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Theresa E. Cudahy
Theresa.Cudahy@chicagounbound.edu

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Federal Statutory Requirements for Accommodating Handicapped Students in School Choice Programs

Theresa E. Cudahy†

Milton Friedman first proposed school tuition vouchers in 1955, arguing that schools would qualitatively improve if they were required to compete for students and funding.1 In the 35 years since Friedman's initial proposal, many commentators have agreed that competitive systems could remedy the shortcomings of public schools.2 These scholars have suggested that competition for funding would provide incentives for schools to improve the educational benefits they offer. Under the current regime, most schools receive public funds regardless of the quality of education they offer. Vouchers, or school choice programs, attempt to impose market forces on the education system so that the best and most efficient schools will prevail.

Selective school choice programs entail students applying for admission, and schools selecting from the applicant pool.3 Students not selected by schools of their choice either attend less desirable participating schools or schools not competing in the choice program. Competitive selection, by both schools and students, blurs the traditional distinction between “public” and “private” schools.

† B.A. 1986, Amherst College; J.D. Candidate 1992, University of Chicago.
3 Some existing choice programs, like the one which operated in Milwaukee, Wisconsin for the 1990-91 school year, allow for schools' random selection of students. See Wis Stat § 119.23(3) (1989). The absence of competition by schools for students eliminates the disparate impact of uniform voucher programs. However, if schools randomly select applicants, schools are not as apt to accommodate the disabled as they are when schools seek out handicapped students. Furthermore, although random selection may eliminate any disparate impact of a choice program on the handicapped, in some cases it may result in handicapped students matriculating at schools which do not have adequate funds to educate the students.
For a choice program to gain the benefits of competition, the program must have broad participation, with few schools accepting students in the traditional residence-based method. As more schools participate, more students will participate, and greater amounts of money will be channeled to schools which compete successfully in their markets.

Broad participation is already a reality: 35 states in the United States provide for some form of parental choice in their children's schools. However, since communities are unsure of the benefits of educational choice, they may operate traditional public school systems in addition to choice programs, thereby creating two classes of schools. If the schools participating in the choice program are superior to the non-participating schools in a community, students excluded from the choice program are forced to attend inferior schools.

This Comment does not address the merits of school choice programs. Instead the Comment assumes the existence of voucher programs and discusses whether federal law requires such programs to accommodate the special needs of handicapped students. Part I of the Comment argues that uniform tuition voucher programs place disabled students at a disadvantage compared to non-disabled students in competing for access to higher quality, selective schools. Selective schools are unlikely to accept handicapped students who offer the same tuition as non-handicapped students, because handicapped students impose higher costs on schools than do the non-handicapped. Thus, uniform vouchers effectively exclude handicapped students from a public program. Parts II through IV of this Comment explain that the Education for All Handicapped Children Act (“EAHCA”), the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990 (“ADA”)...
prohibit the uniform voucher system's exclusionary effects on handicapped students.¹⁰

This Comment argues that a calibrated voucher system that accounts for the additional expense of educating the handicapped complies with federal law without imposing additional costs on the public. A calibrated voucher system awards more money to handicapped students relative to other students, providing schools with an incentive to accept disabled students and to develop programs designed to meet their needs, while also providing sufficient funds to educate them.

I. School Choice Programs

This Comment offers a solution to alleviate the detrimental effect that uniform voucher programs have on the participation of handicapped students in choice programs. In a program with uniform vouchers, each participating student is allocated the same amount of money, regardless of the individual costs of educating the students. Conversely, calibrated voucher programs can better accommodate the needs of disabled students by allocating more money to them.

A. Uniform Vouchers

Uniform voucher programs have a disparate impact on the handicapped because they do not provide selective schools financial incentive to accept handicapped students. Concededly, choice programs that provide uniform vouchers do not explicitly exclude the handicapped. Rather, the programs are neutral on their face, offering identical tuition credit to any participating student, regardless of whether the student is handicapped or requires additional care.

