. NO. 332, 94th Cong., 1st Sess. 7 (1975), S. REP. NO. 168, 94th Cong., 1st Sess. 7-8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1431-32. The Senate Committee reporting the EHA explicitly stated that "[i]t is the intent of the Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws." S. REP. NO. 168, 94th Cong., 1st Sess. 13, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1437.

7. Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1232, 1401, 1405, 1406, 1411-20, 1453 (1976 & Supp. III 1979)).

8. 20 U.S.C. §§ 1401(1) (1976) and 34 C.F.R. § 300.5(a) (1981) define handicapped children as children who are mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, deaf-blind, multi-handicapped and those who have specific learning disabilities and need special education and related services.

9. 20 U.S.C. § 1401(18) (1976).

10. 20 U.S.C. § 1401(18) (1976) and 34 C.F.R. § 300.4 (1982) define free appropriate public education as special education and related services that (a) have been provided at public expense, without charge and under public supervision; (b) meet the standards of the state educational agency; and (c) provide an individualized education program for each child at the preschool, elementary, or secondary school level. 20 U.S.C. § 1401(16) (1976) and 34 C.F.R. § 300.14 (1982) define special education as specially designed instruction to meet the unique needs of the handicapped child, including classroom instruction, physical education, and instruction in homes, hospitals, and institutions if necessary. 20 U.S.C. § 1401(17) (1976) and 34 C.F.R. § 300.13 (1982) define related services as transportation, and such developmental, corrective, and support services as a handicapped child requires to benefit from special education. These services are to include early identification and assessment of handicapping conditions, medical services necessary for diagnosis and evaluation, speech pathology, audiology, psychological counseling, physical therapy, occupational therapy, and recreation.

11. 20 U.S.C. § 1401(19) (1976) and 34 C.F.R. §§ 300.340-349 (1982) define an individualized education program as follows: [a]n IEP is a written statement for each handicapped child prescribing specialized instruction to meet his or her unique needs. The IEP is developed in meetings which are to include the handicapped child if appropriate, the child's parents or guardian, the child's teacher, and a representative of the school district qualified to provide or supervise the program of instruction for the child. The IEP must include (1) a statement of the child's current educational performance, (2) a statement of short-term instruction objectives and annual goals, (3) a statement of specific educational services to be provided to the child and the extent to which the child

appropriate public education. The EHA mandated active parental involvement with the child's teacher and school district in developing a comprehensive written plan of educational goals, services, and regular evaluation for each child. The ongoing IEP process was designed to manifest what Congress regarded as a fundamental tenet: "[e]ach child requires an educational plan that is tailored to achieve his or her maximum potential."¹³ Unfortunately, other Congressional statements conflicted with such ambitious pronouncements and Congress failed to specify the exact standard of education that States were expected to provide. States such as Washington developed their own educational standard¹⁴ which substantially avoided the rigors of the IEP process.

The EHA legislative history indicates that Congress intended a standard of education which would give handicapped children an educational opportunity equal to that provided non-handicapped children.¹⁵ Lower federal courts interpreting the EHA developed three different standards, each building on the goal of equal educational opportunity,¹⁶ but no definitive stan-

will be able to participate in regular school programs, (4) a statement of dates for initiation and duration of the services, and (5) an evaluation by objective criteria at least yearly to determine whether instruction goals are being met and such evaluation is to include the child's parent or guardian.

12. See H. R. REP. NO. 332, 94th Cong., 1st Sess. 13-14, *reprinted in* 1975 U.S. CODE & AD. NEWS, 1425, 1437-38, S. REP. NO. 168, 94th Cong., 1st Sess. 10-12, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1434-36.

13. H. R. REP. NO. 332, 94th Cong., 1st Sess. 13 (1975).

14. See *infra* note 139 and accompanying text.

15. See *infra* notes 59-60, 81-92 and accompanying text.

16. A free appropriate public education has been defined by one of three standards: (1) The maximum potential standard: An appropriate education is one which enables the handicapped child to achieve his or her full potential; (2) The commensurate opportunity standard: An appropriate education requires that each handicapped child be given an opportunity to achieve his or her full potential commensurate with the opportunity provided other children; (3) The self-sufficiency standard: An appropriate education is one that enables each handicapped child to be as free as reasonably possible from dependency on others, and enables him or her to be a productive member of society. All of the federal courts of appeal which considered the question and a majority of federal district courts which considered the question either adopted, or cited with approval, the commensurate opportunity standard. See *Springdale School Dist. No. 50 v. Grace*, 656 F.2d 300, 305 (8th Cir. 1981), *vacated and remanded*, — U.S. —, 102 S. Ct. 3505 (1982); *Battle v. Pennsylvania*, 629 F.2d 269, 277 (3rd Cir. 1980); *Gladys J. v. Pearland Indep. School Dist.* 520 F. Supp. 869, 875 (S.D. Tex. 1981); *Espino v. Besteiro*, 520 F. Supp. 905, 912-13 (S.D. Tex. 1981); *Pinkerton v. Moye*, 509 F. Supp. 107, 113 (W.D. Va. 1981); *Bales v. Clarke*, 523 F. Supp. 1366, 1370 (E.D. Va. 1981); *Hines v. Pitts County Bd. of Educ.*, 497 F. Supp. 403, 406 (E.D. N.C. 1980). Two district courts adopted or referred to the maximum potential standard. See *Age v. Bullitt County Pub. Schools*, No. (78-0461-L(B)), 3

dard has emerged. In its first decision addressing the issue, *Board of Education v. Rowley*¹⁷ ("Rowley"), the Supreme Court struck down an equal educational opportunity standard developed by the two lower federal courts;¹⁸ this standard had struck a balance between providing no education at all and the unrealistic goal of maximizing the potential of each child. The *Rowley* Court instead adopted a standard based on educational benefit.¹⁹ The minimal requirements of the educational benefit standard severely restrict the effectiveness of the EHA. Under this nebulous standard, nearly any state program for a given handicapped child will suffice; consequently, handicapped children will be denied the education Congress intended for them under the EHA. As if this were not enough, however, the *Rowley* Court destroyed a major component of the procedural safeguards in the EHA by which parents could demand an equal educational opportunity for their child.

In order to qualify for EHA funds,²⁰ the States must provide administrative review procedures so that a child's parents

E.H.L.R. 551:505 (1980), *aff'd*, 673 F.2d 141 (6th Cir. 1981); *DeWalt v. Burkholder*, No. 80-0014-A, 3 E.H.L.R. 551:550, 553 (E.D. Va. 1980). A number of courts have referred to self-sufficiency, but no court has advocated this as a general standard, *see, e.g., Armstrong v. Kline*, 476 F. Supp. (E.D. Pa. 1979), *cert. denied*, 452 U.S. 968 (1981).

17. 458 U.S. —, 102 S. Ct. 3034 (1982).

18. *Mills v. Bd. of Educ.*, 348 F.Supp. 866 (D.D.C. 1972), *Pennsylvania Ass'n of Retarded Children v. Commonwealth*, 343 F.Supp. 279 (E.D. Pa. 1972). *See also infra* note 46 and accompanying text. A discussion of the various theories put forth to provide meaning to a standard of equal educational opportunity for handicapped children is beyond the scope of this article. For a thorough discussion see Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 *TEMP. L.Q.* 961, 964-84 (1977).

19. *See infra* note 48 and accompanying text.

