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Let's Get off the Floor: The Call for Illinois to Adopt a Higher Substantive Standard for Special Education

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Comment

Let's Get off the Floor: The Call for Illinois to Adopt a Higher Substantive Standard for Special Education

I. INTRODUCTION

In 1975, Congress passed the Education for All Handicapped Children Act ("EAHCA"),[1] which requires states that receive funding under the EAHCA to provide a "free appropriate public education" to all handicapped children.[2] Seven years later, in *Board of Education v. Rowley*,[3] the Supreme Court defined *free appropriate public education* and concluded that to receive federal funds under the Act, states are not required to design special education programs to maximize the potential of handicapped children.[4] Rather, they need only provide special educational programs designed to assure "some educational benefit."[5] Some states, however, have chosen to exceed this floor.[6]

This Comment argues that Illinois should join those states that have established a higher substantive standard for special education. First, this Comment briefly examines the history of special education in Illinois.[7] Next, it examines the Education Article of the 1970 Illinois Constitution,[8] which helped to redefine the goals of special education in Illinois, focusing on judicial interpretations

1. Pub. L. No. 94-142, 89 Stat. 773. In 1990, Congress amended the EAHCA and renamed it the Individuals with Disabilities Education Act ("IDEA"). Pub. L. No. 101-476, 104 Stat. 1103 (eff. Oct. 1, 1990) (codified as amended at 20 U.S.C. §§ 1400-85 (1988 & Supp. III 1991)). For a discussion of the 1990 amendments, see *infra* note 83.

2. 20 U.S.C. § 1412(1) (Supp. III 1991).

3. 458 U.S. 176 (1982).

4. *Id.* at 189-90.

5. *Id.* at 200.

6. *See infra* note 133 and accompanying text.

7. *See infra* notes 14-34 and accompanying text.

8. ILL. CONST. of 1970, art. X, § 1 provides:

> A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.
>
> The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secon-

of the Education Article.[9] Next, this Comment revisits the federal guarantee of a free appropriate education.[10] The Comment then reexamines the Illinois Constitution of 1970 and suggests that Illinois join those states that have chosen to exceed the federal floor.[11] Finally, this Comment proposes an outline for a special education standard for Illinois that exceeds the federal floor but avoids the problems that a higher standard may bring.[12]

II. BACKGROUND

Educational opportunities for children with disabilities have come a long way in a short period of time.[13] This section will examine the development of these opportunities by providing a history of special education in Illinois.

A. A Brief History

Illinois courts have long recognized the need to make accommodations for children with special needs. In *Richards v. Raymond*,[14] a taxpayer sought to enjoin the county collector from collecting a tax designed to support a high school for the "more advanced pupils."[15] The taxpayer asserted that the tax was unconstitutional, arguing that a high school was not a "common school" within the meaning of the 1870 Illinois Constitution.[16] Although it recognized that the "common school" language of the constitution placed a limit on the legislature, the Illinois Supreme Court rejected the taxpayer's argument.[17] The court reasoned that the

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dary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

9. *See infra* notes 35-80 and accompanying text.

10. *See infra* notes 81-202 and accompanying text.

11. *See infra* notes 203-14 and accompanying text.

12. *See infra* notes 261-82 and accompanying text.

13. Prior to the passage of the EAHCA (the IDEA's predecessor), approximately one-eighth of all children with disabilities were excluded entirely from the educational system, and more than one-half of all children with disabilities were receiving an "inappropriate education." Board of Education v. Rowley, 458 U.S. 176, 189 (1982).

14. 92 Ill. 612 (1879).

15. *Id.* at 615. In the early days of this nation, those who attended high school were "young men preparing for college." FRANK KOPECKY & MARY SHERMAN HARRIS, UNDERSTANDING THE ILLINOIS CONSTITUTION 50 (1986).

16. *Richards*, 92 Ill. at 615. Article X, § 1 of the Illinois Constitution of 1870 provided: "The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." ILL. CONST. of 1870, art. VIII, § 1, *repealed by* ILL. CONST. of 1970, art. X, § 1.

17. *Richards*, 92 Ill. at 616.

phrase *common school* was ambiguous,[18] and determined that the tax was not unconstitutional since it did not clearly conflict with the constitution.[19] The court further stated that providing a school for advanced students did not violate the spirit of the constitution, which called for a "thorough and efficient" school system; without provisions for advanced students, their academic progress would be slowed.[20]

Similarly, in *Powell v. Board of Education*,[21] taxpayers sued the school board for misappropriation of funds because the board had funded an elementary school that offered some courses in German.[22] Again, the plaintiffs argued that the board had exceeded its authority by providing more than the "common school" required by the constitution.[23] The taxpayers further alleged that the money spent on German courses should have been spent on courses taught in English.[24]

Reviewing these contentions, the court first noted that the constitutional concept of a common school limited the legislature's power to create and fund certain types of schools,[25] and stated that the concept of common school education only embraced the rudiments of education[26] and did not cover such things as university curricula.[27] Nevertheless, the court upheld the constitutionality of the German instruction, concluding that because German courses were only part of the curriculum, the school retained its essentially English character.[28]

18. *Id.* at 617 ("It would thus be almost impossible to find two persons who would in all respects agree in regard to what constituted a common school education.").

19. *Id.* at 616-17.

20. *Id.* at 617.

21. 97 Ill. 375 (1881).

22. *Id.* at 375-76. The court noted that approximately 80-90% of the school's pupils participated in this instruction. *Id.* at 377. Although not explicitly stated in the opinion, it is obvious that these children spoke German as their principal language.

23. *Id.* at 376.

24. *Id.* This argument is commonly called the "cannibalism" argument. It is frequently raised by opponents of a higher substantive standard for special education. These critics contend that the large sums spent on children with special needs diminish the pool of resources available to other children, both able and disabled. *See, e.g.*, Andrew S. Gordon, *Special Education in Massachusetts: Reevaluating Standards in Light of Fiscal Constraints*, 26 NEW ENG. L. REV. 263, 287 (1991) [hereinafter Gordon]. For a more detailed discussion of cannibalism, see *infra* notes 230-243 and accompanying text.

25. *Powell*, 97 Ill. at 378.

26. The rudiments of a first grade education included: "orthography, reading in English, penmanship, arithmetic, English grammar, modern geography, the elements of the natural sciences, the history of the United States, physiology, and the laws of health." *Id.* at 379.

27. *Id.* at 378.

28. *Id.* at 389.

Despite the *Powell* court's expansive reading of the "common school" provision, in *Department of Public Welfare v. Haas*,[29] the court was unwilling to accommodate children with disabilities who had asserted their right to a "good common school education." In *Haas*, the Illinois Department of Public Welfare had sued the father of an institutionalized, mentally retarded child to recover maintenance costs. The father argued that he was not liable for the costs because his son was entitled to a free common school education.[30] The father maintained that his son was entitled to an education that would foster partial self-sufficiency and the ability to contribute to the community.[31] The Illinois Supreme Court rejected the father's argument and held that the right to a good common school education was guaranteed only to children who had the capacity to receive that education.[32] To hold otherwise, the court concluded, would be to authorize an unworkable educational system.[33] Accordingly, the father was required to pay the cost of maintaining his son at an institution.[34]

B. The 1970 Illinois Constitution

Disturbed by the holding in *Haas*, the framers of the Illinois Constitution of 1970[35] sought to overturn the decision by writing a new Education Article.[36] The framers removed the common school language relied upon by the *Haas* court and replaced it with a provision stating that "[a] fundamental goal of the People of the State of Illinois is the educational development of all persons to the limits of their capacities."[37] In addition, the new constitution

29. 154 N.E.2d 265 (Ill. 1958).

30. *Id.* at 270.

31. *Id.* at 270-71.

32. *Id.* at 270. The court stated that "[e]xisting legislation does not require the State to provide a free educational program, as a part of the common school system, for the feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education." *Id.*

33. *Id.*

34. *Haas*, 154 N.E.2d at 275.

35. This section summarizes the Illinois judiciary's interpretation of the current Education Article. The Analysis section of this Comment examines the Illinois Constitution and discusses the substantive standard for special education envisioned by the framers. *See infra* notes 203-214 and accompanying text.

36. *See* 2 CONSTITUTIONAL CONVENTION PROCEEDINGS, VERBATIM TRANSCRIPTS AND COMMITTEE PROPOSALS 797-98 (Dec. 8, 1969-Sept. 3, 1970) [hereinafter PROCEEDINGS] (statement of Mr. Kamin); *see, e.g.*, Elliot v. Board of Educ., 380 N.E.2d 1137, 1142 (Ill. App. Ct. 1978) (stating that the Education Article in the new constitution establishes a broader entitlement than the former provision, which required only a free common school education).

37. For the full text of ILL. CONST. of 1970, art. X, § 1, see *supra* note 8.

called for a "high quality" educational system that would be financed primarily by the state.[38]

The new Education Article was first tested in *Hamer v. Board of Education*[39] by a plaintiff who alleged that towel and book fees charged by a school violated the Article's "free schools" provision.[40] The appellate court reviewed the transcripts of the Illinois Constitutional Convention and noted that the framers had intended to maintain tuition-free but not totally free schools.[41] The court concluded that the 1970 Constitution, like the 1870 Constitution, allowed schools to charge reasonable users' fees.[42] Since the fees at issue in *Hamer* were reasonable,[43] according to the court, the school did not violate the constitution.[44]

Subsequently, in *Blase v. State*,[45] taxpayers challenged the state for failing to maintain the "primary responsibility" for financing the school system.[46] The issue in *Blase* was whether the constitution required the state to pay fifty percent of the cost of financing the school system or whether the constitution's "primary responsibility" provision was merely hortatory[47] in nature.[48] Like the ap-

38. ILL. CONST. of 1970, art. X, § 1. In using the words "educational institutions and services" in the Article, the framers intended to include children with disabilities within the scope of the provision. *See* 2 PROCEEDINGS, *supra* note 36, at 769 (statement of Mr. Patch).

39. 292 N.E.2d 569 (Ill. App. Ct. 1973).

40. *Id.* at 571. The plaintiff, the father of three school-age children, was charged a total of $30.00 in annual fees for his children's textbook rental and towel laundering expenses. *Id.* The trial court granted summary judgment to the Board of Education and the plaintiff appealed. *Id.*

41. *Id.* at 572 (citing 2 PROCEEDINGS, *supra* note 36, at 767-68 (statement of Mr. Fogal)).

42. *Id.* at 571.

43. Two of the children were charged a textbook rental fee of $9.00, one child was charged a textbook rental fee of $8.50, and one child was charged $3.50 for the supply and laundering of clean towels throughout the year. *Id.* at 570.

44. *Hamer*, 292 N.E.2d at 571. The *Hamer* holding has been interpreted to mean that the Education Article provides no protection to children who are denied supplementary special education services. *See* Max M. v. Thompson, 566 F. Supp. 1330, 1339 (N.D. Ill. 1983); Gary B. v. Cronin, 542 F. Supp. 102, 113 (N.D. Ill. 1980). However, as noted above, the framers intended the Education Article to apply to children with disabilities who need special services. *See supra* note 38. Special education services are now required under the IDEA. 20 U.S.C. § 1401(a)(18) (1988 & Supp. III 1991) (stating that " 'free appropriate public education' means special education and related services").

45. 302 N.E.2d 46 (Ill. 1973).

46. *Id.* at 47. The plaintiffs raised their challenge under the third paragraph of ILL. CONST. of 1970 art. X, § 1. *See supra* note 8.

