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CASE NO. 1: Rights of Students With Disabilities to an Education

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN

v.

COMMONWEALTH OF PENNSYLVANIA

United States District Court, E. D. Pennsylvania, 1972

343 F. Supp. 279

OPINION, ORDER AND INJUNCTION

MASTERSON, District Judge.

This civil rights case, a class action, was brought by the Pennsylvania Association for Retarded Children and the parents of thirteen individual retarded children on behalf of all mentally retarded persons between the ages 6 and 21 whom the Commonwealth of Pennsylvania, through its local school districts and intermediate units, is presently excluding from a program of education and training in the public schools. Named as **defendants** are the Commonwealth of Pennsylvania, Secretary of Welfare, State Board of Education and thirteen individual school districts scattered throughout the Commonwealth. In addition, plaintiffs have joined all other school districts in the Commonwealth as class defendants of which the named districts are said to be representative.

> The exclusions of retarded children complained of are based upon four State statutes: (1) . . . which relieves the State Board of Education from any obligation to educate a child whom a public school psychologist certifies as uneducable and untrainable. The burden of caring for such a child then shifts to the Department of Welfare which has no obligation to provide any educational services for the child; (2) . . . which allows an indefinite postponement of admission to public school of any child who has not attained a mental age of five years; (3) . . . which appears to excuse any child from compulsory school attendance whom a psychologist finds unable to profit therefrom and (4) . . . which defines compulsory school age as 8 to 17 years but has been used in practice to postpone admissions of retarded children until 8 or to eliminate them from public schools at age 17 . . .

. . . [T]he parties agreed upon a Stipulation which basically provides that no child who is mentally retarded or thought to be mentally retarded can be assigned initially (or re-assigned) to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer. At that hearing, parents have the right to representation by counsel, to examine their child's records, to compel the attendance of school officials who may have relevant evidence to offer, to cross-examine witnesses testifying on behalf of school officials and to introduce evidence of their own. . . .

. . . [T]he parties submitted a Consent Agreement to this Court which, along with the . . . Stipulation, would settle the entire case. Essentially, this Agreement deals with the four state statutes in an effort to eliminate the alleged equal protection problems. As a proposed cure, the defendants agreed, that since "the Commonwealth of Pennsylvania has undertaken to provide a free public education for all of its children between the ages of six and twenty-one years" . . . therefore, "it is the Commonwealth's obligation to place each mentally retarded child in a *free, public program of education and training appropriate to the child's capacity*. . . ."

The lengthy Consent Agreement concludes by stating that "[e]very retarded person between the ages of six and twenty-one shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than *September 1, 1972*. . . ." Finally, and perhaps most importantly, the Agreement states that:

AUTHORS' NOTE: In this case, as in others, the authors have left the language in the original opinions unchanged. Thus, while terms such as *handicapped* are no longer used today, they are preserved so as to reflect historical accuracy.

"The defendants shall formulate and submit . . . *a plan to be effectuated by September 1, 1972,* to commence or recommence a free public program of education and training for all mentally retarded persons . . . aged between four and twenty-one years as of the date of this Order, and for all mentally retarded persons of such ages hereafter. The plan shall specify the range of programs of education and training, there [*sic*] kind and number, necessary to provide an appropriate program of education and training to all mentally retarded children, where they shall be conducted, arrangements for their financing, and, if additional teachers are found to be necessary, the plan shall specify recruitment, hiring, and training arrangements. . . ."

Thus, if all goes according to plan, Pennsylvania should be providing a meaningful program of education and training to every retarded child in the Commonwealth by September, 1972. . . .

Notes

1. Although *PARC* dealt only with the right to an education for students who suffered from mental retardation it is considered a landmark case. Why is this decision important for students with other types of disabilities?
2. The fact that this dispute was settled by a stipulation and consent agreement indicates that the Commonwealth of Pennsylvania accepted its obligation to provide appropriate educational opportunities for its students with disabilities. Compare this to the following case, in which the District of Columbia claimed that it did not have the resources to educate its students with disabilities properly.

CASE NO. 2: Establishment of Due Process Rights for Students With Disabilities

MILLS

v.

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA

United States District Court, District of Columbia, 1972

348 F. Supp. 866

MEMORANDUM OPINION, JUDGMENT AND DECREE

WADDY, District Judge.

This is a **civil action** brought on behalf of seven children of school age by their next friends in which they seek a declaration of rights and to enjoin the defendants from excluding them from the District of Columbia Public Schools and/or denying them publicly supported education and to compel the defendants to provide them with immediate and adequate education and educational facilities in the public schools or alternative placement at public expense. They also seek additional and ancillary relief to effectuate the primary relief. They allege that although they can profit from an education either in regular classrooms with supportive services or in special classes adopted to their needs, they have been labeled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive, and denied admission to the public schools or excluded therefrom after admission, with no provision for alternative educational placement or periodic review. . . .

The defendants are the Board of Education of the District of Columbia and its members, the Superintendent of Schools for the District of Columbia and subordinate school officials, the Commissioner of the District of Columbia and certain subordinate officials and the District of Columbia.

The Problem

The genesis of this case is found (1) in the failure of the District of Columbia to provide publicly supported education and training to plaintiffs and other "exceptional" children, members of their class, and (2) the excluding, suspending, expelling, reassigning and transferring of "exceptional" children from regular public school classes without affording them due process of law.

The problem of providing special education for "exceptional" children (mentally retarded, emotionally disturbed, physically handicapped, hyperactive and other children with behavioral problems) is one of major proportions in the District of Columbia. The precise number of such children cannot be stated because the District has continuously failed to comply with Section 31–208 of the District of Columbia Code which requires a census of all children aged 3 to 18 in the District to be taken. Plaintiffs estimate that there are " . . . 22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children, and perhaps as many as 18,000 of these children are not being furnished with programs of specialized education." According to data prepared by the Board of Education, . . . the District of Columbia provides publicly supported special education programs of various descriptions to at least 3880 school age children. However, in a 1971 report to the Department of Health, Education and Welfare, the District of Columbia Public Schools admitted that an estimated 12,340 handicapped children were not to be served in the 1971–72 school year. . . .

There Is No Genuine Issue of Material Fact

. . . Defendants have admitted in these proceedings that they are under an affirmative duty to provide plaintiffs and their class with publicly supported education suited to each child's needs, including special education and tuition grants, and also, a constitutionally adequate prior hearing and periodic review. They have also admitted that they failed to supply plaintiffs with such publicly supported education and have failed to afford them adequate prior hearing and periodic review. . . .

Plaintiffs Are Entitled to Relief

Plaintiffs' entitlement to relief in this case is clear. The applicable statutes and regulations and the Constitution of the United States require it. . . .

Thus the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child. By failing to provide plaintiffs and their class the publicly supported specialized education to which they are entitled, the Board of Education violates the . . . statutes and its own regulations.

The Constitution—Equal Protection and Due Process

The Supreme Court in Brown v. Board of Education stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.* (emphasis supplied)

. . . Not only are plaintiffs and their class denied the publicly supported education to which they are entitled many are suspended or expelled from regular schooling or specialized instruction or reassigned without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination of [*sic*] classification into a special program.

The Defense

The Answer of the defendants to the Complaint contains the following:

> "These defendants say that it is impossible to afford plaintiffs the relief they request unless:
>
> (a) The Congress of the United States appropriates millions of dollars to improve special education services in the District of Columbia; or
>
> (b) These defendants divert millions of dollars from funds already specifically appropriated for other educational services in order to improve special educational services. These defendants suggest that to do so would violate an Act of Congress and would be inequitable to children outside the alleged plaintiff class."

This Court is not persuaded by that contention.

The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publiclysupported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds. . . . [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs

and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

Implementation of Judgment

This Court has pointed out that Section 31–201 of the District of Columbia Code requires that every person residing in the District of Columbia ". . . who has custody or control of a child between the ages of seven and sixteen years shall cause said child to be regularly instructed in a public school or in a private or parochial school or instructed privately. . . ." It is the responsibility of the Board of Education to provide the opportunities and facilities for such instruction.

The Court has determined that the Board likewise has the responsibility for implementation of the judgment and decree of this Court in this case. Section 31–103 of the District of Columbia Code clearly places this responsibility upon the Board. It provides:

"The Board shall determine all questions of general policy relating to the schools, shall appoint the executive officers hereinafter provided for, define their duties, and direct expenditures."

Judgment and Decree

Plaintiffs having filed their verified complaint seeking an injunction and declaration of rights as set forth more fully in the verified complaint and the prayer for relief contained therein; and having moved this Court for summary judgment pursuant to [the rules of civil procedure], and this Court having reviewed the record of this cause . . . it is hereby ordered, adjudged and decreed that summary judgment in favor of plaintiffs and against defendants be, and hereby is, granted, and judgment is entered in this action as follows:

1. That no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative.

2. The defendants, their officers, agents, servants, employees, and attorneys and all those in active concert or participation with them are hereby enjoined from maintaining, enforcing or otherwise continuing in effect any and all rules, policies and practices which exclude plaintiffs and the members of the class they represent from a regular public school assignment without providing them at public expense (a) adequate and immediate alternative education or tuition grants, consistent with their needs, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress and the adequacy of any educational alternatives; and it is further ORDERED that:

3. The District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment. Furthermore, defendants shall not exclude any child resident in the District of Columbia from such publicly-supported education on the basis of a claim of insufficient resources.

4. Defendants shall not suspend a child from the public schools for disciplinary reasons for any period in excess of two days without affording him a hearing pursuant to the provisions of Paragraph 13.f., below, and without providing for his education during the period of any such suspension.

5. Defendants shall provide each identified member of plaintiff class with a publicly-supported education suited to his needs within thirty (30) days of the entry of this order. With regard to children who later come to the attention of any defendant, within twenty (20) days after he becomes known, the evaluation (case study approach) called for in paragraph 9 below shall be completed and within 30 days after completion of the evaluation, placement shall be made so as to provide the child with a publicly supported education suited to his needs.

In either case, if the education to be provided is not of a kind generally available during the summer vacation, the thirty-day limit may be extended for children evaluated during summer months to allow their educational programs to begin at the opening of school in September.

6. Defendants shall cause announcements and notices to be placed in the Washington Post, Washington Star-Daily News, and the Afro-American, in all issues published for a three week period commencing within five (5) days of the entry of this order, and thereafter at quarterly intervals, and shall cause spot announcements to be made on television and radio stations for twenty (20) consecutive days,

commencing within five (5) days of the entry of this order, and thereafter at quarterly intervals, advising residents of the District of Columbia that all children, regardless of any handicap or other disability, have a right to a publicly-supported education suited to their needs, and informing the parents or guardians of such children of the procedures required to enroll their children in an appropriate educational program. Such announcements should include the listing of a special answering service telephone number to be established by defendants in order to (a) compile the names, addresses, phone numbers of such children who are presently not attending school and (b) provide further information to their parents or guardians as to the procedures required to enroll their children in an appropriate educational program.

7. Within twenty-five (25) days of the entry of this order, defendants shall file with the Clerk of this Court, an up-to-date list showing, for every additional identified child, the name of the child's parent or guardian, the child's name, age, address and telephone number, the date of his suspension, expulsion, exclusion or denial of placement and, without attributing a particular characteristic to any specific child, a breakdown of such list, showing the alleged causal characteristics for such nonattendance (e. g., educable mentally retarded, trainable mentally retarded, emotionally disturbed, specific learning disability, crippled/other health impaired, hearing impaired, visually impaired, multiple handicapped) and the number of children possessing each such alleged characteristic.

8. Notice of this order shall be given by defendants to the parent or guardian of each child resident in the District of Columbia who is now, or was during the 1971–72 school year or the 1970–71 school year, excluded, suspended or expelled from publicly-supported educational programs or otherwise denied a full and suitable publicly-supported education for any period in excess of two days. Such notice shall include a statement that each such child has the right to receive a free educational assessment and to be placed in a publicly-supported educational program suited to his needs. Such notice shall be sent by registered mail within five (5) days of the entry of this order, or within five (5) days after such child first becomes known to any defendant. Provision of notification for non-reading parents or guardians will be made.

9. a. Defendants shall utilize public or private agencies to evaluate the educational needs of all identified "exceptional" children and, within twenty (20) days of the entry of this order, shall file with the Clerk of this Court their proposal for each individual placement in a suitable educational program, including the provision of compensatory educational services where required.

b. Defendants, within twenty (20) days of the entry of this order, shall, also submit such proposals to each parent or guardian of such child, respectively, along with a notification that if they object to such proposed placement within a period of time to be fixed by the parties or by the Court, they may have their objection heard by a Hearing Officer in accordance with procedures required in Paragraph 13.e., below.

10. a. Within forty-five (45) days of the entry of this order, defendants shall file with the Clerk of the Court, with copy to plaintiffs' counsel, a comprehensive plan which provides for the identification, notification, assessment, and placement of class members. Such plan shall state the nature and extent of efforts which defendants have undertaken or propose to undertake to

(1) describe the curriculum, educational objectives, teacher qualifications, and ancillary services for the publicly-supported educational programs to be provided to class members; and,

(2) formulate general plans of compensatory education suitable to class members in order to overcome the present effects of prior educational deprivations,

(3) institute any additional steps and proposed modifications designed to implement the matters decreed in paragraph 5 through 7 hereof and other requirements of this judgment.

11. The defendants shall make an interim report to this Court on their performance within forty-five (45) days of the entry of this order. Such report shall show:

(1) The adequacy of Defendants' implementation of plans to identify, locate, evaluate and give notice to all members of the class.

(2) The number of class members who have been placed, and the nature of their placements.

(3) The number of contested hearings before the Hearing Officers, if any, and the findings and determinations resulting therefrom.

12. Within forty-five (45) days of the entry of this order, defendants shall file with this Court a report showing the expunction from or correction of all official records of any plaintiff with regard to past expulsions, suspensions, or exclusions effected in violation of the procedural rights set forth in Paragraph 13 together with a plan for procedures pursuant to which parents, guardians, or their counsel may attach to such students' records any clarifying or explanatory information which the parent, guardian or counsel may deem appropriate.

13. Hearing Procedures.

a. Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

b. Before placing a member of the class in such a program, defendants shall notify his parent or guardian of the proposed educational placement, the reasons therefor, and the right to a hearing before a Hearing Officer if there is an objection to the placement proposed. Any such hearing shall be held in accordance with the provisions of Paragraph 13.e., below.

c. Hereinafter, children who are residents of the District of Columbia and are thought by any of the defendants, or by officials, parents or guardians, to be in need of a program of special education, shall neither be placed in, transferred from or to, nor denied placement in such a program unless defendants shall have first notified their parents or guardians of such proposed placement, transfer or denial, the reasons therefor, and of the right to a hearing before a Hearing Officer if there is an objection to the placement, transfer or denial of placement. Any such hearings shall be held in accordance with the provisions of Paragraph 13.e., below.

d. Defendants shall not, on grounds of discipline, cause the exclusion, suspension, expulsion, postponement, interschool transfer, or any other denial of access to regular instruction in the public schools to any child for more than two days without first notifying the child's parent or guardian of such proposed action, the reasons therefor, and of the hearing before a Hearing Officer in accordance with the provisions of Paragraph 13.f., below.

e. Whenever defendants take action regarding a child's placement, denial of placement, or transfer, as described in Paragraphs 13.b. or 13.c., above, the following procedures shall be followed.

(1) Notice required hereinbefore shall be given in writing by registered mail to the parent or guardian of the child.

(2) Such notice shall:

(a) describe the proposed action in detail;

(b) clearly state the specific and complete reasons for the proposed action, including the specification of any tests or reports upon which such action is proposed;

(c) describe any alternative educational opportunities available on a permanent or temporary basis;

(d) inform the parent or guardian of the right to object to the proposed action at a hearing before the Hearing Officer;

(e) inform the parent or guardian that the child is eligible to receive, at no charge, the services of a federally or locally funded diagnostic center for an independent medical, psychological and educational evaluation and shall specify the name, address and telephone number of an appropriate local diagnostic center;

(f) inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child's school records before the hearing, including any tests or reports upon which the proposed action may be based, to present evidence, including expert medical, psychological and educational testimony; and, to confront and crossexamine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action was based.

(3) The hearing shall be at a time and place reasonably convenient to such parent or guardian.

(4) The hearing shall be scheduled not sooner than twenty (20) days waivable by parent or child, nor later than forty-five (45) days after receipt of a request from the parent or guardian.

(5) The hearing shall be a closed hearing unless the parent or guardian requests an open hearing.

(6) The child shall have the right to a representative of his own choosing, including legal counsel. If a child is unable, through financial inability, to retain counsel, defendants shall advise child's parents or guardians of available voluntary legal assistance including the Neighborhood Legal Services Organization, the Legal Aid Society, the Young Lawyers Section of the D. C. Bar Association, or from some other organization.

(7) The decision of the Hearing Officer shall be based solely upon the evidence presented at the hearing.

(8) Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.

(9) A tape recording or other record of the hearing shall be made and transcribed and, upon request, made available to the parent or guardian or his representative.

(10) At a reasonable time prior to the hearing, the parent or guardian, or his counsel, shall be given access to all public school system and other public office records pertaining to the child, including any tests or reports upon which the proposed action may be based.

(11) The **independent Hearing Officer** shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System.

(12) The parent or guardian, or his representative, shall have the right to have the attendance of any official, employee or agent of the public school system or any public employee who may have evidence upon which the proposed action may be based and to confront, and to crossexamine any witness testifying for the public school system.

(13) The parent or guardian, or his representative, shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(14) Within thirty (30) days after the hearing, the Hearing Officer shall render a decision in writing. Such decision shall include findings of fact and conclusions of law and shall be filed with the Board of Education and the Department of Human Resources and sent by registered mail to the parent or guardian and his counsel.

(15) Pending a determination by the Hearing Officer, defendants shall take no action described in Paragraphs 13.b. or 13.c., above, if the child's parent or guardian objects to such action. Such objection must be in writing and postmarked within five (5) days of the date of receipt of notification hereinabove described.

f. Whenever defendants propose to take action described in Paragraph 13.d., above, the following procedures shall be followed.

(1) Notice required hereinabove shall be given in writing and shall be delivered in person or by registered mail to both the child and his parent or guardian.

(2) Such notice shall

(a) describe the proposed disciplinary action in detail, including the duration thereof;

(b) state specific, clear and full reasons for the proposed action, including the specification of the alleged act upon which the disciplinary action is to be based and the reference to the regulation subsection under which such action is proposed;

(c) describe alternative educational opportunities to be available to the child during the proposed suspension period;

(d) inform the child and the parent or guardian of the time and place at which the hearing shall take place;

(e) inform the parent or guardian that if the child is thought by the parent or guardian to require special education services, that such child is eligible to receive, at no charge, the services of a public or private agency for a diagnostic medical, psychological or educational evaluation;

(f) inform the child and his parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child's school records before the hearing, including any tests or reports upon which the proposed action may be based; to present evidence of his own; and to confront and cross-examine any witnesses or any school officials, employees or agents who may have evidence upon which the proposed action may be based.

(3) The hearing shall be at a time and place reasonably convenient to such parent or guardian.

(4) The hearing shall take place within four (4) school days of the date upon which written notice is given, and may be postponed at the request of the child's parent or guardian for no more than five (5) additional school days where necessary for preparation.

(5) The hearing shall be a closed hearing unless the child, his parent or guardian requests an open hearing.

(6) The child is guaranteed the right to a representative of his own choosing, including legal counsel. If a child is unable, through financial inability, to retain counsel, defendants shall advise child's parents or guardians of available voluntary legal assistance including the Neighborhood Legal Services Organization, the Legal Aid Society, the Young Lawyers Section of the D. C. Bar Association, or from some other organization.

(7) The decision of the Hearing Officer shall be based solely upon the evidence presented at the hearing.

(8) Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any disposition and of the alternative educational opportunity to be provided during any suspension.

(9) A tape recording or other record of the hearing shall be made and transcribed and, upon request, made available to the parent or guardian or his representative.

(10) At a reasonable time prior to the hearing, the parent or guardian, or the child's counsel or representative, shall be given access to all records of the public school system and any other public office pertaining to the child, including any tests or reports upon which the proposed action may be based.

(11) The independent Hearing Officer shall be an employee of the District of Columbia, but shall not be an officer, employee or agent of the Public School System.

(12) The parent or guardian, or the child's counsel or representative, shall have the right to have the attendance of any public employee who may have evidence upon which the proposed action may be based and to confront and to cross-examine any witness testifying for the public school system.

(13) The parent or guardian, or the child's counsel or representative, shall have the right to present evidence and testimony.

(14) Pending the hearing and receipt of notification of the decision, there shall be no change in the child's educational placement unless the principal (responsible to the Superintendent) shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others. In such exceptional cases, the principal shall be responsible for insuring that the child receives some form of educational assistance and/or diagnostic examination during the interim period prior to the hearing.

(15) No finding that disciplinary action is warranted shall be made unless the Hearing Officer first finds, by clear and convincing evidence, that the child committed a prohibited act upon which the proposed disciplinary action is based. After this finding has been made, the Hearing Officer shall take such disciplinary action as he shall deem appropriate. This action shall not be more severe than that recommended by the school official initiating the suspension proceedings.

(16) No suspension shall continue for longer than ten (10) school days after the date of the hearing, or until the end of the school year, whichever comes first. In such cases, the principal (responsible to the Superintendent) shall be responsible for insuring that the child receives some form of educational assistance and/or diagnostic examination during the suspension period.

(17) If the Hearing Officer determines that disciplinary action is not warranted, all school records of the proposed disciplinary action, including those relating to the incidents upon which such proposed action was predicated, shall be destroyed.