20. 20 U.S.C. §§ 1412, 1413 (1976) and 34 C.F.R. §§ 300.110-.151 (1982) describe the requirements state plans must meet. Section 1412(1) requires the state to have in effect a policy that assures all handicapped children the right to a free appropriate public education. Section 1412(1)(A) requires the state to establish (1) a goal of providing *full educational opportunity* to all handicapped children, (2) a detailed timetable for accomplishing such a goal, and (3) a description of facilities, personnel, and services necessary throughout the state to meet such a goal. Section 1413(a)(4)(B) requires the state to provide a free appropriate public education to children in *private* schools and facilities. Section 1413(9)(B) provides that EHA funds are to *supplement* and *increase* state and local funds expended for education of handicapped children and *not to replace such state funds*. This last provision is a manifestation of Congress's desire that the EHA be a means for *helping* the states to meet their own obligations under the Constitution to provide equal protection for handicapped children (emphasis added). *See S. REP. NO. 168*, 94th Cong., 1st Sess. 13, *reprinted in* 1975, U.S. CODE CONG. & AD. NEWS 1425, 1437.

can challenge the IEP.²¹ A parent dissatisfied with the school district's decision regarding the child's educational program can appeal administratively. Under the EHA, if still dissatisfied, a parent could bring a de novo action in state or federal court seeking appropriate relief.²² In Washington, however, the state review officer for the Superintendent of Public Instruction in four administrative decisions²³ developed a set of presumptions²⁴ that effectively exclude many administrative appeals by parents.

The *Rowley* Court had the opportunity to reverse such state erosions of the EHA. Unfortunately, the Court ratified and encouraged such attacks. The Court's educational benefit standard²⁵ demands as little as Washington's "suitable education" standard.²⁶ The *Rowley* Court suggested a way to sidestep the IEP process²⁷ which is similar to Washington's avoidance method.²⁸ Finally, the Court eliminated judicial review of state administrative decisions regarding educational standards and the educational programs of handicapped children.²⁹ The *Rowl-*

21. 20 U.S.C. § 1415 (1976) and 34 C.F.R. §§ 300.500-589 require a state receiving EHA funds to set up an elaborate administrative appeals procedure that protects the due process rights of handicapped children and their parents. The school must notify parents of actions to be taken with regard to their child. If parents want to contest the IEP for their child, they are entitled to file a complaint and receive an impartial hearing. Parents have the right to examine school records. Parents may request an independent evaluation of their child that parents do not pay for unless the school district prevails at the hearing. Parents may be represented by counsel at the hearing. The parents and school district have the right to present evidence, present their own experts or witnesses, and to confront, cross-examine and compel attendance of witnesses at the hearing. There must be a verbatim record of the hearing. An independent review officer, provided at school district expense but not a school district employee, must render a decision with specific findings and conclusions. If either party is dissatisfied with the hearing decision, they may appeal to the state educational agency which is to make an independent review. If either party is dissatisfied with this decision they may bring an action de novo in state or federal court.

22. 20 U.S.C. § 1415(e)(2) (1976).

23. *In re Marty S.*, Special Educ. Cause No. 78-1 (Superintendent of Pub. Instruc., Wash., Oct., 1978); *In re Jean Marie and Michelle Lyn H.*, Special Educ. Cause No. 79-2A and 79-2B (Superintendent of Pub. Instruc., Wash., Aug., 1979); *In re John Mc.*, Special Educ. Cause No. 79-7 (Superintendent of Pub. Instruc., Wash., Mar., 1980); *In re Vickie M.*, Special Educ. Cause No. 80-4 (Superintendent of Pub. Instruc., Wash., Nov., 1980).

24. These presumptions have been designated by the author as the *Marty S.* presumption, the dominant view presumption, and the *Vickie M.* presumption. See *infra* notes 141-42, 153-56, 162-63 and accompanying text.

25. See *infra* note 48 and accompanying text.

26. See *infra* notes 139-40 and accompanying text.

27. See *infra* notes 111-14 and accompanying text.

28. See *infra* notes 162-63 and accompanying text.

29. See *infra* notes 119-23 and accompanying text.

ey Court justified this elimination by claiming that parental ardor and participation in the IEP process were sufficient remaining safeguards for handicapped children.³⁰ However, effective exclusion of many appeals at the local hearing level, because of administrative presumptions marshalled against parents, render those safeguards meaningless.³¹ This Comment asserts that state attacks on the EHA, combined with the *Rowley* Court's adoption of a minimal educational benefit standard and elimination of judicial review, have eviscerated the EHA which can only be resurrected by Congressional intervention.

II. THE *Rowley* DECISION

Amy Rowley was a highly motivated, intelligent, eight year old deaf girl.³² The district drafted Amy's IEP, as the EHA requires,³³ in the fall of her first grade.³⁴ Her parents participated but were not satisfied with the results. The district's Committee on the Handicapped³⁵ (COH) began Amy's IEP process by developing a recommendation for Amy's school. Although Amy's parents had presented expert testimony³⁶ that Amy needed a sign language interpreter,³⁷ the COH's recommendation did not include an interpreter.³⁸ The COH did, however, recommend that Amy's IEP include a hearing aid, a tutor and a speech therapist.³⁹ Using this recommendation, Amy's teacher

30. See *infra* notes 126-27 and accompanying text.

31. See *infra* notes 141-42, 153-56, 162-63 and accompanying text.

32. See 632 F.2d at 947.

33. 20 U.S.C. § 1414(a)(5) (1976).

34. 483 F. Supp. at 530.

35. N.Y. EDUC. LAW § 4402(1) (b) (1) (McKinney 1981) authorizes a Committee on the Handicapped to assist the school district in determining the proper educational program. Amy's COH included a psychologist, educator, physician, and one of her parents. New York's Committee on the Handicapped is to be distinguished from those individuals the EHA requires as participants in developing the IEP. 34 C.F.R. § 300.344 requires the following participants: (1) a representative of the school district other than the child's teacher, (2) the child's teacher, (3) one or both of the parents, (4) the child when appropriate, and (5) other individuals at the discretion of the parent or school district.

36. 34 C.F.R. § 300.503(c) (1981) requires the school district to consider results of independent evaluations of the child obtained by the parents.

37. 483 F. Supp. at 530-31. All participants in Amy's IEP agreed she would be mainstreamed (see *infra* note 65) for academic classes with nonhandicapped children. Her parents believed that Amy required a sign language interpreter in her academic classes for her to receive a free appropriate public education. *Id.*

38. *Id.* at 531.

39. *Id.*

drafted the IEP.⁴⁰ Her parents assented to the IEP except for the failure to provide for a sign language interpreter. The IEP was returned to the COH for review, which affirmed its first recommendation.⁴¹ The Rowleys demanded a hearing before an independent hearing officer who ruled against them,⁴² as did the New York Commissioner of Education on appeal.⁴³

The Rowleys then filed suit in federal district court⁴⁴ charging that Amy was not receiving a free appropriate public education. The District Court and Court of Appeals⁴⁵ agreed with the Rowleys. The standard of education required under the EHA, both courts stated, is one that gives "each handicapped child . . . an opportunity to achieve his full potential commensurate with the opportunity provided to other (nonhandicapped) children."⁴⁶ Applying this standard, the courts held that providing Amy with a free appropriate public education required a sign language interpreter for her academic classes.⁴⁷

The school district's appeal to the United States Supreme Court presented the Court with its first opportunity to interpret the EHA. The Court held that a state satisfies the requirement of a free appropriate public education for a handicapped child if it "provide[s] personalized instruction with sufficient support services to permit the child to *benefit educationally* from that instruction"⁴⁸ (emphasis added). Writing for the majority,⁴⁹ Justice Rehnquist rejected the standard enunciated by the two courts

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Rowley v. Board of Education*, 483 F. Supp. 528 (S.D. N.Y. 1980).

45. *Rowley v. Board of Education*, 632 F.2d 945 (2d Cir. 1980).