47. "[A] hortatory statement . . . has no binding effect on the legislature . . . and it is meaningless other than giving [the legislature] direction." 5 PROCEEDINGS, *supra* note 36, at 4503-04 (statement of Mr. Kamin).

48. *Blase*, 302 N.E.2d at 47.

pellate court in *Hamer*, the Illinois Supreme Court in *Blase* reviewed the convention proceedings. Noting that the sponsor of the financing provision did not intend the language to have any legal force,[49] the court concluded that the framers stated only "a commitment, a purpose, a goal."[50] Thus, the state has no legal duty to finance at least one-half of public school education.[51]

The Education Article was at issue again in *Cronin v. Lindberg*,[52] when the Chicago Board of Education challenged, under the Article's "high quality" provision, a statute that revoked some state aid if a local school failed to hold classes for a minimum number of days.[53] Because of a teachers' strike, the board had failed to meet that statutory minimum.[54] The court rejected the board's constitutional argument, noting that statutes enjoy a strong presumption of constitutionality.[55] More important, the court ruled that the minimum-term requirement was consistent with the constitution's high quality provision and concluded that it was reasonable for the legislature to withhold state aid to enforce that provision.[56] Thus, the court allowed the reduction in state aid.[57]

In *Pierce v. Board of Education*,[58] the first special education case brought under the new constitution, the supreme court did not rely on the convention proceedings for guidance; in fact, the court ignored the framers' words.[59] In *Pierce*, doctors had recommended that the plaintiff, a learning-disabled child, be placed in a special education program.[60] Despite this recommendation, the school

49. *Id.* at 49 (citing 5 PROCEEDINGS, *supra* note 36, at 4502 (statement of Ms. Netsch)).

50. *Blase*, 302 N.E.2d at 49.

51. The closest the state ever came to financing at least one-half of public education was in 1975-1976, when it contributed 48.36% of the costs. Since then, that percentage has declined. In 1989-1990, the state contributed only 39.89% of all funds needed to operate the public schools. Local governments make up most of the difference, although the federal government does contribute a small share. THOMAS LAY BURROUGHS & ROBERT LEININGER, STATE, LOCAL, AND FEDERAL FINANCING FOR ILLINOIS PUBLIC SCHOOLS 1989-1990 12 (1990) [hereinafter BURROUGHS & LEININGER].

52. 360 N.E.2d 360 (Ill. 1976).

53. *Cronin*, 360 N.E.2d at 362 (referring to ILL. REV. STAT. ch. 122, para. 10-19 (1975)).

54. *Id.*

55. *Id.* at 365.

56. *Id.*

57. *Id.* at 366.

58. 370 N.E.2d 535 (Ill. 1977).

59. For a complete discussion of *Pierce*, see also *infra* notes 203-14 and accompanying text.

60. 370 N.E.2d at 536.

board failed to test, evaluate, or transfer the child.[61] As a result, the child alleged that he had suffered great emotional injury, which had required hospitalization and treatment.[62] The plaintiff sued the Board of Education, alleging that the school board had breached its duty under the Education Article by failing to place him in a special education program.[63]

The court rejected the plaintiff's argument, holding that the first paragraph of the Education Article was a statement of general philosophy, not a specific mandate.[64] The court reasoned that similar provisions in both the 1870 and 1970 constitutions had been interpreted in that manner.[65] After refusing to impute any legal significance to the Education Article, the court examined other state statutes and regulations. Noting that the plaintiff had failed to exhaust his administrative remedies with the Illinois Board of Education,[66] the court concluded that the state, not the local school board, assumes the ultimate responsibility for providing special education.[67] Thus, until the plaintiff exhausted his administrative remedies, he had no cause of action.[68] Accordingly, the court dismissed the child's complaint.[69]

One year later, in *Elliot v. Board of Education*, the Education Article was again at issue.[70] One of the plaintiffs in *Elliot* was a disabled child[71] who attended a private school because no public school could devise an educational program that adequately met his needs.[72] However, an Illinois statute limited state reimbursement of private school tuition to $2,500 per year for each student.[73]

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Reviewing the first paragraph of the Education Article, the court said that the "pronouncement of the laudable goal of 'the educational development of all persons to the limits of their capacities' is a statement of general philosophy, rather than a mandate that certain means be provided in any specific form." *Id.*

65. *Pierce*, 370 N.E.2d at 536 (citing Sullivan v. Midlothian Park Dist., 281 N.E.2d 659 (Ill. 1972)).

66. *Id.* at 537 (citing Illinois Bell Tel. Co. v. Allphin, 326 N.E.2d 737 (Ill. 1975)). The court was referring to the administrative appeals process. *See* ILL. ADMIN. CODE tit. 23, §§ 226.605-.698 (1991); *infra* notes 95-100 and accompanying text (discussing the procedural rights granted under the EAHCA and under the Illinois statute).

67. *Pierce*, 370 N.E.2d at 537.

68. *Id.*

69. *Id.*

70. 380 N.E.2d 1137 (Ill. App. Ct. 1978).

71. *Id.* at 1139. The child's mother was also a plaintiff, suing individually and on behalf of her child. *Id.*

72. *Id.*

73. *Id.* at 1140. The statute required the child's local school district to pay either the

Rather than pay the difference, the child and his mother sued, alleging that the state's reimbursement cap violated the Education Article provision for free schools through the secondary level.[74] The board maintained that the statute in question excluded children with disabilities from the class of children entitled to a free education.[75] The board also argued that this exclusion was permissible since the current Education Article was to be interpreted consistently with the former provision.[76]

Unlike the supreme court in *Pierce*, the appellate court in *Elliot* reviewed the convention proceedings in making its decision. While recognizing the *Pierce* court's limited interpretation of the first paragraph of the Article,[77] the court concluded that the second paragraph of the Article *was* a legal mandate. In contrast with the *Blase* court's holding that the third paragraph was hortatory in nature, the *Elliot* court found no evidence in the proceedings to support a conclusion that the second paragraph was merely ink on paper.[78] The court stated that the 1970 Constitution should be interpreted differently from the 1870 Constitution.[79] Therefore, the court concluded, the statute was unconstitutional because it required parents to pay for their child's education through the secondary level.[80] The *Elliot* court, then, was the first Illinois court to recognize that a child with disabilities has a vested right to a free education through high school.

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full tuition of a nonpublic school or $2,500, whichever was less. ILL. REV. STAT. ch. 122, para. 14-7.02 (1977).

74. *Elliot*, 380 N.E.2d at 1141. The plaintiffs also challenged the reimbursement cap on the basis that it violated the equal protection provisions of the federal and state constitutions. *Id.*

75. *Id.* at 1142.

76. *Id.* The school board argued that the 1970 Education Article should be interpreted consistently with the 1870 Education Article. *See* Department of Pub. Welfare v. Haas, 154 N.E.2d 265 (Ill. 1958) (holding that under the 1870 Education Article, the state was not required to provide a free educational program as part of the common school system for "feeble-minded or mentally deficient children"). For a detailed discussion of *Haas*, see *supra* notes 29-38 and accompanying text.

77. Departing from *Pierce*, the court noted that the first paragraph of the Article was intended to have "operative effect." *Elliot*, 380 N.E.2d at 1142 (quoting 2 PROCEEDINGS, *supra* note 36, at 762 (statement of Mr. Mathias)). The author agrees with the *Elliot* court that the *Pierce* court incorrectly stripped the first paragraph of the Article of its legal significance.

78. *Elliot*, 380 N.E.2d at 1142 n.4.

79. *Id.* at 1144; *see also* 2 PROCEEDINGS, *supra* note 36, at 804 (statement of Mr. Mathias) ("I think the article as submitted . . . is a great improvement over the provision that we had in the 1870 Constitution.").

80. *Elliot*, 380 N.E.2d at 1144.

C. *The EAHCA/IDEA*

In 1975, responding to arguments similar to those posed by the defendant in *Elliot*, Congress passed the EAHCA,[81] a funding statute designed to assist states in providing special education to handicapped children.[82] In 1990, Congress amended the EAHCA and renamed it the Individuals with Disabilities Education Act ("IDEA").[83] In return for receipt of federal funds, participating states—including Illinois—must provide all handicapped children with a "free appropriate public education."[84] Free appropriate public education includes both special education[85] and related serv-

81. Pub. L. No. 94-142, 89 Stat. 773. The EAHCA amended the Education of the Handicapped Act ("EHA"), which Congress passed in 1970. Pub. L. No. 91-230, 84 Stat. 175.

82. *See, e.g.*, Roland M. v. Concord Sch. Comm., 910 F.2d 983, 987 (1st Cir. 1990) (noting that states receive funds to educate children with disabilities through the EAHCA (the IDEA's predecessor)). The IDEA defines *children with disabilities* as those children "(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, need special education and related services." 20 U.S.C. § 1401(a)(1)(A) (Supp. III 1991). Illinois regulations designed to comply with the IDEA similarly categorize children eligible for special education. *See* ILL. ADMIN. CODE tit. 23, § 226.552 (1991).

83. Pub. L. No. 101-476, 104 Stat. 1103 (eff. Oct. 1, 1990) (codified as amended at 20 U.S.C. §§ 1400-85 (1988 & Supp. III 1991)). Although the 1990 amendment made several substantive changes to the statute, the only change that is relevant to the issues addressed in this Comment is one involving nomenclature: the IDEA uses the phrase *children with disabilities*, the EHA and the EAHCA used the phrase *handicapped children*. This Comment uses both phrases.

84. 20 U.S.C. § 1412(1) (Supp. III 1991). To comply with the IDEA, Illinois has enacted its own statute and regulations. ILL. REV. STAT. ch. 122, para. 14-1.01 to 14-15.01 (1991); ILL. ADMIN. CODE tit. 23, §§ 226.5-.1195 (1991). Since the two acts are identical in substance, Max M. v. Thompson, 566 F. Supp. 1330, 1338 (N.D. Ill. 1983), courts resolve educational disputes by considering the federal and Illinois Acts as one. *See, e.g.*, Board of Educ. v. Illinois State Bd. of Educ., 938 F.2d 712, 715 n.3 (7th Cir. 1991) (declining to engage in a separate analysis of the plaintiff's state law claim because Illinois' procedures parallel those contained in the EAHCA (the IDEA's predecessor)); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 291 n.1 (7th Cir. 1988) (stating that because the appellants failed to present additional arguments pertaining to the Illinois School Code, the court could not separately analyze the state law claim); William S. v. Gill, 572 F. Supp. 509, 518 n.10 (N.D. Ill. 1983) (holding that Illinois state claims are subject to the same limitations on private remedies as the EAHCA (the IDEA's predecessor)); Community High Sch. Dist. 155 v. Denz, 463 N.E.2d 998, 999 (Ill. App. Ct. 1984) (stating that the Illinois and Federal acts are "parallel").

85. The IDEA defines *special education* as:

> [S]pecially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including—
>
> (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
>
> (B) instruction in physical education.

20 U.S.C. § 1401(16) (Supp. III 1991).

ices,[86] designed by parents and school officials to meet a child's unique educational needs.[87]

The centerpiece of the IDEA[88] is the Individualized Educational Program ("IEP"),[89] which puts teeth into a child's substantive right to a free and appropriate public education.[90] Once a child is deemed eligible for special education and related services, the IEP is formulated and reviewed on an annual basis by a representative of the local educational agency, teachers, the child's parents or guardians, and, when appropriate, the child.[91] Each IEP contains statements of (1) the child's present development, (2) educational

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86. The IDEA defines *related services* as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id. § 1401(17).

