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Common-Law Interpretation of Appropriate Education: The Road Not Taken in *Rowley*

Mark C. Weber*

Thirty years old in 2012, *Board of Education v. Rowley*¹ remains the Supreme Court's sole pronouncement on the meaning of the duty to provide appropriate education for children with disabilities. This duty is the central one imposed on school districts by the Individuals with Disabilities Education Act,² the law that governs special education services in the public schools of the United States. *Rowley* is known as the case that established a some-benefit or floor-of-opportunity standard for the services school districts must provide to children who have disabilities.³ But the some-benefit approach is by no means the only one the Court could have adopted. It could have endorsed the view of the lower courts that each child with a disability must be given the opportunity to achieve his or her potential commensurate with the opportunity offered other children.⁴ Or it could have adopted a standard based on achievement of the child's full potential or the opportunity to become self-sufficient, or given some other meaning to the statutory term.

What this Article explores is a different possibility: that the Court not have taken the case in the first place, or simply decided it on its facts without making any grand pronouncement about the interpretation of appropriate education. The result would have

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¹458 U.S. 176 (1982).

²20 U.S.C. §§ 1400-1482 (2006).

³See *infra* text accompanying notes __ (discussing *Rowley* decision).

⁴See *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y.), *aff'd*, 632 F.2d 945, 948 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982).

been caselaw development of the statutory term's meaning in line with the evolution of the meaning of terms in other vaguely worded statutes. Scholars have labeled this a common-law approach because of its analogy to common-law development of negligence or other non-statutory legal standards.⁵ As for appropriate education under IDEA, competing definitions may have arisen in different courts. Meanings that were never suggested in *Rowley* might have come forward. The proportional maximization standard urged by the lower courts in *Rowley* might have gained ascendancy—or been rejected over a run of cases due to problems with workability or other difficulties. Only after a period of years would an observer be able to look back and see where the path of development led. Then with or without Supreme Court guidance, a clear meaning for the statutory term might emerge.

This Article lays out the reasons that a common-law approach would have been the superior one. Persuasive analogies to other statutes support it; moreover, *Rowley*'s reasoning in reaching the some-benefit standard is highly unsatisfactory. Had a common-law approach led to proportional maximization, there would have had good justification for it, but had it led elsewhere, there might have been justification for that, too.

Of course, the Court in *Rowley* rejected common-law development for the appropriate education duty, and established some-benefit as the standard. Interestingly, however, many lower courts have marched along on something that strongly resembles a common-law road, but that cannot be given that name because of the Supreme Court's decision. This Article concludes by pointing to lower court cases that stretch the limits of the some-benefit standard and may represent the emergence of new approaches, as the traditional mode of common-law development would allow. Of course, much has been

⁵See *infra* text accompanying notes ____ (discussing common-law approach).

written about *Rowley*, most of it critical of the case.⁶ But the possibility and prospects of a common-law approach to appropriate education remain undeveloped. The time for the approach just may have come.

Part I of this Article provides a brief introduction to IDEA and *Rowley*. Part II discusses common-law interpretation of statutory provisions and sketches the outlines of a common-law approach to appropriate education. Part III discusses appropriate education as proportional maximization of educational opportunity, a meaning of the term that might have received favor had the courts been given the opportunity for common-law development. Part IV asks whether congressional ratification of *Rowley* has foreclosed judicial approaches to appropriate education other than the one adopted in that case and concludes that they remain open. Finally, Part V points to caselaw under IDEA that suggests a more sophisticated understanding of appropriate education than a narrow reading of *Rowley* might indicate. It contends that these cases may represent the beginnings of common-law interpretation of the concept.

⁶Early articles criticizing *Rowley* include: Katharine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, LAW & CONTEMP. PROBS., Spring 1985, at 7; John E.B. Myers & William R. Jenson, *The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act*, 1984 S. ILL. U.L.J. 401; Bonnie Poitras Tucker, *Board of Education of the Hendrick Hudson Central School District v. Rowley: Utter Chaos*, 12 J.L. & EDUC. 235 (1985); Case Comment, 14 RUTGERS L.J. 989 (1983); Casenote, 14 ST. MARY'S L.J. 425 (1983). More recent critical commentary includes: Joyce O. Eckrem & Eliza J. McArthur, *Is the Rowley Standard Dead? From Access to Results*, 5 U.C. DAVIS J. JUV. L. & POL'Y 199 (2001); Chad Hinson, Note, *A Supreme Paradox: Autism Spectrum Disorder and Rowley Misapplication of a Judicial Relic to an Unprecedented Social Epidemic*, 5 FLA. A&M U. L. REV. 87 (2009); Jonathan Stead, *Toward True Equality of Educational Opportunity: Unlocking the Potential of Assistive Technology Through Professional Development*, 35 RUTGERS COMPUTER & TECH. L.J. 224 (2009). Helpful recent studies of *Rowley* and the caselaw on appropriate education include: Julie F. Mead & Mark A. Paige, *Board of Education of Hendrick Hudson v. Rowley: An Examination of Its Precedential Impact*, 37 J. L. & EDUC. 329 (2008); Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 WEST'S EDUC. L. REP. 1 (2009); Scott Goldschmidt, Comment, *A New Idea for Special Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATH. U. L. REV. 749 (2011). Of special interest to students of the case is Amy June Rowley, *Rowley Revisited: A Personal Narrative*, 37 J.L. & EDUC. 311 (2008 (providing personal narrative of background and consequences of case)).

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE *ROWLEY* CASE

The Individuals with Disabilities Education Act requires states that receive federal special education funding to provide a free, appropriate public education to all children with disabilities.⁷ Participating states and their local school districts not only must furnish an appropriate education programs, but also must provide services related to education, such as transportation, physical and occupational therapy, sign language interpretation, and school health.⁸ The law requires that children with disabilities are to be educated, to the maximum extent appropriate, with children who do not have disabilities, and that school districts have to afford the children supplementary aids and services to avoid any need for removal from regular classes.⁹

Parents of children with disabilities have rights to notice and consent and, critically, rights to participate in the creation of their child's individualized education program ("IEP"). The IEP document sets out the services to be delivered to the child.¹⁰ It must contain a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals, both functional and academic; a description of how the child's progress toward meeting the annual goals will be measured; a statement of the special education and related services and supplementary services to be provided to the child or on behalf of the child; an explanation of the extent of the child's participation with nondisabled children in regular classes; a statement of

⁷See 20 U.S.C. § 1411(i) (2006) (authorizing appropriations).

⁸§ 1401(26) (defining "related services").

⁹§ 1412(a)(5).

¹⁰See § 1414(d) (requiring opportunity for parental participation in devising individualized education program).

accommodations necessary for the child on state and district assessments; and a variety of other items.¹¹ The parents may challenge the program or placement that the school district offers by demanding an adversarial “due process hearing” and they or the school district may appeal the result of the hearing to court.¹² The guarantee to each child with a disability of the right to a free, appropriate education, and the guarantee to parents of procedural rights were key features of the 1975 Education for All Handicapped Children Act;¹³ they demonstrate a “congressional emphasis” on furnishing individual participation rights to enforce the law’s underlying obligations.¹⁴ Two federal cases that influenced Congress in its drafting of the law upheld procedural due process claims against exclusion from public school and equal protection claims against denial of services to children with disabilities in public schools¹⁵

Parents of children with disabilities spent years courting political allies to secure passage of the Education for All Handicapped Children Act.¹⁶ Although some states and local school districts had long furnished services to children with disabilities and received limited federal special education reimbursement, as of 1975 approximately 1.75 million

¹¹§ 1414(d)(A)(i).

¹²§ 1415(f)-(i). States may create a state-level hearing review procedure that must be exhausted before the matter goes to court. § 1415(g). The child remains in the existing placement during the pendency of proceedings. § 1415(j). Attorneys’ fees are available to parents if they are successful. § 1415(i)(3)(B)-(F). The law also provides rights to challenge long-term suspensions, expulsions, or other removals from school imposed on children with disabilities. § 1415(k).

¹³Pub. L. No. 94-142, 89 Stat. 773 (1975).

¹⁴*See Bd. of Educ. v. Rowley*, 476 U.S. 176, 205-206 (1982).

¹⁵*Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass’n for Retarded Children (P.A.R.C.) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). The Supreme Court commented on the importance of these cases to the formation of the Education for All Handicapped Children Act in *Rowley*, 458 U.S. at 192-93.

¹⁶*See* ROBERTA WEINER & MAGGIE HUME, . . . AND EDUCATION FOR ALL 14-21 (2d ed. 1987).

children with disabilities were excluded from public school and 2.5 million were in programs that did not meet their needs.¹⁷ In 1990, Congress renamed the Education for All Handicapped Children Act the Individuals with Disabilities Education Act, and that is the name the law has today.¹⁸ The Individuals with Disabilities Education Improvement Act of 2004 comprises the most recent amendments to the statute.¹⁹

In 1982, without waiting for any clear conflict in the circuits to develop, the Supreme Court took a case that called for it to construe the duty to provide appropriate education. In *Board of Education v. Rowley*, the Court interpreted appropriate education to mean services sufficient to provide “some educational benefit” to child with a disability.²⁰ The entitlement is to services that are beneficial,²¹ so that access to education is meaningful.²² Nevertheless, Congress’s intent was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”²³ Continuing the schoolhouse metaphor, the

¹⁷H.R. REP. NO. 94-332, at 11-12 (1975).

¹⁸Pub. L. No. 101-476, 104 Stat. 1103 (1990). The term “handicapped” has become disfavored, and many in the disabilities rights movement favor placing the noun “person” or “individual” first and the “with disabilities” modifier later, in order to emphasize that a person with a disability is a human being rather than a manifestation of an impairment. See Illinois Attorney General, Disability Rights: Manual of Style for Depicting People with Disabilities, <http://www.ag.state.il.us/rights/manualstyle.html> (visited July 29, 2011).

¹⁹Pub. L. No. 108-446, 118 Stat. 2647 (codified in scattered sections of 20 U.S.C.A. §§ 1400-1482 (West 2008)). See generally Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 27 (2006) (describing and commenting on 2004 Reauthorization).

²⁰458 U.S. 176, 200 (1982)

²¹*Id.* at 200-01.

²²*Id.* at 192. There must be “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 203.

²³*Id.* at 192.

Court described the appropriate education obligation as that to provide a “floor of opportunity” consisting of “access to specialized instruction and related services.”²⁴

The Court applied this some-benefit definition of appropriate education to overturn a ruling that a first-grader who was deaf but had lipreading skills and a hearing aid was entitled to a sign language interpreter even though she was achieving satisfactory grades and passing from grade to grade without the benefit of an interpreter.²⁵ The Court rejected the standard adopted by the lower courts that a child must be provided services sufficient to maximize her potential commensurate with the opportunity provided children without disabilities to maximize theirs.²⁶

II. COMMON-LAW INTERPRETATION OF “APPROPRIATE EDUCATION”

The Court’s precipitate decision to adopt a some-benefit or “floor of opportunity” standard in *Rowley* foreclosed the opportunity to develop a common law of appropriate education. The idea of a common law of appropriate education is hardly radical. Many statutes employ terms whose meanings are open-ended. By interpreting these statutes to apply or not apply to a variety of factual situations, courts develop a common law pertaining to a statute.²⁷ Thus the unadorned phrase “restraint of trade” in the Sherman

²⁴*Id.* at 201.