(18) If the Hearing Officer determines that disciplinary action is warranted, he shall give written notification of his findings and of the child's right to appeal his decision to the Board of Education, to the child, the parent or guardian, and the counsel or representative of the child, within three (3) days of such determination.

(19) An appeal from the decision of the Hearing Officer shall be heard by the Student Life and Community Involvement Committee of the Board of Education which shall provide the child and his parent or guardian with the opportunity for an oral hearing, at which the child may be represented by legal counsel, to review the findings of the Hearing Officer. At the conclusion of such hearing, the Committee shall determine the appropriateness of and may modify such decision. However, in no event may such Committee impose added or more severe restrictions on the child.

14. Whenever the foregoing provisions require notice to a parent or guardian, and the child in question has no parent or duly appointed guardian, notice is to be given to any adult with whom the child is actually living, as well as to the child himself, and every effort will be made to assure that no child's rights are denied for lack of a parent or duly appointed guardian. Again provision for such notice to non-readers will be made.

15. Jurisdiction of this matter is retained to allow for implementation, modification and enforcement of this Judgment and Decree as may be required.

Notes

1. The plaintiffs in *Mills* estimated that as many as 18,000 of the District of Columbia's 22,000 students with disabilities were not receiving specialized educational services. In today's world that would be unconscionable, but sadly, in 1972 it was not that unusual.
2. The Board of Education in *Mills* basically claimed that it could not afford to provide the required services to give the plaintiffs the relief they sought. The court responded that the available funds needed to be expended equitably so that students with disabilities would not be disproportionately deprived of an equal educational opportunity. How does this decision compare with other equal educational opportunity opinions?
3. Many legal commentators have expressed the view that *Mills* laid the groundwork for the elaborate due process provisions that were included in the IDEA. Compare the due process procedures outlined in this decision with those currently included in § 1415 of the IDEA. What are the similarities and differences?

CASE NO. 3: Zero Reject

TIMOTHY W.

v.

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT

United States Court of Appeals, First Circuit,1989

875 F.2d 954

BOWNES, Circuit Judge.

Plaintiff-appellant Timothy W. appeals an order of the district court which held that under the Education for All Handicapped Children Act [now IDEA], a handicapped child is not eligible for special education if he cannot benefit from that education, and that Timothy W., a severely retarded and multiply handicapped child was not eligible under that standard. We reverse.

I. Background

Timothy W. was born two months prematurely on December 8, 1975 with severe respiratory problems, and shortly thereafter experienced an intracranial hemorrhage, subdural effusions, seizures, hydrocephalus, and meningitis. As a result,Timothy is multiply handicapped and profoundly mentally retarded. He suffers from complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder and cortical blindness. His mother attempted to obtain appropriate services for him, and while he did receive some services from the Rochester Child Development Center, he did not receive any educational program from the Rochester School District when he became of school age.

On February 19, 1980, the Rochester School District convened a meeting to decide if Timothy was considered educationally handicapped under the state and federal statutes, thereby entitling him to special education and related services. . . . The school district adjourned without making a finding. In a meeting on March 7, 1980, the school district decided that Timothy was not educationally handicapped—that since his handicap was so severe he was not "capable of benefitting" from an education, and therefore was not entitled to one. During 1981 and 1982, the school district did not provide Timothy with any educational program.

In May, 1982, the New Hampshire Department of Education reviewed the Rochester School District's special education programs and made a finding of non-compliance, stating that the school district was not allowed to use "capable of benefitting" as a criterion for eligibility. No action was taken in response to this finding until one year later, on June 20, 1983, when the school district met to discuss Timothy's case. . . . The school district, however, continued its refusal to provide Timothy with any educational program or services.

In response to a letter from Timothy's attorney, on January 17, 1984, the school district's placement team met. . . . The placement team recommended that Timothy be placed at the Child Development Center so that he could be provided with a special education program. The Rochester School Board, however, refused to authorize the placement team's recommendation to provide educational services for Timothy, contending that it still needed more information. The school district's request to have Timothy be given a neurological evaluation, including a CAT Scan, was refused by his mother.

On April 24, 1984, Timothy filed a complaint with the New Hampshire Department of Education requesting that he be placed in an educational program immediately. On October 9, 1984, the Department of Education issued an order requiring the school district to place him, within five days, in an educational program, until the appeals process on the issue of whether Timothy was educationally handicapped was completed. The school district, however, refused to make any such educational placement. On October 31, 1984, the school district filed an appeal of the order. There was also a meeting on November 8, 1984, in which the Rochester School Board reviewed Timothy's case and concluded he was not eligible for special education.

On November 17, 1984, Timothy filed a complaint in the United States District Court, . . . alleging that his rights under the Education for All Handicapped Children Act [now IDEA] . . . , the corresponding New Hampshire state law (RSA 186-C), § 504 of the Rehabilitation Act

of 1973 . . ., and the equal protection and due process clauses of the United States and New Hampshire Constitutions, had been violated by the Rochester School District. The complaint sought preliminary and permanent injunctions directing the school district to provide him with special education, and $175,000 in damages.

A hearing was held in the district court on December 21, 1984. . . . On January 3, 1985, the district court denied Timothy's motion for a preliminary injunction, and on January 8, stated it would abstain on the damage claim pending exhaustion of the state administrative procedures.

In September, 1986, Timothy again requested a special education program. In October, 1986, the school district continued to refuse to provide him with such a program, claiming it still needed more information. Various evaluations were done at the behest of the school district. . . .

On May 20, 1987, the district court found that Timothy had not exhausted his state administrative remedies before the New Hampshire Department of Education, and precluded pretrial discovery until this had been done. On September 15, 1987, the hearing officer in the administrative hearings ruled that Timothy's capacity to benefit was not a legally permissible standard for determining his eligibility to receive a public education, and that the Rochester School District must provide him with an education. The Rochester School District, on November 12, 1987, appealed this decision to the United States District Court by filing a counterclaim, and on March 29, 1988, moved for summary judgment. Timothy filed a cross motion for summary judgment. . . .

On July 15, 1988, the district court rendered its opinion. . . . It first ruled that "under EAHCA [the Education for All Handicapped Children Act], an initial determination as to the child's ability to benefit from special education, must be made in order for a handicapped child to qualify for education under the Act." After noting that the New Hampshire statute (RSA 186-C) was intended to implement the EAHCA, the court held: "Under New Hampshire law, an initial decision must be made concerning the ability of a handicapped child to benefit from special education before an entitlement to the education can exist." The court then . . . found that "Timothy W. is not capable of benefitting from special education. . . . As a result, the defendant [school district] is not obligated to provide special education under either EAHCA [the federal statute] or RSA 186-C [the New Hampshire statute]." Timothy W. has appealed this order. . . .

The primary issue is whether the district court erred in its rulings of law. Since we find that it did, we do not review its findings of fact.

II. The Language of the Act

A. The Plain Meaning of the Act Mandates a Public Education for All Handicapped Children

The Education for All Handicapped Children Act, [hereinafter the Act], . . . was enacted in 1975 to ensure that handicapped children receive an education which is appropriate to their unique needs. In assessing the plain meaning of the Act, we first look to its title: The Education for *All* Handicapped Children Act. (Emphasis added). . . . Congress concluded that "State and local educational agencies have a responsibility to provide education for *all* handicapped children. . . ." (emphasis added). . . . The Act's stated purpose was "to assure that *all* handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, . . . [and] to assist states and localities to provide for the education of *all* handicapped children . . . (emphasis added).

The Act's mandatory provisions require that for a state to qualify for financial assistance, it must have "in effect a policy that assures *all* handicapped children the right to a free appropriate education." . . . The state must "set forth in detail the policies and procedures which the State will undertake . . . to assure that—there is established a goal of providing full educational opportunity to *all* handicapped children . . ., [and 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 for *all* handicapped children between the ages of three and twenty-one . . . not later than September 1, 1980" (emphasis added). The state must also assure that "*all* children residing in the State who are handicapped, *regardless of the severity of their handicap,* and who are in need of special education and related services are identified, located, and evaluated . . ." (emphasis added) . . . The Act further requires a state to:

> *establish[ ] priorities* for providing a free appropriate public education to *all* handicapped children, . . . first with respect to handicapped children who are not receiving an education, and second *with respect to handicapped children, within each disability, with the most severe handicaps* who are receiving an inadequate education . . . (emphasis added). . . .

Thus, not only are severely handicapped children not excluded from the Act, but the most severely handicapped are actually given *priority* under the Act. . . .

The language of the Act could not be more unequivocal. The statute is permeated with the words "*all* handicapped children" whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed, as indicated *supra,* the Act gives priority to the most severely handicapped. Nor is there any language whatsoever which requires as a prerequisite to being covered by the Act, that a handicapped child must demonstrate that he or she will "benefit" from the educational program. Rather, the Act speaks of the

state's responsibility to design a special education and related services program that will meet the unique "needs" of all handicapped children. The language of the Act in its entirety makes clear that a "zero-reject" policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is to ever again be subjected to the deplorable state of affairs which existed at the time of the Act's passage, in which millions of handicapped children received inadequate education or none at all. In summary, the Act mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might attain.

B. Timothy W.: A Handicapped Child Entitled to An Appropriate Education

Given that the Act's language mandates that all handicapped children are entitled to a free appropriate education, we must next inquire if Timothy W. is a handicapped child, and if he is, what constitutes an appropriate education to meet his unique needs.

(1) handicapped children:

The implementing regulations define handicapped children as "being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services." . . . "Mentally retarded" is described as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance." . . . "Multi-handicapped" is defined as "concomitant impairments (such as mentally retarded—blind, mentally retarded—orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments." . . .

There is no question that Timothy W. fits within the Act's definition of a handicapped child: he is multiply handicapped and profoundly mentally retarded. He has been described as suffering from severe spasticity, cerebral palsy, brain damage, joint contractures, cortical blindness, is not ambulatory, and is quadriplegic.

(2) appropriate public education:

The Act and the implementing regulations define a "free appropriate public education" to mean "special education and related services which are provided at public expense . . . [and] are provided in conformity with an individualized education program." . . .

The record shows that Timothy W. is a severely handicapped and profoundly retarded child in need of special education and related services. Much of the expert testimony was to the effect that he is aware of his surrounding environment, makes or attempts to make purposeful movements, responds to tactile stimulation, responds to his mother's voice and touch, recognizes familiar voices, responds to noises, and parts his lips when spoon fed. The record contains testimony that Timothy W.'s needs include sensory stimulation, physical therapy, improved head control, socialization, consistency in responding to sound sources, and partial participation in eating. The educational consultants who drafted Timothy's individualized education program recommended that Timothy's special education program should include goals and objectives in the areas of motor control, communication, socialization, daily living skills, and recreation. The special education and related services that have been recommended to meet Timothy W.'s needs fit well within the statutory and regulatory definitions of the Act.

We conclude that the Act's language dictates the holding that Timothy W. is a handicapped child who is in need of special education and related services because of his handicaps. He must, therefore, according to the Act, be provided with such an educational program. There is nothing in the Act's language which even remotely supports the district court's conclusion that "under [the Act], an initial determination as to a child's ability to benefit from special education, must be made in order for a handicapped child to qualify for education under the Act." The language of the Act is directly to the contrary: a school district has a duty to provide an educational program for every handicapped child in the district, regardless of the severity of the handicap.

III. Legislative History

An examination of the legislative history reveals that Congress intended the Act to provide a public education for all handicapped children, without exception; that the most severely handicapped were in fact to be given priority attention; and that an educational benefit was neither guaranteed nor required as a prerequisite for a child to receive such education. These factors were central, and were repeated over and over again, in the more than three years of congressional hearings and debates, which culminated in passage of the 1975 Act. . . .

Moreover, the legislative history is unambiguous that the primary purpose of the Act was to remedy the then current state of affairs, and provide a public education for *all* handicapped children. . . .

A. Priority For The Most Severely Handicapped

Not only did Congress intend that all handicapped children be educated, it expressly indicated its intent that the most severely handicapped be given priority. This resolve was reiterated over and over again in the floor debates and congressional reports, as well as in the final legislation. . . .

This priority reflected congressional acceptance of the thesis that early educational intervention was very important for severely handicapped children. . . .

If the order of the district court denying Timothy W. the benefits of the Act were to be implemented, he would be classified by the Act as in even greater need for receiving educational services than a severely multi-handicapped child receiving inadequate education. He would be in the *highest priority*—as a child who was not receiving any education at all.

B. Guarantees of Educational Benefit Are Not A Requirement For Child Eligibility

In mandating a public education for all handicapped children, Congress explicitly faced the issue of the possibility of the non-educability of the most severely handicapped. . . .

Thus, the district court's major holding, that proof of an educational benefit is a prerequisite before a handicapped child is entitled to a public education, is specifically belied, not only by the statutory language, but by the legislative history as well. We have not found in the Act's voluminous legislative history, nor has the school district directed our attention to, a single affirmative averment to support a benefit/eligibility requirement. But there is explicit evidence of a contrary congressional intent, that *no* guarantee of any particular educational outcome is required for a child to be eligible for public education.

We sum up. In the more than three years of legislative history leading to passage of the 1975 Act, covering House and Senate floor debates, hearings, and Congressional reports, the Congressional intention is unequivocal: Public education is to be provided to all handicapped children, unconditionally and without exception. It encompasses a universal right, and is not predicated upon any type of guarantees that the child will benefit from the special education and services before he or she is considered eligible to receive such education. Congress explicitly recognized the particular plight and special needs of the severely handicapped, and rather than excluding them from the Act's coverage, gave them priority status. The district court's holding is directly contradicted by the Act's legislative history, as well as the statutory language.

C. Subsequent Amendments to the Act

In the 14 years since passage of the Act, it has been amended four times. Congress thus has had ample opportunity to clarify any language originally used, or to make any modifications that it chose. Congress has not only repeatedly reaffirmed the original intent of the Act, to educate all handicapped children regardless of the severity of their handicap, and to give priority attention to the most severely handicapped, it has in fact *expanded* the provisions covering the most severely handicapped children. Most significantly, Congress has never intimated that a benefit/eligibility requirement was to be instituted. . . .

In summary, the Congressional reaffirmation of its intent to educate all handicapped children could not be any clearer. It was unequivocal at the time of passage of the Act in 1975, and it has been equally unequivocal during the intervening years. The school district's attempt in the instant case to "roll back" the entire thrust of this legislation completely ignores the overwhelming congressional consensus on this issue.

IV. Case Law

A. Cases Relied on in the Act

In its deliberations over the Act, Congress relied heavily on two landmark cases, Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC) and Mills v. Board of Education of the District of Columbia which established the principle that exclusion from public education of any handicapped child is unconstitutional. . . .

B. All Handicapped Children are Entitled to a Public Education

Subsequent to the enactment of the Act, the courts have continued to embrace the principle that all handicapped children are entitled to a public education, and have consistently interpreted the Act as embodying this principle. . . .

C. Education is Broadly Defined

The courts have also made it clear that education for the severely handicapped under the Act is to be broadly defined. . . .

In the instant case, the district court's conclusion that education must be measured by the acquirement of traditional "cognitive skills" has no basis whatsoever in the 14 years of case law since the passage of the Act. All other courts have consistently held that education under the Act encompasses a wide spectrum of training, and that for the severely handicapped it may include the most elemental of life skills.

D. Proof of Benefit is Not Required

The district court relied heavily on *Rowley* in concluding that as a matter of law a child is not entitled to a public education unless he or she can benefit from it. The district court, however, has misconstrued *Rowley.* In that case, the Supreme Court held that a deaf child, who was an above average student and was advancing from grade to grade in a regular public school classroom, and who was already receiving substantial specialized instruction and related services, was not entitled, in addition, to a full time sign-language interpreter, because she was already benefitting from the special education and services she was receiving. The Court held that the school district was not required to *maximize* her educational achievement. It stated, "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, . . . the child is receiving a 'free appropriate public education' as defined by the Act," . . . , and that "certainly the language of the statute contains no requirement . . . that States maximize the potential of handicapped children." . . .

Rowley focused on the *level* of services and the quality of programs that a *state* must provide, not the criteria for *access* to those programs. . . . The Court's use of "benefit" in *Rowley* was a substantive limitation placed on the state's choice of an educational program; it was not a license for the state to exclude certain handicapped children. In ruling that a state was not required to provide the maximum benefit possible, the Court was *not* saying that there must be proof that a child will benefit before the state is obligated to provide any education at all. Indeed, the Court in *Rowley* explicitly acknowledged Congress' intent to ensure public education to all handicapped children without regard to the level of achievement that they might attain. . . .

Rowley simply does not lend support to the district court's finding of a benefit/eligibility standard in the Act. As the Court explained, while the Act does not require a school to maximize a child's potential for learning, it does provide a "basic floor of opportunity" for the handicapped, consisting of "*access* to specialized instruction and related services" . . . (emphasis added). Nowhere does the Court imply that such a "floor" contains a trap door for the severely handicapped. Indeed, *Rowley* explicitly states:"[t]he Act requires special educational services for children 'regardless of the severity of their handicap,'" . . . , and "[t]he Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied." . . .

And most recently, the Supreme Court, in *Honig v. Doe* has made it quite clear that it will not rewrite the language of the Act to include exceptions which are not there. The Court, relying on the plain language and legislative history of the Act, ruled that dangerous and disruptive disabled children were not excluded from the requirement of [the IDEA], that a child "shall remain in the then current educational placement" pending any proceedings, unless the parents consent to a change. The Court rejected the argument that Congress could not possibly have meant to allow dangerous children to remain in the classroom. The analogous holding by the district court in the instant case—that Congress could not possibly have meant to "legislate futility," i.e. to educate children who could not benefit from it—falls for the reasons stated in *Honig.* The Court concluded that the language and legislative history of the Act was unequivocal in its mandate to educate all handicapped children, with no exceptions. The statute "means what it says," and the Court was "not at liberty to engraft onto the statute an exception Congress chose not to create." . . . As Justice Brennan stated: "We think it clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students . . . from school" . . . (emphasis in original). Such a stricture applies with equal force to the case of Timothy W., where the school is attempting to employ its unilateral authority to exclude a disabled student that it deems "uneducable."

The district court in the instant case, is, as far as we know, the only court in the 14 years subsequent to passage of the Act, to hold that a handicapped child was not entitled to a public education under the Act because he could not benefit from the education. This holding is contrary to the language of the Act, its legislative history, and the case law.

V. Conclusion

The statutory language of the Act, its legislative history, and the case law construing it, mandate that all handicapped children, regardless of the severity of their handicap, are entitled to a public education. The district court erred in requiring a benefit/eligibility test as a prerequisite to implicating the Act. School districts cannot avoid the provisions of the Act by returning to the practices that were widespread prior to the Act's passage, and which indeed were the impetus for the Act's passage, of unilaterally excluding certain handicapped children from a public education on the ground that they are uneducable.

The law explicitly recognizes that education for the severely handicapped is to be broadly defined, to include not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs. The only question for the school district to determine, in conjunction with the child's parents, is what constitutes an

appropriate individualized education program (IEP) for the handicapped child. We emphasize that the phrase "appropriate individualized education program" cannot be interpreted, as the school district has done, to mean "no educational program." . . .

The judgment of the district court is reversed, judgment shall issue for Timothy W. The case is remanded to the district court which shall retain jurisdiction until a suitable individualized education program (IEP) for Timothy W. is effectuated by the school district. Timothy W. is entitled to an interim special educational placement until a final IEP is developed and agreed upon by the parties. The district court shall also determine the question of damages. . . .

Notes

1. The trial court in *Timothy W.* relied on *Rowley*'s educational-benefit analysis to pronounce that a child who could not benefit from education was not entitled to services under the federal special education law. Why was the court's reliance on *Rowley* misplaced?
2. Many students with severe disabilities require expensive special education and related services. Should the cost of services be a factor in a school board's decision regarding what services it will provide to these students? Why? Should school boards be able to use cost-benefit analysis in evaluating whether to provide expensive services? Why?

CASE NO. 4: On-Site Services at a Religious School

ZOBREST

v.

CATALINA FOOTHILLS SCHOOL DISTRICT

Supreme Court of the United States, 1993

509 U.S. 1

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner James Zobrest, who has been deaf since birth, asked respondent school district to provide a sign-language interpreter to accompany him to classes at a Roman Catholic high school in Tucson, Arizona, pursuant to the Individuals with Disabilities Education Act (IDEA), . . . , and its Arizona counterpart, . . . The United States Court of Appeals for the Ninth Circuit decided, however, that provision of such a publicly employed interpreter would violate the Establishment Clause of the First Amendment. We hold that the Establishment Clause does not bar the school district from providing the requested interpreter.

James Zobrest attended grades one through five in a school for the deaf, and grades six through eight in a public school operated by respondent. While he attended public school, respondent furnished him with a sign-language interpreter. For religious reasons, James' parents . . . enrolled him for the ninth grade in Salpointe Catholic High School, a sectarian institution. When petitioners requested that respondent supply James with an interpreter at Salpointe, respondent referred the matter to the county attorney, who concluded that providing an interpreter on the school's premises would violate the United States Constitution. . . . Pursuant to [state law], the question next was referred to the Arizona attorney general, who concurred in the county attorney's opinion. . . . Respondent accordingly declined to provide the requested interpreter.

