

Chapter 1

The Evolution of the Federal Role

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As the year 2000 drew to a close, Congress took a substantial step toward fulfilling an old promise: to pay 40 percent of the extra costs of educating students with disabilities. That promise was attached to the landmark 1975 federal law that mandated the provision of a “free appropriate public education” to all disabled students. The original timetable stipulated regular increases until the 40 percent plateau was met by 1982. Yet only in the past few years has the federal share of special education spending risen higher than about 12 percent.

Only in the past few years has the federal share of special education spending risen higher than about 12 percent, despite Congress’ 1975 promise to pay 40 percent of the extra costs of educating students with disabilities.

In the meantime, the Department of Education, Congress, and federal courts have steadily increased the financial obligations of states and school districts. For instance, several categories of disabilities, such as autism and attention deficit disorder (ADD), have been added to the list of disabilities covered by the special education law. During the 1980s, Congress also extended special education services to disabled infants and preschoolers. Most recently, the 1999 Supreme Court case of *Cedar Rapids Community School District v. Garret F.*¹ elicited a wave of fear and anger over the exploding costs of special education. School administrators viewed the Court’s ruling that a school district must pay for the full-time nursing care of a paralyzed teenager as illustrative of the enormous burdens being placed on their budgets.

As a result, local administrators, state education officials, and advocates for the disabled have all come to see the federal government as a sort of deadbeat dad, siring legislative offspring and then failing to support them adequately. School personnel and advocates for the disabled usually find themselves on opposing sides, yet the “40 percent” figure has long been a galvanizing issue. Moreover, to a number of congressional Republicans, special education is yet another of the loathed “unfunded mandates” that Washington imposes on the states. Here is a federal education program they believe *should be* fully funded. Add in a few years of budget surpluses, and it’s easy to understand why federal grants to the states for special education grew from \$2.3 billion in 1996 to \$6.3 billion in fiscal 2001, a threefold increase (excluding grants for the preschool and infants and families programs). President Clinton requested a total appropriation under the Individuals with Disabilities Education Act (IDEA) of \$6.4 billion in 2001, up from \$6 billion in 2000. Congress instead approved \$7.4 billion in total spending. Still, it would take another doubling in spending to come near the 40 percent mark.

One cannot escape the issue of cost when dealing with special education. There hasn't been a rigorous accounting of what special education costs nationwide since 1988. That tally put the incremental cost of special education—what is spent over and above the cost to educate a nondisabled student—at \$19 billion during the 1985-86 school year.² The study also confirmed an earlier study's finding that disabled children cost about twice as much to educate as the nondisabled.³ The Center for Special Education Finance extrapolated these estimates to the 1995-96 school year and came up with an incremental cost of somewhere between \$30.9 billion and \$34.8 billion.⁴ The expansion of services to children with ADD and attention deficit hyperactivity disorder (ADHD)—there was a 280 percent increase in the "other health impaired" category of disabled children between the 1988-89 and 1997-98 school years—combined with normal inflation and the increasing coverage of younger children has probably pushed the incremental cost near \$40 billion.

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Yet the IDEA has also been a remarkably successful piece of legislation. Before its enactment in 1975, federal statistics showed that, of the more than 8 million children from birth to age 21 with disabilities, only half were receiving an appropriate education. Another 2.5 million were receiving an inappropriate education, and 1.75 million, usually those with severe disabilities, received no public education whatsoever. Now these students are at least in schools, often with a series of supplementary aides and specialized curricula that allow them to participate along with their nondisabled peers.

Along with special education's growth, however, came a long list of complaints. Some contend that far too many children are being shunted into special education when the real problem is that they haven't been taught very well in the regular classroom. G. Reid Lyon of the National Institute of Child Health and Human Development has called the "learning disabled" category a "sociological sponge to wipe up the spills of general education."⁵ Others contend that not enough students are receiving the services to which they're entitled. For instance, some cities—Washington, D.C., is a glaring example—have such heavy backlogs that children go for years without even being evaluated for services, their disabilities weighing them down like clothes in a swimming pool. Moreover, for the children placed in special education, the label itself sometimes acts as an unbearable weight, sticking them with poorly trained teachers and the stigma of diminished expectations.

Policymakers also find special education frustrating because it complicates our handling of just about every other promising education reform. Within the debate over school vouchers, for instance, there is always the lurking concern that private schools will view disabled children much as an HMO might view Vice President Dick Cheney. How can we ensure that private schools won't discriminate against disabled students? In the standards-and-accountability debate, there is the enduring question of whether schools are pushing low-performing students into special education classes in order to exclude them from high-stakes tests. The solution might be to bring special education students into mainstream testing regimes, but might that corrupt

information on overall student performance?

Policy in special education is a complicated stew of statutory language, precedent-setting court decisions, and federal regulations. The vague language of the law has left much of the interpretation to the courts, where the definitions and substantive requirements of special education have evolved over time. The law has developed at the hand of Congress as well, most recently—and some say most dramatically—during the 1997 reauthorization of the IDEA. What follows is the story of how the interaction among courts, Congress, schools, and parents has molded special education into its current form.

From the Margin to the Center

During the 1950s and '60s, two distinct movements converged to form a powerful lobby in pursuit of federal legislation to address the education of children with disabilities. On the one hand were civil rights advocates inspired by the Supreme Court's 1954 decision in *Brown v.*

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*Board of Education.*⁶ They viewed the court's striking down of racial segregation as a clear sign that the public schools' segregation and exclusion of children with disabilities were also unconstitutional. On the other hand were parents—many of them white and middle class—whose children were having trouble in school. They argued that their children's academic difficulties were caused by "learning disabilities" that masked their true intellectual potential. The goal was to define academic failure as primarily a medical problem, one that might be remedied if sufficient resources and extra help were steered toward these "underachieving" children.⁷ By 1968, the grassroots lobby for the learning disabled had secured enactment of statutes in 13 states that recognized

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These movements arose against a backdrop of animosity and discrimination toward the disabled. The eugenics movement of the late 19th and early 20th centuries viewed the physically handicapped and mentally retarded as a drag on human progress. Its followers sought to institutionalize and sterilize the disabled in order to keep them from passing on their genes. In the 1926 case *Buck v. Bell*, the U.S. Supreme Court, in the voice of Justice Oliver Wendell Holmes Jr., legitimized the movement's reasoning in ruling that a young girl who had been labeled "backwards" could be sterilized. Justice Holmes wrote, "The principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes.... Three generations of imbeciles are enough."⁸

Educating the disabled was viewed by some as futile, a waste of resources. Laws that required parents to school their children sometimes exempted children with disabilities. In a typical case, *Board of Education of Cleveland Heights v. State ex rel. Goldman*, a child with an IQ below 50 was excluded from a special school in Ohio. In 1934, the court of appeals ruled that "[a]s a matter of common sense it is apparent that a moron of very low type, or an idiot or imbecile who is incapable of absorbing knowledge or making progress in the schools, ought to be

excluded.”⁹ When severely disabled children weren’t denied an education altogether, they seldom benefited from whatever education was offered to them—often in segregated settings that rarely amounted to much more than warehousing.¹⁰

In the wake of the *Brown* decision, many states continued to exclude the disabled from public schools. A North Carolina statute, still on the books as late as 1969, allowed the state to label a child as “uneducable” and made it a crime for parents to challenge the decision.¹¹ Other states and districts tended to place disabled children in separate schools and classrooms, which was more cost-effective than educating them in regular classrooms. Civil rights advocates, however, argued that schools were underestimating the benefits of placing disabled children in the regular classroom. They pushed for “inclusion,” arguing that if we mean to help disabled children become self-sufficient, they need to learn how to live among and interact with their nondisabled peers.

