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A SUPREME PARADOX AUTISM AND ROWLEY: MISAPPLICATION OF A JUDICIAL RELIC TO AN UNPRECEDENTED SOCIAL EPIDEMIC

Chad M Hinson

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A SUPREME PARADOX AUTISM SPECTRUM DISORDER AND ROWLEY MISAPPLICATION OF A JUDICIAL RELIC TO AN UNPRECEDENTED SOCIAL EPIDEMIC

Chad Hinson

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I. INTRODUCTION

Imagine you are a mom in Anywhere, America and this is your child's first day of kindergarten. This is one of those days where most parents beam with pride. You think your little one is so special, just like all good parents. Alas, it is a big day and you have spared no expense—his shoes are polished, his hair is combed just right, and his dress shirt is tucked in—the works. As you pack his bags, however, you pause for a moment to note that your road to this day was very atypical from most parents. The reason for this is that your child is

1. Chad Hinson is a third year J.D. Candidate, Florida A&M University College of Law. I would like to thank Prof. Barbara Bernier for her guidance and support. For Carter: A boy of sweet promise.

2. This hypothetical is from the author’s personal experience of being a parent of a four year old child with Autism Spectrum Disorder in Orlando, Florida. The author is also a
diagnosed with Autism Spectrum Disorder (ASD). As you zip his bag shut, you glance down into his eyes as they gaze upon you with the raw innocence of youth. The gleam of his eyes illuminates that of a child not yet tainted by the ills of our society. His peering gaze does, however, indicate that something to him seems out of the ordinary. You try assuring him with an uneasy wink of confidence, but as you head for the door, suddenly doubt crosses your own mind. You wonder if they will teach him, if they will hold him, and if they will advocate for him. You know your child has worth, yet you worry that he will be defined by his limitations rather than be challenged to achieve his potential. As you open the door to your car, you remember your own days of public school education. You fondly recall the riveting speeches of Dr. Martin Luther King, the magical and mysterious wonders of nature, and the ingenious and dark poetry of Edgar Allen Poe. You want your child to be exposed to the same opportunity you had in school. You know his potential is there, but will they tap into it? After all, Albert Einstein and Sir Isaac Newton were autistic.

As you walk into his classroom, you glance over at the chalkboard. You sit your child down abruptly and look carefully to make sure you gather the information correctly. To your disbelief, up on the board in big, bold letters are written the following words: “The Supreme Court, in the decision of Board of Education v. Rowley, has stated that because your child is handicapped, our school ‘doesn’t have to provide him with an opportunity to achieve his full potential commensurate with the opportunity provided other children.’” You inadvertently drop your pencil to the floor as you quietly sigh. Your child was born with two strikes against him and now he has a third: the failing public school system and the Supreme Court that sanctions them. You know your child faces obstacles and challenges most people cannot fathom, yet you believe your child deserves the basic educational opportunity other children are afforded. He deserves an

former public school educator of six years that taught many children who were impacted by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-85 (2000).

3. See generally Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000), at 1, 5 (defining Autism as a brain development disorder characterized by impaired social interaction and communication, and by restricted and repetitive behavior. These signs all begin before a child is three years old. Autism affects many parts of the brain; how this occurs is not understood. The Autism Spectrum Disorders (ASD) also include the related conditions Asperger syndrome and PDD-NOS, which have fewer signs and symptoms).


6. Id. at 205.
education with meaning, even if the outcomes are uncertain. As you clench his tender hand, you remember the beautiful and eloquent words uttered long ago by Judge John Minor Wisdom in his opinion in Meredith v. Fair. Judge Wisdom was a progressive and good man who was caught in the vortex of one of the most fiercely contested 1960’s civil rights education cases in Mississippi. Judge Wisdom knew that good law could only be justified by the impact on the interests of all people. As he rendered the opinion of the court long ago, he boldly broke ranks with many of his colleagues when he uttered these prophetic words too often forgotten in courts across America today:

A man should be able to find an education by taking the broad highway. He should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of pitfalls and traps, and, after years of effort, perhaps attain the threshold of his goal when he is past caring about it.