Petitioners then instituted this action in the United States District Court for the District of Arizona under [the IDEA], which grants the district courts jurisdiction over disputes regarding the services due disabled children under the IDEA. Petitioners asserted that the IDEA and the Free Exercise Clause of the First Amendment require respondent to provide James with an interpreter at Salpointe, and that the Establishment Clause does not bar such relief. The complaint sought a preliminary injunction and "such other and further relief as the Court deems just and proper." . . . The District Court denied petitioners' request for a preliminary injunction, finding that the provision of an interpreter at Salpointe would likely offend the Establishment Clause. . . . The court thereafter granted respondent summary judgment, on the ground that "[t]he interpreter would act as a conduit for the religious inculcation of James—thereby, promoting James' religious development at government expense." . . . "That kind of entanglement of church and state," the District Court concluded, "is not allowed."

The Court of Appeals affirmed by a divided vote, . . . applying the three-part test announced in *Lemon v. Kurtzman.* It first found that the IDEA has a clear secular purpose: " 'to assist States and Localities to provide for the education of all handicapped children.' . . . "Turning to the second prong of the *Lemon* inquiry, though, the Court of Essential Concepts and School-Based Cases in Special Education Law Appeals determined that the IDEA, if applied as petitioners proposed, would have the primary effect of advancing religion and thus would run afoul of the Establishment Clause. "By placing its employee in the sectarian school," the Court of Appeals reasoned, "the government would create the appearance that it was a 'joint sponsor' of the school's activities." . . . This, the court held, would create the "symbolic union of government and religion" found impermissible in *School Dist. of Grand Rapids v. Ball.* In contrast, the dissenting judge argued that "[g]eneral welfare programs neutrally available to all children," such as the IDEA, pass constitutional muster, "because their benefits diffuse over the entire population." . . . We granted certiorari . . . and now reverse.

Respondent has raised in its brief in opposition to certiorari and in isolated passages in its brief on the merits several issues unrelated to the Establishment Clause question. Respondent first argues that . . . a regulation promulgated under the IDEA, precludes it from using federal funds to provide an interpreter to James at Salpointe. . . . In the alternative, respondent claims that even if there is no affirmative bar to the

relief, it is not *required* by statute or regulation to furnish interpreters to students at sectarian schools. . . . And respondent adds that providing such a service would offend Art. II, § 12, of the Arizona Constitution. . . .

We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." . . . For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." . . . Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

. . . The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. . . . When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," . . . [I]t follows under our prior decisions that provision of that service does not offend the Establishment Clause. . . . [U]nder the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers. The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the disabled child's tuition—and that is, of course, assuming that the school makes a profit on each student; that, without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.

. . . [T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. Notwithstanding the Court of Appeals' intimations to the contrary, . . . the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance. Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to "transmit everything that is said in exactly the same way it was intended." . . . James' parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause.

The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign-language interpreter there in order to facilitate his education. The judgment of the Court of Appeals is therefore

Reversed.

Notes

1. School boards are often willing to provide special education and related services to private school students within public school settings under dual enrollment arrangements. However, the services of a sign-language interpreter can only be provided on-site. How does this affect a board's ability to provide services to a group of students with similar disabilities? Should this be a factor in a board's decision regarding what services it will provide to students who are enrolled in private schools?
2. *Zobrest* makes it clear that school boards may provide services on-site in religious schools. Are boards required to do so? What if boards provide on-site services to students attending non-sectarian private schools?
3. Although the sign-language interpreter in *Zobrest* could, and most likely would, have interpreted religious content along with the secular material in the student's instruction, the majority did not see this as a problem because the interpreter would not have originated the religious message but would only have conveyed it, much in the manner of a tape or video recorder. The majority saw this as a permissible action under the Establishment Clause. Would the result have been different if the student was visually impaired and requested the services of a public school employee to transcribe written materials, including materials that had a religious content?

CASE NO. 5: Draft IEP Does Not Violate the IDEA

BLACKMON

v.

SPRINGFIELD R-XII SCHOOL DISTRICT

United States Court of Appeals, Eighth Circuit, 1999

198 F.3d 648

TUNHEIM, J.

Grace Blackmon ("Grace") brought claims against the School District of Springfield, R-12 (the "School District") under the Individuals with Disabilities Education Act, . . . (the "IDEA"), alleging that the individual education program ("IEP") offered to her by the School District was not reasonably calculated to provide her with a free, appropriate, public education. Grace's parents requested an impartial due process hearing for a determination of their claims pursuant to [the IDEA]. The administrative hearing panel determined that the IEP offered to Grace was appropriate, and further determined that the alternative IEP advocated by Grace's parents was inappropriate. The hearing panel also found that the School District committed no procedural violations in developing an IEP for Grace. Grace's parents appealed the hearing panel's decision to the United States District Court for the Western District of Missouri. The district court reversed the hearing panel's determinations on December 4, 1998 and ordered the School District to reimburse Grace's parents for their expenses in educating her. By Order dated January 6, 1999, the district court further awarded attorney's fees to Grace and her parents. The School District appeals from both of the district court's orders. We reverse.

I

. . . Physicians have diagnosed Grace as suffering from a severe, diffuse, bilateral brain injury with hypotonic and autistic behaviors. The School District does not dispute that Grace is developmentally disabled and thus entitled to the protections and benefits of the IDEA.

When Grace was approximately fifteen months old, her parents enrolled her in a program designed to evaluate and treat her disabilities called the "First Steps" program. The "First Steps" program is operated by the Springfield Regional Center, a division of the Department of Mental Health, and is not in any way affiliated with the School District. Under this program Grace received speech and occupational therapy for four to five months, and received physical therapy for approximately ten months. Grace's parent's describe the program's approach as "traditional." Although Grace showed no significant improvement in fine motor skills based on the four to five months of occupational therapy she received, she made improvements in other areas, including significant progress in her gross motor skills.

Grace's parents were dissatisfied with her progress in the First Steps program and discontinued her enrollment on September 6, 1995. They thereafter enrolled her in an alternative program that they had been researching that is promoted by an organization called the Institutes for the Achievement of Human Potential (the "Institutes"). The Institutes advocates an intensive, home-based training program requiring individualized therapy taught by a child's parents for twelve hours per day. The Institutes's program centers around the theory that stimulation of the brain, by repetitious activity and increased supplies of oxygen and carbon dioxide, will facilitate its growth. The Institutes's methodology is controversial and has been criticized in a number of medical journals.

. . . The Institutes conducted an evaluation of Grace and provided her parents with a plan for her development. The program requires Grace's parents to keep detailed records of her daily activities, and to travel to Philadelphia for an assessment once every six months. Between visits, Grace's parents provide her with individualized therapy for twelve hours per day based on techniques they have learned through the Institutes's literature and through training provided to them during visits to Philadelphia. Grace's communication and gross motor skills have improved significantly during her treatment under the Institutes's program, and her parents are satisfied with her progress.

When Grace was three years old, and thus old enough to receive benefits under the IDEA, her parents contacted the School District and requested that it pay for the cost of training her under the Institutes's program. The School District informed them that it would need to evaluate Grace before making a determination regarding her education placement. The School District thereafter scheduled an evaluation for Grace and provided her parents with a copy of the procedural safeguards for parents and children set forth under the IDEA, as required by [the IDEA]. The School District put together a team of six employees who evaluated Grace and observed her on two separate occasions. . . . At the conclusion of the evaluation process, the School District produced a twenty-five page "diagnostic summary" of Grace's health, skills and abilities. Although Grace's parents disagreed with parts of the diagnostic summary, and although they were aware of their statutory right to request an independent evaluation of Grace, . . . they did not seek an independent evaluation or request that the School District otherwise reevaluate her.

After completing Grace's diagnostic summary, the School District held a conference with her parents to review the diagnostic summary and to develop an IEP for her. Grace's parents and five School District employees attended the conference, which was held on December 10, 1996. Prior to the meeting, the School District prepared a proposed IEP for Grace with sections pertaining to Grace's "present level of performance" and "goals and objectives" tentatively completed. At the meeting, the School District went through each of these sections item-by-item with Grace's parents and asked them whether they agreed with the proposed statements. Grace's parents in general indicated their agreement.

The School District then engaged in a discussion with Grace's parents about her appropriate placement. The School District indicated that it recommend Grace be placed in a "reverse mainstream" classroom and that she additionally receive individualized speech, occupational and physical therapies. In addition to this option, the School District also discussed with Grace's parents the possibility that the School District would provide Grace with in-home individualized training, as well as the proposal that Grace's parents advocated, namely, that the School District reimburse them for Grace's in-home training through the Institutes. The School District nevertheless rejected these options because they would not provide Grace with the ability to interact with other children.

When Grace's parents learned of the School District's recommendation they became upset and left the IEP meeting before a discussion of Grace's placement could be completed. In a letter to the School District dated December 25, 1996, Grace's parents revealed that they were upset because the School District did not recommend the Institutes's program, stating:

> [W]e thought the evaluators were simply going through the formalities before announcing that they thought our work with the Institutes was the ideal educational plan for Grace and we had their total support. . . . So, when the evaluators recommended the same program (we're pretty confident of this) for Grace they would have recommended before ever meeting us, we were totally outraged (and still are).

The School District provided Grace's parents with a written statement on December 11, 1996 confirming its decision to offer Grace education in a reverse mainstream classroom along with individualized speech, occupational and physical therapies. The School District further provided Grace's parents with another notice of the procedural safeguards under the IDEA. Subsequent efforts to resolve the differences between the School District and Grace's parents were unsuccessful. On December 20, 1996, the School District held an informal resolution conference with Grace's parents at its administrative offices that did not result in an agreement between the parties.

On January 3, 1997, Grace's parents exercised their rights under the IDEA to request an impartial due process hearing. . . .

During the due process hearing, Grace's parents raised as issues for the hearing panel's consideration whether the School District's proposed IEP met the requirements of the IDEA, whether their alternative IEP met the requirements of the IDEA, the amount that the School District should be required to reimburse them for Grace's education, if any, and whether the School District should pay the attorney's fees that they had expended. Grace's parents did not challenge the School District's compliance with the IDEA's procedural requirements. Indeed, their attorney explicitly volunteered:

> I want to say to you gentlemen that the parents through their counsel has [sic] told the School District that they do not want this panel to decide this matter in favor of their child because of the School District's procedural violations, rather they want the decision based upon the merits of the IEPs put before them.

Later, counsel for the School District directly asked counsel for Grace's parents, if he did not intend to raise procedural issues in the case, whether he intended on behalf of Grace's parents to waive any violations that he perceived to exist. Counsel for Grace's parents responded,"I will." Based on these statements, the hearing panel determined that Grace's parents had waived any procedural violations that might exist. The hearing panel further determined that Grace's parents had presented no evidence of procedural violations. The hearing panel issued its decision against Grace's parents and in favor of the School District on all issues on September 12, 1997. . . .

III. Procedural Claims

A. Waiver

Grace's parents argued to the district court that the School District deprived them of their procedural rights under the IDEA by failing to afford them an opportunity to participate equally in the development of Grace's IEP at the IEP meeting. The district court sustained their challenge and reversed the hearing panel's determination that the School District committed no procedural violations in handling Grace's claims. In so doing, the court rejected the School District's argument that Grace waived any existing procedural claims at the administrative due process hearing. The court acknowledged that Grace's counsel "did profess to waive 'procedural violations' in his opening statement at the due process hearing." Nevertheless, the court noted that in a post-hearing brief Grace's counsel argued that he did not intend to waive all procedural issues, but only procedural "technicalities," such as forms of notice, dates, times and places of the due process proceedings. Upon reviewing the administrative record the court also found that Grace's parents offered testimony at the due process hearing regarding the conduct of school district personnel during the IEP meeting. The court determined that this testimony was inconsistent with the hearing panel's conclusion that Grace's parents waived procedural objections to the manner in which the School District conducted the meeting. We disagree.

It is difficult to imagine how Grace's counsel could have set forth her parents' intent to waive their procedural objections more clearly. . . . Thus, we conclude that Grace's parents did not properly raise at the administrative level the issue of whether the School District permitted them to participate sufficiently in the development of her IEP. . . .

B. Procedural Compliance

Even assuming that Grace's parents had properly raised their procedural objection to the administrative hearing panel, the record does not support the district court's conclusion that the School District's IEP should be set aside on the ground that it deprived Grace's parents of their procedural rights. Procedural deficiencies in the development of a child's IEP warrant rejecting the IEP only if they "compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits." . . . Such circumstances are not present in this case.

Grace's parents concede that the School District provided them with proper notice of their procedural rights under the IDEA, that it gave them sufficient opportunities to review Grace's records, that it provided them with notice of the IEP meeting's date and purpose, that it invited them to attend that meeting, and that they signed the IEP, either before or after the meeting, to indicate their participation in developing it.

They nevertheless assert that the School District failed to provide them with a meaningful opportunity to participate in the development of Grace's IEP. They specifically contend that the School District inappropriately drafted Grace's IEP in their absence, that they did not subjectively understand the purpose of the IEP meeting, and that the School District imposed its proposal on them at the IEP meeting as passive listeners without soliciting their input.

The record does not support reversing the hearing panel's decision on these grounds. The fact that the School District developed an unfinished draft of Grace's IEP in advance of the meeting is not cause for concern, as nothing in the IDEA or its regulations prohibits a school district from coming to an IEP meeting with tentative recommendations for its development prepared in the parents' absence. . . . Moreover, the record shows that School District personnel reviewed the pre-drafted "present level of performance" and "goals and objectives" sections of the IEP with Grace's parents carefully and asked whether they agreed with the statements contained therein.

Grace's parents argue that they did not understand that in giving their agreement they were participating in the development of her IEP. This misunderstanding is unfortunate, however, Grace's parents have not shown that it was caused by any wrongdoing on the part of the School District. When, as in this case, a school district provides parents with proper notice explaining the purpose of the IEP meeting, the meeting is conducted in a language that the parents can understand, . . . the parents are of normal intelligence, and they do not ask questions or otherwise express their confusion about the proceedings, the school district's failure to apprehend and rectify that confusion does not constitute a violation of the IDEA's procedural requirements.

More importantly, the main point of contention between Grace's parents and the School District arises not from the development of the "present level of performance" and "goals and objectives" portions of her IEP, but from the School District's placement recommendation. Grace's parents admit that they did not attend the IEP meeting with the expectation that the parties would consider the available options and develop a plan for Grace together, but rather, with the expectation that the School District without discussion would agree to reimburse them for their costs in educating Grace at home through the Institutes's program. Their disillusionment upon learning that the School District recommended a different course of action angered them and they abruptly terminated the meeting before the parties could reach a resolution to their conflicting proposals. In so doing, Grace's parents truncated their own procedural right to contribute to the development of her IEP. The School District cannot be faulted for failing to engage in an open discussion with Grace's parents about alternative options for her placement, when the parents themselves refused to participate in a discussion with the School District at the first hint of disagreement with the plan they advocated.

A school district's obligation under the IDEA to permit parental participation in the development of a child's educational plan should not be trivialized. . . . Nevertheless, the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives. In this case, the record shows that the School District considered both the possibility of providing Grace with in-home instruction and the possibility of reimbursing her parents for the cost of educating her at home through the Institutes, but rejected these options on the ground that they would not provide her with sufficient interaction with other children. The School District's adherence to this decision does not constitute a procedural violation of the IDEA simply because it did not grant Grace's parents' request. For these reasons we agree with the hearing panel's determination that the School District did not deprive Grace's parents of their procedural rights. . . .

Notes

1. While school personnel may come to IEP meetings with draft IEPs, they must be exactly that, drafts. The courts frown on any attempts by school personnel to present finalized IEPs to parents, even if they are called drafts. What actions did school personnel take in this case that convinced the court that their IEP truly was a draft?
2. The parents here left the IEP meeting when it was apparent to them that school personnel were proposing a placement that was not what they wanted. In doing so, did the parents waive any right to further input into the process?
3. Did school personnel here adhere to all other procedural requirements in the development of the IEP?

CASE NO. 6: Graduation Is a Change in Placement

STOCK

v.

MASSACHUSETTS HOSPITAL SCHOOL

Supreme Judicial Court of Massachusetts, 1984

467 N.E.2d 448

NOLAN, Justice.

The plaintiff, Richard Stock, has appealed the entry of summary judgment in favor of the defendants in the Superior Court. We allowed Stock's motion for direct appellate review. We hold that allowance of the defendants' motion for summary judgment was error, and we remand the case to the Superior Court.

1. *Factual background and prior proceedings.* Richard Stock, age 21, suffers from multiple cognitive and motor disabilities which are the result of a brain tumor and chemotherapy-radiation treatments received for that tumor at the age of ten. He also manifests emotional and behavioral difficulties which are concomitant with his physical condition. For the most part, he is confined to a wheelchair. At times he has demonstrated academic abilities ranging from the fourth through the ninth grade level. At the time he was awarded a high school diploma, a psychologist's evaluation indicated that his abilities were consistently below the norm for his age group and were consonant with brain damage.

At the age of fourteen, Stock entered the Massachusetts Hospital School, where he received special education services at the Brayton High School. In the fall of 1980, Stock's teachers met to formulate his Individualized Educational Plan (IEP) for the 1980–81 school year. The teachers intended that Stock be graduated at the end of the academic year. Neither Stock nor his parents were invited to this meeting. In the early part of the winter of 1981, Stock signed the IEP. The IEP does not show a parental signature. The IEP does not mention graduation. At no time were his parents provided formal, written notice of their right to challenge the IEP or of the procedural avenues open to them to make that challenge. Neither were they told that graduation would terminate their son's eligibility for special education services. In June, 1981, Stock was presented with a high school diploma. His eligibility for special education services was thereby terminated.

In the months following graduation, Stock remained at the hospital school. Although the record is unclear as to whether additional special education services were offered to him, or offered and refused, in the time between graduation and the commencement of this action, there is no question that Stock has received no further special education services since his graduation. He has failed to adapt either to sheltered workshop or to independent living settings. At the time appellate briefs were filed, he was hospitalized in a chronic care unit.

In December, 1981, Stock's parents sought legal counsel. In the proceedings below, Stock challenged the award of his diploma on procedural and substantive grounds, alleging violations of both State and Federal law. The defendants asserted that Stock had failed to exhaust administrative remedies. On March 29, 1983, a judge of the Superior Court issued a memorandum and order on cross-motions for summary judgment. In his memorandum, the judge ruled that Stock could not acquire the academic skills necessary for a regular high school education before reaching age twenty-two, the age at which special education entitlements terminate. The judge then concluded that Stock had not met the primary jurisdiction requirement of exhaustion of administrative remedies, ordered the entry of summary judgment in favor of all defendants, and dismissed Stock's complaint.

After judgment, Stock's counsel wrote to the Bureau of Special Education Appeals urging consideration of his client's appeal. The assistant director of the Bureau of Special Education Appeals took the position that, because Stock had received a high school diploma, the bureau no longer had jurisdiction of his case.

On appeal, Stock raises the following issues: (1) whether the defendants' failure to provide notice and procedural protections before terminating special education services violated his rights under State and Federal law; (2) whether presentation of a high school diploma to Stock in the absence of his attaining sufficient skills to warrant such presentation violated his rights under State and Federal law; . . . Stock requests a determination from this court that he had not acquired sufficient skills to graduate from high school without his express consent. He requests relief in the form of an order rescinding his diploma and directing the department to arrange for and fund appropriate special education services for him. . . .

For the reasons set forth below, we agree that Stock's graduation was procedurally and substantively defective. . . .

2. *Procedural safeguards.* The focus of Stock's argument is that the decision to graduate a child with special education needs is a change in placement, . . . triggering the mandatory procedural safeguards of EAHCA [now IDEA], described in 20 U.S.C. § 1415. The plaintiff cites no judicial discussion of this issue, nor have we found any. It seems obvious, however, that graduation, because it will cause the termination of a student's participation in special education programs, can hardly be characterized as anything other than a change in placement. This view accords with Federal law, which requires that States qualifying for Federal assistance provide special needs children with a free appropriate public education. . . . It also accords with the law of this Commonwealth, which mandates that the department administer special education programs so as to assure the maximum possible development of a child with special needs. G.L. 71B, § 2, as amended by St.1978, c. 552, § 19. No change in placement seems quite so serious nor as worthy of parental involvement and procedural protections as the termination of placement in special education programs. Under the Federal scheme, a change in placement requires formal, written notice of the decision to graduate a child, as well as notice of a parent's right to protest that decision, a description of the administrative remedies and procedures to be followed, and a description of any alternative services which may be available. To ensure conformity with Federal policy, the State must adhere to these notice and procedural requirements. This change requires significant parental involvement in the decision making process, . . . It is not enough, contrary to the defendants' argument, that Stock's parents received actual notice of the graduation or that they participated to a limited extent in the transitional planning surrounding the graduation. From all appearances, the Stocks received actual notice of a fait accompli, without any notice that they might challenge the decision. It is difficult to find justification for permitting a young man with Stock's handicaps to pass through and out of the special education system by virtue of his signature on an IEP—which did not even mention the graduation decision—without some evidence that he or his parents were aware of the consequences of doing so and the alternatives available to them. We note that the conduct of which Stock complains was in direct violation of the department's special education regulations.

Failure to provide to Stock's parents formal, written notice concerning the graduation decision, failure to provide such notice regarding their rights to involvement in that decision, and failure to notify them as to rights to a hearing and administrative review, violate State and Federal statutory law. . . .

3. *Relief to be granted.* In view of our determination . . . the trial judge's entry of summary judgment in favor of the defendants must be reversed. Further, because the award of a diploma was both procedurally and substantively deficient, the diploma must be rescinded. This case is remanded to the Superior Court with directions that it order the department to take jurisdiction and to hold a hearing on the matter of providing special education services to Stock. Should it determine that further services are appropriate, the department shall take into account the period of about three years which has elapsed since the initial graduation in June, 1981. This is to be added to Stock's period of eligibility for special education services. . . .