This facially neutral treatment, however, produces an inequitable result. Vouchers which cover all or most of the cost of educating non-handicapped students do not suffice for handicapped students. In 1985-86, public education of handicapped students

¹⁰ Handicapped students do not have a strong federal equal protection claim against uniform vouchers. The Supreme Court has held that education is not a fundamental constitutional right, and that the handicapped do not qualify under the Court's standard for a "suspect class." See San Antonio Indep. School Dist. v Rodriguez, 411 US 1, 37 (1973) (education is not a fundamental right afforded explicit or implicit protection under the Constitution); City of Cleburne v Cleburne Living Center, 473 US 432, 439-47 (1985) (mental retardation is not a "quasi-suspect" classification justifying an intermediate level of scrutiny).
cost an average of $6,335 per pupil, while educating non-handicapped children cost an average of only $2,780. Thus, while a voucher of $3,000 does not even cover half the cost of educating a disabled student, the same voucher provides more than enough funding to educate a non-handicapped student.

Because uniform vouchers fail to compensate schools sufficiently for educating the handicapped, schools have no financial incentive to accept handicapped students. The uniform voucher program thus has a disparate impact on the handicapped: unable to finance the costs of their education in full, handicapped students are unable to participate.

B. Calibrated Vouchers

If public programs are prohibited by law from excluding the handicapped, calibrated vouchers are one method of preventing de facto discrimination in a voucher system. Since education for the handicapped costs roughly two and one-third times more per pupil than education for the non-handicapped, a voucher that provides two and one-third times more funding for the handicapped student enables that child to participate. States which comply with the EAHCA receive federal money to educate handicapped students. EAHCA funding is determined independently of whether states enact voucher programs. The calibrated voucher program merely reallocates how the federal funds are spent, without costing states more than would uniform voucher programs. Even if states were not required by law to consider the needs of the handicapped when formulating school choice programs, calibrated vouchers are a sensible solution.

12 Patterns in Special Education at iv (cited in note 6).
13 Id.
14 See part II of this Comment.
15 Other writers have proposed calibrated vouchers. See Chubb & Moe, Politics, Markets, and America's Schools at 220 (cited in note 2) for a suggestion that states calibrate vouchers for a variety of special needs, including disability and poverty. See also Editorial, School Choice, Without Harm, NY Times, 4-16 (Apr 28, 1991) for an editorial suggesting that President Bush's school choice proposal should "[attach] enough money to each student so that better schools would want to compete for even the dullest and most poorly behaved."
II. THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

The Education for All Handicapped Children Act of 1975 is Congress's explicit remedy for discrimination against the handicapped in education. The statute provides financial assistance to states if they make available to their handicapped students a "free appropriate public education." Congress enacted the EAHCA amidst a wave of judicial decisions and state legislation recognizing the rights of handicapped persons. At the time the EAHCA was enacted, two federal district court decisions had established a right to public education for handicapped children, and many state courts had reached similar results.

The EAHCA mandates that handicapped children receive an "appropriate" education and that they be "mainstreamed" to the greatest extent practicable. Given the statutory requirement for an "appropriate" education in a "mainstream" environment, two arguments emerge for requiring states to provide the disabled meaningful access to educational choice programs. First, states that implement choice programs may not meet the "appropriate" education standard under the EAHCA if these programs effectively exclude disabled students from participating. Second, although a choice program might not remove handicapped children from mainstream classrooms, if the program causes the flight of non-disabled students from certain schools, then it effectively excludes handicapped students from the new "mainstream." Thus, disabled students conceivably could base a claim on both the requirement that states must provide an "appropriate" education for them, and on the requirement that states make reasonable efforts to "main-

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19 20 USC § 1412(1).
18 Education for All Handicapped Children Act, S Rep No 168, 94th Cong, 1st Sess 6-7 (1975), in 1975 USCAAN 1425, 1431.
16 In order to qualify for federal assistance, "[t]he State [must have] in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 USC § 1412(1).
19 The mainstreaming provision reads: "[S]tates must establish procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 USC § 1412(5)(B).
stream” them, in a system where many non-disabled students attend selective schools at the state’s expense.

