COMMENTS

The Probative Weight of the "Mainstreaming" Requirement Under the EHA

We all "struggle throughout childhood and adolescence to be included, not excluded; to be accepted, not rejected; to be integrated, not segregated, to be invited, not isolated."¹

I. INTRODUCTION

In 1975 Congress passed the Education of the Handicapped Act² (hereinafter Act) in response to the unmet educational needs of millions of handicapped children.³ The Act responded to congressional findings that more than half of the handicapped children in the United States did not receive appropriate educational services.⁴ For instance, over one million handicapped children were excluded entirely from public

¹. Sharon Freagon et al., One Educational System for All Including Children and Youth with Severe Intellectual Disabilities and/or Multiple Handicaps, 39 ILL. COUNCIL. FOR EXCEPT. CHD. Q. 18, 18 (1990) [hereinafter Freagon]. To acquaint the reader with the sharp division in educational philosophy regarding "mainstreaming," this statement of "inclusion" by Ms. Freagon can be contrasted with an introductory quotation in an article by Sy DuBow, Legal Director of the National Center for Law and the Deaf, Gallaudet University. Compare Sy DuBow, "Into the Turbulent Mainstream"—A Legal Perspective on the Weight to be Given to the Least Restrictive Environment in Placement Decisions for Deaf Children, 18 J. L. & EDUC. 215 (1989) [hereinafter DuBow]. "Championship prowess will sooner be attained if she concentrates on intensive training and learning to swim before she plunges unprepared into the turbulent mainstream. When her strokes are stronger she will be able to make better headway in the water." DuBow at 215 (quoting Grkman v. Scanlon, 528 F. Supp. 1032, 1037 (W.D. Pa. 1981)).


school systems, and many of the children who were included in public school systems had handicapping conditions which were overlooked or inadequately served. To qualify for funding under the Act, States must have policies which assure that all handicapped children have the right to a "free appropriate public education." Additionally, this free appropriate public education must be provided, to the maximum extent appropriate, in the least restrictive environment. This concept of least restriction is commonly called "mainstreaming."

5. Id. at § (a)(4).
6. Id. at § (a)(5).
7. Id. at § (a)(6); see also H. Rutherford Turnbull III et al., The Least Restrictive Education for Handicapped Children: Who Really Wants It?, 16 Fam. L.Q. 161, 162 (1982) [hereinafter Turnbull] (The existing system was perceived as a "dual" system which resulted in state school agencies' discrimination against handicapped children in "special education" programs.); What Are Special Education Needs? 153 Loc. Gov't Rev. 406, 406 (1989) (The Warnock Report of 1978 recommended an overhaul of the British special education system stressing that, whenever possible, handicapped children should be educated in ordinary schools instead of special schools.).
8. 20 U.S.C.A. § 1412(1). Subsection 2 further provides that:
(2) The State [must have] developed a plan ... which will ... set forth in detail the policies and procedures which the State will undertake ... in order to assure that —
(A) there is established (i) a goal of providing full educational opportunity to all handicapped children . . .
(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State . . .
20 U.S.C.A. § 1412 (2)(A)-(B) (emphasis added). See also 34 C.F.R. § 300.4 (1990). In this context, the term "appropriate" is a term of art used to describe a "free appropriate public education." It means compliance with the procedural requirements of the Act in a program which confers some educational benefit. See infra notes 20-24, 36-40 and accompanying text.
9. 20 U.S.C.A. § 1412 (5). The least restrictive environment requirement provides that:
(5) The State has established . . . (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . .
Id; see also 34 C.F.R. secs. 300.550-552 (1990). The least restrictive environment requires that a child be mainstreamed "to the maximum extent appropriate." In this context, "appropriate" is used as an adjective to describe the extent to which a child is mainstreamed.
10. For complete historical discussions of the Act, see generally Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179-84 (1982); Wegner, supra note 2, at
In 1982, the Supreme Court had its first opportunity to review the Act in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*. The Court in *Rowley* developed a test to determine whether a child's educational program was "appropriate" under the Act. However, because the plaintiff in *Rowley* was already mainstreamed into a regular classroom, the *Rowley* decision did not address whether a child's placement meets the least restriction mandate under the Act.

Since *Rowley*, courts, educators and parents have struggled with the weight to accord the mainstreaming mandate within an individual child's placement. Often, due to the nature of a child's handicapping condition, a child's "appropriate" placement is not in the least restrictive environment. Alternatively, one court has held that unless a

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387. For a discussion of mainstreaming, see also infra notes 25-35 and accompanying text.

12. *Id.* A child's program is "appropriate" within the Act when the state has complied with the procedures set forth in the Act and the IEP is "reasonably calculated to enable the child to receive educational benefit." *Id.* See also infra notes 36-61 and accompanying text for a discussion of *Rowley*.
13. "Because in this case we are dealing with a handicapped child who is . . . in the regular classroom of a public school system, we confine our analysis to that situation." *Rowley*, 458 U.S. at 204. *See e.g.*, Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989); Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir. 1983), cert. denied, 464 U.S. 864 (1983); Thornock v. Boise Ind. Sch. Dist. 1, 767 P.2d 1241, 1244 (Idaho 1988).

Mainstreaming remains the most unsettled and unsettling issue. Perhaps this is because the Court in *Rowley* did not address mainstreaming directly since [sic] Amy Rowley was progressing in a regular classroom. Unfortunately, some lower courts have used the *Rowley* opinion to undermine the importance of the mainstreaming preference of the act. This issue may require a Supreme Court opinion before there can be consistent treatment.

*Id.* at 283; see also, Community High Sch. Dist. 155 v. Denz, 463 N.E.2d 998, 1002 (Ill. App. Ct. 1984) ("[T]he *Rowley* case did not discuss the circumstances under which a school district's refusal to 'mainstream' a child would constitute a violation of the (Act) . . . . Thus, the decision offers little guidance on the proper interpretation of the 'mainstreaming' requirement.").

15. *See, e.g.*, Briggs v. Bd. of Educ. of State of Conn., 882 F.2d 688, 693 (2d Cir. 1989) (weighing presumption in favor of mainstreaming against the importance of providing a child with an "appropriate" education and holding that, due to the severity of the child's handicap, mainstreaming was inappropriate); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 164 (8th Cir. 1987) (rejecting the mainstream placement in favor of a segregated school placement because of the substantial cost to duplicate the segregated program at the mainstream school and the minimal educational benefit to the child at the mainstream school); Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52, 54 (8th Cir. 1986) (recognizing that segregated preschool program did not
school district could not prove that the lesser restrictive program could not be "appropriate," the child must be mainstreamed.¹⁶ This uncertainty has raised several questions. For example, must a child be placed in the least restrictive environment if it is less "appropriate" than a more restrictive setting? Does Rowley recognize degrees of "appropriateness"? If two programs are deemed "appropriate," what weight is or should be given to the least restrictive environment? What if the parents and or the student himself prefer greater restriction? Does the mandate for mainstreaming operate as a presumption, rebutted only by evidence that a child will receive no educational benefit in the least restrictive environment?¹⁷ This Comment will describe the current state of the law regarding these questions which continue to perplex educators, courts and parents.

In Part II. A. this Comment begins with a discussion of the statutory language of the Act. Part II. B. follows by exploring the approaches taken by state and federal courts in applying the Rowley test where mainstreaming was the only issue. Following a discussion of the general rule of mainstreaming, Part III. B. examines cases in which two programs met the Rowley test for "appropriateness," but differed in their levels of restriction. Then Part III. C. examines cases where courts have differed in their application of the mainstreaming requirement. It will also discuss, in Part III. D., whether mainstreaming can require neighborhood or home school placement, including a discussion distinguishing "methodology" (the educational philosophy or pedagogy used by a teacher or school district to convey educational knowledge) from "mainstreaming." Following this discussion, Part III. E. will analyze the role parents can play when saddled with the heavy burdens of both production and persuasion in administrative hearings.

In Part IV., this article discusses the implications of the increasing difficulty of judicial decision-making in the area of "mainstreaming.

¹⁶. See Thornock v. Boise Sch. Dist. 1, 767 P.2d 1241 (Idaho 1988); see also infra notes 102-16 and accompanying text for a discussion of Thornock.

¹⁷. See Turnbull, supra note 7, at 169. As a general rule, integration of handicapped with non-handicapped children is a presumption which can be rebutted by a showing that the placement is not appropriate for the handicapped child. This is a middle ground between irrebuttable presumption and "unguided case-by-case" decision-making. Id.; see also Robert J. Goodwin, Public School Integration of Children With Handicaps After Smith v. Robinson, "Separate but Equal" Revisited?, 37 MAINE L.R. 267, 289 (1985). Under Sec. 504 of the Civil Rights Act there is a rebuttable presumption of illegality on a defendant who has segregated children with handicaps. Therefore, a plaintiff need only establish a prima facie case of discrimination and defendant would need to rebut or integrate. Goodwin, at 289.
As more programs in special education develop within each school district, handicapped students are often finding that their "individual" program may lie between the only two "appropriate" programs offered by the school district; Rowley, then, is unenlightening. In these cases the courts will appropriately defer to the findings of the state administrative hearings. In order to unify decisions under these circumstances, Part V. urges the Supreme Court to grant certiorari to establish an appropriate test for the weight to be given the mainstream mandate within a child's individual program, particularly when the parents and/or the child himself opt for greater restriction. In establishing the appropriate weight, this author suggests that the Court adopt a factor analysis to include: the decision of the state administrative agencies, the Act's preference for mainstreaming, cost when at issue, and the choice of the parents and the handicapped child himself. This test properly respects the unique nature of each handicapped student and the role of parents as advocates, yet preserves judicial deference to the findings of state educational administrators and agencies.