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Civil rights advocates scored their first victories in the courts. Fears that schools, in reaction to the *Brown* decision, were now labeling black children as “mentally retarded” in order to exclude them from school was one motivator of a wave of litigation. Two famous cases defined the rights of the disabled and set up a framework for subsequent legislation. In the 1972 case *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*,¹² commonly known as the *PARC* decision, parents of mentally retarded children filed a class-action suit challenging Pennsylvania statutes that barred them from public schools. The suit alleged that the state had violated the 14th Amendment’s guarantees of equal protection and due process by arbitrarily excluding children from school without any kind of hearing or legitimate reason for doing so. The resulting consent decree outlined both the state’s duty to educate the mentally retarded and a series of rules and procedures meant to protect students’ rights.

Another 1972 case, *Mills v. Board of Education of District of Columbia*,¹³ involved a broader class of students, including those with behavioral problems, emotional disturbance, and hyperactivity. *Mills* also alleged equal protection and due process violations. Here, however, the District’s Board of Education acknowledged its obligation to educate all children but claimed that it did not have the resources to do so. The board’s claim of inadequate resources turned out to be no defense. Said the court: “Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly supported education, and their failure to afford them due process hearings and periodical review, cannot be excused by the claim that there are insufficient funds.”¹⁴

PARC and *Mills* established three principles that have guided special education law ever since. One is that the Constitution’s guarantees of equal protection and due process prevent schools from excluding students solely on the basis of their disabilities. Another is that parents of disabled children must have a range of opportunities—such as impartial hearings and access to the courts—to challenge a school’s decisions regarding their children’s educational programs. And, finally, exorbitant costs are no excuse for failure to grant the disabled access to the public

education system. *PARC* and *Mills* and the principles they elucidated fueled a surge in litigation that resulted in similar decisions in 27 states by 1974. Many states also enacted laws mandating education for the disabled.

The agitations of civil rights advocates pushed Congress to act as well. In 1966, Congress amended the new Elementary and Secondary Education Act to include funds for the education of disabled children and to create the Bureau of Education for the Handicapped within the U.S. Office of Education. A number of grants for disabled children were then consolidated under the Education for the Handicapped Act (EHA) of 1970, the first freestanding statute devoted to students with disabilities. Further amendments in 1974 significantly boosted federal grants for states to help them pay for the rights being secured through lawsuits and required states to detail their plans for achieving the goal of full educational opportunities for disabled children.

Prior to enacting the Education for All Handicapped Children Act (EAHCA) in 1975, Congress' most significant action on behalf of disabled children was passage of Section 504 of the Rehabilitation Act of 1973.¹⁵ Section 504 was a broad antidiscrimination statute that applied not only to public schools but also to any institution that received federal funds. It read: "No otherwise qualified individual with a disability...shall, solely by reason of his disability, be excluded from participation in, or be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." In granting specific protections to disabled students, Section 504 relied heavily on the *Mills* and *PARC* decisions and affirmed the principle that disabled children should be educated in regular classrooms.

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By 1974, most of the legal protections that characterize special education as we know it were in place. Both case law and statutes prohibited the exclusion of disabled students from public school and required schools to make every effort to place disabled children in classrooms with their nondisabled peers. Parents had the right to be notified of, and to challenge, any changes in their disabled child's educational placement. But passing a civil rights law is one matter; enforcing it is another. The Rehabilitation Act gave disabled children certain rights, but not the funds to encourage and help schools to identify, evaluate, and serve all disabled children, or to set up the kinds of due process protections specified by the laws.

A Clear Mandate

Some funds, together with a clearer, more specific mandate, came with passage of the EAHCA in 1975. (Henceforth, this statute will be referred to as the IDEA, its name since 1990.) Congress justified the legislation on two major grounds: as an antidiscrimination measure, and as a long-term investment in the nation's economic health. The goal was to make small educational investments early in a disabled child's life that might lead to him or her becoming a self-sufficient, productive adult who would need fewer social services later on.

The IDEA expanded the EHA's small financial commitment into a multibillion dollar program of grants to the states. The intent was not to pay for all the costs of providing special education to disabled children; it was to help states fulfill their duty to uphold the 14th Amendment's equal-protection guarantee. At the time, Congress promised eventually to pay 40 percent of the incremental cost of special education—those expenses above what schools spend on regular students. The Senate estimated the cost of implementing the law nationwide at \$1.9 billion in 1978, while the House estimate was set at \$3.8 billion. The funding formula was based on the percentage of children labeled as disabled in a state, with a cap of 12 percent to dissuade states from overlabeling in pursuit of extra funds. The bill, signed by then-President Gerald Ford, enjoyed enormous popularity: The final vote was 375 to 44 in the House, 83 to 10 in the Senate.

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The IDEA followed a trend, best represented by Medicare and Medicaid, of setting up entitlements that give a certain class of people legally enforceable rights without regard to the costs of exercising them. In the 1970s, writes education scholar Paul Hill, these entitlements sometimes joined with the idea that Congress should leave the interpretation and enforcement of laws to the courts rather than write reams of regulations and set up new bureaucracies. Hill has called the IDEA the “high water mark of resource allocation by court decision.”¹⁶

The IDEA is not technically an “unfunded mandate.”¹⁷ By foregoing federal special education funding, states could avoid being subject to the law's requirements. No rational state would comply with the law, write law professors Mark Kelman and Gillian Lester, if federal funds did not cover the costs of compliance. But the IDEA is not disabled children's only line of defense. Section 504, though less targeted at education and less detailed, substantially overlaps with the IDEA's requirements. It precludes discrimination on the basis of disability, and anyone with a physical or mental impairment which “substantially limits one or more major life activities,” including learning, is covered by its protections. A state would have to forego *all* federal funds in order to avoid the special education mandates of Section 504. In fact, only one state, New Mexico, didn't immediately apply for federal funds under the IDEA, but by 1984 even New Mexico had complied with the statute.

