No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION OF HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY *et al.*,
Petitioners,

v.

AMY ROWLEY *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, EPILEPSY FOUNDATION OF AMERICA, NATIONAL MENTAL HEALTH ASSOCIATION AND NSAC, THE NATIONAL SOCIETY FOR CHILDREN AND ADULTS WITH AUTISM, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are four organizations of parents of handicapped children, disabled adults, citizens, professionals and advocates who are concerned that children with a wide variety of handicapping conditions receive

educational services which are appropriate to meet their special needs.[1]

Amici are directly familiar with the effect on handicapped children and on their families of the lack of the appropriate educational services that are needed to enable a child to learn to participate fully as an adult member of this society. In the absence of these services, *amici* believe that society will waste the valuable talents and skills of handicapped children and will be burdened with the unnecessary expense of supporting their continued dependency as adults.

Many of the *amici* organizations actively participated in the congressional hearings preceding the enactment of the Education for All Handicapped Children Act of 1975 (PL 94-142), 20 U.S.C. §§ 1401-1420 (1976), and all have been involved in the implementation of the Act's provisions. They share a common concern that the flexible and individualized approach to the education of

[1] *Amici* include:

(1) The Association for Retarded Citizens of the United States, a voluntary organization of 300,000 members devoted to promoting the welfare of mentally retarded children and adults;

(2) the Epilepsy Foundation of America, an organization of 12,000 members established to advance the interests of persons with epilepsy and, *inter alia*, to ensure that children with epilepsy are permitted to participate fully in educational programs;

(3) the National Mental Health Association, a citizens' organization of one million lay and professional members whose primary purpose is to encourage efforts to provide better educational and other services for mentally ill children and adults; and

(4) NSAC, The National Society for Children and Adults with Autism, a national organization of 6,000 parents, citizens and professionals dedicated to the education and welfare of children and adults with severe disorders of communication and behavior.

handicapped children which was adopted by the Congress be maintained.

Amici have received consent to file this brief from both petitioners and respondents. Their letters of consent are being filed with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The only issue properly before this Court is whether, based on the unique facts of this case, the district court properly determined that a sign-language interpreter was necessary to provide respondent with a "free appropriate public education" under the Education for All Handicapped Children Act (PL 94-142), 20 U.S.C. §§ 1401-1420 (1976). This Court should not attempt to redefine a standard carefully crafted by Congress as a condition for the receipt of federal funds by those states choosing to participate in the program. In addition, petitioners' arguments stemming from their reading of *Halderman v. Pennhurst State School & Hospital*, 451 U.S. 1 (1981), are not properly before the Court because they were not raised at either level below.

As a condition for receipt of funds under the Act, Congress promulgated several basic requirements. First, states must provide broad services to meet the needs of individual children, including sign-language interpreters when appropriate for a particular child. Second, Congress articulated a flexible and workable standard for decisionmakers. Congress did not intend decisionmakers to narrow this standard (*i.e.*, an educational program appropriate to meet the unique needs of the handicapped child) in order to create from the unique facts of an individual case a single, inflexible goal. Finally, in those extremely rare instances when disputes are not resolved through the Act's local and state administrative procedures, Congress vested final authority with state and federal courts to take evidence and determine what is an appropriate education for an individual child. The mandate for services,

the substantive standard and the procedural safeguards were based upon a detailed hearing record and findings by the Congress as to both previous state neglect of these children and the substantial economic benefit to society of properly educating handicapped children.

Based on the particular record and findings of fact in this case, the district court's ruling that a sign-language interpreter was necessary for respondent to receive an appropriate education under the Act was not clearly erroneous.

ARGUMENT

I. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT REQUIRES PARTICIPATING STATES TO PROVIDE AN INDIVIDUALIZED AND APPROPRIATE EDUCATIONAL PROGRAM TO ALL HANDICAPPED CHILDREN.

The Education for All Handicapped Children Act of 1975 (PL 94-142), 20 U.S.C. §§ 1401-1420 (1976), is designed to ensure, through a combination of federal financial assistance and detailed conditions, that states provide handicapped children an education appropriate to their individual needs. States have the choice of voluntarily participating in this $1 billion program. If they choose to participate, they must then assume full responsibility for providing programs and services sufficient to meet the special educational needs of all handicapped children residing in the state, regardless of intellectual ability or severity of handicapping condition.

Congress enacted this ambitious program after years of deliberation and fact-finding about the states' denial of necessary services to handicapped children and the harms to children and costs to society that flowed from this denial. The historical context and the statutory language leave no doubt that Congress intended to require states accepting federal financial assistance under

the Act to provide programs and services sufficient to meet children's individual needs.

A. Background and History of the Act.

PL 94-142 was the culmination of nearly ten years of legislation. In response to states' widespread failure to provide public education to millions of children, Congress had progressively increased federal responsibility to guarantee appropriate educational services to the nation's handicapped children.[2]

Federal involvement in education for handicapped children began in 1966. Congressional hearings revealed that fully two-thirds of the nation's handicapped children were either totally excluded from school or were sitting idly in regular classrooms, their special needs largely ignored. House Report, *supra* note 2, at 2. On the basis of these findings, Congress established a program of grants to the states to encourage both development of new special education programs for handicapped children and improvement of existing services. *Id.* Four years later, in 1970, this program was expanded and federal funding for special education was increased. *Id.*; Senate Report, *supra* note 2, at 5.

Congressional concern was heightened between 1971 and 1973 by a series of court cases filed by handicapped children and their parents, seeking to establish a right to equal educational opportunity. House Report, *supra* note 2, at 3-4, 7; Senate Report, *supra* note 2, at 6-8. The findings of the courts demonstrated that wholesale exclusion of handicapped children from schools and neglect of those in school remained a serious national problem. *Id.*

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[2] H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-7 (1975), [hereinafter "House Report"]; S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 1425, 1429-32 [hereinafter "Senate Report"]; 121 Cong. Rec. 19502-3 (1975) (Sen. Cranston); 121 Cong. Rec. 19482 (1975) (Sen. Randolph); 121 Cong. Rec. 19485 (1975) (Sen. Williams).

Early in 1973, Congress began nearly a year and a half of hearings.[3] More than 200 witnesses testified about the harm being done both to handicapped children and to society by the states' failure to provide these children an appropriate education.[4] These witnesses included parents, teachers, school principals and superintendents, school board members, state and local officials, special education experts and other professionals expert in the care and education of handicapped children. Senate Report, *supra* note 2, at 7; House Report, *supra* note 2, at 5-6. They testified about large numbers of children denied many critical services.

The testimony described the educational neglect of children with all types of handicapping conditions, both severe and mild.[5] It revealed that none of the states in which hearings were held was providing the broad range of services required to meet the varied needs of these handicapped children. 121 Cong. Rec. 19487-91 (1975) (Table 3; Status of State Education Programs for Handicapped Children). Hearings were held in a number of states that had enacted state laws establishing a right to education for handicapped children. Yet even in these states, the testimony showed that substantial numbers of handicapped children continued to be denied appropriate services.[6] Some children were placed on waiting lists, some children were excluded from school completely because services were unavailable and still others were placed in existing programs with little regard for their special individual needs. *See, e.g.*, Senate Hearings, *supra* note 4, at 25, 43, 48, 389, 459.

Extensive testimony of both parents and educators focused on the wide range of services needed to educate appropriately these special children. The service needs discussed in the hearings included, *inter alia*, specialized diagnostic and evaluation services, speech therapy and communication-skills training, sign-language interpretation, vocational training, specialized tutoring programs, behavior-modification programs, psychological counseling, self-help and self-care skills training programs and specially equipped resource rooms.[7]

National statistics prepared by the Office of Education at the request of Congress revealed that the numbers of children excluded from school or denied appropriate services continued to be substantial. Senate Report, *supra* note 2, at 8; House Report, *supra* note 2, at 11-12. Figures ultimately adopted as congressional findings estimated that more than one million handicapped children were

[3] In 1974, Congress extended funding for special education on an interim basis, pending completion of the hearings. At the same time, Congress imposed specific protections for handicapped children on the states as a condition for receiving federal funds. Among the provisions included in the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974), were requirements that states accepting these federal funds identify unserved handicapped children, integrate them and their programs into normal school programs as much as possible and establish basic due process procedures to protect their rights. House Report, *supra* note 2, at 4-5; Senate Report, *supra* note 2, at 3, 5-6, 8.

[4] *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973-74) [hereinafter "Senate Hearings"]; House Report, *supra* note 2, at 5-6.

[5] *See, e.g.*, Senate Hearings, *supra* note 4, at 399 (orthopedically handicapped); 833 (speech impaired and deaf); 796 (hard of hearing); 1213 (emotionally disturbed); 403-11 (mentally retarded); 805, 807 (learning disabled); 812 (cerebral palsy); 394, 397, 793 (autistic).

[6] For example, in New Jersey, Senator Williams noted that "only 43 percent of all children who should be served currently are being served in our State." Senate Hearings, *supra* note 4, at 21 (introductory remarks of Sen. Williams). Similarly, in Massachusetts, despite a progressive state law, approximately 100,000 Massachusetts children were excluded from school at the time of the hearings. *Id.*, at 346 (testimony of David Bartley, Speaker, Massachusetts House of Representatives).