II. HISTORY

A. STATUTORY LANGUAGE OF THE ACT

The central tool of the Act is the development of an "individualized educational program" (hereinafter IEP)\(^8\) for each handicapped

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18. 20 U.S.C.A. § 1401(19). Subsection 19 of the Act provides:

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, 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, 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 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; see also 34 C.F.R. § 300.346 (1990).
child. Implicit within the IEP provision is the recognition of the integral role of the handicapped child's parents. The IEP becomes the "blueprint" from which the school will build a child's "free appropriate public education" during the following school year.

What constitutes "appropriate" within the "free appropriate public education" dictated by the Act has been the subject of considerable case law and legal commentary. The statutory definition of "appropriate" provides little guidance to educators, judges and parents. Although a clear substantive definition is impractical given the individualized nature of the Act, educators, parents, and judges require some guidance to determine whether they have complied with the Act.

These shortcomings notwithstanding, the Act also established a general rule that "handicapped children should be educated with non-handicapped children to the maximum extent appropriate for them. This is a rule of least restriction: government should act only in the way that interferes minimally with a citizen's liberties." Least restriction "forbids a state from using a bazooka to kill a fly on a citizen's back if a fly swatter would do as well." Therefore, least restriction has been interpreted as a constitutional principle which enables the government to act but does not permit it to take any form of action it may wish.

19. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 182 n.6 (1982). The Supreme Court recognized that the placement of parents on the IEP team resulted from Congress' efforts to maximize parental involvement in the IEP process. Id.; see also Turnbull, supra note 7, at 402 and 402 n.5.

20. Myers, supra note 3, at 405.
21. 20 U.S.C.A. § 1401(18). This section of the Act states:

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id.
22. See Myers, supra note 3, at 404-05.
23. Id. at 405.
24. Id.
25. Turnbull, supra note 7, at 163.
26. Id. at 164.
27. Id; see also Mark C. Weber, The Transformation of the Education of the
The "least restrictive environment" requirement directly remedies the congressional finding that "one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers."\textsuperscript{28} For example, the Act now requires that these children be brought into the public school systems.\textsuperscript{29} Additionally, by application of the least restrictive environment provision, handicapped children have advanced toward the regular classroom, away from segregated programs.\textsuperscript{30} Those children who have not obtained regular classroom placement can be

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\textbf{Handicapped Act: A Study in the Interpretation of Radical Statutes, 24 U.C. Davis L. Rev. 349 (1990) [hereinafter Weber]. Professor Weber indicates that the Act is rooted in the civil rights movement. Although prior to the Act, handicapped students were completely and legally excluded from the public education system, [public exclusion practices eventually collided with the civil rights movement. In 1954 Brown v. Board of Education established that black children had the right to equal educational opportunities, and that segregated schooling denied them this right. Advocates of the disabled argued that handicapped children were also entitled to equal access to the public schools ... [these advocates] took to the courts to enforce the right to educational equality. Weber at 356 (footnote omitted).}
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\textsuperscript{30} U.S. Dep't. of Educ., To Assure the Free Appropriate Public Education of All Handicapped Children: Ninth Annual Report to Congress on the Implementation of the Education of All Handicapped Children Act 3-6 (1987). In the Ninth Annual Report to Congress on the implementation of the Act it was reported that for the 1985-86 school year:

1. 4,370,244 children received education and related services under the Act. This amounted to 10.97% of all school enrollment.

2. of that 4 million:
   - 27% received services in regular classrooms
   - 42% received services in resource rooms
   - 24% received services in separate classrooms in regular schools
   (most learning disabled and speech or language impaired children were in regular classrooms or resource rooms, and 50% of mentally retarded children were in separate classes)

3. 212,000 children over age 16 exited the system:
   - 39% graduated with a diploma
   - 15% graduated with a certificate of completion
   - 4% reached maximum age for services (age 21)
   - 21% dropped out
   - 18% left for "other" or unknown reasons
   (emotionally disturbed students have a drop-out rate of 29%)

\textit{Id.}
found along a “cascade” of educational placements which provides a continuum of lesser to greater restrictive settings. At the least restrictive end of this continuum is placement in the neighborhood school, and now, many children are receiving services under the Act in their neighborhood or home school. However, as children move from greater to lesser restriction along this continuum of placements and as contact with non-handicapped children increases, student-to-special education teacher ratios generally decrease, and the concentration of related services staff decreases as well. In segregated or centralized placements, for example, a program primarily for physically handicapped children, schools may be able to economize on costs by maintaining an in-house staff to provide related services for its students. As children move from centralized or segregated programs into regular classrooms and finally into their neighborhood schools, these related services will likely be provided by an itinerant staff. Although the least restrictive environment recognizes the social and public policy values of educating handicapped children in the least discriminatory means, the concentration of services may decrease in lesser restrictive settings thereby forcing parents to choose between mainstreaming and services.

31. 34 C.F.R. § 300.551 (1990); see also, LAURA F. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS 32 (1984). The Cascade System of placement alternatives is, from least to most restrictive: regular classroom, regular classroom with specialist consultation, regular classroom with itinerant teachers, regular classroom plus a resource room, part-time special class, full-time special class, special day school, residential school, and hospital. Rothstein at 32, n.126. Additional variations of restriction can be made by incorporating these programs into the handicapped child’s neighborhood school, and the classroom in which the child would attend were he not disabled.

32. 20 U.S.C.A. § 1401(a)(17) describes related services to include: “transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, . . . and medical and counseling services.” Id.

33. An itinerant staff is employed or contracted by the school district to provide services throughout the district. Each itinerant staff-member travels from school to school delivering services to students on his or her caseload.

34. See Turnbull, supra note 7, at 168-69. Public policy encourages providing handicapped children with appropriate educations and also favors conservation of political and fiscal capital by reducing duplicative programs. Id. at 169; see also Weber, supra note 28, at 393. By analogizing to race discrimination, forced segregation of handicapped students fosters inequality. This segregation places handicapped children in a position of inferiority. When schools provide services under the Act, they permit handicapped children to “prosper in settings from which they have been unlawfully barred.” Weber, supra note 28, at 393.

B. THE UNITED STATES SUPREME COURT REVIEWS THE ACT IN ROWLEY

In *Board of Educ. v. Rowley*, the Supreme Court articulated the standard for "appropriateness" under the Act. Recognizing the issue as one of statutory interpretation, the Court concluded that a child's program is "appropriate" within the Act when the state has complied with the procedural requirements of the Act, and the IEP is "reasonably calculated to enable the child to receive educational benefits." The following discussion of *Rowley* provides a descriptive summary of the procedural safeguards of the Act because the Rowleys availed themselves of their right to hearings and review as provided by the Act. It is these procedures which are central to the *Rowley* test for "appropriateness."

Amy Rowley was a deaf student initially placed in a regular kindergarten classroom. This placement was made to assess Amy's needs for supplemental services. At the end of a trial period, the school determined that Amy should remain in kindergarten but be fitted with a hearing aid which would amplify the voices of teachers and fellow students. Amy completed kindergarten successfully. Amy's IEP for first grade proposed that Amy continue in a regular classroom, continue use of the hearing aid, and receive instruction from a tutor for the deaf for one hour each day and speech therapy for three hours each week. Amy's parents agreed with most of the IEP, but requested that Amy be provided with a sign-language interpreter in all of her academic classes in lieu of some of the assistance proposed in the IEP.

When the school refused the Rowleys' request, the Rowleys brought their request before a hearing officer. The hearing officer found that

38. Id. at 179.
39. Id. at 206-07.
42. Id.
43. Id. at 184. A sign-language interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, and although the interpreter reported that Amy did not need his services at that time, Amy's parents requested service of an interpreter for Amy in first-grade. They argued that because Amy understood considerably less of what went on in class than she would have had she not been deaf, she was therefore performing below her academic potential. Id. at 184-85.
44. 20 U.S.C.A. § 1415 (West 1990 & Supp. 1991). The review by a hearing officer is the first review granted to parents who reject the proposed school placement. Id; see also infra note 53.
the sign-language interpreter was not necessary because "Amy was achieving educationally, academically, and emotionally." On appeal, the decision of the hearing officer was affirmed by the State Commissioner of Education.

The Rowleys brought the case into federal district court claiming that the school's IEP was not a "free appropriate public education" without a sign-language interpreter. The district court found that although Amy was performing better than the average child in her class, she was performing below her potential. This disparity between her actual and potential performance led the court to conclude that Amy's program was not a "free appropriate public education" under the Act. The district court's decision was affirmed by a divided Second Circuit. The Supreme Court granted certiorari to interpret the "free appropriate public education" requirement of the Act and to establish the role of the state and federal courts in their review granted by the Act.

The Court recognized that the specific procedural safeguards of the Act were significantly important. Adequate compliance with the procedural aspects of the Act assures Congress' mandate regarding

46. Id.
47. Id.
48. Id.
49. Id. at 185-86.
51. Rowley, 458 U.S. at 186; see also infra notes 55, 176-78 and accompanying text (discussing standard of review).
52. Id. at 205.