46. 483 F. Supp. at 534. The statement of U. S. District Court Judge Broderick invites the following analysis: Compare any handicapped child with a nonhandicapped child of the same age. Every child has a maximum potential level and a performance level. Every child experiences a gap between his performance and his potential. This is to be expected, because no school maximizes every child's potential. But a handicapped child experiences an additional shortfall in performance by virtue of his or her handicap. It is this shortfall, the statement suggests, that every school district is obligated to eliminate and only then will a handicapped child have an educational opportunity equal to a nonhandicapped child. See Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of P.L. 94-142*, 14 CONN. L. REV. 477, 500 (1982).

47. 632 F.2d, at 948; 483 F. Supp. at 535.

48. 458 U.S. at ___, 102 S. Ct. at 3049.

49. *Rowley* was a 6-3 decision. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Powell, Stevens and O'Connor joined. Justice Blackmun concurred in the judgment. Justices White, Brennan and Marshall dissented.

below.⁵⁰ The Court supported its holding by finding that the legislative history of the EHA "do[es] not imply a congressional intent to achieve strict equality of opportunity"⁵¹ for handicapped children. The Court found that Congress, by enacting the EHA, sought primarily to provide access to education for handicapped children as opposed to an equal educational opportunity. Therefore, the Court reasoned, Congress imposed no greater educational standard upon the states than would make such access meaningful.⁵²

Justice Rehnquist claimed support for this proposition from three sources: (1) principles established in the two major federal handicapped education rights cases, *Mills v. Board of Education*⁵³ and *Pennsylvania Association of Retarded Children v. Commonwealth*⁵⁴ (P.A.R.C.), both discussed in the Congressional committee reports;⁵⁵ (2) statements in the legislative history by senators and congressmen;⁵⁶ and (3) statements and tables in the committee reports describing the scope of the problem for handicapped children in 1975.⁵⁷ These sources, however, do not adequately explain the Court's rejection of the equal educational opportunity standard. Arguably, each source supports the conclusion the Court rejected.

The *Mills* and *P.A.R.C.* cases were explicitly referred to in the Senate and House committee reports on the EHA. The reports also make reference to *Brown v. Board of Education*.⁵⁸ Together, these cases propound the principle of equal educational opportunity for handicapped children. The Senate Labor

50. See *supra* note 44 and accompanying text.

51. 458 U.S. at —, 102 S. Ct. at 3047.

52. *Id.* at —, 102 S. Ct. at 3048.

53. 348 F. Supp. 866 (D.D.C. 1972). *Mills* was a class action on behalf of handicapped children in the District of Columbia against the District's Board of Education for failure to provide plaintiffs with a publicly supported education and for exclusion or transfer of plaintiffs from public schools without due process of law. The court held that plaintiffs were constitutionally entitled to a publicly supported education and to a hearing before exclusion, suspension, or transfer from public school. *Id.* at 878.

54. 343 F. Supp. 279 (E.D. Pa. 1972). *P.A.R.C.* was a class action brought by the Pennsylvania Association for Retarded Children and thirteen parents on behalf of all mentally handicapped children excluded from an education by the Commonwealth. The parties reached a consent agreement whereby no mentally retarded child could be excluded from public education without a prior hearing. *Id.* at 314.

55. *Board of Education v. Rowley*, 458 U.S. —, n.16, 102 S. Ct. 3034, 3044, n.16 (1982).

56. 458 U.S. at —, n.13, 102 S. Ct. at 3043, n.13.

57. 458 U.S. at —, nn.19-20, 102 S. Ct. at 3045-46 nn.19-20.

58. 347 U.S. 483 (1954).

and Public Welfare Committee (the Senate Committee), reviewing federal cases that led to the EHA, stated that in *Brown* the Supreme Court established the principle of educational opportunity.⁵⁹ The Senate Committee reiterated the familiar quote from *Brown*:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms.⁶⁰

The Senate Committee viewed *P.A.R.C.* and *Mills* as "guarantee[ing] the right to free publicly-supported education for handicapped children. . . ."⁶¹ The House Education and Labor Committee called *P.A.R.C.* the first case in a nationwide movement in state and federal courts granting handicapped children a constitutional right to a public education.⁶²

Not surprisingly, the *Rowley* Court correctly perceived that the principle of access to education for handicapped children was one aspect of *P.A.R.C.* and *Mills*. When *P.A.R.C.* and *Mills* were decided, 80,000 of Pennsylvania's 126,000 handicapped children⁶³ and 12,340 of the District of Columbia's 16,620 handicapped children⁶⁴ received no public education at all. Getting in the schoolhouse door was a necessary first step in both cases.

But *P.A.R.C.* and *Mills* went beyond the principle of access. Both courts believed it was not sufficient to merely get handicapped children in the school and segregate them from non-handicapped children; the school must strive to mainstream⁶⁵

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

60. 347 U.S. at 493, quoted in 348 F. Supp. at 875.

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

62. H. R. REP. No. 332, 94th Cong., 1st Sess. 3 (1975).

63. 343 F. Supp. at 296.

64. 348 F. Supp. at 868-69.

65. The EHA places a high priority on educating handicapped children with non-handicapped children in a regular classroom. This practice is known as mainstreaming. The EHA requires education of a handicapped child in a separate classroom only when the child's education in a regular classroom with supplementary aids and services is not satisfactory. See S. REP. No. 168, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432; H. REP. No. 332, 94th Cong., 1st Sess. 5 (1975); and 20 U.S.C. § 1412(5)(b) (1976). For a critical examination of mainstreaming provisions of the EHA see Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1 (1978).

these children by educating them alongside nonhandicapped children in a regular classroom.⁶⁶ *Mills* affirmed each child's right to receive a free and independent medical, psychological, and educational evaluation and to be placed in a publicly supported educational program suited to his or her needs.⁶⁷ Further, the *Mills* Court announced that the state may be required to provide its handicapped children with a compensatory education that overcomes the present effects of prior educational deprivations.⁶⁸ *P.A.R.C.* stood for the principle that each handicapped child should receive an annual written statement of educational strategy and an annual evaluation of that strategy,⁶⁹ and that review of a handicapped child's educational program must include notice to the parents, an opportunity for them to be heard,⁷⁰ and other procedural safeguards.⁷¹ *P.A.R.C.* and *Mills* established principles that took handicapped children far beyond mere access to the schoolhouse and demanded far more of schools than simply opening the door to handicapped children.

The *Mills* Court viewed its decision as one furthering the principle of equal educational opportunity. *Mills* relied for authority not only on *Brown*, but on *Hobsen v. Hansen*,⁷² in which the D. C. district court found that denying poor public school children an educational opportunity equal to that available to more affluent public school children violated the due process clause. *Mills* held that denying handicapped children "not just an equal publicly supported education but all publicly supported education, while providing such education to other children, violates the due process clause."⁷³

The *Rowley* Court, by taking three circuitous steps, ignored the equal educational opportunity principle in *Mills*. The Court correctly perceived that the *Mills* Court did not require a substantive educational standard. The Court then stated that *Mills*

66. 343 F. Supp. at 307; 348 F. Supp. at 880.

67. 348 F. Supp. at 879, 880-81.

68. *Id.* at 879.

69. 343 F. Supp. at 313.

70. *Id.* at 314.

71. *Id.* at 304. Such notice must include a detailed description of any proposed change in the child's program, must advise the parent of alternative educational opportunities for his child besides the proposed one, and must inform the parents of their right to a full hearing before the state's Secretary of Education or his designee.

72. 269 F. Supp. 401 (D.D.C. 1967).

73. 348 F. Supp. at 875.

no doubt contained principles that Congress incorporated into the EHA. The Court selected access from the numerous principles at work in *Mills* and superimposed only the access principle on the EHA. Analysis shows, however, that the *Mills* Court applied the principle of equal educational opportunity to handicapped children just as the *Hobson* Court had applied it to poor children. Congressional records support the conclusion that Congress incorporated principles from *P.A.R.C.* and *Mills* into the EHA. Viewed in toto, they do not suggest that Congress borrowed only the principle of access from those cases, but in fact suggest that Congress also embraced the principle of equal educational opportunity.