Notes

1. This case clearly established the principle that graduation is a change in placement under the IDEA because it effectively terminates all educational services. In what situations, other than graduation, would this legal principle apply?
2. School personnel committed a number of procedural errors in this situation. Most seriously, they did not provide proper notice and did not include the student's parents in the decision-making process. Why is this a problem?
3. The IDEA now requires that transition services be written into IEPs well before students graduate or leave educational systems. If this provision had been in effect in this situation, would school officials have been less likely to make the decision to graduate Richard Stock? Why?

CASE NO. 7: Definition of Free Appropriate Public Education

BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT

v.

ROWLEY

Supreme Court of the United States, 1982

458 U.S. 176

Justice REHNQUIST delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act. We agree and reverse the judgment of the Court of Appeals.

I

The Education of the Handicapped Act (Act) [now IDEA] . . . provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, . . . The Act's evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case. . . .

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." . . .

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). . . . The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document. . . .

II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N.Y. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of

the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. . . . The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. . . . Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.

The District Court found that Amy "is a remarkably well-adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. . . . It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," but "that she understands considerably less of what goes on in class than she could if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap." This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." . . . According to the District Court, such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." The District Court's definition arose from its assumption that the responsibility for "giv[ing] content to the requirement of an 'appropriate education' " had "been left entirely to the [federal] courts and the hearing officers." . . .

A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals "agree[d] with the [D]istrict [C]ourt's conclusions of law," and held that its "findings of fact [were] not clearly erroneous ." . . .

We granted certiorari to review the lower courts' interpretation of the Act. . . . Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the review granted by [the Act]? We consider these questions separately.

III

A

This is the first case in which this Court has been called upon to interpret any provision of the Act. As noted previously, the District Court and the Court of Appeals concluded that "[t]he Act itself does not define 'appropriate education,'" . . . but leaves "to the courts and the hearing officers" the responsibility of "giv[ing] content to the requirement of an 'appropriate education. . . .'" Petitioners contend that the definition of the phrase "free appropriate public education" used by the courts below overlooks the definition of that phrase actually found in the Act. Respondents agree that the Act defines "free appropriate public education," but contend that the statutory definition is not "functional" and thus "offers judges no guidance in their consideration of controversies involving 'the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education. . . .'" The United States, appearing as *amicus curiae* on behalf of respondents, states that "[a]lthough the Act includes definitions of a 'free appropriate public education' and other related terms, the statutory definitions do not adequately explain what is meant by 'appropriate.' . . ."

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":

> "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 preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [this Act]."
>
> "Special education," as referred to in this definition, means "specially 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." . . . "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education."

Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Other portions of the statute also shed light upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education. . . . When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children." . . . That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutory definition of "free appropriate public education" to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history.

B
(i)

. . . By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." . . . Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Both the House and the Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments rendered in 1971 and 1972. As the Senate Report states, passage of the Act "followed a series of landmark court cases establishing in law the right to education for all handicapped children." . . . The first case, *Pennsylvania Assn. for Retarded Children v. Commonwealth* (*PARC*), was a suit on behalf of retarded children challenging the constitutionality of a Pennsylvania statute which acted to exclude them from public education and training. The case ended in a consent decree which enjoined the State from "deny[ing] to any mentally retarded child *access* to a free public program of education and training." . . .

PARC was followed by *Mills v. Board of Education of District of Columbia,* . . . a case in which the plaintiff handicapped children had been excluded from the District of Columbia public schools. The court's judgment . . . provided that

> "no [handicapped] child eligible for a publicly supported education in the District of Columbia public schools shall be *excluded* from a regular school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) *adequate* alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the *adequacy* of any educational alternative." . . .

Mills and *PARC* both held that handicapped children must be given *access* to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education. Rather, like the language of the Act, the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. . . . The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having "incorporated the major principles of the right to education cases." . . . . Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute. . . .

That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an "appropriate education" to the receipt of some specialized educational services. . . .

(ii)

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." . . . We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children . . ." and the United States correctly note that Congress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." . . . But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two District Court decisions referred to above. But cases such as *Mills* and *PARC* held simply that handicapped children may not be excluded entirely from pub-lic education. In *Mills,* the District Court said:

> "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." . . .

The *PARC* court used similar language, saying "[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity." . . . The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent that Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth Amendment does not require States to expend equal financial resources on the education of each child. . . .

In explaining the need for federal legislation, the House Report noted that "no congressional legislation has required a precise guarantee for handicapped children, i.e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children." Assuming that the Act was designed to fill the need identified in the House Report—that is, to provide a "basic floor of opportunity" consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not

the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

(iii)

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. . . .

The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that "mainstreaming" preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.

C

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. . . .

IV

A

As mentioned in Part I, the Act permits "[a]ny party aggrieved by the findings and decision" of the state administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." The complaint, and therefore the civil action, may concern "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." . . . In reviewing the complaint, the Act provides that a court "shall receive the record of the [state] 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." . . .

The parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review for state compliance with the Act's procedural requirements and no power to review the substance of the state program, and

respondents contending that the Act requires courts to exercise ***de novo*** review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent decision[s] based on a preponderance of the evidence." . . .

But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in § 1415, which is entitled "Procedural safeguards," is not without significance. When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate" cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Therefore, a court's inquiry in suits brought under [the Act] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

B

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. . . .

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V

Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies . . . and in the formu-lation of the child's individual educational program. . . . As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act.

VI

Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements

of the Act. On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." . . . In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Notes

1. In a dissenting opinion Justice White wrote:

   Providing a teacher with a loud voice would not meet Amy's needs and would not satisfy the Act. The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom— less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades. (p. 215)

   Did the Court do little more than provide Amy Rowley with a "teacher with a loud voice"?

2. In addition to providing a more concrete definition of what constitutes an appropriate education, *Rowley* provided instructions for lower courts on how to resolve cases involving an appropriate education. This is discussed in greater detail in Chapter 7.

3. As noted, states are free to establish higher standards of appropriateness. As such, states may adopt the "commensurate with the opportunities provided to other children" standard enunciated by the lower courts in *Rowley.* Check the standard in your state.

4. By way of update, Amy Rowley is currently a clinical instructor in the Department of Exceptional Children at the University of Wisconsin in Milwaukee, where she coordinates the American Sign Language program. She earned a bachelor's degree from Gallaudet University and a master's degree from Western Maryland College. At this writing she is pursuing a doctorate in Second Language Education at the University of Wisconsin.

CASE NO. 8: Least Restrictive Environment

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, BOARD OF EDUCATION

v.

RACHEL H.

United States Court of Appeals, Ninth Circuit, 1994.

14 F.3d 1398

SNEED, Circuit Judge:

The Sacramento Unified School District ("the District") timely appeals the district court's judgment in favor of Rachel Holland ("Rachel") and the California State Department of Education. The court found that the appropriate placement for Rachel under the Individuals with Disabilities Act ("IDEA") was full-time in a regular second grade classroom with some supplemental services. The District contends that the appropriate placement for Rachel is half-time in special education classes and half-time in a regular class. We affirm the judgment of the district court.

I

Facts and Prior Proceedings

Rachel Holland is now 11 years old and is mentally retarded. She was tested with an I.Q. of 44. She attended a variety of special education programs in the District from 1985–89. Her parents sought to increase the time Rachel spent in a regular classroom, and in the fall of 1989, they requested that Rachel be placed full-time in a regular classroom for the 1989–90 school year. The District rejected their request and proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a regular class for non-academic activities such as art, music, lunch, and recess. The district court found that this plan would have required moving Rachel at least six times each day between the two classrooms. The Hollands instead enrolled Rachel in a regular kindergarten class at the Shalom School, a private school. Rachel remained at the Shalom School in regular classes and at the time the district court rendered its opinion was in the second grade.

The Hollands and the District were able to agree on an Individualized Education Program ("IEP") for Rachel. Although the IEP is required to be reviewed annually, . . . because of the dispute between the parties, Rachel's IEP has not been reviewed since January 1990.

The Hollands appealed the District's placement decision to a state hearing officer pursuant to [the IDEA]. They maintained that Rachel best learned social and academic skills in a regular classroom and would not benefit from being in a special education class. The District contended Rachel was too severely disabled to benefit from full-time placement in a regular class. The hearing officer concluded that the District had failed to make an adequate effort to educate Rachel in a regular class pursuant to the IDEA. The officer found that (1) Rachel had benefited from her regular kindergarten class—that she was motivated to learn and learned by imitation and modeling; (2) Rachel was not disruptive in a regular classroom; and (3) the District had overstated the cost of putting Rachel in regular education— that the cost would not be so great that it weighed against placing her in a regular classroom. The hearing officer ordered the District to place Rachel in a regular classroom with support services, including a special education consultant and a part-time aide.

The District appealed this determination to the district court. Pursuant to [the IDEA], the parties presented additional evidence at an evidentiary hearing. The court affirmed the decision of the hearing officer that Rachel should be placed full-time in a regular classroom.

In considering whether the District proposed an appropriate placement for Rachel, the district court examined the following factors: (1) the educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared

with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of Rachel's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming Rachel in a regular classroom.

1. Educational Benefits

The district court found the first factor, educational benefits to Rachel, weighed in favor of placing her in a regular classroom. . . . The court noted that the District's evi-dence focused on Rachel's limitations but did not establish that the educational opportunities available through special education were better or equal to those available in a regular classroom. Moreover, the court found that the testimony of the Hollands' experts was more credible because they had more background in evaluating children with disabilities placed in regular classrooms and that they had a greater opportunity to observe Rachel over an extended period of time in normal circumstances. The district court also gave great weight to the testimony of Rachel's current teacher, Nina Crone, whom the court found to be an experienced, skillful teacher. Ms. Crone stated that Rachel was a full member of the class and participated in all activities. Ms. Crone testified that Rachel was making progress on her IEP goals: She was learning one-to-one correspondence in counting, was able to recite the English and Hebrew alphabets, and was improving her communication abilities and sentence lengths.

The district court found that Rachel received substantial benefits in regular education and that all of her IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide.

2. Non-academic Benefits

The district court next found that the second factor, non-academic benefits to Rachel, also weighed in favor of placing her in a regular classroom. The court noted that the Hollands' evidence indicated that Rachel had developed her social and communications skills as well as her self-confidence from placement in a regular class, while the District's evidence tended to show that Rachel was not learning from exposure to other children and that she was isolated from her classmates. The court concluded that the differing evaluations in large part reflected the predisposition of the evaluators. The court found the testimony of Rachel's mother and her current teacher to be the most credible. These witnesses testified regarding Rachel's excitement about school, learning, and her new friendships and Rachel's improved self-confidence.

3. Effect on the Teacher and Children in the Regular Class

The district court next addressed the issue of whether Rachel had a detrimental effect on others in her regular classroom. The court looked at two aspects: (1) whether there was detriment because the child was disruptive, distracting or unruly, and (2) whether the child would take up so much of the teacher's time that the other students would suffer from lack of attention. The witnesses of both parties agreed that Rachel followed directions and was well-behaved and not a distraction in class. The court found the most germane evidence on the second aspect came from Rachel's second grade teacher, Nina Crone, who testified that Rachel did not interfere with her ability to teach the other children and in the future would require only a part-time aide. Accordingly, the district court determined that the third factor, the effect of Rachel's presence on the teacher and other children in the classroom weighed in favor of placing her in a regular classroom.

4. Cost

Finally, the district court found that the District had not offered any persuasive or credible evidence to support its claim that educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the District's proposed setting.

The District contended that it would cost $109,000 to educate Rachel full-time in a regular classroom. This figure was based on the cost of providing a full-time aide for Rachel plus an estimated $80,000 for school-wide sensitivity training. The court found that the District did not establish that such training was necessary. Further, the court noted that even if such training were necessary, there was evidence from the California Department of Education that the training could be had at no cost. Moreover, the court found it would be inappropriate to assign the total cost of the training to Rachel when other children with disabilities would benefit. In addition, the court concluded that the evidence did not suggest that Rachel required a full-time aide.

In addition, the court found that the District should have compared the cost of placing Rachel in a special class of approximately 12 students with a full-time special education teacher and two full-time aides and the cost of placing her in a regular class with a part-time aide. The District provided no evidence of this cost comparison.

The court also was not persuaded by the District's argument that it would lose significant funding if Rachel did not spend at least 51% of her time in a special education class. The court noted that a witness from the California Department of Education testified that waivers were available if a school district sought to adopt a program that did not fit neatly within the funding guidelines. The District had not applied for a waiver.

By inflating the cost estimates and failing to address the true comparison, the District did not meet its burden of proving that regular placement would burden the District's funds or adversely affect services available to other children. Therefore, the court found that the cost factor did not weigh against mainstreaming Rachel.

The district court concluded that the appropriate placement for Rachel was full-time in a regular second grade classroom with some supplemental services and affirmed the decision of the hearing officer. . . .

IV

DISCUSSION . . .

B. Mainstreaming Requirements of the IDEA

1. The Statute

The IDEA provides that each state must establish:

[P]rocedures to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .

This provision sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers. . . .

3. Test for Determining Compliance with the IDEA's Mainstreaming Requirement

We have not adopted or devised a standard for determining the presence of compliance with [the IDEA's least restrictive environment provision]. . . .

Although the district court relied principally on *Daniel R.R.* and *Greer,* it did not specifically adopt the *Daniel R.R.* test over the *Roncker* test. Rather, it employed factors found in both lines of cases in its analysis. The result was a four-factor balancing test in which the court considered (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect Rachel had on the teacher and children in the regular class; and (4) the costs of mainstreaming Rachel. This analysis directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of [the IDEA]. Accordingly, we approve and adopt the test employed by the district court.

4. The District's Contentions on Appeal

The District strenuously disagrees with the district court's findings that Rachel was receiving academic and non-academic benefits in a regular class and did not have a detrimental effect on the teacher or other students. It argues that the court's findings were contrary to the evidence of the state Diagnostic Center and that the court should not have been persuaded by the testimony of Rachel's teacher, particularly her testimony that Rachel would need only a part-time aide in the future. The district court, however, conducted a full evidentiary hearing and made a thorough analysis. The court found the Hollands' evidence to be more persuasive. Moreover, the court asked Rachel's teacher extensive questions regarding Rachel's need for a part-time aide. We will not disturb the findings of the district court.

The District is also not persuasive on the issue of cost. The District now claims that it will lose up to $190,764 in state special education funding if Rachel is not enrolled in a special education class at least 51% of the day. However, the District has not sought a waiver pursuant to California Education Code § 56101. This section provides that (1) any school district may request a waiver of any provision of the Education Code if the waiver is necessary or beneficial to the student's IEP, and (2) the Board may grant the waiver when failure to do so would hinder compliance with federal mandates for a free appropriate education for children with disabilities. . . .

Finally, the District . . . argues that Rachel must receive her academic and functional curriculum in special education from a specially credentialed teacher. . . . [T]he District's proposition that Rachel must be taught by a special education teacher runs directly counter to the congressional preference that children with disabilities be educated in regular classes with children who are not disabled. . . .

We affirm the judgment of the district court. While we cannot determine what the appropriate placement is for Rachel at the present time, we hold that the determination of the present and future appropriate placement for Rachel should be based on the principles set forth in this opinion and the opinion of the district court.

Notes

1. The Ninth Circuit ruled that although the trial court referenced cases from other circuits, it did not specifically adopt one test over another. How does the Ninth Circuit's test incorporate elements of the tests established by other circuits?
2. The student in *Rachel H.* (like the plaintiffs in several other LRE disputes) attended an elementary school. Would the results have been different if the student had been older and the issue was inclusion in a high school environment?
3. During the two years following *Rachel H.,* the Ninth Circuit used its own LRE test with different results in *Clyde K. v. Puyallup School District* (1994), *Capistrano Unified School District v. Wartenberg* (1995), and *Poolaw v. Bishop* (1995). Compare and contrast these cases. How did the unique facts of each case dictate their respective outcomes?

CASE NO. 9: Provision of Nursing Services for a Medically Fragile Student

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT

v.

GARRET F.

Supreme Court of the United States, 1999

526 U.S. 66

Justice STEVENS delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA) . . . as amended, was enacted, in part,"to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." . . . Consistent with this purpose, the IDEA authorizes federal financial assistance to States that agree to provide disabled children with special education and "related services." . . . The question presented in this case is whether the definition of "related services" in [the IDEA] requires a public school district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours.

I

Respondent Garret F. is a friendly, creative, and intelligent young man. When Garret was four years old, his spinal column was severed in a motorcycle accident. Though paralyzed from the neck down, his mental capacities were unaffected. He is able to speak, to control his motorized wheelchair through use of a puff and suck straw, and to operate a computer with a device that responds to head movements. Garret is currently a student in the Cedar Rapids Community School District (District), he attends regular classes in a typical school program, and his academic performance has been a success. Garret is, however, ventilator dependent, and therefore requires a responsible individual nearby to attend to certain physical needs while he is in school.

During Garret's early years at school his family provided for his physical care during the school day. When he was in kindergarten, his 18-year-old aunt attended him; in the next four years, his family used settlement proceeds they received after the accident, their insurance, and other resources to employ a licensed practical nurse. In 1993, Garret's mother requested the District to accept financial responsibility for the health care services that Garret requires during the school day. The District denied the request, believing that it was not legally obligated to provide continuous one-on-one nursing services.

Relying on both the IDEA and Iowa law, Garret's mother requested a hearing before the Iowa Department of Education. An **administrative law judge** (ALJ) received extensive evidence concerning Garret's special needs, the District's treatment of other disabled students, and the assistance provided to other ventilator-dependent children in other parts of the country. In his 47-page report, the ALJ found that the District has about 17,500 students, of whom approximately 2,200 need some form of special education or special services. Although Garret is the only ventilator-dependent student in the District, most of the health care services that he needs are already provided for some other students. "The primary difference between Garret's situation and that of other students is his dependency on his ventilator for life support." . . . The ALJ noted that the parties disagreed over the training or licensure required for the care and supervision of such students, and that those providing such care in other parts of the country ranged from nonlicensed personnel to registered nurses. However, the District did not contend that only a licensed physician could provide the services in question.

The ALJ explained that federal law requires that children with a variety of health impairments be provided with "special education and related services" when their disabilities adversely affect their academic performance, and that such children should be educated to the

maximum extent appropriate with children who are not disabled. In addition, the ALJ explained that applicable federal regulations distinguish between "school health services," which are provided by a "qualified school nurse or other qualified person," and "medical services," which are provided by a licensed physician. . . . The District must provide the former, but need not provide the latter (except, of course, those "medical services" that are for diagnostic or evaluation purposes. . . . According to the ALJ, the distinction in the regulations does not just depend on "the title of the person providing the service"; instead, the "medical services" exclusion is limited to services that are "in the special training, knowledge, and judgment of a physician to carry out." . . . The ALJ thus concluded that the IDEA required the District to bear financial responsibility for all of the services in dispute, including continuous nursing services.

The District challenged the ALJ's decision in Federal District Court, but that court approved the ALJ's IDEA ruling and granted summary judgment against the District. . . . The Court of Appeals affirmed. . . . It noted that, as a recipient of federal funds under the IDEA, Iowa has a statutory duty to provide all disabled children a "free appropriate public education," which includes "related services." . . . The Court of Appeals read our opinion in *Irving Independent School Dist. v. Tatro* to provide a two-step analysis of the "related services" definition in [the IDEA]—asking first, whether the requested services are included within the phrase "supportive services"; and second, whether the services are excluded as "medical services." . . . The Court of Appeals succinctly answered both questions in Garret's favor. The Court found the first step plainly satisfied, since Garret cannot attend school unless the requested services are available during the schoolday. . . . As to the second step, the court reasoned that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." . . .

In its petition for certiorari, the District challenged only the second step of the Court of Appeals' analysis. The District pointed out that some federal courts have not asked whether the requested health services must be delivered by a physician, but instead have applied a multifactor test that considers, generally speaking, the nature and extent of the services at issue. We granted the District's petition to resolve this conflict. . . .

II

The District contends that [the IDEA] does not require it to provide Garret with "continuous one-on-one nursing services" during the schoolday, even though Garret cannot remain in school without such care. . . . However, the IDEA's definition of "related services," our decision in *Irving Independent School Dist. v. Tatro,* . . . and the overall statutory scheme all support the decision of the Court of Appeals.

The text of the "related services" definition . . . broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education." As we have already noted, the District does not challenge the Court of Appeals' conclusion that the in-school services at issue are within the covered category of "supportive services." As a general matter, services that enable a disabled child to remain in school during the day provide the student with "the meaningful access to education that Congress envisioned." *Tatro,* . . . ("'Congress sought primarily to make public education available to handicapped children' and 'to make such access meaningful'" (quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley* . . .).

This general definition of "related services" is illuminated by a parenthetical phrase listing examples of particular services that are included within the statute's coverage . . . . "[M]edical services" are enumerated in this list, but such services are limited to those that are "for diagnostic and evaluation purposes." . . . The statute does not contain a more specific definition of the "medical services" that are excepted from the coverage of [the IDEA].

The scope of the "medical services" exclusion is not a matter of first impression in this Court. In *Tatro* we concluded that the Secretary of Education had reasonably determined that the term "medical services" referred only to services that must be performed by a physician, and not to school health services. . . . Accordingly, we held that a specific form of health care (clean intermittent catheterization) that is often, though not always, performed by a nurse is not an excluded medical service. We referenced the likely cost of the services and the competence of school staff as justifications for drawing a line between physician and other services, . . . but our endorsement of that line was unmistakable. It is thus settled that the phrase "medical services" in [the IDEA] does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as a claim for an income tax deduction.

