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Free Appropriate Public Education of Handicapped Children Requires Personalized Instruction and Support Services to Produce Beneficial Results but Does Not Require Reaching Full Potential of Handicapped Student.

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CASENOTES

EDUCATION—Handicapped—Free Appropriate Public Education Of Handicapped Children Requires Personalized Instruction And Support Services To Produce Beneficial Results But Does Not Require Reaching Full Potential Of Handicapped Student.

Board of Education v. Rowley
___U.S.___, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Amy Rowley, a deaf student, was placed in a regular first grade classroom in the Hendrick Hudson School District, Peekskill, New York. With the aid of special support services, Amy's performance exceeded that of the average, non-handicapped child in the class.[1] Her parents, however, demanded the classroom services of a qualified sign language interpreter. Denied this request by the school district's Committee on the Handicapped, by an independent examiner, and by the Commissioner of Education of the State of New York,[2] the Rowleys brought suit, under the Education of All Handicapped Children Act of 1975,[3] in the United States District Court for the Southern District of New York. The district court found Amy entitled to the services of an interpreter, since the Act's requirement of a "free appropriate public education" mandated for handicapped children the opportunity, commensurate with that afforded other children, to develop their full potential.[4] The United States Court of Appeals for the Second Circuit affirmed.[5] The Supreme Court granted certi-

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1. Board of Educ. v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3040, 73 L. Ed. 2d 690, 699 (1982). Support services included teachers and school administrators especially trained in sign language, an FM hearing aid to amplify residual sounds, a daily tutor for the deaf, and a weekly speech therapist. *Id.* at ___, 102 S. Ct. at 3039, 73 L. Ed. 2d at 698.

2. *Id.* at ___, 102 S. Ct. at 3040, 73 L. Ed. 2d at 699. These procedural steps were specified by the Education of All Handicapped Children Act of 1975, 20 U.S.C. § 1415 (1976).

3. 20 U.S.C. §§ 1401-61 (1976).

4. *See* Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd and remanded*, ___U.S.___, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

5. *See* Rowley v. Board of Educ., 632 F.2d 945, 948 (2d Cir. 1980) (court limited holding to facts of case and precluded citation of holding as precedent), *rev'd and remanded*,

orari to examine the lower courts' readings of the Act.[6] Held—*Reversed and remanded.* "Free appropriate public education" of handicapped children requires personalized instruction and support services to produce beneficial results but does not require reaching the full potential of the handicapped student.[7]

The decision in *Rowley* rested solely on interpretation of the Education of All Handicapped Children Act and not on the equal protection clause.[8] Although no constitutional question of equal protection was presented to the Supreme Court in *Rowley*, consideration of equal protection is important in understanding significant prior decisions related to the education of the handicapped.[9]

The fourteenth amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[10] Generally, equal protection requires that all persons in a similar situation be treated in a similar fashion.[11] In ana-

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__U.S.__, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

6. Board of Educ. v. Rowley, __U.S.__,__, 102 S. Ct. 3034, 3040, 73 L. Ed. 2d 690, 699 (1982).

7. *Id.* at __, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710.

8. *Id.* at __, 102 S. Ct. at 3036-37, 73 L. Ed. 2d at 695.

9. *See, e.g.*, Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975) (mentally retarded had an equal protection claim); Mills v. Board of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972) (failure to provide education for handicapped violated equal protection component of fifth amendment); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 297 (E.D. Pa. 1972) (plaintiffs had colorable equal protection claim).

10. U.S. CONST. amend. XIV, § 1. Although the amendment was enacted following the Civil War to guarantee freedom for blacks, courts have extended its protection to all persons, regardless of race or class. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 477-78 (1954) (fourteenth amendment protection extended to other classes than white and Negro); Buchanan v. Warley, 245 U.S. 60, 76 (1917) (broad language of fourteenth amendment extended equal protection to all persons and not just those of color); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (all persons within territorial jurisdiction received equal protection); *see also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 342 (1949) (history of equal protection until 1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1069 (1969) (updated history of equal protection).

11. *See, e.g.*, Jones v. Helms, 452 U.S. 412, 424 (1981) (statute in question applied equally to all parents in state); Truax v. Corrigan, 257 U.S. 312, 333 (1921) (immunity from law of certain segment of class violated equal protection rights of rest of class since laws must apply equally to all similarly situated); Kentucky R.R. Tax Cases, 115 U.S. 321, 337 (1885) (equal protection not violated when law applied equally to all railroads). Originally perceived as limiting the states' treatment of individuals and groups, equal protection now extends to acts of the federal government as well, through the due process clause of the fifth amendment. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (cited holding in *Bolling v. Sharpe* that "equal protection component" of fifth amendment due process clause prohibited discrimination by federal government); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (Supreme Court approached equal protection identically under both fourteenth and fifth amendments); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (equal protection

lyzing a statute for possible denial of equal protection, the Supreme Court has developed certain standards, the application of which depends upon the class of persons involved.[12] Originally, the Supreme Court used only the "rational basis" test, under which the government had to show that the classification resulting from the application of the statute was reasonably related to a legitimate government interest.[13] The Warren Court added a second, more demanding test.[14] Those laws which involved either a "suspect class"[15] of persons or a "fundamental interest"[16] demanded "strict scrutiny,"[17] which required that the resulting classification serve a "compelling state interest."[18] In recent years, the Court has

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applied to District of Columbia through fifth amendment); *see* Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. REV. 541, 543-47 (1977).

12. *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971). Even though the equal protection clause guarantees equal treatment, the Supreme Court has recognized the impossibility of eliminating classifications of people since almost all statutes provide advantages or disadvantages for certain groups of people. *See* Reed v. Reed, 404 U.S. 71, 75 (1971); Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications,* 68 KY. L.J. 845, 851 (1979-80).

13. *See, e.g.,* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (economic regulations presumed constitutional and required only rational relationship to legitimate government interest); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (laws governing economics and social welfare demanded only "reasonable basis"); McDonald v. Board of Election, 394 U.S. 802, 809 (1969) (classifications set up by law had only to bear rational relationship to legitimate government interest).