A. The EAHCA’s “Appropriate” Education Requirement

The Supreme Court has interpreted the “appropriate” education standard of the EAHCA so narrowly as to foreclose any argument that the statute requires states to provide the handicapped with equal access to a choice program. In *Hendrick Hudson Dist. Bd. of Educ. v Rowley*, the Court held that appropriate education consisted of “educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” Since even poor schools generally confer some benefit, handicapped students cannot argue that their inability to attend the best schools violates the “appropriate” education requirements of the EAHCA.

In *Rowley*, the parents of an exceptionally bright deaf child sought a school-sponsored sign language interpreter for their daughter, so that she could achieve her full potential, commensurate with the opportunity afforded non-handicapped students. Although the lower courts ordered the accommodation, the Supreme Court reversed, holding that the standard for education of the handicapped is merely that which confers “some educational benefit” on the student.

*Rowley* set out a two-part inquiry in determining whether an education is “appropriate” for a given handicapped student:

(1) Does the state comply with the EAHCA’s procedural requirements?
(2) Has the state crafted a program for the student reasonably calculated to enable the child to receive educational benefits?

The majority found that Congress’s intent in passing the EAHCA was not to provide equal opportunities for all students, but rather to identify handicapped children and provide them with access to a free public education. In reaching its conclusion, the

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22 Id at 188-89.
23 *Rowley v Board of Educ*, 483 F Supp 528 (S D NY 1980); *Rowley v Board of Educ.* 632 F2d 945 (2d Cir 1980).
25 Id at 206-07.
26 Id at 198-200.
Court focused on the statutory definition of "appropriate" education:

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

The Court then analyzed the EAHCA's definitions of "special education" and "related services," and found that "related services" means "supportive services . . . as may be required to assist a handicapped child to benefit from special education." Thus the Court found that the "benefit" language of section 1401(17) is "the principal tool [provided by] Congress . . . for parsing the critical phrase of the Act."

The Rowley Court found that the chief concern of the EAHCA's sponsors was to provide access to public education without guaranteeing any particular standard of education. The opinion notes that the EAHCA's legislators were influenced by Mills v Board of Educ. and PARC v Pennsylvania, neither of which required any substantive level of service, but merely access to an adequate public education.

Both Justice Blackmun's concurrence and Justice White's dissent define "appropriate" education differently from the majority. First, each argues that the statute specifies that state programs are to provide "full educational opportunity to all handi-

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27 20 USC § 1401(18).
29 Id.
30 Id at 192. Although the Court does not specify a particular standard of education, it does refer to the EAHCA's providing a "floor of opportunity" in education for the handicapped, perhaps suggesting more substance than this Comment argues. Id at 200. The Court also states that schools which advance students from grade to grade are not necessarily providing an appropriate education under the EAHCA. Id at 203 n 25.
31 348 F Supp 866.
32 334 F Supp 1257.
34 Id at 210 (Blackmun concurring).
35 Id at 213 (White dissenting). Justice White's dissent was joined by Justices Brennan and Marshall.
capped children.\textsuperscript{66} They read this provision to imply that "appropriate" requires not only mere benefit, but equal educational opportunities for handicapped and non-handicapped children.\textsuperscript{67} Second, both the concurrence and dissent cite an EAHCA Senate report which expresses congressional intent "to guarantee that handicapped children are provided equal educational opportunity."\textsuperscript{68}

The Circuit Courts have not applied the Rowley standard uniformly. In \textit{Polk v Central Susquehanna Intermediate Unit}, the Third Circuit interpreted Rowley's "benefit" language as affording "more than a trivial amount of educational benefit."\textsuperscript{69} The court found that physical therapy was an integral part of an "appropriate" education, as opposed to the services of a full-time interpreter requested in \textit{Rowley}. However, the District of Columbia Circuit found in \textit{Knight by Knight v District of Columbia} that placement of a handicapped child in public school would provide the student with "some educational benefit," and therefore the student's parents were not entitled to reimbursement for placing him in private school, regardless of the comparative benefits of the private school.\textsuperscript{70} A handicapped student trying to gain access to a choice program is comparable to the plaintiff in \textit{Knight}, in that the student would need to show that the public school environment did not offer educational benefits.