Though schools must comply with both Section 504 and the IDEA, it is primarily the IDEA that drives policy in special education, with one exception: Students with ADD have sometimes appealed to Section 504 because schools were reluctant to cover them as “other health impaired,” emotionally disturbed, or learning disabled under the IDEA. The Office of Civil Rights within the Department of Education handles Section 504 complaints, and its staff seems more willing to identify children with ADD as disabled.¹⁸ In a survey by Professors Kelman and Lester, districts reported widespread fears and uncertainty surrounding the requirements of Section 504, mainly because they seem to cover a broader and less well-defined set of disabilities—anything that “substantially limits” a major life activity. “If a student can describe herself as disabled

whenever her ability to perform a ‘major life activity’ is compromised,” write Kelman and Lester, “there is no obvious limit on who can make claims: every weakness can be described as a handicap.” Kelman and Lester concluded that school administrators’ worries stemmed more from their familiarity with the procedures and rules of the IDEA, and their relative lack of experience with Section 504, than from any legitimate threat of looming Section 504 litigation.¹⁹ (Title II of the Americans with Disabilities Act provides antidiscrimination protections similar to Section 504, but it rarely has been invoked in K-12 education litigation.²⁰)

What the IDEA Covers

The IDEA mandates that all disabled students be provided a “free appropriate public education” (FAPE) in the “least restrictive environment” (LRE). Each disabled child must have an individualized education program (IEP) that details the range of services to be provided and where a student’s education is to take place, with the law expressing a heavy preference for the mainstreaming of disabled children whenever possible. The law also mandates that districts establish procedures for ensuring that parents are involved in the development of each IEP and that they have opportunities to challenge a district’s decisions about the range of services it will provide.

A parent’s first line of defense in special education is his or her child’s IEP. It is the tool that allows parents to ensure that their disabled children are receiving an “appropriate” education.

The law covers a range of handicapping conditions, including mental retardation, deafness, speech or language impairments, blindness, serious emotional disturbance, physical and health disabilities, and, significantly, “specific learning disabilities.” It requires schools to grant children with these conditions whatever special education they require as well as the “related services” they need to attend school and benefit from education. These may include transportation services, assistive listening devices, Braille textbooks, and medical services, “except that such medical services shall be for diagnostic or evaluation purposes only,” in the words of the statute.

A parent’s first line of defense in special education is his or her child’s IEP. It is the tool that allows parents to ensure that their disabled children are receiving an “appropriate” education. The law requires school districts to seek out, identify, and evaluate all children who may be eligible for special education services. Once a potentially disabled child is identified, a team of experts (including the child’s teachers) convenes to assess whether he is indeed disabled and, if so, to design a suitable course of treatment. During these meetings, school representatives, the child’s teacher, the parents, and any experts called by parents or the school develop the student’s IEP, which gives a written diagnosis of the child’s problems, a detailed account of the special services he will receive, and a statement of academic objectives and goals. At any point, the child’s parents may challenge the district’s decisions regarding diagnosis or treatment and suggest alternatives. If the two parties can’t reach an agreement, the parents may ask for a hearing in front of an impartial officer. If either party doesn’t agree with the hearing’s result, it can appeal to the state board of education and, ultimately, to the courts.

That “specific learning disabilities” were included as a handicapping condition under the IDEA represented a major coup for disability advocates. This term covers children who, outside of school, might not be considered disabled. Any discussion of special education must keep the distinction between students with learning disabilities (LD) and physical or severe mental disabilities clear. In the days before Section 504 and the IDEA, children with LD were seldom if ever excluded from school. Their needs rarely rise above having a well-trained teacher who can diagnose and help them cope with their learning difficulties. No one expected that they would eventually account for more than half of all children served under the IDEA and for a third of the nation’s spending on special education.

The IDEA defines learning disabilities as “psychological processing disorders that interfere with one’s ability to perform a number of learning tasks.” These learning deficits cannot result from physical disabilities, mental retardation, emotional disturbance, or environmental or socioeconomic factors. As Professors Kelman and Lester put it in *Jumping the Queue*, this is a “negative” definition of LD. A learning disability is assumed to be present if we can’t find other factors, such as poverty, that would explain low achievement. In practice, the law considers a student to be learning disabled if he exhibits a discrepancy between his intellectual ability, usually measured on an IQ test, and his actual achievement, usually measured by various standardized tests. These students, it is said, are “underachieving,” i.e., not achieving at the level predicted by their innate ability. In theory, schools must determine whether this discrepancy is the result of factors other than a specific learning disability, but in practice it is difficult if not impossible to isolate which factor causes a child’s inability to measure up to his potential.²¹ This has led to frequent criticism that special education services are given to children who are failing in school but who don’t suffer from an identifiable learning disability (in other words, their low test scores are predicted by equally low IQ scores or other factors, such as a poor learning environment at home). In fact, evaluations of special education have found that only about 50 percent of students classified as LD actually presented an achievement/aptitude discrepancy.²² The rest are students who perform poorly relative to their peers but don’t score well on aptitude tests either. However, the question of why learning disabled children are more deserving of extra help than everyday low achievers is one that LD advocates have never quite answered.

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Questions for the Courts

The history of special education law since 1975 is, essentially, the evolution of the federal courts’ answers to two questions: What constitutes an appropriate education, and to what lengths must schools go to place disabled students in regular classrooms? In fact, the law itself has not changed much during the past quarter century. What has expanded is its scope. In the 1980s, Congress approved large increases in funding for the preschool program for children ages 3–5 with disabilities and created a new early intervention program for infants and toddlers. In 1986, Congress gave parents the right to be reimbursed for attorneys’ fees if they prevailed in court. The law’s name was changed to the Individuals with Disabilities Education

Act in 1990 and several new categories of disability, including autism and traumatic brain injury, were added to the list of handicapping conditions. Congress has also lengthened the list of “related services” that schools must provide. Social work services, rehabilitative counseling, and transition from school to work are just a few of the services that have been added since 1975. Advocates claim that fundamental changes were made in 1997—an assertion we examine below—but, otherwise, the statutory language of the IDEA in the year 2000 looks much like that of the EAHCA of 1975.

Where the law has changed most is in the courts. The statute’s vague language has left many of its terms open to various interpretations, thus inviting litigation. Serious questions were left unanswered, such as: What is an “appropriate” education? Do schools need to provide those services necessary to maximize the potential of disabled children to the degree that the potential of nondisabled children is maximized? Or was the law meant to grant disabled children mere access to the public schools, not the right to any particular level of education? Can evidence that a child is not progressing in school be used as prima facie proof that he is not receiving an appropriate education? Can a district take other students’ interests into account when faced with implementing a costly IEP? How much can the interests of disabled and nondisabled children be balanced against one another? Can other students’ interests be taken into account when placing a disabled child in the “least restrictive environment,” especially when that child is disruptive and interferes with the education of his peers? In essence, to what lengths must schools go to accommodate students with disabilities?