²⁵*Id.* at 209-10. The Court said, “We do not attempt to establish a single test for determining the adequacy of educational benefits conferred upon all children covered by the Act,” *id.* at 202, but suggested that if a child is advancing from grade to grade in regular education classrooms the standard is likely to be met, *id.* at 203-04 & n.25.

²⁶*Id.* at 198.

²⁷See RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 607 (6th ed. 2009) (“[T]he fact is that common lawmaking often cannot be sharply distinguished from statutory or constitutional interpretation. As specific evidence of legislative purpose with respect to the issue at hand attenuates, all interpretation shades into judicial lawmaking.”); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity*, 78 MICH. L. REV. 311, 332 (1980) (“The difference between ‘common law’ and ‘statutory interpretation’ is a difference in emphasis rather than a difference in kind. . . . The distinction . . . is entirely one of degree.”); see also Martha A. Field, *Sources of Law: The Scope of*

Antitrust Act²⁸ requires case-by-case interpretation and precedential evolution that is little different from common-law development of concepts such as negligence.²⁹

The term “appropriate education” is not readily susceptible to interpretation by traditional means of statutory construction. Ordinary usage gives little help, nor does professional terminology from before 1975 give an interpretation. Although special

Federal Common Law, 99 HARV. L. REV. 881, 889-90 (1986) (“I do not differentiate between the creation of federal common law and the ordinary interpretation of federal enactments, because I do not believe any such differentiation would have operative effect.”); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (“‘Federal common law,’ as I use the term, means any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense.”).

²⁸15 U.S.C. § 1 (2006). Other statutory areas that have received similar treatment include patents, *see* Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. REV. 51, 54 (2010) ([A] significant portion of U.S. patent law, including some of the most important and controversial patent law doctrines, is either built upon judicial interpretation of elliptical statutory phrases, or is devoid of any statutory basis whatsoever.”); labor relations and unfair competition in interstate commerce, *see* Field, *supra* note __, at 940 n. 245 (“The Sherman Act and the National Labor Relations Act serve as clear examples of federal statutes under which federal judicial lawmaking is appropriate and necessary to define their terms.”), 980 n.415 (“Federal common law governs unfair competition in or affecting interstate commerce, for example, under the authority of § 43 of the Lanham Trade-Mark Act”); and bankruptcy, *see* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 4 (2006) (“Federal common lawmaking has long quietly existed in bankruptcy, but it has been a clunking sort of common lawmaking because it has never been recognized as such. Instead, it has always been analyzed in terms of equity, which has led to the inappropriate statutory and historical limitations.”). Of course, courts need not admit that what they are doing is common lawmaking, though in the Sherman Act context, they have done exactly that. *See* Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978) (describing Rule of Reason as part of “common-law tradition” under Sherman Act).

²⁹*See* FALLON, *supra* note __, at 621 n.9 (“[W]here a statute adopts open-ended language that necessitates the exercise of substantial judicial discretion, it is hard to avoid concluding that Congress delegated implied lawmaking powers.”) (collecting authorities); *see also id.* at 607 n.1 (pointing out that some writers consider instances such as Sherman Act interpretation to be federal common lawmaking whereas others deem them ordinary statutory interpretation); Field, *supra* note __, at 890 (“I will use ‘federal common law’ to refer to any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.”); Merrill, *supra* note __, at 43 (“[I]f in addition to granting jurisdiction to the federal courts, the enacting body adopts a broad legal standard that federal courts are directed to apply in resolving controversies, this may well support an inference of delegation. . . . [T]here is a category of provisions that are so vague and general that further ‘interpretation’ is necessary before the process of application can even begin. In this sort of case, the courts must develop rules that translate the general textual language into applicable law.”). Of course, Congress may always step in and adopt an interpretation contrary to one that courts have created. *See* Westen & Lehman, *supra* note __, at 326-27 (“[W]hile the federal judiciary and the national executive inevitably make law in performing their respective functions, the nonconstitutional law they make is subordinate to Congress’s final legislative authority.”).

educators used the words “appropriate education” before passage of the Act, there appears to have been no clear or uniform meaning given to the term when they did so.³⁰

The strained nature of Justice Rehnquist’s effort in *Rowley* to define the term appropriate education as that which provides some educational benefit further demonstrates that the phrase is not readily susceptible to traditional modes of interpretation. The opinion conceded that the language providing a definition of “free, appropriate public education” in the Act “tends towards the cryptic rather than the comprehensive,”³¹ and that “[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children,”³² Nevertheless, the Court rested its some-benefit interpretation on (1) the very absence of a statutory specification of the level of services to be provided children,³³ and (2) legislative history, which reported children being excluded entirely from public education,³⁴ extensively described two court cases challenging the exclusion and failure to provide “adequate” services,³⁵ and, in a few places, seemingly equated “served” with receiving an appropriate education and “unserved” with receiving no services.³⁶

³⁰James J. Gallagher, *The Special Education Contract for Mildly Handicapped Children*, 38 EXCEPTIONAL CHILDREN 527, 529 (1972); Rosalyn A. Rubin et al., *Factors in Special Class Placement*, 39 EXCEPTIONAL CHILDREN 525, 525 (1973); James Smith & Joan Arkans, *Now More than Ever: A Case for the Special Class*, 40 EXCEPTIONAL CHILDREN 497, 498 (1974).

³¹*Rowley*, 458 U.S. at 188.

³²*Id.* at 189.

³³*Id.*

³⁴*Id.* at 191-92.

³⁵*Id.* at 192-94 (discussing *Pa. Ass’n for Retarded Children v. Pa.*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)).

³⁶*Id.* at 195-96.

The Court shored up these supports by contending (3) that a standard requiring equality of opportunities is unworkable, and noting (4) that the Supreme Court had not required states, under the Constitution, to create equality of educational opportunity for children from poor school districts.³⁷ Although the Court conceded that “isolated statements” in the legislative history evidenced a congressional intention to maximize the potential of children with disabilities, it found (5) those statements outweighed by other statements mentioning educational adequacy. It further argued (6), following *Pennhurst State School v. Halderman*,³⁸ that conditional spending statutes must impose their requirements on states “unambiguously” to be sure that the states are voluntarily accepting the terms Congress imposes, and that the statute had not imposed a standard beyond adequacy in an unambiguous fashion.³⁹

Taking these arguments for the Court’s interpretation in turn, (1) the absence of statutory language better defining appropriate education is not a basis for declaring programs that merely confer some educational benefit to be appropriate. It would appear much more clearly to be a concession that Congress could not at the time fully imagine what the term might eventually encompass, and therefore, common-law interpretation would be proper. With regard to the legislative history (2), it is hardly surprising that Congress would focus on the most pressing and most outrageous situations when it wrote the legislative history of the statute, and these situations, of course, were the ones where children were out of school entirely for long periods of time. Trying to derive statutory

³⁷*Id.* at 198-200 (citing, with regard to children in impoverished school districts, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

³⁸451 U.S. 1, 17 (1981).

³⁹*Rowley*, 458 U.S. at 204 n.26.

meaning from language about statistics of children served and unserved falls into the same trap of guessing congressional intentions from references of sponsors to worst cases.⁴⁰ The Court misanalyzed the congressional reliance on the two district court decisions establishing constitutional rights to education for children with disabilities. As Justice White noted in dissent, one of the cases cited by the majority explicitly required “educational opportunity equal to that of non-handicapped children;”⁴¹ moreover, as he pointed out, “[t]hat these decisions served as an impetus for the Act does not . . . establish them as the limits of the Act.”⁴²

What of the workability (3) of an equality-based standard? Determining whether a school system has met the educational needs of a student with a disability as adequately as it meets the needs of students without disabilities requires a difficult comparison, but not impossible one. There are levels of special education and general education services that experts, or even ordinary observers, would rate as excellent, good, or poor at serving the students’ needs. Quality may be measured by things such as qualifications of teachers, depth and innovativeness of teaching technique, research support behind the curriculum, consistency in application of professional best practices, conformity to state rules, responsiveness of the administration, and other indicators. If the children without disabilities in a given school district receive excellent services in comparison to students throughout the nation, then so should the children with disabilities. This standard does

⁴⁰*See id.* at 213 (White, J., dissenting). As Justice White emphasized, even the language in the legislative history about complete deprivation of educational services for children with disabilities was typically linked to statements by Senators or Representatives demanding equal educational opportunity. *Id.* at 213 n.1.

⁴¹*Id.* at 214 n.2.

⁴²*Id.* (citing *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972)).

not entail maximizing educational opportunities of children with disabilities, but rather treating all children equitably.⁴³ Moreover, even if the comparison is difficult, it is hardly a task so bizarre that it would justify abandoning a reading of the statute otherwise supported by interpretive evidence.⁴⁴ Plainly, federal educational regulators do not consider the standard unworkable, for they built it into the rules that govern public education of children who meet the eligibility standards of section 504 of the Rehabilitation Act of 1973.⁴⁵

The Court's belief that the Constitution permits educational inequality for children in impoverished areas (4) does not imply that Congress wished to perpetuate educational inequality for children with disabilities as well. The Court in this instance bootstrapped its interpretation by assuming that Congress wished to legislate the constitutional minimum and then declaring that the standard is just that—the minimum. In the battle of legislative history quotations (5), Justice White massed far more passages than those found by the majority, with materials variously supporting “full educational opportunity,” “equal educational opportunity,” education tailored to enable the child Ato

⁴³ See Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?*, 106 WEST'S EDUC. L. REP. 471, 474 (1996) (“Deftly mischaracterizing the lower courts' standard as ‘strict equality of opportunity or services,’ the Rehnquist majority criticized it as ‘an entirely unworkable standard requiring impossible measurements and comparisons.’”).

⁴⁴ Cf. Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 53-56 (2006) (discussing absurdity doctrine, which permits courts to avoid bizarre applications of otherwise clear statutes).