If Congress intended an equal educational opportunity for disabled students, uniform vouchers which result in disparate impact on the handicapped are prohibited. Under the heightened standard proposed by the Rowley dissent or perhaps by the Third Circuit in \textit{Polk}, a choice program would be unlawful if it denied handicapped students an appropriate education by relegating them to the least desirable schools through uniform vouchers. If a state offers students the opportunity to attend higher quality selective schools with public funds, but denies that same opportunity to a handicapped student by providing a stipend that does not approach the

\textsuperscript{66} Id at 210 (Blackmun concurring) and at 213 (White dissenting, emphasis on "full" deleted). Both cite 20 USC § 1412(2)(A).

\textsuperscript{67} \textit{Rowley}, 458 US at 211 (Blackmun concurring) and at 214-15 (White dissenting).

\textsuperscript{68} Id at 210, 213 (Blackmun concurring; White dissenting) citing Education for All Handicapped Children Act, S Rep No 168 at 9, 94th Cong, 1st Sess (June 2, 1975).

\textsuperscript{69} 853 F2d 171, 181 (3d Cir 1988).

\textsuperscript{70} 877 F2d 1025, 1029-30 (DC Cir 1989). The court goes on to say that "there is simply no evidence to support the proposition that [the child] will be unable to obtain educational benefits in [a public school] environment, and the absence of such evidence is fatal to [plaintiff's argument]." Id at 1030.
cost of that student’s education, the state has denied the handicapped student an equal educational opportunity.

However, under the standard adopted by the Rowley majority, states need not provide equal educational opportunity to handicapped students. A handicapped student could only assert a claim against a uniform voucher system if education in a non-participating school was of no benefit. Notwithstanding the existence of a choice program, it would be difficult to argue that even the poorest schools provide no educational benefit. Thus, Rowley probably forecloses the “appropriate education” argument under the EAHCA.

B. The EAHCA’s “Mainstreaming” Requirement

Because the Rowley Court mentioned but failed to analyze the mainstreaming provision of the EAHCA,\(^4\) the opinion does not indicate how the Court would apply the general “benefit” standard to the EAHCA’s direction to provide integrated schooling. The lower courts have generally interpreted the mainstreaming provisions of the EAHCA with deference to the congressional preference for integration, but are cautious about imposing an undue financial burden on local school districts. Some courts require mainstreaming except where it would cause extreme hardship to the local school district or other students.\(^5\)

The Ninth Circuit has found that mainstreaming is fundamental to the purpose of the EAHCA.\(^6\) Conversely, the Eighth Circuit has held that a school district is not required to place a handicapped child in an integrated setting, as long as the requirements for placement in a public program are met.\(^7\) A calibrated tuition voucher proposal might be a solution for a court adopting the stricter standard. Other courts, applying the lower standard, might not require states to accommodate the disabled in their choice plans. However, if these same courts apply the lower standard largely out of concern for district finances, they might accept a calibrated system, if calibration does not impose additional costs upon the district.


\(^{42}\) See, for example, Roncker v Walter, 700 F2d 1058 (6th Cir 1983). See also A.W. v Northwest R-1 School Dist., 813 F2d 158 (8th Cir 1987).

\(^{43}\) Department of Educ. v Katherine D., 727 F2d 809, 817 (9th Cir 1983) (“Although the statute does not require ‘mainstreaming’ in every case, it is fundamental to the scheme and purpose of the Act that handicapped children be provided the same educational opportunity and exposure as those children who are not so disadvantaged.”).