The Court viewed Congress’ creation of strict rules and procedures as the vehicle through which parents could ensure that their children were receiving an appropriate education.

An “Appropriate” Education

The first IDEA case to go before the Supreme Court was *Hendrick Hudson District Board of Education v. Rowley*, in 1982.²³ The fundamental issue was how to define an “appropriate” education. Amy Rowley, a deaf child whose school district had provided speech therapy, tutoring, and a hearing aid to help her cope with her disability, claimed that the district’s refusal to provide a full-time sign-language interpreter in first grade constituted a failure to provide an appropriate education. She had been doing well in regular classes but, she claimed, not as well as she would have with an interpreter.

Federal courts at both the district and appellate levels ruled in favor of Rowley. The district court defined an appropriate education as one that gives a student with a disability the chance to achieve at the same level as a student of equal “intellectual caliber” but without a disability.²⁴ This conformed to earlier decisions that had interpreted the Act to guarantee a level of education that would help a disabled child achieve at the level he would have achieved without the disability.²⁵

But the Supreme Court overturned the lower courts, ruling that such a standard involved “impossible measures and comparisons.”²⁶ For one, it would mean determining each student’s “intellectual caliber.” Also, said the Court, the range of disabilities is so wide that a single

standard could never apply to all students. After all, by definition a mentally retarded student has no nondisabled peers of similar “intellectual caliber.” Impaired intellectual functioning is a mentally retarded child’s disability. The Court substituted a two-part test that focused more on whether the district had followed proper procedures in determining the services it would provide to Amy Rowley. It first asked whether the school had complied with the law’s procedural mandates, such as properly evaluating Amy’s needs and involving her parents in the development of her IEP. Second, it asked whether Amy’s IEP was “reasonably calculated to enable the child to receive educational benefits.”²⁷ If the school met both requirements, then the Court would not overturn its decisions. Because the school district had followed the law’s procedural requirements and Amy Rowley was making substantial progress in school, the Court upheld the district’s decision to deny her a full-time interpreter.

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In essence, the court deferred to the opinions of local professionals as to what constituted an “appropriate” education. In passing the IDEA, then-Justice William Rehnquist wrote on behalf of the majority, Congress did not extend an “invitation to the courts to substitute their own notions of sound educational policy” for those of school authorities.²⁸ The Court viewed Congress’ creation of strict rules and procedures as the vehicle through which parents could ensure that their children were receiving an appropriate education. If schools followed those requirements in coming to a decision, they were deemed to have adhered to the law.

Disability-rights advocates viewed the *Rowley* decision as a major setback. They had celebrated the IDEA as visionary, transformative legislation that would vastly improve the educational experiences of disabled students. The Court’s low standard of “some educational benefit” was not what they had envisioned. The Court, they claimed, had ignored the congressional intent of providing equal educational opportunity to disabled students; its decision was said to be motivated by concern over the costs of providing an education to disabled students. Bonnie Tucker, a disability attorney, wrote, “The obvious rationale for the Court’s blatant disregard of congressional intent was its unspoken fear that a contrary result would have opened the floodgates by allowing every seriously handicapped child in the nation to receive full-time individualized educational assistance where needed.”²⁹

Later courts have used the *Rowley* decision to deny services to disabled students that, while potentially beneficial, were not required by the law. In the 1988 case *Kerkam v. McKenzie*, for example, the D.C. Circuit Court of Appeals wrote, “Proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.”³⁰ In particular, courts have often relied on *Rowley* to refuse parents’ requests for expensive private schooling in lieu of the public school placement offered by the school district, even while acknowledging that the private placement offered a superior educational experience. In *Doe v. Board of Education*, the Sixth Circuit compared the private school placement to a Cadillac, the public school placement to a Chevrolet, and held that the state was “not required to provide a Cadillac, and that the proposed IEP [was] reasonably calculated to provide educational benefits,” and thus satisfied the FAPE requirement.³¹

Because the *Rowley* case involved a student who was making substantial progress from grade-to-grade without extra services—a fact that the Supreme Court emphasized in its decision—plaintiffs have tried to use the *Rowley* holding to request more services when the current level of services has been of limited benefit to the child. This argument has sometimes met with success. In some cases involving severely handicapped students, the courts have declared the *Rowley* standard basically irrelevant to the facts at hand. Other courts have interpreted *Rowley* to mean that, if a child is not progressing from grade-to-grade, more services are required. But one important decision, *E.S. v. Independent School District*, broadly interpreted *Rowley* to hold that an educational program of only marginal benefit was still appropriate.³² The plaintiff, a dyslexic child entering 7th grade, was reading at a 3.8 grade level and had progressed only .8 grade equivalents after three years of special education. The school district provided her with a program of one-on-one instruction during the summer but when her parents asked the district to continue the program during the year, the district refused, even though she had made substantial

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summertime progress. The court denied the services to her, holding that she hadn’t proved that one-on-one tutoring was necessary for her to benefit from education. It can be argued that such cases actually represent a strong departure from *Rowley*.³³ The *Rowley* court specifically limited its findings to the facts of the case at hand, where Amy Rowley was making substantial progress without the extra services she was requesting.

In the end, the courts have clung to a case-by-case approach in determining what an “appropriate” education is. *Rowley* established the precedent that the law does not require schools to maximize a disabled child’s potential, nor even to spend as much on disabled students as on the nondisabled.³⁴ An “appropriate” education, according to the courts, can range from a plan that delivers almost no educational benefit to one that maximizes a disabled child’s potential. *Rowley* held that Congress’ intent in passing the IDEA “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.”³⁵ In short, courts respect the decisions of educators regarding an “appropriate” education, so long as they follow the procedural rules in its design.

In designing an “appropriate” education, school districts generally may not oppose an otherwise “appropriate” education because it is too costly. The courts have held, however, that a district may choose one IEP among several appropriate ones because it is less expensive than the others. In *Greer v. Rome City School District*, the court held that the issue of cost may be raised in certain limited conditions. It wrote: “If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in the regular classroom is not appropriate.”³⁶ In *Jumping the Queue*, however, Professors Kelman and Lester argue that these conditions make no sense: only the smallest of districts would be seriously burdened by the costs of even the most expensive IEP.³⁷ No courts, they note, have found that a given IEP can be opposed on the grounds that giving all similar students the same IEP would bankrupt the district.