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or
(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;
the substantive content of an IEP. Additionally, the "preponderance of the evidence" standard of review included within the procedural directives, the Court observed, is not an invitation for reviewing courts to "substitute their own notions of sound educational policy for those of the school authorities which they review." The Court then concluded that the state would be in compliance with the Act when, (1) the state had complied with the procedures set forth in the Act, and (2) the IEP developed as a result of following these procedures was "reasonably calculated to enable the child to receive educational benefits." The Act, therefore, did not require a state to maximize a child's potential, but only to provide a "basic floor of opportunity" through the IEP.

The Court applied this test to Amy Rowley's program and reversed the appellate and district courts. The Court held that the first prong

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) the parents or guardian shall have an opportunity for an impartial due process hearing [not] conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Any party aggrieved by the findings and decision rendered in such a [local] hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing.

(e)(2) Any party aggrieved by the findings and decision made . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

Id.

55. 20 U.S.C.A. § 1415(e)(2) (West 1990 & Supp. 1991). After reviewing the records of the state administrative hearings, courts shall base their decisions on "the preponderance of the evidence, [and] shall grant such relief as the court determines is appropriate." Id.
57. Id. at 206-07.
58. Id. at 198-201; see also Lavinia R. Northrup and Lee W. Oxendine, Comment, The Education for All Handicapped Children Act: The Benefits and Burdens of Mainstreaming Capable Handicapped Children in a Regular Classroom, 38 MERCER L.R. 903, 912 (1987) [hereinafter Northrup Comment].
of the test had been met because neither the appellate nor the district
court found that the school had not complied with the procedures of
the Act. With respect to the second prong, the Court held that because
Amy was “performing better than the average child in her grade and
[wa]s advancing easily from grade to grade” she had been receiving
educational benefit. Amy’s program therefore was a “free appropriate
public education” within the meaning of the Act.

The test of Rowley, summarized as procedural compliance and
educational benefit, is a workable test to administer when the issue
before a court is the “appropriateness” of a child’s educational pro-
gram. However, because Amy Rowley was already placed in the
mainstream, Rowley is not enlightening when the issue before a court
is solely mainstreaming. In solely mainstreaming cases courts have
generally applied a two-step analysis; first, to test both the school
district’s and the parents’ programs applying the Rowley test for
“appropriateness,” then, if both programs meet Rowley, to consider
whether the mainstream program is required. Unfortunately, because
the second prong of the mainstreaming analysis has not been addressed
by the Supreme Court, the results have been inconsistent as courts
continue to struggle with the proper weight to accord the mainstreaming
preference under the Act.

III. WHAT ROWLEY DID NOT DO

A. GRACE I AND GRACE II: THE GENERAL RULE

Springdale Sch. Dist. v. Grace was one of the first cases to apply
the Rowley test for “appropriateness” in a mainstreaming case. Sherry
Grace, an eleven year old girl, was profoundly and prelingually deaf.
Her hearing loss of 95% rendered her completely deaf for all purposes.
Sherry was enrolled at the age of four in a special program for children
with hearing impairment. Because these children retained some hearing,
the program was taught orally. Due to Sherry’s total hearing loss, she
did not progress in this program because children who are “profoundly
and prelingually deaf, . . . lack[] the concept of language and must not
only receive visual instruction, but also must be taught the most

60. Id.
61. Id. at 210.
rudimentary matters concerning language."\(^{64}\) When Sherry was six, her parents enrolled her in the School for the Deaf which employed a total communication system. A total communication system is a method of visual communication encompassing signing, finger spelling, visual cues, touching and mouthing.\(^{65}\) Sherry thrived in this program, where her skills progressed from the language of a two year-old to being able to read at the second grade level. Her social and emotional skills also improved.\(^{66}\)

After three years at the School for the Deaf, Sherry’s parents moved. They removed her from the School for the Deaf, and enrolled her in their local school. The new school district prepared an IEP and concluded that although Sherry’s academic skills had significantly improved at the School for the Deaf, because of her continued lack of skills in reading, spelling, and math, the “appropriate” program was still at the School for the Deaf.\(^{67}\) The Graces objected to this placement and obtained a due process hearing pursuant to the Act.\(^{68}\) The Graces’ proposed placement at the regular school was sustained by the hearing officer, by the Coordinator of the Department of Education and by the district court on appeal.\(^{69}\) The district court noted that although the School for the Deaf could have provided Sherry with the “best” free education, the Act required only an “appropriate” education.\(^{70}\) The Eighth Circuit (Grace I) held that based on the facts of Sherry’s case, the program approved by the State Department of Education (the Graces’ program) was “appropriate” under the Act, and it satisfied the mainstreaming requirement.\(^{71}\) The Supreme Court granted certiorari but ultimately remanded the case back to the Eighth Circuit for a decision consistent with the Supreme Court’s test for “appropriateness” established in Rowley.\(^{72}\)

On remand and applying the Rowley test, the Eighth Circuit again found no error in the holding of the district court (Grace II).\(^{73}\)

\(^{64}\) Springdale Sch. Dist. No. 50 v. Grace, 656 F.2d 300, 302 (8th Cir. 1981) [hereinafter Grace I]. The Eighth Circuit decision in Grace I was vacated by the Supreme Court and remanded for decision consistent with Rowley. The Grace I holding was the same as Grace I, however in Grace II, the court applied the Rowley test for “appropriateness.”
\(^{65}\) Grace I at 303 n.2.
\(^{66}\) Id. at 303.
\(^{67}\) Id.
\(^{69}\) Grace I, 656 F.2d at 303.
\(^{70}\) Id.
\(^{71}\) Grace II, 693 F.2d 41, 42 (8th Cir. 1982).
\(^{72}\) Id.
\(^{73}\) Id.
Specifically, the court found that (1) the state had complied with the procedures of the Act in establishing Sherry’s IEP, and (2) Sherry’s IEP was reasonably calculated to enable her to receive educational benefits. Additionally, “[a]lthough the School for the Deaf may offer the best educational opportunities for Sherry, the Supreme Court has said that the Act does not require states to make available the best possible option.” Finally, the court noted that Rowley reserved questions of educational methodology to the state, and therefore deferred to the State Department of Education and its choice of IEP.

In sum, Grace II established the general rule that when choosing between two programs which are both “appropriate” under Rowley, a child will not have to be afforded the “best” educational program if it does not also offer the lesser restrictive environment. Although both programs were found to have been “appropriate” under Rowley, the court sustained the program requested by the Graces because in addition to meeting the mainstreaming goal established by the Act, it was the program chosen by the State Department of Education, and it was “appropriate.” This analysis, however, still does not help to establish the precise weight of the mainstreaming requirement under the Act. Even though the court chose the mainstream program, the result would have been the same had the court merely deferred to the state administrative findings. It is unclear, therefore, whether deference to the state proceedings, or the preference for mainstreaming, or a combination of both tipped the scale in favor of the mainstream program. In any case, the court did not indicate that the Graces’ choice, because it was the program advanced by the parents, played any role in its analysis.

B. APPLYING ROWLEY TO A COMPLETELY RESTRICTIVE PROGRAM

The Sixth Circuit contemplated the proper weight to be given the mainstreaming preference in Roncker v. Walter. Neill Roncker was a severely mentally retarded nine year-old boy who suffered from a seizure disorder and required constant supervision because he was

74. Id. at 43.
75. Id. at 42.
76. Id. at 43.
77. See Michael S. Treppa, The EHA: Trends and Problems with “Related Services” Provisions, 18 GOLDEN GATE U. L. REV. 427, 433 (1988). The Rowley rule for “appropriateness” has been construed by commentators to mean a program conferring some educational benefit, even “minimal educational benefit.” Id.
78. See Dubow, supra note 1, at 225. “An interesting epilogue to this case is that Sherry Grace in her teenage years returned to the Arkansas School for the Deaf.” Id.
unable to recognize dangerous situations. The IEP established by the school district called for Neill's placement in a county school exclusively for handicapped children. The Ronckers rejected that placement because Neill would have had no contact with non-handicapped children. The Ronckers sought a due process hearing wherein the hearing officer found that the school had not satisfied its burden of proving that its IEP afforded maximum appropriate contact with non-handicapped children. The hearing officer ordered that "Neill be placed within the appropriate special education class in the regular elementary school setting." The decision by the hearing officer is noteworthy because his order was for a placement neither offered by the school district nor specifically requested by the Ronckers (although the hearing officer's proposal would have affected the Roncker's goal of increased mainstreaming).

On appeal by the school district, the State Board of Education found that although the county school afforded Neill an "appropriate" education, he needed some contact with non-handicapped children to meet the least restrictive environment requirement. The State Board of Education held that Neill was properly placed in the county school with the condition that some provision be made for him to interact with non-handicapped children. Therefore, the State Board of Education approved the school district's program, but ordered some mainstreaming contacts. The administration of this conceptual program was, however, left to the school district.