[7] Senate Hearings, *supra* note 4, at 45, 87, 448, 790, 797, 809, 813, 833, 1212.

excluded entirely from public school and more than half of the estimated eight million handicapped children in the United States were not receiving appropriate services.[8] All categories of handicapping conditions and all age groups were affected. Senate Report, *supra* note 2, at 8; House Report, *supra* note 2, at 11-12. For example, the Office of Education estimated that 29 percent of deaf and 82 percent of hard-of-hearing children were unserved. *Id.* Figures for other categories of handicapping conditions varied from a low of 17 percent of mentally retarded children to a high of 88 percent of learning disabled children unserved. *Id.*

Congress found that this failure to appropriately educate handicapped children harmed both the children and their families and, furthermore, resulted in substantial costs to society.[9] Children were denied "the chance to develop their abilities as individuals and to reach out with their peers for their own personal goals and dreams." [10] Parents' and brothers' and sisters' lives were often profoundly disrupted by the unending burden of caring for the uneducated handicapped child. Moreover, Congress found equally great costs to society. Children capable of becoming taxpaying members of society instead became permanently dependent on the taxpayers. Thousands of the more severely handicapped were forced into public institutions when their families could no longer care for them. Finally, society lost the benefit of the

[8] Pub. L. No. 94-142, § 3(a), 89 Stat. 773 (1976) (reprinted in notes to 20 U.S.C. § 1401).

[9] Senate Report, *supra* note 2, at 9; House Report, *supra* note 2, at 11, 24; 121 Cong. Rec. 19482 (1975) (Sen. Randolph); 121 Cong. Rec. 19492 (1975) (Sen. Williams); 121 Cong. Rec. 37411 (1975) (Sen. Humphrey); 121 Cong. Rec. 25541 (1975) (Rep. Harkin).

[10] Senate Hearings, *supra* note 2, at 341 (Sen. Kennedy). *See also* 121 Cong. Rec. 19496 (1975) (Sen. Kennedy) ("Children who do not receive the training and educational opportunities necessary for their full development as human beings often lead unhappy lives working in jobs far below their capabilities.").

contribution the children could have made if provided an appropriate education.[11]

B. Congress Conditioned Receipt of Funds on Provision of a Broad Range of Services to Handicapped Children Regardless of the Severity of Their Handicapping Conditions.

Based upon the voluminous record before it, including the advice of special education experts and school officials, Congress enacted PL 94-142. It conditioned receipt of funds under the Act upon the commitment of state and local educational agencies to provide each handicapped child special education and related services designed to meet the unique needs of the child, notwithstanding the nature and severity of the child's handicapping condition. As an incentive for states to accept these conditions and serve handicapped children, Congress increased sevenfold the funds available to provide services under the Act—from less than $150 million in 1974 to more than $1 billion in 1980.[12] And in recognition of the substantial changes in service delivery patterns required by the Act, states were given years of lead time to allow them to plan and develop the additional services required. 20 U.S.C. § 1412(2)(B); House Report, *supra* note 2, at 13, 15; Senate Report, *supra* note 2, at 18. Every state except New Mexico chose to participate in the program and accept its conditions.[13]

Congress' purpose and intent and the mandated conditions for states' participation are clear, beginning with

[11] 121 Cong. Rec. 19505 (1975) (Sen. Beall); 121 Cong. Rec. 19494 (1975) (Sen. Javits).

[12] The Budget of the United States Government: Fiscal Year 1976 at 420 and Fiscal Year 1982 at I-I 6-7, U.S. Government Printing Office, 1975 and 1981, respectively.

[13] State Program Implementation Studies Branch, Office of Special Education, U.S. Department of Education, *Second Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* 26-27 (1980).

the Act's preamble and continuing through each of its provisions. The Declaration of Purpose, for example, states that the Act is designed to "assure that all handicapped children have available to them, within the time periods specified . . ., a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." [14]

The statute explicitly provides that "the following conditions" must be met by a state in order to qualify for assistance:

1. The state must have in effect a policy assuring "all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1).

2. The state must establish detailed policies and procedures to assure that "a free appropriate public education will be available for all handicapped children between the ages of three and eighteen . . . not later than September 1, 1978, and . . . between the ages of three and twenty-one . . . not later than September 1, 1980." 20 U.S.C. § 1412(2)(B).[15]

3. Each local educational agency in the state must establish and annually review and revise an "individualized education program for each handicapped child." 20 U.S.C. §§ 1412(4) and 1414(a)(5).

Finally, each of the Act's operational terms (including, *inter alia*, free appropriate public education, special education, related services and individualized education program) is defined with particularity. 20 U.S.C. § 1401.

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[14] Pub. L. No. 94-142, § 3(a), 89 Stat. 773 (1976) (reprinted in notes to 20 U.S.C. § 1401).

[15] A limited exception is allowed for children ages 3 to 5 and 18 to 21 if serving such children is inconsistent with state law or a court order. 20 U.S.C. § 1412(2)(B).

II. THE ACT'S STANDARD OF "APPROPRIATE EDUCATION" DOES NOT REQUIRE FURTHER ELABORATION AND CONGRESS DID NOT INTEND IT TO MEAN SELF-SUFFICIENCY OR ANY OTHER SINGLE GOAL.

The cornerstone of the Act is the requirement that all state and local education agencies provide each handicapped child with a "free appropriate public education," 20 U.S.C. §§ 1412(1), 1414(a)(1)(C)(ii), including, *inter alia*, a program of "special education" and "related services," 20 U.S.C. § 1401(18).[16] Consistent with Congress' intent of requiring provision of services which meet the unique needs of each handicapped child, the Act refrains from specifying any universal educational goal for all handicapped children or naming the services required to meet such a goal. Instead, Congress sensibly adopted a flexible standard—appropriate to meet the unique needs and capabilities of the child—and provided guidance as to the factors that should be considered in designing a particular program and determining whether it is "appropriate." Four essential factors were specified: (1) tests and evaluations of the child; (2) consideration of professional standards in the education field; (3) the viewpoint of the parents; and (4) the viewpoint of the local school district and the child's

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[16] "Special education" is defined by § 1401(16) of the Act as:

> [S]*pecially designed instruction,* at no cost to parents or guardians, *to meet the unique needs of a handicapped child,* including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions.

Emphasis added.

"Related services" are defined by § 1401(17) of the Act as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education. . . .

teachers. These factors must be carefully weighed by the relevant decisionmaker;[17] the credibility of the witnesses must be determined and the validity of the various positions evaluated. In addition, the ultimate decision on the appropriate program must be reconciled with a statutory preference that educational programs be provided in a normal setting whenever possible. The Act is explicit on each point.

First, the Act recognizes that tests and other evaluation instruments are an important tool in assessing the unique capabilities and needs of a handicapped child. Therefore, the Act provides that "no single procedure shall be the sole criterion for determining an appropriate educational program for a child," 20 U.S.C. § 1412(5)(C). Congress intended that "all relevant information with regard to the functional abilities of the child" be utilized in determining the appropriate placement. Senate Report, *supra* note 2, at 29. Assessments conducted in each area related to the child's disability must be taken into account, including, *inter alia*, tests of vision, hearing, social and emotional status and intelligence, depending upon the disability. Tests and other materials used must be "properly and professionally evaluated for the specific purpose for which they are being used." *Id.* Reliance is to be placed on tests of specific abilities, rather than upon general intelligence tests; for children with hearing, visual or communication disabilities, test selection and administration must provide protection that the test "accurately reflects the child's ability in the area tested and not the child's impaired communication skill." *Id.* at 29-30; 20 U.S.C. § 1412(5)(C).

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[17] In the first instance, and for the vast majority of children, a decision is reached by agreement of parents and school officials; in a small number of cases, the decision is made in plenary review by an impartial administrative hearing officer; and in a very few cases, a court makes the decision. *See* discussion generally in section III and *see* notes 23 and 24.

Second, the Act requires that an "appropriate education" be defined in light of accepted professional standards in the education field.[18] Qualified professionals are involved at every stage of the referral, assessment and placement process. Accepted professional standards are one of the benchmarks against which "appropriate" is to be measured.[19]

Third, the Act recognizes the importance of the viewpoint of parents in determining what is appropriate. Parental participation is encouraged by providing parents full access to their child's evaluations and records, 20 U.S.C. § 1415(b)(1)(A), and by requiring an opportunity for their participation in the development of their child's individualized education plan. 20 U.S.C. § 1401(19). Indeed, Congress intended that parents be actively involved as partners with school officials in each stage of the development of their child's program. House Report, *supra* note 2, at 13, 16, 19; Senate Report, *supra* note 2, at 11, 12. Thus, parents must be notified before any changes are initiated in their child's placement and they are afforded the opportunity of disputing school district decisions at any stage of the classification, assessment or placement process. 20 U.S.C. § 1415(b)(1)(C)(i), (ii). So critical a role do the parents play, that the Act makes provision for the involvement of substitute or "surrogate

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[18] In recognition of the important role professional judgment plays in determining the substantive content of "appropriate," the Act's due process protections for parents include the parents' right to obtain an independent educational evaluation of their child, 20 U.S.C. § 1415(b)(1)(A), and the right to present the testimony of "individuals with special knowledge or training with respect to the problems of handicapped children" at any stage of the process concerning their child's education. 20 U.S.C. § 1415(d).

[19] 20 U.S.C. § 1401(17); 1401(19); 121 Cong. Rec. 25540 (1975) (Rep. Miller) (the Act's administrative procedures are "designed to increase parental and professional input into the development of the program of education for handicapped children"). *See also* 20 U.S.C. § 1413(a)(3).

parents" for children whose parents are unavailable or unknown. 20 U.S.C. § 1415(b)(1)(B).