⁴⁵ 29 U.S.C. § 794 (2006). See 34 C.F.R. § 104.33 (2011) (“(a) General. A recipient [of federal educational funds] that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. (b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . . .”). See generally Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. ON C.L. & C.R. 1 (2010) (discussing application of as-adequately standard in special education cases under section 504).

achieve his or her maximum potential,” and an education “equivalent, at least, to the one those children who are not handicapped receive.”⁴⁶

As for the application of spending statutes, in requiring narrow interpretation of these laws (6) *Pennhurst* departed from precedent establishing that courts should construe conditional spending statutes as best they can with regard to congressional purposes; if states do not like the conditions as interpreted, they should cease participation in the program and free themselves of their obligations to comply.⁴⁷ That approach, fashioned by Justice Harlan in *Rosado v. Wyman*⁴⁸ eleven years before *Pennhurst*, is more persuasive than the one *Pennhurst* advanced and *Rowley* adopted.⁴⁹ Even if one accepts the *Pennhurst* rule as a given, it need not be applied in a rigid way, but instead should be tempered by the use of other sources of statutory construction and reliance on the principle that states have notice of the core obligations imposed by statutes and their

⁴⁶*Rowley*, 458 U.S. at 213-14 (White, J., dissenting).

⁴⁷*Rosado v. Wyman*, 397 U.S. 397, 421-23 (1970). *Rosado* involved the interpretation of complex federal statutes establishing state conditions for receipt of federal money to support public welfare programs. At the conclusion of its analysis, the Court commented:

It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use. As Mr. Justice Cardozo stated, speaking for the Court [in] *Helvering v. Davis*, 301 U.S. 619, 645 (1937): “When (federal) money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states.”

Id. at 422-23.

⁴⁸*Rosado*, 397 U.S. at 421-23.

⁴⁹See Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking about Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155 (2004) (criticizing *Pennhurst-Rowley* approach to interpretation of spending statutes on grounds that it leads to legislative overdrafting, constricted executive interpretation, and unduly limited judicial reading of legislation inspired by constitutional norms).

continuing interpretation by administrative and judicial authorities.⁵⁰ An evolving standard for appropriate education gives sufficient notice for the states to make a fair choice whether to stick with the program.⁵¹ At any given moment lawyers can determine the obligations courts are likely to put into place, just as they do in other contexts.⁵² If the duties become too onerous, states may withdraw from the federal program.⁵³ The most a given defendant will be liable for in a particular case is tuition reimbursement or compensatory education obligations, not compensatory or punitive damages. This reality distinguishes the IDEA situation from that in *Barnes v. Gorman*, where the Supreme Court ruled that liability for a punitive damages award under the Americans with Disabilities Act exceeded the scope of the obligations that the states could be thought of

⁵⁰See Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Legislation*, 84 TULANE L. REV. 1067, 1120 (2010) (“[T]he requisite notice should be focused on the essential parameters around the legislative conditions, not their details.”).

⁵¹See Samuel R. Bagenstos, *Spending Clause Legislation and the Roberts Court*, 58 DUKE L.J. 345, 407 (2008) (“[M]odern contract theory recognizes that parties may have good reasons for agreeing to open-textured duties, and that it is utility-maximizing to enforce those duties. When a state agrees to accept federal funds, and the law makes clear that the funds are conditioned on the state’s subjecting itself to an open-textured standard of liability, there is no failure of notice.”) (footnote omitted).

⁵²See Seligmann, *supra* note __[Muddy], at 1120 (“There are multiple opportunities for clarification of the legislation built into our governmental structure, and states are well aware of and fairly sophisticated in their ability to participate in them.”).

⁵³See *id.* (“The accompanying and ensuing legislative, administrative and judicial processes, along with the renewable cycle of funding, should be seen as mediating the ‘clarity’ appropriately demanded for states to make their choice to participate in a program.”). States make reasoned choices whether to accept federal money and with it the duties imposed by federal law; there even appears to be a recent trend towards refusing federal funds and the obligations that come with them. See Tom McNamara, *Obama and Republicans Stand on Opposite Sides of the High-Speed Tracks*, NEED TO KNOW ON PBS (Feb. 21, 2011), <http://www.pbs.org/wnet/need-to-know/economy/obama-and-republicans-stand-on-opposite-sides-of-the-high-speed-tracks/7527/> (“Gov. Rick Scott (R.-Fla.) became the third Republican state leader to turn down federal dollars for high-speed rail. Wisconsin and Ohio first refused a combined billion dollars for lines that would have connected the Midwest; Florida now rejects a link between Tampa and Orlando, forgoing more than \$2 billion. Just as in Wisconsin, the money in Florida would have covered almost the entire cost of construction. And just as in Wisconsin, the governor argued that high-speed rail would forever obligate the state to subsidize the cost to keep trains running.”). In the early days of the federal special education program under the Education for All Handicapped Children Act, New Mexico declined to participate. *N.M. Ass’n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 853 (10th Cir. 1982) (“New Mexico has chosen not to participate in the [Education for the] Handicapped Act program.”).

as assuming under remedial provisions crafted for a spending clause program.⁵⁴ In two of the three cases establishing and extending tuition reimbursement remedies, the Court did not even address an argument based on the lack of notice to the states;⁵⁵ in the third and most recent one, it rejected the contention.⁵⁶ The instance in which it relied on the argument is in *Arlington Central School District v. Murphy*,⁵⁷ refusing to award expert witness fees to successful parents—not a standard for liability for existing forms of relief but rather a wholly new category of remedy comparable to the punitive damages in *Barnes*. In two post-*Rowley* cases in which the Supreme Court imposed the obligation to provide potentially expensive⁵⁸ services under the Court’s interpretation of IDEA, the Court rejected arguments based on *Pennhurst*’s contract idea.⁵⁹

⁵⁴536 U.S. 181, 187-88 (2002) (vacating punitive damages award of \$1.2 million). The applicable provision of the ADA, 42 U.S.C. § 12133 (2006), incorporates the remedies under title V of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(2) (2006), which in turn incorporates the remedies under title VI of the Civil Rights Act, 42 U.S.C. § 2000d (2006). The Rehabilitation Act and title VI of the Civil Rights Act forbid discrimination by federal grantees under the federal government’s spending power. See *Barnes*, 536 U.S. at 185-86.

⁵⁵*Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993) (upholding reimbursement for parental placement of child at school not approved by state authorities); *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359 (1985) (upholding reimbursement for unilateral parental placement of child).

⁵⁶*Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2495 (2009) (upholding reimbursement claim for child not previously enrolled in special education on ground that states were on notice of authority to order reimbursement); see Seligmann, *supra* note __, at 1112 (“*Forest Grove* does suggest that the interpretation of Spending Clause legislation need not be driven predominantly by the clear statement rule That Justices Kennedy, Roberts, and Alito joined in *Forest Grove*’s reasoning suggests that the use of judicial precedents and congressional ratification of those precedents to find the requisite notice, at least for subsequent spending cycles, may be an established part of a clear statement inquiry.”).

⁵⁷See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

⁵⁸At least in one of the two cases. See *Cedar Rapids Indep. Sch. Dist. v. Garret F.*, 526 U.S. 66, 85 (1999) (Thomas, J., dissenting) (stating that services would cost minimum of \$18,000 per year).

⁵⁹*Cedar Rapids Indep. Sch. Dist. v. Garret F.*, 526 U.S. 66, 78-79 (1999) (upholding claim for extensive health services for ventilator-dependent child); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 n.8 (1984) (upholding claim for catheterization of child at school); see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005) (relying on notice from general principles embodied in statute and construction of other laws to uphold liability for retaliation under spending clause statute); *Bennett v. Ky. Dept’ of Educ.*, 470 U.S. 656, 666 (1985) (allowing recovery of misused federal funds, noting that general guidance on improper expenditures sufficed to provide notice to federal grantee); *Mansourian v. Regents of*

Reluctant to create an interpretive structure similar to that the Supreme Court ultimately manufactured, the lower courts in *Rowley* stated that “[t]he Act itself does not define ‘appropriate education,’ . . . but leaves ‘to the courts and the hearing officers’ the responsibility of ‘giving content to the requirement of an ‘appropriate education.’”⁶⁰ The lower courts had good reason to reach this conclusion. A *Harvard Law Review* note that received wide attention in the period before the Supreme Court’s decision concluded that Congress had left the term open to future interpretation by judges and hearing officers,⁶¹ that is, essentially, to common-law development. The note commented on the opportunities for common-lawmaking and warned of overspecification of standards:

The development of a “common law” for decisionmaking under the Act would eliminate much of the ambiguity of the current standards. There is, however, the danger that it may rigidify those standards and stifle the potential for creative response under the Act. Hearing officers should be careful to regard earlier decisions only as general guidelines for principled

Univ. of Cal., 602 F.3d 957, 967-69 (9th Cir. 2010) (imposing liability under title IX of Education Amendments for failure to provide athletic opportunities for women, relying on adequate notice of underlying obligation).

⁶⁰*Rowley*, 458 U.S. at 176 (describing views of court of appeals and district court; quoting *Rowley v. Bd. of Educ.*, 483 F. Supp. 536, 533 (S.D.N.Y. 1980)).

⁶¹Note, *Enforcing the Right to an Appropriate Education: The Education of All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1105, 1125 (1979) (ΔAt the center of many complaints will be a conflict over the nature and quality of services to which a handicapped child is entitled. Parents will assert that the law requires certain services to be provided. The school representativesBaware of the constraints of their own budgetBwill contend that “appropriate” means something less. The language of the Act provides no clear guidelines for resolving such a conflict. Judges and hearing officers must develop standards for evaluating the facts of individual cases.Ⓜ) (footnotes omitted).

decisionmaking and not as mandates that a particular program is the appropriate placement for any child with a particular type of handicap.⁶²

Even if the Supreme Court had overturned the decision to grant Amy Rowley an interpreter, had it done so “with a minimum of exposition,”⁶³ the denial of the service would simply be one of a mosaic of common-law interpretations of appropriate education. Educators, parents, and others would know schools need not provide interpreters to children in lower grades with partial hearing, good lipreading skills and the native intelligence to perform at above average levels and pass easily from grade to grade if given regular tutoring and speech therapy.⁶⁴ Cases involving other children and different circumstances would be weighed differently. New approaches would be permissible as long as they were based on sufficient reasons.⁶⁵

Curiously, Justice Rehnquist at one point in the opinion invited later courts to confine the *Rowley* decision to its peculiar facts:

We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by

⁶²*Id.* at 1127. In commenting that this common lawmaking task was difficult but still feasible, the note referred to Judge Henry Friendly’s famous article, *In Praise of Erie And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-22 (1964). Note, *supra* note ___, at 1127 n. 148.

⁶³*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 443 n.* (1982) (Powell, J., concurring).

⁶⁴Of course, the fact that Amy Rowley was passing easily from grade to grade despite understanding less than half of what was said in class, *Rowley*, 458 U.S. at 215 (White, J., dissenting), lends support to Bonnie Tucker’s inference that, like Tucker herself, a deaf person skilled in lipreading, Amy was learning in spite of school rather than because of it. *Bonnie Poitras Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley: Utter Chaos*, 12 J.L. & EDUC. 235, 241 & n.31 (1983).

