SEPTEMBER 1982 LAW REVIEW

SUPREME COURT LOWERS STANDARD FOR "APPROPRIATE EDUCATION" OF HANDICAPPED

James C. Kozlowski, J.D.

On June 28, 1982, the United States Supreme Court decided *Hendrick Hudson District Board of Education v. Rowley*.

In this case, Amy Rowley and her parents argued unsuccessfully that a "free and appropriate education" guaranteed by the Education for All Handicapped Children Act of 1975 (Public Law 94-142) should include a sign language interpreter in the classroom. Despite the use of a hearing aid and wireless receiver provided by the school, Amy was able to understand less than half of what was said in the classroom. Amy did receive special services, including one hour of instruction per day from a tutor for the deaf and three hours per week of speech therapy.

The issue before the court was the meaning of a "free and appropriate public education" as defined in P.L. 94-142. This law provides federal funds to the states for education of the handicapped. Speaking for the majority in this 6 to 3 decision, Justice William Rehnquist said such an education "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."

Recreation is identified in the act as a related service, and, therefore, eligible for federal funds provided for handicapped education under P.L. 94-142. As defined in the Code of Federal Regulations (34 CFR 300.14), the term "recreation" includes: assessment of leisure function; therapeutic recreation services; recreation programs in schools and community agencies; and leisure education.

In addition to personalized instruction and sufficient supportive services such as recreation, Rehnquist described a "checklist for adequacy" under the act which "requires that such instruction and services be provided at public expense and under public supervision, meet the state's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP." The IEP, or "individualized educational program," required by P.L. 94-142 consists of a written document prepared by the school, teacher, and parents containing:

> (A) a statement of the present levels of educational performance of the child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such service, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual

> basis, whether instructional objectives are being achieved.

The IEP must be reviewed by the education agency at least annually.

According to Rehnquist, "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures which would result in individualized consideration of and instruction for each child." The court rejected the requirement imposed by the lower courts that the states maximize the potential of handicapped children. "Thus the intent of the act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside," Rehnquist said.

EARLIER COURT DECISIONS

In determining the congressional intent of the act, Rehnquist refers to two earlier federal court decisions (*Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, and *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866) which provided the impetus for such legislation. According to Rehnquist, the legal principle enunciated in these cases (handicapped children must be given access to an adequate, publicly-supported education) guided the drafters of the act. Access, however, does not necessarily include additional services to ensure equal educational opportunities for the handicapped commensurate with that provided other children. Rehnquist rejects this equal opportunity requirement imposed by the lower courts as "an entirely unworkable standard requiring impassible measurements and comparisons." As a result, Rehnquist concludes "the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go."

In establishing the limitations of an "appropriate" education under P.L. 94-142, Rehnquist quotes the Mills case as indicative of the act's congressional intent:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to benefit therefrom.

According to Rehnquist, the federal court cases cited above identified a need which was addressed by P.L 94-142 "to provide a basic floor of opportunity" for handicapped children. Rehnquist, therefore, finds "neither the act nor its history persuasively demonstrate that Congress thought that equal protection required anything more than equal access." As a result, Rehnquist concludes P.L 94-142 "cannot be read as imposing any particular substantive educational standard upon the states."

As defined in this case, equal access to an education does require more than mere physical presence in

the educational setting. "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child," Rehnquist said. Rehnquist, therefore, defines the "basic floor of opportunity" provided by the act to consist of "access to specialized instruction designed to provide educational benefit to the handicapped child."

Given that services provided Amy Rowley were more than a "basic floor of opportunity," the court declined the invitation to go beyond the facts and define that point below which services would be considered inadequate:

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

The court did, however, suggest that a normal progression from grade to grade is indicative of some benefit conferred by the educational process.

> The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the act.

For those instances where an educational institution may try to circumvent the act by promoting a child without regard to educational achievement, Rehnquist said the facts in *Rowley* indicate that "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all the benefits to which they are entitled by the act." In a footnote, Rehnquist said, "We do not hold that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a free and appropriate public education." However, given Amy Rowley's academic progress and the special services provided her, the court deferred to the judgment of the school administrators' decision to forego a classroom interpreter in this instance.

Having considered the language of P.L. 94-142 and its legislative history, the court described the holding of the case as follows:

> Insofar as a state is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense,

must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP.

THREE JUDGES DISAGREE

The three dissenters in this case, Justices White, Brennan, and Marshall, disagreed with the majority's interpretation of the act's legislative history. The dissenting opinion, written by Justice White, points to references in the legislative history wherein "the purpose of the act was described as tailoring each handicapped child's educational plan to enable the child *to achieve his or her maximum potential*."

White rejects the argument offered by Rehnquist and the majority that such references are "isolated phrases and not controlling when analyzing a legislative history." According to White, the goal of maximizing the educational potential of handicapped children "is repeated through the legislative history, in statements too frequent to be passing references and isolated phrases."

According to White, special education as defined in P.L. 94-142 means *specifically designed instruction to meet the unique needs of a handicapped child*. Under the facts in this case, the dissenters conclude that the educational institution did not meet these unique needs despite the provision of substantial services: "Amy Rowley, without a sign language interpreter, comprehends less than half of what is said in the classroom—less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades."

It is difficult to determine whether *Rowley* will necessarily mean less 94-142 funds allotted by local education agencies for related services such as recreation. Given the language of the opinion, it is apparent that recreational services must enable a handicapped child to benefit from the educational process. In this context, benefit is indicated by passing marks and advancement from grade to grade. Arguing that such services will maximize the child's potential by promoting the constructive use of free time obviously goes further than required by the act under *Rowley*. A more cogent argument, therefore, would correlate recreation services with minimal rather than maximum academic progress.

Although the court determined that the rather substantial services provided Amy Rowley under the act were adequate, there was no attempt to establish a baseline standard below which services would be considered unacceptable. It is unlikely that the Supreme Court will choose to review a case presenting this tough issue in the near future. As a result, the lower courts will have to wrestle with situations involving minimal services in educational settings less affluent than Westchester County, New York.

Given the conservative majority on the court, one can expect similar narrow interpretations of legislation like P.L 94-142 in the future. Strict construction of the law rather than judicial activism characterizes the court majority on such issues. As a result, it is unlikely that the present court will expand the rights of the handicapped and provide redress for perceived inequities absent clear and specific legislative direction.

Congress could certainly overrule *Rowley* by amending the act and establish a standard based upon the maximum potential of the child. Given the rhetoric of the new federalism, however, this type of costly requirement for states to receive federal funds is unlikely. In addition, appropriations for P.L. 94-142 state grant programs would have to be increased significantly to mute state objections to a higher standard for educating the handicapped.

Given judicial restraint in this area, advocates for related services under P.L 94-142, like recreation, must build their case around Rehnquist's "checklist for adequacy under the act." Specifically, recreation services for the handicapped must be spelled out in state educational standards and/or the child's IEP. Clear evidence of these requirements on the record will increase the likelihood of a successful court challenge should such services later be denied by the educational institution. Absent such documentation, the Rowley case would suggest that federal courts will defer to the judgment of school administrators.