The *Rowley* majority suggested that Congress may have referred to cases other than *Mills* and *P.A.R.C.* for guiding principles in passing the EHA.⁷⁴ The cases suggested by the Court, however, were inappropriate. For example, the Court stated that Congress may have looked to *San Antonio v. Rodriguez*,⁷⁵ decided one year after *Mills*. *Rodriguez* held that the equal protection clause of the fourteenth amendment did not require states to expend equal financial resources on the education of each child.⁷⁶ *Rodriguez* supported the *Mills* holding that handicapped children cannot, when a school district has limited funds, be forced to bear a heavier burden than nonhandicapped children.⁷⁷ But *Rodriguez* did not repudiate the principle of equal educational opportunity in *Mills*. Moreover, *Rodriguez* is simply irrelevant to the issue of Congressional intent behind the EHA.⁷⁸ Congress nowhere in the legislative history refers to *Rodriguez* as a limiting factor on EHA provisions.⁷⁹

74. 458 U.S. —, —, 102 S. Ct. 3034, 3047 (1982).

75. 411 U.S. 1 (1975).

76. *Id.* at 23-24.

77. 348 F. Supp. at 876.

78. The constitutionality of a Texas statutory funding scheme was at issue in *Rodriguez*. 411 U.S. at 17. The constitutionality of the EHA was not at issue in *Rowley*. *Rodriguez* reviewed a state mechanism for division of limited state education funds. *Id.* at 9-11. By contrast, Congress intended under the EHA to increase its funding of handicapped education in the future, and it expected the states to increase their funding as well. See S. REP. NO. 168, 94th Cong., 1st Sess. 14-15, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1438-39. Under the EHA, Congress nowhere expressed the fear that the combination of federal and state expenditures for handicapped children would place them above or below the per pupil expenditures for nonhandicapped children. *Rodriguez* was amenable to analysis under the equal protection clause, but this analysis was inappropriate for analyzing the EHA, passed under the spending power of Congress.

79. See, e.g., S. REP. NO. 168, 94th Cong., 1st Sess. 6-7, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430-31 and H. REP. NO. 332, 94th Cong., 1st Sess. 3-4, 10

A second source for the *Rowley* majority's proposition that Congress intended only access to education for handicapped children were statements by Senators Cranston and Javits and Congresswoman Mink.⁸⁰ However, analysis of other statements by these representatives indicates their intent to provide an equal educational opportunity, not just equal access for handicapped children. For example, a search of the Congressional record reveals the following statement by Congresswoman Mink: "The bill seeks to achieve the goal of equal educational opportunity for all handicapped children."⁸¹ Congresswoman Mink elsewhere noted the regrettable reality that handicapped children did not yet enjoy equal educational opportunity.⁸² In the same discussion from which the *Rowley* majority extracted Senator Cranston's reference to access, the Senator also stated that the EHA represented a broadening of the principle of equal educational opportunity to include handicapped children.⁸³ Precisely where the Court found Senator Javits' reference to access, the Senator also stated that handicapped children were entitled to the same educational opportunity as all other children.⁸⁴ This analysis suggests that the *Rowley* majority selected isolated statements, and simply ignored other remarks by the same representatives which would have damaged the Court's argument.

A balanced reading of statements by key Congressional supporters of the EHA indicate an intent to provide equal educational opportunity for handicapped children. Senator Randolph, Chairman of the Subcommittee on the Handicapped, noted that Congress had not met its goal of providing full educational services to handicapped children through the Education Amendments of 1974, and that four million children were still entirely excluded from an adequate education. But the Senator did not advocate simply providing access to school for these children. He stated that the EHA promised to handicapped children "the educational opportunity that has long been considered the right of every other American child."⁸⁵ Senator Stafford⁸⁶ explained

(1975).

80. *Board of Education v. Rowley*, 458 U.S. —, —, n.13, 102 S. Ct. 3034, 3043, n.13 (1982).

81. 121 CONG. REC. 37031 (1975).

82. *Id.* at 37030 (1975).

83. *Id.* at 19503 (1975).

84. *Id.* at 19494 (1975).

85. *Id.* at 37410 (1975).

86. Senator Stafford was at the time ranking minority member of the Subcommittee

that the EHA made its first priority those children totally excluded from schools and made its second priority severely handicapped children. Although suggestive of an access standard, the Senator prefaced his entire discussion with the following statement: "We can all agree that [the education that handicapped children are entitled to receive] should be equivalent at least to the one those children who are not handicapped receive."⁸⁷ Equal educational opportunity for handicapped children, the Senator believed, was the goal; the EHA was the means for achieving that end and funding prioritization was a necessary part of the means. Senator Schweiker⁸⁸ addressed the access problems, but he concluded that "Congress must take a more active role . . . to guarantee that handicapped children are provided equal educational opportunity."⁸⁹ Congressman Brademas⁹⁰ thought it was shameful that 1.75 million handicapped children were excluded entirely from an education, but said it was equally shameful that handicapped children were denied an equal educational opportunity.⁹¹ Numerous other declarations by supporters demonstrate that Congress intended through the EHA to provide not just access, but an equal educational opportunity as well.⁹²

Language in the Congressional committee reports of the EHA allows a court to derive an educational standard even higher than equal educational opportunity. The reports proclaim

on the Handicapped.

87. 121 CONG. REC. 19,483 (1975).

88. Senator Schweiker was a member of the Senate Labor and Public Welfare Committee and later, Secretary of Health and Human Services in the Reagan Administration.

89. 121 CONG. REC. 19,504 (1975).

90. Congressman Brademas was the author and cosponsor of the EHA in the House of Representatives.

91. 121 CONG. REC. 23,704 (1975).

92. Senator Beall, a member of the Senate Labor and Welfare Committee, hoped the EHA would "insure . . . equal educational opportunities for all handicapped" children. 121 CONG. REC. 19,506 (1975). Senator Williams, Chairman of the Senate Labor and Public Welfare Committee, claimed the EHA fulfilled "the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left out." 121 CONG. REC. 37,413 (1975). Senator Humphrey saw the EHA as one in a series of steps by Congress to correct what had been "the violation of [handicapped] children's rights to an equal and free education." 121 CONG. REC. 19,504 (1975). Congressman Quie saw the EHA as "one of the most meaningful and beneficial steps ever taken by Congress . . . toward bringing equal educational rights for [handicapped children]." 121 CONG. REC. 23,706 (1975). Congressman Grassley lamented the fact that "handicapped children have always been slighted on equal educational opportunity." 121 CONG. REC. 25,540 (1975).

numerous times that the EHA is a means to provide "full educational opportunities"⁹³ for all handicapped children. The Senate report uses "full educational services" and "comprehensive services"⁹⁴ synonymously with the free appropriate public education the EHA is to supply. The House report stresses in three places the goal of maximizing each handicapped child's potential⁹⁵ and twice emphasizes maximizing the benefits⁹⁶ to each handicapped child. The equal educational opportunity standard developed by the two lower federal courts in *Rowley* reasonably compromised between these extreme references and providing no education at all. The Supreme Court, by contrast, ignored references to equal educational opportunity and selected Congressional statements which referred to access. A study of the entire legislative history, however, suggests that Congress contemplated substantially more than getting handicapped children to school.