87. *Id.* § 1401(16).

88. *See, e.g.*, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988) (stating that an IEP is "the centerpiece of the statute's education delivery system for disabled children") (citations omitted); Town of Burlington v. Department of Educ., 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) (stating that "[t]he ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time").

89. 20 U.S.C. § 1401(a)(20) (Supp. III 1991).

90. 20 U.S.C. § 1401(a)(20) (Supp. III 1991) defines an *individualized education program* as:

> [A] written statement for each child with a disability . . . which statement shall include —
>
> (A) a statement of the present levels of educational performance of such child,
>
> (B) a statement of annual goals, including short term instructional objectives,
>
> (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,
>
> (D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,
>
> (E) the projected date for initiation and anticipated duration of such services, and
>
> (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Id.

91. *Id.*

goals, (3) the objective criteria for determining whether those goals are being met, and (4) the means by which those goals will be achieved.[92] If a child is not receiving an education in accordance with his or her IEP, the school system is not providing a free appropriate public education as a matter of law.[93] In addition, all special educational programs and services must be designed to comply with the IDEA mainstreaming requirement.[94]

Along with the substantive guarantee of a free appropriate public education, the IDEA gives parents a host of procedural rights.[95] Thus, if a parent believes his or her child is not receiving a free appropriate public education or if a parent has a complaint concerning the evaluation, identification, or educational placement of the child,[96] the IDEA guarantees the right to a due process hearing and an appeals process to resolve the dispute.[97] If either the par-

92. *Id.*

93. *See, e.g.*, Board of Educ. v. Rowley, 458 U.S. 176, 203 (1982) (holding that a state satisfies its requirement of providing a disabled child with a "free appropriate public education" by providing personalized instruction and support services which, inter alia, "comport with the child's IEP").

94. The IDEA requires states to establish procedures that assure "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." 20 U.S.C. § 1412(5)(B) (Supp. III 1991). "The mainstreaming philosophy calls for integrating children with disabilities into regular classrooms." Jeffrey Zaslow, CHI. SUN TIMES, Jan. 7, 1993, § 2, at 45. Mainstreaming, if appropriate, assures children beneficial social interaction rather than segregation, Scituate Sch. Comm. v. Robert B., 620 F. Supp. 1224, 1238 (D.R.I. 1985), and operates in "tandem" with educational benefits to "create a continuum of educational possibilities," Roland M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990), which allows children to make better progress. *See* Gordon, *supra* note 24, at 287. Courts, however, will not place a child in a mainstream program if mainstreaming would not be beneficial. *See, e.g.*, Angevine v. Jenkins, 752 F. Supp. 24, 28 (D.D.C. 1990) (holding that appropriate placement for one child was in a private special education facility rather than in a public school because the child had made "good progress" at the private facility and little or no progress at the public school).

95. For example, a child's IEP must be developed with parental assistance, 20 U.S.C. § 1401(20) (Supp. III 1991); a child's parents have the right to examine all relevant records prior to placement, *id.* § 1415(b)(1)(A); and the parents have a right to notice before a school changes or plans to change a child's placement. 20 U.S.C. § 1415(b)(1)(C) (1988 & Supp. III 1991). Violation of IDEA procedures by a school may lead a court to conclude that the child is not receiving a free appropriate public education. *See, e.g.*, Walker v. Cronin, 438 N.E.2d 582, 587 (Ill. App. Ct. 1982) (granting reimbursement for parent's unilateral placement of child in a private program when the school delayed due process proceedings).

96. 20 U.S.C. § 1415(b)(1)(E) (1988 & Supp. III 1991).

97. The IDEA provides for a two-level administrative hearing process. The first hearing is conducted at the local district level and is available to both the school and the parents. Any party aggrieved by this hearing can appeal to the state education administrator. 20 U.S.C. §§ 1415(b)(2)-1415(C) (1988 & Supp. III 1991). In Illinois, the two levels of this system are known as "Level 1" and "Level 2" due process hearings. ILL. REV. STAT. ch. 122, para. 14-8.02 (g)-(h) (1991); ILL. ADMIN. CODE tit. 23, §§ 226.605-

ents or the school officials are dissatisfied with the administrative review process, each has the right to file an action in state or federal court.[98] The court must give due weight to the administrative decision, but it may receive new evidence.[99] Basing its decision on a preponderance of the evidence, a reviewing court has the power to grant "appropriate relief."[100]

D. The Rowley *Decision*

The meaning of the EAHCA's (the IDEA's predecessor) guarantee of *free appropriate public education* was at issue in *Rowley v. Board of Education*.[101] In that case, Amy Rowley, a partially deaf child[102] who was an excellent lip reader, began first grade in a public school with classmates who were unimpaired.[103] Despite her disability, Amy achieved above average scores in her class and ad-

.698 (1991) (establishing hearing procedures). If the parents can prove that the current placement is providing a free appropriate public education and that the school district has failed to provide a free appropriate public education, courts will award reimbursement to parents who unilaterally place their children in programs not approved by the school district before exhausting their administrative remedies. Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504, 1511 (N.D. Ill. 1986) (citing Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359 (1985)). *But cf.* Taglianetti v. Cronin, 493 N.E.2d 29, 33 (Ill. App. Ct. 1986) (holding that reimbursement will not be granted for unilateral placement in an out-of-state facility not approved by the State even if the placement was appropriate).

98. 20 U.S.C. § 1415(e)(2) (1988 & Supp. III 1991).

99. *Id.*; *see also* Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 293 (7th Cir. 1988) (stating that "in reviewing the outcomes reached through the . . . administrative appeals procedure, a district court must give due weight to the results of those state administrative proceedings") (citations omitted).

100. 20 U.S.C. § 1415(e)(2) (1988 & Supp. III 1991); *see also Lachman*, 852 F.2d at 293. Courts regard the IDEA as the exclusive remedy in special education cases. *See, e.g.*, Eva N. v. Brock, 741 F. Supp. 626, 632 (E.D. Ky. 1990) (determining that if the state complies with the EAHCA (the IDEA's predecessor), it also satisfies section 504 of the Rehabilitation Act); Max M. v. Thompson, 566 F. Supp. 1330, 1337 (N.D. Ill. 1983) (dismissing 42 U.S.C. § 1983 claim on exclusive remedy grounds). Generally, injunctive relief is the preferred remedy of courts interpreting the IDEA. *See id.* (stating that except in very narrow circumstances, damages are disallowed under the EAHCA (the IDEA's predecessor)). However, as mentioned, courts will grant reimbursement for unilateral placements in appropriate cases. *See supra* note 97.

In addition, courts will grant special education to a child previously denied a free appropriate education if that child is too old to qualify for IDEA benefits. This is known as compensatory education. *See* Timms v. Metropolitan Sch. Dist., 722 F.2d 1310, 1315 (7th Cir. 1983). *Contra* Miener v. Missouri, 673 F.2d 969, 980 (8th Cir. 1982) (holding that a compensatory education remedy was barred by the Eleventh Amendment).

101. 458 U.S. 176 (1982).

102. Amy comprehended less than one-half of what was said in the classroom. *Id.* at 215 (White, J., dissenting).

103. *Id.* at 184.

vanced easily from grade to grade.[104] Although the school provided Amy with a hearing aid, Amy's parents thought that she could do even better if the school provided her with a sign language interpreter.[105] After supplying an interpreter for Amy during a two-week trial period, the school determined that the interpreter's services were not needed.[106] The parents disagreed and initiated due process proceedings.[107]

Stung by adverse rulings at the local and state administrative levels, the parents filed suit in district court.[108] The district court sided with the parents, holding that although Amy was performing at an above average level, she had the potential to do even better work.[109] By denying Amy the right to an interpreter, the school denied Amy 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."[110] The U.S. Court of Appeals for the Second Circuit affirmed.[111]

In a majority opinion written by then-Justice Rehnquist, the U.S. Supreme Court did not find a required substantive standard in the language of the EAHCA. Therefore, the Court reviewed the Act's legislative history,[112] and concluded that Congress, by enacting the EAHCA, had merely intended to "open the door" to special education in the states, and did not intend to mandate a specific level of education once children were receiving special education services.[113] The Court stated, however, that Congress did

104. *Id.* at 209-10.

105. *Id.* at 184.

106. *Rowley*, 458 U.S. at 185-86.

107. *Id.* at 185.

108. Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y. 1980).

109. *Id.* at 532.

110. *Id.* at 534 (citations omitted). The district court standard involved a calculation of Amy's potential and a measurement of her present achievement against that potential. *Id.* The next step in the process was to compare this difference against that of nonhandicapped children. *Id.* The Supreme Court rejected that standard as "entirely unworkable." *Rowley*, 458 U.S. at 198. Nevertheless, the district court standard survived. *See* Gordon, *supra* note 24, at 290 (suggesting that Massachusetts adopt the *Rowley* district court standard). *But see* Abram Chayes, *The Supreme Court 1981 Term*, 96 HARV. L. REV. 4, 302 (1982) (criticizing the district court standard).

111. Rowley v. Board of Educ., 632 F.2d 945 (2d Cir. 1980).

112. Board of Educ. v. Rowley, 458 U.S. 176, 187-97 (1982).

113. *Id.* at 191 (citing 121 CONG. REC. 19,486 (1975) (statement of Sen. Williams, emphasizing the number of children excluded from educational opportunities)). The Court rejected legislative history that described a potential maximizing goal for the EAHCA as noncontrolling "[p]assing references and isolated phrases." *Id.* at 204 n. 26 (citing Department of State v. Washington Post Co., 456 U.S. 595, 600 (1982)).

intend to make special education "meaningful."[114] Thus, the *Rowley* Court established a "floor" that special education programs must meet in order to satisfy the EAHCA's (now IDEA's) requirement of a free appropriate public education.[115]

The Court ostensibly created a two-pronged test: Courts must determine (1) whether the state has complied with EAHCA (now IDEA) procedures and (2) whether the child's IEP has been "reasonably calculated" to confer educational benefits.[116] If both prongs of the test are satisfied, the state has complied with the EAHCA (now the IDEA), and "courts can require no more."[117] The Court concluded that a state meets the requirements if its special education program provides "personalized instruction" and "support services" that would enable a child to "benefit educationally."[118] In the *Rowley* case, the Court concluded that because Amy was achieving passing marks and advancing from grade to grade, her educational program met the federal substantive floor.[119] Thus, Amy was not entitled to interpreter services as part of a free appropriate public education.[120]

Justice Blackmun's concurrence rejected both the majority standard and the standard established by the district court.[121] His review of the EAHCA's legislative history led Justice Blackmun to conclude that Congress intended to provide disabled children with an "equal educational opportunity."[122] He stated that a child's access to equal educational opportunity should be evaluated from the totality of a child's educational program and not merely from the presence or absence of one isolated service, such as an interpreter.[123] After reviewing Amy Rowley's complete record, Justice Blackmun stated that Amy was receiving an educational opportunity "substantially equal" to that afforded her nonhandicapped

114. *Id.* at 200-01. "[I]t 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." *Id.*

115. *Id.* at 202.

116. *Id.* at 206-07.

117. *Rowley*, 458 U.S. at 207.

118. *Id.* at 203. The Court established other requirements as well: "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." *Id.*

119. *Id.* at 209-10.

120. *Id.* at 210.

121. *Id.* at 210-11 (Blackmun, J., concurring).

122. *Rowley*, 458 U.S. at 210 (Blackmun, J., concurring) (citing S. REP. NO. 168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S.C.C.A.N. 1433, 1433).