The District does not ask us to define the term so broadly. Indeed, the District does not argue that any of the items of care that Garret needs, considered individually, could be excluded from the scope of [the IDEA]. It could not make such an argument, considering that one of the services Garret needs (catheterization) was at issue in *Tatro,* and the others may be provided competently by a school nurse or other trained personnel. . . . As the ALJ concluded, most of the requested services are already provided by the District to other students, and the in-school care necessitated by Garret's ventilator dependency does not demand the training, knowledge, and judgment of a licensed physician. . . . While more extensive, the in-school services Garret needs are no more "medical" than was the care sought in *Tatro.*

Instead, the District points to the combined and continuous character of the required care, and proposes a test under which the outcome in any particular case would "depend upon a series of factors, such as [1] whether the care is continuous or intermittent, [2] whether existing school health personnel can provide the service, [3] the cost of the service, and [4] the potential consequences if the service is not properly performed." . . .

The District's multifactor test is not supported by any recognized source of legal authority. The proposed factors can be found in neither the text of the statute nor the regulations that we upheld in *Tatro.* Moreover, the District offers no explanation why these characteristics make one service any more "medical" than another. The continuous character of certain services associated with Garret's ventilator dependency has no apparent relationship to "medical" services, much less a relationship of equivalence. Continuous services may be more costly and may require additional school personnel, but they are not thereby more "medical." Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute. Absent an elaboration of the statutory terms plainly more convincing than that which we reviewed in *Tatro,* there is no good reason to depart from settled law.

Finally, the District raises broader concerns about the financial burden that it must bear to provide the services that Garret needs to stay in school. The problem for the District in providing these services is not that its staff cannot be trained to deliver them; the problem, the District contends, is that the existing school health staff cannot meet all of their responsibilities and provide for Garret at the same time. Through its multifactor test, the District seeks to establish a kind of undue-burden exemption primarily based on the cost of the requested services. The first two factors can be seen as examples of cost-based distinctions: Intermittent care is often less expensive than continuous care, and the use of existing personnel is cheaper than hiring additional employees. The third factor—the cost of the service— would then encompass the first two. The relevance of the fourth factor is likewise related to cost because extra care may be necessary if potential consequences are especially serious.

The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law. Defining "related services" in a manner that *accommodates* the cost concerns Congress may have had, . . . is altogether different from using cost *itself* as the definition. Given that [the IDEA] does not employ cost in its definition of "related services" or excluded "medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA. The statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children, . . . and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA. . . . But Congress intended "to open the door of public education" to all qualified children and "require[d] participating States to educate handicapped children with nonhandicapped children whenever possible." . . .

This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.

The judgment of the Court of Appeals is accordingly

Affirmed.

Notes

1. In a dissenting opinion, Justice Thomas noted that Congress had not included nursing services within the list of required related services. School nursing services have since been added to that list.
2. Justice Thomas in his dissent also stated that spending clause legislation must be interpreted narrowly. The Supreme Court has interpreted the IDEA very narrowly in more recent cases. Compare the results in the Court's decision in *Arlington Central School District Board of Education v. Murphy* 126 S. Ct. 2455 (2006) with *Cedar Rapids.*

CASE NO. 10: Limitation on Requirement to Provide Transportation

FICK ex rel. FICK

v.

SIOUX FALLS SCHOOL DISTRICT

United States Court of Appeals, Eighth Circuit, 2003

337 F.3d 968

BYE, Circuit Judge.

This is a dispute over whether the Sioux Falls School District (the District) must transport Sarah Fick to a day care center after school, rather than to her home, in order to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). . . . Both a state hearing examiner and the district court held the District did not violate the IDEA, because transportation to the day care center was not necessary for Sarah to benefit educationally from her individualized education plan (IEP). We affirm.

I

Sarah Fick suffers from epileptic seizures. When a seizure occurs, Sarah must receive a shot of Valium from a qualified nurse within a short period of time. This condition requires the District to provide Sarah transportation to and from school as a "related service" under the IDEA. The District satisfies this requirement by providing Sarah with a nurse-accompanied taxi ride to school in the morning, and back to her home in the afternoon.

The District has created geographical "cluster sites" within its boundaries to provide better and more efficient education services to its students. For example, the cluster sites allow children to be with the same neighborhood peer groups as they move through elementary school, middle school, and high school. During the 2000–2001 school year, the District had three cluster sites for its elementary school children located at John Harris, John F. Kennedy, and Hawthorne Elementary Schools. Sarah Fick lived in the John Harris cluster site.

The District uses the cluster boundaries to establish transportation policies for all children, both regular and special education, who are eligible for transportation to and from school. Students are allowed one designated pick-up address before school and one drop-off address after school. The addresses do not have to be the same, but both must be located within the child's cluster boundaries. The District will, however, transport a disabled child outside her designated cluster site when the transportation is necessary for the child to benefit from her IEP.

In October 2000, Sarah's mother, Darlene, asked the District to change Sarah's designated drop-off address from her home to an after-school day care center called Liberty Center. The District refused to change Sarah's drop-off point because Liberty Center was outside the boundaries of Sarah's cluster site. Darlene renewed her request at an IEP meeting held in February 2001. When that request was denied as well, Darlene filed a complaint with the state Office of Special Education (OSE). After an informal investigation, the OSE determined the District violated the IDEA by failing to accommodate the transportation request, and ordered the District to pay for Sarah's transportation to Liberty Center.

The District requested a due process hearing to contest the OSE's decision. After a formal hearing, a state hearing examiner issued written findings of fact and conclusions of law determining the District had not violated the IDEA. The state hearing examiner concluded the transportation request was made for personal reasons unrelated to Sarah's educational needs, and therefore the District was not required to pay for the transportation. Darlene Fick challenged the hearing examiner's decision by filing suit in the district court. Noting that Darlene made her request for personal reasons unrelated to Sarah's educational needs, the district court also concluded the District had not violated the IDEA by refusing to transport Sarah to a drop-off address outside her designated cluster site. Ms. Fick timely appealed the district court's decision.

II

In IDEA cases we review the district court's decision de novo . . . but, like the district court we must give "due weight" to the state administrative proceedings. . . .

We believe our decision in *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.,* is dispositive. That case, like this one, involved a parental request to transport a disabled child to a school outside a neighborhood school boundary. The Cedar Rapids School District had an intra-district transfer policy which allowed parents to send their child to a school other than the neighborhood school as long as the parents paid for transportation. We held the school district did not violate Section 504 of the Rehabilitation Act of 1973. . . , by refusing to pay to transport a disabled child to a school outside the neighborhood boundaries. Specifically, we said the child's parents failed to prove the child was denied the benefits of participating in the intra-district transfer program, because all parents in the district had to pay for transportation costs in order to participate in the program. . . . We concluded all of the disabled child's educational needs were being met by the school within the neighborhood boundaries, and the request for transportation to a school outside the boundaries was "for reasons of parental preference" only. . . .

In short, *Timothy H.* indicates a school district may apply a facially neutral transportation policy to a disabled child without violating the law when the request for a deviation from the policy is not based on the child's educational needs, but on the parents' convenience or preference . . . We conclude *Timothy H.* controls our decision here because the pertinent obligation of the District under Section 504 is the same as its obligation under the IDEA:"To provide disabled students with a free appropriate public education." . . . We therefore affirm the decision of the district court.

Notes

1. As noted in the text of this chapter, school boards have been upheld in their refusal to make transportation arrangements to suit parents' domestic situations when the parents are divorced and live separately. In *Fick* the requested alternate transportation arrangements had little to do with the student's disability but much to do with the parents' personal needs.
2. Consider the circumstances of the parent of a wheelchair-bound student who must get the student down several stairs to get to the school bus. Should a school board be required to provide a transportation aide to help get the student down the stairs? Would such a request be due to the student's disability or the parents' personal circumstances (i.e., their living arrangements)? How is this situation different from the situation in *Fick*?

CASE NO. 11: Suspension and Expulsion of Students With Disabilities

HONIG

v.

DOE

Supreme Court of the United States, 1988

484 U.S. 305

Justice BRENNAN delivered the opinion of the Court.

As a condition of federal financial assistance, the Education of the Handicapped Act requires States to ensure a "free appropriate public education" for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards. . . . Among these safeguards is the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. Today we must decide whether, in the face of this statutory proscription, state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. . . .

I

. . . The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 IEP identified him as a socially and physically awkward 17–year-old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was "[i]mprovement in [his] ability to relate to [his] peers [and to] cope with frustrating situations without resorting to aggressive acts." Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to exclude her child permanently from SFUSD and was therefore extending his suspension until such time as the expulsion proceedings were completed. The Committee further advised her that she was entitled to attend the November 25 hearing at which it planned to discuss the proposed expulsion.

After unsuccessfully protesting these actions by letter, Doe brought this suit . . . [a]lleging that the suspension and proposed expulsion violated the EHA, he sought a temporary restraining order canceling the SPC hearing and requiring school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief and further ordered defendants to provide home tutoring for Doe on an interim basis; shortly thereafter, she issued a preliminary injunction directing defendants to return Doe to his then current educational placement at Louise Lombard School pending completion of the IEP review process. Doe reentered school on December 15, 5 1/2 weeks, and 24 school-days, after his initial suspension.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable "to control verbal or physical outburst[s]" and exhibited a "[s]evere disturbance in relationships

with peers and adults." Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem. Of particular concern was Smith's propensity for verbal hostility; one evaluator noted that the child reacted to stress by "attempt[ing] to cover his feelings of low self worth through aggressive behavior . . . primarily verbal provocations."

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children. His grandparents, however, believed that his needs would be better served in the public school setting and, in September 1979, the school district acceded to their requests and enrolled him at A.P. Giannini Middle School. His February 1980 IEP recommended placement in a Learning Disability Group, stressing the need for close supervision and a highly structured environment. Like earlier evaluations, the February 1980 IEP noted that Smith was easily distracted, impulsive, and anxious; it therefore proposed a halfday schedule and suggested that the placement be undertaken on a trial basis.

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program; although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior—which included stealing, extorting money from fellow students, and making sexual comments to female classmates—they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD. As it did in John Doe's case, the Committee scheduled a hearing and extended the suspension indefinitely pending a final disposition in the matter. On November 28, Smith's counsel protested these actions on grounds essentially identical to those raised by Doe, and the SPC agreed to cancel the hearing and to return Smith to a half-day program at A.P. Giannini or to provide home tutoring. Smith's grandparents chose the latter option and the school began home instruction on December 10; on January 6, 1981, an IEP team convened to discuss alternative placements.

After learning of Doe's action, Smith sought and obtained leave to intervene in the suit. The District Court subsequently entered summary judgment in favor of respondents on their EHA claims and issued a permanent injunction. In a series of decisions, the District Judge found that the proposed expulsions and indefinite suspensions of respondents for conduct attributable to their disabilities deprived them of their congressionally mandated right to a free appropriate public education, as well as their right to have that education provided in accordance with the procedures set out in the EHA. The District Judge therefore permanently enjoined . . . any disciplinary action other than a 2- or 5-day suspension against any disabled child for disability-related misconduct, or from effecting any other change in the educational placement of any such child without parental consent pending completion of any EHA proceedings. In addition, the judge barred the State from authorizing unilateral placement changes and directed it to establish an EHA compliance-monitoring system or, alternatively, to enact guidelines governing local school responses to disability-related misconduct. Finally, the judge ordered the State to provide services directly to disabled children when, in any individual case, the State determined that the local educational agency was unable or unwilling to do so.

. . . the Ninth Circuit affirmed the orders with slight modifications. Agreeing with the District Court that an indefinite suspension in aid of expulsion constitutes a prohibited "change in placement" under [the EHA], the Court of Appeals held that the stay-put provision admitted of no "dangerousness" exception and that the statute therefore rendered invalid those provisions of the California Education Code permitting the indefinite suspension or expulsion of disabled children for misconduct arising out of their disabilities. The court concluded, however, that fixed suspensions of up to 30 schooldays did not fall within the reach of [the EHA], and therefore upheld recent amendments to the state Education Code authorizing such suspensions. . . .

Petitioner Bill Honig, California Superintendent of Public Instruction, sought review in this Court, claiming that the Court of Appeals' construction of the stay-put provision conflicted with that of several other Courts of Appeals which had recognized a dangerousness exception. . . . We granted certiorari to resolve these questions and now affirm.

II

. . .

III

The language of [the EHA] is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child *shall* remain in the then current educational placement." (emphasis added). Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to rewrite the statute.

Petitioner's arguments proceed, he suggests, from a simple, commonsense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.

As noted above, Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in Mills v. Board of Education of District of Columbia and PARC, both of which involved the exclusion of hard-to-handle disabled students. Mills in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. . . .

Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate all disabled children, regardless of the severity of their disabilities, and included within the definition of "handicapped" those children with serious emotional disturbances. It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed. Recognizing that those proceedings might prove long and tedious, the Act's drafters did not intend to operate inflexibly and they therefore allowed for interim placements where parents and school officials are able to agree on one. Conspicuously absent from [the EHA], however, is any emergency exception for dangerous students. This absence is all the more telling in light of the injunctive decree issued in PARC, which permitted school officials unilaterally to remove students in "'extraordinary circumstances.'" Given the lack of any similar exception in Mills, and the close attention Congress devoted to these "landmark" decisions, we can only conclude that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.

Our conclusion that [the EHA] means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Such procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays. This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under, which empowers courts to grant any appropriate relief.

Petitioner contends, however, that the availability of judicial relief is more illusory than real, because a party seeking review under [the EHA] must exhaust time-consuming administrative remedies, and because under the Court of Appeals' construction of [the EHA's due process procedures], courts are as bound by the stay-put provision's "automatic injunction," as are schools. It is true that judicial review is normally not available under [the EHA] until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate. While many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process, and we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances. The burden in such cases, of course, rests with the school to demonstrate the futility or inadequacy of administrative review, but nothing in [the EHA] suggests that schools are completely barred from attempting to make such a showing. Nor do we think that [the EHA] operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by schools, not courts, and one of the purposes of [the EHA's procedural protections], therefore, was "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by [the EHA]; indeed, it says nothing whatever about judicial power.

In short, then, we believe that school officials are entitled to seek injunctive relief under [the EHA] in appropriate cases. In any such action, [the EHA's procedural protections] effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. In the present case, we are satisfied that the District Court, in enjoining the state and local defendants from indefinitely suspending respondent or otherwise unilaterally altering his then current placement, properly balanced respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA against the interests of the state and local school officials in maintaining a safe learning environment for all their students.

IV

We believe the courts below properly construed and applied [the EHA], except insofar as the Court of Appeals held that a suspension in excess of 10 schooldays does not constitute a "change in placement." We therefore affirm the Court of Appeals' judgment on this issue as modified herein. . . .

Affirmed.

Notes

1. In *Honig* the Court did not mention or address whether school officials must determine whether a student's misbehavior is a manifestation of a disability. Perhaps because the students in this case were identified as having behavior problems, it was automatically assumed that their misbehavior was a manifestation of their disabilities. Recent amendments to the IDEA make it clear that the manifestation doctrine is alive and well. Is it appropriate to assume that behavior is a manifestation of a student's disability based on a disability classification?
2. As *Honig* indicated, suspensions of up to ten school days can be handed out in the same manner for students with disabilities as they are for those who are not disabled. However, serial suspensions that, when taken together, exceed ten days can be problematic if they create a pattern of exclusion. What factors need to be considered when a student's total suspension days in a year exceed ten?
3. School officials can sometimes be heard to lament that the IDEA creates a different standard of discipline for students with disabilities. Yet, commentators insist that the IDEA only creates different procedures. Does the IDEA's process for disciplining students with disabilities result in different codes of conduct? How would you explain this to the parents of a student who was not disabled but was disciplined for hitting back after being struck by a student with disabilities?

CASE NO. 12: Manifestation Determination

AW ex rel. WILSON

v.

FAIRFAX COUNTY SCHOOL BOARD

United States Court of Appeals, Fourth Circuit, 2004

372 F.3d 674

DUNCAN, Circuit Judge:

AW, a disabled student in Fairfax County,Virginia, appeals the district court's judgment in favor of the Fairfax County School Board ("FCSB") in his suit under the Individuals with Disabilities Education Act, . . . ("the IDEA"). In his complaint, AW asserted that the FCSB improperly refused to allow him to enroll at his preferred junior high school after a pattern of misbehavior in the preceding school year resulted in his mid-year transfer to an elementary school that sent its students on to a different junior high school. Specifically, AW alleged that the FCSB's transfer decision violated the procedural and substantive protections afforded him under the IDEA, including its "stay-put" provision requiring that the student's "educational placement" not change while disciplinary proceedings are pending. Because we conclude that the term "educational placement" as used in the stay-put provision refers to the overall educational environment rather than the precise location in which the disabled student is educated, we affirm.

I

In March 2002, AW was a sixth-grade student assigned to the "gifted and talented" program (the "GT program") at his elementary school. During the prior school year, a committee at AW's school concluded that AW was eligible to receive special education assistance under the IDEA as a student with an emotional disability. That determination resulted in the formulation of an Individualized Educational Program ("IEP") for AW that devoted one hour of each school week to specialized education intended to alleviate AW's "difficulty maintaining focus and completing academic tasks as required" and avoidance of "many tasks, especially when they involve writing." . . . AW successfully completed the remainder of his fifth-grade year, and his IEP was revised the following year in accordance with IDEA procedure.

As a sixth-grader, AW began exhibiting behavior problems he had not displayed during the first year of his IDEA program. These disciplinary issues culminated in a March 2002 incident in which AW persuaded another student to place a threatening note in the computer file of a student that AW disliked. In the ensuing inquiry, AW admitted that his intent was to scare the targeted student away from school. Based on his admission and past behavioral problems, school administrators suspended AW from school for two school weeks and initiated proceedings to expel AW.

As required by the IDEA, school officials convened a Manifestation Determination Review ("MDR") committee in order to determine the extent to which AW could be disciplined. Under the IDEA, a disabled student may not be disciplined by his school unless an MDR committee concludes that the student's IEP was appropriate relative to his qualifying disability and that the student's disability did not inhibit his capacity either to appreciate that his behavior was inappropriate or to conform his behavior to expectations. . . .

On the ninth day of AW's suspension, the MDR committee concluded that AW's IEP appropriately compensated for his emotional disability and that AW's disability did not prevent him from either understanding that his actions violated school rules or behaving appropriately. This finding opened the door for the FCSB to discipline AW as it would any other student. . . . The following day, however, a FCSB administrator rejected the expulsion recommendation from the administrators of AW's school and directed instead that AW be transferred to the GT program at another FCSB elementary school for the remainder of the school year. It is undisputed that AW would continue to receive the one hour per week of special education at this new location.

Despite the transfer determination, AW returned to his original school at the conclusion of his suspension to complete the final week of school before spring break. During this week, AW continued to receive GT program course work but was separated from his class and assigned instead to an empty classroom. As the week drew to a close, AW's parents invoked their right under the due process procedures of the IDEA to a review of the MDR determination. The appointed due process review officer ("DPR Officer") issued a pre-hearing decision staying the FCSB administrator's transfer decision, and AW returned to his original school following spring break.

At the April 17, 2002 hearing regarding the MDR committee's findings,AW's psychologist testified that AW had Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiance Disorder ("ODD"). AW's psychologist opined that AW's IEP failed to adequately compensate for ODD and that AW's combination of conditions figured prominently in the behavior for which he was disciplined. Nevertheless, the DPR Officer concluded that the MDR committee's conclusion was sound and that the FCSB could transfer AW to a nearby school with a comparable GT program, based in part on his conclusion that the evidence did not support the findings of AW's psychologist. The DPR Officer's order released the FCSB to transfer AW to another elementary school located approximately five miles away from AW's original school, and AW completed his sixthgrade year at that school.

Following their unsuccessful attempts to enroll AW at the junior high he would likely have attended but for his transfer, AW's parents filed the complaint in this case on AW's behalf on August 16, 2002. The complaint alleged that the FCSB violated the IDEA's "stayput" provision by transferring AW despite the ongoing challenge to the MDR committee's determination under the IDEA's review procedures, and that the MDR committee erred in concluding that AW could be disciplined as any other student. The district court granted judgment in favor of the FCSB, and AW timely appealed.

II

. . . AW challenges the substantive determination by the MDR committee that allowed the FCSB to discipline AW in the same manner as any non-disabled student. . . .

III

. . .

IV

AW's substantive challenge to the FCSB's transfer decision addresses the adequacy of the MDR committee's determination that his disability did not factor into the conduct for which he was suspended. As noted above, the IDEA requires that before any school can discipline a student, the school must determine whether the student's misconduct is related to the student's disability. If it is, the school officials are confined to the limited disciplinary measures described in [the IDEA]. However, if the MDR committee concludes that the child's disability did not factor into the student's conduct, then the school may discipline that student as it would any other. . . .

The issues the MDR committee must consider are clearly defined by the IDEA. The MDR committee must gather "all relevant information," including any "evaluation or diagnostic results," any "observations of the child," and "the child's IEP and placement." The MDR committee must then decide whether: (1) "the child's IEP and placement were appropriate and the special education services . . . were provided consistent with the child's IEP and placement"; (2) the child's disability impaired his ability to understand "the impact and consequences of the behavior subject to disciplinary action"; and (3) the child's disability impaired his ability "to control the behavior subject to disciplinary action." . . . The parties disagree as to the nature of AW's disability. Although it is undisputed that AW suffers from ADHD and ODD, the hearing officer and district court concluded that these disorders did not figure in the "emotional disability," . . . that rendered AW eligible for special education under the IDEA. The hearing officer and district court concluded instead that these conditions constituted "social maladjustment," . . . which was not a basis for coverage under the IDEA, and therefore the MDR committee need not have inquired whether these conditions impacted the adequacy of AW's IEP or his conduct.