The third source Justice Rehnquist relied on were tables in the Congressional reports⁹⁷ and statements by representatives⁹⁸ depicting the problem as it stood in 1975. These tables and statements show the number of handicapped children who were receiving or not receiving an education in 1975. Justice Rehnquist concluded that these tables and statements were evidence that the EHA imposed "no clear obligation upon recipient states beyond the requirement that handicapped children receive some form of specialized education."⁹⁹

Searching for the substantive content of the EHA in these tables has questionable validity. Typical of Congressional reports, the Senate report begins by describing the problem before Congress. The cited tables are in the Senate report section titled "Need for Legislation."¹⁰⁰ In this very section, after

93. S. REP. No. 168, 94th Cong., 1st Sess. 3, 8, 15, 18, 31, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1427, 1432, 1439, 1441-42, 1454-55; H.R. REP. No. 332, 94th Cong., 1st Sess. 5, 11, 50 (1975).

94. S. REP. No. 168, 94th Cong., 1st Sess. 18, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1441-42.

95. S. REP. No. 168, 94th Cong., 1st Sess. 32, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1455-56.

96. H.R. REP. No. 332, 94th Cong., 1st Sess. 7, 13, 19 (1975).

97. S. REP. No. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432; H.R. REP. No. 332, 94th Cong., 1st Sess. 11-12 (1975).

98. *Board of Education v. Rowley*, 458 U.S. —, —, n.13, 102 S. Ct. 3034, 3043 n.13 (1982).

99. 458 U.S. at —, 102 S. Ct. at 3045.

100. S. REP. No. 168, 94th Cong., 1st Sess. 7-9, *reprinted in* 1975 U.S. CODE CONG. &

describing the problem in 1975, the Senate committee concludes, "Congress must take a more active role . . . to guarantee that handicapped children are provided equal educational opportunity."¹⁰¹ The following sections of the Senate report, according to the common structure of Congressional reports, describe in detail how the EHA provisions will remedy the problem.¹⁰² Justice Rehnquist's reliance on language describing the problem, in an effort to elucidate Congress's intent with regard to the educational standard that the EHA required, was inappropriate. Since Congress obviously did not intend to perpetuate the problem, the only rational source for Congress' intent was the remedial language in the reports.

Remedial language in the reports as well as regulations implementing this language demonstrate that Congress intended an exhaustive educational program for handicapped children. Congress expected physical education services, specially designed where necessary, as an integral part of every handicapped child's education.¹⁰³ Congress urged art programs for handicapped children.¹⁰⁴ Congress demanded that school districts develop extracurricular activities which accorded handicapped children an opportunity to participate "to the same extent as nonhandicapped children."¹⁰⁵ Congress required each school district to take steps to provide as broad a range of educational programs and services to handicapped children as were available to nonhandicapped children in the district.¹⁰⁶ Certainly

AD. NEWS 1425, 1431-33. See also H.R. REP. NO. 332, 94th Cong., 1st Sess. 11 (1975).

101. S. REP. NO. 168, 94th Cong., 1st Sess. 9, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432.

102. S. REP. NO. 168, 94th Cong., 1st Sess. 9-38, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433-62.

103. H.R. REP. NO. 332, 94th Cong., 1st Sess. 9 (1975); S. REP. NO. 168, 94th Cong., 1st Sess. 12 (1975), reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1436.

104. H.R. REP. NO. 332, 94th Cong., 1st Sess. 9-10 (1975); S. REP. NO. 168, 94th Cong., 1st Sess. 12-13 (1975), reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1436-37.

105. H.R. REP. NO. 332, 94th Cong., 1st Sess. 10 (1975). 34 C.F.R. § 300.306 (1982) requires each school district to take steps to "provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities."

106. S. REP. NO. 168, 94th Cong., 1st Sess. 12, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1436. 34 C.F.R. § 300.305 (1982) requires each school district to take steps to "insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education."

the remedial language of the EHA does not indicate a Congressional intent to provide mere access to schools for handicapped children. Rather, Congress envisioned a broad, highly ambitious program that would provide each handicapped child with an educational opportunity equal to that provided nonhandicapped children.

Since the Court's rejection of the equal educational opportunity standard is not justified by reference to the three sources to which the *Rowley* majority points, the Court's decision is perhaps best explained by unarticulated reasons. A window on these concerns may have been provided in *Rodriguez*, which like *Rowley*, raised large and difficult issues. Although the Court in *Rodriguez* was careful to point out that this was not the basis of its holding,¹⁰⁷ the Court noted that affirmance "would occasion . . . an unprecedented upheaval in public education."¹⁰⁸ Recognizing the equal educational opportunity standard in *Rowley*, like recognizing the equal per pupil expenditure requirement in *Rodriguez*, the Court probably realized, would have greatly increased the financial burden on States and school districts, which the Court may have felt they were unable to shoulder. Furthermore, the Court in *Rowley* may have thought, as it stated in *Rodriguez*, that affirmance would have meant infringement by Congress and the courts on decision making in the areas of educational policy and local fiscal policy which were matters best left to the States and school districts.¹⁰⁹ If these were the actual, unarticulated reasons for rejection of the equal educational opportunity standard, the Court baldly engaged in public policy making. These functions are better left to the legislative judgment of Congress.

Conforming to its finding that Congress intended only access to public schools for handicapped children, the *Rowley* Court held that the educational standard required is that which enables a child to "benefit" educationally.¹¹⁰ This "benefit" standard is met in the case of a mainstreamed handicapped child, the Court suggested, if that child makes "academic progress."¹¹¹ The Court held that a state provides a free appropriate

107. 411 U.S. at 56.

108. *Id.* at 58.

109. *Id.* at 49-53, 56, 58.

110. See *supra* note 48 and accompanying text.

111. The Court stated that it did not mean to hold that every handicapped child advancing grade-to-grade in a regular public school system is automatically receiving a

public education if it supplies the four elements of the EHA statutory definition: (1) special education and related services provided at public expense, (2) which meet state educational agency standards, (3) which approximate the grade level in regular schools, and (4) comport with the child's IEP.¹¹² In addition, the Court stated that a mainstreamed handicapped child's IEP should be formulated "to enable the child to achieve passing marks and advance from grade to grade,"¹¹³ and that the "grading . . . system . . . constitutes an important factor in determining educational benefit."¹¹⁴ The Court's language strongly suggests that a school district may show fulfillment of a mainstreamed child's IEP, and, consequently, compliance with the educational benefit standard, by presenting evidence of passing marks and advancement from grade to grade by the mainstreamed child.

If the Court means that "academic progress" is now sufficient to show that an IEP has been properly fulfilled, the educational benefit standard will render the IEP meaningless. Clearly, this is not consistent with legislative objectives in enacting the EHA. Substantial evidence suggests that Congress intended the criterion of a successful IEP to be whether it provided an educational opportunity for a handicapped child equal to that provided a nonhandicapped child.¹¹⁵ Passing marks, concededly, are one factor in this determination, but not the sole factor. Congress intended an ongoing IEP process that included regular evaluation of the IEP's success by the parent, the child's teacher, and the child himself where appropriate.¹¹⁶ If the IEP had not succeeded, Congress intended that these same individuals revise the IEP to include a new written plan of goals and resources that would succeed. If a school district's showing of passing marks replaces the IEP process, the EHA will be critically impaired.

The Court's educational benefit standard is toothless. The standard requires a minimal effort by school districts with

free appropriate public education. In Amy's case, however, the Court found her academic progress "dispositive." *Board of Education v. Rowley*, 458 U.S. —, —, n.25, 102 S. Ct. 3034, 3049, n.25, (1982).

112. See *supra* note 10.

113. 458 U.S. —, —, 102 S. Ct. 3034, 3049 (1982).

114. 458 U.S. —, —, 102 S. Ct. 3034, 3049 (1982).