⁶⁵*See generally* FREDERICK POLLOCK, *THE GENIUS OF THE COMMON LAW* 81 (1912) (“Our grand pervading principle of Reasonableness . . . may almost be called the life of the modern Common Law . . .”).

the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.⁶⁶

As he must have known, however, lower courts would extend the Court's analysis beyond immediately similar cases, and the broad language the opinion employed in asserting that Congress intended only some educational benefit guaranteed that would be so.⁶⁷ If the decision had simply been a no to the Rowley family, coupled with a frank admission that the Court was not fully certain what Congress intended, the lower courts, over a period of time, would have been able to flesh out what appropriate education means, free of the Court's restrictive interpretation.

Justice Blackmun, in his concurrence, hinted at what might have been. He declared that "Congress unambiguously stated that it intended 'to take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity*.'"⁶⁸ Rather than a matter of receiving educational benefits and passing from grade to grade, "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-

⁶⁶*Rowley*, 458 U.S. at 202.

⁶⁷It remains true, however, that many lower courts have resisted *Rowley*, and frequently have minimized or distinguished it. See *infra* text accompanying notes ____.

⁶⁸*Id.* at 210 (Blackmun, J., concurring in the judgment) (quoting S. REP. NO. 94-168, at 9 (1975)). Justice Blackmun added the emphasis to the quotation, and in the next sentence referred to his separate opinion in *Pennhurst*, pointing out that federal statutory enactments establishing the rights of people with disabilities are more than "politically self-serving but essentially meaningless language." *Id.* (quoting *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 32 (Blackmun, J., concurring in part and concurring in the judgment)).

handicapped classmates.”⁶⁹ In light of the accommodations already provided to Amy Rowley, Justice Blackmun felt that the school did not need to add the services of a sign-language interpreter even if the Court were to apply a definition of appropriate education that embraces equal educational opportunity.⁷⁰

Had it been allowed to develop, the common law of appropriate education might have developed a content not fully predictable in the 1980s nor knowable today. It might have employed Justice Blackmun’s interpretation, an evidently flexible standard “predicated on equal educational opportunity and equal access to the educational process.”⁷¹ Or, following the approach of the lower courts in *Rowley*, it may have assumed the more precise form of proportional maximization, that is, “affording a child with a disability an opportunity to achieve [her] full potential commensurate with the opportunity provided to . . . children [without disabilities].”⁷² It may have placed a greater stress on the comparison of the child’s benefits to his or her intellectual capacity.⁷³ Or the standard might not have emerged until a run a caselaw appeared and

⁶⁹*Id.* at 211.

⁷⁰*Id.* at 211. In adopting this position, he relied as well on the principle of giving deference to the hearing officer who originally ruled on the case, who had upheld the school district’s position and denied the interpretation services. *Id.*

⁷¹*Rowley*, 458 U.S. at 211 (Blackmun, J., concurring in the judgment). The divergent results reached by Justice Blackmun and the lower courts in *Rowley* demonstrate the flexibility of that standard in comparison to proportional maximization.

⁷²*Rowley v. Bd. of Educ.*, 483 F. Supp. 536, 534 (S.D.N.Y. 1980).

⁷³Justice Alito, while sitting on the Third Circuit, crafted such a standard by combining *Rowley* and various Third Circuit glosses on it: “[T]he IEP [must be] ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the child’s ‘intellectual potential.’” *Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) (Alito, J.) (citations omitted).

an observer, looking backward, would finally be able to put a label on what courts were doing.⁷⁴

III. APPROPRIATE EDUCATION AS PROPORTIONAL MAXIMIZATION

Among competing interpretations of appropriate education, proportional maximization has much to recommend it. The congressional debates emphasize equalizing educational services for children with and without disabilities and educating children with disabilities to promote self-sufficiency in adulthood.⁷⁵ The legislative history also refers to *Brown v. Board of Education*⁷⁶ and its insistence on equal education.⁷⁷ The equality of services theme sounds clearly in the committee reports.⁷⁸ Senator Stafford, one of the Act's sponsors, made a comment typical of those of the law's

⁷⁴See Field, *supra* note __[Harv.], at 944 (“Case-by-case development is sometimes the wisest choice; sometimes situations or even solutions emerge that no one could foresee at the time of the legislation.”).

⁷⁵121 CONG. REC. 19482-83 (1975) (remarks of Sen. Randolph); 121 CONG. REC. 19483 (remarks of Sen. Stafford); 121 CONG. REC. 19504 (1975) (remarks of Sen. Humphrey); 121 CONG. REC. 19505 (1975) (remarks of Sen. Beall); 121 CONG. REC. 23704 (1975) (remarks of Sen. Brademas); 121 CONG. REC. 25538 (1975) (remarks of Rep. Cornell); 121 CONG. REC. 25540 (1975) (remarks of Rep. Grassley); 121 CONG. REC. 37025 (1975) (remarks of Rep. Perkins); 121 CONG. REC. 37030 (1975) (remarks of Rep. Mink); 121 CONG. REC. 37412 (1975) (remarks of Sen. Taft); 121 CONG. REC. 37413 (1975) (remarks of Sen. Williams); 121 CONG. REC. 37418-18 (1975) (remarks of Sen. Cranston).

⁷⁶347 U.S. 483 (1954).

⁷⁷S. Rep. No. 94-168, at 6 (1975). The Supreme Court ignored this reference in *Rowley*, even though it had received attention in a prominent pre-*Rowley* circuit court decision. See *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 690 & n. 6 (3d Cir. 1981). Professor Zirkel states that the legislative history of the Act “only references *Brown* briefly, without further analysis of application,” but later concludes:

Symbolically, arguably as a moral imperative, *Brown* served as a landmark, in terms of representing a sea of change in the legal approach to students that based on group characteristics faced separation or exclusion. This change, via the bridge of the consent decrees in *PARC* and *Mills*, had a direct impact on the passage of the IDEA. The commonality includes the concepts of access and equal opportunity.

Perry A. Zirkel, *Does Brown v. Board of Education Play a Prominent Role in Special Education Law*, 34 J.L. & EDUC. 255, 263, 270 (2005).

⁷⁸See S. REP. NO. 94-168, at 9 (1975) (stating that Act guarantees “equal educational opportunity” for children with disabilities); see also H.R. REP. NO. 94-332, at 13 (1975) (“Each child requires an education plan tailored to achieve his or her maximum potential.”).

supporters: “We can all agree that education [of a child with a disability] should be equivalent, at least, to the one those children who are not handicapped receive.”⁷⁹ As noted above, the members of the *Rowley* Court agreed that the cases asserting a right to appropriate education for children with disabilities helped motivate Congress to adopt the Act, and *Mills* and *PARC* feature prominently in the legislative history.⁸⁰ Although both cases focused significantly on children receiving no services, they did not suggest that merely providing some educational benefit would be sufficient. Indeed, the *Mills* case employed strong language requiring equality of publicly supported education for children with disabilities.⁸¹ The *PARC* consent decree spoke of access *to* appropriate education, not of access *as* appropriate education.⁸² Other right-to-education cases also spoke of

⁷⁹121 CONG. REC. 19483 (1975) (quoted in *Rowley*, 458 U.S. at 214 (White, J., dissenting)).

⁸⁰*See supra* text accompanying notes _____.

⁸¹*Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (“The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), stated: . . . ‘[Educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.’ (emphasis supplied). . . . Thus the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child. . . . [In *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967)] Judge Wright concluded ‘(F)rom these considerations the court draws the conclusion that the doctrine of equal educational opportunity—the equal protection clause in its application to public school education—is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment.’ In *Hobson v. Hansen*, *supra*, Judge Wright found that denying poor public school children educational opportunities equal to that available to more affluent public school children was violative of the Due Process Clause of the Fifth Amendment. *A fortiori*, the defendants’ conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.”).

⁸²*See Pennsylvania Ass’n for Retarded Citizens v. Pa.*, 343 F. Supp. 279, 286 (E.D. Pa. 1972). The court’s description of the decree and the decree itself use the term “appropriate” to modify “program of education and training” or similar words, a meaning that does not equate to some educational benefit, but that does not give much additional guidance with respect to comparisons to services provided children without disabilities. *See, e.g., id.* at 1258 (defendants must “immediately re-evaluate the named plaintiffs, and to accord to each of them, as soon as possible but in no event later than October 13, 1971, access to a free public program of education and training appropriate to his learning capacities; . . . provide, as soon as possible but in no event later than September 1, 1972, to every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter, access to a free public program of education and training appropriate to his learning capacities. . . .”) (emphasis added).

appropriate education; the meaning of the term was less than crystalline, but there is no hint that it was supposed to mean merely some educational benefit.⁸³

It is possible that Congress may have been looking to contemporary sources other than the right-to-education cases for the meaning of appropriate education. Education commentary giving content to the term in the period before passage of the Act is scant, but one prominent source from that era used it to signify a level and type of services that match the child's needs and capacities, a standard that is higher than that adopted by *Rowley*, albeit one that makes less of an explicit comparison to services provided children without disabilities than a proportional maximization test does.⁸⁴

The post-Act and pre-*Rowley* commentary and caselaw lined up strongly in favor of proportional maximization as the content of appropriate education. The *Harvard Law Review* note stated that “an appropriate education for a particular child would require services aimed at developing the child’s intellectual capacity to the same degree that the school sought to develop the ‘normal’ abilities of its nonhandicapped students.”⁸⁵ James Stark, an associate professor at the University of Connecticut Law School and director of the school’s clinic, which specialized in special education litigation, wrote that “the Act is premised on notions of proportional equality.”⁸⁶ Pre-*Rowley* courts added their

⁸³See *Panitch v. Wisconsin*, 390 F. Supp. 611, 613 (E.D. Wis. 1974) (using term appropriate education to describe services matching child’s needs and capacities); *McMillan v. Board of Educ.*, 331 F. Supp. 302, 304 (S.D.N.Y. 1971) (same).

⁸⁴Peter Kuriloff et al., *Legal Reform and Educational Change*, 41 EXCEPTIONAL CHILDREN 35, 38 (1974) (distinguishing between children “placed somewhere” and those “placed in appropriate programs,” in compliance with court settlement).

⁸⁵Note, *supra* note ___, at 1125-26.

⁸⁶James H. Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. 94-142*, 14 CONN. L. REV. 477, 502 (1982).

endorsements of proportional maximization to those of the scholars.⁸⁷ For example, in *Gladys J. v. Pearland Independent School District*,⁸⁸ the court declared that the Act entitled a child with severe mental impairments with “educational opportunities commensurate with that provided other children in the public schools,”⁸⁹ and ordered more intensive services for the child than those the school district had offered. In fact, before *Rowley*, the competition was mainly between those who urged the use of proportional maximization and those who favored a standard of maximization of potential without regard to the comparison to the quality of services offered students without disabilities.⁹⁰

It is hardly surprising, then, that the lower courts in *Rowley* opted for a proportional maximization approach.⁹¹ The district court viewed the choice as between

⁸⁷See, e.g., *Springdale Sch. Dist. v. Grace*, 656 F.2d 300, 305 (8th Cir. 1981); *Battle v. Pa.*, 629 F.2d 269, 277 (3d Cir. 1980); *Espino v. Besteiro*, 520 F. Supp. 905, 912 (S.D. Tex. 1981); *Pinkerton v. Moye*, 509 F. Supp. 107, 113 (W.D. Va. 1981); *Hines v. Pitt County Bd. of Educ.*, 497 F. Supp. 403, 406 (E.D.N.C. 1980).