Based on our review of the record, we conclude the MDR committee's conclusion was sound, although for slightly different reasons than relied on by the district court. AW's IDEA eligibility form is only marginally instructive, as it states that AW is eligible based on his "difficulties maintaining focus and completing academic tasks as required" and avoiding "many tasks, especially when they involve writing." . . . Additionally, the form notes that "Social Maladjustment has been ruled out as the PRIMARY cause of identified characteristics," . . . but does not exclude the possibility that it plays a secondary role in his qualifying disability.

A psychological and educational evaluation conducted in December 2000, however, indicates that while ADHD was a central feature of the emotional disability that qualified AW for special education services under the IDEA, ODD was not. In that evaluation, a psychologist at

AW's elementary school concluded that AW's primary difficulty was his inability to concentrate and hyperactivity, two undisputed symptoms of ADHD. Although the evaluation also noted AW's tendency towards "frequent confrontations with authority figures," and that "*[t]his behavioral pattern may also lead to difficulties relating to peers at times, . . .*" (emphasis added), the evaluation nevertheless makes clear that AW's primary difficulty was behavior associated with ADHD that hampered his ability to thrive educationally. The psychologist concluded that "structure, consistency, predictability, and immediate feedback are critical in the development of any plan to address difficulties related to attention, impulsivity and concentration," and recommended that due to AW's hyperactivity, "*teachers [should] consider a variety of modifications in his school program,*" which would apparently include the very special education services subsequently implemented through AW's IEP . . . (emphasis added). By contrast, with respect to AW's "interpersonal and emotional difficulties," the evaluation concluded that outside counseling should be encouraged. . . . This evaluation strongly suggests that ADHD figured prominently in AW's qualifying disability, but ODD did not.

We therefore find no error in the MDR committee's conclusion that AW's IEP and placement in a general curriculum GT program was appropriate, and that his ADHD did not figure into the behavior for which he was to be disciplined. With respect to the adequacy of AW's IEP, we note that the IEPs of February 2001 and February 2002 focused on the complications occasioned in AW's schoolwork by his ADHD and identified his "social/emotional" difficulties as a matter for out-of-school counseling with a private counselor. This approach conforms to the recommendations made by the school psychologist in his evaluation of AW just prior to AW's IDEA eligibility determination. Moreover, nothing in the IEPs or the school psychologist's evaluation suggests that AW's interpersonal difficulties were so substantial that they could not be managed by outside counseling or that they would be exacerbated by being placed in the general GT curriculum with other students.

We likewise find no basis in the administrative record to conclude that ADHD figured into the conduct for which AW was disciplined. It is undisputed that AW is an intelligent student, and that AW was not only aware of the consequences of sending the threatening message to the targeted student, but anticipated them by enlisting another student to actually place the note. To the extent that students with ADHD may be described as impulsive, the circumstances of the conduct for which AW was disciplined indicated forethought and investigation, as he had to figure out a way to gain access to his target's personal folder. Given these circumstances, we find no error in the MDR committee's conclusion that AW's IEP and placement were appropriate to his ADHD, and that his ADHD did not figure into the conduct for which he was disciplined by the FCSB.

V

Because we find that the specific location where the student is being educated is not controlling in a determination of educational placement in this context, and that the MDR committee's evaluation was appropriate given the nature of AW's disability, we find no error in the reasoning of the DPR Officer or the district court. Accordingly, the district court's order is

AFFIRMED.

Notes

1. This case was decided under the 1997 version of the IDEA. When Congress passed the 2004 amendments, the inquiry into whether misconduct was a manifestation of the student's disability was simplified. IEP teams now must consider "(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local education agency's failure to implement the IEP" (20 U.S.C. § 1415(k)(1)(E)(i)). If the answer to either subclause (I) or (II) is yes, then the team must evaluate whether students' misconduct is a manifestation of their disabilities.
2. Here the court also decided that school personnel had not changed the student's placement while an appeal of the manifestation determination was pending in violation of the IDEA. That portion of the opinion was not included in the edited version of this case because it was not pertinent to the material presented in this chapter. Please refer to Chapter 3 for a discussion of the IDEA's change in placement procedures.
3. Insofar as the student involved in this case was gifted, the court was of the opinion that he was well aware that his conduct was not appropriate and understood the consequences of his actions. Would the decision have been different if the student had cognitive limitations or was learning disabled?

CASE NO. 13: Burden of Proof at Due Process Hearings

SCHAFFER *ex rel.* SCHAFFER

v.

WEAST

Supreme Court of the United States, 2005

546 U.S. 49

JUSTICE O'CONNOR delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act) is a Spending Clause statute that seeks to ensure that "all children with disabilities have available to them a free appropriate public education." Under IDEA, school districts must create an "individualized education program" (IEP) for each disabled child. If parents believe their child's IEP is inappropriate, they may request an "impartial due process hearing." The Act is silent, however, as to which party bears the burden of persuasion at such a hearing. We hold that the burden lies, as it typically does, on the party seeking relief.

I

A

Congress first passed IDEA as part of the Education of the Handicapped Act in 1970 and amended it substantially in the Education for All Handicapped Children Act of 1975. . . . {Unless otherwise noted, the Court applied . . . the pre-2004 version of the statute because this is the version that was in effect during the proceedings below}

. . .

Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child under the Act. Parents are included as members of "IEP teams." They have the right to examine any records relating to their child, and to obtain an "independent educational evaluation of the[ir] child." They must be given written prior notice of any changes in an IEP, and be notified in writing of the procedural safeguards available to them under the Act. If parents believe that an IEP is not appropriate, they may seek an administrative "impartial due process hearing." School districts may also seek such hearings, as Congress clarified in the 2004 amendments. They may do so, for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated. As a practical matter, it appears that most hearing requests come from parents rather than schools.

Although state authorities have limited discretion to determine who conducts the hearings, and responsibility generally for establishing fair hearing procedures, Congress has chosen to legislate the central components of due process hearings. It has imposed minimal pleading standards, requiring parties to file complaints setting forth "a description of the nature of the problem" and "a proposed resolution of the problem to the extent known and available at the time." At the hearing, all parties may be accompanied by counsel, and may "present evidence and confront, cross-examine, and compel the attendance of witnesses." After the hearing, any aggrieved party may bring a civil action in state or federal court. Prevailing parents may also recover attorney's fees. Congress has never explicitly stated, however, which party should bear the burden of proof at IDEA hearings.

B

This case concerns the educational services that were due, under IDEA, to petitioner Brian Schaffer. Brian suffers from learning disabilities and speech-language impairments. From prekindergarten through seventh grade he attended a private school and struggled academically. In 1997, school officials informed Brian's mother that he needed a school that could better accommodate his needs. Brian's parents contacted respondent Montgomery County Public Schools System (MCPS) seeking a placement for him for the following school year.

MCPS evaluated Brian and convened an IEP team. The committee generated an initial IEP offering Brian a place in either of two MCPS middle schools. Brian's parents were not satisfied with the arrangement, believing that Brian needed smaller classes and more intensive services. The Schaffers thus enrolled Brian in another private school, and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education.

In Maryland, IEP hearings are conducted by administrative law judges (ALJs). After a 3-day hearing, the ALJ deemed the evidence close, held that the parents bore the burden of persuasion, and ruled in favor of the school district. The parents brought a civil action challenging the result. The United States District Court for the District of Maryland reversed and remanded, after concluding that the burden of persuasion is on the school district. Around the same time, MCPS offered Brian a placement in a high school with a special learning center. Brian's parents accepted, and Brian was educated in that program until he graduated from high school. The suit remained alive, however, because the parents sought compensation for the private school tuition and related expenses.

Respondents appealed. . . . While the appeal was pending, the ALJ reconsidered the case, deemed the evidence truly in "equipoise," and ruled in favor of the parents. The Fourth Circuit vacated and remanded the appeal so that it could consider the burden of proof issue along with the merits on a later appeal. The District Court reaffirmed its ruling that the school district has the burden of proof. On appeal, a divided panel of the Fourth Circuit reversed. Judge Michael, writing for the majority, concluded that petitioners offered no persuasive reason to "depart from the normal rule of allocating the burden to the party seeking relief." We granted *certiorari,* to resolve the following question: At an administrative hearing assessing the appropriateness of an IEP, which party bears the burden of persuasion?

II

A

The term "burden of proof" is one of the "slipperiest member[s] of the family of legal terms." Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," *i.e.,* which party loses if the evidence is closely balanced, and the "burden of production," *i.e.,* which party bears the obligation to come forward with the evidence at different points in the proceeding. We note at the outset that this case concerns only the burden of persuasion, as the parties agree, and when we speak of burden of proof in this opinion, it is this to which we refer.

When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.

Thus, we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims. For example,Title VII of the Civil Rights Act of 1964, does not directly state that plaintiffs bear the "ultimate" burden of persuasion, but we have so concluded. In numerous other areas, we have presumed or held that the default rule applies. . . .

The ordinary default rule, of course, admits of exceptions. For example, the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions. Under some circumstances this Court has even placed the burden of persuasion over an entire claim on the defendant. But while the normal default rule does not solve all cases, it certainly solves most of them. Decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding—as petitioners urge us to do here—are extremely rare. Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

B

Petitioners contend first that a close reading of IDEA's text compels a conclusion in their favor. They urge that we should interpret the statutory words "due process" in light of their constitutional meaning, and apply the balancing test established by *Mathews v. Eldridge.* Even assuming that the Act incorporates constitutional due process doctrine, *Eldridge* is no help to petitioners, because "[o]

utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment."

Petitioners next contend that we should take instruction from the lower court opinions of *Mills v. Board of Education* and *Pennsylvania Association for Retarded Children v. Commonwealth* (hereinafter *PARC*). IDEA's drafters were admittedly guided "to a significant extent" by these two landmark cases. As the court below noted, however, the fact that Congress "took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into the Act" does not allow us to "conclude that Congress intended to adopt the ideas that it failed to write into the text of the statute."

Petitioners also urge that putting the burden of persuasion on school districts will further IDEA's purposes because it will help ensure that children receive a free appropriate public education. In truth, however, very few cases will be in evidentiary equipoise. Assigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs and presenting their evidence. But IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services. Moreover, there is reason to believe that a great deal is already spent on the administration of the Act. Litigating a due process complaint is an expensive affair, costing schools approximately $8,000-to-$12,000 per hearing. Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes. In 2004, Congress added a mandatory "resolution session" prior to any due process hearing. It also made new findings that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways," and that "[t]eachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes."

Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals. It also includes a so-called "stay-put" provision, which requires a child to remain in his or her "then current educational placement" during the pendency of an IDEA hearing. Congress could have required that a child be given the educational placement that a parent requested during a dispute, but it did no such thing. Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances.

Petitioners' most plausible argument is that "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." But this "rule is far from being universal, and has many qualifications upon its application." School districts have a "natural advantage" in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. As noted above, parents have the right to review all records that the school possesses in relation to their child. They also have the right to an "independent educational evaluation of the[ir] child." The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. Prior to a hearing, the parties must disclose evaluations and recommendations that they intend to rely upon. IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act. Finally, and perhaps most importantly, parents may recover attorney's fees if they prevail. These protections ensure that the school bears no unique informational advantage.

III

Finally, respondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances. . . . Because no such law or regulation exists in Maryland, we need not decide this issue today. Justice BREYER contends that the allocation of the burden ought to be left *entirely* up to the States. But neither party made this argument before this Court or the courts below. We therefore decline to address it.

We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is Brian, as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ. The judgment of the United States Court of Appeals for the Fourth Circuit is, therefore, affirmed.

It is so ordered.

The Chief Justice took no part in the consideration or decision of this case.

Notes

1. Do you agree with this decision?
2. Is it appropriate for individual states to set their own burdens of proof? Can this lead to inconsistent results between states, making the rights of children with disabilities depend on where their parents live?
3. Chief Justice Roberts did not participate in this decision. Customarily the Justices do not give a reason for recusing themselves but most likely Chief Justice Roberts abstained because he was formerly associated with a law firm representing one of the parties in this case.

CASE NO. 14: Right of Nonattorney Parents to Proceed Pro Se in IDEA Lawsuits

WINKELMAN ex rel. WINKELMAN

v.

PARMA CITY SCHOOL DISTRICT

Supreme Court of the United States, 2007

127 S. Ct. 1994

Justice KENNEDY delivered the opinion of the Court.

Some four years ago, Mr. and Mrs. Winkelman, parents of five children, became involved in lengthy administrative and legal proceedings. They had sought review related to concerns they had over whether their youngest child, 6-year-old Jacob, would progress well at Pleasant Valley Elementary School, which is part of the Parma City School District in Parma, Ohio.

Jacob has autism spectrum disorder and is covered by the Individuals with Disabilities Education Act (Act or IDEA), . . . His parents worked with the school district to develop an individualized education program (IEP), as required by the Act. All concede that Jacob's parents had the statutory right to contribute to this process and, when agreement could not be reached, to participate in administrative proceedings including what the Act refers to as an "impartial due process hearing."

The disagreement at the center of the current dispute concerns the procedures to be followed when parents and their child, dissatisfied with the outcome of the due process hearing, seek further review in a United States District Court. The question is whether parents, either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel though they are not trained or licensed as attorneys. Resolution of this issue requires us to examine and explain the provisions of IDEA to determine if it accords to parents rights of their own that can be vindicated in court proceedings, or alternatively, whether the Act allows them, in their status as parents, to represent their child in court proceedings.

I

. . .

The school district proposed an IEP for the 2003–2004 school year that would have placed Jacob at a public elementary school. Regarding this IEP as deficient under IDEA, Jacob's nonlawyer parents availed themselves of the administrative review provided by IDEA. They filed a complaint alleging respondent had failed to provide Jacob with a free appropriate public education; they appealed the hearing officer's rejection of the claims in this complaint to a state-level review officer; and after losing that appeal they filed, on their own behalf and on behalf of Jacob, a complaint in the United States District Court for the Northern District of Ohio . . . [T]hey challenged the administrative decision, alleging, among other matters: that Jacob had not been provided with a free appropriate public education; that his IEP was inadequate; and that the school district had failed to follow procedures mandated by IDEA. Pending the resolution of these challenges, the Winkelmans had enrolled Jacob in a private school at their own expense. They had also obtained counsel to assist them with certain aspects of the proceedings, although they filed their federal complaint, and later their appeal, without the aid of an attorney. The Winkelmans' complaint sought reversal of the administrative decision, reimbursement for private-school expenditures and attorney's fees already incurred, and, it appears, **declaratory relief**.

The District Court granted respondent's motion for judgment on the pleadings, finding it had provided Jacob with a free appropriate public education. Petitioners, proceeding without counsel, filed an appeal with the Court of Appeals for the Sixth Circuit. Relying on its recent

decision in *Cavanaugh v. Cardinal Local School Dist.*, the Court of Appeals entered an order dismissing the Winkelmans' appeal unless they obtained counsel to represent Jacob. In *Cavanaugh* the Court of Appeals had rejected the proposition that IDEA allows nonlawyer parents raising IDEA claims to proceed *pro se* in federal court. The court ruled that the right to a free appropriate public education "belongs to the child alone," not to both the parents and the child. It followed, the court held, that "any right on which the [parents] could proceed on their own behalf would be derivative" of the child's right, so that parents bringing IDEA claims were not appearing on their own behalf. As for the parents' alternative argument, the court held, nonlawyer parents cannot litigate IDEA claims on behalf of their child because IDEA does not abrogate the common-law rule prohibiting nonlawyer parents from representing minor children. As the court in *Cavanaugh* acknowledged, its decision brought the Sixth Circuit in direct conflict with the First Circuit, which had concluded, under a theory of "statutory joint rights," that the Act accords to parents the right to assert IDEA claims on their own behalf. See *Maroni v. PemiBaker Regional School Dist.*

Petitioners sought review in this Court. In light of the disagreement among the Courts of Appeals as to whether a nonlawyer parent of a child with a disability may prosecute IDEA actions *pro se* in federal court, we granted certiorari.

II

Our resolution of this case turns upon the significance of IDEA's interlocking statutory provisions. Petitioners' primary theory is that the Act makes parents real parties in interest to IDEA actions, not "mer[e] guardians of their children's rights." If correct, this allows Mr. and Mrs. Winkelman back into court, for there is no question that a party may represent his or her own interests in federal court without the aid of counsel. Petitioners cannot cite a specific provision in IDEA mandating in direct and explicit terms that parents have the status of real parties in interest. They instead base their argument on a comprehensive reading of IDEA. Taken as a whole, they contend, the Act leads to the necessary conclusion that parents have independent, enforceable rights. Respondent, accusing petitioners of "knit[ting] together various provisions pulled from the crevices of the statute" to support these claims, reads the text of IDEA to mean that any redressable rights under the Act belong only to children.

We agree that the text of IDEA resolves the question presented. We recognize, in addition, that a proper interpretation of the Act requires a consideration of the entire statutory scheme. Turning to the current version of IDEA, which the parties agree governs this case, we begin with an overview of the relevant statutory provisions.

A

The goals of IDEA include "ensur[ing] that all children with disabilities have available to them a free appropriate public education" and "ensur[ing] that the rights of children with disabilities and parents of such children are protected." To this end, the Act includes provisions governing four areas of particular relevance to the Winkelmans' claim: procedures to be followed when developing a child's IEP; criteria governing the sufficiency of an education provided to a child; mechanisms for review that must be made available when there are objections to the IEP or to other aspects of IDEA proceedings; and the requirement in certain circumstances that States reimburse parents for various expenses. . . .

IDEA requires school districts to develop an IEP for each child with a disability, with parents playing "a significant role" in this process. . . . Parents serve as members of the team that develops the IEP. . . . IDEA accords parents additional protections that apply throughout the IEP process. . . . The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child. . . .

. . .

When a party objects to the adequacy of the education provided, the construction of the IEP, or some related matter, IDEA provides procedural recourse: It requires that a State provide "[a]n opportunity for any party to present a complaint . . . 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." By presenting a complaint a party is able to pursue a process of review that, as relevant, begins with a preliminary meeting "where the parents of the child discuss their complaint" and the local educational agency "is provided the opportunity to [reach a resolution]." If the agency "has not resolved the complaint to the satisfaction of the parents within 30 days," the parents may request an "impartial due process hearing," which must be conducted either by the local educational agency or by the state educational agency, and where a hearing officer will resolve issues raised in the complaint.

. . .

. . . Once the state educational agency has reached its decision, an aggrieved party may commence suit in federal court: "Any party aggrieved by the findings and decision made [by the hearing officer] shall have the right to bring a civil action with respect to the complaint."

IDEA, finally, provides for at least two means of cost recovery that inform our analysis. First, in certain circumstances it allows a court or hearing officer to require a state agency "to reimburse the parents [of a child with a disability] for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." Second, it sets forth rules governing when and to what extent a court may award attorney's fees. Included in this section is a provision allowing an award "to a prevailing party who is the parent of a child with a disability."

B

Petitioners construe these various provisions to accord parents independent, enforceable rights under IDEA. We agree. The parents enjoy enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.

The statute sets forth procedures for resolving disputes in a manner that, in the Act's express terms, contemplates parents will be the parties bringing the administrative complaints. . . . Claims raised in these complaints are then resolved at impartial due process hearings, where, again, the statute makes clear that parents will be participating as parties. . . . The statute then grants "[a]ny party aggrieved by the findings and decision made [by the hearing officer] . . . the right to bring a civil action with respect to the complaint."

Nothing in these interlocking provisions excludes a parent who has exercised his or her own rights from statutory protection the moment the administrative proceedings end. Put another way, the Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them once the time comes to file a civil action. Through its provisions for expansive review and extensive parental involvement, the statute leads to just the opposite result.

Respondent, resisting this line of analysis, asks us to read these provisions as contemplating parental involvement only to the extent parents represent their child's interests. In respondent's view IDEA accords parents nothing more than "collateral tools related to the child's underlying substantive rights—not freestanding or independently enforceable rights."

This interpretation, though, is foreclosed by provisions of the statute. IDEA defines one of its purposes as seeking "to ensure that the rights of children with disabilities and parents of such children are protected." The word "rights" in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense.

Further provisions confirm this view. IDEA mandates that educational agencies establish procedures "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." It presumes parents have rights of their own when it defines how States might provide for the transfer of the "rights accorded to parents" by IDEA, and it prohibits the raising of certain challenges "[n]otwithstanding any other individual right of action that a parent or student may maintain under [the relevant provisions of IDEA]," To adopt respondent's reading of the statute would require an interpretation of these statutory provisions (and others) far too strained to be correct.

Defending its countertextual reading of the statute, respondent cites a decision by a Court of Appeals concluding that the Act's "references to parents are best understood as accommodations to the fact of the child's incapacity." This, according to respondent, requires us to interpret all references to parents' rights as referring in implicit terms to the child's rights—which, under this view, are the only enforceable rights accorded by IDEA. Even if we were inclined to ignore the plain text of the statute in considering this theory, we disagree that the sole purpose driving IDEA's involvement of parents is to facilitate vindication of a child's rights. It is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child. . . . There is no necessary bar or obstacle in the law, then, to finding an intention by Congress to grant parents a stake in the entitlements created by IDEA. Without question a parent of a child with a disability has a particular and personal interest in fulfilling "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."