The strongest approach to the EAHCA's mainstreaming requirement, that taken by the Sixth Circuit, requires services to be provided in an integrated environment wherever feasible.\(^4\) The court in *Roncker v Walter* recognized that the EAHCA allows exceptions to its general requirement of integration “only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”\(^4\) The court identified a strong congressional preference for integration,\(^7\) and proposed that the state incorporate separate but superior services into an integrated setting wherever feasible.\(^8\) By requiring integration in such strong terms, the Sixth Circuit sought to balance Congress's strong preference for integration with the reality that some handicapped students either would not benefit from a mainstream classroom or would unduly disrupt a mainstream classroom.\(^9\) The court cited cost as a proper factor to balance in the analysis, but stated that cost is no defense for a district which has failed “to provide a proper continuum of alternative placements for handicapped children.”\(^5\) Thus, the Sixth Circuit's standard for the EAHCA mainstreaming provision is far more demanding than the *Rowley* Court's application of the EAHCA's "appropriate" education requirement.

The Eighth Circuit in *A. W. v Northwest R-1 School Dist.* accepted the *Roncker* analysis but nonetheless found that a severely mentally retarded boy belonged in a segregated institution. The *A. W.* decision is based on deference to local government's allocation of limited economic resources.\(^5\) The court commented that to have held for plaintiff would have “tie[d] the hands of local and state educational authorities who must balance the reality of limited public funds against the exceptional needs of handicapped children.”\(^5\) So even under the most stringent test for implementing the EAHCA, one court has held that mainstreaming is not re-

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\(^4\) *Roncker*, 700 F2d 1058.
\(^5\) Id at 1060, citing 20 USC § 1412(5)(B).
\(^7\) Id at 1063.
\(^9\) “In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.” Id.
\(^5\) *Roncker*, 700 F2d at 1063.
\(^5\) Id.
\(^5\) *A. W.* 813 F2d 158 (8th Cir 1987).
\(^5\) Id at 164.
\(^5\) Id.
required where cost considerations drive the school district's decision to place handicapped children in separate facilities.

An earlier Eighth Circuit decision had held that the school district was not required to place a handicapped child in an integrated setting where the segregated setting complied with the requirements for placement in a public program. Thus, the courts' willingness to enforce the mandate of the EAHCA mainstreaming provision is mixed.

If cost concerns drive the courts' decisions to interpret the mainstreaming provision narrowly, then the courts might accept calibrated vouchers as a reasonable accommodation. Because states already provide higher average funding to handicapped students, vouchers and credits can be calibrated to acknowledge the needs of the disabled without extra cost to the state. Courts need not defer to a uniform voucher program out of fear that enforcing the EAHCA would burden local school districts.

III. THE REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973 prohibits discrimination against the handicapped by recipients of federal money. The statute prohibits discrimination in public programs, including educational agencies.

A. School Choice Exception to the Smith Rule

Although the Rehabilitation Act prohibits discrimination by educational agencies, the Supreme Court in Smith v. Robinson severely restricted a plaintiff's ability to sue under the Rehabilitation Act where the EAHCA provides a cause of action. However, the Smith decision does not apply to programs that provide benefits in addition to those guaranteed under the EAHCA. Because a voucher program would exceed the minimal requirements imposed by the EAHCA, such programs remain susceptible to Rehabilitation Act challenges.

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64 Mark A., 795 F2d at 54.
65 29 USC §§ 701-796 (1982).
66 29 USC § 794.
70 Note that the Handicapped Children's Protection Act of 1986 codifies the holding in Smith.
In *Smith* the Court held that where a suit is filed under both the EAHCA and the Rehabilitation Act, plaintiffs must exhaust EAHCA grievance procedures before pursuing other statutory remedies. Since the EAHCA is more specific to causes of action in education, the Court foreclosed broader discrimination protections in cases which could be brought under the EAHCA. Some commentators decried the Court’s limitation, especially given the narrow interpretation of the EAHCA in *Rowley*. *Rowley* limits the EAHCA’s “appropriate” education requirement to education which offers some benefit, and *Smith* limits a handicapped student’s causes of action to those under the EAHCA.

However, the Court did enumerate some exceptions to the *Smith* rule, and suggested that the Rehabilitation Act would be available where a state denied services to a handicapped child in a program which went beyond the requirements of the EAHCA. As discussed above, a choice program goes beyond the scope of EAHCA requirements, and thus would probably fall outside the *Smith* rule. If the state denied handicapped students access to a choice program, the Rehabilitation Act would provide redress.