14. *See* Gunther, *The Supreme Court 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972); Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards,* 57 U. DET. J. URB. L. 867, 867-68 (1980). *See generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1065 (1969) (analyzed principles of equal protection).

15. *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (alienage as classification inherently suspect); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (racial classifications "constitutionally suspect"); Korematsu v. United States, 323 U.S. 214, 216-17 (1944) (law affecting only citizens of Japanese ancestry suspect). The Supreme Court, by 1971, had recognized three suspect classes: race, alienage, and national origin. *See* Marks & Greenwood, *The Burger Court and Substantive Rights, An Analytical Approach,* 57 U. DET. J. URB. L. 751, 764 (1980).

16. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (right of interstate movement is fundamental); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (right to vote is fundamental). By 1971, fundamental rights were limited to the right to travel and the right to vote. *See* Marks & Greenwood, *The Burger Court And Substantive Rights, An Analytical Approach,* 57 U. DET. J. URB. L. 751, 765 (1980).

17. *See* McDonald v. Board of Election, 394 U.S. 802, 807 (1969) (quoting from Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966)); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (classifications invading fundamental rights must be "closely scrutinized and carefully confined").

18. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (waiting-period impinged on fundamental right of movement and served no compelling state interest); Williams v.

added an "intermediate scrutiny" or "heightened scrutiny" test, somewhere between the extremes of the "strict scrutiny" and "rational basis" tests.[19]

Brown v. Board of Education[20] was a landmark case that applied equal protection to education.[21] In *Brown*, the Supreme Court acknowledged the primary importance of education as a function of state and local governments, and concluded that, when a state provided an educational opportunity, "it is a right which must be made available to all on equal terms."[22] Although *Brown v. Board of Education* concerned racially segregated schools, proponents of equal education for the handicapped subsequently cited the holding to support their claim for equal education.[23] Due to *Brown's* impetus, states and school districts began to increase their special programs for the handicapped so that, by the late 1960's, the movement to provide some kind of special education for the handicapped

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Rhodes, 393 U.S. 23, 31 (1968) (no compelling state interest justified law affecting right to vote).

19. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 278-79 (1979) (statute must foster important government interests and substantially relate to their attainment); Craig v. Boren, 429 U.S. 190, 197 (1976) (gender classifications required to "serve important governmental objectives" and be "substantially related" to these objectives); Matthews v. Lucas, 427 U.S. 495, 505-06 (1976) (illegitimacy did not require strict scrutiny but less demanding standard); *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (rejected two rigid standards of "strict scrutiny" and "mere rationality" and called for broad "spectrum of standards"); Fox, *Equal Protection Analysis: Laurence Tribe, the Middle Tier, and the Role of the Court*, 14 U.S.F.L. REV. 525, 527 (1980); Gunther, *The Supreme Court 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972). Those classifications most often afforded the intermediate test include gender and illegitimacy; however, this new category is still evolving. *See* McCarthy, *Is The Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?*, 6 J.L. & ED. 159, 179-80 (1977).

20. 347 U.S. 483 (1954).

21. *See id.* at 495 (school segregation violated equal protection guaranteed by fourteenth amendment).

22. *Id.* at 493.

23. *See, e.g.*, Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975) (quoted *Brown* on the importance of education); Mills v. Board of Educ., 348 F. Supp. 866, 874 (D.D.C. 1972) (also quoted *Brown* on the importance of education); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 297 (E.D. Pa. 1972) (plaintiffs had colorable equal protection claims as in *Brown*); *see also In re* G.H., 218 N.W.2d 441, 447 (N.D. 1974) (quoted *Brown* on equal education); Alschuler, *Education for the Handicapped*, 7 J.L. & ED. 523, 526 (1978) (quoted *Brown* as basis for litigation involving education of handicapped). Sen. Robert Stafford, one of the co-sponsors of P.L. 94-142, or the Education of All Handicapped Children Act of 1975, pointed to *Brown v. Board of Education* as "the legal foundation underpinning the development of a federal law guaranteeing the right to an education for handicapped children." Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 73 (1978).

was well established.[24] Nevertheless, many handicapped children were still denied access to public schools.[25]

To remedy this situation, plaintiffs, in *Pennsylvania Association for Retarded Children v. Pennsylvania*,[26] a significant pre-Act case, raised the equal protection question to challenge the constitutionality of certain state statutes which excluded the mentally retarded from public schools.[27] The court enjoined the enforcement of these statutes and ordered the admission of all mentally retarded children into the public school systems.[28]

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24. *See* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1444-45 (table of state laws relating to education of handicapped); Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U. L. REV. 253, 255 (1978). Texas was among the early providers of education for the handicapped. *See generally* Comment, *Public Law 94-142 and the Texas View*, 12 ST. MARY'S L.J. 180, 187-90 (1980) (traced Texas' involvement in education of handicapped beginning in 1945).

25. *See* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1429-30; Alschuler, *Education for the Handicapped*, 7 J.L. & ED. 523, 526 (1978); Baugh, *The Federal Legislation on Equal Educational Opportunity for the Handicapped*, 15 IDAHO L. REV. 65, 67 (1978).

26. 334 F. Supp. 1257 (E.D. Pa. 1971) (consent decree), *opinion at* 343 F. Supp. 279 (E.D. Pa. 1972). Henceforth, the case will be referred to as *P.A.R.C.*

27. *See id.* at 296-97. In analyzing the equal protection claim, the court looked at expert testimony which established that all mentally retarded children benefit from education and training; therefore, by denying these children any form of education, while at the same time providing it for normal children, the state and schools had violated *Brown's* demand for equal educational opportunity. *Compare id.* at 296-97 (denial of education to handicapped raised colorable equal protection claims, citing *Brown*), *with* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (school segregation based on race violated equal protection). Because these mentally retarded children could benefit from education, there was no rational basis for their exclusion from school. *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 296-97 (E.D. Pa. 1972). A few courts held that the handicapped were a "suspect class" which demanded strict scrutiny. *See* Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975); *In re* G.H., 218 N.W.2d 441, 447 (N.D. 1974). *But see* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (physical disability did not confer suspect status). Because the handicapped as a class had suffered the criteria of a suspect class, strict scrutiny could be applied. *See* Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55 NEB. L. REV. 637, 657 (1976). In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court described a suspect class as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. One commentary claimed that the handicapped as a class fit all three of these criteria, whereas only one was necessary to qualify a class as "suspect." *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 906 (1975).