123. *Id.* at 211 (Blackmun, J., concurring).

classmates.[124] He concluded, therefore, that the school was providing her with a free appropriate public education even though it did not furnish her with an interpreter.[125]

Dissenting, Justice White read the legislative history of the EAHCA differently than both Justice Rehnquist and Justice Blackmun.[126] Justice White concluded that the EAHCA provided, at minimum, a guarantee of educational benefits on par with those afforded nonhandicapped children.[127] Thus, any special education program must be designed to "eliminate the effects of the handicap" so that if possible a child will be given an "equal opportunity to learn."[128] Justice White noted that without an interpreter, Amy understood less than one-half of what went on in the classroom. Therefore, Justice White concluded, Amy was denied an equal opportunity to learn and was not receiving a free appropriate public education.[129]

III. Discussion

Commentators have both praised and condemned the *Rowley* decision.[130] Although it was intended to be narrow,[131] the holding in *Rowley* has been broadly construed by most courts.[132] Despite

124. *Id.* at 212 (Blackmun, J., concurring).

125. *Id.* at 211-12 (Blackmun, J., concurring). School administrators took sign-language courses to prepare for Amy's arrival; a teletype machine was installed in the school office to allow Amy's parents, who were also deaf, to communicate with school officials; and Amy was given a wireless hearing aid by the school. *Id.* at 184.

126. *Id.* at 212 (White, J., dissenting). Justices Brennan and Marshall joined in the dissent. *Id.*

127. *Rowley,* 458 U.S. at 213-14 (White, J., dissenting). Citing extensive legislative history, Justice White concluded that the EAHCA drafters intended to exceed the "benefit" test established by the majority. *Id.* at 215. Indeed, there is legislative history requiring schools to design IEPs that maximize children's potential. *Id.* at 214 (citing H.R. Rep. No. 332, 94th Cong., 1st Sess. 19 (1975)). The dissenters rejected the majority's characterization of this legislative history as merely consisting of "passing references and isolated references." *Id.* at 213-14.

128. *Id.* at 215 (White, J., dissenting).

129. *Id.* (White, J., dissenting).

130. *See, e.g.*, Kathryn M. Coates, Note, *The Education For All Handicapped Children Act Since 1975*, 69 Marq. L. Rev. 51, 74 (1985) [hereinafter Coates] (praising the *Rowley* standard as "realistic and warranted" in light of the high cost of special education and current economic conditions); John E.B. Myers & William R. Jenson, *The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act*, 1984 S. Ill. U. L.J. 401, 440 (1984) [hereinafter Myers & Jenson] (criticizing *Rowley* as a "pinched and miserly" interpretation of the EAHCA, which has slowed the progress of special education programs).

131. "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." *Rowley,* 458 U.S. at 202.

132. *See, e.g.*, Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285,

this, several states have enacted statutory standards that exceed the minimal guarantees of *Rowley*.[133] This section of the Comment will examine judicial decisions interpreting the statutes that exceed the *Rowley* floor and compare them with judicial interpretations of statutes that remain on the floor, focusing specific attention on Illinois.

A. A Higher Standard

While educators and school administrators generally prefer the *Rowley* benefit test, parents and child advocates typically favor a higher standard.[134] The decision in *Rowley* explicitly left the door open for states to craft higher standards for special education pro-

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1289 (5th Cir. 1991) (noting that under *Rowley*, the state is required to provide an appropriate education that benefits children with disabilities); Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 152-53 (4th Cir. 1991) (stating that *Rowley* requires that educational services be provided to the extent that a child benefits from the program); Johnson v. Independent Sch. Dist., 921 F.2d 1022, 1028-29 (10th Cir. 1990) (noting that *Rowley* stated that an appropriate education does not necessarily mean one that maximizes a child's potential); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 293-94 (7th Cir. 1988) (applying the second prong of the *Rowley* test). *But see* Polk v. Central Susquehanna Central Intermediate Unit 16, 853 F.2d 171, 180-81 (3d Cir. 1988) (distinguishing *Rowley* as a narrow decision, and returning to the EAHCA legislative history to determine that Congress intended "more than a trivial educational benefit" standard); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985) (stating that *Rowley* created no single standard; rather, *Rowley* instructed the courts to resolve educational disputes on a case-by-case basis).

133. KAN. STAT. ANN. § 72-962 (1985 & Supp. 1991) ("maximum of their abilities or capacities"); MD. EDUC. CODE § 8-401 (1989) ("consistent with their potential"); ME. REV. STAT. ANN. tit. 20-A, § 7201 (West 1991) ("equal educational opportunities"); MASS. GEN. L. ch. 71B § 2 (1991 & Supp. 1992) ("maximum possible development"); MICH. COMP. LAWS ANN. § 380.1751 (West 1988) ("maximum potential"); MO. ANN. STAT. § 162.670 (Vernon 1991) ("maximize the capabilities of handicapped and severely handicapped children"); NEV. REV. STAT. § 388.450 (1991) ("reasonably equal educational opportunity"); N.J. STAT. ANN. § 18A:46-19.1 (West 1991) ("fullest possible opportunity to develop their intellectual capacities"); N.C. GEN. STAT. § 115C-106 (1992) ("full potential"); S.C. CODE ANN. § 59-135-50 (Law. Co-op. 1990) ("maximize the potential for independent living"); TENN. CODE ANN. § 49-10-101 (1990) ("maximize the capabilities of handicapped children"); Pink v. Mount Diablo Unified Sch. Dist., 738 F. Supp. 345, 346-47 (N.D. Cal. 1990) (holding that California regulations require handicapped children to have opportunities to achieve their "full potential commensurate with the opportunity provided other pupils"). *But see* Scituate Sch. Comm. v. Robert B., 620 F. Supp. 1224, 1233 (D.R.I. 1985), *aff'd*, 795 F.2d 77 (1st Cir. 1986) (holding that the Rhode Island Statute, R.I. GEN. LAWS § 16-24-1 (1991), which provides that the school system "best satisfy the needs of the handicapped child," is equal to the *Rowley* standard).

134. *See* Judith Welch Wegner, *Variations on a Theme—The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 169, 175 (1985) [hereinafter Wegner] (stating that parents support the idea that children with disabilities be afforded an "equivalent opportunity" rather than just "some benefit").

grams.[135] In *David D. v. Dartmouth School Committee*,[136] the U.S. Court of Appeals for the First Circuit addressed the question of whether a state statute that conferred a higher substantive standard[137] should be incorporated by reference into the federal act. The court answered affirmatively, noting that the legislative history of the EAHCA imposed no substantive ceiling.[138] The court also noted that the language of the EAHCA itself favored the incorporation of state standards.[139] In addition, by incorporating a higher state standard into the EAHCA, the court removed the temptation for forum shopping.[140] The court concluded that when a state has set a substantive standard that exceeds the *Rowley* floor, the state must then meet that standard in order to receive federal funds under the EAHCA (now the IDEA).[141]

Though states are free to exceed the *Rowley* floor, no state guarantees a utopian program for special education. For example, in *Harrell v. Wilson County Schools*,[142] a North Carolina couple applied for a grant to send their hearing-impaired child to the Central Institute for the Deaf, a private school in St. Louis that is recognized as one of the world's best schools for the hearing impaired.[143] The North Carolina school system rejected the parents' proposed placement and developed an IEP that called for the child to be placed in a regular sixth grade classroom with support services.[144]

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135. *Rowley*, 458 U.S. at 207.

136. 775 F.2d 411 (1st Cir. 1985) (applying Massachusetts law).

137. For a list of state statutes that exceed the *Rowley* floor, see *supra* note 133.

138. *David D.*, 775 F. 2d at 416 (citing Town of Burlington v. Department of Educ., 736 F.2d 773, 784 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985)).

139. *Id.* at 418.

140. *Id.* at 419. In other words, had the First Circuit not incorporated the Massachusetts standard into the EAHCA (now the IDEA), the plaintiffs would have lost the case, despite their guaranteed success if they had brought suit in a Massachusetts court.

141. *Accord* Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982-83 (4th Cir. 1990); Geis v. Bd. of Educ., 774 F.2d 575, 581 (3d Cir. 1985); Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 515 (6th Cir. 1984); Pink v. Mount Diablo Unified Sch. Dist., 738 F. Supp. 345, 346 (N.D. Cal. 1990); Barwacz v. Michigan Dept. of Educ., 674 F. Supp. 1296, 1302 (W.D. Mich. 1987).

By merging the state standard into federal law, these courts avoided any possible Eleventh Amendment problem. The Eleventh Amendment forbids Congress from subjecting a state to suit in federal court to enforce that state's laws. *See David D.*, 775 F.2d at 420. The *David D.* court was no longer forcing a state to comply with its own law by being subject to suit in federal court. Rather, it was enforcing a state statute that was now federal law. *Id.* at 417-19. The Eleventh Amendment is also a topic of discussion in compensatory education cases. *See, e.g.*, Miener v. Missouri, 673 F.2d 969, 980 (8th Cir. 1982).

142. 293 S.E.2d 687 (N.C. Ct. App. 1982).

143. *Id.* at 688.

144. *Id.* at 689.

The parents appealed the proposed IEP to local and state administrative hearing officers.[145] Both agencies affirmed the decision of the local school system.[146] After suing the school system and losing at trial,[147] the parents appealed.

Reviewing the parents' claims, the appellate court first noted that the North Carolina statute exceeded the *Rowley* floor.[148] After interpreting the statute in a manner consistent with the standard formulated by Justice White in the *Rowley* dissent, the court summarily rejected the parents' proposed placement.[149] The court stated that handicapped students in North Carolina were no more entitled to "utopian" special education placements than nonhandicapped children were entitled to "utopian" programs in regular schools.[150]

B. A Comparison

1. More than "some benefit"

Contrary to what some commentators have suggested, cases like *Harrell* do not indicate that the stepped-up state standards will be interpreted simply as gloss on the *Rowley* floor.[151] Although all jurisdictions generally regard the *Rowley* "benefit" test as "progress,"[152] a court that is asked to examine a program from a jurisdiction with a higher standard will not find that program adequate if it merely confers "some" benefit.[153] For example, in *B.G. v.*

145. *Id.*
146. *Id.*
147. *Harrell*, 293 S.E.2d at 689.
148. *Id.* at 690; *see also supra* note 133.
149. *Harrell*, 293 S.E.2d at 690; *see also supra* notes 126-29 and accompanying text.
150. *Harrell*, 293 S.E.2d at 691.
151. *See, e.g.*, Wegner, *supra* note 134, at 193-94.
152. Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 153 (4th Cir. 1991) (stating that "an appropriate education is one which allows the child to make educational progress"); Angevine v. Jenkins, 752 F. Supp. 24, 27 (D.D.C. 1990) (recognizing that *Rowley* requires that students receive education that enables them to advance); Eva N. v. Brock, 741 F. Supp. 626, 633 (E.D. Ky. 1990) (noting that EAHCA (now IDEA) dictates that "a standard of reasonable progress is employed"). Early post-*Rowley* commentaries suggested this "progress" approach. *See* Lauren A. Larson, *Beyond Conventional Education: A Definition of Education Under the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 63, 90 (1985) [hereinafter Larson] (stating that a child's education should at least provide "progress from simple tasks to more complex tasks"); Myers & Jenson, *supra* note 130, at 440 (suggesting a standard that would measure the appropriateness of a placement by comparing the child's progress with progress made by other children as documented in scientific literature).
153. The Third Circuit has held that even under *Rowley*, a minimal benefit will not suffice. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988). However, the Third Circuit seems to be alone in this determination. *Cf.* Hall v.