As you get up to leave the classroom, you realize that the “seminal” case of Rowley was written as the law of the sword rather than as one of the shield. History has witnessed our highest court erroneously swap the shield for sword several times in its imperfect history. In 2010, many public classrooms for children with Autism Spectrum Disorder are anything but appropriate and far from meaningful. This reality is patently unacceptable and at odds with the polestar function of public education in providing a meaningful education to all students. This paper will examine the case of Board of Education v. Rowley and make several arguments. The first argument analyzes the seismic demographic shift of children with ASD in our classrooms to-day and its unforeseeability to the majority of Justices who issued the opinion in Rowley, thus calling for new authority so the courts can reconcile the illogical standard of applying antiquated authority to

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7. See Meredith v. Fair, 298 F.2d 696 (2nd Cir.1962) (recognizing that the road to an education should not be fraught with perilous difficulties based on one’s race).
8. See generally Joel W. Friedman, Desegregating the South: John Minor Wisdom’s Role in Enforcing Brown’s Mandate, 78 Tulane L. Rev. 6 (2004).
9. Meredith, 298 F.2d at 703.
10. See, e.g., Dred Scott v. Sandford, 60 U.S. 393 (1857) (ruling that people of African descent imported into the United States and held as slaves, or their descendents were not legal persons). See also Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the constitutionality of racial segregation even in public accommodations under the doctrine of “separate but equal.” Id. at 552 (Harlan, J, dissenting)).
contemporary autism cases. This premise is a derivative of the logical notion that as the rise of autism progresses in America, there are and will be new societal interests in seeing these children attain a meaningful education commensurate with their non-disabled peers. The slow judicial osmosis of the Supreme Court is currently mired in an erroneous judicial ideology that myopically clings to antiquated precedent when unorthodox social circumstances mandate change. President Barack Obama and the United States Congress now recognize the fierce urgency of modernizing and tailoring federal laws to combat Autism Spectrum Disorder.\textsuperscript{12} Initiatives by President Obama, along with proposed congressional legislation, show unity and alliance.\textsuperscript{13} As a result of stubborn judicial adherence to poor precedent, many parents of children with ASD are fraught with uncertainty and anxiety when they seek legitimate redress from our courts.

The second argument scrutinizes the lack of consensus by the Supreme Court Justices regarding the legislative intent and history of the Education for all Handicapped Children Act of 1975 (EAHCA)\textsuperscript{14} on which the foundation of \textit{Rowley} was written. The fierce disagreement and split among the Justices calls for a renewed examination of the majority's rationale. The underlying position of this note is that the majority's opinion was erroneous as a matter of law. Moreover, because the Individuals with Disabilities Education Act (IDEA)\textsuperscript{15} has replaced the EAHCA, it is time for a fresh judicial approach that applies a common sense rule to progressive times.

The final argument is that blanket application of \textit{Rowley} creates the unusual judicial paradox of shielding our schools, rather than the children that Congress intended to protect.\textsuperscript{16} Presently, under the holding of \textit{Rowley}, public schools have no quantifiable measure or credible threshold by which they are held accountable. This results in deleterious long term outcomes for these children who clearly need more than empty formalities and procedural “safeguards.” While there is an important duty to safeguard public schools from frivolous lawsuits, schools that fail autistic children should not be granted carte

\begin{itemize}
\item \textsuperscript{12} See infra Part III.
\item \textsuperscript{13} See infra Part IV.
\item \textsuperscript{15} 20 U.S.C. §§ 1400-85 (Supp. 2005).
\end{itemize}
blanche exemption from viable actions. Accordingly, this note concludes with an examination of a modern case Thompson R2-J v. Luke, which demonstrates the harsh result of applying a nonsensical holding to an unprecedented social epidemic.

II. RE-EXAMINING ROWLEY

A. Classroom Disability Precedent

Ten year old Amy Rowley was deaf, so she couldn't hear the words uttered by Justice William Rehnquist on June 18th, 1982 as he delivered the opinion of the court. Amy was a first grade student at the Furnace Woods School in the Hendrick Hudson School District located in Peekskill, New York. The issue before the Supreme Court was a dispute over the statutory construction and legislative intent behind the Education for All Handicapped Children Act of 1975 (EAHCA). The initial dispute arose because the parents of Amy Rowley requested that the school district place a qualified sign-language interpreter in all her academic classes in lieu of assistance proposed in other parts of her Individualized Educational program (IEP). When their request was denied, the Rowleys demanded and received a hearing before an independent examiner. The examiner agreed with the administrator's determination that an interpreter was not necessary because “Amy was achieving educationally, academically, and socially without assistance.” Pursuant to the Act's provision for judicial review, the Rowley family then brought forth an action in the United States District Court for the Southern District of New York, claiming that the administrator's denial of a sign-language interpreter constituted denial of a “free appropriate public education” (FAPE) to Amy guaranteed under the Act. Consequently, Judge Vincent Broderick and the Second Circuit concluded Amy was not receiving a free appropriate public