We therefore find no reason to read into the plain language of the statute an implicit rejection of the notion that Congress would accord parents independent, enforceable rights concerning the education of their children. We instead interpret the statute's references to parents' rights to mean what they say: that IDEA includes provisions conveying rights to parents as well as to children.

A variation on respondent's argument has persuaded some Courts of Appeals. The argument is that while a parent can be a "party aggrieved" for aspects of the hearing officer's findings and decision, he or she cannot be a "party aggrieved" with respect to all IDEA-based challenges. Under this view the causes of action available to a parent might relate, for example, to various procedural mandates, and reimbursement demands. The argument supporting this conclusion proceeds as follows: Because a "party aggrieved" is, by definition, entitled to a remedy, and parents are, under IDEA, only entitled to certain procedures and reimbursements as remedies, a parent cannot be a "party aggrieved" with regard to any claim not implicating these limited matters.

This argument is contradicted by the statutory provisions we have recited. True, there are provisions in IDEA stating parents are entitled to certain procedural protections and reimbursements; but the statute prevents us from placing too much weight on the implications to be drawn when other entitlements are accorded in less clear language. We find little support for the inference that parents are excluded by implication whenever a child is mentioned, and vice versa. . . . Without more, then, the language in IDEA confirming that parents enjoy particular procedural and reimbursement-related rights does not resolve whether they are also entitled to enforce IDEA's other mandates, including the one most fundamental to the Act: the provision of a free appropriate public education to a child with a disability.

We consider the statutory structure. The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP. The IEP, in turn, sets the boundaries of the central entitlement provided by IDEA: It defines a "'free appropriate public education'" for that parent's child.

The statute also empowers parents to bring challenges based on a broad range of issues. The parent may seek a hearing on "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." To resolve these challenges a hearing officer must make a decision based on whether the child "received a free appropriate public education." When this hearing has been conducted by a local educational agency rather than a state educational agency, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision" to the state educational agency. Judicial review follows, authorized by a broadly worded provision phrased in the same terms used to describe the prior stage of review: "[a]ny party aggrieved" may bring "a civil action."

These provisions confirm that IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made. We therefore conclude that IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to parents. As a consequence, a parent may be a "party aggrieved" for purposes of [IDEA] with regard to "any matter" implicating these rights. The status of parents as parties is not limited to matters that relate to procedure and cost recovery. To find otherwise would be inconsistent with the collaborative framework and expansive system of review established by the Act. . . .

Our conclusion is confirmed by noting the incongruous results that would follow were we to accept the proposition that parents' IDEA rights are limited to certain nonsubstantive matters. The statute's procedural and reimbursement-related rights are intertwined with the substantive adequacy of the education provided to a child, and it is difficult to disentangle the provisions in order to conclude that some rights adhere to both parent and child while others do not. Were we nevertheless to recognize a distinction of this sort it would impose upon parties a confusing and onerous legal regime, one worsened by the absence of any express guidance in IDEA concerning how a court might in practice differentiate between these matters. It is, in addition, out of accord with the statute's design to interpret the Act to require that parents prove the substantive inadequacy of their child's education as a predicate for obtaining, for example, reimbursement under [IDEA], yet to prevent them from obtaining a judgment mandating that the school district provide their child with an educational program demonstrated to be an appropriate one. The adequacy of the educational program is, after all, the central issue in the litigation. The provisions of IDEA do not set forth these distinctions, and we decline to infer them.

The bifurcated regime suggested by the courts that have employed it, moreover, leaves some parents without a remedy. The statute requires, in express terms, that States provide a child with a free appropriate public education "at public expense," including specially designed instruction "at no cost to parents." Parents may seek to enforce this mandate through the federal courts, we conclude, because among the rights they enjoy is the right to a free appropriate public education for their child. Under the countervailing view, which would make a parent's ability to enforce IDEA dependant [*sic*] on certain procedural and reimbursement-related rights, a parent whose disabled child has not received a free appropriate public education would have recourse in the federal courts only under two circumstances: when the parent happens to have some claim related to the procedures employed; and when he or she is able to incur, and has in fact incurred, expenses creating a right to reimbursement. Otherwise the adequacy of the child's education would not be regarded as relevant to any cause of action the parent might bring; and, as a result, only the child could vindicate the right accorded by IDEA to a free appropriate public education.

The potential for injustice in this result is apparent. What is more, we find nothing in the statute to indicate that when Congress required States to provide adequate instruction to a child "at no cost to parents," it intended that only some parents would be able to enforce that mandate. The statute instead takes pains to "ensure that the rights of children with disabilities and parents of such children are protected." . . .

We conclude IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child.

C

Respondent contends, though, that even under the reasoning we have now explained petitioners cannot prevail without overcoming a further difficulty. Citing our opinion in *Arlington Central School Dist. Bd. of Ed. v. Murphy,* respondent argues that statutes passed pursuant to the Spending Clause, such as IDEA, must provide "'clear notice'" before they can burden a State with some new condition, obligation, or liability. Respondent contends that because IDEA is, at best, ambiguous as to whether it accords parents independent rights, it has failed to provide clear notice of this condition to the States.

Respondent's reliance on *Arlington* is misplaced. In *Arlington* we addressed whether IDEA required States to reimburse experts' fees to prevailing parties in IDEA actions.

"[W]hen Congress attaches conditions to a State's acceptance of federal funds," we explained,"the conditions must be set out 'unambiguously.'" The question to be answered in *Arlington,* therefore, was whether IDEA "furnishes clear notice regarding the liability at issue." We found it did not.

The instant case presents a different issue, one that does not invoke the same rule. Our determination that IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe. The basic measure of monetary recovery, moreover, is not expanded by recognizing that some rights repose in both the parent and the child. . . .

Respondent argues our ruling will, as a practical matter, increase costs borne by the States as they are forced to defend against suits unconstrained by attorneys trained in the law and the rules of ethics. Effects such as these do not suffice to invoke the concerns under the Spending Clause. . . .

III

The Court of Appeals erred when it dismissed the Winkelmans' appeal for lack of counsel. Parents enjoy rights under IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf. The decision by Congress to grant parents these rights was consistent with the purpose of IDEA and fully in accord with our social and legal traditions. It is beyond dispute that the relationship between a parent and child is sufficient to support a legally cognizable interest in the education of one's child; and, what is more, Congress has found that "the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."

In light of our holding we need not reach petitioners' alternative argument, which concerns whether IDEA entitles parents to litigate their child's claims *pro se.*

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment in part and dissenting in part.

I would hold that parents have the right to proceed *pro se* under the Individuals with Disabilities Education Act (IDEA), when they seek reimbursement for private school expenses or redress for violations of their own procedural rights, but not when they seek a judicial determination that their child's free appropriate public education (or FAPE) is substantively inadequate.

Whether parents may bring suits under the IDEA without a lawyer depends upon the interaction between the IDEA and the general *pro se* provision in the Judiciary Act of 1789. The latter . . . provides that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." The IDEA's right-to-sue provision, provides that "[a]ny *party aggrieved* by the findings and decision [of a hearing officer] shall have the right to bring a civil action with respect to the [administrative] complaint." Thus, when parents are "parties aggrieved" under the IDEA, they are "parties" within the meaning of [the Judiciary Act], entitled to sue on their own behalf.

As both parties agree, "party aggrieved" means "[a] party entitled to a remedy; espy., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." This case thus turns on the rights that the IDEA accords to parents, and the concomitant remedies made available to them. Only with respect to such rights and remedies are parents properly viewed as "parties aggrieved," capable of filing their own cases in federal court.

A review of the statutory text makes clear that, as relevant here, the IDEA grants parents only two types of rights. First, under certain circumstances "a court or a hearing officer may require the [school district] to reimburse *the parents*" for private school expenditures "if the court or hearing officer finds that the [school district] had not made a free appropriate public education available to the child." Second,

parents are accorded a variety of procedural protections, both during the development of their child's individualized education program (IEP). It is clear that parents may object to procedural violations at the administrative due process hearing, and that a hearing officer may provide relief to parents for certain procedural infractions. Because the rights to reimbursement and to the various procedural protections are accorded to parents themselves, they are "parties aggrieved" when those rights are infringed, and may accordingly proceed *pro se* when seeking to vindicate them.

The Court goes further, however, concluding that parents may proceed *pro se* not only when they seek reimbursement or assert procedural violations, but also when they challenge the substantive adequacy of their child's FAPE—so that parents may act without a lawyer *in every IDEA case*. In my view, this sweeps far more broadly than the text allows. Out of this sprawling statute the Court cannot identify even *a single* provision stating that parents have the substantive right to a FAPE. The reason for this is readily understandable: The right to a free appropriate public education obviously inheres in the child, for it is he who receives the education. As the IDEA instructs, participating States must provide a "free appropriate public education . . . to all children with disabilities. . . ." The statute is replete with references to the fact that a FAPE belongs to the child. . . . The parents of a disabled child no doubt have an *interest* in seeing their child receive a proper education. But there is a difference between an *interest* and a statutory *right*. The text of the IDEA makes clear that parents have no *right* to the education itself.

The Court concedes, as it must, that while the IDEA gives parents the right to reimbursement and procedural protection in explicit terms, it does not do so for the supposed right to the education itself. The obvious inference to be drawn from the statute's clear and explicit conferral of discrete types of rights upon parents and children, respectively, is that it does not by accident confer the parent-designated rights upon children, or the children-designated rights upon parents. The Court believes, however, that "the statute prevents us from placing too much weight on [this] implicatio[n]." That conclusion is in error. Nothing in "the statute," undermines the obvious "implication" of Congress's scheme. What the Court relies upon for its conclusion that parents have a substantive right to a FAPE is not the "statutory structure," but rather the myriad *procedural* guarantees accorded to parents in the administrative process. But allowing parents, by means of these guarantees, to help shape the contours of their child's education is simply not the same as giving *them* the right to that education. Nor can the Court sensibly rely on the provisions governing due process hearings and administrative appeals, the various provisions that refer to the "parent's complaint," or the fact that the right-to-sue provision, refers to the administrative complaint, which in turn allows parents to challenge "any matter" relating to the provision of a FAPE. These provisions prove nothing except what all parties concede: that parents *may* represent their child *pro se* at the administrative level. . . . Parents thus have the power, at the administrative stage, to litigate *all* of the various rights under the statute since at that stage they are acting not only on their *own* behalf, but on behalf of *their child* as well. This tells us nothing whatever about *whose* rights they are. The Court's spraying statutory sections about like buckshot cannot create a substantive parental right to education where none exists.

Harkening back to its earlier discussion of the IDEA's "text and structure" (by which it means the statute's procedural protections), the Court announces the startling proposition that, in fact, the "IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents." If that were so, the Court could have spared us its painful effort to craft a distinctive parental right out of scattered procedural provisions. But of course it is not so. The IDEA quite clearly differentiates between the rights accorded to parents and their children. As even petitioners' *amici* agree,"Congress specifically indicated that parents have rights under the Act that are separate from and independent of their children's rights." Does the Court seriously contend that a child has a right to reimbursement, when the statute most definitively provides that if "*the parents* of a child with a disability" enroll that child in private school, "a court . . . may require the [school district] to reimburse *the parents* for the cost of that enrollment"? Does the Court believe that a child has a procedural right under [IDEA], which gives *parents* the power to excuse an IEP team member from attending an IEP meeting? The IDEA does not remotely envision communal "family" rights.

The Court believes that because parents must prove the substantive inadequacy of a FAPE before obtaining reimbursement, and because the suitability of a FAPE may also be at issue when procedural violations are alleged, it is "out of accord with the statute's design" to "prevent [parents] from obtaining a judgment mandating that the school district provide their child" with a FAPE. That is a total non sequitur. That Congress has required parents to demonstrate the inadequacy of their child's FAPE in order to vindicate their own rights says nothing about whether parents possess an underlying right to education. The Court insists that the right to a FAPE is the right "most fundamental to the Act." Undoubtedly so, but that sheds no light upon whom the right belongs to, and hence upon who can sue in their own right. Congress has used the phrase "party aggrieved," and it is this Court's job to apply that language, not to run from it.

The Court further believes that a distinction between parental and child rights will prove difficult to administer. I fail to see why that is so. Before today, the majority of Federal Courts of Appeals to have considered the issue have allowed parents to sue *pro se* with respect to some claims, but not with respect to the denial of a FAPE. . . . The Court points to no evidence suggesting that this majority rule has caused any confusion in practice. Nor do I see how it could, since the statute makes clear and easily administrable distinctions between parents' and children's legal entitlements.

Finally, the Court charges that the approach taken by the majority of Courts of Appeals would perpetrate an "injustice," since parents who do not seek reimbursement or allege procedural violations would be "without a remedy." That, of course, is not true. They will have the same remedy as all parents who sue to vindicate their children's rights: the power to bring suit, represented by counsel. But even indulging the Court's perception that it is unfair to allow some but not all IDEA parents to proceed *pro se,* that complaint is properly addressed to Congress, which structured the rights as it has, and limited suit to "party aggrieved." And there are good reasons for it to have done so. *Pro se* cases impose unique burdens on lower courts—and on defendants, in this case the schools and school districts that must hire their own lawyers. Since *pro se* complaints are prosecuted essentially for free, without screening by knowledgeable attorneys, they are much more likely to be unmeritorious. And for courts to figure them out without the assistance of plaintiff's counsel is much more difficult and time-consuming. In both categories of *pro se* parental suit permitted under a proper interpretation of the statute, one or the other of these burdens is reduced. Actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate. And actions alleging procedural violations can ordinarily be disposed of without the intensive record-review that characterizes suits challenging the suitability of a FAPE.

* * *

Petitioners sought reimbursement, alleged procedural violations, and requested a declaration that their child's FAPE was substantively inadequate. I agree with the Court that they may proceed *pro se* with respect to the first two claims, but I disagree that they may do so with respect to the third.

Notes

1. In something of a surprise, the Court decided this case by a margin of seven to two. Most commentators thought that the Court would have ruled in favor of the board.
2. In his dissent, Justice Scalia expressed his concern that allowing parents who are not attorneys to initiate litigation can be costly to school systems. What additional costs could a school district incur by the ruling?
3. The Court failed to address what should take place if the interests of parents differ from those of their children. For example, if students in secondary schools disagree with their parents as to the content of their IEPs, it is possible that students and their parents, as well as their school boards, might all resort to litigation, creating the anomalous situation of having three different lawyers present. Further, if a noncustodial parent disagrees with the custodial parent and the student, then a fourth lawyer could be added to the mix.
4. Two related arguments against allowing parents to proceed on behalf of their children in IDEA cases is that their children, the real beneficiaries of the IDEA, should be represented by competent counsel and that their entitlements should not be compromised by the failure of their parents to obtain competent counsel. Conversely, others might argue that a child's entitlement would be compromised even further if parents were unable to file suit due to their inability to obtain counsel. Which side do you think has the better argument?

CASE NO. 15: Unilateral Parental Placements in Non-State-Approved Facilities

FLORENCE COUNTY SCHOOL DISTRICT FOUR

v.

CARTER

United States Supreme Court, 1993

510 U.S. 7

Justice O'CONNOR delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act), requires States to provide disabled children with a "free appropriate public education." . . . This case presents the question whether a court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and put the child in a private school that provides an education that is otherwise proper under IDEA, but does not meet all the requirements of § 1401(a)(18). We hold that the court may order such reimbursement, and therefore affirm the judgment of the Court of Appeals.

I

Respondent Shannon Carter was classified as learning disabled in 1985, while a ninth grade student in a school operated by petitioner Florence County School District Four. School officials met with Shannon's parents to formulate an individualized education program (IEP) for Shannon, as required under IDEA. The IEP provided that Shannon would stay in regular classes except for three periods of individualized instruction per week, and established specific goals in reading and mathematics of four months' progress for the entire school year. Shannon's parents were dissatisfied, and requested a hearing to challenge the appropriateness of the IEP. Both the local educational officer and the state educational agency hearing officer rejected Shannon's parents' claim and concluded that the IEP was adequate. In the meantime, Shannon's parents had placed her in Trident Academy, a private school specializing in educating children with disabilities. Shannon began at Trident in September 1985 and graduated in the spring of 1988.

Shannon's parents filed this suit in July 1986, claiming that the school district had breached its duty under IDEA to provide Shannon with a "free appropriate public education," § 1401(a)(18), and seeking reimbursement for tuition and other costs incurred at Trident. After a bench trial, the District Court ruled in the parents' favor. . . . The District Court concluded that Shannon's education was "appropriate" under IDEA, and that Shannon's parents were entitled to reimbursement of tuition and other costs.

The Court of Appeals for the Fourth Circuit affirmed. The court agreed that the IEP proposed by the school district was inappropriate under IDEA. . . . Accordingly, "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'"

The court below recognized that its holding conflicted with *Tucker v. Bay Shore Union Free School Dist.*, in which the Court of Appeals for the Second Circuit held that parental placement in a private school cannot be proper under the Act unless the private school in question meets the standards of the state education agency. We granted certiorari to resolve this conflict among the Courts of Appeals.

II

In *School Comm. of Burlington v. Department of Ed. of Mass.,* we held that IDEA's grant of equitable authority empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Congress intended that IDEA's promise of a "free appropriate public

education" for disabled children would normally be met by an IEP's provision for education in the regular public schools or in private schools chosen jointly by school officials and parents. In cases where cooperation fails, however,"parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." For parents willing and able to make the latter choice, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." Because such a result would be contrary to IDEA's guarantee of a "free appropriate public education," we held that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case."

As this case comes to us, two issues are settled: (1) the school district's proposed IEP was inappropriate under IDEA, and (2) although Trident did not meet the § 1401(a)(18) requirements, it provided an education otherwise proper under IDEA. This case presents the narrow question whether Shannon's parents are barred from reimbursement because the private school in which Shannon enrolled did not meet the § 1401(a)(18) definition of a "free appropriate public education." We hold that they are not, because § 1401(a)(18)'s requirements cannot be read as applying to parental placements.

Section 1401(a)(18)(A) requires that the education be "provided at public expense, under public supervision and direction." Similarly, § 1401(a)(18)(D) requires schools to provide an IEP, which must be designed by "a representative of the local educational agency," and must be "establish[ed]," "revise[d]," and "review[ed]" by the agency, § 1414(a)(5). These requirements do not make sense in the context of a parental placement. In this case, as in all *Burlington* reimbursement cases, the parents' rejection of the school district's proposed IEP is the very reason for the parents' decision to put their child in a private school. In such cases, where the private placement has necessarily been made over the school district's objection, the private school education will not be under "public supervision and direction." Accordingly, to read the § 1401(a)(18) requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in *Burlington.* Moreover, IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of § 1401(a)(18) to bar reimbursement in the circumstances of this case would defeat this statutory purpose.

Nor do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards. Trident's deficiencies, according to the school district, were that it employed at least two faculty members who were not state-certified and that it did not develop IEP's. As we have noted, however, the § 1401(a)(18) requirements— including the requirement that the school meet the standards of the state educational agency do not apply to private parental placements. Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." Accordingly, we disagree with the Second Circuit's theory that "a parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on [the State's] approved list of private" schools. Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.

Furthermore, although the absence of an approved list of private schools is not essential to our holding, we note that parents in the position of Shannon's have no way of knowing at the time they select a private school whether the school meets state standards. South Carolina keeps no publicly available list of approved private schools, but instead approves private school placements on a case-by-case basis. In fact, although public school officials had previously placed three children with disabilities at Trident . . . Trident had not received blanket approval from the State. South Carolina's case-by-case approval system meant that Shannon's parents needed the cooperation of state officials before they could know whether Trident was state-approved. As we recognized in *Burlington,* such cooperation is unlikely in cases where the school officials disagree with the need for the private placement.

III

The school district also claims that allowing reimbursement for parents such as Shannon's puts an unreasonable burden on financially strapped local educational authorities. The school district argues that requiring parents to choose a state approved private school if they want reimbursement is the only meaningful way to allow States to control costs; otherwise States will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the Act, no matter how expensive it may be.

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Moreover, parents who, like Shannon's, "unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." They are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.

Finally, we note that once a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." Under this provision, "equitable considerations are relevant in fashioning relief," and the court enjoys "broad discretion" in so doing. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.

Accordingly, we affirm the judgment of the Court of Appeals.

So ordered.

Notes

1. Is this outcome in the best interest of students with disabilities?
2. How far can, or should, courts go in extending this rationale? For example, what if parents wished to send their children to religiously affiliated charter schools? What if parents sought reimbursement for costs associated with homeschooling?

CASE NO. 16: Denial of Fees for Expert Witnesses and Consultants

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION

v.

MURPHY

United States Supreme Court, 2006

_U.S._, 126 S. Ct. 2455

Justice ALITO delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act) provides that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act. We granted certiorari to decide whether this fee-shifting provision authorizes prevailing parents to recover fees for services rendered by experts in IDEA actions. We hold that it does not.

I

Respondents Pearl and Theodore Murphy filed an action under the IDEA on behalf of their son, Joseph Murphy, seeking to require petitioner Arlington Central School District Board of Education to pay for their son's private school tuition for specified school years. Respondents prevailed in the District Court and the Court of Appeals for the Second Circuit affirmed.

As prevailing parents, respondents then sought $29,350 in fees for the services of an educational consultant, Marilyn Arons, who assisted respondents throughout the IDEA proceedings. The District Court granted respondents' request in part. It held that only the value of Arons' time spent between the hearing request and the ruling in respondents' favor could properly be considered charges incurred in an "action or proceeding brought" under the Act. This reduced the maximum recovery to $8,650. The District Court also held that Arons, a nonlawyer, could be compensated only for time spent on expert consulting services, not for time spent on legal representation, but it concluded that all the relevant time could be characterized as falling within the compensable category, and thus allowed compensation for the full $8,650.