Cranford Board of Education,[154] the parents of B.G., a ten-year-old emotionally disturbed child,[155] sought placement in a private residential facility.[156] The school board resisted and developed an IEP calling for a split schedule: the child would attend classes with only disabled children but would also be mainstreamed during the non-academic part of the day.[157] The parents rejected the proposed IEP and initiated administrative proceedings.[158] After the administrative law judge found for the parents, the school board appealed to the district court.[159] In light of the testimony of expert witnesses,[160] the court concluded that B.G.'s emotional problems were an impediment to his learning.[161] More important, the court noted that although B.G.'s passing grades and promotion to the next grade level in a normal school environment would have met the *Rowley* standard, this minimal level of progress was not a free appropriate public education under New Jersey law.[162]

In contrast, in *Max M. v. Illinois State Board of Education*,[163] Max, a learning disabled child who had been awarded a diploma by the school district,[164] sued the district for compensatory education.[165] During his first year at the school's proposed placement, Max had received mostly A's and B's, but during his senior year,

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Vance County Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985) (holding that EAHCA (now IDEA) requires more than a minimal benefit but basing its decision on both federal law and North Carolina law, which sets a higher standard than *Rowley*); *see also supra* note 133. The Fourth Circuit removed this language when it decided a case on the basis of Virginia law, which does not adhere to a higher standard. *See Barnett*, 927 F.2d at 153.

154. 702 F. Supp. 1140 (D.N.J. 1988).

155. The child was disobedient to his mother, hoarded food in his room, stole money from his father, harassed his sisters, and set fires when he was angry. *Id.* at 1142. The child also exhibited abnormal sexual aggression toward his sister and foster mother. *Id.* at 1154.

156. *Id.* at 1147.

157. *Id.* For a discussion of *mainstreaming*, see *supra* note 94.

158. *Id.* at 1147.

159. *B.G.*, 702 F. Supp. at 1147.

160. Five out of six experts testified that a residential placement would have been more appropriate for B.G. *Id.* at 1156-57.

161. *Id.*

162. *Id.* at 1157. The court stated that "[B.G.'s] educational rite of passage entitles him to a program and services that will permit him to best achieve educational success." *Id.* at 1156.

163. 629 F. Supp. 1504 (N.D. Ill. 1986).

164. Max M. had poor organizational skills, experienced difficulty in writing, and suffered from anxiety. *Id.* at 1507. As a result, his academic progress was poor. *Id.*

165. *Id.* at 1509. Under the EAHCA (and the IDEA), the right to special education terminates upon graduation. Max M. v. Thompson, 592 F. Supp. 1437, 1440 (N.D.Ill. 1984). Thus, Max M. also sued to revoke his diploma. Max M. v. Thompson, 566 F. Supp. 1330, 1333 (N.D. Ill. 1983). If the court awarded Max M. compensatory educa-

Max's academic performance had plummeted and he received mostly D's and F's.[166] Nevertheless, the court refused to award compensatory education, noting that Max had met the "minimum expectations" of his teacher.[167] Thus, the school district had complied with the *Rowley* standard.[168]

2. A willingness to compare programs

A second difference between floor and nonfloor jurisdictions is a willingness on the part of states that have set higher standards to compare programs proposed by the parents and school district. Higher-standard states commonly choose between two alternatives and place the child in the program that is most appropriate.[169] A good example is *Geis v. Board of Education*.[170] In *Geis*, the court considered whether a substantially handicapped[171] fifteen-year-old child should remain in his current educational placement at a private residential facility (the parents' proposed placement), with tuition paid for by the school system, or whether the child should be placed in a normal high school.[172] At trial, the court considered expert testimony and the judge visited both proposed schools.[173] Although the court stated that each program was "excellent" and "perhaps a model,"[174] the court selected the residential setting because that program provided the child with the best opportunity to

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tion, he would have been able to continue to receive special education benefits even though he had graduated. For a definition of *compensatory education*, see *supra* note 100.

166. *Max M.*, 629 F. Supp. at 1508.

167. *Id.* at 1517.

168. *Id.* at 1516-17. The court refused to consider the fact that Max had improved after his parents placed him in a program of their choice. *See id.* at 1517. The court stated that "[a]lthough other methods may have existed for approaching Max's learning disability and behavioral difficulties, this Court finds that the school district provided Max with an adequate program of specialized education." *Id.* at 1516. For a discussion of the refusal by *Rowley* courts to compare special education programs, see *infra* notes 177-86 and accompanying text.

169. *E.g.*, David D. v. Dartmouth Sch. Comm., 775 F.2d 411 (1st Cir. 1985) (applying Massachusetts law); Geis v. Bd. of Educ., 774 F.2d 575 (3d Cir. 1985) (applying New Jersey law); Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984) (applying Tennessee law).

170. 589 F. Supp. 269 (D.N.J. 1984), *aff'd*, 774 F.2d 575 (3d Cir. 1985) (applying New Jersey law).

171. S.G. was classified as "Multiply Handicapped with Primary Trainable Mentally Retarded and Secondary Neurologically Impaired." *Id.* at 270. Despite these handicaps, experts agreed that S.G. had the potential to work in a sheltered workshop and live in a group home for similarly situated adults. *Id.* at 272.

172. *Id.* at 270.

173. *Id.* at 271.

174. *Id.* at 273.

become at least partially self-sufficient.[175] The court concluded that the parents' proposed placement provided the child with a program designed to "*best* achieve educational success."[176]

Conversely, in floor states, little program comparison is done. Instead, when a parent challenges the school's proposed placement, the court usually defers to the decisions of educators.[177] For example, in *Scituate School Committee v. Robert B.*,[178] the parents of a learning-disabled child, Todd, had removed him from a public school program, where he had made some progress and placed him in a private school.[179] In this private placement, Todd had "blossomed."[180] After rejecting the school's proposed IEP, which called for a return to the public school system, the parents initiated due process proceedings, asking that the school system pay for Todd's education in the private placement.[181] After the parents prevailed at the state administrative level,[182] the public school appealed.[183] Concluding that the Rhode Island statute did not exceed the federal floor,[184] the court refused to place Todd at the private school. The court stated that its job was not to compare programs, but only to determine whether the proposed public school program

175. *Geis*, 589 F. Supp. at 275. Giving nine reasons for its decision, the court concluded: "The . . . program is not designed to encourage S.G.'s permanent institutionalization. It generally pushes each resident towards his or her next level of development with the aim of sending the person out into the community to the greatest extent feasible." *Id.*

176. *Id.* at 272.

177. The judiciary's hesitancy to compare competing educational programs may be attributed to language from the *Rowley* decision: "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." *Rowley*, 458 U.S. at 207. However, courts that have construed *Rowley* as a narrow opinion have not hesitated to engage in program comparison. *See, e.g.*, Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180 (3d Cir. 1988); Angevine v. Jenkins, 752 F. Supp. 24, 28 (D.D.C. 1990) ("In attempting to gauge the appropriateness of programs for children at different points of the spectrum, the school system, and where necessary, the hearing officers or the courts, may also review the effectiveness of the programs.").

178. 620 F. Supp. 1224 (D.R.I. 1985), *aff'd*, 795 F.2d 77 (1st Cir. 1986).

179. *Id.* at 1226. Todd's reading level had increased by one grade level during his stay in the public school system. However, Todd repeated the third grade. *Id. Cf. Rowley*, 458 U.S. at 209-10 (stating that one aspect of a "benefit" is the ability of the child to advance from grade to grade).

180. *Scituate*, 620 F. Supp. at 1238.

181. *Id.* at 1226-27.

182. *Id.* at 1227.

183. *Id.*

184. The court refused to construe the Rhode Island statute as exceeding the *Rowley* floor because the statute was enacted decades before the EAHCA and the Rhode Island regulations paralleled the EAHCA regulations. *Id.* at 1233. *Contra* Geis v. Board of Educ., 774 F.2d 575, 582 (3d Cir. 1985) (holding that the statute enacted 20 years before the EAHCA conferred a higher standard).

complied with federal requirements.[185] Since the public school's IEP offered qualified teachers and aides, approximated the class size of the private placement, offered an individualized approach to Todd's problems, and included students with problems similar to Todd's, the court determined that the proposed IEP was adequate even though Todd had never actually tested the IEP.[186]

3. An emphasis on self-sufficiency

A third goal of jurisdictions that exceed the federal standard is to place children in special education programs that will allow the children to live in the mainstream community, to the degree that it is possible.[187] In *David D. v. Dartmouth School Committee*,[188] a seventeen-year-old child with Down's syndrome[189] challenged the school system's desire to place him in a local special education program with supplementary services.[190] David's parents wanted him to be placed in a full-time residential program because they did not believe that the public school system provided their son with the

185. *Scituate*, 620 F. Supp. at 1236.

186. *Id.* at 1236-37. Under *Rowley*, the adequacy of a proposed IEP need not be tested by actual experience. *See Rowley*, 458 U.S. at 207-08 (holding that to provide a free appropriate public education, an IEP need only be "reasonably calculated to enable the child to receive educational benefits"). Thus, although Todd's parents had not enrolled him in a public school for seven years, the court concluded that the public school was providing him with a free appropriate public education. *Scituate*, 620 F. Supp. at 1238.

In making its decision, the court apparently felt constrained by its own interpretation of Rhode Island law: "Regrettably, however, the law does not allow me to choose the educational plan I feel would be best for the child." *Id.*

For Illinois cases that have refused to compare proposed educational placements, see Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988); Max M. v. Thompson, 592 F. Supp. 1437 (N.D. Ill. 1984).

187. The goal of self-sufficiency was a major concern of the EAHCA drafters, and courts had recognized a self-sufficiency standard in many pre-*Rowley* cases. *Rowley*, 458 U.S. at 201-02 n.23 (citing 121 CONG. REC. 19,492 (1975) (statement of Sen. Williams); 121 CONG. REC. 25,541 (1975) (statement of Rep. Harkin); 121 CONG. REC. 37,024-25 (1975) (statement of Rep. Brademas); 121 CONG. REC. 37,027 (1975) (statement of Rep. Gude); 121 CONG. REC. 37,410 (1975) (statement of Sen. Randolph); 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams)); *see also* Myers & Jenson, *supra* note 130, at 406. Nevertheless, the *Rowley* Court explicitly rejected self-sufficiency as a possible substantive EAHCA (now IDEA) standard. *Rowley*, 458 U.S. at 202 (rejecting self-sufficiency as the standard because "[o]ne child may have little difficulty competing successfully in an academic setting with non-handicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills").

188. 775 F.2d 411 (1st Cir. 1985).

189. *Id.* at 415. David was incapable of showing self-control in "unstructured or unfamiliar situations." *Id.* He "repeatedly . . . engaged in sexual and aggressive behavior directed at persons and animals." *Id.*

190. *Id.*

opportunity to become an employable adult.[191] Applying the Massachusetts standard of "maximum possible development,"[192] the U.S. Court of Appeals for the First Circuit accepted the parents' argument. The court relied on an expert opinion that stated that David would probably not be able to get a job in the community if he remained in his current placement.[193]

In contrast, in *Lachman v. Illinois State Board of Education*,[194] the parents wanted their hearing-impaired child to have a cued-speech program,[195] which would enable the child to speak and to understand others.[196] However, the school district's IEP called for a total communication program that emphasized sign language.[197] After they lost at the administrative level, the parents brought suit in the district court.[198] Their case was dismissed.[199] On appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal.[200] Citing the two-pronged *Rowley* test,[201] the court deferred to the decision of the educators, who had concluded that the sign-language program provided educational benefits and was thus appropriate.[202]

IV. ANALYSIS

This section of the Comment examines the Illinois Constitution of 1970 and the proceedings of the constitutional convention, and

191. *Id.*

192. MASS. GEN. L. ch. 71B, § 2 (1991 & Supp. 1992).

193. *David D.*, 775 F.2d at 423.