Least Restrictive Environment

At issue in *Greer* was the other bedrock principle of special education law: the “least restrictive environment,” or inclusion, mandate. The law requires that disabled children be served in regular classrooms to the “maximum extent possible,” a direct reply to the past exclusion of disabled children from public schools. The further away from a regular classroom, the more restrictive the placement is said to be. A disabled student’s IEP must document the extent to which disabled students are to be educated in the regular classroom; to pull a disabled pupil out of his regular classroom, the school must have a compelling reason. This is a controversial issue because it is often more efficient to serve disabled students in separate, centralized classrooms and schools. It may be more effective as well. For instance, if ten dyslexic students need specialized instruction in reading, it may make more sense to teach them together than to try to serve each one individually in his regular classroom. Schools also attempt to exclude disabled students, especially emotionally disturbed students, because their behavior can make it difficult for teachers to manage their classrooms. They sometimes wind up devoting more time to discipline than to instruction.

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The courts have generally placed the burden on schools to justify any segregation of disabled students from regular classrooms. They have required schools to consider a range of supplementary aids and services in order to mainstream students effectively, from training regular classroom teachers in special education techniques to adding specially trained aides to the regular classroom to assist disabled children. In doing so, the courts have held that districts may engage in a series of balancing exercises in which the interests of nondisabled children are weighed against the interests of the disabled. In *Daniel R.R. v. State Board of Education*, the leading precedent in this area, the court stated that one factor in deciding whether a student can be excluded from the regular classroom is the effect of inclusion on his classmates.³⁸ Daniel was a six-year-old child with Down syndrome who had the communication skills of a two-year-old. The problem was that his presence in a regular classroom put enormous demands on the teacher to the detriment of his classmates.

The court concluded that Daniel’s presence was “unfair to the rest of the class. When Daniel is in the pre-Kindergarten classroom, the instructor must devote all or most of her time to Daniel. Yet she has a classroom filled with other, equally deserving students who need her attention.” The court held that, “Although regular education instructors must devote extra attention to their handicapped students, we will not require them to do so at the expense of their entire class.”³⁹ The court further ruled that, if it were not appropriate to place a child in the regular classroom, the district then had to ensure that he was mainstreamed with nondisabled peers in academic and extracurricular pursuits to the maximum extent possible.

Although the court ruled against Daniel’s request for placement in the regular classroom, it established a general policy in favor of inclusion. It told districts that they had to make serious efforts to place disabled children in the regular classroom, that the courts would not tolerate “mere token gestures” to meet the law’s “least restrictive environment” mandate.

In a later case, *Oberti v. Board of Education*, the court ruled in favor of Rafael, a child with Down syndrome, precisely because the district had made little effort to accommodate his disability.⁴⁰ The district had placed Rafael in a special education class in a neighboring district after his behavior in a mainstreamed developmental kindergarten classroom proved extremely disruptive. His behavior problems ranged from toilet accidents to touching, hitting, and spitting on other children. But the court, relying on expert testimony that Rafael's behavioral problems would have subsided if he had been given proper supports, ruled that the district had not exhausted its options before excluding Rafael from the regular classroom. His IEP had no plan to address his behavior problems and provided for no communication between his regular and special education teachers.

Oberti was the first case to detail the kinds of supplementary aids and services that districts would have to try before excluding a disabled child from regular classrooms. Potential accommodations suggested by the court included modifying the curriculum to address differences in ability; modifying a disabled child's curriculum to allow him to work on the same assignments as his classmates but at his own pace; parallel instruction, in which a child works independently on one assignment while his classmates work on a different assignment that would not benefit him; special education training for the regular teacher; and special instruction in a "resource room" for part of the day. In *Clyde K.*

Under the umbrella of the "least restrictive environment" concept, one group of cases has been particularly controversial: those dealing with severely disabled students who need medical care during the school day in order to remain in the regular classroom.

v. Puyallup School District, the court ruled that a student who had violently attacked two students and assaulted staff members could be placed in a separate school, in part because the district had provided supplementary services and special training for staff.⁴¹

Under the umbrella of the "least restrictive environment" concept, one group of cases has been particularly controversial: those dealing with severely disabled students who need medical care during the school day in order to remain in the regular classroom. The IDEA says that schools must provide medical services, but only when they are for purposes of diagnosis or evaluation. The Supreme

Court first entered this thicket in 1984, in *Irving Independent School District v. Tatro*.⁴² Amber Tatro was an 8-year-old born with spina bifida. Her incompletely developed spinal cord caused her to need a procedure called "clean intermittent catheterization," or CIC, every three to four hours to prevent damage to her kidneys. It was a relatively easy procedure that a layperson could be trained in an hour to do, but the district refused to provide this service. Here the Court established what is called a "bright-line test," a clear, easily understood guideline for schools to follow. The Court held that the "medical services" exclusion applied only to services that needed a physician's attention. Therefore, if a student needed the care in order to attend school, and such care could be provided by someone other than a physician, then it fell within the range of services required by the IDEA.

Some later courts departed from *Tatro* in cases where students needed more complicated

procedures than CIC. They said that when the number and complexity of services rose, they could become excluded “medical services” even if a physician was not required to perform them.⁴³ This became known as the “nature of services” standard. Other courts, meanwhile, adhered to the *Tatro* standard, causing tension among circuit courts that the Supreme Court decided to resolve in 1999 in *Cedar Rapids Community School District v. Garret F.*⁴⁴ The Cedar Rapids school district insisted that full-time, continuous nursing care fell under the “medical services” exclusion, but the Court, in a 7–2 decision, reaffirmed *Tatro*’s bright-line test that any service not needing a physician’s supervision was by definition not medical.

For the most part, court decisions regarding the services provided and the extent to which students can be removed from the regular classroom must disregard cost or the impact on nondisabled peers.

The cases in which LRE has been at issue have in some ways expanded the *Rowley* decision. The courts have used the congressional preference for mainstreaming to require a range of supplements and services that may not fit into the Supreme Court’s definition of an “appropriate” education yet are necessary to keep a child in the regular classroom.⁴⁵ The Supreme Court has yet to take up an LRE case, so the standard has been left to differ from circuit to circuit. For instance, the more conservative Fourth Circuit, based in Richmond, has been less likely to factor in the nonacademic benefits of placing a disabled student in the regular classroom, especially if a district can show that the services offered in a segregated setting are superior.⁴⁶ In the 1983 case *Roncker v. Walter*, by contrast, the Sixth Circuit held that, when the segregated environment offers a superior education, the court must inquire as to whether the features that make it superior can be replicated in the regular classroom.⁴⁷ The Fifth Circuit’s response in *Daniel R.R.* was that this “necessitates too intrusive an inquiry into educational policy choices that Congress deliberately left to state and local school officials.”⁴⁸

Despite the inconsistencies, what has emerged in the case law is a broad set of protections for disabled children. For the most part, decisions regarding the services provided and the extent to which disabled students can be removed from the regular classroom must disregard cost or the impact on nondisabled peers. There is a strong presumption that disabled children should be taught alongside their nondisabled peers. Children whose behavior disrupts the classroom or endangers themselves or their peers may be excluded from the regular classroom, but only after the school has tried a range of interventions. Still, it is not true, as is often said, that special education students have a right to an infinite array of educational services.