28. *See* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972). For a discussion of *P.A.R.C.*, see Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of An Appropriate Education*, 50 TEMP. L.Q. 961, 966-

Mills v. Board of Education,[29] another pre-Act case, strengthened *P.A.R.C.'s* holding by extending it to all handicapped children.[30] The court in *Mills* found that handicapped children excluded from the public school system had been denied a constitutional right to an "equal publicly supported education."[31] The *Mills* court also provided both methods for implementing its decision and procedural remedies if a child were denied access to special education.[32]

The cause of education for the handicapped received an apparent setback in *San Antonio Independent School District v. Rodriguez*.[33] Even though the Court cited *Brown* to acknowledge the importance of education,[34] it declared that education was not a fundamental right.[35] Classifications based on school district wealth also did not demand strict scrutiny, but only required a rational basis;[36] therefore, the residents of less affluent school districts were not a suspect class.[37] Proponents of special

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70 (1977).

29. 348 F. Supp. 866 (D.D.C. 1972).

30. *See id.* at 878 (District of Columbia must provide all children with public education "regardless of the degree of the child's mental, physical, or emotional disability or impairment").

31. *See id.* at 875.

32. *See id.* at 876-83. The court stated that lack of funds was no excuse for a school system's failure to include the handicapped. If the school district had insufficient funds to provide full services to all children, then it should spend its available monies so that no child was totally excluded. *See id.* at 876. For a discussion of *Mills*, see Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of An Appropriate Education*, 50 TEMP. L.Q. 961, 970-72 (1977).

33. 411 U.S. 1, 34-35 (1973). Also prior to the Act, this case did not involve education of the handicapped but was a step backward in equal protection as applied to education in general. *See id.* at 34-35. *Rodriguez* examined the constitutionality of school district financing in Texas, which resulted in unequal per pupil expenditures in the different districts. *See id.* at 4-6.

34. *See id.* at 29.

35. *See id.* at 34-35 (education is neither explicit nor implied right protected by constitution).

36. *See id.* at 55.

37. *See id.* at 28. The Court defined a suspect class as "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. Commentators quickly pointed out that the classification in *Rodriguez*, based on unequal expenditures between children in different school districts, applied to children who were already receiving a minimally adequate education. Since many handicapped children received no education at all, *Rodriguez* would not affect their access to schools. The question then concerned the adequacy of education for the handicapped. *See* Colley, *The Education for all Handicapped Children Act (EHA) A Statutory and Legal Analysis*, 10 J.L. & ED. 137, 139 (1981); Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U.L. REV. 253, 264 (1978); Comment, *The Handicapped Child Has a Right to an Appropriate Education*, 55

education services for the handicapped found support in *Lau v. Nichols*,[38] another pre-Act decision, which mandated special education for children of Chinese origin who spoke no English.[39] The Court asserted that "there is no equality of treatment merely by providing students with the same facilities."[40] Advocates for handicapped children applied this same rationale in justifying their demands for greater expenditures necessary to provide the handicapped with equal educational opportunities.[41]

In 1966, Congress first provided aid for the education of the handicapped by adding title VI to the Elementary and Secondary Education Amendments, establishing a Bureau of Education for the Handicapped and a limited program of grants to the states for the education of the handicapped.[42] After repealing this title in 1970, Congress then passed the Education of the Handicapped Act to set up a more complex program, including larger grants to the various state programs.[43] Following the decisions in *P.A.R.C.* and *Mills*, congressional leadership recognized that federal fiscal assistance still did not meet the needs of handicapped children.[44] In 1974, Public Law 93-380,[45] an emergency measure, extended the Education of the Handicapped Act for three years and provided one year funding to enable Congress to expand its role in aiding the handicapped and to study further actions and proposals.[46] The result of this study was the Education of All Handicapped Children Act of 1975[47]

NEB. L. REV. 637, 653-57 (1976).

38. 414 U.S. 563 (1974).

39. *See id.* at 568.

40. *Id.* at 566. The concept of enhanced treatment for special children was applied to the handicapped in Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976). The court also utilized an equal protection analysis and found the handicapped as a class subject to "strict rationality." *See id.* at 835-36.

41. *See* Frederick L. v. Thomas, 408 F. Supp. 832, 836 (1976). *Lau v. Nichols* was based on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), rather than on the equal protection clause. *See* Lau v. Nichols, 414 U.S. 563, 566 (1974). Nevertheless, its holding was immediately applied to the question of equal educational opportunity for the handicapped. *See* Haggerty & Sacks, *Education of the Handicapped: Toward a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 975 (1977).

42. *See* Elementary and Secondary Education Amendments, Pub. L. No. 89-750, 80 Stat. 1191, 1204-10 (1966).

43. *See* Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121, 175-88 (1970).

44. *See* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1429 ("increased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for handicapped children pointed to the necessity of an expanded Federal fiscal role"). The "landmark court cases" referred to in the Senate Report were *Brown*, *P.A.R.C.*, and *Mills*. *See id.* at 1430.

45. 88 Stat. 484, 579-85 (1974).

46. H. REP. No. 332, 94th Cong., 1st Sess. 4 (1975).

47. 20 U.S.C. §§ 1401-61 (1976).

which established the federal government's involvement on a permanent basis.[48] The Act required that all handicapped children receive a "free appropriate public education" and provided funds to the states to facilitate such an education.[49] A state's eligibility for financial assistance depended upon its promulgating a policy and program to implement the education of the handicapped.[50] A "free appropriate public education"[51] was defined to include "special education"[52] and "related services"[53] as prescribed in each child's "individualized education program."[54] The Act

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48. *See* H. REP. No. 332, 94th Cong., 1st Sess. 5 (1975) (purpose of bill is "to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress will result in maximum benefits for handicapped children and their families").