Fourth, the Act requires that the viewpoint of the child's teachers and other local school district officials be considered. This occurs in several ways. Local school district professionals and teachers play the primary role in evaluating the child and recommending needed services. In addition, the child's classroom and special education teachers are key participants in the individualized educational program (IEP) meeting. *See* 20 U.S.C. § 1401(19). Finally, the child's IEP—the document that specifies the services the school deems appropriate and will provide to the handicapped child—is initially prepared by the local school district, and thus reflects the school district's range of concerns. *Id.*; 20 U.S.C. § 1414(a)(5).

Fifth, the Act requires the factfinder to apply the nontechnical standard of "appropriate education" to the facts elicited from the four sources listed above. Like the "reasonable care" standard in torts, what is appropriate cannot be explained in the abstract, but flows from the totality of circumstances and the judgment of the trier of fact in each case.

Finally, the Act provides guidance on the interpretation of this information in the face of arguments for competing but comparably appropriate educational programs. Congress establishes a clear preference for services that enable handicapped children to participate with their nonhandicapped peers and that, to the extent possible, put these children on an equal footing with nonhandicapped children by exposing them to the same program opportunities.[20] While Congress recognized that for some children the use of special classes or even separate institutional programs may be necessitated by the nature

[20] Senate Report, *supra* note 2, at 12; House Report, *supra* note 2, at 9-10; 121 Cong. Rec. 25540 (1975) (Rep. Miller).

or severity of the handicap, it mandated education in regular classes, with the use of supplementary aids and services that make regular programs accessible, in all cases where there is a choice between services that are otherwise appropriate to meet the child's needs. 20 U.S.C. § 1412(5)(B).

Petitioners incorrectly advance a hard-and-fast rule (self-sufficiency) as the only interpretation of the term "appropriate" intended by Congress. Pet. Br. at 66. But, because of the range of needs and abilities of the children protected by the Act, PL 94-142's flexible standard does not lend itself to any more definitive statement. Children differ with regard to the nature of their handicapping conditions, the severity of their disabilities and their potential for intellectual growth and educational achievements. Even within discrete categories of handicapping conditions, children's levels of achievement and potential differ dramatically. Accordingly, goals for each of these children and the services required to achieve such goals must cover a broad spectrum.

For example, for most mentally retarded children, self-sufficiency is a reasonable and attainable goal. For others—particularly for children who are more severely retarded—even a goal of self-sufficiency might be unrealistic. For these children, Congress noted that education should be directed to increasing "their independence, thus reducing their burden on society." Senate Report, *supra* note 2, at 9. And for still others—those functioning at the higher levels of retardation—a goal of keeping up with some of their nonhandicapped classmates is perfectly realistic, given their potential for achievement.

Differences exist for extraordinarily talented and gifted handicapped children as well.[21] While "appropriate" serv-

[21] This Act was intended to serve all handicapped children, including the gifted and talented. As Senator Javits remarked:

> [H]andicapped youth . . . have minds and ambitions, too. One of them became President of the United States and remained President for an unprecedented four terms. There have been

ices for these children should generally be designed so that they may gain as close to equal access to the regular public school program as possible, the particular services required to achieve that goal may differ substantially from one child to the next.

As Congressman Quie explained in the House debate:

> [A]ll handicapped children are not the same. Children often have unique problems. Not all blind children need the same special program; many can be educated in regular classrooms with some assistance from readers and special braille textbooks; others are trained in specially segregated classrooms or institutions. Not all retarded children require special segregated classes; many can be educated in regular classrooms and given supplementary services through a resource program. As you can see, it is difficult to make a generalized statement that applies to all handicapped children.

121 Cong. Rec. 23707 (1975); *see also* 121 Cong. Rec. 37412 (1975) (Senator Stafford). It was in response, then, to this tremendous variation in the goals and services needed for individual children that the Congress turned to individual decisionmaking, using the flexible standard: appropriate to the unique needs of the handicapped child.[22]

This Court should not reshape what it took the Congress hundreds of witnesses and years of deliberation to craft. *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980); *Environmental Protection Agency v. National*

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other highly significant examples, although we do not need any better example than that of F.D.R. as to overcoming a handicap.

That is what this [Act] is all about.

121 Cong. Rec. 19495 (1975). *See also* Senate Report, *supra* note 2, at 12-13.

[22] House Report, *supra* note 2, at 9, 13-14; Senate Report, *supra* note 2, at 11; 121 Cong. Rec. 19483, 19484, 37410 (1975) (Sen. Randolph); 121 Cong. Rec. 25538 (1975) (Rep. Harris).

Crushed Stone Association, 449 U.S. 64, 83 (1980). Congress provided that the determination of the "appropriate" educational program is a factual determination left, in disputed cases, to the trier of fact.

> This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does . . . . If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter . . . .

Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 290 (1960).

III. PL 94-142 PROVIDES FINAL RECOURSE TO THE COURTS TO RESOLVE DISPUTES ABOUT THE CONTENT OF AN APPROPRIATE EDUCATIONAL PROGRAM.

The Congress has mandated administrative procedures at the local and state levels that will resolve over 99.99 percent of all educational program decisions under the Act. See notes 23 and 24, *infra*. However, in the very rare instance when a dispute between parents and the schools persists, the Act provides that the state and federal courts have full authority to take additional evidence and make decisions wholly independent from the administrative process.

The Act establishes an initial and mandatory nonadversarial mechanism designed to allow parents and school districts to reach agreement on the content of an appropriate educational program: the IEP meeting required by 20 U.S.C. § 1414(a)(5). At this meeting, parents and school district personnel share information about the child and discuss the services and placement that should go into the educational program. On the basis of this meeting and the information gathered on the child

(*see* discussion at 12-14, *supra*), the school district then prepares a written IEP and presents it to the parents for their review and approval. *See* 20 U.S.C. § 1415(b)(1) For the vast majority of all handicapped children, the parents give their approval at this stage and the program is agreed upon as appropriate without any further proceedings.[23]

To address the atypical circumstance when the parents disagree with the program proposed by the school district following the IEP meeting, and in recognition of the important role of parents in decisions affecting the lives of their children, *see, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925), section 1415 of the Act explicitly requires state and local education agencies to "establish and maintain procedures . . . to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Under the terms of the Act, the procedural safeguards apply to complaints with respect to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). Parents are entitled to a full panoply of due process safeguards in these administrative proceedings, including, *inter alia*, adequate notice, an opportunity to examine relevant records, an opportunity to obtain an evaluation of the child by independent experts, an opportunity for a full hearing before an impartial hearing officer and a right of appeal to the state educational agency. 20 U.S.C. § 1415(b)-(d).

[23] Out of a total of 4,036,219 children receiving special education in the 1979-80 school year, fewer than .065% challenged any aspect of their special education in an administrative hearing. Unpublished data to be included in *Special Education Programs, U.S. Department of Education, Third Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* (1982).

Finally, if disagreement persists, *either party* involved in a due process hearing may bring an action in any state court of competent jurisdiction or in federal district court.[24] 20 U.S.C. § 1415(e)(2). Paralleling the original administrative complaint, the court is authorized to entertain "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education," 20 U.S.C. § 1415(b)(1)(E), and to grant "such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2).[25]

The scope of review set forth in the statute is as follows:

> [T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2).[26] Congress granted the courts

[24] In 1980, fewer than .007% of children (256 children nationwide) for whom IEPs were written filed a complaint in either state or federal court relating to any aspect of their special education. National Center for State Courts, *Student Litigation: A Compilation and Analysis of Civil Cases Involving Students, 1977-1981*, 22 (1981).

[25] Petitioners' contention that the court is limited to review of procedural shortcomings and not to a determination of the content of an appropriate education for a child, is wholly inconsistent with the broad grant of authority to the court on the face of the statute and with the legislative history. *See* this section generally.

[26] The legislative history of this provision shows that Congress considered and rejected a lower standard of review. The initial bill passed by the House had provided that the court review would be limited to a determination whether the state's decision was supported by substantial evidence. H.R. 7217, 94th Cong., 1st Sess. (1975), *reprinted in* House Report, *supra* note 2, at 56. This standard was rejected in the Conference in favor of a statutory requirement that the court "shall hear additional evidence" and shall make "an independent decision based on a preponderance of the evidence." S. Rep. No. 455, 94th Cong., 1st Sess. 50 (1975) (Conference Re-

the discretion to make a decision independent from the state administrative proceeding because of the nature of the decision, the long history of state neglect and the voluntary basis of the program as a whole.

As described in part II of this brief, *supra*, the educational placement decision requires a careful balancing of various types of evidence elicited about an individual child and the application of a flexible standard ("appropriate education") to the facts. Aware of the tradition of local and state control of education in this country, Congress paid deference to this control and struck a delicate balance among federal, state and local decisionmaking.[27] The child's program is developed initially by the local school district, the entity responsible for convening individualized education program conferences and for writing the IEP. 20 U.S.C. § 1414(a)(5). If there is a dispute, a state administrative hearing is provided to hear evidence and resolve the matter. 20 U.S.C. § 1415(b)(2). Either party may appeal a hearing officer's adverse determination to the state education agency. 20 U.S.C. § 1415(c). Thus, only if a dispute remains unresolved after the local and state education agencies have had an opportunity to review the child's program can a complaint be filed in either state or federal court.