194. 852 F.2d 290 (7th Cir. 1988).

195. "Cued speech is a technique for aiding hearing-impaired persons to understand spoken language. It is used in conjunction with speech (lip) reading and employs eight hand shapes held in four positions close to the mouth to clarify phonetic ambiguities." *Id.* at 291 n.2.

196. *Id.*

197. *Id.* at 291-92.

198. *Id.* at 292.

199. *Lachman*, 852 F.2d at 293.

200. *Id.* at 297.

201. *Id.* at 293. However, the court limited its analysis to the second prong because the education officials complied with all procedural requirements. *Id.* at 293-94; *see also* text accompanying *supra* note 116.

202. *Lachman*, 852 F.2d at 297. In dictum, the court stated that "parents, no matter how well-motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child." *Id.*

This statement was significantly undermined by Board of Educ. v. Illinois State Bd. of Educ., 938 F.2d 712 (7th Cir. 1991), where a divided court held that a school-proposed program is inappropriate when parental opposition is so strong that it undermines the effectiveness of the proposed placement. *Id.* at 717. In the *Board of Educ.* case, the parents had "poisoned" the proposed placement in the child's mind. *Id.*

concludes that the framers would have wanted Illinois to adopt a higher standard for special education than that eventually required under *Rowley*. This section also evaluates the pros and cons of adopting a higher standard for special education. Finally, the Comment proposes a special education standard that offers all of the advantages of a higher standard, while avoiding the disadvantages.

A. A Return to the Constitution

The Illinois Supreme Court in *Pierce v. Board of Education*[203] erred in its interpretation of the first paragraph of the Education Article of the Constitution of 1970.[204] This misinterpretation has stifled the intent of the framers, who wanted to guarantee a high level of special and regular education in Illinois.[205] Although other Illinois courts had looked to the convention proceedings to interpret the constitution,[206] the *Pierce* court ignored those proceedings.[207] The framers had not intended their "fundamental goal"[208]

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203. 370 N.E.2d 535 (Ill. 1977).

204. The first paragraph of ILL. CONST. of 1970, art. X, § 1 states that "[a] fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities." The *Pierce* court refused to give this provision any legal effect. *Pierce*, 370 N.E.2d at 536.

205. As interpreted by courts, the first paragraph of the Education Article has become meaningless. *See, e.g.*, O'Connor v. Board of Educ., 645 F.2d 578, 582 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981) (dismissing due process claim brought under the first paragraph of the Education Article); Max M. v. Thompson, 566 F. Supp. 1330, 1339 (N.D. Ill. 1983) (dismissing claim brought under Illinois Education Article).

206. *See supra* notes 39-51, 70-80 and accompanying text.

207. Holding that the first paragraph of the Education Article has no legal effect, the *Pierce* court stated: "Similar provisions of both the 1970 Constitution and its predecessor, the 1870 Constitution, have been so interpreted." 370 N.E.2d at 536 (citing Sullivan v. Midlothian Park Dist., 281 N.E.2d 659 (Ill. 1972)). In *Sullivan*, however, the court dealt with a noneducational constitutional provision, and stated that that provision would be interpreted the same as its counterpart under the 1870 Constitution—that is, as hortatory language. 281 N.E.2d at 662.

In contrast, the common school provision of the 1870 Constitution, which was replaced by the first paragraph of the 1970 Education Article, had been given legal effect. *See, e.g.*, Richards v. Raymond, 92 Ill. 612, 615-16 (1879). Furthermore, the framers of the 1970 Constitution explicitly intended the first paragraph of the new Education Article to be interpreted very differently than its predecessor. 2 PROCEEDINGS, *supra* note 36, at 804 (statement of Mr. Mathias); 6 PROCEEDINGS, *supra* note 36, at 233-36 (statement from the Education Committee report discussing flaws of the common school language and stating how the new first paragraph will remedy those flaws).

208. The original proposal of the committee stated that "[t]he paramount goal of the people of the State shall be the educational development of all persons to the limits of their capacities." 6 PROCEEDINGS, *supra* note 36, at 227. For various reasons, the full convention substituted the word *fundamental* for *paramount*. Consider the words of Delegate Lewis during the debate on this issue:

of educating all "to the limits of their capacities" to be meaningless.[209] Nor had the framers intended the new Education Article to provide mere educational access for handicapped children.[210] Instead, the framers called for a "high quality"[211] education system, which emphasized self-sufficiency for both handicapped and nonhandicapped children.[212] To carry out the intent of the framers,

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> [L]ife, liberty, and happiness are *the* paramount goal, and education is a means to that goal. . . .
>
> Paramount means chief, principal, top sawyer, first fiddle, biggest frog in the pond, king, prima donna, or star.
>
> Now fundamental, on the other hand, means the following: substance, essential, center, kernel, the meat, the core, the heart, the soul.

2 PROCEEDINGS, *supra* note 36, at 802 (statement of Mr. Lewis).

The words *shall be* were removed from the final product by the Style and Drafting Committee and changed to *is*. This change was not intended to be a substantive alteration of the Article that had been approved by the full convention. 5 PROCEEDINGS, *supra* note 36, at 4121 (statement of Mr. Whalen).

209. For example, when asked by Delegate Cicero whether the first two paragraphs of the Education Article were to have operative effect or whether they were merely a preamble, Delegate Patch responded: "In effect, [the Education Committee] would like them to be operative, but not as a preamble." 2 PROCEEDINGS, *supra* note 36, at 767 (statement of Mr. Patch). Similarly, when asked whether the first paragraph of the Education Article should appear in the Preamble to the Constitution, Delegate Patch responded: "Well, personally, I feel it should be in the education article; the preamble doesn't have any legal ramifications as to the implementation of the constitution." *Id.* at 768. Further evidence of the Convention's intent to give legal force to the first paragraph of the Education Article is found at 6 PROCEEDINGS, *supra* note 36, at 236; 2 PROCEEDINGS, *supra* note 36, at 764 (statement of Mr. Patch). Reference to the first paragraph as a "hortatory statement" appears in 2 PROCEEDINGS, *supra* note 36, at 796 (statement of Mr. Foster). However, this statement was made during a dispute over whether the Education Article goal should be "paramount," not whether all should be educated "to the limits of their capacities." *Id.*

210. Recognizing that the new Article would allow access for handicapped people, the Education Committee further stated: "The objective is to provide each person an opportunity to progress to the limit of his ability." 6 PROCEEDINGS, *supra* note 36, at 234.

The most enlightening definition of *to the limits of their capacities* in the special education context came from Delegate Kamin: " 'To the limits of their capacities' recognizes that individuals have different problems, that there are physically and emotionally handicapped, mentally handicapped, that there are adults who are deserving of the maximum educational development they can get." 2 PROCEEDINGS, *supra* note 36, at 798 (statement of Mr. Kamin).

211. In using the words *high quality public educational institutions and services* in the second paragraph of the Education Article, the Education Committee "had in mind the highest, the most excellent educational system possible." *Id.* at 767 (statement of Mr. Fogal).

212. 6 PROCEEDINGS, *supra* note 36, at 233; 2 PROCEEDINGS, *supra* note 36, at 795 (statement of Mr. Buford):

> [W]e shall be able to move freedom forward and our people generally will carry their own loads and more in a better society than any of us have ever known up until this time. It's no little challenge, but we are not here to do no better than we did in 1870.

the courts[213] and the legislature[214] should implement an optimal system, which exceeds the *Rowley* floor.

With this goal in place, only one question remains: what standard should Illinois adopt? Before proposing a solution, this Comment will first address the pitfalls to be avoided in drafting a higher standard.

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213. *Pierce* should be limited to its facts, if not overruled, and the Illinois Supreme Court should reinterpret the Education Article along the lines of Elliot v. Board of Educ., 380 N.E.2d 1137 (Ill. App. Ct. 1978). Nancy J. Wolfe, Note, *Illinois' State Subsidy of Special Education at Private Institutions Act*, 28 DEPAUL L. REV. 769, 775-76 (1979) [hereinafter Wolfe]; *see also* Perry A. Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 493 n.191 (1985) [hereinafter Zirkel] (recognizing the Education Article as a means of establishing a higher substantive standard in Illinois, but also noting the *Pierce* roadblock); Wolfe, *supra*, at 775 (stating that "[i]n short, the court seems to be relying more on the established limitations set by the repealed constitution than on the intentions of the framers of the existing constitution").

214. The General Assembly recognizes that the Education Article is a genuine force. *See* ILL. REV. STAT. ch. 111 1/2, para. 2103(i) (1991) (requiring hospitals to disseminate information to the family when a handicapped child is born so that child may be helped to reach his or her full potential); ILL. REV. STAT. ch. 122, para. 13-40 (1991) (requiring prisons to develop inmate educational programs that allow inmates to reach their full capacities); ILL. REV. STAT. ch. 122, para. 34-18.9(a) (1991) (finding made by the General Assembly that by outlawing "beepers" in public schools, they were promoting the "fundamental goal" of "the educational development of all persons to the limits of their capacities"). Perhaps in light of the *Pierce* statement that the Article is not "self-executing," the role of setting a new higher standard should be left to the legislature. *Pierce*, 370 N.E.2d at 536; *see also* 2 PROCEEDINGS, *supra* note 36, at 767 (statement of Mr. Fogal) (stating that it is the legislature's role to implement the framers' goal of a "high quality" education system).

Of course, another alternative is to simply amend the Illinois constitution. This avenue was attempted and narrowly defeated by referendum on November 3, 1992. *See* Jacquelyn Heard & Rob Karwath, *School Amendment Forces to Press the Fight*, CHI. TRIB., Nov. 5, 1992, § 2, at 10 [hereinafter Heard & Karwath]. The proposed amendment to the Education Article read in pertinent part:

> A fundamental right of the People of the State is the educational development of all persons to the limits of their capacities.
>
> It is the paramount duty of the State to provide for a thorough and efficient system of high quality public education institutions and services and to guarantee equality of educational opportunity as a fundamental right of each citizen. . . . The State has the preponderant financial responsibility for financing the system of public education.

S.J. Res. 130, 87th Gen. Assem. (1992).

This amendment would have overruled *Pierce* by creating a right to, rather than a goal of, an education to the limits of one's capacities. In other words, the intent of the constitution's framers would have been made explicit by the text. In addition, this amendment would have required the state to finance at least one-half of the cost of educating Illinois children. *See supra* notes 45-51 and accompanying text. Opponents argued that the amendment, if passed, would increase taxes and drive jobs out of Illinois. *See* Heard & Karwath, *supra*. Despite this opposition, the amendment failed by only three percentage points of the vote. *Id.*

B. The Potential Disadvantages of a Higher Standard

Lack of financial resources is the primary impediment to enacting a higher standard for special education in Illinois.[215] Although the law disfavors placement decisions that are based solely on cost factors,[216] lack of funds is a major concern for any judge or legislator who considers adopting a higher standard for Illinois,[217] and is at the root of most education crises, not only those that involve special education.[218] The resource debate breaks down into three categories: (1) over-classification,[219] (2) cost-effectiveness,[220] and (3) cannibalism.[221] The following sections will discuss these concerns.