49. *See* 20 U.S.C. § 1414 (1976). The statute's phrase, "free appropriate public education," was similar to wording in Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 293 (E.D. Pa. 1972), a pre-Act case based on an equal protection claim. In *P.A.R.C.*, the state was required to provide for each mentally retarded child a "free, public program of education and training appropriate to the child's capacity." *See id.* at 285.

50. 20 U.S.C. § 1412 (1976). The state must establish "(i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal." *Id.* § 1412 (2) (A).

51. *Id.* § 1401 (18). The Act defined "free appropriate public education" as:

> [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) (15) of this title.

Id. § 1401 (18). An additional feature of the Act required that, "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped . . .." *Id.* § 1412 (5). The resulting "mainstreaming" of handicapped children, although admirable in principle, has led to many problems. *See* Stearns & Cooperstein, *Equity in Educating the Handicapped*, 38 EDUC. LEADERSHIP 324, 324-25 (1981). Mainstreaming is a contributing factor to "teacher burnout." *See* Weiskopf, *Burnout Among Teachers of Exceptional Children*, 47 EXCEPTIONAL CHILDREN 18, 18-19 (1980). To date, 93% of all handicapped children attend regular classrooms. Television interview with Sen. Lowell Weicker, MacNeill-Lehrer Report (Sept. 8, 1982).

52. 20 U.S.C. § 1401 (16) (1976).

53. *Id.* § 1401 (17).

54. *Id.* § 1401 (19). The Act defined an "individualized education program"(IEP) as:

> [A] written statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . who shall be qualifed to provide . . . specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals . . ., (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated

also compelled states to establish procedural safeguards for handicapped children and their parents to assure the provision of a "free appropriate public education."[55]

In the years following the passage of the Act, much litigation centered on the meaning of the Act's requirements.[56] Some courts defined an appropriate education as promoting self-sufficiency.[57] Others considered the "special education" component as requiring, in some instances, year-round schooling[58] or residential placement.[59] Still other courts limited

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duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Id. § 1401 (19).

55. *See* 20 U.S.C. § 1415 (a) (1976). For specific procedural requirements, see 20 U.S.C. § 1415 (b), (c), (d), & (e) (1976). After the handicapped children and their parents had exhausted procedural remedies within the school system, they could bring a civil action "in any State court of competent jurisdiction or in a district court of the United States." *Id.* § (e) (2) (1976). The Act's enabling regulations were originally set up under the Department of Health, Education, and Welfare, 45 C.F.R. Part 121a (1980), but were recodified when the Department of Education was created in 1980, at 34 C.F.R. Part 300 (1981). *See* Board of Educ. v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3037 n.3, 73 L. Ed. 2d 690, 696 n.3 (1982).

56. *See, e.g.,* Kruelle v. New Castle County School Dist., 642 F.2d 687, 691 (3rd Cir. 1981) (Congress did not provide detailed programs but left many specifics to states); Battle v. Pennsylvania, 629 F.2d 269, 276-79 (3rd Cir. 1980) (Act provided no clear guidance so solutions best left to states), *cert. denied,* 452 U.S. 968 (1981); Pinkerton v. Moye, 509 F. Supp. 107, 112 (W.D. Va. 1981) (Act's goal of full education for handicapped traditionally implemented by states). Part of the confusion stemmed from Congress' failure to furnish a substantive definition of "free appropriate public education," possibly because education traditionally has been a state and local matter. *See* Note, *Enforcing the Right to an Appropriate Education: the Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103, 1109 (1979).

57. *See, e.g.,* Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 875 (S.D. Tex. 1981) (Act's legislative history expressed goal of self-sufficiency and freedom from caretakers); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 53-54 (N.D. Ala. 1981) (IEP must at least enable child to become self-sufficient); Armstrong v. Kline, 476 F. Supp. 583, 603 (E.D. Pa. 1979) (Congress, in legislative history, showed concern for achieving self-sufficiency and freedom from caretakers at minimum), *aff'd sub nom.* Battle v. Pennsylvania, 629 F.2d 269, *cert. denied,* 452 U.S. 968 (1981).

58. *See, e.g.,* Battle v. Pennsylvania, 629 F.2d 269, 281 (3rd Cir. 1980) (application of 180-day rule of maximum schooling defeated goal of appropriate education), *cert. denied,* 452 U.S. 968 (1981); Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263, 1278 (N.D. Ga. 1981) (free appropriate education in some cases required schooling in excess of 180 days); Anderson v. Thompson, 495 F. Supp. 1256, 1266 (E.D. Wis. 1980) (year-round schooling required, if necessary, to provide free appropriate public education), *aff'd,* 658 F.2d 1205 (7th Cir. 1981).

59. *See, e.g.,* Kruelle v. New Castle County School Dist., 642 F.2d 687, 694 (3rd Cir. 1981) (Act provided residential placement in some cases); Papacoda v. Connecticut, 528 F. Supp. 68, 72 (D. Conn. 1981) (special education required residential placement if needed); Gladys J. v. Pearland Indep. School Dist., 520 F. Supp. 869, 873 (S.D. Tex. 1981) (residen-

their decisions to an evaluation of the need for a particular "related service."[60] Some courts interjected a disciplinary problem by holding that expulsion or suspension of a handicapped student from school could result in a denial of an appropriate education.[61] Several courts suggested an equal protection approach, consistent with the rationale in pre-Act cases,[62] but at least one court specifically declined to rule on the equal

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tial placement was necessary to provide free appropriate public education); *see also* Hines v. Pitt County Bd. of Educ., 497 F. Supp. 403, 409 (E.D.N.C. 1980) (appropriate education required school district to pay for residential placement in private facility); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 142 (D.D.C. 1979) (court ordered residential placement for plaintiff at school district's expense). Courts did not accede, however, to all demands for special education requirements. *See, e.g.*, Age v. Bullitt County Pub. Schools, 673 F.2d 141, 143-44 (6th Cir. 1982) (school's provision for deaf classroom teaching of both oral/aural and total methods met deaf student's needs, school not required to set up special class using only one method); Springdale School Dist. v. Grace, 656 F.2d 300, 304-05 (8th Cir. 1981) (deaf child received appropriate education in regular classroom rather than in special school for deaf), *vacated*, ___U.S.___, 102 S. Ct. 3504, 73 L. Ed. 2d 1380 (1982); Pinkerton v. Moye, 509 F. Supp. 107, 112 (W.D. Va. 1981) (school not required to provide self-contained program for one learning disabled child who attended similar program in another school six miles further from home).