On appeal by the Ronckers to the district court, the Ronckers argued that Neill could only receive an "appropriate" education in a setting where he could interact with non-handicapped children. Conversely, the school district argued that any minimal benefit to Neill from mainstreaming was outweighed by the educational benefits of the county's segregated school. The district court found in favor of the

81. Roncker, 700 F.2d at 1060.
82. Id. at 1061.
83. Id.
84. Id. at 1061.
85. Id.
86. Id. (emphasis added).
87. Id.
88. Id.
school district by deferring to the local school district's discretion in establishing placements for handicapped children.\(^{90}\)

On appeal, the Sixth Circuit said that the district court failed to give due weight to the state administrative proceedings under \textit{Rowley}.\(^{91}\) Because both the hearing officer and the State Board of Education found the school district's placement not "appropriate" (because of inadequate mainstreaming), the appellate court found that the district court erred in applying a deferential standard of review to the school district's placement.\(^{92}\) By deferring to the school district, the district court "render[ed] the administrative hearings provided for by the Act virtually meaningless."\(^{93}\)

In evaluating the proper level of mainstreaming in Neill's case, the Sixth Circuit recognized that although "[t]he Act does not require mainstreaming in every case . . . its requirement that mainstreaming be provided to the \textit{maximum} extent appropriate indicates a very strong congressional preference."\(^{94}\) The strength of that preference is reflected in the court's test for mainstreaming:

\textit{Placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. . . . In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities. . . . Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. . . . Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children.}\(^{95}\)

\(^{90}\) \textit{Id.}  
\(^{91}\) \textit{Id.} at 1062.  
\(^{92}\) \textit{Id.}  
\(^{93}\) \textit{Id.}  
\(^{94}\) \textit{Id.} at 1063 (emphasis in original).  
\(^{95}\) \textit{Id.} (citation omitted).
The appellate court said that the district court must determine whether Neill's needs required some service which could not feasibly be provided in a segregated class in a regular school. Although the Sixth Circuit recognized that this placed a difficult burden on the district court, the district court may rely on the state administrative findings for guidance. Also, this result is reasonable under the Act because the court framed the issue as one of "mainstreaming" and not one of "methodology."

The major flaw of the school district's proposed IEP in Roncker was the failure to establish any type of continuum of placements for Neill. Recognizing that Neill was not a candidate for full mainstreaming, the school proposed a completely segregated school as the only alternative to a completely mainstreamed placement. Both the hearing officer and the State Board of Education agreed that Neill's segregated placement did not meet the mainstreaming goal of the Act. The hearing officer sought to solve the problem by substituting his judgement for that of the school district. Conversely, the State Board accepted the school district's program but ordered Neill's interaction with non-handicapped children within that program.

The Roncker decision may most aptly be construed as an appeal to schools to be creative in moving handicapped children from com-

96. Id; see, e.g., A.W. v. Northwest R-I Sch. Dist., 813 F.2d 158, 163-64 (8th Cir. 1987) (held that under Roncker, the district court was correct in considering cost to the school district as a factor of feasibility).
97. Roncker, 700 F.2d at 1063.
98. For a discussion regarding problems which arise when courts confuse mainstreaming with methodology, see infra notes 142-73 and accompanying text.
99. 34 C.F.R. § 300.551 (1990); see also Martin, supra note 35. Reed Martin, leading writer and advocate for children in special education and plaintiff's attorney in Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989), has observed: [S]ome schools all across the country [automatically place children in a predetermined type of school soley on the basis of their classificaiton i.e., trainable mentally retarded], making what can only be characterized as automatic categorical placements. Responding to school administrative needs rather than individual differences, they group children together and then let the demands of that placement dictate an all or nothing decision about integration. For example, a certain classification might produce a self-contained class whose students traditionally do not leave for any purpose. The school does not individually examine each child, contrasting his unique needs with each element of the school program, thus making an individual decision which might be different for one child's art class, another child's recess and still another child's transportation. Martin, supra note 35, at 1-2.
100. Both parties agreed that Neill could not receive mainstreamed substantive education classes. See Roncker, 700 F.2d at 1061.
pletely segregated placements into lesser restrictive placements. The Roncker rule of completely transposing the program from the greater restrictive environment to the lesser restrictive environment, where feasible, has been more readily applied where the challenged placement was completely restrictive, causing the handicapped child to be completely segregated from non-handicapped children.\textsuperscript{101} It is clear from this rule that so long as the lesser restrictive program is "appropriate," mainstreaming is a clear preference unless prohibitive cost renders the mainstream program not feasible. Practically however, prohibitive cost is an argument available only to the school district, and may be an argument which will trump all others. For example, in a situation where parents have argued for a mainstream placement which the school rejects as cost prohibitive, the school will prevail because under Roncker, prohibitive cost is a permissible factor in feasibility. In the alternate situation, where parents argue for greater restriction, the district may argue only the Act's preference for mainstreaming and prevail here as well. Because of this unilateral use of the prohibitive cost factor, the weight of "mainstreaming" is different when in the hands of the school district than when in the hands of the parents.

C. CONFUSION INCORPORATING "MAINSTREAMING" INTO A "FREE APPROPRIATE PUBLIC EDUCATION"

Other courts have struggled with establishing the precise role and weight to give the mainstreaming requirement when mainstreaming was

\textsuperscript{101} See Weber supra note 28, at 391.

[T]he implications of Roncker run far to the contrary of Rowley. Rowley expounded the idea of a minimal duty to provide access to some educational benefit; Roncker established an open-ended commitment to provide services in settings where they ha[d] never before been provided. Although the facts of Roncker primarily involved moving the child into a regular school building, the commitment to provide services to enable a child to be in the mainstream could entail much more — as much outside help as the child needs to survive in a regular classroom for part or all of the day.

\textit{Id.}; see, e.g., Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990) (rejected the “better” academic residential placement proposed by the parents in favor of an “appropriate” academic placement in a learning disabilities class in a public school); Department of Educ., Haw. v. Katherine D., 727 F.2d 809 (9th Cir. 1983) (school's proposed homebound program found “inappropriate” under the Act for failure to provide for any interaction with non-handicapped children); Barwacz v. Michigan Dept. of Educ., 681 F. Supp. 427 (W.D. Mich. 1988) (parent's request for a segregated school for the deaf rejected in favor of public school placement); Community High Sch. Dist. 155 v. Denz, 463 N.E.2d 998 (Ill. App. Ct. 1984) (school's proposed homebound program found to meet the “appropriate” standard of Rowley, but rejected because it provided for no contact with non-handicapped children).
the only issue. Unlike Grace II and Roncker, where both programs were found to have been "appropriate" under Rowley, the Idaho Supreme Court refused to find a program "appropriate" without a mainstreaming provision. In Thornock v. Boise Sch. Dist. 1,102 the supreme court applied a test for mainstreaming which required balancing the preference of mainstreaming with "the primary objective of providing handicapped children with an 'appropriate education.'"103 The supreme court made the mainstreaming mandate a factor in establishing a child's "appropriate" placement.104

Gabriel Thornock was a multiply handicapped child, classified as "trainable mentally retarded."105 The school district's proposed placement for Gabriel was a self-contained special education classroom in a regular school. The Thornocks rejected that placement, requesting that Gabriel be placed in a mainstream classroom with a full-time aide, and sought review at a due process hearing. The school district had "made no offer to consider any placement other than in a segregated classroom for 'special education' children."106 The hearing officer approved the school district's placement and the State Board of Education affirmed that decision.107 The Thornocks then appealed to the state district court, which rejected the school district's placement in a segregated classroom and chose the mainstreamed program proposed by the Thornocks.108

The school district appealed to the Idaho Supreme Court and argued that the district court had not given due weight to the decisions of the hearing officer and the State Board of Education.109 The supreme court, however, upheld the district court's findings of fact, and found Gabriel's IEP not "appropriate" because the school district had failed to rebut the substantial evidence that mainstreaming was appropriate for Gabriel.110 Because the IEP prepared by the school district failed

102. 767 P.2d 1241 (Idaho 1988); see also 20 U.S.C.A. § 1415(e)(2)(c) (Any party appealing a decision made by the State educational agency may appeal to either "any State court of competent jurisdiction or . . . [to] a district court of the United States without regard to the amount in controversy.").
103. Thornock v. Boise Sch. Dist. 1, 767 P.2d 1241, 1249 (Idaho 1988) (emphasis added) (quoting Wilson v. Marana Unified Sch. Dist. of Prima County, 735 F.2d 1178, 1183 (9th Cir. 1981). The Thornock case also involved the issue of a school district's obligation to pay for supplementary services in a private school under the Act, an issue beyond the scope of this Comment.
104. Thornock, 767 P.2d at 1249.
105. Id. at 1243.
106. Id.
107. Id. at 1244.
108. Id.
109. Id.
110. Id. at 1245.
to state the extent to which Gabriel would be able to participate in regular educational programs, a procedural requirement of the Act, the program was per se not an "appropriate" program.\textsuperscript{111} The court explained that it did not mean to denigrate the expertise of the school authorities, but that because the school system offered no evidence that its system was more efficient, the district was obligated to treat "mainstreaming, to the maximum extent appropriate, as its preference."\textsuperscript{112}

In a strongly-worded dissent, Chief Justice Shepard rejected the majority's conclusion that the mainstreaming of handicapped children was required.\textsuperscript{113} "[The Act] does not necessarily require 'mainstreaming' in cases where a child would receive no educational benefits therefrom."\textsuperscript{114} Justice Shepard concluded that Gabriel's interaction with non-handicapped children in the school district's IEP, during lunch, recess, and P.E., was "mainstreamed to the maximum extent appropriate" for Gabriel.\textsuperscript{115} Finally, Justice Shepard warned that Gabriel's mainstreamed placement was "essentially a warehousing process," a severe conclusory placement not required by the Act.\textsuperscript{116}