Congress (and the courts) have repeatedly addressed the weight courts should give to administrative decisions in proceedings such as the PL 94-142 education decision process. Congress has specified standards for review of administrative decisions ranging from *de novo* review to

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port), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1480, 1503. *See* discussion in court of appeals decision below, 632 F.2d 945, 948 n.5 (2d Cir. 1980).

[27] *See*, for example, 121 Cong. Rec. 19482-83 (1975) (Sen. Randolph); 121 Cong. Rec. 37411 (1975) (Sen. Stafford); 121 Cong. Rec. 19502-03, 37418 (1975) (Sen. Cranston).

a near-absolute prohibition on review.[28] Here, Congress decided not to make the state administrative process dispositive. The discretion to take additional evidence and make its own decision was granted to the courts (both state and federal) because state and local education agencies had been discredited by their history of ignoring handicapped children. Congress found that state education agencies had repeatedly violated their own state laws in failing to provide these children an appropriate education.[29] Recourse to a decisionmaker independent of the education system was seen by the Congress as a way to make state and local education agencies directly accountable to handicapped children and their parents.

Moreover, the role of applying a somewhat flexible standard to a complex fact situation is neither a new nor an inappropriate role for the Congress to have assigned the courts. As the United States District Court for the Northern District of Alabama aptly noted:

> While this court is sharply aware of its lack of expertise in educational matters, the judicial function not infrequently involves the application of law to unfamiliar fields where reliance must be placed upon the testimony of experts.

Campbell v. Talladega Cty. Bd. of Ed., 518 F. Supp. 47, 53 (N.D. Ala. 1981). The lower courts asked to decide what education program is appropriate for a handicapped child under the terms of the Act have had little difficulty in applying the standards of the Act to the diverse fact

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[28] *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (*de novo* review, discussed in *Chandler v. Roudebush*, 425 U.S. 840 (1976)); Federal Trade Commission Act of 1914, 15 U.S.C. § 41 ("Findings of fact, if supported by substantial evidence, shall be conclusive."); Immigration Act of 1952, 8 U.S.C. § 1252(b) ("the decision of the Attorney General shall be final").

[29] House Report, *supra* note 2, at 10; 121 Cong. Rec. 23706-07 (Rep. Quie); 121 Cong. Rec. 19487-91 (Table 3; Status of State Education Programs for Handicapped Children). *See* discussion at 5-9, *supra*.

situations. *See, e.g., Campbell v. Talladega Cty. Bd. of Ed., id.* (program for a severely retarded child which fails to teach functional or communication skills is not appropriate under the Act); *Bales v. Clarke*, 523 F. Supp. 1366 (E.D. Va. 1981) (special school program supplemented by one-on-one instruction, language therapy and speech therapy is "appropriate" to meet plaintiff's special needs. School need not provide best possible program); *Springdale School Dist. v. Grace*, 494 F. Supp. 266 (W.D. Ark. 1980) (placement in public school supplemented by auxiliary services, although not the best possible education for a deaf child, provides an "appropriate" education).

IV. CONGRESS INTENDED TO CREATE INDIVIDUAL RIGHTS AND STATES ACCEPTING FUNDS UNDER PL 94-142 RECEIVED ADEQUATE NOTICE OF THIS FACT.

Petitioners contend for the first time in this Court that the Act did not create any individual right to a free appropriate public education, that the state was not on notice that the Act created such a right, and that the state is required to do nothing more than that which is contained in its state plan submitted to the federal government under the Act. Because these arguments were not made in the courts below, *amici* suggest they are not properly before this Court now.[30] *Hormel v. Helvering*, 312 U.S. 552 (1941). Even if this Court decides to consider these arguments, however, each is utterly without merit.

First, the entire statutory framework, as discussed in sections I-III of this brief, documents Congress' intent to create an individually enforceable right to a free appropriate public education after the respective 1978 and 1980 deadlines in those states choosing to accept funds under

[30] Indeed, the New York State plan is not even a part of the record in this case.

the Act. Indeed, what other purpose could Congress have had both in creating a cause of action "to present complaints with respect to . . . the provision of a free appropriate public education to such child" and in expanding the jurisdiction of the federal courts to hear such complaints without regard to the amount in controversy requirement in effect at the time. 20 U.S.C. §§ 1415(b)(1)(E), (e)(2) and (e)(4). The Senate Report perhaps best summarizes the conviction of the Congress on this issue:

> It can no longer be the policy of the Government to merely establish an unenforceable goal . . . . S. 6 takes the positive necessary steps to ensure that the rights of children and their families are protected.

Senate Report, *supra* note 2, at 9. *See also* Senate Report, *supra* note 2, at 3, 13; House Report, *supra* note 2, at 15; 121 Cong. Rec. 37417 (1975) (Sen. Schweiker); 121 Cong. Rec. 19483 (1975) (Sen. Randolph); 121 Cong. Rec. 19492 (1975) (Sen. Williams); 121 Cong. Rec. 25538 (1975) (Rep. Harris); 121 Cong. Rec. 23707 (1975) (Rep. Quie).

Second, given the specificity of the Act, petitioners should have been on notice that PL 94-142 requires a full range of services designed to meet each child's "unique needs," and is not merely an encouragement to implement general congressional findings. Unlike the bill of rights provisions in the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010, considered by this Court last term in *Halderman v. Pennhurst State School & Hospital*, 451 U.S. 1 (1981), PL 94-142 on its face and in its implementing regulations (34 C.F.R. Part 300) clearly and unambiguously conditions receipt of federal funds on the provision of a free appropriate education as determined for each handicapped child through an individual procedure, which includes judicial review of the content of an appropriate educa-

tion.[31] That petitioners actually knew this and agreed to these conditions when they chose to participate in the program every year since its enactment can be seen from their own most recent state plan under the Act[32] and from their continued participation in PL 94-142 following decisions of lower courts which they did not appeal and which have enjoined previous state attempts to limit services required by the Act.[33]

Third, petitioners are incorrect in asserting that the Act would allow the state plan they have submitted to the federal government to limit in any way their obligation to provide handicapped children an education appro-

[31] This Court has long recognized that "[t]here is, of course, no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose terms and conditions upon which its money allotments to the states shall be disbursed." *King v. Smith*, 392 U.S. 309, 333 n.34 (1968). *See also, Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Rosado v. Wyman*, 397 U.S. 397, 408 (1970); *Oklahoma v. Civil Service Comm.*, 330 U.S. 127, 142-43 (1947); *Halderman v. Pennhurst State School & Hospital*, 451 U.S. 1 (1981).

[32] There is no suggestion of the state's ability to limit services in its plan. Indeed, petitioners state they will provide by June 1, 1981, "the *most* appropriate placement for children with handicapping conditions." The New York State Plan Submitted Under the Education for All Handicapped Children Act (P.L. 94-142): 1980-81 at 15, emphasis added. In addition, petitioners recognize that educational program content is properly a part of administrative and judicial review. Petitioners state that "[y]our district must give you an opportunity to question or challenge recommendations and decisions about your child's educational program." *Id.* at 173. Further, the plan provides that "[i]f you are dissatisfied with the final determination or order of the Commissioner of Education, you can take your child's case to court." *Id.* at 176.

[33] *See, e.g., Riley v. Ambach*, 508 F. Supp. 1222, 1247 (E.D.N.Y. 1980) ("In this developing area of educational law, courts have frequently focused on the requirement that education programs must meet a handicapped child's unique needs and have accordingly invalidated broad rules [limiting services] imposed by the states.").

priate to each child's needs. The structure of the Act indicates that the principal conditions for receipt of funds are contained in sections 1412 and 1415 and that the state-plan requirements set forth in section 1413 serve a very different and more limited purpose. These require the state to set forth, *inter alia*, the policies and procedures it has adopted (1) to train additional personnel, acquire needed facilities and develop new services; (2) to establish accounting systems which provide adequate fiscal accountability for funds received under the Act; (3) to develop procedures for evaluating the effectiveness of programs developed under the Act; (4) to establish necessary recordkeeping systems; and (5) to protect the confidentiality of education records. 20 U.S.C. § 1413; 121 Cong. Rec. 37410 (1975) (Sen. Randolph). Noticeably absent from the Act's state-plan requirements is any hint that the plan is intended to allow states to define or limit in any way either the goals or services for children mandated by the other sections. Petitioners' claim to the contrary finds no support in the provisions of the Act.[34]

[34] To the extent petitioners find support in subpart (B) of 20 U.S.C. § 1401(18) (the definition of free appropriate public education) for their theory that the state plan is to define the content of an "appropriate" education, their reliance is misplaced. Subpart (B)'s requirement that special education and related services under the Act "meet the standards of the State educational agency" was included to ensure that the normal accreditation and state-licensing standards that govern the quality of regular education services would apply to special education services as well. Congress heard testimony during the hearings preceding the passage of the bill about special education classes located in basements or in temporary facilities that failed to meet state standards for classroom space and about classes taught by unqualified teachers who were unable to obtain state certification to teach in regular classrooms. *See, e.g.*, Senate Hearings, *supra* note 4, at 45 (Paul Crawford); 409 (Raymond Miller). This provision was intended to end such discriminatory treatment and to ensure that state licensing and accreditation standards would be applied uniformly.