60. *See, e.g.*, Tokarcik v. Forest Hills School Dist., 665 F.2d 443, 456 (3rd Cir. 1981) (school required to supply catheterization to spina bifida child); Papacoda v. Connecticut, 528 F. Supp. 68, 72 (D. Conn. 1981) (related services included psychotherapy); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1109 (N.D. Cal. 1979) (services of full time tutor required). In some situations, denial of a related service, such as catheterization for a spina bifida child, would exclude the handicapped child from the regular classroom. *See* Tokarcik v. Forest Hills School Dist., 665 F.2d 443, 456 (3rd Cir. 1981); Tatro v. Texas, 625 F.2d 557, 562 (5th Cir. 1980); *cf.* Hairston v. Drosick, 423 F. Supp. 180, 184 (S.D.W. Va. 1976) (spina bifida child could not be excluded from school under Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976)). *But cf.* Sherer v. Waier, 457 F. Supp. 1039, 1048 (W.D. Mo. 1978) (opinion suggested constitution imposed no duty of special services for spina bifida child and other handicapped, under Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976)). A student whose handicap required an air-conditioned room did not receive an appropriate education in an air-conditioned glass cubicle within a regular classroom. *See* Espino v. Besteiro, 520 F. Supp. 905, 913 (S.D. Tex. 1981). A school also needed to provide a full time tutor in the home as a part of an appropriate education. *See* Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1109 (N.D. Cal. 1979). Psychotherapy could be a related service. *See* Papacoda v. Connecticut, 528 F. Supp. 68, 72 (D. Conn. 1981); Matter of "A" Family, 602 P.2d 157, 165 (Mont. 1979).

61. *See, e.g.*, S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir. 1981) (change in placement resulting from expulsion required Act's procedures), *cert. denied*, ___U.S.___, 102 S. Ct. 566, 70 L. Ed. 2d 473 (1981); Doe v. Koger, 480 F. Supp. 225, 228 (N.D. Ind. 1979) (school needed to place student in more appropriate environment rather than expel him); Howard S. v. Friendswood Indep. School Dist., 454 F. Supp. 634, 639 (S.D. Tex. 1978) (school's exclusion of mentally handicapped student without proper procedure deprived him of appropriate education); *see also* Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978) (expulsion of handicapped violated requirements of Act).

62. *See, e.g.*, Colin K. v. Schmidt, 536 F. Supp. 1375, 1388 (D.R.I. 1982) (equal protection claim valid but not with these facts); Parks v. Pavkovic, 536 F. Supp. 296, 307 (N.D. Ill.

protection question.[63]

Board of Education v. Rowley[64] is the first case in which the Supreme Court dealt with the construction of the Act. In *Rowley*, the Supreme Court reached a definition of "free appropriate education" by considering the language of the Act and its legislative history.[65] Writing for the majority, Justice Rehnquist determined that the Act's goal was "to make public education available to the handicapped" and thus implement the holdings in *P.A.R.C.* and *Mills*.[66] Since these cases dealt with "the right of access to free public education"[67] for the handicapped, the question of equal protection then in *Rowley* became only the question of equal access;[68] therefore, equal protection did not demand that the child in *Rowley* receive any particular substantive level of education.[69] Once the handicapped, however, had entry to a "free appropriate public education," that education necessarily had to afford some benefit to the handicapped

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1982) (Congress passed Act based on its power to enforce equal protection clause); Larry P. v. Riles, 495 F. Supp. 926, 974 (N.D. Cal. 1979) (court turned to equal protection claim, since Act had little judicial interpretation); *see also* Lora v. Board of Educ., 456 F. Supp. 1211, 1275 (E.D.N.Y. 1978) (right to treatment based on equal protection as well as Act), *vacated for clarification of other issues*, 623 F.2d 248 (2d Cir. 1980); *cf.* Kruse v. Campbell, 431 F. Supp. 180, 186-87 (E.D. Va. 1977) (applied equal protection analysis to unequal tuition reimbursements), *vacated*, 434 U.S. 808 (1977).

63. *See* Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263, 1283 (N.D. Ga. 1981) (plaintiffs received complete relief under Act, so ruling on constitutional questions not needed).

64. ___U.S.___, ___, 102 S. Ct. 3034, 3041, 73 L. Ed. 2d 690, 700 (1982).

65. *See id.* at ___, 102 S. Ct. at 3041-42, 73 L. Ed. 2d at 700-02. The Court found it necessary to resort to legislative history since, "like many statutory definitions, this one tends toward the cryptic rather than the comprehensive . . . ." *Id.* at ___, 102 S. Ct. at 3041, 73 L. Ed. 2d at 701.

66. *See id.* at ___, 102 S. Ct. at 3043-44, 73 L. Ed. 2d at 703-04, referring to Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) (consent decree), *opinion at* 343 F. Supp. 279 (E.D. Pa. 1972), and Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

67. *Id.* at ___, 102 S. Ct. at 3047, 73 L. Ed. 2d at 707. The majority opinion pointed to specific language in both *P.A.R.C.* and *Mills* to reinforce its claim. *See id.* The *P.A.R.C.* court required the state "to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . . ." Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971). In *Mills*, the court ordered that available funds be spent so that "no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972).