115. See *supra* notes 59-60, 72-73, 81-92 and accompanying text.

116. See *supra* notes 11-12 and accompanying text.

regard to handicapped children. For example, even with a tutor, hearing aid, and speech therapist, Amy Rowley received only 60% of the information a nonhandicapped child received in class.¹¹⁷ Yet under the Court's standard, the district could conceivably still comply with the EHA if it took away these aids and gave Amy a teacher with a loud voice.¹¹⁸ The district could show compliance with the educational benefit standard since the loud-speaking teacher would represent personalized instruction and support services that benefited Amy educationally. The *Rowley* Court's educational benefit standard strays far from Congress's intended equal educational opportunity standard and significantly undercuts the meaning of a free appropriate public education.

III. JUDICIAL REVIEW AFTER *Rowley*

In whatever manner the educational benefit standard undermines a child's IEP, *Rowley* assures that courts will not be involved in either revising the standard or in resolving whether a particular handicapped child is being given a free appropriate public education. Despite the EHA provisions that allow a parent dissatisfied with a state educational agency decision to bring a *de novo* action in state or federal court,¹¹⁹ *Rowley* held that a court may make only two inquiries: (1) whether the state has complied with EHA procedures, and (2) whether the child's IEP is reasonably calculated to enable the child to receive an educational benefit.¹²⁰ Courts may no longer probe into the substantive educational requirements of the EHA,¹²¹ or into methodologies employed in a child's IEP.¹²² These, the Court said, are solely state educational decisions.¹²³

Essentially delineating a restricted scope of review, this interpretation of a *de novo* court's authority is an unwarranted circumscription of EHA provisions. EHA § 1415(e)(2) plainly allows a parent dissatisfied with the state educational agency

117. See 483 F. Supp. at 532.

118. The *Rowley* dissent suggested this possible result under the majority's educational benefit standard. *Board of Education v. Rowley*, 458 U.S. ___, ___, 102 S. Ct. 3034, 3055 (1982) (White, J., dissenting).

119. See *supra* note 21.

120. 458 U.S. at ___, 102 S. Ct. at 3051.

121. *Id.* at ___, 102 S. Ct. at 3051.

122. *Id.* at ___, 102 S. Ct. at 3052.

123. *Id.* at ___, 102 S. Ct. at 3052.

decision to bring a de novo action in state or federal court on the original complaint brought at the local hearing. Such complaint may contain "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."¹²⁴ The legislative history also supports a Congressional intent to provide broad de novo court review.¹²⁵ After *Rowley*, however, a court answering its two narrow inquiries in the negative may only return the case to the state educational agency for adjustment in the child's IEP, either to make sure EHA procedures are followed or to make sure the child gets some sort of educational benefit from his or her IEP. *Rowley* severely undercuts Congress's judicial review provisions in the EHA.

The Court justified this narrowed scope of judicial inquiry and the virtual abdication of placement of decisions in favor of the state on the basis of two safeguards: (1) the participation given to concerned parties under the EHA in formation of the child's IEP;¹²⁶ and (2) the continued ardor of parents seeking benefits for their child.¹²⁷ Parental ardor, however, is futile without procedural safeguards by which to appeal the school district's placement decision. Agency decisions in Washington state have created an educational standard and administrative presumptions which severely limit a parent's administrative appeal opportunity. Contrary to the *Rowley* majority assertion, these decisions illustrate the need for broad de novo review.

IV. WASHINGTON STATE EHA DECISIONS

The Washington State assault on the EHA procedural safeguards occurred in four decisions of the state review officer (S.R.O.) for the Superintendent of Public Instruction. The major blows against the procedural safeguards were struck by the S.R.O.'s use of a "suitable" education standard and development of three presumptions: (1) the *Marty S.* presumption, (2) the dominant view presumption, and (3) the *Vickie M.* presumption.

124. 20 U.S.C. § 1415(b)(1) (E) (1976).

125. Senator Williams, Chairman of the Senate Labor and Public Welfare Committee, emphasized that "a complaint may involve matters such as questions respecting a child's individualized education program, . . . whether special education and related services are being provided without charge . . . or any other question within the scope of the definition of free appropriate public education." 121 CONG. REC. 37,415 (1975).

126. 458 U.S. at —, 102 S. Ct. at 3052.

127. *Id.* at —, 102 S. Ct. at 3052.

The S.R.O. based his decisions on state regulations¹²⁸ that implement RCW 28.13,¹²⁹ the Washington state counterpart to the federal EHA.¹³⁰ These decisions are precedential authority for local hearing officers¹³¹ and, therefore, greatly influence the outcome of local EHA hearings in Washington State.

The leading EHA administrative decision in Washington State is *In Re Marty S.*¹³² Marty was a deaf child¹³³ in the Spokane School District. Uncontested facts at the local hearing and S.R.O. level established that Marty was handicapped,¹³⁴ was entitled to a free appropriate public education,¹³⁵ and needed a specifically designed program to remedy his communication problems.¹³⁶ Marty's parents requested that his IEP include two additional hours per day of linguistic tutoring.¹³⁷ The school district maintained that its program¹³⁸ without the tutoring was

128. WASH. ADMIN. CODE chs. 392-171 through 392-173 (1980) attempt to implement WASH. REV. CODE ch. 28A.13 (1981) in accordance with the federal EHA. The state regulations are, with a few exceptions, a mirror image of the federal regulations.

129. WASH. REV. CODE § 28A.13.005 (1981) states that its purpose is to ensure that all handicapped children, as defined in WASH. REV. CODE § 28A.12.010 (1981), shall have the opportunity for an appropriate education at public expense as guaranteed to them by the Constitution of this state. The Washington State Constitution article IX § 1, provides that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

130. WASH. REV. CODE ch. 28A.13 (1981) besides mimicking the federal EHA provisions, established a division of special education for handicapped children in the Office of the Superintendent of Public Instruction, and granted the Superintendent of Public Instruction the power to withhold funds from a school district for not providing handicapped children an opportunity for an appropriate education.

131. See, e.g., *In re Jean Marie and Michelle Lyn H.*, Special Educ. Cause No. 79-2A and 79-2B, at 16 (Superintendent of Pub. Instruc., Wash., Aug., 1979); *In re Gregory K.*, Special Educ. Cause No. 812, at 4-5 (Superintendent of Pub. Instruc., Wash., Sept., 1981).

132. *In re Marty S.*, Special Educ. Cause No. 78-1 (Superintendent of Pub. Instruc., Wash., Oct., 1978).

133. See WASH. ADMIN. CODE § 392-171-436 (1980) for the definition and eligibility criteria for deaf children.

134. A handicapped child is one having a disability set forth in WASH. ADMIN. CODE §§ 392-171-381 through -451 (1980).

135. WASH. ADMIN. CODE § 392-171-310 (1980) defines a free appropriate public education as special education and related services provided at public expense, under local school district supervision, without charge, which meet the standards of the state educational agency, and are provided in conformity with an individualized education program.

136. *In re Marty S.*, Special Educ. Cause No. 78-1, at 17 (Superintendent of Pub. Instruc., Wash., Oct., 1978).

137. *Id.* at 18.

138. The district's IEP for Marty included (1) placement in a self-contained classroom for part of the school day where both group and individualized attention is given, (2) placement in a regular classroom for part of the school day where a signer is provided

“best” designed to assist Marty. The S.R.O. held the following:

The proper standard for review is not “best”, but “appropriate” education as that term has been previously defined as meeting the unique needs of the handicapped child. In common usage the term appears synonymous with “suitable” or specifically designed. As a term of art, it responds more to the question of whether the shoe “fits” rather than whether it is the “best” shoe.¹³⁹

Since *Marty S.*, the educational standard expressing a free appropriate education under the EHA in Washington is not the best program for the child but merely a suitable one.