Finally, the Congress contemplated petitioners' need to plan for the cost of meeting the Act's conditions and gave states an extensive period of time during which they could receive federal funds and plan for the provision of services. House Report at 13, 15; Senate Report at 18. During the three- to five-year start-up period, states were supposed to identify handicapped children not being served; assess the kind and number of facilities, personnel and services necessary throughout the state to serve them; and develop and implement a "comprehensive system of personnel development" to train new teachers, retrain existing teachers and provide all teachers with significant information about handicapped children. 20 U.S.C. §§ 1412(2)(C), 1412(2)(A)(iii), and 1413(a)(3). In addition, this period gave states a chance to refine their data on the costs of meeting PL 94-142's requirements.[35] In short, petitioners had ample opportunity to assess the consequences of accepting the federal conditions that accompanied the federal dollars.

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[35] It is misleading for petitioners to point to the high cost of providing respondent a sign-language interpreter as an indication of the cost of serving children with other handicapping conditions or even other deaf children. As Congress recognized, the needs of handicapped children differ widely, both within and among categories, and the corresponding costs of services for these children differ as well. *See, e.g.*, House Report, *supra* note 2, at 11-12. Children with severe disabilities who need the most expensive services are by far the fewest in number. *Id.* Thus, deaf children account for only 6% of all handicapped children as compared, for example, with speech-impaired children, who need the least expensive service, and account for about 30% of all handicapped children. *Id.* Even among deaf children, very few will need sign-language interpreters. *See* Brief *Amicus Curiae* of National Association for the Deaf *et al.*

V. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE BOTH COURTS BELOW APPLIED THE PROPER STANDARD UNDER THE ACT IN DETERMINING THAT RESPONDENT IS ENTITLED TO A SIGN-LANGUAGE INTERPRETER IN HER ACADEMIC CLASSES AND BECAUSE THIS DECISION IS NOT CLEARLY ERRONEOUS.

Review by this Court of the concurring judgments of both the trial court and the court of appeals below should be limited to a determination of (1) whether the courts below applied the proper standard under the Act and (2) whether their conclusion was clearly erroneous.

As discussed in section II of this brief, the statutory standard adopted by the Congress requires flexible application to the facts of the particular case. If this Court finds that evidence as to each of the guiding factors established by the Congress was admitted and weighed in reaching the decision below, the Court should not attempt to decide *de novo* what services are needed to provide respondent an appropriate education. As the court of appeals noted, the decision on the issue presented in this case must be based on a sensitive weighing of multiple factual elements, including evidence concerned with "a particular child, her atypical family, her upbringing and training since birth, and her classroom experience." *Rowley v. Bd. of Ed. of Hendrick Hudson Cent. S.D.*, 632 F.2d 945, 948 (2d Cir. 1980). This Court has recognized that where a statutory standard requires the trial court to weigh "[a] multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each . . . primary weight in this area must be given to the conclusions of the trier of fact." *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 289 (1960). This is especially true where, as here, the impact of the decision below has been strictly limited to the unique facts of respondent's case. *Rowley*, 632 F.2d at 948. Because the courts below applied the proper

standards under the Act and because their findings were not clearly erroneous, this Court should affirm.[36]

First, the district court considered the results of at least five different tests and evaluations of the respondent. Consistent with the provisions of the Act and regulations, the court eschewed reliance on a single test or measure of respondent's ability and needs and, instead, considered auditory speech discrimination test results, intelligence test results and achievement test results. *Rowley*, 483 F. Supp. at 532 (S.D.N.Y. 1980). The court went beyond test scores to evaluate the methods of test administration. 483 F. Supp. at 532 n.6.

Second, the district court heard extensive evidence from experts in the fields of audiology and the education of deaf children. It weighed the evidence presented by experts testifying for plaintiffs and defendants, in light of the witnesses' qualifications and credibility, to decide what constituted accepted professional standards in the education of deaf children. In reaching its decision, the court took into account the largely uncontradicted evidence of respondent's experts concerning professionally accepted methods of deaf education. 483 F. Supp. at 535. It also relied upon evidence tying this information to respondent's unique capabilities and needs. *Id.*

Third, the court reviewed the testimony of respondent's parents concerning respondent's family life and background. Evidence concerning the parents' methods of

[36] To the extent the district court's decision can be read as distilling from PL 94-142 a single, across-the-board standard for all children, *amici* disagree. However, because the district court admitted and carefully evaluated evidence of each of the factors established by Congress, its conclusion as to the goal and services appropriate to meet Amy Rowley's unique needs can and should be affirmed. The court of appeals recognized this and explicitly limited the district court's ruling to a standard that is appropriate only to determine this particular child's needs. 632 F.2d at 948. *See* discussion, *infra*.

addressing their child's handicap was weighed as an important factor in designing an appropriate education. 483 F. Supp. at 529-30.

Fourth, the court accepted the classroom teacher's assessment of respondent's behavior in the classroom and social interaction with other students and weighed this information in reaching its decision. 583 F. Supp. at 531 n.5. Although the court considered the local school's testimony that an interpreter would be disruptive in the class, it ultimately rejected this claim, basing its finding instead upon the testimony of respondent's expert witnesses. 483 F. Supp. at 536.

Finally, the court followed the Act's mandate that services be provided, where possible, in the regular classroom.

Based on all of these factors, then, the court determined that an appropriate education for respondent required the provision of a sign-language interpreter in her academic classes. In light of the evidence below, which showed (1) that Amy Rowley was an extraordinarily bright, energetic and capable child, with the potential to excel in school, (2) that she had a fluency in sign language unusual for a deaf child in second grade, (3) that she missed over 40 percent of verbal communication in the classroom and (4) that she could, with an interpreter, have full access to the regular class program, the lower court's decision was not clearly erroneous.

The court of appeals affirmed the district court's decision, concluding that the trial judge had "weighed and evaluated the evidence with great care" and that the findings of fact were not clearly erroneous. The court of appeals properly limited to the facts of this case the district court's conclusion that respondent was entitled to an interpreter in order "to bring her educational opportunity up to the level of the educational opportunity being offered to her nonhandicapped peers." 632 F.2d at 948, *quoting* 483 F. Supp. at 535. This guideline, although

not proper as an across-the-board standard under the Act, was an appropriate educational objective for respondent, given her potential to excel in school and her unusual facility with sign language.

CONCLUSION

Because both courts below applied the proper standard under the Act to the facts of this case and because their conclusion was not clearly erroneous, *amici* urge this Court to affirm the judgment of the court of appeals.[37]

Respectfully submitted,

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January 30, 1982

Counsel for *amici* gratefully acknowledge the assistance of Robert Senville, Legal Clerk, Mental Health Law Project.

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[37] If the Court questions the particular services ordered for respondent below, the Court should vacate and remand rather than make new findings of fact or reach a strained interpretation of the legal standard. A remand would allow the trial court to take such additional evidence as is necessary in light of this Court's construction of the Act, clear up some evidentiary confusion raised in the courts below, *see id.* at 954-55 (Mansfield, J., dissenting), and provide this Court with guidance from the lower courts on the application of the law to a complex set of facts.

No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF UNITED CEREBRAL PALSY ASSOCIATIONS, INC. and UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., *AMICI CURIAE*

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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF UNITED CEREBRAL PALSY ASSOCIATIONS, INC. and UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., *AMICI CURIAE*

INTEREST OF AMICI CURIAE*

United Cerebral Palsy is a nationwide network of approximately 250 state and local voluntary agencies (UCP affiliates) which provides services, conducts public and professional education and advocacy programs, and supports research about cerebral palsy. The United Cerebral Palsy Associations, Inc.

* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

(UCPA) is the national organization, formed in 1949, to coordinate and assist the affiliates and their over one and a half million volunteers in carrying out these programs.

At the local level, UCP affiliates provide direct services to children and adults with cerebral palsy and their families, including when necessary, special education and related services. On the national level, UCPA serves in an advocacy role for the handicapped in governmental activities, encouraging legislation and federal, state and local programs to benefit those with cerebral palsy and other disabilities.

The express mission of UCP is to involve individuals with cerebral palsy and their families and those with similar service needs in the mainstream of society by assuring their ability to assume their rights as citizens and to receive services as needed. The assurance of an "appropriate education" as contemplated in the Education For All Handicapped Children Act, 20 U.S.C. §§1401 *et seq.* (the "Act"), is an integral part of that mission.

UCP of New York City, Inc. ("UCP/NYC") is the largest UCP affiliate in the State of New York, and has had substantial experience in dealing with the implementation of "appropriate education" under the Act, and in relation to New York State statutes and regulations. UCP/NYC is plaintiff in a major class action litigation involving the provision of appropriate education to approximately 90,000 handicapped students suffering from cerebral palsy and a wide spectrum of other disabilities. *United Cerebral Palsy* v. *Board of Education*, 3 Education of the Handicapped Law Reporter ("E.H.L.R.") 551: 251 (E.D.N.Y. 1979), *aff'd sub nom. Jose P.* v. *Ambach*, F. 2d (2d Cir. January 21, 1982). As such, UCP/NYC both has a direct, immediate interest in the standards for "appropriate education" under the Act at issue in this case, and is in a position to bring to the Court information on its implementation which may not be available from other sources.

STATEMENT

UCPA and UCP/NYC believe that the holding of the Courts below, declaring that Amy Rowley was entitled to the services of

a sign language interpreter as a part of her educational program in the petitioner school district, should be affirmed. In support of this position, UCPA and UCP/NYC join in those parts of the brief of *amici curiae Association for Retarded Citizens of the United States, et al.* that discuss the findings of fact below and that set forth a full analysis of the requirements of the Act and the obligations of the state and local school district in accepting funds thereunder.