Legal Actions and IDEA Enforcement

Whatever one thinks of special education’s goals and achievements, there is no denying that it is a well-regulated program. As early as 1982, just seven years after the IDEA passed Congress, the RAND Corporation was finding that school-level special education administrators understood the regulations facing them better than the administrators of other federal education programs. Title I administrators, for instance, still understood only the basic principles of the program and often couldn’t evaluate the legality of certain arrangements, even though their law was passed a decade before the IDEA.⁴⁹

Because the law gives specific, legally enforceable rights to certain individuals, schools face powerful incentives to provide the necessary services to eligible children. Administrators need to stay abreast of the law or they can find themselves in court. This bottom-up, decentralized form of regulation relies on strong networks of parent groups, who quickly disseminate new legal findings and regulations. The U.S. Department of Education nourishes the regulatory system by funding parent information and assistance centers that provide parents with pro-bono legal representation. In poor areas, such as Baltimore, where parents have been ill-informed of their legal rights, districts have operated for years under the shadow of class-action suits brought on behalf of their disabled students.

Legal actions (and the threat of legal actions) by parents have led to a backlash, both from special education's critics and from advocates for the disabled. School administrators complain about having their professional decisions challenged by parents and having to worry more about administrative hearings than the actual quality of services being given to students. Advocates for the disabled, by contrast, worry about the regulatory burden being placed on parents. In a scathing indictment of federal enforcement efforts that was issued in January 2000,

The IDEA's definitions of such categories as specific learning disabilities and behavioral disorders are hazy enough to allow for some striking differences in how the law is applied.

the National Council on Disability wrote, "Enforcement of the law is too often the burden of parents who must invoke formal complaint procedures and request due process hearings to obtain the services and supports to which their children are entitled under law."⁵⁰ There is a powerful minority of parents who know their legal rights and aren't afraid to exercise them. But most parents are at a decided disadvantage vis-à-vis school administrators. They don't know their rights, have little experience with the legal system, and tend to respect the decisions of professional educators.

This has led to the criticism that affluent parents are most able to avail themselves of the law's protections. They tend to be well-educated and more forceful and confident in their dealings with school administrators. They also

have the means to back up any threats of litigation. They are the most likely to secure private school or full-time residential placements when their children are severely disabled. In short, they are less likely to be bullied around, and more likely to do the bullying.

But the availability of legal action as a recourse is not just a boon to wealthy, pushy parents. In a study of Massachusetts special education directors, Thomas Hehir found that legal decisions tend to reverberate throughout the education system, expanding the services available to all disabled children. To avoid the courts, districts attempt to settle most disputes through negotiation with parents. In the end, few cases actually ever reach a judge. "The threat of a hearing," write Hehir and Sue Gamm, "is an essential element in the relationship between districts and parents because it raises the stakes in disputes over placement."⁵¹ They contend that the IDEA's critics have focused too much on the effects of administrative hearings themselves, ignoring all the hearings that never happen as a result of settlements reached prior to the formal initiation of legal actions.

Still, the law's definitions of such categories as specific learning disabilities and behavioral disorders are hazy enough to allow for some striking differences in how the law is applied. In a mainly anecdotal survey of more than 20 school districts, Professors Kelman and Lester found that the selection of students diagnosed as LD often depended on the characteristics of the district. Wealthy districts tended to ignore the legal definition of LD (as a discrepancy between aptitude and achievement) in favor of serving any low achievers who might benefit from extra help. Low-income districts also tended to ignore the aptitude/achievement discrepancy requirement, mainly because their students presented such low aptitude scores that severe discrepancies were rare. Administrators in low-income schools tended to believe that all their children had special needs, and that they would be served one way or another, whether with special education or compensatory funds. They also tended to use the LD diagnosis more often to deal with behavioral problems, as a mechanism to remove problem children from the classroom. Working-class districts tended to use discrepancy scores most often, in order to keep their special education rolls down.⁵²

The widespread crackdown on school violence in the mid-1990s further spotlighted the protections afforded to disabled students that, at times, shielded them from discipline.

The 1997 Reauthorization

Until 1997, each reauthorization of the IDEA was mainly an exercise in expanding the population of eligible children or the range of services to which they were entitled, either by extending coverage to younger ages or by adding named disabilities (such as autism, traumatic brain injury, and ADD). Both trends have served to increase dramatically the number of children served. The changes wrought during the 1997 reauthorization, however, were hailed as the most significant since the IDEA's passage.

These changes were in response to several long-standing criticisms of special education. One is the perception that the IDEA's protections for disabled students are undermining efforts to crack down on violence in the schools. Another concern is that special education contributes to the "fragmentation" of schools—in essence, the lack of integration that occurs when several different programs, each with its own funding stream and staff, co-exist within the same school. For example, special and regular education teachers tend to inhabit their own spheres, rarely collaborating. The IDEA contributed to their isolation from one another by prohibiting federally funded special education teachers from teaching nondisabled children. The risk of "leakage"—of funds and services that were designated for special education students also helping nondisabled children—often encouraged schools to segregate disabled students from their peers. This effectively diminishes disabled children's access to the general curriculum. A related worry is that disabled students have been excluded from the effort to hold all students and schools to common standards of achievement, the so-called standards-based reform movement. Finally, Congress tried to address the concern that federal funding formulas encourage overlabeling and segregation of disabled students.