The Court of Appeals for the Second Circuit affirmed. Acknowledging that other Circuits had taken the opposite view, the Court of Appeals for the Second Circuit held that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions." . . .

We granted certiorari to resolve the conflict among the Circuits with respect to whether Congress authorized the compensation of expert fees to prevailing parents in IDEA actions. We now reverse.

II

Our resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause. Like its statutory predecessor, the IDEA provides federal funds to assist state and local agencies in educating children with disabilities "and conditions such funding upon a State's compliance with extensive goals and procedures."

Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out "unambiguously." . . . States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain." Thus, in the present case, we must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds.

We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.

III

A

In considering whether the IDEA provides clear notice, we begin with the text. We have "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." When the statutory "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."

The governing provision of the IDEA, 20 U.S.C. § 1415(i)(3)(B), provides that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs" to the parents of "a child with a disability" who is the "prevailing party." While this provision provides for an award of "reasonable attorneys' fees," this provision does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts.

Respondents contend that we should interpret the term "costs" in accordance with its meaning in ordinary usage and that § 1415(i)(3)(B) should therefore be read to "authorize reimbursement of all costs parents incur in IDEA proceedings, including expert costs." This argument has multiple flaws. For one thing, as the Court of Appeals in this case acknowledged,"'costs' is a term of art that generally does not include expert fees." The use of this term of art, rather than a term such as "expenses," strongly suggests that § 1415(i)(3)(B) was not meant to be an open-ended provision that makes participating States liable for all expenses incurred by prevailing parents in connection with an IDEA case—for example, travel and lodging expenses or lost wages due to time taken off from work. Moreover, contrary to respondents' suggestion, § 1415(i)(3)(B) does not say that a court may award "costs" to prevailing parents; rather, it says that a court may award reasonable attorney's fees "as part of the costs" to prevailing parents. This language simply adds reasonable attorney's fees incurred by prevailing parents to the list of costs that prevailing parents are otherwise entitled to recover. This list of otherwise recoverable costs is obviously the list set out in 28 U.S.C. § 1920, the general statute governing the taxation of costs in federal court, and the recovery of witness fees under § 1920 is strictly limited by § 1821, which authorizes travel reimbursement and a $40 per diem. Thus, the text of 20 U.S.C. § 1415(i)(3)(B) does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice that is required under the Spending Clause.

Other provisions of the IDEA point strongly in the same direction. While authorizing the award of reasonable attorney's fees, the Act contains detailed provisions that are designed to ensure that such awards are indeed reasonable. The absence of any comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized. Moreover, the lack of any reference to expert fees in § 1415(d)(2) gives rise to a similar inference. This provision, which generally requires that parents receive "a full explanation of the procedural safeguards" available under § 1415 and refers expressly to "attorneys' fees," makes no mention of expert fees.

B

Respondents contend that their interpretation of § 1415(i)(3)(B) is supported by a provision of the Handicapped Children's Protection Act of 1986 that required the General Accounting Office (GAO) to collect certain data, § 4(b)(3), (hereinafter GAO study provision), but this provision is of little significance for present purposes. The GAO study provision directed the Comptroller General, acting through the GAO, to compile data on, among other things: "(A) the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party" in IDEA cases for a particular period of time, and (B) "the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency."

Subparagraph (A) would provide some support for respondents' position if it directed the GAO to compile data on awards to prevailing parties of the expense of hiring consultants, but that is not what subparagraph (A) says. Subparagraph (A) makes no mention of consultants or experts or their fees.

Subparagraph (B) similarly does not help respondents. Subparagraph (B), which directs the GAO to study "the number of hours spent [in IDEA cases] by personnel, including . . . consultants," says nothing about the award of fees to such consultants. Just because Congress directed the GAO to compile statistics on the hours spent by consultants in IDEA cases, it does not follow that Congress meant for States to compensate prevailing parties for the fees billed by these consultants. Respondents maintain that "Congress' direction to the GAO would be inexplicable if Congress did not anticipate that the expenses for 'consultants' would be recoverable," but this is incorrect. There are many reasons why Congress might have wanted the GAO to gather data on expenses that were not to be taxed as costs. Knowing the costs incurred by IDEA litigants might be useful in considering future procedural amendments (which might affect these costs) or a future amendment regarding fee shifting. And, in fact, it is apparent that the GAO study provision covered expenses that could not be taxed as costs. For

example, the GAO was instructed to compile statistics on the hours spent by all attorneys involved in an IDEA action or proceeding, even though the Act did not provide for the recovery of attorney's fees by a prevailing state or local educational agency. Similarly, the GAO was directed to compile data on "expenses incurred by the parents," not just those parents who prevail and are thus eligible to recover taxed costs.

In sum, the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants. Certainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds.

IV

Thus far, we have considered only the text of the IDEA, but perhaps the strongest support for our interpretation of the IDEA is supplied by our decisions and reasoning in *Crawford Fitting* and *Casey*. In light of those decisions, we do not see how it can be said that the IDEA gives a State unambiguous notice regarding liability for expert fees.

In *Crawford Fitting,* the Court rejected an argument very similar to respondents' argument that the term "costs" in § 1415(i)(3)(B) should be construed as an open-ended reference to prevailing parents' expenses. It was argued in *Crawford Fitting* that Federal Rule of Civil Procedure 54(d), which provides for the award of "costs" to a prevailing party, authorizes the award of costs not listed in 28 U.S.C. § 1821. The Court held, however, that Rule 54(d) does not give a district judge "discretion to tax whatever costs may seem appropriate;" rather, the term "costs" in Rule 54(d) is defined by the list set out in § 1920. Because the recovery of witness fees is strictly limited by § 1821, the Court observed, a broader interpretation of Rule 54(d) would mean that the Rule implicitly effected a partial repeal of those provisions. But, the Court warned, "[w]e will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees."

The reasoning of *Crawford Fitting* strongly supports the conclusion that the term "costs" in 20 U.S.C. § 1415(i)(3)(B), like the same term in Rule 54(d), is defined by the categories of expenses enumerated in 28 U.S.C. § 1920. This conclusion is buttressed by the principle, recognized in *Crawford Fitting,* that no statute will be construed as authorizing the taxation of witness fees as costs unless the statute "refer[s] explicitly to witness fees." Our decision in *Casey* confirms even more dramatically that the IDEA does not authorize an award of expert fees. In *Casey,* as noted above, we interpreted a fee-shifting provision, 42 U.S.C. § 1988, the relevant wording of which was virtually identical to the wording of 20 U.S.C. § 1415(i)(3)(B). We held that § 1988 did not empower a district court to award expert fees to a prevailing party. To decide in favor of respondents here, we would have to interpret the virtually identical language in 20 U.S.C. § 1415 as having exactly the opposite meaning. Indeed, we would have to go further and hold that the relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical language in 42 U.S.C. § 1988 was held to mean in *Casey.*

The Court of Appeals, as noted above, was heavily influenced by a *Casey* footnote, but the court misunderstood the footnote's meaning. The text accompanying the footnote argued, based on an analysis of several fee-shifting statutes, that the term "attorney's fees" does not include expert fees. In the footnote, we commented on petitioners' invocation of the Conference Committee Report relating to 20 U.S.C. § 1415(i)(3)(B), which stated: "'The conferees intend[ed] that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.'" This statement, the footnote commented, was "an apparent effort to *depart* from ordinary meaning and to define a term of art." The footnote did not state that the Conference Committee Report set out the correct interpretation of § 1415(i)(3)(B), much less that the Report was sufficient, despite the language of the statute, to provide the clear notice required under the Spending Clause. The thrust of the footnote was simply that the term "attorneys' fees," standing alone, is generally not understood as encompassing expert fees. Thus, *Crawford Fitting* and *Casey* strongly reinforce the conclusion that the IDEA does not unambiguously authorize prevailing parents to recover expert fees.

V

Respondents make several arguments that are not based on the text of the IDEA, but these arguments do not show that the IDEA provides clear notice regarding the award of expert fees. Respondents argue that their interpretation of the IDEA furthers the Act's overarching goal of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A) as well as the goal of "safeguard[ing] the rights of parents to challenge school decisions that adversely affect their child." These goals, however, are too general to provide much support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations. Because the IDEA is not intended in all instances to further the broad goals identified by the respondents at the expense of fiscal considerations, the goals cited by respondents do little to bolster their argument on the narrow question presented here.

Finally, respondents vigorously argue that Congress clearly intended for prevailing parents to be compensated for expert fees. They rely on the legislative history of § 1415 and in particular on the following statement in the Conference Committee Report, discussed above: "The

conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case."

Whatever weight this legislative history would merit in another context, it is not sufficient here. Putting the legislative history aside, we see virtually no support for respondents' position. Under these circumstances, where everything other than the legislative history overwhelming suggests that expert fees may not be recovered, the legislative history is simply not enough. In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds. Here, in the face of the unambiguous text of the IDEA and the reasoning in *Crawford Fitting* and *Casey,* we cannot say that the legislative history on which respondents rely is sufficient to provide the requisite fair notice.

* * *

We reverse the judgment of the Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Notes

1. This was the first education case in which Justice Alito authored the Court's majority opinion. The vote was six to three.
2. Even in conceding that the Court stayed close to the text in interpreting the IDEA, is it fair for parents to have to pay for experts and consultants who help them prevail in obtaining services for their children? Put another way, after the Supreme Court denied prevailing parents the opportunity to recover attorney fees, Congress amended the IDEA. Although it has refused to do so in recent years, should Congress amend the IDEA to permit parents to recover fees for expert witnesses and consultants who assisted in helping them win their cases?
3. In the lengthier of the two dissents, Justice Breyer, joined by Justices Stevens and Souter, disagreed with the Court on two primary points. First, he interpreted the GAO Report as permitting fee awards to prevailing parents. Second, he maintained that interpreting the IDEA as allowing prevailing parents to recover the disputed fees would have advanced its goals. Although he joined Justice Breyer's dissent, Justice Souter thought it necessary to pen a separate paragraph length dissent to emphasize his support for the disputed GAO report.

CASE NO. 17: The Meaning of "Otherwise Qualified"

SOUTHEASTERN COMMUNITY COLLEGE

v.

DAVIS

Supreme Court of the United States, 1979

442 U.S. 397

Justice POWELL delivered the opinion of the Court.

This case presents a matter of first impression for this Court:Whether § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," forbids professional schools from imposing physical qualifications for admission to their clinical training programs.

I

Respondent, who suffers from a serious hearing disability, seeks to be trained as a registered nurse. During the 1973–1974 academic year she was enrolled in the College Parallel program of Southeastern Community College, a state institution that receives federal funds. Respondent hoped to progress to Southeastern's Associate Degree Nursing program, completion of which would make her eligible for state certification as a registered nurse. In the course of her application to the nursing program, she was interviewed by a member of the nursing faculty. It became apparent that respondent had difficulty understanding questions asked, and on inquiry she acknowledged a history of hearing problems and dependence on a hearing aid. She was advised to consult an audiologist.

On the basis of an examination at Duke University Medical Center, respondent was diagnosed as having a "bilateral, sensori-neural hearing loss." A change in her hearing aid was recommended, as a result of which it was expected that she would be able to detect sounds "almost as well as a person would who has normal hearing." But this improvement would not mean that she could discriminate among sounds sufficiently to understand normal spoken speech. Her lipreading skills would remain necessary for effective communication: "While wearing the hearing aid, she is well aware of gross sounds occurring in the listening environment. However, she can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker."

Southeastern next consulted Mary McRee, Executive Director of the North Carolina Board of Nursing. On the basis of the audiologist's report, McRee recommended that respondent not be admitted to the nursing program. In McRee's view, respondent's hearing disability made it unsafe for her to practice as a nurse. In addition, it would be impossible for respondent to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from realizing the benefits of the program:"To adjust patient learning experiences in keeping with [respondent's] hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs."

After respondent was notified that she was not qualified for nursing study because of her hearing disability, she requested reconsideration of the decision. The entire nursing staff of Southeastern was assembled, and McRee again was consulted. McRee repeated her conclusion that on the basis of the available evidence, respondent "has hearing limitations which could interfere with her safely caring for patients." Upon further deliberation, the staff voted to deny respondent admission.

Respondent then filed suit in the United States District Court for the Eastern District of North Carolina, alleging both a violation of § 504 of the Rehabilitation Act of 1973 and a denial of equal protection and due process. After a bench trial, the District Court entered judgment in favor of Southeastern . . .

. . . the District Court concluded that respondent was not an "otherwise qualified handicapped individual" protected against discrimination by § 504. . . .

On appeal, the Court of Appeals for the Fourth Circuit reversed. It did not dispute the District Court's findings of fact, but held that the court had misconstrued § 504. the appellate court believed that § 504 required Southeastern to "reconsider plaintiff's application for admission to the nursing program without regard to her hearing ability." It concluded that the District Court had erred in taking respondent's handicap into account in determining whether she was "otherwise qualified" for the program, rather than confining its inquiry to her "academic and technical qualifications." . . .

Because of the importance of this issue to the many institutions covered by § 504, we granted certiorari. We now reverse.

II

As previously noted, this is the first case in which this Court has been called upon to interpret § 504. It is elementary that "[t]he starting point in every case involving construction of a statute is the language itself." Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.

The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.

The regulations promulgated by the Department of HEW to interpret § 504 reinforce, rather than contradict, this conclusion. According to these regulations, a "[q]ualified handicapped person" is, "[w]ith respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity. . . ."

A . . . note emphasizes that legitimate physical qualifications may be essential to participation in particular programs. We think it clear, therefore, that HEW interprets the "other" qualifications which a handicapped person may be required to meet as including necessary physical qualifications.

III

The remaining question is whether the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program. It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program. As the District Court found, this ability also is indispensable for many of the functions that a registered nurse performs.

Respondent contends nevertheless that § 504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication. First, it is suggested that respondent can be given individual supervision by faculty members whenever she attends patients directly. Moreover, certain required courses might be dispensed with altogether for respondent. It is not necessary, she argues, that Southeastern train her to undertake all the tasks a registered nurse is licensed to perform. Rather, it is sufficient to make § 504 applicable if respondent might be able to perform satisfactorily some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.

Respondent finds support for this argument in portions of the HEW regulations discussed above. In particular, a provision applicable to postsecondary educational programs requires covered institutions to make "modifications" in their programs to accommodate handicapped persons, and to provide "auxiliary aids" such as sign-language interpreters. Respondent argues that this regulation imposes an obligation to ensure full participation in covered programs by handicapped individuals and, in particular, requires Southeastern to make the kind of adjustments that would be necessary to permit her safe participation in the nursing program.

We note first that on the present record it appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring. [A federal regulation], for example, explicitly excludes "devices or services of a personal nature"

from the kinds of auxiliary aids a school must provide a handicapped individual. Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program. Furthermore, it also is reasonably clear that [the regulation] does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program. In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute an unauthorized extension of the obligations imposed by that statute.

The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. Section 501(b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals. . . ." These plans "shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met." Similarly, § 503(a), governing hiring by federal contractors, requires employers to "take affirmative action to employ and advance in employment qualified handicapped individuals. . . ."

Under § 501(c) of the Act, by contrast, state agencies such as Southeastern are only "encourage[d] . . . to adopt and implement such policies and procedures." Section 504 does not refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.

Although an agency's interpretation of the statute under which it operates is entitled to some deference, "this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so.

IV

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. This type of purpose, far from reflecting any animus against handicapped individuals is shared by many if not most of the institutions that train persons to render professional service. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.

Respondent's argument misses the point. Southeastern's program, structured to train persons who will be able to perform all normal roles of a registered nurse, represents a legitimate academic policy, and is accepted by the State. In effect, it seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast. Even if the licensing requirements of North Carolina or some other State are less demanding, nothing in the Act requires an educational institution to lower its standards.

One may admire respondent's desire and determination to overcome her handicap, and there well may be various other types of service for which she can qualify. In this case, however, we hold that there was no violation of § 504 when Southeastern concluded that respondent did not qualify for admission to its program. Nothing in the language or history of § 504 reflects an intention to limit the freedom of an

educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed.

V

Accordingly, we reverse the judgment of the court below, and remand for proceedings consistent with this opinion.

So ordered.

Notes

1. One could argue that if parents were fully aware of the parameters of Section 504, then schools would have to operate differently. Would this be good?
2. Note that all students who are covered by Section 504 are not necessarily protected by the IDEA's more specific eligibility requirements.
3. What are the implications of *Davis* on participation in sports or other extracurricular activities? What if their conditions place student athletes, such as those who may be visually impaired, at greater risks of injury? What does it mean to these students? Other participants?

CASE NO. 18: Defenses Under Section 504

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA

v.

ARLINE

Supreme Court of the United States, 1987

480 U.S. 273

Justice BRENNAN delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of 1973 prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap. This case presents the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of § 504 of the Act, and, if so, whether such an individual is "otherwise qualified" to teach elementary school.

I

From 1966 until 1979, respondent Gene Arline taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years. After she was denied relief in state administrative proceedings, she brought suit in federal court, alleging that the school board's decision to dismiss her because of her tuberculosis violated § 504 of the Act.

. . . Arline was hospitalized for tuberculosis in 1957. For the next 20 years, Arline's disease was in remission. Then, in 1977, a culture revealed that tuberculosis was again active in her system; cultures taken in March 1978 and in November 1978 were also positive.

The superintendent of schools for Nassau County, Craig Marsh, then testified as to the school board's response to Arline's medical reports. After both her second relapse, in the spring of 1978, and her third relapse in November 1978, the school board suspended Arline with pay for the remainder of the school year. At the end of the 1978–1979 school year, the school board held a hearing, after which it discharged Arline, "not because she had done anything wrong," but because of the "continued reoccurence [sic] of tuberculosis." In her trial memorandum, Arline argued that it was "not disputed that the [school board dismissed her] solely on the basis of her illness. Since the illness in this case qualifies the Plaintiff as a 'handicapped person' it is clear that she was dismissed solely as a result of her handicap in violation of Section 504." The District Court held, however, that although there was "[n]o question that she suffers a handicap," Arline was nevertheless not "a handicapped person under the terms of that statute." The court found it "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." The court then went on to state that, "even assuming" that a person with a contagious disease could be deemed a handicapped person,Arline was not "qualified" to teach elementary school.

The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of section 504," and that Arline's condition "falls . . . neatly within the statutory and regulatory framework" of the Act. The court remanded the case "for further findings as to whether the risks of infection precluded Mrs. Arline from being 'otherwise qualified' for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position" or in some other position. . . . We granted certiorari and now affirm.

II

In enacting and amending the Act, Congress enlisted all programs receiving federal funds in an effort "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." To that end, Congress not only increased federal support for vocational rehabilitation, but also addressed the broader problem of discrimination against

the handicapped by including § 504, an antidiscrimination provision patterned after Title VI of the Civil Rights Act of 1964. Section 504 of the Rehabilitation Act reads in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . 29 U.S.C. § 794.

In 1974 Congress expanded the definition of "handicapped individual" for use in § 504 to read as follows:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B).

The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."

In determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance. As we have previously recognized, these regulations were drafted with the oversight and approval of Congress; they provide "an important source of guidance on the meaning of § 504." The regulations are particularly significant here because they define two critical terms used in the statutory definition of handicapped individual. "Physical impairment" is defined as follows:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.
>
> In addition, the regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

III

Within this statutory and regulatory framework, then, we must consider whether Arline can be considered a handicapped individual. According to . . . testimony . . . Arline suffered tuberculosis "in an acute form in such a degree that it affected her respiratory system," and was hospitalized for this condition. Arline thus had a physical impairment as that term is defined by the regulations, since she had a "physiological disorder or condition . . . affecting [her] . . . respiratory [system]." This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus,Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of . . . impairment" within the meaning of 29 U.S.C. § 706(7)(B)(ii), and is therefore a handicapped individual.

Petitioners concede that a contagious disease may constitute a handicapping condition to the extent that it leaves a person with "diminished physical or mental capabilities," Brief for Petitioners 15, and concede that Arline's hospitalization for tuberculosis in 1957 demonstrates that she has a record of a physical impairment. Petitioners maintain, however, that Arline's record of impairment is irrelevant in this case, since the school board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others.

We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.

Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. . . .

Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are

regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief. The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent. We conclude that the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504.

IV

The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks. The basic factors to be considered in conducting this inquiry are well established. In the context of the employment of a person handicapped with a contagious disease, we agree with amicus American Medical Association that this inquiry should include . . . "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials. The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry.

Because of the paucity of factual findings by the District Court, we, like the Court of Appeals, are unable at this stage of the proceedings to resolve whether Arline is "otherwise qualified" for her job. . . .

We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973, and that respondent Arline is such a person. We remand the case to the District Court to determine whether Arline is otherwise qualified for her position. The judgment of the Court of Appeals is Affirmed.

Notes

1. Was this decision wise? Was it safe for the school community?
2. What are *Arline's* implications for students with contagious diseases such as HIV/AIDS or hepatitis B? How would a school board's response be different for students with more contagious diseases based on the increased risk of infection? Under what circumstances could students with contagious diseases be excluded from inclusive programs in public schools?
3. Davis and *Arline* demonstrate that in order to be otherwise qualified, individuals with disabilities must be able to meet all of a program's requirements in spite of their impairments. Even so, Section 504 and the ADA require officials to make reasonable accommodations so that individuals may, in fact, meet programmatic requirements. In addition to those discussed in the text, what are some other reasonable accommodations that are typically provided in school settings?