19. Id. at 184.
20. Id. at 179.
21. Id. at 184.
22. Id.
23. Id.
education. The U.S. District Court for the Second Circuit, for the first time, defined a FAPE as “an opportunity to achieve potential commensurate with the opportunity provided other children.”

After the School Board of Hendrick Hudson School District appealed, the Court of Appeals for the Second Circuit agreed with the U.S. District Court’s broad statutory interpretation over what defines “free and appropriate public education.” Furthermore, because the Court of Appeals held that its findings were not clearly erroneous, a divided panel of judges subsequently affirmed. This set the stage for a final determination of what Congress intended by the words “free and appropriate”, the U.S. Supreme Court granted the Hendrick Hudson School District’s writ of certiorari. The parents of Amy Rowley had an enhanced interest in the outcome because both parents, Clifford and Nancy, were also deaf.

When the opinion came down a little over two months later, the United States Supreme Court in a majority opinion reversed the United States Court of Appeals for the Second Circuit. The majority in its opinion rejected the U.S. District Court’s definition of “free and appropriate” by looking to a fiercely disputed legislative intent behind the EAHCA. First, the Supreme Court rejected the U.S. District Court’s holding that the Act itself did not define a “free and appropriate education.” Justice Rehnquist stated that it did expressively define “free and appropriate” by using the following criteria: (a) provided at public expense, under public supervision and without charge; (b) meeting the standards of the State Educational Agency; (c) including an appropriate preschool, elementary, or secondary school education in the state involved; (d) provided in conformity with the individualized education program (IEP) required under section 1414 (a)(5) of this title. Additionally, the majority then stated that special education was required to assist a handicapped child to “benefit” from special instruc-

26. Id. at 529.
27. Id. at 534.
28. Id.
29. Id.
34. Rowley, 458 U.S. at 187-204.
35. A child is normally eligible for an IEP when the child's educational progress is adversely affected by his or her disability such that special services or accommodations are needed. See 20 U.S.C. §§ 1414 (d)(1)(A)(i).
Thus, the court held if personalized instruction is being provided with sufficient supportive services to permit the child to “benefit” from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a FAPE as defined by the Act.\(^37\)

However, the majority noted that Congress found in writing this Act that of the roughly eight million handicapped children in the United States, one million were excluded entirely from the public school system and more than half were receiving an inappropriate education.\(^38\) They then stated that the face of the statute evinces a Congressional intent to bring previously excluded handicapped children into public education systems of the United States and to require the states to adopt procedures which would result in individualized consideration of and instruction for each child.\(^39\) Further clarifying their position, Justice Rehnquist added that by passing the Act, Congress sought primarily to make public education available to handicapped children, but did not require that the States maximize the potential of handicapped children commensurate with the opportunity provided other children.\(^40\)

The majority concluded by stating that the EAHCA itself merely provided disabled children a “basic floor of opportunity” by way of access to specialized instruction.\(^41\) Because neither the U.S. District Court nor the Court of Appeals found that the petitioners had failed to comply with the procedural requirements of Title 20 U.S.C. § 1415, they erroneously concluded that the Act required the necessity of a sign language interpreter for Amy Rowley.\(^42\) On that basis, the Supreme Court reversed the decision.

### B. Oral Argument and Legislative Intent

The Supreme Court reached its conclusion largely based on testimony presented by Amy Rowley’s parents and the Hendrick Hudson Central School District.\(^43\) The issue before the court was couched differently between counsel for the petitioner, Board of Education of the

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38. \textit{Id.} at 191.
39. \textit{Id.} at 192.
40. \textit{Id.}
41. \textit{Id.}
43. See generally \textit{Rowley}.
Hendrick Hudson Central School District, and respondent, Amy Rowley and her parents Clifford and Nancy Rowley. Mr. Kuntz, appearing on behalf of the petitioners phrased the issue as whether or not:

"[T]he Hendrick Hudson Central School District [met] the requirements of Public law 94-142, the Education of All Handicapped Children Act of 1975, when it provided Amy Rowley with an educational program which resulted in outstanding academic achievement and social success, although it did not comply with her parent’s wishes that a sign language interpreter be placed in her classroom."  