Pressure from parent groups, teacher unions, and organizations representing both school boards and administrators pushed the issue of school discipline to the top of Congress' agenda in the

mid-1990s. The widespread crackdown on school violence, best represented by the adoption of “zero tolerance” policies in many districts and by Congress’ passage of the Gun Free Schools Act of 1994, further spotlighted the protections afforded to disabled students that, at times, shielded them from discipline. In essence, the courts have held that a student may not be subject to expulsion or long-term suspension if his misbehavior is a “manifestation” of his disability. This is an extension of the law’s general prohibition on changing a disabled child’s classroom placement without both a recommendation from the student’s IEP committee and the parents’ consent. The law’s “stay put” provision further prevents a district from changing a child’s placement while any appeal of its decision is underway. The Supreme Court has held that any suspension of a disabled student for more than 10 days constitutes a change in placement.⁵³

A disabled student may be expelled or suspended if his misbehavior is not related to his disability. In practice, however, determining whether a given behavior is a manifestation of a disability, especially in cases of LD and emotional and behavioral disorders, is almost impossible; and neither courts nor regulators have given much guidance. This has led to several high-profile cases where two or more students were involved in the same crime, such as gun possession on school grounds, but at least one student escaped punishment due to his disability, the rationale evidently being that students with learning disabilities or behavioral disorders have diminished capacity to understand the consequences of, or to control, their actions. The issue of discipline also sparked the most serious altercation to date between the federal Department of

Education (DOE) and a state over special education. In 1994, in a dispute over a Virginia statute that allowed districts to deny educational services to disabled students who had been expelled from school, the Clinton administration attempted to withhold Virginia’s entire \$60 million special education grant. The DOE argued that Virginia was still obligated to educate a child who had been expelled from school for reasons unrelated to his disability.

Coming on the heels of the 1994 Title I cycle, the 1997 IDEA reauthorization sought to fold disabled students into the broader standards and accountability movement.

The DOE eventually lost in court, but Congress sealed this loophole during the 1997 reauthorization by requiring districts to provide the educational services laid out in a student’s IEP even after he has been expelled. But the reauthorization created an exception to the “stay put” provision: If a student brings a weapon to school or commits a drug offense, or if a

hearing officer determines that the student is likely to injure himself or others, the school can immediately place him in an alternative educational setting for up to 45 days. Still, there can be no cessation of the educational services guaranteed by the student’s IEP.

In 1997, Congress also attempted to solve the school “fragmentation” problem by aligning federal special education policy with the prevailing standards-based reform movement. By the 1990s, state policymakers had embraced two broad education reform strategies: (1) to establish academic standards and tests to determine how well schools were performing; and (2) to give schools flexibility and control over instructional methods and budgetary issues in exchange for holding them accountable for results. President George W. Bush’s catch phrase for this pairing is “authority and accountability.” This strategy first seeped into federal policy during the 1994

reauthorization of Title I, the \$11 billion compensatory program for low-income students. On the accountability side, the 1994 Title I amendments required all states to create standards regarding what students need to learn from grade and tests to assess whether they are meeting the standards. On the authority side, Title I used to insist that Title I funds flow only to Title I-eligible students, a procedural rule that encouraged schools to pull Title I students out of the regular classroom, thus segregating the students and fragmenting the school. The 1994 reauthorization loosened this restriction by making it easier for schools with high proportions of low-income students to use their Title I funds for schoolwide priorities.

Coming on the heels of the 1994 Title I cycle, the 1997 IDEA reauthorization sought to fold disabled students into the broader standards and accountability movement. It required that IEPs be designed with the goal of giving disabled students access to the general curriculum. States were also to design their standards and assessments with the needs of disabled students in mind. For children whose disabilities prevent them from participating in regular state testing programs, alternative assessments, such as portfolios of student work, must be developed. In 1997, the National Center for Educational Outcomes found that only half the states even had policies regarding the participation of disabled students in statewide assessments.⁵⁴ Now federal law requires that states set performance goals for disabled children and include all students in their testing programs. To address the fragmentation problem while maximizing the inclusion of special education students in regular classrooms, Congress eased the rules prohibiting nondisabled students from benefiting incidentally from special education funds. For instance, a special education teacher or aide working in a regular classroom may now teach a reading lesson to a mixed group of disabled and nondisabled children.

States must ensure that their funding mechanisms don't encourage overlabeling or the placement of disabled children in more segregated settings.

To address concerns that federal funding formulas were unintentionally encouraging both the overlabeling and segregation of disabled children, Congress adjusted the IDEA funding formula as well. Most federal special education money is still allocated to states based on the percentage of their population that is deemed to be disabled. But any funds appropriated for state grants in excess of \$4.9 billion are now distributed on the basis of a state's total school population and its population in poverty instead of its number of disabled students—a system called census-based funding. The reasoning is that this will not punish states whose special education rolls are shrinking, but it will discourage overidentification. Census-based funding is controversial among advocates for the disabled because it could give schools too little incentive to identify children as disabled; it could encourage underlabeling. Census-based funding also risks failing to account for true differences in the proportion and types of disabled children from one district to another.

States, too, must now ensure that their funding mechanisms don't encourage overlabeling or the placement of disabled children in more segregated settings. States often provide higher reimbursements to school districts for more segregated placements under the rationale that these placements are more costly. Moreover, with the state grant appropriation exceeding \$4.1 billion, any districts that receive larger awards may reduce local spending somewhat. This

relaxes the usual “supplement, not supplant” regulations that govern nearly all federal education programs, and responds to the complaint that special education expenses are overburdening local school districts.

Hardly anyone seems pleased with the special education system, yet hardly anyone seems clear about how to fix it.

Conclusion

Hardly anyone seems pleased with the special education system, yet hardly anyone seems clear about how to fix it. On the one hand, advocates for the disabled say that too few children are receiving the services to which they are entitled. They claim that either schools are reluctant to provide the services and parents don't know their rights, or that the courts have limited the services to which the disabled are entitled. On the other hand, public education interest groups and many policymakers think of special education as a runaway train of

exploding costs and limited accountability. These are sharply divergent views. The former holds, in essence, that there are too few students on the special education rolls. The latter seems to imply that there are too many. And there is strong evidence supporting both sides. On the one hand, class-action lawsuits against urban districts such as Baltimore, New York, Chicago, and Washington, D.C., have uncovered thousands of students who never received the services they were entitled to. On the other hand, the weight of the evidence from federal studies of reading disabilities shows that many children would have avoided remaining on the special education rolls if their problems had been diagnosed and dealt with earlier.

What everyone seems to agree on is the need for the federal government to satisfy its 40 percent promise. But it's not clear that this is a promise worth keeping. In a world of limited funds for education, should the federal government devote more of its resources to educating the disabled than it devotes to educating the poor? At 40 percent of national special education spending, the federal commitment to special education would far exceed its current commitment to the Title I program. Washington has played an important role in ameliorating disparities in wealth among the states; the Title I program is far more targeted to poor areas and children than is spending under the IDEA. We might want the federal government to fully fund both programs, but in the near future they'll continue to compete for resources with one another and with other funding priorities. And it's fair to say, in this case, that the poor don't have much of a lobby, at least compared to the well-organized and powerful coalition of parents and advocates for the disabled. It is important, also, to recall that the IDEA is a civil rights law first, and a grants program second. Before passage of the IDEA, federal courts were already requiring schools to meet their constitutional obligations to serve all disabled students. Spending under the IDEA is intended to help them do so.