Like Roncker, the flaw in the school district's IEP may have been in its failure to provide a continuum of services for Gabriel.\textsuperscript{117} Its only offer to the Thornocks was complete academic segregation or nothing. Although it is understandable that the school district sought to keep its special education costs low, its failure to creatively assure Gabriel's contact with non-handicapped children doomed its program. When a school district proposes a completely segregated program, it must justify that segregation by explaining why a child cannot have contact with

\begin{itemize}
\item \textsuperscript{111} Id. at 1247.
\item \textsuperscript{112} Thornock v. Boise Sch. Dist. 1, 767 P.2d 1241, 1251 (Idaho 1988).
\item \textsuperscript{113} Id. at 1258 (Shepard, C.J., dissenting).
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. at 1260.
\item \textsuperscript{117} Madeleine Will, Office of Special Education and Rehabilitative Serv., Educating Students with Learning Problems: A Shared Responsibility (1986) [hereinafter Will]. Ms. Will, Assistant Secretary for the Office of Special Education and Rehabilitation Services (OSERS), calls this the "fragmented approach," where school districts try to fit handicapped children into predetermined "delivery systems." Id. at 5. OSERS has challenged the states to renew their commitment to serve handicapped children effectively. At the heart of this commitment is a "search for [creative] ways to serve as many of these children as possible in the regular education classroom." Id. at 19; see also Turnbull, supra note 7, at 163 (The least restrictive environment has not pushed handicapped children into the "mainstream," and will not, until courts use it more creatively.).
\end{itemize}
non-handicapped peers. There is a presumptive preference for mainstream contacts for handicapped students, but a school district can sufficiently rebut this presumption by arguing either that the mainstream program would confer no educational benefit, or that mainstream contacts for this child would be cost prohibitive.

The absence of educational benefit argument is a weak argument because, if the school district has a true continuum of programs in place, one step toward lesser restriction should not negate all educational benefit. However, if the school district provides this segregated program in a building exclusively for handicapped children, it may not be able to offer any mainstream contacts without incurring potentially prohibitive cost, as one step toward lesser restriction might require a move to another school building. Because prohibitive cost is a permissible argument for the school district, the school district can indefinitely avoid creating a continuum of placements, following the letter of the law under Rowley, yet miss the spirit of the law — to afford handicapped students educational opportunity equal to that of their non-handicapped peers.118

However, other courts have been reluctant to require “mainstreaming” as a necessary factor in “appropriateness.” In DeBlaay v. Fairfax County Sch. Bd.119 the Fourth Circuit adopted the view taken by Chief Justice Shepard in the Thornock dissent.120 Michael DeVries was a seventeen year-old autistic student. The IEP prepared by the school district chose a vocational center serving exclusively handicapped children for Michael’s placement. Michael’s mother contested that placement, arguing that, notwithstanding the school district’s procedural compliance with the Act pursuant to Rowley, Michael’s IEP was not a “free appropriate public education” because the school district had not sustained its burden of proving that Michael could not receive an “appropriate” education at the local high school.121

The school district’s IEP was upheld by both the hearing officer and the state reviewing officer.122 On appeal, the district court relied on language in Roncker which recognized that although preferable, mainstreaming is not appropriate for every handicapped child.123 In its findings of fact, the district court noted that although Michael had

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119. 882 F.2d 876 (4th Cir. 1989).
121. DeBlaay, 882 F.2d at 878.
122. Id. at 877.
been successful in a community setting where he held a job, his cognitive and academic functioning was depressed and he had difficulty with his social skills in the school environment.\textsuperscript{124} The court concluded that "there is no appropriate peer group academically, socially or vocationally \textit{for} Michael at [the local high school]. Even with an aide . . . Michael would simply be monitoring classes."\textsuperscript{125} The court held that the IEP proposed by the school district was a "free appropriate public education" in the "least restrictive environment" because Michael's education in the high school could not be accommodated.\textsuperscript{126}

The striking difference between the reasoning used in \textit{Thornock} and \textit{DeBlay} is the role of the mainstreaming requirement in determining whether or not an IEP is a "free appropriate public education" in the "least restrictive environment." The \textit{Thornock} court concluded that a school district must bear the burden of proving that the least restrictive environment \textit{cannot} be appropriate. Absent such proof, a child \textit{must} be mainstreamed; the mainstream program is therefore presumptively "appropriate." The \textit{DeBlay} court said that if it is shown that the mainstreamed program is not "appropriate," the more restrictive program becomes the "appropriate" program \textit{in the "least restrictive environment."}\textsuperscript{127} The request of the parents was not dispositive in either case, as both parents argued for the least restrictive environment program. Although the \textit{Thornock} program was "appropriate" under \textit{Rowley}, the \textit{DeBlay} decision may effectively assure a child more than minimal benefit by permitting a program to be "appropriate" absent a mainstreaming provision.

Parents have argued in the Second, Third and Fifth Circuits that an IEP which does not mainstream cannot be a free appropriate public education.\textsuperscript{128} The Second Circuit rejected the parents' request for a mainstreamed program by upholding the hearing officer's finding that the parents had not sustained their burden of proving that the handicapped child's needs could only be met in a mainstreamed environ-

\begin{footnotes}
\item[124.] \textit{DeBlay}, 882 F.2d at 879.
\item[125.] \textit{Id.}
\item[126.] \textit{Id.} at 880.
\item[127.] \textit{Id.} The Fourth Circuit said that the district court "fully considered the Act's mainstreaming requirements" by observing that "Michael could not be satisfactorily educated in regular classes even with the use of supplementary aids and services." \textit{Id.} at 878.
\end{footnotes}
Therefore, the school district's placement in a more restrictive setting became a free appropriate public education in the least restrictive environment because the mainstreamed program was not appropriate.\textsuperscript{130}

In \textit{Daniel R.R. v. State Bd. of Educ.},\textsuperscript{131} the Fifth Circuit upheld the school district's proposed IEP which removed Daniel from a regular kindergarten.\textsuperscript{132} The school district claimed that the mainstream program was not "appropriate" because Daniel, who suffered from mental retardation and a speech impairment as a victim of Down's Syndrome, was receiving little educational benefit and was disrupting the class.\textsuperscript{133} Daniel's parents argued that by removing Daniel from the mainstream classroom, the school district had not provided Daniel with a continuum of special education services.\textsuperscript{134} The district court rejected the parents' contention and upheld the finding of the hearing officer that Daniel was receiving no educational benefit in the mainstream program. Therefore the school district's program was a free appropriate public education in the least restrictive environment.\textsuperscript{135}

The \textit{Daniel} court rejected the \textit{Roncker} test (which requires that the "better" more restrictive program be transposed into a lesser restrictive environment, where feasible)\textsuperscript{136} and established a two-part test for mainstreaming; (1) can education in the regular classroom be achieved satisfactorily with use of supplemental aids and services, and if not, then (2) has the school mainstreamed the child to the maximum extent appropriate?\textsuperscript{137} The court felt that this inquiry would give proper deference to the choice of methodologies selected by the local school officials (i.e. local district, hearing officials, and state board of education). The requirements of the first prong of the test can be established by evidence that the state has taken steps to accommodate the handicapped child into regular education, this child will receive educational benefit from regular education, and this child's presence in the regular classroom will not be disruptive.\textsuperscript{138} Requirements of the second prong can be established by evidence that the state has provided a

\begin{itemize}
\item \textsuperscript{129} Briggs, 882 F.2d at 691.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} 874 F.2d 1036 (5th Cir. 1989).
\item \textsuperscript{132} Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989).
\item \textsuperscript{133} Id. at 1039.
\item \textsuperscript{134} Id. at 1043.
\item \textsuperscript{135} Id. at 1047.
\item \textsuperscript{136} See supra notes 79-101 and accompanying text for a complete discussion of \textit{Roncker}.
\item \textsuperscript{137} Daniel, 874 F.2d at 1048.
\item \textsuperscript{138} Id.
\end{itemize}
continuum of services.\textsuperscript{139} Applying this test to Daniel's placement, the court approved the school district's placement and said that the mainstream program "offer[ed] Daniel nothing but an opportunity to associate with non-handicapped students."\textsuperscript{140} This warning from the court sounds like the "warehouse" warning from Justice Shepard's dissent in \textit{Thornock}.\textsuperscript{141}

Unlike the Idaho Supreme Court in \textit{Thornock}, these courts are reluctant to manufacture some minimal educational benefit in a mainstreamed setting in which there is no educational benefit. Although the "minimal benefit" requirement in \textit{Rowley} could have easily been used to justify the decision to mainstream in these cases, the courts were looking for greater educational benefit, or at least positive evidence of some educational benefit. These courts clearly will accept a segregated program as "appropriate" in the least restrictive environment by a showing that a child will not receive educational benefit in the mainstream program. Unlike the program in \textit{Thornock}, an IEP can be a free appropriate public education absent a mainstreaming provision. This reasoning properly preserves some educational benefit for the handicapped student. It is worrisome that the parents or the school district may rely on the congressional preference for mainstreaming, and absent a contravening argument such as prohibitive cost or no educational benefit, a child may be "mainstreamed," but receive inadequate "individual" services. In creating the "least restrictive environment" provision of the Act, it is unlikely that Congress intended that handicapped students be present in mainstream classrooms, but unable to participate in any meaningful way.

D. DOES THE "LEAST RESTRICTIVE ENVIRONMENT" REQUIRE THE HOME SCHOOL? IS IT "MAINSTREAMING" OR "METHODOLOGY"?

Most of the cases discussed above involve fact patterns where parents have objected to a more restrictive placement proposed by the school district. Often, the school district's placement involves a centralized program directed to the needs of children within a specific disability group, for example, physically handicapped, hearing impaired, or vision impaired children. These centralized programs may be housed within a regular education school building, which permits the handicapped children to be mainstreamed into regular classrooms.