68. *See id.* at ___, 102 S. Ct. at 3047, 73 L. Ed. 2d at 708. According to Justice Rehnquist, the intent of the Act was to provide "a basic floor of opportunity" which all school districts would provide in order to comply with equal protection rights of handicapped students. *See id.*

69. *See id.* at ___, 102 S. Ct. at 3047-48, 73 L. Ed. 2d at 708.

child.[70] The Court did not attempt to delineate a test of sufficient benefits.[71] Instead, it concluded that, if the child was receiving individualized instruction, coupled with adequate support services to reinforce the instruction, he or she was receiving a "free appropriate public education."[72] Finally, the Court considered the role of the lower courts under the judicial review sections of the Act.[73] The authority of the lower courts was not limited solely to a determination of whether the states had followed the Act's procedural requirements.[74] On the other hand, these courts could not impose their own concepts of educational policy on the school districts.[75] Instead, the lower courts must only determine whether the child's educational plan was "reasonably" designed to provide benefits.[76]

In a concurring opinion, Justice Blackmun interpreted the Act's history and goals to require "equal educational opportunity," according to equal protection demands.[77] Because the child's program afforded her an educational opportunity substantially equal to the non-handicapped, then the Act's standard was met.[78] The question here should not have been

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70. *See id.* at ___, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708. The Court reasoned that little would be accomplished if Congress spent millions on providing access to an education which did not benefit the handicapped child. *See id.*

71. *See id.* at ___, 102 S. Ct. at 3049, 73 L. Ed. 2d at 709. The Court did not go further in the decision because the child involved was already doing well in school. *See id.*

72. *See id.* at ___, 102 S. Ct. at 3049, 73 L. Ed. 2d at 710. The Court thus rejected the standard set up by the district court in Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980), "that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children." *Id.* at 534. Not finding a definition for "free appropriate public education" from the Act itself, the district court had found its definition in a law journal 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). *See* Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980). This standard then became the basis for several other lower court decisions. *See, e.g.*, Springdale School Dist. v. Grace, 656 F.2d 300, 304 (8th Cir. 1981) (court affirmed *Rowley* standard), *vacated*, ___U.S.___, 102 S. Ct. 3504, 73 L. Ed. 2d 1380 (1982); Battle v. Pennsylvania, 629 F.2d 269, 277 (3rd Cir. 1980) (*Rowley* required that education of handicapped be commensurate to education of non-handicapped), *cert. denied*, 452 U.S. 968 (1981); San Francisco Unified School Dist. v. California, 182 Cal. Rptr. 525, 534 (Ct. App. 1982) (almost all cases have adopted *Rowley* standard). *See also* Rowley v. Board of Educ., 632 F.2d 945, 952 (2d Cir. 1980) (Mansfield, J., dissenting) (district judge used standard from law review note), *rev'd and remanded*, ___U.S.___, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

73. *See id.* at ___, 102 S. Ct. at 3050, 73 L. Ed. 2d at 711.

74. *See id.* at ___, 102 S. Ct. at 3050, 73 L. Ed. 2d at 711.

75. *See id.* at ___, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712.

76. *See id.* at ___, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. Procedures in this instance referred to the development of the IEP. "Adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at ___, 102 S. Ct. at 3050, 73 L. Ed. 2d at 711-12.

77. *See id.* at ___, 102 S. Ct. at 3053, 73 L. Ed. 2d at 714 (Blackmun, J., concurring).

78. *See id.* at ___, 102 S. Ct. at 3053, 73 L. Ed. 2d at 715 (Blackmun, J., concurring).

whether the child needed an interpreter but whether the program as a whole gave her an equal educational opportunity.[79]

Justice White, in a dissent joined by Justices Brennan and Marshall, argued that a clear reading of legislative history revealed the Act's purpose to be a "full" or "equal educational opportunity" for all handicapped children;[80] therefore, the child in *Rowley* should have received the services of an interpreter, since without such services she understood less than half of what was said.[81] The dissenting opinion expressed dissatisfaction with the Court's definition of an appropriate education; however, it offered no specific alternative.[82]

Both the majority and dissent in *Board of Education v. Rowley* selected from the legislative history those elements that substantiated their holdings.[83] Some statements in the legislative history referred to an equal

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79. *See id.* at ___, 102 S. Ct. at 3053, 73 L. Ed. 2d at 715 (Blackmun, J., concurring). The services received by a handicapped child should not have depended on the child's level of achievement. *See id.* at 3053.

80. *See id.* at ___, 102 S. Ct. at 3054, 73 L. Ed. 2d at 716 (White, J., dissenting) (referring to Senate Report, House Report, and Congressional Record).

81. *See id.* at ___, 102 S. Ct. at 3055, 73 L. Ed. 2d at 718 (White, J., dissenting). Even if Amy made passing grades, she did not "have an equal opportunity to learn." *Id.* at 3055.

82. *See id.* at ___, 102 S. Ct. at 3056, 73 L. Ed. 2d at 718 (White, J., dissenting).

83. *See id.* at ___, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701-02. Neither Rehnquist nor White mentioned *Brown v. Board of Educ.*, yet Congress clearly pointed to *Brown* as the foundation upon which other cases, such as *P.A.R.C.* and *Mills*, and subsequent legislation rested. *See* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430.

The majority opinion began its examination of legislative history with a quotation from the House Report about the state of education of handicapped children before the passage of the Act in 1975. The actual statement from the House Report referred to the situation of handicapped children before the first federal legislation was passed in 1966. *Compare* Board of Educ. v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3043, 73 L. Ed. 2d 690, 702 (1982) (indicated that, before passage of Act, many handicapped children excluded from schools), *with* H. REP. No. 332, 94th Cong., 1st Sess. 2 (1975) (indicated that, before passage of first congressional legislation in 1966, many handicapped excluded from schools). The opinion then pointed to statements of Sen. Williams, Javits, and Cranston, and Rep. Mink as proof of Congress' primary intent, the inclusion of handicapped children in the schools. *See* Board of Educ. v. Rowley, ___ U.S.___, ___, 102 S. Ct. at 3034, 3043 n.13, 73 L. Ed. 2d 690, 703 n.13. Sen. Williams' remarks concerned a table, which he placed into the record, showing total handicapped children in 1975 (7.8 million), those "served" (3.9 million), and those "unserved" (3.9 million). *See* 121 CONG. REC. 19,487 (1975). Of those unserved, "1.75 million handicapped children do not receive any educational service, and 2.5 million children are not receiving an appropriate education." *Id.* at 19,486. Sen. Cranston's remarks referred to those above figures: "The right to a free appropriate public education has long been the right of certain children between the ages of 5 and 17; but the right has not been extended universally in our country. Some 7.8 million children . . . are largely excluded from the educational opportunities that we give our other children. They are children with physically and emotionally handicapping conditions." *Id.* at 19,502. Since the 7.8 million handicapped

educational opportunity for the handicapped, whereas others indicated a need to limit the requirements.[84] Taken as a whole, the legislative history gave no clear guide to the substantive meaning of the Act's requirements.[85] What the history did indicate, however, was that Congress intended more than just a guarantee of equal access to education for the handicapped.[86] Senator Robert T. Stafford, one of the Act's co-sponsors,