While the “suitable education” standard probably conforms to *Rowley’s* educational benefit standard, it undermines the advocacy role Congress intended for parents under the EHA.¹⁴⁰ The S.R.O. provided no criteria for determining whether a child’s educational program is suitable. Local hearing officers, therefore, have considerable discretion to make this determination. This procedure would be unobjectionable if the suitable education standard afforded parents the same opportunity to object to an educational program as that provided by an equal educational opportunity standard, but it does not. The two standards do not have the same reference point. An equal educational opportunity standard compares a handicapped and non-handicapped similarly circumstanced. A parent can understand and demonstrate the educational opportunity afforded a non-handicapped child and contrast it with that given their handicapped child. A “suitable education”, by contrast, is one that fits the particular handicapped child and refers only to that particular child. Under this standard, parents can at most argue that a program does not fit their child. Disputes under this standard are reduced to opposing opinions about a child’s capabilities or potential. Since the district can rightly claim greater expertise in such evaluations, the district will prevail in such disputes before hearing officers under the suitable education standard. The suitable education standard, therefore, weakens the advocacy role Congress intended for parents under the EHA.

when needed, and (3) personal instruction with a communications disorder specialist, scheduled for 20 hours per year. *Id.*

139. *In re Marty S.*, Special Educ. Cause No. 78-1, at 22 (Superintendent of Pub. Instruc., Wash., Oct., 1978).

140. See H.R. REP. No. 332, 94th Cong., 1st Sess. 14-15 (1975); S. REP. No. 168, 94th Cong., 1st Sess. 47, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1470-71.

Also in this decision, the S.R.O. formulated the *Marty S.* presumption. A school district may gain the presumption that the handicapped child's IEP meets state and federal EHA requirements for a free appropriate public education by showing the following: (1) the district made an IEP conforming to state and federal EHA regulations, (2) the district's experts who assessed the child and made the IEP were qualified, and (3) the district's experts and the COH experts¹⁴¹ were nearly unanimous in the assessment and the making of the IEP. When the district acquires the presumption, the burden of proof shifts to the parents to show that the IEP does not provide the child with a free appropriate public education.¹⁴²

The *Marty S.* presumption is not supported by federal or state authority in statute, case law, or regulations. The federal EHA requires that the hearing officer and the S.R.O. make an "impartial review" of the case and that the S.R.O. make an "independent decision."¹⁴³ Washington State regulations require the hearing officer and S.R.O. to base their decisions on a preponderance of the evidence,¹⁴⁴ but make no mention of presumptions. A Washington Superior Court discussing the *Marty S.* presumption stated that no presumption of appropriateness arises in hearings, but this was dictum.¹⁴⁵ Despite the lack of authority, the *Marty S.* presumption has dominated subsequent Washington EHA administrative review cases; only in rare instances have parents overcome the presumption.¹⁴⁶

141. WASH. ADMIN. CODE § 392-171-351(1) (1980) mandates an assessment team composed of the child's teacher and an individual qualified to conduct diagnostic examinations such as a school psychologist. This team is sometimes designated as the Committee on the Handicapped or COH.

142. *In re Marty S.*, Special Educ. Cause No. 78-1, at 26 (Superintendent of Pub. Instruc., Wash., Oct., 1978).

143. 20 U.S.C. § 1415(b)(2) (1976); 20 U.S.C. § 1415(c) (1976).

144. WASH. ADMIN. CODE § 392-171-566(6)(e) (1981); WASH. ADMIN. CODE § 392-171-556(1)(a) (1981).

145. *Hunter v. Lake Washington School Dist.* #414, Wash. Super. Ct. No. 79-2-03412-6 (Nov. 20, 1980). The court noted that it was nonsensical to require a party to overcome the presumption and offer additional evidence to create a preponderance of the evidence at the administrative level and require only preponderance of the evidence in court; this the court said would simply encourage parties challenging an IEP to bypass administrative review and seek judicial review immediately. *Id.* at 15-17.

146. Two examples of where parents successfully overcame the *Marty S.* presumption are *In re Vickie M.*, Special Educ. Cause No. 80-4 (Superintendent of Pub. Instruc., Wash., Nov., 1980), where the parents showed that the personnel who drew up the IEP were not qualified; and *In re Eric P.*, Special Educ. Cause No. 79-4 (Superintendent of Pub. Instruc., Wash., June, 1979), where the parents showed that the school district

The formidable burden of the *Marty S.* presumption upon a parent asserting their child's right to a free appropriate public education is unjustifiable. The district employs a battery of experts to make the child's IEP. These experts have the same employer and work together daily. Arguably, district experts are unlikely to disagree on the child's IEP or the educational methodologies used. And even if these experts do not entirely agree, they are likely to rally behind the district upon challenge to the district's IEP by parents and their experts. Since the district gains the *Marty S.* presumption by showing prima facie compliance with state and federal EHA regulations more familiar to the district than to the parents, and by near unanimity of experts unlikely to disagree in the first place, parents start the administrative review process at a great disadvantage. The *Marty S.* presumption, moreover, clearly violates Congress's intent with regard to the IEP process by giving disproportionate weight to the expert's opinion. Congress intended an IEP process in which the parent, the child's teacher, the expert, and even the handicapped child himself would participate in evaluation and revision of the IEP.¹⁴⁷ Congress nowhere stated that the opinion of the parent, teacher, and child were to be devalued relative to the expert's opinion when the IEP was administratively reviewed, although this is the effect of the *Marty S.* presumption.

The only weapon that parents of Washington's handicapped children have to challenge a proposed IEP is expert testimony. *Marty S., In re Jean Marie and Michelle Lyn H.*,¹⁴⁸ and *In re John Mc.*,¹⁴⁹ held that these experts must meet a "specific knowledge" requirement in addition to showing general competence. Marty's expert testified that Marty unquestionably would benefit from the tutoring that his parents requested in his IEP.¹⁵⁰ The school district did not contest this.¹⁵¹ Nonetheless, the S.R.O. found that the testimony of Marty's expert was of "limited value" because, while Marty's expert had substantial

experts were not in near unanimity.

147. See *supra* notes 11, 12.

148. Special Educ. Cause No. 79-2A and 79-2B (Superintendent of Pub. Instruc., Wash., Aug., 1979).

149. Special Educ. Cause No. 79-7 (Superintendent of Puc. Instruc., Wash., Mar., 1980).

150. *In re Marty S.*, Special Educ. Cause No. 78-1, at 19 (Superintendent of Pub. Instruc., Wash., Oct., 1978).

151. *Id.* at 21.

knowledge of the general educational needs of deaf children, he had only limited knowledge about Marty S.¹⁵² The S.R.O. strongly implied that testimony by a parent's expert, even if nationally renowned for educating a class of handicapped children, is insufficient. The parent's expert must have specific knowledge about the particular child before his testimony can overcome the opposing opinion of the district's experts.

The "specific knowledge" requirement places another barrier, generally an economic one, in front of parents. Not only must the parent find a respected expert, but the expert must be employed for a sufficient length of time to familiarize himself thoroughly with the particular handicapped child. Only then will his testimony be credible. Few parents of handicapped children can afford such an expense, nor arguably should they have to. There can be little reason, other than administrative efficiency, to deny parents the right to have their evidence considered. Whereas Congress meant the hearing procedure to strengthen the substantive rights created by the EHA, the result of these presumptions is a weakening of those rights.

The dominant view presumption was formulated in *Jean Marie*, where the S.R.O. held that, in the battle of experts, the standard for review purposes is the dominant view of the profession.¹⁵³ Although the girls' parents insisted that only the oral-aural teaching method¹⁵⁴ was appropriate for Jean Marie and Michelle Lyn, the total communication method¹⁵⁵ prescribed by the district was considered appropriate for any deaf child, in the dominant view of the profession. Thus Jean Marie and Michelle Lyn's IEP's, calling for the total communication method, were appropriate.¹⁵⁶

152. *Id.* at 22.

153. *In re Jean Marie and Michelle Lyn H.*, Special Educ. Cause No. 79-2A and 79-2B, at 15 (Superintendent of Pub. Instruc., Wash., Aug., 1979).