\textsuperscript{139} \textit{Id.} at 1050.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{See supra} notes 113-16 and accompanying text for a discussion of the \textit{Thornock} dissent.
at any time during the day. Conflicts may arise, however, when parents whose children are mainstreamed within these programs seek to have the program duplicated at the child's neighborhood or home school. These parents are relying on regulatory language which states that, "[u]nless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped." Conversely, parents may object when the school district proposes removing the child from a centralized special education program into the home school. Recent decisions indicate however, that within the prescriptions of the Act, the school district may be the only party able to demand the home school.

In *Barnett v. Fairfax County Sch. Bd.*, Michael Barnett had flourished in a cued speech program for the hearing impaired. Michael received services from this program which was located in a regular education school building, although not his home school. By Michael's sophomore year in high school, he was completely mainstreamed for all of his academic classes. Michael's parents argued that categorical placement in a centralized program, albeit a mainstream program, ignored Michael's individual needs in violation of the Act, and therefore sought to have the cued speech program duplicated at Michael's local high school. At a due process hearing, the hearing officer agreed that the cued speech program should be provided at Michael's local high school. The state administrative hearing officer reversed the due process hearing officer, and the Barnett's appealed to the district court.

The district court upheld the decision of the state hearing officer, and found that the centralized program proffered by the school district

142. 34 C.F.R. § 300.552 (c) (1990).
143. See, e.g., *No Dogs Allowed*, Time, Sept 17, 1990, at 55. Sixth-grader Michael Gaudiello and his parents objected to Michael's transfer from his mainstream program at a school with a physically handicapped program, to Michael's home school. Michael's father Ralph Gaudiello indicated that Michael would be the only disabled student at the new school. Neither Michael nor Michael's parents agreed with this placement — Michael just wanted to stay at his old school with his long-time friends. Telephone Interview with Ralph and Michael Gaudiello (Oct. 10, 1990). See also supra notes 201-07 for a discussion regarding the Regular Education Initiative, or full inclusion programs.
144. 927 F.2d 146 (4th Cir. 1991).
146. Id.
147. Id.
148. Id.
was "appropriate." The court reasoned that it was within a school district's discretion to centralize resources in a program serving a small number of students in order to gain "educational advantages of centralization." Michael's parents then appealed to the Fourth Circuit where they argued that the Act required the school district to duplicate the cued speech program at Michael's home school.

Applying Rowley, the Fourth Circuit found that the school district had properly complied with the procedural requirements of the Act. The court also found that the centralized program was "appropriate" under Rowley because Michael had received "tremendous educational benefit from the cued speech program" there. The final issue for consideration then became whether the Act required the school district to duplicate this "appropriate" cued speech program at Michael's home school as his parents had requested. The appellate court explained that the Act and the regulations did not create a duty to place a child in his home school, but rather that the school board consider the proximity of the proposed program to the child's home as one factor in choosing a program. Additionally, the court recognized that the school could legitimately consider the cost of providing the cued speech program to Michael at his home school. "Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions." Therefore, notwithstanding the preference for mainstreaming at the local school, the school district's program was a free appropriate public education in the least restrictive environment.

It is interesting to note that in this case, the court interpreted the centralized special education program as a school district's choice in educational methodology, to which the court may defer. Conversely, the court could have concluded that the failure of the district to duplicate the program at the neighborhood school was a failure to

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151. Id. at 150.
152. Id. at 151.
154. Id. at 153 (relying on 34 C.F.R. §§ 300.522 (a)(3),(c) and official comments thereto).
155. Id. at 154.
156. Id.
157. Id.
provide a continuum of educational placements, a violation of the Act. Although the court acknowledged that the school district was operating with limited financial resources, when the court accepted a centralized program as a permissible choice in methodology, the court opened the door to arguments for segregated programs regardless of the limited financial resources/prohibitive cost argument.

In *Schuldt v. Mankato Indep. Sch. Dist.*,158 the Eighth Circuit came to a similar conclusion after applying a somewhat strained argument to a distinguishable fact pattern. Erika Schuldt was born with spina bifida and was paralyzed below the waist.159 As a result, she used a wheelchair and required physical therapy, catheterization, and bowel care. When Erika was ready for kindergarten, the Schuldts notified the school district that they wanted Erika to attend the local grade school. The school district advised the Schuldts that the local school was not accessible to Erika in her wheelchair, and that the school district was not required to make the school accessible for her. The school district offered the Schuldts *their choice* of three other grade schools which were wheelchair accessible.160 The Schuldts sought relief at a due process hearing in order to compel the school district to make the local school building accessible for Erika.161

The hearing officer found that the school district had not complied with the procedural requirements of the Act, that Erika's IEP was not a "free appropriate public education," and that "placement at a school other than [the local school] did not constitute placement in the least restrictive environment as required under the . . . Act."162 The school district appealed to the State Commissioner of Education who determined that although the school district had not complied with procedural requirements of the Act, placement at the accessible school was a free appropriate public education in the least restrictive environment.163

On appeal by the Schuldts, the district court focused only on the resultant program offered by the school district.164 The district court said that although the school district had failed to comply with the procedural requirements of the Act, the program in the accessible school was a free appropriate public education in the least restrictive

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158. 937 F.2d 1357 (8th Cir. 1991).
160. Id. at 1359 (emphasis added).
161. Id.
162. Id. (emphasis in original).
163. Id. at 1359-60.
164. Id. at 1359.
environment. The court found that even if the school district had complied with the procedural requirements of the Act, it would still have chosen only the accessible school.\textsuperscript{165} According to the district court, because the accessible program complied with the "ultimate objective" of the Act, the program had actually satisfied the requirements of the Act.\textsuperscript{166}

On appeal to the Eighth Circuit, the Schuldts argued that the school district's noncompliance with the procedures of the Act (as required under 

Rowley) was a per se denial of a "free appropriate public education" for Erika.\textsuperscript{167} The court stated however, that the Schuldts' argument which required that the school district place Erika in her home school "misinterpret[ed] the act, misuse[d] precedent, and essentially ignore[d] the district court's determination that the school district [had] fully complied with the Act by placing Erika [at the accessible school]."\textsuperscript{168} The court reasoned that placement at the home school was not a requirement of the Act, but proximity to the home school was only one factor which a school district must consider.\textsuperscript{169} A school district must choose the home school "unless the child's program requires something else."\textsuperscript{170} In addition to gaining access to the school building itself, Erika's IEP also called for movement within crowded classrooms, access to the library, storage for Erika's wheelchair, and a private room where Erika could receive physical therapy and catheterization.\textsuperscript{171} The court concluded by finding the program at the accessible school "appropriate" because it provided Erika with a "fully integrated public education" even though it denied her contact with her siblings and with neighborhood children.\textsuperscript{172}

\textit{Barnett} can be easily distinguished from \textit{Schuldt}. The \textit{Barnett} court recognized the presence of a centralized program at the cued speech school. This program served a core group of hearing impaired students, all with similar educational and therapeutic needs, a program which can be characterized as a program of educational methodology.

\textsuperscript{165} Schuldt v. Mankato Indep. Sch. Dist., 937 F.2d at 1360 (8th Cir. 1991) (citing Schuldt v. Mankato Indep. Sch. Dist., No. 4-89-636, Slip op. at 14).
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 1361.
\textsuperscript{169} Id.
\textsuperscript{170} Id. (emphasis added).
\textsuperscript{171} Id. at 1361, n.6. It is interesting to note that the Supreme Court has described "clean intermittent catheterization" as a \textit{simple procedure} which "may be performed in a few minutes by a layperson with less than an hour's training." Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 885 (1984) (emphasis added).
\textsuperscript{172} Schuldt, 937 F.2d at 1361.
In Schuldt, however, the school district was able to rely on physical access alone as a centralized program offered only at the accessible school. Yet the Schuldts had been offered their choice of one of three accessible school buildings suggesting that the school district did not have an established program of accessibility in any specific building prior to Erika’s enrollment. It is difficult to imagine that a court could recognize the presence of physical access alone as a permissible choice in methodology.

In both cases, however, had the school district proposed the home school because it was cheapest, and had the parents objected to that placement, the courts would likely have sustained the choice of the home school as both “appropriate” under Rowley and as fulfilling the mainstreaming requirement.173 Michael Barnett’s parents could not have relied on an argument in which they preferred a centralized program because choice of educational methodology is for the educators. Once again, mainstreaming in the home school can either be incorporated or ignored, incorporated when offered by the school district or the state educational agencies, or ignored when requested by the parents alone.174

E. WHAT IS THE ROLE OF THE PARENTS?

Congress recognized the role of a handicapped child’s parents as advocate, and consequently gave parents or guardians a procedure to “present complaints” regarding a child’s IEP or placement.175 Yet the procedures of the Act work in such a way that the parents will always be the initial complaining party because the school district develops an IEP with which the parents must either agree or disagree. Due to this procedural imbalance, parents have no real influence in the creation of their child’s IEP. Practically speaking, unless the parents’ proposition is upheld either by the hearing officer at the due process hearing, or

173. See e.g., Kerkam v. Superintendent, 931 F.2d 84 (D.C. Cir. 1991) (sustained day placement at a local public school over the parents’ choice of a private day school and a group residential home); Hulme v. Dellmuth, No. 89-6189, 1991 WL 83115, (E.D. Pa. 1991) (sustained a lesser restrictive program offered by the school because it met the mainstream requirement of the Act).