Mr. Chatoff, counsel for respondent, however, phrased the issue differently:

"[Whether or not a] school district that receives funds under the Education for All Handicapped Children’s Act upon, its commitment to provide each handicapped child with a free appropriate public education fulfilled that obligation when it fails to provide a specific deaf child with the services necessary for that child to receive an educational opportunity equivalent to the educational opportunity provided to other children."  

Additionally, Attorney Schulder was present on behalf of the United States to rebut the petitioner’s contentions that raised fundamental questions about Congress’ purpose and intent in enacting the EAHCA.

A poignant question offered by the court that shed some light on which direction it was moving was addressed to Mr. Kuntz, attorney for petitioner, when one of the Justices asked, “as soon as you acknowledge that there are some substantive requirements, what’s the stopping point?”  

Mr. Kuntz agreed with the Justices concerns and stated, “once you grant one case, then every other case follows it, and it’s only a question of degree. . . . that’s what happens when you carry the logic to its extreme.” Subsequently, Mr. Kuntz opined that “there are substantive rights insofar as a right to the procedure is concerned, but . . . that’s the only right of substance that was enacted by the statute.” Essentially, Mr. Kuntz’s argument was that 20 U.S.C. § 1415 contained no actual substantive rights for disabled children,
merely *de minimus* procedural “safeguards.” After he completed his argument, attorney for respondent, Mr. Chatoff, began.

According to one of the Justices, The language of the Act and the regulations appear to require no more than an individual educational program in accordance with the state plan.” Hence, when Mr. Chatoff was questioned with regard to “what in the Act itself or the accompanying regulations would yield the precise test that the Court of Appeals applied, the measurement of the potential and determining the shortfall and applying that standard,” Mr. Chatoff supported his position as follows:

The Act requires specific individualized instruction for each handicapped child. The equal educational opportunity standard is set forth in the Senate report and in the Congressional debate accompanying the Act. I think that that should be responsive to your question. I would only add that if Amy receives the proper education she can become a doctor, a lawyer, an engineer.

The Rowley’s argument was predicated on the position that Title 20 U.S.C. § 1415 provided for more than meager procedural “safeguards.” They believed that the legislative intent found within congressional reports provided ample evidence of broader substantive rights. Furthermore, they argued, the EAHCA was intended to have the force of giving disabled children equality of opportunity in public classrooms commensurate with that of their non disabled peers.53

After petitioner and respondent concluded, the last attorney to speak was Mr. Schulder, attorney for the United States. When asked “[h]ow one gets from there to the standard that the District Court used and that the Court of Appeals was willing to see used. . . .that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children,” Mr. Schulder stated, “Your Honor, we do not agree with that particular part of the District Court’s opinion.”55

The final step the Supreme Court utilized in reaching its opinion in *Rowley* was to look at the legislative history and intent behind the Education for All Children Handicapped Act of 1975. Two pieces of evidence cast some doubt on the majority opinion’s overall rationale. The first statement is found in one Senate report that specifically shows that Congress intended to “take a more active role under its re-

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51. *Id.* at 30-31.
52. *Id.* at 30-31.
53. *Id.* at 32-33.
54. *Id.* at 32-33.
55. *Id.*
sponsibility for equal protection of the laws to guarantee that handicapped children are provided an equal educational opportunity.” Moreover, the majority themselves conceded this very point when they stated that “Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt ‘a goal of providing full educational opportunities to all handicapped children.’”

Insight into the concurring opinion of Justice Blackmun, as well as the dissenting opinions of Justices White, Brennan and Marshall, raise further questions. Justice Blackmun, while concurring in the overall holding, utterly rejected how the majority interpreted the legislative intent. In fact, his overall analysis was in total agreement with the dissenting opinion:

The clarity of the legislative intent convinces me that the relevant question here is not, as the court says, whether Amy Rowley’s Individualized Education Program was ‘reasonably calculated’ to enable her to receive educational benefits, rather, the question is whether Amy’s program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process.