UCPA and UCP/NYC respectfully disagree, however, with *amici Association for Retarded Citizens of The United States, et al.* insofar as they suggest that the standard of "appropriate education" that was expressly relied upon by the lower courts "is not a proper across-the-board standard under the Act." This brief is submitted to present the legal basis for UCP's separate views on this critical issue.

SUMMARY OF ARGUMENT

The definition of appropriate education set forth in §1401(18) of the Act incorporates state educational policies and federal substantive and procedural requirements. The federal courts which have been called upon to apply these general criteria to the particular needs of individual handicapped children have articulated and/or applied three specific standards for determining appropriate education: "maximum potential," "commensurate opportunity" and "self-sufficiency."

The "maximum potential" standard, though perhaps desirable in the abstract, could require such enormous expenditures that it cannot realistically be considered consistent with Congressional intent. The "self-sufficiency" standard is inadequate because it relates only to the needs of a limited number of severely disabled children, and provides no guidance whatsoever for the needs of the overwhelming majority of handicapped students covered by the Act, whose needs go beyond self-sufficiency.

The "commensurate opportunity" standard adopted by the courts below is the only one of the proferred approaches which is

consistent with the purposes of the Act and its legislative history. All of the federal Courts of Appeals and most of the District Courts which have considered these issues have adopted this standard or cited it with approval. Consideration of both the actual case law experience to date and implementation issues arising under the Act which might require judicial review in the future, show that the commensurate opportunity standard both assures reasonable fiscal prudence and is judicially manageable.

ARGUMENT

THE "COMMENSURATE OPPORTUNITY" STANDARD FOR DEFINING "APPROPRIATE EDUCATION," ADOPTED BY THE COURTS BELOW, IS THE ONLY STANDARD WHICH IS CONSISTENT WITH THE PURPOSES OF THE ACT AND ITS LEGISLATIVE HISTORY AND RELATES TO THE NEEDS OF ALL HANDICAPPED CHILDREN.

The key requirement of the Education of the Handicapped Act, 20 U.S.C. §1401 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, ("the Act") is that each state and local educational agency receiving federal grants thereunder, assure each handicapped child in the jurisdiction a "free appropriate public education." 20 U.S.C.§§1412(1), 1414(a)(1). Free appropriate public education ("FAPE") is specifically defined in 20 U.S.C. §1401(18) as follows:

> (18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a) (5) of this title.

See also 34 C.F.R. §300.4.

Except for the obligation to provide services "at public expense" (in contrast to prior practice in some states of requiring parents to pay some or all of the costs of educating their children in expensive private schools: *see, e.g., McMillan* v. *Board of Education*, 430 F. 2d 1145 (2d Cir. 1970); *Elliot* v. *Board of Education*, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978)), this broad definition is not self-referent. Rather, it provides a comprehensive framework that draws upon a variety of criteria to combine substantive requirements and flexible particularity to cover the individual needs of millions of children suffering from hundreds of kinds of disabilities. Thus, §1401 (18) specifically incorporates by reference the minimum educational standards of the applicable state law and regulations,* uniform federal substantive requirements contained in the definitions of "special education," and "related services," and specific federal procedures for formulation of the "individualized education program."** The resulting combination of state educational policies, federal substantive standards, and individualized federal planning procedures, should in each case provide education fully "appropriate" to each child's needs.

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* The "standards of the state educational agency" to which §1401 (18)(B) refers would include both minimum standards applicable to regular public school programs in the state (such as teacher certification requirements) and, in addition, specific standards applicable to the needs of the handicapped which some states have enacted in accordance with local policies and educational approaches. (*See, e.g.,* New York State's regulations providing specific maximum class size and age range limitations for each major disability category. 8 N.Y.C.R.R. §200-1.4.)

** The federal definition of "special education" in §1401 (16), incorporated by reference in the definition of FAPE, provides substantive benchmarks requiring state and local education agencies to provide "specially designed instruction ... to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." The additional requirement for the provision of "related services" in §1401 (17) details further explicit substantive requirements for particular services "including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services...."

The reference in §1401(18) to conformity with the "individualized education program," incorporates by reference into FAPE the entire process of formulating an individualized education plan each year designed to respond to the child's particular needs (§1414(a)(5)), and also, by necessary implication, the

Because of the detailed substantive and procedural requirements of the Act, most disputes concerning the appropriateness of a particular child's education are resolved at local school district conferences, or in state level administrative hearings. Where resort to the courts has been necessary, judges have often been able to resolve disputes by applying express provisions of the Act, especially those specifying individualized planning and due process procedures. *See, e.g. Battle* v. *Pennsylvania*, 629 F. 2d 269 (3d Cir. 1980), *cert. denied sub nom. Scanlon* v. *Battle*, 101 S.Ct. 3123 (1981) (blanket policy limiting instructional year to 180 days held inconsistent with individualized process requirements of the Act), *Concerned Parents and Citizens For Continuing Education at Malcolm X* v. *New York City Board of Education*, 629 F. 2d 751 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (transfer of child from one site location to another is not a change in educational placement triggering due process requirements under the Act). At times, however, courts have been presented with issues which require them to render substantive decisions concerning the appropriateness under the Act of the education being offered in particular fact situations.

This kind of judicial scrutiny clearly was contemplated by Congress. Section 1415(e)(2) of the Act creates a private right of action in the federal district courts for any party aggrieved by the result of the state administrative proceedings, regardless of the amount in controversy. Departing from the usual "substantial evidence" standard for judicial review of administrative action

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testing and evaluation that must precede the design of a proper plan (§1412(5)C)) and the administrative hearings and other due process guarantees which may follow (§1415).

The highly limited interpretation of its responsibilities under the Act put forward here by petitioner New York State Education Department ("the content of that education is left to the states" Pet. 33) is inconsistent, on its face, with the definition of free appropriate public education in §1401 (18) which specifically adds to its reference to local state standards, additional substantive federal requirements for "free education," "special education," "related services," and individually designed education. Petitioner's further suggestion (Pet. 62-3) that "appropriate education in the Act refers only to "mainstreaming" requirements for placement in the "appropriate," least restrictive environment, further ignores the comprehensive, substantive definition of FAPE set forth in §1401(18).

(*see, e.g.*, Administrative Procedure Act, 5 U.S.C. §706(2)), §1415(e)(2) directs the federal district court to "hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, ... grant such relief as the court determines is appropriate."*

In this reviewing capacity the district courts have, of necessity, tended to develop judicial standards for evaluating the facts of individual cases in light of the statutory language, Congressional intent and well-considered holdings in analogous cases. *Cf.* Note, "Enforcing the Rights to an Appropriate Education: The Education for All Handicapped Children Act of 1975," 92 Harv. L. Rev. 1103, 1125 (1979).

In the five years that the Act has been in effect, only three such standards have been articulated and applied in decisions of the federal courts.** These three standards may be summarized as follows:

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* Consistent with the indication in the conference committee report, that the court in these cases "shall make an *independent decision based on a preponderance of the evidence*..." S. Conf. Rep. No. 455, 94th Cong., 1st Sess. at 50 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1503 (emphasis added), the courts have uniformly interpreted §1415 to call for independent, *de novo* judicial review. *Anderson* v. *Thompson*, 495 F. Supp. 1256, 1260-61 (E.D. Wis. 1980), *aff'd*, F. 2d, 3 E.H.L.R. 553:105 (7th Cir. 1981); *Town of Burlington* v. *Dept. of Education*, 655 F. 2d 428 (1st Cir. 1981); *Tokarcik* v. *Forest Hills School District*, F. 2d, 3 E.H.L.R. 552:513, 521 (3d Cir. 1981); *Kruelle* v. *New Castle County School District*, 642 F. 2d 687, 692 (3d Cir. 1981); *Ladson* v. *Board of Education*, 3 E.H.L.R. 551:188, 189 (D.D.C. 1979).

** A fourth standard, one calling simply for "opening the doors of the regular classroom to those capable of entering and learning without special assistance" Note, 92 Harv. L. Rev. at 1125, which might be called a "minimum adequacy" standard or an equal "access" theory (Brief of *Amici Curiae* National School Boards Association, *et al.*, 8) is also conceivable.

No judge has advocated and no court has applied such a minimum adequacy standard, however, because it is obviously inconsistent with the explicit purposes of the Act to assure that handicapped children receive a "full educational opportunity" 20 U.S.C. §1401 (16). The "adequate education" standard mentioned and rejected out of hand by Judge Broderick in the District Court below would appear to fit into this category. *See* 483 F. Supp. at 534.

1. *Maximum potential.* "An appropriate education... mean[s] one which enables the handicapped child to achieve his or her full potential."

2. *Commensurate opportunity.* Appropriate education requires that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."

3. *Self-sufficiency.* An appropriate education means "an education for each handicapped child that enables the child to be as free as reasonably possible from dependency on others, and would enable the child to become a productive member of society."

Each of these standards was considered by the courts below. Judge Broderick explicitly rejected the "maximum potential" standard, and specifically adopted the "commensurate opportunity standard", as defined above. 483 F. Supp. at 534. His approach was affirmed by the majority of the panel in the Second Circuit. However, Judge Mansfield, dissenting from the Second Circuit opinion, advocated the "self-sufficiency" standard, as defined above.* 632 F. 2d at 953 (as apparently do the petitioners in this case (Pet. 66)).