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children included 6.4 million already in the schools, Sen. Cranston's statement did not indicate only an intent to provide access to public education. Yet the majority opinion made this assumption and quoted only a part of the remarks as proof: "millions of handicapped 'children are largely excluded from educational opportunities that we give our other children.'" Board of Educ. v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3043, 73 L. Ed. 2d 690, 702 (1982). Sen. Javits' remarks, "all too often, our handicapped citizens have been denied the opportunity to receive an adequate education," led into a paragraph, from a committee report, related to the goal of self-sufficiency. *Compare id.* at ___, 102 S. Ct. at 3043 n.13, 73 L. Ed. 2d at 702 n.13 (handicapped denied proper education) *with* 121 CONG. REC. 19,494 (1975) (with proper education, these people would be self-sufficient). Rep. Mink's comment, "handicapped children . . . are denied access to public schools because of a lack of trained personnel," Board of Educ., v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3043 n.13, 73 L. Ed. 2d 690, 702 n.13, could not be found on the page cited, 121 CONG. REC. 23,703 (1975), which was devoted to remarks of Rep. Brademas, or in the record where her comments were located, 121 CONG. REC. 37,030-31 (1975).

In these examples, the majority opinion thus disregarded its own admonition that "Congress expresses its purposes by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *See* Board of Educ. v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3042 n.11, 73 L. Ed. 2d 690, 702 n.11 (1982), quoting from 62 Cases of Jam v. United States, 304 U.S. 593, 596 (1951).

84. *See* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433. "It is this committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal education opportunity." *Id.* at 1433. *See* S. REP. No. 168, 94th Cong., 1st Sess. 1, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1427. "[T]he bill provides that the State must establish priorities for services, first to handicapped children not receiving an education and second, to handicapped children with the most severe handicaps receiving an inadequate education." *Id.* at 1427. *See* H. REP. No. 332, 94th Cong., 1st Sess. 19 (1975). "The individualized plan will achieve 2 fundamental goals: (1) each child requires an educational plan tailored to achieve his or her maximum potential . . . ." *Id.* at 19. *See* H. REP. No. 332, 94th Cong., 1st Sess. 24 (1975). "It could be rightly argued that to authorize such sums as might be appropriated for each handicapped child being served would permit an excessive contribution for each child. Not only would there be no guidance for the appropriations and budget committees, but there would be no limitation on the amount that could be appropriated." *Id.* at 24.

85. *See* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425; H. REP. No. 332, 94th Cong., 1st Sess. 2 (1975).

86. *See* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433 ("Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal opportunity"); H. REP. No. 332, 94th Cong., 1st Sess. 13 ("each child requires an educational plan that is tailored to achieve his or her maximum potential"); H. REP. No. 332, 94th Cong., 1st Sess. 19 ("Congress has the responsibility to assure equal protection of the laws

supported this view in listing as models for the Act the various state statutes, prior federal statutes, court decrees, and, most especially, recommendations from professionals in the field of special education.[87] Stafford also suggested that, by providing the handicapped with special services to give them an "equal educational opportunity,"[88] the federal government was providing only a "minimum floor of collective responsibility."[89]

Had the Supreme Court been able to define the sufficiency of education for handicapped children within the pre-Act framework of equal protection analysis and the express legislative intent behind the Act itself, local school districts today would have available for use a meaningful substantive definition.[90] Both *P.A.R.C.* and *Mills* established that handicapped children have a right to education.[91] Since the handicapped now have a place in the school systems, they can no longer claim to constitute a "suspect class" with respect to public education, as some lower courts have

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and thus to take action to assure that handicapped children have available to them appropriate educational services").

87. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 VT. L. REV. 71, 72-73 (1978). According to Stafford,

> the law is largely an affirmation of, and is actually modeled upon, all of the following:
> mandatory full service statutes in practically all the states
> numerous court decrees
> prior federal law dating back to 1967
> and, of special importance, the best and most progressive professional practice of all who are involved in the instructional development of exceptional children.

Id. at 72-73.

88. *See id.* at 71.

89. *See id.* at 75. According to Stafford, the Act was "characterized as one which provides a minimum floor of collective responsibility for the Nation as a whole. It tackles the delicate mission of prodding, through legislation, those regions which are not correctly serving their handicapped population while at the same time not penalizing those who are doing a good job." *Id.* at 75. Stafford also commented that "we in Congress did not attempt to define 'appropriate' in the law but instead, we established a base-line mechanism, a written document called the Individualized Education Program (IEP)." *Id.* at 75.

90. *Cf.* S. REP. No. 168, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1433. The legislative history indicated that Congress was concerned with equal protection for the handicapped:

> Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an enforceable goal requiring all children to be in school. S. 6 takes positive steps to ensure that the rights of children and their families are protected.

Id. at 1433.

See H. REP. No. 332, 94th Cong., 1st Sess. 19 (1975). "Congress has the responsibility to assure equal protection of the laws and thus to take action to assure that handicapped children have available to them appropriate educational services." *Id.* at 19.

91. *See* Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children, Inc. v. Pennsylvania, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971).

held.[92] Therefore, "strict scrutiny" does not apply to any laws affecting the education of handicapped and such laws must now be examined by a different standard.[93] If the requirements of the Act could have been examined under the rational basis test, any resulting disparity in the treatment of handicapped children would require only a reasonable relationship to a legitimate government interest, such as the state's concern with distributing available educational funds to all children.[94] Under this analysis, any expenditure too large for the school district to handle would not be necessary as long as the handicapped child was receiving some benefit otherwise.[95] By relying solely on selected legislative history, the Court has not made a clear statement.[96] The Supreme Court could have headed off future litigation if it had been able to deal with the equal protection question in *Rowley*.[97]

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92. *See* Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975); *In re* G.H., 218 N.W.2d 441, 446-47 (N.D. 1974); *cf.* Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976) (plaintiffs might have claimed application of strict scrutiny), *aff'd*, 557 F.2d 373 (3rd Cir. 1977). *But cf.* New York Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762-63 (E.D.N.Y. 1973) (suggested that mentally retarded were not suspect class). *See generally* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975) (considered equal protection rights of handicapped in respect to public education and residential institutionalization, and concluded that handicapped are suspect class).