Justice Blackmun’s concurrence with the majority was premised mainly on the fact that Amy was making very good progress in the classroom. Citing to the record, he specifically pointed to the initial opinion of the Hendrick Hudson Central School District’s impartial hearing officer who felt Amy was doing well in school.

The dissenting opinion also vehemently refuted the majority by analyzing the legislative intent. Justice White’s dissent lambasted the majority opinion by stating that “the Act itself announces that it provides a ‘full educational opportunity to all handicapped children.’” For further support, the dissent cited Senator Stafford, one of the original sponsors of the Act, who unequivocally declared in congressional hearings that “[w]e can all agree that the education given a handicapped child should be equivalent, at least, to the one those children

59. Id. at 210-211.
60. Id.
61. Id. at 212-218. (White, J., dissenting).
62. Id.
who are not handicapped receive.”63 Finally, the dissent took exception to the majority’s interpretation of the word “appropriate.”64 Justice White stated that the “meaning of appropriate was to approximate the opportunity provided other children as noted again and again in the legislative history.”65

III. The Precipitant Rise of Autism Spectrum Disorder

Today about thirteen percent of all students qualify as disabled in public classrooms.66 The average thirty-student classroom will have at least three children with disabilities.67 The number of children with Autism Spectrum Disorder (ASD) receiving treatment in public schools has soared by six hundred percent.68 During the initial creation of the Education for All Handicapped Children Act, around 1.75 million children were excluded and another 2.2 million languished in classrooms without help or curriculum adapted to their needs.69 The pediatric prevalence rate of ASD in 2010 is calculated to be one in every one hundred ten children born today.70 Boys are afflicted at four times the rate than girls and their diagnosis rate is closer to one in ninety nine.71 Every ethnic and socioeconomic demographic is affected.72 There is no known cure as the incidence rates continue to skyrocket.73 As the rise of autism continues to escalate and more and more children are labeled “disabled”, the legal community remains skeptical as to whether equal accessibility and opportunity of individual children should be considered in the classroom.74

63. 121 Cong. Rec. 19,483 (1975).
64.  Rowley 458 U.S. at 212-218. (White, J., dissenting).
65.  Id.
73.  Id.
Representative Graph of the Rise of Autism Spectrum Disorder

IV. EXECUTIVE AND LEGISLATIVE DISQUIETUDE

A. Modern Approaches

President Barack Obama and the United States Congress have recognized the swift urgency for policy changes regarding the issue of autism. President Obama recently requested 211 million dollars as part of the Department of Health and Human Services budget for ASD research. The funds are to be appropriated toward research for causes of ASD, developing new treatments, as well as additional screening, support services, and efforts to raise public awareness. Due in part to pressure from Congress, funding for autism efforts has risen from about $101 million in 2006 to $132 million in 2007, even in a

76. See office of Special Education and Rehab Services, Office of Special Education Programs, U.S. Department of Education, Data Analysis System (DANS), 1976-2005, Table 1-3 (2006).


78. Id.
time of tight National Institute of Health budgets.\footnote{Id. News and Analysis from the World of Science Policy} President Obama’s 2010 budget proposal urges boosting funding more quickly than originally planned—an earlier goal was to hit $210 million in 2011.\footnote{Id.}

Moreover, the Combating Autism Act\footnote{Pub. L. No. 109-416, 120 U.S.C. § 2821 (2006).} was signed into law by former President George W. Bush on December 19th, 2006.\footnote{Id.} This legislation specifically authorizes nearly one billion dollars in expenditures to combat Aspergers Syndrome, Rett Syndrome, Childhood Disintegrative Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS), all of which fall under the broad umbrella of Autism.\footnote{Id.} This particular legislation supports screening, education, early intervention, and prompt referrals for treatment, services and research.\footnote{Id.}

Additionally, on April 2, 2009, U.S. Senator Richard Durbin of Illinois introduced the Autism Treatment Acceleration Act.\footnote{H.R. 2413, 111th Cong. (2009).} If passed, this legislation will provide coverage for the diagnosis and treatment of ASD, including coverage of Applied Behavioral Analysis therapy, a medically-necessary, evidence-based autism treatment and assistive communication devices.\footnote{Id.}