Amici curiae respectfully submit that the Court should affirm Judge Broderick's commensurate opportunity standard because, quite simply, it is the only one of the proferred approaches which is consistent with the purposes of the Act** and its legislative history, and is capable of general application. The maximum potential standard, though perhaps desirable in the abstract,

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* The self-sufficiency standard as defined by Judge Mansfield included an additional clause stating that an appropriate education also would "hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates." 632 F.2d at 953. The meaning of this clause in its context is difficult to comprehend. It seems more relevant to Judge Broderick's commensurate opportunity standard than to Judge Mansfield's attempt to define a standard consistent with his view that "[t]he aim of the Act is to develop a handicapped child's self-sufficiency" 632 F. 2d at 952.

** This standard would also appear to be consistent with, if not explicitly required by, the specific language of §1401(18)(C). That provision, in partially defining "appropriate education" in terms of "an appropriate pre-school, elementary, or secondary school education in the State involved" utilizes regular public school education as provided in the particular State as a comparative benchmark for evaluating the propriety of education for the handicapped.

could require such enormous expenditures if widely implemented that it cannot realistically be considered consistent with Congress's intent. The self-sufficiency standard is inadequate because it relates only to the needs of a limited number of disabled children, and provides no guidance whatsoever for the needs of the overwhelming majority of the handicapped students covered by the Act, whose needs go beyond self-sufficiency.

Significantly, not only the Second Circuit, but also the Third, and Eighth Circuits (which constitute all of the federal Courts of Appeals that have considered this question), as well as the overwhelming majority of the district courts – in cases holding for and against plaintiffs – have adopted or cited with approval, the commensurate opportunity standard. *See Springdale School District* v. *Grace,* 656 F. 2d 300, 305 (8th Cir. 1981) ("The *Rowley* standard provides the handicapped child with the opportunity to achieve her full potential but takes into account that such a task is equally fair and feasible only to the extent that such opportunity must be commensurate with the opportunity granted to nonhandicapped in the same system."; *Battle* v. *Pennsylvania,* 629 F. 2d at 277 ("Thus, the Act probably anticipates that, where possible, educational objectives for the handicapped should be set with reference to those objectives established for the nonhandicapped." (*Gladys J.* v. *Pearland Independent School District,* 520 F. Supp, 869, 875 (S.D. Tex. 1981); *Espino* v. *Besteiro,* 520 F. Supp. 905, 912–913 (S.D. Tex. 1981); *Pinkerton* v. *Moye,* 509 F. Supp. 107, 113 (W.D. Va. 1981); *Bales* v. *Clarke,* 523 F. Supp. 1366, 1370 (E.D. Va. 1981); *Hines* v. *Pitt County Board of Education,* 497 F. Supp. 403, 406 (E.D.N.C.1980).

Two district courts have adopted or referred to the maximum potential standard. *Age* v. *Bullitt County Public Schools,* 3 E.H.L.R. 551:505, 506 (W.D. Ky. 1980) ("The Court is persuaded that the intent of the Act is to furnish the optimum in the way of education to those to whom nature has dealt less than a full hand"); *DeWalt* v. *Burkholder,* 3 E.H.L.R. 551:550, 553 (E.D. Va. 1980) ("The Hampton Schools offer Christine the best hope for the future... [and] the most appropriate education.") Most judges, however, have rejected the maximum potential approach in favor of the commensurate opportunity standard largely because of considerations of fiscal prudence:

> An appropriate education is not synonymous with the best possible education. *Springdale School District* v. *Grace,* 494 F. Supp. 266, 272 (W.D. Ark. 1980). It is also not an education which enables a child to achieve his full potential: "even the best public schools lack the resources to enable every child to achieve his full potential." *Rowley* v. *Board of Education,* 483 F. Supp. 528, 534 (S.D.N.Y. 1980). Plaintiff's parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they, nor any other parents have the right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense.

Bales v. *Clarke,* 523 F. Supp at 1370. *See also Pinkerton* v. *Moye,* 509 F. Supp at 113; *Rettig* v. *Kent City School District,* 3 E.H.L.R. 552:503 (N.D. Ohio 1981).

A number of courts have referred to "self-sufficiency" but no court has advocated it as a general standard because all appear to have recognized the critical fact, overlooked by Judge Mansfield in his dissent below, that self-sufficiency as a goal does not relate to all categories of handicapping conditions covered by the Act. Thus, in cases involving extremely low-functioning students such as the severely retarded student in *Campbell* v. *Talladega County Board of Education,* 518 F. Supp. 47 (N.D. Ala. 1981) and the multiply handicapped child in *Gladys J.* v. *Pearland, supra,* the courts have found it helpful to consider the self-sufficiency goal, but they specifically noted that self-sufficiency is a partial standard applicable only to some of the students covered by the Act.* *Campbell,* 518 F. Supp. at 54, *Gladys J.,* 523 F. Supp at 875.

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* Actually, "self-sufficiency" is not a valid general standard even for the severely disabled because for many very low-functioning children, self-sufficiency is not a realistic, attainable goal. Brown, *et al.,* "The Principle of Partial Participation and Individualized Adaptations in Educational Programs for Severely Handicapped Students," in 10 Curricula Strategies for Teaching Severely Handicapped Students Functional Skills in School and Non-School Environments (D. Baumgart, *et al.,* eds. 1980) Brown, *et al.,* "A Strategy for

Judge Mansfield's assumption that Congress's *exclusive* concern was to promote self-sufficiency for handicapped children, an assumption which has been adopted and urged by the petitioners herein (Pet. 66) simply is incorrect. Of course, Congress recognized the needs of many of the severely disabled to strive for self-sufficiency. But its primary purpose was to provide a statutory scheme firmly grounded in broad concepts of equal educational opportunity that would confer benefits on all categories of disabled children. The Third Circuit, analyzing in detail the legislative history on this point, concluded:

> The Education Act embodies a strong federal policy to provide an appropriate education for every handicapped child. Three interrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a publicly-supported equal educational opportunity which it perceived to be mandated by *Brown* v. *Board of Education,* and explicitly guaranteed with respect to the handicapped by two seminal federal cases, *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania* and *Mills* v. *Board of Education.* Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens. Third, Congress acknowledged the need for an expanded federal fiscal role to aid state compliance with the court decisions and to assure protection for the rights of handicapped children.

Kruelle v. *New Castle County School District,* 642 F. 2d at 690–691. (footnotes omitted and emphasis added). *See also Battle* v. *Pennsylvania,* 629 F. 2d at 278–79.

Developing Chronological Age Appropriate and Functional Curricular Content for Severely Handicapped Adolescents and Young Adults," 13 J. Special Educ. 81 (1979); Sontag, Smith & Sailor, "The Severely/Profoundly Handicapped: Who Are They? Where Are We?" 1977 J. Special Educ. 5. To generalize an unattainable goal as a legal standard would tend to certify the failure of any child who could not achieve this goal. It also could prove even more fiscally imprudent than the maximum potential standard, if local school districts were to consider themselves mandated to do everything conceivably possible, at inordinate cost, to pursue unlikely possibilities for "self-sufficiency."

The Senate Committee Report specifically stated a "belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1433 ("the Senate Report"). The theme of extending to the handicapped the equal educational opportunity rights of *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954), articulated in regard to the handicapped in the landmark cases of *Pennsylvania Association for Retarded Children* v. *Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa. 1971), *modified,* 343 F. Supp. 279 (1972), and *Mills* v. *Board of Education,* 348 F. Supp. 866 (D.D.C. 1972) is repeated throughout the Senate Report, *id.* at 6, 9, 17; H.R. Rep. No. 332, 94th Cong., 1st Sess. 3 (1975), ("the House Report"); and in the debates, *see, e.g.,* 121 Cong. Rec. 19485 (1975) (remarks of Sen. Williams); *id.* at 19504, (remarks of Sen. Schweiker); *id.* at 37410 (remarks of Sen. Randolph). This goal to "assure equal protection of the law" for handicapped children was specifically incorporated in the statutory statement of purpose adopted with the Act, Pub. L. No. 94-142, §3 (a), 89 Stat. 775 (1975).

The Congressional insistence on providing a "full educational opportunity to *all* handicapped children" 20 U.S.C. §1412(2)(A)(i) (emphasis added) reflected a Congressional concern with the complex, variegated needs of all the handicapped, which go well beyond "self-sufficiency." Representative Quie specifically articulated this understanding in the House debate:

> [A]ll handicapped children are not the same. Children often have unique problems. Not all blind children need the same special program; many can be educated in regular classrooms with some assistance from readers and special braille textbooks; others are trained in special segregated classrooms or institutions.... Also it is difficult to make a judgment simply on the basis of the word 'handicapped' because a deaf child may require far more services, specialized personnel, training, and equipment than a retarded child. A child with cerebral palsy may, in addition to the CP problems have hearing and visual problems; however, not all

CP children have all of these problems; many are gifted..."

121 Cong. Rec. 23707 (1975)*

Both the House and Senate Reports referred to estimates of approximately 6 to 8 million children who would be considered handicapped under the definitions in the Act; the majority of these children, suffering from disabilities such as speech impairment, emotional disturbance and learning disabilities, were "self-sufficient" but needed special education services to receive a meaningful education.**

* Some of the types of services beyond "self-sufficiency" which higher functioning students would be expected to need were spelled out in the report of the House Committee on Education and Labor, which emphasized "physical education, exercise, and participation in sports," "artistic and cultural programs" and "extracurricular activities... such as 4-H, young business clubs, production and selling." House Report at 9-10.