⁸⁸520 F. Supp. 869 (S.D. Tex. 1981).

⁸⁹*Id.* at 875.

⁹⁰Many authorities favored this absolute or non-comparative maximization standard. See, e.g., *Kruelle v. Biggs*, 489 F. Supp. 169, 173-74 (D. Del. 1980), *aff'd*, 642 F.2d 687 (3d Cir. 1981); *DeWalt v. Burkholder*, 1979 Educ. Handicapped L. Rep. 551:550 (E.D. Va. 1980); *Armstrong v. Kline*, 476 F. Supp. 583, 603-04 (E.D. Pa. 1979), *remanded sub nom. Battle v. Pa.*, 629 F.2d 269 (3d Cir. 1980); Marc S. Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1065; Comment, *Self-Sufficiency Under the Education for All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516, 526. A few sources, however, foreshadowed the approach ultimately adopted by the Supreme Court, notably the dissenting opinion in the Second Circuit *Rowley* decision and one student note, Bruce G. Sheffler, Note, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81, 109-10 (1981) (criticizing views of district court in *Rowley*). The legislative history of the Act provides some support for the absolute maximization interpretation. E.g., H.R. REP. NO. 94-332, at 13 (1975) (“Each child requires an education plan tailored to achieve his or her maximum potential.”).

⁹¹The use of the word “maximization” as part of a standard based on equality may be a rhetorical error (one that the lower courts in *Rowley* avoided by talking about “full potential”), even though the word is prominent in the Act’s legislative history. As discussed below, the word conjures images of Cadillacs rather than Chevrolets (in the modern era, perhaps BMWs rather than Hyundais). The emphasis really belongs on “proportional,” or if one prefers another term, “commensurate.” Children with disabilities are

“an ‘adequate’ education that is, an education substantial enough to facilitate a child’s progress from one grade to another and to enable him or her to earn a high school diploma”⁹² or, on the other hand, “one which enables the handicapped child to achieve his or her full potential.”⁹³ The court found a middle ground between those two extremes, one that “would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.”⁹⁴ The court identified support for this standard in the regulations promulgated under section 504 of the Rehabilitation Act of 1973,⁹⁵ the right to education cases leading

entitled to something comparable in terms of quality to what children without disabilities receive. No more, no less: Cadillacs if children without disabilities are getting a Cadillac education, Chevrolets if children without disabilities are getting Chevrolet educations. Determining in any given case what the motoring metaphor means will present a challenge, but it is hardly an impossibility. *See supra* text accompanying notes _____. A student comment even worked the automobile brands into its title, but failed to respond to the point that the motoring metaphor embodies a comparison between education for children in general education and those receiving special education, suggesting that proportional maximization or other equality-related measures are in fact workable. *See* Judith DeBerry, *When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY’S L.J. 503 (2003). When discussing general education, it makes sense to talk about a “Cadillac” school (or, for that matter, a clunker). *See* Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755 (2004) (discussing education provided by wealthy school districts). Similarly, it makes sense to ask whether the services provided children with disabilities are as high in quality as those provided other children.

⁹²*Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y.), *aff’d*, 632 F.2d 945 (2d Cir. 1980), *rev’d*, 458 U.S. 176 (1982).

⁹³*Id.*

⁹⁴*Id.*

⁹⁵29 U.S.C. § 794 (2006). These regulations define “appropriate education,” for purposes of the non-discrimination law, as “the provision of regular or special education and related aids and services that are . . . designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . .” 45 C.F.R. § 84.33(b) (1980). *See Rowley*, 483 F. Supp. at 533. The Supreme Court criticized the reliance on these regulations, *see Rowley* 458 U.S. at 186 n.8, and in a subsequent decision tried to eliminate all reliance on section 504 in cases governed by the special education law, *see Smith v. Robinson*, 468 U.S. 992, 1012-16 (finding that Education for All Handicapped Children Act preempted possible claims based on section 504 or equal protection). Congress, however, overruled *Smith*, and restored the availability of section 504 in special education cases, subject to an exhaustion rule. 20 U.S.C. § 1415(l) (2006). Commentators noted that the congressional action restored the possibility of claims for proportional equality in educational services for children with disabilities based on the section 504 regulations. Thomas F. Guernsey, *The Education for All Handicapped Children Act*, 42 U.S.C. § 1983, and *Section 504 of the Rehabilitation Act of 1973: Interaction Following the Handicapped*

to passage of the Act, and “common sense.”⁹⁶ The common sense argument is significant. As the court pointed out, some children with disabilities can do far better than merely pass from grade to grade, but even the best public schools rarely have the resources to enable every child to reach his or her full potential.⁹⁷ A middle approach is the best. The court conceded that the standard may be difficult to apply in some instances, but in the case before it found ample evidence of the child’s great potential and extreme effort, and thought that the school ought to confer the same degree of benefit on her that her classmates received by attending class.⁹⁸ The court of appeals, in a relatively brief opinion, praised the approach of the district court, adopting its findings of facts and conclusions of law.⁹⁹ The court, however, limited its decision “to the unique facts of this case.”¹⁰⁰

The Second Circuit’s words of caution about the reach of its decision should carry weight. With all that may be said in favor of a proportional maximization standard, it remains true that the interpretation may not be the only one that could be considered

Children’s Protection Act of 1986, 68 NEB. L. REV. 564, 591-92 (1989); Mark C. Weber, *The Transformation of the Education of the Handicapped Act*, 24 U.C. DAVIS L. REV. 349, 417-21 (1990) [hereinafter, Weber, *Transformation*]. In the period since passage of the statute overruling *Smith*, however, most of the section 504 caselaw concerning primary and secondary education has concerned services for children who do not meet IDEA’s definitional provisions but still have a disability for purposes of section 504’s definition, and claims for damages for intentional discrimination. See MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 21.6(3) (3d ed. 2008 & supp. 2010) (collecting cases). In discussing the origins of the Act, Senator Stafford emphasized its close harmony with the section 504 regulations. Robert T. Stafford, *Education for the Handicapped: A Senator’s Perspective*, 3 VT. L. REV. 71, 80-82 (1982).

⁹⁶*Rowley*, 483 F. Supp. at 534.

⁹⁷*Id.*

⁹⁸*Id.* at 534-36.

⁹⁹*Rowley*, 632 F.2d at 947.

¹⁰⁰*Id.* at 948.

persuasive. A common-law process might lead there, but perhaps it could lead to a standard with greater flexibility (such as Justice Blackmun's), a standard that looks to the child's intellectual potential, or to no standard at all that can be described with a single, pithy phrase.

IV. HAS CONGRESS RATIFIED THE SOME-BENEFIT STANDARD FOR APPROPRIATE EDUCATION?

Congress has not disturbed the *Rowley* decision despite reenacting the statute that is now IDEA several times since 1982.¹⁰¹ To some courts, the failure to change the statute's language regarding appropriate education evidences Congress's ratification of *Rowley*.¹⁰² These courts adopt the view that cases that interpret statutes should be given a special degree of stare decisis protection, and that Congress is expected to be aware of Supreme Court interpretations of statutory language when it reenacts.¹⁰³ Nevertheless, the Supreme Court has frequently disregarded this rule, using new discoveries about the original intentions of Congress or other bases on which to deeply erode, or even overrule previous statutory interpretations, including ones in which the language was reenacted. Perhaps the most prominent example is *Monnell v. Department of Social Services*,¹⁰⁴

¹⁰¹See Pub.L. No. 98-199, 97 Stat. 1357 (1983); Pub.L. No. 99-457, 100 Stat. 1145 (1986); Pub.L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1141-42 (1990); Pub.L. No. 105-17, 111 Stat. 37 (1997); Pub.L. No. 108-446, 118 Stat. 2647 (2004).

¹⁰²See *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 948 (9th Cir. 2010); *Mr. C. v. Me. Sch. Admin. Dist. No. 6*, 538 F. Supp. 2d 298, 300-01 (D. Me. 2008).

¹⁰³*J.L.*, 592 F.3d at 948; *Mr. C.*, 538 F. Supp. 2d at 301. See generally *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the act After it has been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction is effective, is persuasive of legislative recognition that the judicial construction is the correct one.").

¹⁰⁴436 U.S. 658 (1978).

which reexamined nineteenth century legislative history to overrule the portion of *Monroe v. Pape*¹⁰⁵ that held that 42 U.S.C. § 1983 did not permit municipal liability.¹⁰⁶ In other noteworthy cases, *Griffin v. Breckenridge* overruled earlier Supreme Court precedent that 42 U.S.C. § 1985(3) requires state action; it extended the statute to purely private conspiracies to deprive people of civil rights.¹⁰⁷ *Boys Markets, Inc. v. Retail Clerks Union, Local 770*¹⁰⁸ overruled *Sinclair Refining Co. v. Atkinson*,¹⁰⁹ rereading the Norris-LaGuardia Act¹¹⁰ to permit injunctions against strikes called in violation of a no-strike clause in a collective bargaining agreement.¹¹¹ Closer to the present time and the disability civil rights context, *Buckhannon Board & Care Home v. West Virginia Department of Health and Human Resources*¹¹² interpreted language in the Americans with Disabilities Act of 1990 (ADA)¹¹³ and Fair Housing Act Amendments of 1988 (FHAA)¹¹⁴ that had been copied from 42 U.S.C. § 1988 to forbid awards of attorneys’ fees for suits that acted as catalysts for voluntary conduct by defendants achieving the

¹⁰⁵365 U.S. 167, 192 (1961).

¹⁰⁶Whether the legislative history is the strongest support for the Court’s decision is subject to debate. A prominent scholar has observed that “the reasons for overruling *Monroe* have little to do with the legislative history of the 1871 statute, and a lot to do with the practical and theoretical evolution of the statute.” William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1396 (1988).

¹⁰⁷403 U.S. 88, 95-96 (1971).

¹⁰⁸398 U.S. 195 (1970).

¹⁰⁹370 U.S. 195 (1962).

¹¹⁰29 U.S.C. § 104 (2006) (current codification).

¹¹¹See generally Eskridge, *supra* note __, at 1390 (citing *Boys Markets* as paradigm case for more flexible approach to stare decisis regarding statutory precedents).

¹¹²532 U.S. 598 (2001).

¹¹³42 U.S.C. §§ 3601-3607 (2006) (current codification).