Finally, on March 25th, 2009 U.S. Senator Robert Menendez of New Jersey also introduced a bill entitled The Helping Hands for Autism Act.\footnote{S. 706, 111th Cong. (2009).} If passed, this bill will increase Housing, Awareness, and Navigation Demonstration Services (HANDS) for individuals with Autism Spectrum Disorders.\footnote{Id.}

The magnitude of this governmental response was not present, nor was it needed, during the Rowley era. The pediatric prevalence rate of ASD at that time was approximately one in every ten thousand children.\footnote{See Causes of Autism, http://www.brighttots.com/autism_on_the_rise_70604.html (last visited April 1, 2009).} This stark numerical contrast between incident rates of the 1980’s and 2009 clearly suggests that the rise of Autism Spectrum Disorder was unforeseeable and thus a non-factor when the Rowley opinion was rendered.
V. The Paradox and Paradigm of Applying Rowley

Due to the shortcomings of the Education of the Handicapped Act of 1970, Congress has had to refine legislation so as to remedy disparity and discrimination of the disabled in public education. The Education of the Handicapped Act was reauthorized as the Individuals with Disabilities Education Act (IDEA) in 2000. Subsequently, IDEA was reauthorized again in 2004 as the Individuals with Disabilities Education Improvement Act.

Against this backdrop emerges the contemporary case of Thompson R2-J School District v. Luke. This case initially began over a dispute between the Thompson R2-J School District in Colorado and the parents of a student with Autism Spectrum Disorder named “Luke.” Luke was a student at Berthoud Elementary School. While there, he was having trouble “generalizing” skills. “Generalization” is a child’s ability to take what is learned at school and successfully implement the skills outside the confines of the classroom.

A. Generalization and IEP’s

In the fall of 2000, Luke began receiving special education services in accordance with the provisions of IDEA. Central to IDEA is the requirement that local school districts develop, implement, and annually revise an Individualized Education Program (IEP) calculated to meet the eligible student’s specific educational needs. Luke’s parents, concerned about his lack of progress in class, were informed by an outside professional, Diane Osaki that the school staff sometimes unknowingly reinforced negative behaviors that Luke’s parents were trying to desist. His parents subsequently called for an IEP meeting on December 16th, 2003 and told the school they felt the goals in Luke’s Individualized Education Program were not attainable at Berthoud Elementary. Furthermore, they felt that the only place-
ment for Luke would be a residential program tailored for autistic children. On December 19, 2003, counsel for Luke’s family sent the school district a letter stating that the family intended to remove Luke from Berthoud Elementary, enroll him at BHS, and seek from the R2-J School District financial reimbursement under the provisions of IDEA. The school district immediately challenged, stating it was their opinion that their own IEP would incorporate nearly all the goals requested by the parents. They also called for Luke’s continued placement at Berthoud Elementary. Pursuant to the Individuals with Disabilities Education Act provisions, Luke’s parents sought a procedural due process hearing in the Colorado Department of Education stating that the school district’s Individual Education Plan failed to provide Luke with a free and appropriate public education.

After two subsequent hearings, both the impartial hearing officer and the administrative law judge agreed that Luke’s residential placement was necessary. In weighing their decision, they factored in evidence of Luke becoming more violent at home as well as the fact that his teachers were unknowingly reinforcing his negative behavior.

In response to these adverse decisions, the R2-J School District initiated an action in the U.S. District Court for the 10th Circuit, seeking reversal on the grounds that they were in compliance with all legal requirements under the Individuals with Disabilities Education Act. The U.S. District Court for the 10th Circuit, however, ultimately agreed with the administrative decisions regarding the need to place Luke in a more appropriate school program compatible with Luke’s unique needs. Subsequently, the R2-J School District appealed.

B. Two Issues and Two Reversals

The Tenth Circuit Court of Appeals was tasked with answering Rowley throughout their opinion; the court reexamined Luke’s 2003 In-

100. Id. at 2.
101. Id. at 3.
102. Id.
103. Id.
104. Supra note 99, at 4.
106. Id.
107. Id. at 7.
108. Id.
109. Id.
individual Education Plan and stated that precedent dictated that “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student.” Essentially, this means that a school is not legally held accountable based on a lack of academic progress of the child. Furthermore, the opinion stated that their Circuit’s precedent dictated that “neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” In hindsight, the effectiveness of what was written as a goal in an Individualized Education Plan was not reasonable in the eyes of the court. Lastly, since the Court of Appeals concluded that Luke’s IEP was in fact “calculated” for him to receive “benefits,” the R2-J School District in Colorado was found to comply with the Individuals with Disabilities Education Act’s requirements.