174. The only time parents may rely on the mainstream requirement of the Act in placing their child is when the parents' program is upheld at the due process hearing or by the state administrative agency. Because a reviewing court must give due weight to administrative findings, the parents' program must be sustained somewhere in the administrative process, otherwise the reviewing court will have no basis to find for the parents. See Gallegos, supra note 14 at 265. “In applying the Rowley standard, parents are left without a judicial tool for securing their preferred approach.” Id.

by the state educational agency, the parents will be foreclosed on appeal in a civil action.\textsuperscript{176}

In addition to the "appropriateness" rule in \textit{Rowley}, the Supreme Court also established the appropriate standard of review under the Act.\textsuperscript{177} Notwithstanding "extensive parental involvement" in establishing a child's IEP,\textsuperscript{178} a reviewing court may not overturn "a State's choice of appropriate educational theories . . . . [Q]uestions of methodology are for resolution by the States."\textsuperscript{179} Therefore, the parents' program must be supported either by the hearing officer or by the state reviewing board to withstand the deference a court must give to the state review process.

The harshness of this approach was recently evident in the Second Circuit. In \textit{Briggs v. Bd. of Educ.},\textsuperscript{180} the court virtually stripped parents of any ability they may have had to challenge the school's placement by sustaining the hearing officer's demand that the parents prove how the least restrictive environment program they requested could be feasible.\textsuperscript{181} James Briggs was a three year-old suffering from moderate to severe sensorineural hearing loss, and mild to moderate speech and language delays. The school district proposed that James be placed in a pre-school program for hearing-impaired children. The Briggs argued that the school district's program was not appropriate because of inadequate interaction with non-handicapped children.\textsuperscript{182} At the due process hearing, the hearing officer found that the school district's proposed program was "appropriate," and that the Briggs "ha[d] failed to support their contention that James' needs c[ould] be met only in a social milieu of predominantly non-handicapped children."\textsuperscript{183}

On appeal to the district court, the Briggs argued that the hearing officer erred by placing the burden on them to prove that James could only receive an "appropriate" education in the least restrictive environment. The district court reversed the hearing officer, and found that the school district's program was "not appropriate" within the meaning of the Act because the program could have "feasibly" been offered in a lesser restrictive setting.\textsuperscript{184}

\textsuperscript{176} See \textit{Briggs v. Bd. of Educ.} 882 F.2d 688 (2d Cir. 1989).
\textsuperscript{177} 20 U.S.C.A. § 1415 (e)(2).
\textsuperscript{179} \textit{Id.} at 208.
\textsuperscript{180} 882 F.2d 688 (2d Cir. 1989).
\textsuperscript{181} \textit{Id.} at 689.
\textsuperscript{182} \textit{Id.} at 691.
\textsuperscript{183} \textit{Id.} at 692-93 (although the district court did not explain how this could "feasibly" be done).
In limiting its review only to the test of Rowley, the Second Circuit reversed the district court.\textsuperscript{185} Because the Briggs had failed to establish any evidence on the record that the program proposed by the school district could have been provided in a lesser restrictive setting, it was not the court’s role to do so. “We do not know if the same services could have been provided in a less segregated setting . . . however, it was not our role to decide that question, nor was it the role of the district court.”\textsuperscript{186} In this situation, mainstreaming in the hands of the parents did not even operate as a mere preference! The hearing officer and the circuit court both demanded that the parents, as complaining parties, prove the school district’s program “not appropriate.”

The Eighth Circuit has suggested an interesting solution to this problem: “the school district should have the opportunity, and to an extent have the duty, to try these less restrictive alternatives before recommending [greater restriction].”\textsuperscript{187} This requirement may permit parents to rely on a presumption which says that an “appropriate” program, moved to the least restrictive environment is still “appropriate” under Rowley. The school district would then have to rebut this choice with evidence that the parents’ program is “not appropriate,” or that the cost factor far outweighs the preference for mainstreaming.

IV. IMPLICATIONS

Even in light of considerable case law on the subject of mainstreaming, there is evidence that courts, educators and parents are still struggling with the proper application of the mainstream mandate within a child’s individual program.\textsuperscript{188} Recently, the First Circuit established yet another test for determining whether a child had been adequately mainstreamed.\textsuperscript{189} The test is brilliant rhetoric, but this author

\textsuperscript{185.} Id. at 693 (whether the state complied with the procedures established by the Act, and whether the IEP is “reasonably calculated to enable the child to receive educational benefits”).

\textsuperscript{186.} Id. at 693.

\textsuperscript{187.} Evans v. Dist. No. 17 of Douglas Cty. Neb., 841 F.2d 824, 832 (8th Cir. 1988). It must be stressed that this case presented a situation where parents made a unilateral placement in a residential setting, with the school district arguing for lesser restriction. Id.

\textsuperscript{188.} Dubow, supra note 1, at 215 (acknowledged that the concept of the least restrictive environment has “provoked more controversy and confusion than any other issue in special education”).

\textsuperscript{189.} Roland M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990). To determine a particular child’s place on [the] continuum, the desirability of mainstreaming must be weighed in concert with the Act’s mandate for educational improvement. Assaying an appropriate educational plan, there-
challenges any court, educator or parent to apply it to a child's individualized program and reach an acceptable or understandable placement based on this test alone. Additionally, in spite of the seemingly important role given to parents under the Act as the advocates for their children, in practice this role may be little more than perfunctory. To date there has been no reported case in which the parents' choice, as a factor in and of itself, was found to have played a significant role.

Once a child's placement has been narrowed to a choice between two "appropriate" programs under Rowley, in rendering their decisions, courts must look to other permissible factors including the findings of the state administrative agencies, the preference for mainstreaming, and cost to the school district. In some instances however, there may be evidence that notwithstanding these articulated factors, the court has considered the "best" program.¹⁹

The Supreme Court should grant certiorari on a case in which the sole issue is mainstreaming for several reasons. First, as school districts develop more programs along the continuum of special education, there is an increased chance that more than one program will be found to be "appropriate" under the Rowley test. The rule of Rowley will not be helpful in such a case and courts and educators need to know whether mainstreaming operates as a preference, as a presumption or as a mandate, and whether it ever outweighs findings of the state administrative agencies. Secondly, the Court should articulate a role for parents which is something beyond that of mere plaintiff, especially when the handicapped child himself aligns with his parents and opposes the school district's placement. Finally, the inequities that may arise when the school district is permitted to rely on the mainstreaming requirement in developing placements should be eliminated, because the mainstreaming factor assumes a different weight when exercised by the parents than when exercised by the school district.

fore, requires a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum. Neither side is automatically entitled to extra ballast.

Id. (citation omitted).

190. See Rowley, 458 U.S. 176, 200 (1982). The "best" program might be described as one which seeks to "maximize the [educational] potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." Id; see also, Gallegos, supra note 14 at 259. Courts often ignore the strict minimum standards of Rowley in order to obtain expansive services for handicapped children, especially when parents have argued for a more restrictive placement for their child because of the severity of the handicap. Id.
Mainstreaming

Most of the prior case law discussions involved choices between two "appropriate" programs under Rowley. As school districts create more options along the special education continuum, the "minimal benefit" threshold will likely be crossed in more than one program offered by the school district. For example, a completely restrictive home tutoring program would certainly confer educational benefit to nearly any child. In the alternative, it could be argued that even a profoundly retarded child could gain socialization skills in a regular education classroom. Consequently, in accepting minimal benefit as the only factor, nearly any program would meet Rowley.

Beyond Rowley, courts must look to additional factors in choosing between two "appropriate" programs. In approving the program requested by the parents, the Eighth Circuit in Grace II merely sustained the program upheld by both levels of state administrative hearings although the program had the added benefit of being in the lesser restrictive environment. Likewise, the Roncker court approved a lesser restrictive program approved by both levels of state administrative hearings. The mainstreaming requirement may not have been dispositive in either case though, because both courts would have held the same had they merely deferred to the findings of the state administrative agencies. The fact that it was the parents who had requested these lesser restrictive placements was not an articulated factor in the court's analysis in either case. In the end, the Roncker reasoning may be more compelling because in that case the restrictive program was a completely segregated program. By permitting Neill Roncker to be integrated with non-handicapped children, the Sixth Circuit complied with both the letter and the spirit of the Act.

Although the "least restrictive environment" had truly noble roots at the inception of the Act, there are additional unspoken factors working against the least restrictive environment which underlie the educational system as it exists today. Educators may oppose the application of the least restrictive environment because they fear that the presence of handicapped children in their mainstream classrooms will lower the standard of education for all students. Although this concern may spring from altruistic intentions, often educators' salary increases are tied to their students' performance on standardized tests.

191. See supra notes 62-76 and accompanying text for a discussion of Grace I and Grace II.
192. See supra notes 79-101 for a discussion of Roncker.
193. See supra notes 1-10 and accompanying text.
Some educators and parents also may believe that a classroom teacher is not qualified to be both classroom teacher and "special education" teacher. Another systemic problem may be that the least restrictive environment focus is on the individual child, which conflicts with the public education goal of mass education of large numbers of children. Parents may oppose their child's return to the regular classroom with skepticism because that was probably the place where their child failed initially. Additionally, it is understandable that parents may prefer to keep their children in a safe, homogeneous program in which their children have enjoyed relative success. Some special education programs foster student-teacher relationships which are almost family-like. Many special education students are physically, educationally and emotionally needy, and justifiably rely on special educators who are extremely dedicated people. It is difficult for both parents and students when students must leave this type of nurturing environment. Finally, "in implementing least restrictive environment, the courts have not focused on the creation of appropriate educational placements, only on the selection of one of two available choices."  