93. *See* Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46, 52 (N.D. Ohio 1976) (treatment of mentally retarded met rational basis test); Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976) (for equal protection, handicapped as class fit middle test, called "strict rationality"), *aff'd*, 557 F.2d 373 (3d Cir. 1977); *cf.* Lora v. Board of Educ., 456 F. Supp. 1211, 1275 (E.D.N.Y. 1978) (suggested that handicapped might require "an intermediate level of scrutiny"), *vacated for clarification of other issues*, 623 F.2d 248 (2d Cir. 1980). These cases suggest that courts, although no longer applying strict scrutiny, continue to scrutinize the handicapped by one of two tests, either the rational basis or the intermediate level. If the Supreme Court were to apply equal education analysis to the handicapped, this ambivalence should be resolved. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973) (unequal expenditures between school districts satisfied rational basis test).

94. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973). In *Rodriguez*, the Court found that school district financing, resulting in unequal pupil expenditures between districts, satisfied a legitimate state purpose of local financing for education. *See id.* at 54-55. The same reasoning could be applied to the handicapped.

95. *Cf. id.* at 53-55.

96. *See* Board of Educ. v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3042, 73 L. Ed. 2d 690, 701-02 (1982).

97. *Compare* Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976) (Supreme Court would use middle test of "strict rationality" in dealing with handicapped) *with* Pennsylvania Ass'n for Retarded Children, Inc. v. Pennsylvania, 343 F. Supp. 279, 297 (E.D. Pa. 1972) (law affecting handicapped examined under rational basis test). Because of the possibility of applying either the rational basis standard or the intermediate level standard, fu-

In refusing to set substantive standards, the Court has given power to local schools and state educational systems to define a "free appropriate public education."[98] Since the lower courts no longer can determine educational policy, the ultimate authority may now rest with the schools.[99] The result could be a decrease in services that school districts provide the handicapped and a possible decline in the number of cases that reach the state and federal courts.[100] Because the courts, however, still retain the power to examine a child's individualized education program, this power could lead to future judicial involvement in the development of these programs.[101] The Supreme Court, by choosing to review a situation in which the child's progress was already satisfactory, has also avoided the question of a "free appropriate public education" in more extreme instances, such as residential placement, year-round schooling, and disciplinary action.[102] Undoubtedly, situations involving such issues will lead to future court action.[103]

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ture litigation seems inevitable. According to Fred Weintraub, assistant executive director of the Council for Exceptional Children who helped draft the Act, after *Rowley*, "there is still room for . . . coming back to court with constitutional arguments based on equal protection." "Setback for Handicapped," N.Y. Times, June 30, 1982, at B2, col. 5. The need for a definitive standard becomes apparent in consideration of the large number of cases filed each year under the Education of All Handicapped Children Act. In Texas, during the 1981-82 school year, 49 cases were filed under the Act; in 1980-81, there were 87 cases filed and in 1979-80, 49 cases. So far, in 1982-83, there have been 11 cases filed. Telephone interview with Annette Hewgley, Docket Clerk of the Texas Education Agency (Nov. 4, 1982).

98. *See* Board of Educ. v. Rowley, ___U.S.___, ___, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 710 (1982).

99. *See* statement by Gwendolyn Gregory, lawyer for the National School Boards Association, in "Setback for Handicapped," N.Y. Times, June 30, 1982, at B2, col. 6; "Justices See a Limit to Services Schools Must Offer Handicapped," Wash. Post, June 29, 1982, at A7, col. 1.

100. *See* "Effect of Handicapped Ruling Unclear," N.Y. Times, June 29, 1982, at B5, col. 4; TIME, July 12, 1982, at 53. Currently, the Act's regulations, 34 C.F.R. Part 300, are undergoing revision for the purpose of giving more autonomy and responsibility to local school districts. *See* television interview with T. H. Bell, Secretary of Education, MacNeill-Lehrer Report (Sept. 8, 1982). One proposed change allows school districts to consider a handicapped child's disruptive influence in a regular classroom and thus vary placement and services accordingly. *See* School Board News, Vol. 2, No. 14, Aug. 25, 1982, p. 1 (pub. by the National School Boards Association).

101. *See* School Board News, Vol. 2, No. 14, Aug. 25, 1982, p. 6 (pub. by the National School Boards Association). The Council of School Attorneys for the National School Boards Association recommends that school districts follow in minute detail every procedural step required in the Act, involving parents and concentrating particularly on the IEP. *See id.*

102. *See* Rowley v. Board of Educ., ___U.S.___, ___, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 709 (1982); Butler & Cook, *After Rowley: An Effective Education for Handicapped Children*, 18 TRIAL 71, 73 (Sept. 1982).

103. *See* Butler & Cook, *After Rowley: An Effective Education for Handicapped Chil-*

The Supreme Court has made a positive contribution in affirming the Education of All Handicapped Children Act of 1975.[104] In doing so, however, the Court has not resolved many of the questions concerning the Act's requirements. The resulting ambiguities, coupled with the emotional overtones attached to the cause of the handicapped, create much potential for future controversy.

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dren, 18 TRIAL 71, 75 (Sept. 1982); School Board News, Vol. 2, No. 14, Aug. 25, 1982, p. 6 (pub. by the National School Boards Association).

104. *See* "Setback for Handicapped," N.Y. Times, June 30, 1982, at B2, col. 5 ("The major significance of the Supreme Court decision is that the Court has for the first time upheld the basic structure of the law."); TIME, July 12, 1982, at 53 ("the court left intact the statutes's fundamental safeguards").