1. Over-classification

A recent article criticizing the Massachusetts standard[222] noted that in 1988, in contrast with the national average of twelve percent, over sixteen percent of all Massachusetts public school children were enrolled in special education programs.[223] The author argued that the lax classification system in Massachusetts resulted in the erroneous placement of many nondisabled children in special education programs.[224] This problem should not be encountered in

215. *See* Elliott v. Board of Educ., 380 N.E.2d 1137, 1142 (Ill. App. Ct. 1978) (rejecting the defendants' argument in support of a special education tuition cap).

216. *See* Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost Be A Factor In Special Education Cases?*, 71 EDUC. L. REP. 11, 24 (1992) [hereinafter Collins & Zirkel].

217. *See, e.g.*, Coates, *supra* note 130, at 74 (recognizing that current economic conditions coupled with the escalating cost of educating children with disabilities supports the *Rowley* minimum standard). However, the framers of the Illinois Constitution considered finances several times, repeatedly rejecting arguments that educating all to the "limits of their capacities" would be too costly. *See* 2 PROCEEDINGS, *supra* note 36, at 769 (question of Mr. Miller and response of Mr. Patch) (indicating that the intent of Education Committee was to have education adequately financed before other state needs were met); *id.* at 795 (statement of Mr. Buford) ("[T]he best place in the world that you can put your money is in education."); *id.* at 805 (the Education Article passed by a vote of 110 to 0 on the first reading almost immediately after a statement expressing fear that the Article would bankrupt the school system).

218. *See generally* John Kass & Christine Hawes, *Daley Rips Schools for Lack of Cuts*, CHI. TRIB., July 23, 1992, § 2, at 1 (noting that the Chicago public school system faced a $156 million budget gap shortly before schools were scheduled to open for the 1992-93 academic year).

219. *See, e.g.*, Gordon, *supra* note 24, at 264.

220. *See, e.g.*, Larson, *supra* note 152, at 83.

221. *See, e.g.*, Gordon, *supra* note 24, at 284.

222. *See generally* Gordon, *supra* note 24.

223. *Id.* at 265.

224. *Id.* at 266. To avoid stigmatizing children with disabilities, Massachusetts does not categorize children eligible for special education. *Id.* at 285. Instead, any child "who

Illinois where regulations clearly define what types of children are eligible for special education.[225]

2. Cost-effectiveness

The cost-effectiveness of a higher standard is another significant financial concern. Here the matter for consideration is the spending of scarce resources on placements that are not successful.[226] To address this problem, many courts have developed a balancing test whereby the appropriateness of a placement is determined by balancing the costs involved in the placement against its expected benefits.[227] For these courts, the placement is deemed inappropriate if the costs outweigh the benefits. There is no doubt that such a mechanism is needed to avoid abuse.[228] However, the courts and the drafters of the EAHCA (now the IDEA) have agreed that spending money on a quality education program at the outset assures substantial savings in the future, because a child can be mainstreamed into normal education at a faster pace and because a successful program will lead to the child's self-sufficiency.[229] Thus, if it guarantees results, a placement is well worth the expense.

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is unable to progress effectively in a regular education program" is entitled to special education. *Id.* This results in special education programs designed for children who actually have no disability. *Id.*

225. Illinois limits those eligible for special education to one or more of the following categories: (a) visual impairment, (b) hearing impairment, (c) physical and health impairment, (d) speech and/or language impairment, (e) specific learning disability, (f) educationally handicapped, (g) behavioral or emotional disorder, (h) mental impairment, or (i) multiple impairment. ILL. ADMIN. CODE tit. 23, § 226.552 (1991). Indeed, at present only 11% of all Illinois school children are enrolled in special education. Telephone Interview with the Illinois State Board of Education, Department of Special Education (Aug. 12, 1992).

226. "When funds are diverted from the already scant resources allocated for the education of nonhandicapped students in an attempt to educate children whom experts believe are incapable of ever functioning in society, however, the benefits may be outweighed by the costs." Larson, *supra* note 152, at 83 n.119 (quoting Charles R. Weldon et al., Comment, *A Modern Wilderness: The Law of Education for the Handicapped*, 34 MERCER L. REV. 1045, 1064 (1983)).

227. *See, e.g.*, Barnett v. Fairfax Sch. Bd., 927 F.2d 146, 154 (4th Cir. 1991); Doe v. Anrig, 692 F.2d 800, 806-07 (1st Cir. 1982); Age v. Bullitt County Pub. Schs., 673 F.2d 141, 145 (6th Cir. 1982); Stacey G. v. Pasadena Indep. Sch. Dist., 547 F. Supp. 61, 79-80 (S.D. Tex. 1982); *see generally* Collins & Zirkel, *supra* note 216.

228. *See* Gordon, *supra* note 24, at 286 (noting a case in which a school district was forced to spend thousands of dollars annually for the education of a comatose child).

229. As one court observed:

> A chief selling point of the [EAHCA] was that although it is penny dear, it is pound wise—the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens.

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181-82 (3d Cir. 1988).

3. Cannibalism

The strongest argument raised by those opposed to a higher standard is that it will result in "cannibalism." Critics maintain that a higher standard for special education necessarily diverts funds away from regular education and allows that money to be "devoured" by children with disabilities.[230] In addition, disabled children who require expensive programs funnel resources away from other disabled children who require less costly placements.[231] Unfortunately, this problem has existed for a long time[232] and continues to exist on many levels. While some commentators argue that special education unjustly deprives non-challenged children of an adequate education, special education advocates may contend that resources needed for special education are wrongly diverted elsewhere.[233]

There are two ways to address cannibalism and other resource problems. The first is simply to devote more resources to education.[234] Illinois already has the philosophical[235] and legal mechanisms for this solution in place.[236] To date, the state has failed to achieve its constitutional goal to be the "primary" financier of special education.[237]

In 1974, the Illinois General Assembly created a lottery to increase school revenues.[238] Although lottery revenues have risen dramatically over the last few years, the state's share of contribution to its public schools has decreased.[239] When the lottery reve-

230. *See* Collins & Zirkel, *supra* note 216, at 18.

231. *See* Gordon, *supra* note 24, at 284.

232. *See supra* note 24 and accompanying text.

233. For example, in fiscal year 1990, 16.7% of all appropriated state funds went to elementary and special education, while 16.1% went to public aid. *See* BURROUGHS & LEININGER, *supra* note 51, at 8. Special education advocates can argue that public aid is "cannibalizing" their programs, and public aid advocates can argue the opposite.

234. *See* Larson, *supra* note 152, at 90-91 (arguing that EAHCA (now IDEA) requirements should force states to increase their special education budgets).

235. Illinois State Board of Education Principle I states that adequate state aid is necessary to move towards the goal of educating all "to the limits of their capacities." MAX PIERSON & BOB HALL, SCHOOL FINANCE IN ILLINOIS: RESULTS FROM THE 1990 SCHOOL FINANCE SURVEY AND POLICY STATEMENTS OF INTEREST GROUPS 55 (1991).

236. *See infra* notes 237-242 and accompanying text.

237. *See supra* note 51 and accompanying text. *See generally Unions Can Help Schools and Themselves*, CHI. TRIB., Aug. 11, 1992, § 1, at 10 ("All Illinois schools are being shortchanged by dwindling state aid. Chicago schools are flat-out gypped.").

238. ILL. REV. STAT. ch. 120, para. 1152 (1991); *see also* Mary O. Borg & Paul M. Mason, *The Budgetary Incidence of a Lottery to Support Education*, 41 NAT'L TAX J. 75, 81-83 (1988) [hereinafter Borg & Mason].

239. Although 1991 was a record-breaking year for lottery sales, the percentage of lottery revenues contributed to schools was "well below the record 46.3 percent contrib-

nues first began to pour in, the state responded by diverting dollars that had been previously earmarked for schools into various noneducation programs.[240] In effect, the lottery has supported and continues to support numerous programs that are unrelated to education.[241] This use of lottery proceeds directly contradicts the original purpose of the state lottery. This practice is unacceptable, and it must stop.[242]

The second solution to the resource problem is to develop a well-reasoned standard for special education in Illinois. Because the state's resources are finite, this standard must ensure a solid return on any money expended for special education.[243] Such a standard would allow the state to spend resources on programs that will assist children to become self-sufficient or quickly rejoin regular educational programs. However, the higher standard would not allow resources to be spent on expensive programs of dubious benefit to children.

4. Mainstreaming

Critics of higher standards contend that states electing to exceed the *Rowley* floor usually ignore the statutory mainstreaming requirement.[244] Courts have held that although mainstreaming is strongly preferred, the individual needs of the child should always be examined to determine whether mainstreaming is appropriate.[245] For example, in *B.G. v. Cranford Board of Education*,[246] the

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uted in 1976, the lottery's second year." Rob Karwath, *Lottery Contribution to Schools Sets Record*, CHI. TRIB., July 15, 1992, § 2, at 4.

240. *See* Borg & Mason, *supra* note 238, at 83; *see also* BURROUGHS & LEININGER, *supra* note 51, at 7 ("[P]utting money into the common school fund 'makes no difference in how much is appropriated to schools.' ") (quoting Sharon Sharp, former Lottery Director).

241. *See* Borg & Mason, *supra* note 238, at 83.

242. "These results . . . certainly represent a funding scheme that the voters of Illinois did not approve and one that they may not be aware is occurring." *Id.*

243. *See supra* notes 226-29 and accompanying text.

244. *See* Gordon, *supra* note 24, at 289. That Massachusetts ignores the mainstreaming requirement may not be as drastic as Mr. Gordon believes. *See* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 993 (1st Cir. 1990) (applying Massachusetts law and denying parental reimbursement for unilateral placement because of failure to provide for mainstreaming, even through parental preference may have been better academically); David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 423 (1st Cir. 1985) (granting more restrictive placement designed to promote mainstreaming in the near future); School Comm. v. Comm'r of Educ., 462 N.E.2d 338, 347-48 (Mass. App. Ct. 1984) (dismissing parental action for reimbursement because of parental failure to prove that their preferred placement was in the least restrictive environment).

245. *See supra* note 94 and accompanying text.

246. 702 F. Supp. 1140 (D.N.J. 1988).

court ordered a child to attend an out-of-district residential program rather than a mainstream placement, because the child's aggressive sexual behavior, emotional problems, and expulsion from a prior placement dictated a more restrictive educational environment.[247] Nevertheless, mainstreaming is an important goal for both the child, who seeks to maximize contact with the outside world, and for the taxpayer and legislator, who seek to minimize spending on special education.

5. Compliance

Critics have also charged that it is impossible to determine when a school has met the higher standard.[248] Not only does the same problem exist with the *Rowley* standard,[249] but as the EAHCA/IDEA common law continues to develop, the problem becomes illusory because courts in nonfloor jurisdictions have had no difficulty interpreting their own state standards.[250] Nevertheless, to avoid this possible pitfall, a new special education standard for Illinois must be as clear and objective as possible.