** House Report at 11, Senate Report at 8. The reports discussed statistics from the Bureau of the Education for the Handicapped estimating the prevalence of each major category of handicapping condition. These breakdowns show that the incidence of mild disabilities such as speech impairment, learning disability, and emotional disturbance was substantially higher than the incidence of severe disabling categories such as multiple handicaps and severe mental retardation, to which self-sufficiency concepts would be relevant:

	Prevalence	Number of Children 5 to 17 yrs.
Visually handicapped	0.1	51,800
Deaf	.75	38,900
Hard of hearing	.5	259,000
Speech handicapped	3.5	1,813,000
Crippled and other health impaired	.5	259,000
Emotionally disturbed	2.0	1,026,000
Mentally retarded	2.3	1,185,400
Learning disabilities	3.0	1,554,000
Multiple handicapped	.06	31,000
Total	12.035	6,218,200

(House Report at 11)

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, and a prime sponsor of the bill, presented during the Senate debates a state-by-state summary of the number of children who were receiving an "inappropriate" education at the time. "Inappropriateness" was repeatedly defined in terms of "not receiving a public education designed to meet their needs" and not receiving "a meaningful public education." These findings referred to millions of unserved and under-served children from all disability categories. 121 Cong. Rec. 19486-19492. *See also, e.g., id.* at 19502 (remarks of Sen. Cranston); *id.* at 19504 (remarks of Sen. Mondale); *id.,* (remarks of Sen. Humphrey); *id.* at 23704 (remarks of Rep. Brademas)

The definition of "handicapped" included in §1401(1)* specifically incorporates the full range of disabilities and conclusively demonstrates Congress' intent to cover the needs of all the handicapped. The "self-sufficiency standard" relates only to a small fraction of the population included in the definition under the Act; clearly it is inconsistent with the Congressional intent.

The commensurate opportunity standard adopted by the courts below is the only interpretation of the "appropriate education" requirements of the Act advanced by any court or regulatory agency** that is broad enough to supply rules of decision for disputes involving handicapping conditions across the full spectrum of disabilities and yet is delimited enough to keep the results within the bounds of fiscal prudence. Actual experience with this standard not only in this case, but also in the other recent cases cited above shows that it is judicially manageable. The standard, while requiring special education geared to the individual child's needs, also is sensitive to the fiscal realities of a particular school district (*see Mills, supra,* 348 F. Supp. at 876) and reasonably permits a range of cost differentials – from a few dollars for supplementary large-type books for the mildly visually impaired to more expensive services which are required at least temporarily, for students like Amy Rowley***.

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* "The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

** HEW regulations implementing §504 of the Rehabilitation Act of 1973, 29 USC. §794, cited below at 483 F. Supp. 533, define appropriate education as "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." 45 C.F.R. §84.33(b)(1), recodified as 34 C.F.R. §104.33(b)(1). Regulations issued under one statute are, of course, relevant to the interpretation of another closely connected statute. Note also that in this situation, the regulations under the Handicapped Act in effect at the time of the District Court decision below explicitly required that each state's annual plan include an assurance that the program be operated in accordance with the 504 Regulations. *See* 45 C.F.R. §121a.150 (1979).

*** The average costs experienced by school boards throughout the country in implementing the appropriate education requirements of the Act (under the generally prevalent commensurate opportunity standard) appear to be well within the range anticipated by Congress at the time of the passage of the Act.

Most of the petitioners' criticism of the commensurate opportunity standard is actually a misdirected attack on the "maximum potential" standard that was already rejected by the courts below*. The petitioners' only direct criticism of the commensurate opportunity standard focuses on the alleged difficulty of measuring the "potential and shortfall from potential of the handicapped and non-handicapped children in a given population." (Pet. 70). On the facts of the present case, Judge Broderick determined, and the Court of Appeals agreed, that the record presented sufficient objective measures (achievement, I.Q., and auditory speech discrimination tests) to permit a quantitative expression of Amy's shortfall as compared with opportunities available to her peers. It may be that such quantitative measures may not be available or may be difficult to apply in other cases. But invocation of the commensurate opportunity standard need not be (and, indeed, has not been – see cases cited *supra* at 9) dependent upon the availability of specific quantitative measurements.**

The Congressional reports and debates repeatedly cited figures anticipating that the cost of educating a handicapped child, on average, would be 1.9 times the cost of educating the non-handicapped. *See, e.g.,* House Report, at 12; *see also* 121 Cong Rec. 23703 (remarks of Rep. Brademas); *id.* at 23706 (remarks of Rep. Perkins); *id.* at 37418 (remarks of Sen. Biden); *id.* at 37420 (remarks of Sen. Hathaway). The latest available figures show that in 1980, the average nationwide *per capita* supplemental cost for special education was $1900 (U.S. Dept. of Education, U.S. Office of Special Education and Rehabilitation Services, "Second Annual Report to Congress on Implementation of Public Law 94-142; The Education for All Handicapped Children Act," p. 20, Table 1.1 (1980)). This $1900 supplement, considered in relation to the average nationwide *per capita* expenditure for non-handicapped children in 1980 of $2,230 (National Center for Educational Statistics, U.S. Dept. of Education, "Statistics of Public School Systems, Fall 1980" (Early Release), p. 5) represents a cost ratio of 1.85, slightly below the ratio anticipated by the Congress.

* *See, e.g.,* Pet. 47 ("scheme of unlimited liability"); *id.* at 65, 72 ("opportunity for full potential"). *See also* Brief of *Amici Curiae,* National School Boards Association, *et al.,* 9, 24, 26.

** Although some language in the District Court decision below might be read to imply that quantitative measurement is a *sine qua non* for application of the commensurate opportunity standard in all cases, such statements were clearly *dicta,* which was not necessary for the holding in this case, and was not incorporated in the Second Circuit's affirmance.

Without reference to quantitative testing measurements, the commensurate opportunity standard clearly incorporates important comparative benchmarks for judicial review. For example, the standard is directly relevant to the following specific issues which have arisen in recent years in administrative hearings and court cases in which *amici curiae* have been involved:

* *Hours of instruction.* In New York State, all non-handicapped children at the elementary school level receive a minimum of five hours of instruction per day. But some programs for handicapped children provide only three or four hours of instruction per day.

* *Delays in placement.* Non-handicapped students newly enrolling in public schools are generally placed in specific class assignments on the first day of a new term or very shortly thereafter. In many cases, however, handicapped children are not placed until months after school opens, even if all their tests and evaluations have been fully completed.

* *Curriculum standards.* Curriculum standards for self-contained special education programs sometimes are maintained on a simplified, low-functioning level, even though many children assigned to these classes are capable of absorbing the same level of curriculum materials as non-handicapped (in some cases, of course, with supplemental instructional equipment or aids).

* *Enrichment activities.* Handicapped students are often excluded from participation in basic school enrichment activities such as assembly programs, library instruction, and after-school clubs and activities.

In each of these situations, a board of education would be required, under the commensurate opportunity standard, to explain practices which deny to handicapped children specific opportunities that the district makes available to the non-handicapped. Although in come cases, proferred justifications will need to be considered (as, for example, whether an "instructional lunch" period may reasonably be substituted for classroom instruction time), the comparative perspective of commensurate opportunity

provides a concrete framework for judicial review*, a framework which clearly is lacking in self-sufficiency, or any other standard which has been proposed. Case law precedents emerging under the standard, both in the clear-cut situations like those listed above, and from more complex cases of children with unusual special needs as in *Espino, supra,* will further enable the courts, where necessary, to assure the provision of an "appropriate education," consistent with the purposes of the Act, which is tailored to the individual needs of each child.

In short, the commensurate opportunity standard adopted by the courts below is the only meaningful and effective standard for judicial review which has been presented to the Court.

CONCLUSION

For all the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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* In most situations where these issues have arisen to date, they have been settled by negotiations between the parties or at administrative hearings, primarily through application of a perhaps unstated, but usually implicit, commensurate opportunity approach. *See, e.g., Jose P* v. *Ambach* 3 E.H.L.R. 551:245, 3 E.H.L.R. 551:412 (E.D.N.Y. 1979); *United Cerebral Palsy of New York* v. *Board of Education,* 3 E.H.L.R. 551:251 (E.D.N.Y. 1979), *consolidated appeals aff'd,* F. 2d (2d Cir. January 21, 1982). It would seem, in fact, that the very clarity and ease of applicability of the commensurate opportunity standard promotes settlement and administrative resolution of these issues and tends to limit the number of cases brought to the courts under §1415(e)(2).

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February 2, 1982

Ms. Jane Yohalem
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2021 L Street NW, Suite 800
Washington DC

Re: Board of Education v. Amy Rowley et. al.
Brief of Amici Curiae

Dear Ms. ~~Yohalem~~ Jane:

Enclosed is a copy of our brief amici curiae which was filed with the United States Supreme Court last week.

I would very much appreciate receiving a copy of your brief.

I have sent copies of our brief to: The Justice Department, National Center for Law and the Deaf, National School Board Association, and the New York School Board Association. I would appreciate your giving me the names and addresses of other groups who have filed briefs and who should receive a copy of our brief.

Sincerely yours,

Michael A. Rebell

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