¹¹⁴42 U.S.C.A. §§ 12101-12113 (West 2011) (current codification).

objectives of the plaintiffs' litigation. The Supreme Court came to this conclusion despite the existence of tolerably clear Supreme Court precedent¹¹⁵ and crystal clear lower court precedent,¹¹⁶ of which Congress was well aware,¹¹⁷ that had read § 1988 to permit the awards, prior to enactment of the ADA and FHAA.

Scholarly sources cast doubt on the proposition that statutory precedents should be given special stare decisis protection, even when reenactment has occurred. Professor Eskridge notes that congressional failure to change a judicially imposed interpretation may indicate approval, but may as easily signify apathy; disapproval but disagreement about how to change the interpretation; disapproval but procedural obstacles to new legislation, such as committee or individual opposition, filibusters, threatened vetoes and the like; disapproval but existence of more important issues dominating the legislative agenda; or disapproval but failure to act due to logrolling or compromises.¹¹⁸ As

¹¹⁵*Hewitt v. Helms*, 482 U.S. 755, 763 (1987) (describing entitlement to fees as “settled law” when “voluntary action by the defendant . . . affords the plaintiff all or some of the relief sought” and reserving question of when catalyst theory supports fees awards); *see also* *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (also recognizing catalyst interpretation).

¹¹⁶*E.g.*, *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978); *see Buckhannon*, 532 U.S. at 626 & n.4 (Ginsburg, J., dissenting) (citing twelve other court of appeals decisions predating 1987 *Hewitt v. Helms* decision).

¹¹⁷Senators Strom Thurmond and Orrin Hatch introduced a bill to amend § 1988 to overturn the catalyst rule several years before enactment of the FHAA and ADA. *See* 131 Cong. Rec. S22356 (1985) (remarks of Sen. Hatch) (“Due to the protracted nature of some litigation, a claim may be rendered moot by State or Federal legislation enacted prior to judicial resolution of the conflict. Under existing case law such a turn of events would not preclude an award of attorneys’ fees where a court determined that the case was a catalyst for the legislative change.”). This situation is precisely the one in *Buckhannon*. *See* 532 U.S. 598, 601 & n.2 (2001) (describing dismissal on ground of mootness after state legislature repealed challenged rule).

¹¹⁸Eskridge, *supra* note __, at 1405. For further support, Eskridge quotes Justices Frankfurter (“[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.” *Helvering v. Hallock*, 309 U.S. 106, 121 (1940)) and Scalia (“I think we should admit that vindication by Congressional inaction is a canard.” *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 672 (1987)). *Id.* at 1405 & n. 215. A subsequent article suggests that a presumption of correctness should be given a judicial construction of a statute after legislative inaction when the relevant judicial interpretation is one that is settled or authoritative and has created public or private interests in reliance on the interpretation, what Eskridge terms a “building block interpretation.” William N. Eskridge,

Eskridge points out, a more flexible attitude to following or not following statutory precedents is a better way to protect the primary goal of stare decisis, the orderly development of the law.¹¹⁹

Adhering to *Rowley*'s some-benefit approach on the basis of assumed congressional acquiescence is particularly inappropriate if the common-law interpretation of IDEA's appropriate education guarantee is correct. Professor Eskridge cites the view of Justice Stevens that ordinarily stare decisis should be rigidly followed when interpreting statutes, but not when Congress phrases a statute in sweeping, general terms, and expects the courts to interpret it by developing rules on a case-by-case basis in common-law style, such as 42 U.S.C. § 1983 and Sherman Act.¹²⁰ If, as suggested here, IDEA is similar to these open-ended laws and appropriate education carries a meaning to be developed over time, a flexible approach to the term is the only sensible one.¹²¹ Congressional reenactment of the language should not be taken as preserving *Rowley* in amber.

Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70 (1988). Articles putting forth similar views include John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737, 741 (1985) ("[T]here exists no legal or functional justification for the imputation of any meaning to the necessarily frequent and prolonged silences of Congress."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476 (1989) ("[S]tare decisis and post-enactment history should play a limited role in interpretation."); Articles critical of a flexible approach to application of statutory precedents include Lawrence C. Marshall, "*Let Congress Do It*": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

¹¹⁹ Eskridge, *supra* note __ [Geo.], at 1392-93.

¹²⁰ *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 641 & n. 12 (1983) (Stevens, J., dissenting).

¹²¹ Notably, *Boys Markets* is a paradigm case for overruling statutory precedents, and it involves an interpretation of federal law regarding enforcement of collective bargaining agreements, a topic that Justice Douglas declared to be one in which Congress intended the development of a federal common law. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, (1957); *see also* Field, *supra* note __, at 940 n. 245 (describing common-law-style development of labor-management law).

Moreover, if Congress is ordinarily expected to be aware of Supreme Court interpretations of a statute when it reenacts, it is also likely to be aware of prominent lower court interpretations. The lower courts, as documented from sources stretching back more than twenty years, have frequently, if subtly, departed from a some-benefit approach.¹²² It is as likely that later Congresses intended to endorse those lower-court departures from *Rowley* as it is that these Congresses intended to enshrine *Rowley*'s some-benefit reading of appropriate education.

V. TOWARDS A COMMON LAW OF APPROPRIATE EDUCATION

Are there prospects for common-law development of the meaning of appropriate education despite the reality of *Rowley*? The answer appears to be a qualified yes. Over the years, many courts have not hewed strictly to the *Rowley* some-benefit line,¹²³ though the Supreme Court's decision has kept them from adopting any clear alternative based on proportional maximization or equality of opportunity.¹²⁴ More than twenty years ago, an

¹²²See sources cited *supra* note ___ and accompanying text.

¹²³An article by Scott Johnson contends that *Rowley*'s "'some educational benefit' standard no longer accurately reflects the requirements of the IDEA" in light of state constitutional law litigation establishing obligations to provide higher levels of educational services; the standards-based education movement directed towards increasing expectations and performance levels; and the focus on high expectations and enhanced educational results in the 1997 revision to IDEA. Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. & L.J. 561, 567 (explaining developments altering educational and legal landscape since early 1980s). With respect to the 1997 amendments, Johnson emphasizes the provision requiring states to adopt performance goals for children with disabilities that are consistent with other goals and standards set for all children. *Id.* at 578 (citing 20 U.S.C. ' 1412(a)(16)). As he notes, the legislative history and findings in the 1997 law also support having high expectations for children with disabilities and insuring high quality services and maximum access to the general curriculum. *Id.* at 578-79 (citing H.R. REP. NO. 105-95, at 83-84 (1997) and 20 U.S.C. ' 1400(c)(5)(A)). For an additional argument that the 1997 law in fact raises the appropriate education standard beyond that established in *Rowley*, see Tara L. Eyer, Comment, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 DICK. L. REV. 613 (1999).

¹²⁴Professor Perry Zirkel suggests that *Rowley*'s emphasis on the Act as guaranteeing access is obsolete in light of the large numbers of children now in special education; at the same time, he contends, an alternative vision of the Act premised on equality is no longer applicable given the large amounts of money spent on educating children with disabilities. Perry A. Zirkel, *The Over-Legalization of Special*

article of mine identified three categories of cases in which lower courts had refused to embrace the broader implications of the *Rowley* decision: (1) cases involving children with severe disabilities, for whom extensive services are required for progress that is meaningful; (2) cases involving children who can advance from grade to grade, but only with significant levels of services, essentially *Rowley*'s converse proposition; and (3) cases involving ideas from the statute that were not developed in *Rowley*, such as the least restrictive environment and individualization principles, which again might call for extensive services for a given child to succeed in a mainstreamed setting or to overcome unique and difficult impediments to learning.¹²⁵ More recently, Professor Seligmann has observed that courts in disputes over services for children with autism heed the message from *Rowley* that they should defer to school districts on substantive decisions regarding the methodology for serving children and intensity levels for services provided, but nonetheless may overturn a child's IEP and order different services on the ground that the

Education, 195 EDUC. L. REP. 35, 35-36 (2005). The mere fact that more is being spent, on average, on educating children with disabilities than educating children without disabilities does not mean that children with disabilities are being treated equally in the sense that they are afforded comparable opportunities or that their potentials are being developed to the same degree that other children's are. The premise of the Americans with Disabilities Act and other modern civil rights legislation for individuals with disabilities is that different, and at times quite specifically more expensive, treatment may be necessary to treat people equally. See Michael Ashley Stein, *Employing People with Disabilities*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 51, 57 (Peter David Blanck ed. 2000) (discussing costs of accommodation in relation to general social benefits of ending discrimination and moral imperative of integration and equality). Moreover, although it is a commonplace assumption that more is expended in educating a child with a disability (that is, of course, the reason for the federal funding under IDEA), that assumption is rarely critically examined. It could well be that the educational expenditures for extracurriculars, including sports, music, and other enrichment activities, and the costs of various advanced academic programs, especially at the high school level, benefit students without disabilities in a much greater proportion than students with disabilities. Certainly, schools spend more on some individual students without disabilities than on some students with disabilities.

¹²⁵See Weber, *Transformation*, *supra* note ____ [Davis], at 377-404 (collecting and analyzing cases to date); see also Elena M. Gallegos, *Beyond Board of Education v. Rowley: Educational Benefit for the Handicapped?*, 97 AM. J. EDUC. 258, 259-60 (1989) (arguing that courts depart from *Rowley* in cases with compelling facts); Mark G. Yudof, *Education for the Handicapped: Rowley in Perspective*, 92 AM. J. EDUC. 163, 174 (1984) (suggesting that courts might not apply *Rowley*'s restrictive language); Perry A. Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 469 (1983) (same).

program was not developed following proper procedures.¹²⁶ Though Professor Seligmann does not state the proposition in such stark terms, the conclusion may be drawn that when given an out because of a procedural failing by the school district, many courts require school districts to provide autism services that are greater than what a some-benefit standard would demand. Cases similar to those identified by me and by Professor Seligmann have continued to proliferate,¹²⁷ though it remains true that many, many courts rely on *Rowley* to deny requested educational services or placements.¹²⁸

¹²⁶Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUVENILE L. & POL'Y 217, 219-20, 274-80 (2005).