One of the most compelling factors undermining the success of the "least restrictive environment" is that by use of the "minimal benefit" standard of Rowley, school districts can force mainstreaming when it is not in the child's best interest. Schools can also use Rowley to reduce existing special education services and expenses. While it is clearly objectionable to "warehouse" a handicapped child in a mainstream classroom (even at the parent's request), it is just as objectionable to encourage that placement under the guise of "least restrictive environment" when that placement lacks supportive and related services. Parents may find themselves reluctantly choosing between mainstreaming and services.

195. Id.  
196. Turnbull, supra note 7, at 167.  
198. Turnbull supra note 7, at 199 (emphasis added).  
199. Heise Comment, supra note 194, at 111.  

(17) . . . transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, including rehabilitation counseling, except that such medical services shall be for diagnostic and evaluation purposes only) as may be
These problems lie at the heart of the controversy surrounding the Regular Education Initiative, developed four years ago, and other “inclusion” programs. The Regular Education Initiative and “inclusion” programs are programs developed out of the philosophy that all special education children should be educated in their neighborhood school, and regular classroom. "[T]his has primarily meant integrating children from institutions and special schools in regular schools; in other places it has moved children from special classes and resource teacher programs into full time regular class placement." The underlying premise of some inclusion programs is that such “inclusion” is itself a form of educational benefit, generally social in nature, to handicapped children. Unfortunately, when these students are “mainstreamed” based on a school district’s categorical policy of inclusion or Regular Education Initiative, these students may also lose their “individualized” programming required by the Act.

Critics of the Regular Education Initiative argue that, among other things, it is illogical to believe that regular education teachers can improve their overall class performance while providing individualized programs to an ever-increasing number of low performing students. These critics also recognize that the special education model is still in its infancy, and it is wrong to abandon it “just at a time when hundreds of thousands of drug-affected children will be entering school.” Finally, these critics note that the Regular Education Initiative may violate the Act by failing to provide a continuum of alternative placements based on students’ individualized needs.

required to assist a child with a disability to benefit from special education.

Id.


203. See generally, Will, supra note 117; see also, LaNelle Gallagher, Statement on the Regular Education Initiative, 26 LEARNING DISABILITIES ASSOCIATION NEWSBRIEFS, May/June, 1991, at 1. The propositions in the Will paper, which encouraged the return of special education students to the regular classroom, has been named the Regular Education Initiative. Gallagher at 1. See generally Freagon, supra note 1 for a description of the prototype “inclusion” program. “Inclusion” programs seek to place all special education students at the school and in the classroom they would normally attend were they not identified as having disabilities. Freagon at 21.


205. Id.

206. See generally Freagon supra note 1 (calling for “one integrated quality educational system for all students” in order to address the isolation and rejection handicapped students feel when they are segregated from their non-handicapped peers).

207. Id.

208. Id.

209. Id; see also, Letter from LaNelle S. Gallagher to President Bush (Aug. 14,
In this context, the Supreme Court must respect the preference that some educators and parents have for educational methodologies which are not in the least restrictive environment, or that some handicapping conditions require more restrictive settings. The goal of "least restrictive environment" should not "trump all other considerations," but should be "secondary to the paramount goal of the Act to provide an appropriate education that meets the unique needs of each handicapped child, decided upon through an individualized process." To this end, the choice of the parents, in and of itself, should be given positive weight in a multi-factor analysis, particularly when the parents have supported their choice with expert testimony regarding the efficacy of the methodology they have proposed, or when the student himself opts for greater restriction. By recognizing the parents' wishes as a factor in this analysis, the Court would acknowledge the fact that parental and student support of the student's program is crucial to the student's success in that program.

The Court must also ensure that the "mainstreaming" requirement possesses equal weight regardless of its proponent. It is inequitable that under the Regular Education Initiative, school districts may rely on the preference for mainstreaming to move children into regular classrooms, yet case law has established that parents cannot equally rely. In each of these cases, one level of the state administrative hearings had agreed

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1991). Ms. Gallagher, President of Learning Disabilities Association of America, warned that the Regular Education Initiative may be "no more than [a] thinly veiled budget cutting strateg[y] designed to reduce expenditures for students with disabilities . . . . If students with disabilities require special education outside the regular classroom, in order to receive an education which is appropriate to his or her individual needs, the law requires that education reform initiatives accomodate this need." Id.

210. For a thought-provoking article on how the least restrictive environment has worked to the disadvantage of some deaf students, see generally, Dubow, supra note 1.

211. Id. at 223 (quoting Geis v. Bd. of Educ., 774 F.2d 575, 583 (3d Cir. 1985).

212. Id. at 227. When viewed together, these beliefs and concerns may suggest the unfortunate view that the "better" program can never be accomplished in a lesser restrictive setting. Some educators are shirking their responsibility to be "creative" when developing individualized programs in lesser-restrictive settings, and some parents obligingly believe those educators when they are told that their child's program cannot be duplicated in a lesser-restrictive setting. Parents may accept the proposal by the schools as the "only" way their child will receive special education. Due to ignorance or intimidation, many parents never question their child's IEP or placement. Worse yet, some parents never even read their child's IEP.

213. See Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991); Schuldt v. Mankato Indep. Sch. Dist. 77, 937 F.2d 1357 (8th Cir. 1991); see also supra notes 144-73 and accompanying text.
with the parents, so that by adding the factors of deference to the state hearings, the preference for mainstreaming, and the choice of the parents, the choice of the greater restrictive programs offered by the school districts could have been overcome.

Finally, the Court should require that school districts support their decisions to offer only segregated or centralized programs as reasonable choices of educational methodology. A school district could sustain this burden by offering proof that 1) it can economize costs by centralizing its staff, 2) the centralized program is needed because of a sufficient number of students with similar needs, 3) the students would not receive educational benefit elsewhere because their needs are unique, or 4) these unique needs can best be met in a segregated setting. In order to comply with the "individualized" nature of the Act, school districts would have to sustain this burden for each child, individually. Although this is a heavy burden for school districts to bear, recall that school districts may permissibly argue that prohibitive cost confines their choice to a centralized program. The Court, however, must not permit school districts to rely on physical access alone as a choice of educational methodology. By restricting this argument, the Court would require school districts to justify their decisions to centralize with legitimate methodological arguments, or prohibitive cost arguments. Without that requirement, school districts could indefinitely avoid the "least restrictive environment" provision without justification.

V. RECOMMENDATIONS

This author recommends that in cases where "mainstreaming" is the only issue, a two-step test should be applied. First, it must be determined whether both of the proposed programs meet the Rowley test for "appropriateness." If so, a factor test should then be applied to determine which level of restriction is appropriate for this individual child. Courts should consider the following factors: the decisions of the state administrative agencies; the congressional preference for mainstreaming; cost when argued; and the choice of the parents or the student himself. It is not suggested that any of these factors be given a predetermined or precise weight, for the "individualized" nature of the Act requires that each case be analyzed based on its individual merits. Although school districts may try to fit handicapped students into preexisting special education programs, each handicapped student

214. See supra notes 172-74 and accompanying text distinguishing methodology from mainstreaming.
is unique. The Act has acknowledged this fact by requiring an "individualized educational program."

In order to maintain flexibility, this factor test should be applied as a totality of the circumstances test. Courts must be able to establish the relative weights of these factors on a case-by-case basis, for each individual child, and no factor alone should be dispositive. For example, courts should be able to refuse mainstreaming when opposed by both the parents and the student if the court believes that this opposition would result in the student's failure in the mainstream program. Just as categorical placements by the school based on handicapping condition alone violates the Act, so too does categorical mainstreaming, even under the name of "inclusion" or Regular Education Initiative.

VI. CONCLUSION

Although decision-making in mainstreaming cases may be clear-cut when programs differ significantly on either the level of appropriateness or degree of restriction, clear choices disappear when school districts (and hopefully parents and courts) creatively fill the interstices of the continuum of special education placements. For example, the differences become blurred when evaluating the differences between placement in a mainstream classroom with special education services in a resource room, and a special education classroom with intermittent mainstreaming. Most likely each program is "appropriate" under the Rowley test, and the level of mainstreaming is nearly identical.215 Notwithstanding the preference for mainstreaming in a situation like this, it may be important to choose the program advocated by the parents and/or the handicapped child.216

The Supreme Court should acknowledge the potential misuses of the mainstream provision (both by the parents and by the school districts), and establish a factor test which includes deference to the state educational agencies, prohibitive cost, the preference for mainstreaming, and the choice of the parents or student. Additionally, this test must insure that the "mainstreaming" argument has equal weight when advanced by either the school district or by the parents. Categorical placements in either segregated programs or in the regular classroom


216. Bonadonna v. Cooperman, 619 F. Supp. 401, 412 (D.C.N.J. 1985) ("It is my philosophy that a child will do best when the parents support the program the child is in," (quoting Ms. Gorsky, a specialist in teaching and hearing impaired, record at 22)).
under "inclusion" must be prohibited to protect each child's individualized needs. In this way, school districts will be forced to creatively fill the gaps along the continuum of special education placements, satisfying the congressional goals of the Act and meeting the individualized educational needs of the students they serve.

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