6. Impossible comparisons

Finally, a new standard for Illinois must avoid making impossible comparisons.[251] Not only must this standard avoid comparing disabled children with nondisabled children, but any placement made on the basis of comparing suggested alternatives must rest on sound evidence. For example, if a child has already taken part in a program that has resulted in progress, this fact must be brought out at administrative hearings and trials. This permits the court to make an informed decision between a proven program and an IEP that might not have been tried.[252] In cases where the success of a program is not yet known, decisions must be made on the basis of expert testimony.[253] This would avoid any *Rowley* problem by re-

247. *Id.* at 1157; *accord* Geis v. Bd. of Educ., 774 F.2d 575 (3d Cir. 1985); *David D.*, 775 F.2d at 423.

248. *See* Wegner, *supra* note 134, at 191.

249. *See* Zirkel, *supra* note 213, at 481.

250. *See supra* notes 136-76, 187-93 and accompanying text.

251. *See* Board of Educ. v. Rowley, 458 U.S. 176, 198 (1982); *see also supra* note 110 and accompanying text.

252. *See* Scituate Sch. Comm. v. Robert B., 620 F. Supp. 1224, 1238 (D.R.I. 1985), *aff'd*, 795 F.2d 77 (1st Cir. 1986) (denying parents reimbursement for placement where child "blossomed").

253. *See* B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1140, 1157 (D.N.J. 1988) (basing decision on testimony of six psychotherapists); *see also* Myers & Jenson, *supra* note 130, at 440 (advocating the use of expert testimony in programming decisions).

quiring judges to defer to experts in the field of special education.[254]

C. *Other Advantages of a Higher Standard*

In addition to fulfilling the aims of the constitution's framers[255] and offering the advantages discussed in the previous section,[256] a higher standard will have several other benefits. First, a standard that enables disabled children to maximize their self-sufficiency will also maximize their dignity.[257] In addition, a higher standard will restore the morale of parents and child advocates—a morale that was damaged by the *Rowley* decision.[258] If parents become aware that the school's job is to provide more than just "some benefit," they are likely to become more involved in the educational process both at school and at home. A standard that facilitates maximization of a child's self-sufficiency will energize parents to become, in the *Rowley* Court's words, the enforcers of the EAHCA (now the IDEA).[259] Most important, a higher standard will inspire legislators and educators.[260] Every lawsuit filed under the EAHCA and the IDEA has been and continues to be an indictment of a special education program. With a higher standard in place, school officials will be forced to take a fresh look at their programs and to rework those programs in a manner consistent

254. *Rowley*, 458 U.S. at 207.

255. This Comment aims to eliminate a result feared by Delegate Johnson: "I have a personal aversion to governments . . . which seem to promise so much but deliver so little. They raise hopes, but when these hopes fail to materialize in solid progress, the reaction usually sets in and it's a very bitter one." 2 PROCEEDINGS, *supra* note 36, at 794. This Comment agrees with Delegate Johnson, and takes the position that the first paragraph of the Education Article should be repealed if it is not given true meaning. Compare the following statement of Delegate Patch:

> And if you don't place the priority on education whereby the state will be mandated to do something, you will perpetuate an ill—a strong ill—and we are going to have to address ourselves to this. If we don't, we might as well quit this game of rhetoric and go home.

Id. at 797.

256. *See supra* notes 151-202 and accompanying text.

257. *See* David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 423 (1st Cir. 1985).

258. *See* Zirkel, *supra* note 213 at 468 ("[S]ome advocates of handicapped children have viewed [*Rowley*] as a significant step backwards.").

259. *Rowley*, 458 U.S. at 208-09. Since parents must be involved in the IEP process, 20 U.S.C. § 1401(20) (Supp. III 1991), and since the second prong of the *Rowley* test measures the adequacy of the IEP, 458 U.S. 206-07, it follows that the parents are in the primary position to assure that their children receive a free appropriate public education. *Cf.* Eva N. v. Brock, 741 F. Supp. 626, 627 (E.D. Ky. 1990) ("The most sensitive nerve in the human body is the parental nerve.").

260. *See, e.g.*, Myers & Jenson, *supra* note 130, at 440; Wegner, *supra* note 134, at 175.

with the new standard. Special education will then be well on its way to permitting children to reach "the limits of their capacities."

V. PROPOSAL

The standard that Illinois should adopt must be based on a broad view of special education.[261] This view should encompass the twin goals of returning the child to a regular classroom and preparing the child for a self-sufficient life. Thus, the scope of special education should include not only traditional classwork but

A. Real Substantial Progress

Under the above principles, if a child is currently enrolled in a program in which he or she is exceeding the goals of the school-recommended IEP, school officials have no right to contest the placement, even if their proposed IEP meets the *Rowley* test.[269] As part of its obligation to provide a free appropriate public education, a public school system must support that child, even when parents remove the child from a district-proposed placement because they believe that the program is not adequately addressing their child's needs. In such cases, if administrative officials and courts determine that a child in his or her new placement has exceeded the goals called for by the school IEP, then the parents' choice will be deemed the appropriate placement, even if the district program provided some benefit.[270] When the parents establish that the child is exceeding the goals recommended by the school system, the goal of self-sufficiency is being achieved. In these cases, any extra cost associated with the successful program is well spent.[271]

B. Speculative Substantial Progress

An entirely different situation exists when a placement favored by parents has not yet been tried. In this case, if the court determines by a preponderance of the evidence that the school-proposed IEP meets the *Rowley* test,[272] but that the parent-proposed IEP will be more successful, then the court should order placement in

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quires that all IEPs contain a statement of educational goals and short term objectives. *See supra* note 92.

269. This type of standard would preclude removal from a successful program. *See, e.g.*, Scituate Sch. Comm. v. Robert B., 620 F. Supp. 1224, 1238 (D.R.I. 1985), *aff'd*, 795 F.2d 77 (1st Cir. 1986).

270. Of course, if the child fails to meet the IEP goals, he or she is not receiving a free appropriate public education. *See supra* note 93 and accompanying text.

271. *Cf.* Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984) (placing child in an $88,000 program rather than the $55,000 program recommended by the school on the grounds that the more expensive placement had a chance to be more effective); *see also supra* note 229 and accompanying text.

272. Of course, if the school proposal fails the *Rowley* test, the court should award placement in the parent-proposed program unless the parents fail to establish by a preponderance that their proposal would at least meet *Rowley*. If the parent proposal fails, the court may order placement as it deems appropriate, perhaps modifying the child's existing IEP. In any event, Illinois courts should follow those cases holding that an IEP that contemplates merely a "trivial" benefit is not acceptable. *E.g.*, Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1290 (5th Cir. 1991) (rejecting parents' request for longer school day in light of the minimal benefit such placement would offer); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988) (holding that to provide a free appropriate public education, a school must provide more than a trivial benefit).

the program preferred by the parent,[273] provided the parent, if able, pays the difference in costs.[274] Then, if the child eventually exceeds the goals of the school IEP, upon review of the IEP, the parents could petition the school system to pay the entire amount of the successful placement. If administrators or courts determine that the child has indeed achieved more progress than would have been achieved in the school-system IEP, then the school system would be ordered to pay the entire amount.

Under this scheme, if the parents cannot pay the difference between their placement and the school placement, the school will be required to pay the entire amount for the first year. Then, when the IEP is reviewed the following year, the school can initiate due process proceedings if the child has not exceeded the goals set out in the school IEP. If the school prevails, it will no longer be obligated to provide any payment above the costs associated with its own IEP.[275]

An oversimplified example will clarify this system. Assume that A.J., a five-year-old mildly autistic child, has one goal[276] in his IEP: the ability to put on his own shoes thirty percent of the time in appropriate situations.[277] At an IEP conference, A.J.'s parents state that the goal should be for A.J. to be able to put on his shoes all of the time. The school denies the parents' request. Nevertheless, the school's IEP conforms to *Rowley*, assuming the goal is met during the school year. If the parents initiate due process proceedings and offer expert testimony regarding an alternative program[278] that will teach A.J. to put on his shoes over thirty percent of the

273. The Seventh Circuit recognized broad parental control over children's educational placements in Board of Educ. v. Illinois State Bd. of Educ., 938 F.2d 712 (7th Cir. 1991); *see also supra* note 202.

274. The IDEA, 20 U.S.C. § 1415(e)(2) (1988), gives a reviewing court power to grant "appropriate" relief or "such relief as the court determines is appropriate."

275. However, if the school cannot prove that the costs of the parental preference exceed those of the school IEP, the school should be obligated to pay the entire amount. *Cf.* Max M. v. Thompson, 629 F. Supp. 1504, 1519 (N.D. Ill. 1986) (holding that parents were entitled to reimbursement for private psychotherapy services, but only for the amount that these services would have cost if provided by the school district. Since the school district did not provide a cost figure, the court held the district liable for the full amount.).

276. Actually, A.J. has 22 goals in the IEP proposed by a number of professionals during A.J.'s annual IEP conference. For purposes of this example, we will assume that he only has one since only one goal is in dispute. Confidential IEP of A.J. (1992).

277. From this real-life IEP, one can see that IEPs are highly individualized and that special education professionals recognize the broad concept of education discussed above. *See supra* notes 261-63 and accompanying text.

278. The parents need not offer a wholly alternative program. For example, they could offer A.J. supplementary services with an occupational therapist in conjunction

time, the administrative hearing officer or judge should allow the placement, but order the parents to pay the price differential between the two programs.[279] If, at the time of the next IEP evaluation, A.J. is able to put his shoes on over thirty percent of the time, then the parents can initiate due process proceedings to order the school to pay the entire amount.[280] On the other hand, if A.J. can put his shoes on only thirty percent of the time, the school system is under no obligation to pay the extra cost. Still further, if A.J. can put his shoes on only ten percent of the time, then even under *Rowley*, the parents' proposed placement is inadequate. In this case, the school may initiate proceedings to have the child removed from the inappropriate placement.[281]

The above standard is simple, objective, and resource-conscious. The standard is based on reality rather than on speculation. The school provides the baseline through its proposed IEP. If parents can actually demonstrate that their child has exceeded this baseline, the school system will, under the new standard, have to provide the economic resources. This extra money will be well spent.[282]

VI. CONCLUSION

The framers of the Illinois Constitution of 1970 had high hopes for special education in Illinois. The framers aimed for the ceiling, but politics and economics got in the way. Because our children

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with the program proposed by the school. *Cf. Max M.*, 629 F. Supp. at 1508 (parents providing supplementary psychotherapy).

279. If A.J.'s parents decided to place him in their proposed program before the hearing, and the administrator determined that A.J. can put on his shoes over 30% of the time, A.J. would be placed in that program and the school system would have to pay the entire amount.

280. Thus, in Lachman v. Illinois State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988), *see supra* notes 194-202 and accompanying text, the parents would be granted a cued-speech program for their child but would have to pay the extra costs. If, at the end of one year, the cued-speech program allowed the child to communicate on a higher level than that called for by the school-proposed IEP—for example, if the child learned a significant amount of normal communication as opposed to sign language—the parents would be entitled to permanent placement and reimbursement through due process proceedings.

281. Due process proceedings are available to both parents and schools. *See supra* note 97.

282. This standard does not discard the mainstreaming requirement. However, when mainstreaming is considered, it must always be done in the context of IEP goals. If it furthers IEP goals, a mainstreamed placement is appropriate. If it thwarts these goals, the more restrictive alternative should be chosen because it will allow fuller mainstreaming in the future. Similarly, if parents propose a more restrictive placement and if that placement exceeds IEP goals the placement should be allowed because it allows for fuller mainstreaming in the future. *See supra* note 94 and accompanying next.

deserve the best, it is time for the General Assembly and the Illinois Supreme Court to adopt the enthusiasm of our constitution's framers and push our special education system to a higher level by setting a standard that gets "off the floor."

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