¹²⁷A sampling should suffice. On intensive programs for children with severe disabilities: *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009) (holding that district court did not err in finding that IEP calling for public school placement was not appropriate for child with severe behavioral disabilities); *Bucks County Dep't of Mental Health/Mental Retardation v. Pennsylvania*, 379 F.3d 61 (3d Cir. 2004) (finding child with autism entitled to greater services than offered); *R.E. v. N.Y. City Dep't of Educ.*, No. 10 CIV. 3176, 2011 WL 924895 (S.D.N.Y. Mar. 15, 2011) (same); *R.K. v. N.Y. City Dep't of Educ.*, No. 09-CV-4478 KAM, 2011 WL 1131492 (E.D.N.Y. Jan. 21, 2011) (same), *adopted*, 2011 WL 1131522 (E.D.N.Y. Mar. 28, 2011); *Linda E. v. Bristol Warren Reg'l Sch. Dist.*, 758 F. Supp. 2d 75, 55 IDELR 218 (D.R.I. Dec. 1, 2010) (finding child with severe behavior difficulties entitled to specialized placement). On individualization: *Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576 (5th Cir. 2009) (finding program insufficient for individual child's needs); *Sytsema v. Acad. Sch. Dist. No. 20*, No. 03-cv-2582-RPM, 2009 U.S. Dist. LEXIS 105978 (D. Colo. Oct. 30, 2009) (same). On enhanced services to enable children to remain in least restrictive setting, keep up in the mainstream curriculum, or narrow the gap: *C.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981 (8th Cir. 2011) (upholding decisions of hearing officer and district court that although child made progress in reading over relevant two school years, education offered was not appropriate when gap between student and peers increased each year); *Woods v. Northport Pub. Sch. Bd. of Educ.*, No. 1:09-CV-243, 2011 WL 1230813 (W.D. Mich., March 31, 2011) (finding services inadequate when child did not progress in general curriculum); *Breanne C. v. S. York County Sch. Dist.*, 732 F. Supp. 2d 474 (M.D. Pa. 2010) (finding district's services inadequate when child did well in mainstream only though intensive efforts of parents at home and outside tutoring); *Kingsport City Sch. Sys. v. J.R.*, No. 2:06-CV-234, 2008 WL 4138109 (E.D. Tenn. Sept. 4, 2008) (finding behavior plan inadequate when it failed to provide training in negotiating mainstreamed environment without assistance); *Waukeg Cnty. Sch. Dist. v. Douglas L.*, 51 IDELR 15 (S.D. Iowa 2008) (affirming decision of hearing officer that school district educating child with cognitive impairment and multiple disabilities gave insufficient consideration to related services to permit receipt of core academic instruction in general education setting); *Indep. Sch. Dist. No. 12 v. Minn. Dep't of Educ.*, 788 N.W.2d 907 (Minn. 2010) (requiring supplemental aids and services to permit child to participate in mainstream extracurriculars).

¹²⁸Representative cases include: *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938 (9th Cir. 2010) (overturning and remanding decision as to appropriateness of program in light of continuing vitality of *Rowley* standard); *T.Y. v. N.Y. City Dep't of Educ. Region 4*, 584 F.3d 412 (2d Cir. 2009) (upholding determination that one-on-one aide provided sufficient benefits in addressing problem behaviors), *cert. denied*, 130 S. Ct. 3277 (May 17, 2010); *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008) (ruling that child with autism was offered appropriate education in public school program despite fact that program failed adequately to address child's inability to generalize functional behavior learned at

What is newsworthy in the evolution of the *Rowley* doctrine is the appearance of several additional types of cases pushing the limits of the some-benefit standard: (1) Those in which a program is found inadequate because it fails to address all areas of the child's disability or all of the child's educational needs; (2) Cases in which a program is deemed not to provide appropriate education because the services are not based on peer-reviewed research; and (3) Cases in which a program fails the appropriate education test because the IEP does not include other necessary components or lacks meaningful goals for the child.

(1) *All Areas of Disability*. IDEA compels school districts to evaluate children “in all areas of suspected disability,”¹²⁹ and further provides that the IEP must contain measurable annual goals designed to “meet each of the child’s . . . educational needs that result from the child’s disability,”¹³⁰ and must include a statement of special education and related services that will be provided for the child “to advance appropriately toward attaining annual goals.”¹³¹ However, it might be possible to read *Rowley* to permit a school to neglect one or another area of need, as long as the program as a whole confers some benefit.¹³² Courts are avoiding that reading, and instead are requiring schools to

school to home and other environments); *A.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004) (“IDEA’s FAPE standards are far more modest than to require that a child excel or thrive.”); *Brad K. v. Board of Educ.*, No. 10 C 0534, 2011 WL 1362667 (N.D. Ill. Apr. 7, 2011) (upholding determination by hearing officer that half-day early childhood program met adequacy standard); *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, No. C2-07-1272, 2009 WL 3127775 (S.D. Ohio Sept. 28, 2009) (finding autism services adequate).

¹²⁹20 U.S.C. § 1414(b)(3)(B) (2006).

¹³⁰§ 1414(d)(1)(A)(i)(II).

¹³¹§ 1414(d)(1)(A)(IV)(aa).

¹³²A case that flirts with this reading is *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 350 (5th Cir. 2000), which states that “it is not necessary for [a child] to improve in every area to obtain an educational benefit . . .,” and rejects the parents’ IDEA claim even though portions of the child’s

provide some benefit to a child with a disability in all areas of need and with regard to all categories of services that will address the child's identified needs.

Cases in this category break down into those relating to general areas such as transition and behavior, and specific areas such as reading-writing and speech-language. IEPs must have plans to address transition for children sixteen and older, but the law does not specify much more than that the plans have to address training, education, employment, and, where appropriate, independent living skills.¹³³ Courts, however, have ruled that IEPs fail the test of providing appropriate education when they do not call for specific services to facilitate the adjustment to post-secondary experience. *Dracut School Committee v. Bureau of Special Education Appeals* found an IEP's transition services to be inadequate when they failed to address a student's need for pragmatic language skills, vocational skills, and skills for independent living, even though the child excelled in mainstream high school courses and graduated in the top half of his class.¹³⁴ The court stressed that despite the student's academic achievement, he lacked the communication skills and other life skills to attend and participate effectively in college classes.¹³⁵ Similarly, in *Klein Independent School District v. Hovem*, discussed at greater length below, the court found a failure to provide appropriate education when a high school child's IEP lacked objective and measurable goals for transition to college and failed to

IEP, including an alphabetic phonics program, were not fully implemented. On closer examination, however, it becomes clear that the opinion rests on the fact that compensatory services were offered to make up for the implementation problems and relies on the principle that *de minimis* failures in IEP implementation do not support a remedy when the child makes educational progress in the area the missing services were designed to address. *See id.* at 349-50.

¹³³20 U.S.C. § 1414(d)(1)(A)(i)(VII)(aa)-(bb) (2006).

¹³⁴737 F. Supp. 2d 35 (D. Mass. 2010).

¹³⁵*Id.* at 47, 52-53.

identify needed services, despite the fact that the child passed all his classes and was on track to graduate high school.¹³⁶

As for behavior services, the IEP section of IDEA provides that “in the case of a child whose behavior impedes the child’s learning or that of others, [the IEP team shall] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”¹³⁷ Nothing more specific is laid out except in the student discipline section of the statute, which applies only when a student is being suspended or otherwise excluded from school,¹³⁸ and it is possible to imagine an educational program conferring some benefit on a student while still leaving important behavior deficits unaddressed. Courts, however, have required a level of adequacy of services in this area even for students otherwise receiving an educational benefit. For example, in *R.K. v. New York City Department of Education*, the court held that failure to incorporate a functional behavioral analysis and behavior intervention plan into an autistic child’s IEP violated the appropriate education requirement when the child’s behavior, though not atypical for a child with autism, impeded her learning.¹³⁹ A New Jersey case required behavior services to be delivered at home to curb a child’s self-stimulation and aggression, and found parent training offered by the school district to be insufficient, even though the child was already being given extensive applied behavior analysis

¹³⁶745 F. Supp. 2d 700, 751 (S.D. Tex, 2010). *See generally infra* note __ (discussing case in connection with reading and writing services).

¹³⁷20 U.S.C. § 1414(d)(3)(B)(i) (2006).

¹³⁸§ 1415(k)(3)(B)(i) (2006).

¹³⁹No. 09-CV-4478 KAM, 2011 WL 1131492 (E.D.N.Y. Jan. 21, 2011) (magistrate judge recommendation), *adopted*, 2011 WL 1131522 (E.D.N.Y. Mar 28, 2011).

services at school.¹⁴⁰ *A.C. v. Board of Education* found a failure to provide appropriate education when the school district did not conduct a functional behavioral analysis of the student whose poor attention, lack of focus, tangential speech, and fantasizing interfered with his instruction, even though a one-on-one aide kept the child's behavior in control at school.¹⁴¹ The court noted that the presence of the aide interfered with the child's achievement of independent functioning, but it did not balance that detriment against any of the other benefits of the program.¹⁴²

Courts have also found a failure to provide appropriate education when an otherwise beneficial program lacked particular needed services such as speech and language or reading and writing interventions. In *B.H. v. West Clermont Board of Education*, the court ruled that the school district denied appropriate education when it failed to consider independent evaluations showing that the child needed speech services and predetermined that the child did not need speech services, even though other services were provided.¹⁴³ The chief complaint in *Klein Independent School District v. Hovem* was that the high schooler, although learning the content of his courses, remained at a 5.1

¹⁴⁰New Milford Board of Education v. C.R., No. 09-328 (JLL), 2010 WL 2571343 (D.N.J. June 22, 2010). The court relied in part on the Judge Alito's gloss on *Rowley*. See *id.* at *5. See generally *supra* note __ and accompanying text (describing Third Circuit interpretation of *Rowley* standard). Other cases requiring specific behavioral services for students with autism, despite programs oriented towards autistic behaviors, include: *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005); *Indiana Area Sch. Dist. v. H.H.*, No. Civ.A. 04-1696, 2005 WL 3970591 (W.D. Pa. July 25, 2005).

¹⁴¹No. 06 Civ. 4238(CLB), 2007 WL 1259145 (S.D.N.Y. April 27, 2007).

¹⁴²*Id.* at *5; see also *Long v. Dist. of Columbia*, No: 09-2130 (GK), 2011 WL 1061172 (D.D.C. Mar. 23, 2011) (stressing IEP requirement to consider strategies to address behavior and noting deterioration of child's behavior in school); *School Bd. v. Brown*, No. 2:10CV41, 2010 WL 5587759 (E.D. Va. Dec. 13, 2010) (finding violation of IDEA by failing to implement positive behavioral interventions and supports, thus not providing any meaningful way for child to achieve educational benefit in response to behavioral difficulties).

¹⁴³No. 1:10-CV-520, 2011 WL 1575591 (S.D. Ohio Apr. 26, 2011). The school also failed to provide needed occupational therapy services, see *id.* at *10, and provided ineffective behavioral services, see *infra* text accompanying notes ____.

grade level in word identification and at second and third grade levels in various other aspects of reading, even though he had a high overall reading comprehension score.¹⁴⁴ He achieved his good grades in part by being allowed to present material orally,¹⁴⁵ an indication he was making educational progress in general, but the absence of services to address his reading, writing, and other specific deficits constituted a denial of appropriate education.¹⁴⁶

Numerous cases that relate to the all-areas idea directly enforce the statutory requirement that children must be evaluated in all areas of suspected disability;¹⁴⁷ the

¹⁴⁴745 F. Supp 2d 700, 751 (S.D. Tex. 2010).