154. The oral-aural instructional technique emphasizes the development of the residual hearing capacities of the deaf child, relies on the child's listening and visual skills, and encourages a child to develop a speaking ability with signing as a supplement. *In re Erik K.*, Special Educ. Cause No. 78-5, at 3-4 (Superintendent of Pub. Instruc., Wash., Jan., 1979).

155. The total communication instruction methodology for deaf children emphasizes signing, relies on the child's visual and manual abilities, and is a more limited form of communication than the oral-aural instructional technique. *In re Erik K.*, Special Educ. Cause No. 78-5, at 3-4 (Superintendent of Pub. Instruc., Wash., Jan., 1979).

156. *In re Jean Marie and Michelle Lyn H.*, Special Educ. Cause No. 79-2A and 79-2B, at 15 (Superintendent of Pub. Instruc. Wash., Aug., 1979). The S.R.O. did not rule, as he was requested to by the parents, whether the oral-aural educational methodology

The dominant view presumption is as unupportable as the *Marty S.* presumption. No authority exists for it in the federal or state EHA statutes or regulations.¹⁵⁷

A more significant defect is that whether a method or theory is a minority or dominant view has no relation to its validity with regard to a particular handicapped child. The dominant medical treatment and education methods, for example, were ineffective with John Mc.; the minority medical treatment and education methods successfully educated John.¹⁵⁸ A minority professional view or educational method which has successfully educated the particular handicapped child, at the very least, deserves an airing by the parent as to its continuing validity and should not be dismissed outright by a presumption. A more fundamental criticism of the dominant view presumption is that it is conceptually flawed. The S.R.O. admitted in *John Mc.* that a minority view "like all new ideas or theories . . . must begin as a minority opinion . . . before it can become a dominant opinion or standard . . . practice accepted within the profession."¹⁵⁹ The logical extension of the S.R.O.'s statement is that a minority view rejected today may become the dominant view tomorrow; this lessens considerably the significance of a view's dominance. Foreclosing presentation of evidence by experts on the basis of the dominant view presumption is defensible only on the ground of administrative efficiency. Administrative efficiency, however, must not eclipse Congress's primary goal: serving the unique needs of the handicapped child.¹⁶⁰ This is best achieved by a full airing of all views or methodologies relevant to educating the child.

The third doctrine marshalled against parents in Washington State is the *Vickie M.* presumption. Vickie's parents had challenged her IEP, alleging that she needed additional tutoring

was appropriate in general for deaf children and specifically appropriate for Jean Marie and Michelle Lyn.

157. WASH. ADMIN. CODE § 392-171-546(3) (1980) permits hearing officers to take notice of a legislatively enacted state or federal rule embodied in reported court cases or statutes, adjudicative facts not in reasonable dispute because generally known within the school district or based on unquestionably accurate sources, and scientific facts within the specialized knowledge of the hearing officer. However, the regulations do not mention the authority in hearing officers to notice disputed educational methodologies, and medical and psychological views. *Id.*

158. *In re John Mc.*, Special Educ. Cause No. 79-7 at 5-6 (Superintendent of Pub. Instruct., Wash., Mar., 1980).

159. *Id.* at 9.

160. See *supra* note 10. See H.R. REP. NO. 332, 94th Cong., 1st Sess. 8 (1975).

to obtain a free appropriate public education.¹⁶¹ In the course of deciding for Vickie's parents, the S.R.O. recited the four statutory indicators of a free appropriate public education under the state EHA: planned teaching (1) by certified personnel, (2) directed to the student's unique needs, (3) designed to facilitate progress towards specific written objectives, and which (4) occurs repeatedly during regular sessions.¹⁶² The S.R.O. then held that "the existence of academic progress serves to establish that the third criterion of an appropriate program has been met."¹⁶³ The third Washington statutory criterion for a free appropriate public education expresses the federal EHA requirement of an IEP for each handicapped child. Thus, a showing of "academic progress" creates a presumption of a successful IEP; "academic progress" with a showing of indicators 1, 2, and 4 creates a presumption that a free appropriate public education has been provided to the handicapped child.

The S.R.O. has asserted, just like the *Rowley* Court, that academic progress indicates a successful IEP. The *Vickie M.* presumption is objectionable for the same reasons that *Rowley's* passing marks language is objectionable. Although "academic progress" is one relevant factor in evaluating the success of a mainstreamed child's IEP, no evidence supports the view that it is the sole criterion. Rather, substantial evidence in the legislative history indicates that Congress intended the measure of a successful IEP to be its ability to provide a handicapped child with an educational opportunity equal to that provided a non-handicapped child.

Congress carefully designed the procedural safeguards in EHA to enable parents to assert their child's right to a free appropriate public education.¹⁶⁴ Clearly, the aggregate effect of the suitable education standard, the *Marty S.* presumption, the specific knowledge requirement, the dominant view presumption, and the *Vickie M.* presumption is, however, to discourage

161. *In re Vickie M.*, Special Educ. Cause No. 80-4, at 26-27 (Superintendent of Pub. Instruc. Wash., Nov., 1980).

162. *Id.* at 17. These four indicators of a free appropriate public education were derived from WASH. REV. CODE § 28A.13.010 (1981) and WASH. ADMIN. CODE § 392-171-317 (1980).

163. *In re Vickie M.*, Special Educ. Cause No. 80-4, at 18 (Superintendent of Pub. Instruc. Wash., Nov., 1980). Moreover, if the parent establishes that their child's IEP is inappropriate, the district may raise the "defense" of academic progress by showing that the handicapped child's academic progress "is not significantly substandard." *Id.*

164. H.R. REP. No. 332, 94th Cong., 1st Sess. 15 (1975).

and prevent parents in many cases from asserting their child's right. A parent in the State of Washington must hire experts for a time sufficiently long for the expert to gain familiarity with the child. The expert must be careful to espouse a dominant view or methodology. A parent is hard pressed to show that their child's education is not "suitable," since the district's evaluation of the child's capabilities is likely to be more persuasive than the parents'. Assuming a parent overcomes the *Marty S.* presumption, demonstrating that the IEP is inappropriate, the district may retort with a showing of "academic progress" that presumes a successful IEP. Prior to *Rowley*, a parent had further recourse.

Rowley failed to reverse these state attacks on the EHA. The Court's "educational benefit" standard requires no more substantive content to a handicapped child's education than a "suitable education" standard. The Court's suggestion that passing marks signify a mainstreamed child's successful IEP encourages states to adopt an administrative presumption that enshrines the suggestion and avoids the IEP process mandated by Congress. Before *Rowley* a parent overcome by the state's educational standard, the state's "academic progress" showing, or the state's marshaling of administrative presumptions could count on de novo court review. *Rowley*, however, eliminated this protection. *Rowley's* purported "safeguards" of parental participation in the IEP process and parental ardor simply mock the elaborate scheme established by Congress in the EHA.

V. CONCLUSION

In 1975, Congress recognized that more than half of the nation's handicapped children were not receiving an adequate education. Congress sought to remedy the problem by passing the EHA, which was to provide every handicapped child with a free appropriate public education. The Supreme Court's decision in *Rowley*, however, severely cripples the effectiveness of the EHA by ratifying state attacks on the EHA which have occurred since its enactment. Congress must intervene to salvage the EHA. Congress must make clear that states are required to provide to handicapped children an educational opportunity equal to that provided nonhandicapped children or risk losing their EHA funding. Furthermore, Congress should declare that it will not tolerate any erosion in the IEP process, and that the standard against which the success of an IEP is to be measured is the ability of the IEP to provide an educational opportunity

equal to that provided nonhandicapped children. Only by clarifying its goals in the EHA can Congress ensure equal educational opportunity for handicapped children.

Karl Boettner