Conventional wisdom also seems to hold that special education needs to become more results-oriented. Put aside the troubles inherent in designing a workable and efficient accountability system that is to be applied to a population as diverse in their needs and abilities as disabled students. A more pressing issue is the risk of a further cost explosion when lawmakers call for a higher standard of performance in special education. The broader standards movement has already given ammunition to a wave of litigation claiming that the schools need more resources

to meet the higher standards set by legislatures. In the hyper-legalized world of special education, where each child holds a legally enforceable right to a certain standard of education, subtle changes in the law can dramatically change the obligations of school districts. Parents and advocacy groups could use the new focus on results to claim that Congress has now set a standard higher than the “educational benefit” standard the Supreme Court elucidated in *Rowley*. Courts could agree and begin awarding an increasingly expensive set of services to disabled children who aren’t meeting the higher standards set by Congress. For almost 20 years courts have used the *Rowley* decision to limit the range of expensive interventions available to disabled students. At a time of great concern over the costs of special education, is *Rowley* a decision policymakers wish to nullify?

¹ 119 S.Ct. 992 (1999).

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³ See J.S. Kakalik, W.S. Furry, M.A. Thomas, and M.F. Carney, *The Cost of Special Education* (Santa Monica, CA: The Rand Corporation, 1981).

⁴ Thomas B. Parrish and Jean Wolman, “Trends and New Developments in Special Education Funding: What the States Report,” in *Funding Special Education*, eds. Thomas B. Parrish, Jay G. Chambers, and Cassandra M. Guarino (Thousand Oaks, CA: Corwin Press, 1999), 203-229.

⁵ Richard Lee Colvin and Duke Helfand, “Special Education in State Is Failing on Many Fronts,” *Los Angeles Times* (December 12, 1999), sec. A, p. 1.

⁶ 347 U.S. 483 (1954).

⁷ See Gerald Coles, *The Learning Mystique: A Critical Look at “Learning Disabilities”* (New York: Fawcett Columbine, 1987).

⁸ 274 U.S. 200 at 207 (1926), as cited in Thomas Hehir and Sue Gamm, “Special Education: From Legalism to Collaboration,” in *Law and School Reform*, ed. Jay P. Heubert (New Haven: Yale University Press, 1999), 210.

⁹ 47 Ohio Appendix 417, 191 N.E. 914 at 914-15 (1934), as cited in Hehir and Gamm, “Special Education,” at 240.

¹⁰ See Rebecca Weber Goldman, Comment, “A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act,” 20 *U. Dayton L. Rev.* 243, 246-47 (1994).

¹¹ See Mark C. Weber, “The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes,” 24 *U.C. Davis L. Rev.* 350, 356 (1990).

¹² 343 F. Supp. 279 (E.D. Pa. 1972).

¹³ 348 F. Supp. 866 (D.D.C. 1972).

¹⁴ *Ibid.* at 876.

¹⁵ P.L. 93-112 (1973), 29 U.S.C.A. §§ 701-796 (1996).

¹⁶ Paul T. Hill and Doren L. Madey, *Educational Policymaking through the Civil Justice System* (Santa Monica, CA: The Rand Corporation, 1982).

¹⁷ See Mark Kelman and Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities* (Cambridge, MA: Harvard University Press, 1997), 234 n. 14.

¹⁸ *Ibid.* at 38.

¹⁹ *Ibid.* at 112-15.

²⁰ Jane K. Babin, Comment, “Adequate Special Education: Do California Schools Meet the Test?” 37 *San Diego L. Rev.* 211, 220 (2000).

- ²¹ See Kelman and Lester, *Jumping the Queue*, 10.
- ²² See Kenneth A. Kavale and Steven R. Fortness, "What Definitions of Learning Disability Say and Don't Say," *Journal of Learning Abilities*, 33, no. 3 (2000), 239.
- ²³ 458 U.S. 176 (1982).
- ²⁴ 483 F. Supp. 528, 534 (S.D.N.Y. 1980).
- ²⁵ See generally Weber, "The Transformation of the Education of the Handicapped Act."
- ²⁶ 458 U.S. 176, at 198.
- ²⁷ *Ibid.* at 207.
- ²⁸ *Ibid.* at 206.
- ²⁹ Bonnie Tucker, "Board of Education of the Hendrick Hudson Central School district v. Rowley: Utter Chaos," 12 *Journal of Law & Education* 235, 235 (1983).
- ³⁰ 862 F.2d 884, 886 (D.C. Cir. 1988).
- ³¹ 9 F.3d 455, at 459-460 (6th Cir. 1993).
- ³² 135 F.3d 566 (8th Cir. 1998).
- ³³ See Babin, "Adequate Special Education," 229.
- ³⁴ 458 U.S. 176, 199-200.
- ³⁵ *Ibid.* at 192.
- ³⁶ 950 F.2d 688, at 697 (11th Cir. 1991).
- ³⁷ Kelman and Lester, *Jumping the Queue*, 56.
- ³⁸ 874 F.2d 1036 (5th Cir. 1989).
- ³⁹ *Ibid.* at 1051.
- ⁴⁰ 995 F.2d 1204 (3rd Cir. 1993).
- ⁴¹ 35 F.3d 1396 (9th Cir. 1994).
- ⁴² 468 U.S. 883 (1984).
- ⁴³ See, e.g., *Neely v. Rutherford County School*, 68 F.3d 965 (1995), *cert. denied*, 116 S.Ct. 1413 (holding that a child whose breathing tube required regular suctioning was not entitled to full-time nursing services because of the risk and potential liability involved in providing such care); *Detsel v. Board of Education of Auburn Enlarged City School District*, 820 F.2d 587 (1987), *cert. denied*, 108 S.Ct. 495 (holding that a child who required constant respirator assistance was not entitled to full-time nursing services because of the burdensome costs and because it required a health professional with skills beyond those of a school nurse).
- ⁴⁴ 119 S.Ct. 992 (1999).
- ⁴⁵ See generally Weber, "The Transformation of the Education of Handicapped Act."
- ⁴⁶ See *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989).
- ⁴⁷ 700 F.2d 1058 (6th Cir. 1983).
- ⁴⁸ 874 F.2d. 1036, at 1046 (5th Cir. 1989).
- ⁴⁹ Hill and Madey, *Educational Policymaking Through the Civil Justice System*, 20.
- ⁵⁰ National Council on Disability, *Back to School on Civil Rights* (Washington, DC: National Council on Disability, 2000).
- ⁵¹ Hehir and Gamm, "Special Education," 215.
- ⁵² Kelman and Lester, *Jumping the Queue*, 68-74.
- ⁵³ See *Honig v. Doe*, 484 U.S. 305 (1988).
- ⁵⁴ U.S. Department of Education, *Twenty-first Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC: U.S. Department of Education, 1999), IV-9.