The second and final issue was whether Luke’s failure to “generalize” from school to home was a significant factor to consider under IDEA. Luke’s parents argued that Luke’s obtaining generalization skills was fundamental to his progress and that without it their son could never reach adult self-sufficiency. To help answer the “generalization” issue, the 10th Circuit Court of Appeals again cited Rowley. Its opinion on this issue was that the Supreme Court “expressly considered and rejected the notion that self-sufficiency is the substantive standard which Congress imposed on the States.” Judge Gorsuch’s opinion went even further and stated that “no educational value or goal, including generalization, carries special weight under IDEA.” Analyzed in its totality, the Tenth Circuit Court of Appeals proclaimed that the “appropriateness” of Luke’s education would not be based on factors such as goals, values, nor generalization of skills from school to home. Based on these findings, the Tenth Circuit Court of Appeals reversed.

C. ‘Autism Speaks’ Files a Writ of Certiorari on Behalf of Luke

On January 8th, 2009, Autism Speaks, acting as Amicus Curiae for Luke, filed a writ of certiorari to petition the United States Su-

111. Id.
112. Id. at 8.
113. Id.
114. Id. at 9.
116. Id.
preme Court to hear Luke’s case.\textsuperscript{117} The main argument presented by Autism Speaks was that a “benefit standard cannot hope to meaningfully address a pervasive developmental disorder any more than a ‘band-aid’ would be reasonably calculated to address the needs of someone badly injured in an automobile accident.”\textsuperscript{118} On January 8th, 2009, the United States Supreme Court declined to hear the merits of this argument.

\section*{VI. Conclusion}

One constant over the course of American history is the Supreme Court’s willingness to overturn bad precedent in a judicial system based on a foundation of “stare decisis.” The Supreme Court has reestablished its lost credibility time and again by redressing unseemly precedent when necessity mandates change.\textsuperscript{119} In 2010, new authority is needed so the courts can reconcile the illogical standard of applying antiquated authority to contemporary autism cases. A blanket application of \textit{Rowley} creates the unusual judicial paradox of shielding our schools, rather than protecting the children as Congress intended. Our courts and society have an interest in protecting schools from frivolous lawsuits, but the scope of that interest should not extend to blanket exemption from meritorious actions when they fail. The \textit{Rowley} precedent and classroom disability legislation, in the final analysis, are the laws of the forked tongue. On one side, public school disability legislation was implemented to advance the interests of disabled students. On the other side, however, the \textit{Rowley} precedent has rendered these same goals as nothing more than mere pretense.

Justice Antonin Scalia once wrote in an opinion, “[t]he value of any rule must be assessed not only on the basis of what is gained, but also on the basis of what is lost.”\textsuperscript{120} \textit{R2-J School District v. Luke} captures the essence of everything wrong in misapplying a judicial relic to an unprecedented social epidemic. This obscure case, while now settled for the R2-J School District, has devastating consequences for Luke and his family. As a result of not receiving appropriate services

\begin{flushleft}
\textsuperscript{118} Id. at 5.
\textsuperscript{119} Cf. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the constitutionality of racial segregation even in public accommodations under the doctrine of “separate but equal”) and \textit{Brown v. Board of Education of Topeka}, 347 U.S. 483 (1954) (declaring that state laws that established separate public schools for black and white students denied black children equal educational opportunities).
\end{flushleft}
tailored to his needs, Luke will most likely will slip further and further behind in school and thus in life. His case ultimately stands to symbolize the growing amount of autism cases across our nation's jurisdictions. While public schools are not to blame for Autism Spectrum Disorder, denying Luke and others similarly situated an opportunity to receive an “appropriate education” to may inevitably seal his young fate.

In 2010, many students diagnosed with Autism Spectrum Disorder are nowhere to be found on the broad highway of education Judge Minor Wisdom wrote about so long ago. Instead, these children and their parents are instead forced to travel along the demoralizing crucible of judicial by-roads and winding trails that are full of sharp thickets, pitfalls, and traps. Surely Judge Wisdom would dissent.