¹⁴⁵*See id.* at 750.

¹⁴⁶*Id.* at 753; *see also* Me. Sch. Admin. Dist. No. 56 v. Ms. W, No: 06-81-B-W, 2007 WL 922252 (D. Me. Mar. 27, 2007) (magistrate judge recommendation) (stating that school district denied child appropriate education by failing to provide services to address his weakness in writing, though noting that program addressed other problems), *adopted*, 2007 WL 1129378 (D. Me. Apr. 16, 2007).

¹⁴⁷*E.g.*, N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202 (9th Cir. 2008) (ruling that school district failed to fulfill procedural requirements to evaluate child in all areas of disability, depriving child of appropriate education); J.G. v. Kiryas Joel Union Free Sch. Dist., No. 08 CIV. 6395-WGY, 2011 WL 1346845 (S.D.N.Y. Mar. 31, 2011) (requiring assistive technology evaluation for child with severe speech and language deficits); D.B. v. Bedford County Sch. Bd., 708 F. Supp. 2d 564 (W.D. Va. 2010) (finding failure to evaluate student for learning disability caused denial of appropriate education); Compton Unified Sch. Dist. v. A.F., No. CV 09-1427 AHM (CWx), 2010 WL 1727674 (C.D. Cal. Apr. 26, 2010) (finding failure to evaluate child for emotional disturbance, leading to denial of appropriate education); Suggs v. District of Columbia, 679 F. Supp. 2d 43, 53 IDELR 321 (D.D.C. Jan. 19, 2010) (denying school system's motion for summary judgment in case alleging that school system failed to provide needed evaluations); W.H. v. Clovis Unified Sch. Dist., No. CV F 08-0374 LJO DLB, 2009 WL 1605356 (E.D. Cal. June 8, 2009) (finding that school district improperly ignored evidence that writing was area of suspected disability and inadequately assessed child in that area, depriving child of educational benefits), *motion to stay denied*, 2009 WL 2959849 (E.D. Cal. Sept. 10, 2009), *judgment withdrawn*, 2009 WL 5197215 (E.D. Cal. Dec. 22, 2009); Blake C. v. Department of Educ., 593 F. Supp. 2d 1199 (D. Haw. 2009) (holding that school system violated IDEA by failing to perform assistive technology evaluation); *see* Charlotte-Mecklenburg Bd. of Educ. v. B.H., No. 3:07cv189, 2008 WL 4394191 (W.D. N.C. Sept. 24, 2008) (denying motion to dismiss action alleging prolonged failure to evaluate child with serious neurological disease for other health impairments or speech-language and occupational therapy, failure to assess writing, and use of invalid verbal comprehension and perceptual reasoning evaluation).

evaluations may in turn be expected to lead to provision of adequate services in all areas or a finding of denial of appropriate education if adequate services are not provided.¹⁴⁸

(2) *Peer-Reviewed Research*. A 2004 amendment to IDEA provides that an IEP must include “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child”¹⁴⁹ By requiring interventions that are supported by serious professional research, this provision has the potential to improve the quality of special education services and, not coincidentally, to mandate services that are not just reasonably calculated to confer some benefit but that are actually demonstrated to work.¹⁵⁰ The court in *B.H. v. West Clermont Board of Education* relied on the state administrative code section incorporating this federal

¹⁴⁸See, e.g., *Long v. District of Columbia*, No. CIV.A. 09-2130 GK, 2011 WL 1061172 (D.D.C. Mar. 23, 2011) (holding that defendant must afford child evaluation of functional behavior and develop behavior intervention plan on evaluation’s analysis); *Bd. of Educ. v. H.A.*, No. No. 2:09-cv-001318, 2011 WL 861163 (S.D. W. Va. Mar. 9, 2011) (finding that failure to evaluate behavior and provide services violated appropriate education obligation); *E.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417 (S.D.N.Y. 2010) (finding program for school year inadequate for failing to account for progress reflected in qualitative evaluations from past school year); *District of Columbia v. Bryant-James*, 675 F. Supp. 2d 115 (D.D.C. 2009) (holding that IEP was inadequate in failing to address evaluation’s determination that child needed distraction-free environment); *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549 (E.D. Pa. 2007) (finding failure to evaluate child for behavioral or psychiatric problems, leading to failure to provide appropriate services).

¹⁴⁹Pub. L. No. 108-446, § 101, 118 Stat. 2708 (2004) (codified at 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2006)).

¹⁵⁰See Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for “Free Appropriate Public Education”?*, 28 J. NAT’L ASS’N ADMIN L. JUDICIARY 397, 410-15 (2008) (discussing potential impact of peer-reviewed-research provision); see also Jean B. Crockett & Mitchell L. Yell, *Without Data All We Have Are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education*, 37 J.L. & EDUC., 381, 388 (2008) (“The inclusion of this terminology may prove to be significant to future courts when interpreting the FAPE mandate because the law directs IEP teams, when developing a student’s IEP, to base the special education services to be provided on reliable evidence that the program or service works. To comply with this new requirement, therefore, special education teachers should use interventions that empirical research has proven to be successful in teaching behavioral and academic skills to students with disabilities.”); Mark C. Weber, *Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, 11 LOY. J. PUB. INT. L. 217, 232-33 (2010) (discussing peer-reviewed-research provision in connection with improving educational outcomes for children in special education).

statutory language¹⁵¹ to hold that the school district denied appropriate education by using a behavior-intervention point system that was not shown to have a scientific basis, was not understood by the child, and was inconsistently applied.¹⁵² In harmony with other cases addressing behavioral services, the court stressed that the state review officer misapplied the legal standard by demanding the parents to make a showing of negative impact on the child’s educational opportunities from the improper behavior techniques, stating flatly that “IDEA requires that the District address the student’s behavior if it impedes their learning or that of others.”¹⁵³ There are parallel holdings elsewhere. In *Waukee Community School District v. Douglas L.*, the court, without directly relying on the “peer-reviewed research” language, found that the public education offered a child who had a pervasive developmental disorder failed provide appropriate education when the methods used to control the student’s behavior—restraint-type interventions and the extensive use of time-outs—reinforced the behavior and were contrary to methods supported by professional research.¹⁵⁴ Thus the school district violated the appropriate education requirement.¹⁵⁵

¹⁵¹OHIO ADMIN CODE 3301-51-07(H)(1)(e) (2011) (current codification).

¹⁵²No. 1:10-CV-520, 2011 WL 1575591 (S.D. Ohio Apr. 26, 2011).

¹⁵³*Id.* at *12.

¹⁵⁴51 IDELR 15 (S.D. Iowa 2008).

¹⁵⁵*Id.* at p. 88; *see also* D.S. v. Bayonne Bd. of Educ., 602 F.3d 553 (3d Cir. 2010) (not relying on peer-reviewed-research provision, but holding that to confer meaningful educational benefit, IEP needed to incorporate specific remedial techniques and provisions for accommodations supported by professional evaluators, rather than general recommendation to use multi-sensory approach). The decisions on this topic are not uniform. In another case, a court held that the peer-reviewed-research provision does not in and of itself raise the statutory standard for what constitutes appropriate education, and stated that failure of a school district to provide services based on peer-reviewed research did not automatically constitute a denial of appropriate education. *Joshua A. v. Rocklin Unified Sch. Dist.*, 2008 U.S. Dist. LEXIS 26745 (E.D. Cal. 2008), *aff’d*, 319 F. App’x 692 (9th Cir. 2009).

(3) *Other IEP Requirements.* Although Congress has not altered the statutory definition of appropriate education in the wake of *Rowley*, it has placed an increasing number of statutory obligations on IEP teams and added to the mandatory content of the IEP. Examples include the behavioral services and peer-reviewed research provisions discussed above.¹⁵⁶ In upholding these IEP mandates, courts have rejected IEPs that omitted parent training,¹⁵⁷ lacked specific plans to facilitate a child's transition from a private school setting to public school and failed to specify adequate training for a child's teachers,¹⁵⁸ and neglected to include goals in connection with a child's needs concerning auditory processing disorder and anxiety and omitted occupational therapy services.¹⁵⁹ The enhanced attention to what services and goals are in the IEP fits well with the tendency of courts to be ever more demanding of the IEPs' educational goals themselves, finding IEPs not to provide appropriate education when the goals listed are too vague or insufficiently measurable.¹⁶⁰

¹⁵⁶ See *supra* text accompanying notes __ (behavior), __ (peer-reviewed research).

¹⁵⁷ See *R.K. v. N.Y. City Dep't of Educ.*, No. 09-CV-4478 KAM, 2011 WL 1131492 (E.D.N.Y. Jan. 21, 2011) (requiring inclusion of parent training and counseling in IEP; further requiring provision of adequate speech and language therapy services), *adopted*, 2011 WL 1131522, 56 IDELR 212 (E.D.N.Y. Mar 28, 2011).

¹⁵⁸ *Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. P.*, No. 3:06 CV 01278 (CFD), 2009 WL 103376 (D. Conn. January 12, 2009) (finding program not to be appropriate due to absence of plan for transition from private to public school, and failure to require adequate training for child's teachers and family members, and assessment of child's assistive technology needs).

¹⁵⁹ *C.B. v. Garden Grove Unified Sch. Dist.*, 655 F. Supp. 2d 1088, 1097-98 (C.D. Cal. 2009); see also *Sch. Bd. of Norfolk v. Brown*, No. 2:10CV41, 2010 WL 5587759, 56 IDELR 8 (E.D. Va. Dec. 13, 2010) (finding IDEA child-find obligation violation in case of child whose IEP lacked any behavioral goals or objectives).

¹⁶⁰ See, e.g., *Woods v. Northport Pub. Sch. Bd. of Educ.*, No. 1:09-CV-243, 2011 WL 1230813 (W.D. Mich., March 31, 2011) (ruling that IEP lacked adequate information about present level of functioning and ascertainable criteria for measuring child's progress); *M.H. v. N.Y. Department of Education*, 712 F. Supp. 2d 125, 157 (S.D.N.Y. 2010) (rejecting IEP with short term objectives lacking evaluative procedures and containing goals not tailored to child's unique needs). Of course, in a way this

CONCLUSION

It must be emphasized that the cases just described are not efforts by lower courts to overrule *Rowley*, *sub silentio* or otherwise; the decisions rest on other bases in the law and rely on plausible distinctions from that case. Inevitably, however, these and other well reasoned case results will put pressure on *Rowley*'s some-benefit rule. It is premature to label *Rowley* obsolete, but a common-law approach to appropriate education—one that eventually leads to proportional maximization or one that does not—may be glimmering on the horizon.

dovetails with *Rowley* itself, which emphasized the importance of the IEP and the procedural safeguards around its creation. *Rowley*, 458 U.S. at 203, 205-06 & n.27.