B. Disparate Impact Test

If the Rehabilitation Act provides a cause of action for discrimination in choice programs, and the discrimination is assessed under a disparate impact test, uniform voucher programs violate the Rehabilitation Act. The disparate impact, or “effects”, test finds liability if disparate impact is shown, while the intent test requires a showing that there was an intent to discriminate by the state. The disparate impact standard is useful in cases, like disability, where discrimination is more often the product of neglect rather than malice. Guided by the factors analyzed in *Alexander v Choate*, a disparate impact standard imposes liability whenever

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81 Id at 992.
82 The Court held that where the Rehabilitation Act did not expand the substantive rights of the handicapped child, and where the EAHCA provided a more precise remedy, § 504 of the Rehabilitation Act was unavailable. Id at 1021. Section 504 is codified at 29 USC § 794, the primary discrimination prohibition in the Rehabilitation Act.
84 The Court commented, “[o]f course, if a State provided services beyond those required by the [EAHCA], but discriminatorily denied those services to a handicapped child, § 504 would remain available to the child as an avenue of relief.” *Smith*, 468 US at 1019 n 22.
public education programs effectively exclude the handicapped. Thus, uniform voucher systems which result in low-level participation by handicapped students are illegal.

The Court in *Choate* held that with regard to a state Medicaid program's disparate impact on the handicapped, the standard for discrimination under the Rehabilitation Act falls somewhere between "intent" and "effects."66 Faced with rocketing Medicaid costs, Tennessee had proposed reducing from twenty to fourteen the number of annual days of inpatient hospital care covered by the state Medicaid program.67 Respondents, Medicaid recipients, alleged that the limitation would have a discriminatory effect on handicapped hospital users, who required more than fourteen days of hospitalization at three and a half times the rate of non-handicapped users.68 The Court rejected a strictly intent-based test, because, if applied in every case, such a narrow test would defeat the purpose of section 504's anti-discrimination provisions.69 Because discrimination against the handicapped is more often the product of neglect than animosity, an intent test would not reach much of the conduct that Congress sought to proscribe.70

However, the Court argued that not all state conduct with discriminatory effects on the handicapped would violate section 504. A requirement that states evaluate the impact on the handicapped of every action affecting them would be administratively burdensome.71 Section 504 prohibits disparate impact when "an otherwise qualified handicapped individual [has not been] provided with meaningful access to the benefit that the grantee offers."72

In defining "meaningful access," the Court analyzed four factors to determine whether a program's disparate impact on the handicapped would violate the Rehabilitation Act. The Court implied that a disparate impact test would be appropriate where:

1. the handicapped were excluded from or denied meaningful access to a public program;
2. the handicapped did not receive the benefit promised by the program;

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66 Id at 299.
67 Id at 289.
68 Id at 289-90.
70 Id at 289-97.
71 Id at 298.
72 Id at 301, citing *Southeastern Community College v Davis*, 442 US 397 (1979).
(3) the federal statutory plan indicated that Congress would favor requiring meaningful access to the handicapped over allowing state discretion in deciding what level of access to provide; and
(4) the cost of a disparate impact or effects test would not be unduly burdensome to the state.\(^7\)

Applying these factors to the reduction of Medicaid benefits in Choate, the Court found that all four factors favored the state. First, the limitation did not exclude the handicapped from Tennessee Medicaid services nor deny them meaningful access to the program.\(^7\) Not only was the limitation neutral on its face, but the handicapped, like the non-handicapped, would benefit from coverage they received under the fourteen-day rule.\(^7\) Second, since Congress merely guaranteed that Medicaid recipients would receive some package of health care benefits, but did not seek to provide a particular level of health care, the handicapped received the promised benefit of the Medicaid program.\(^7\) In supporting this argument, the Court cited regulations promulgated under section 504 which mandate equal opportunity as opposed to equal benefit.\(^7\) Third, the Court found that the legislative history of the Rehabilitation Act did not limit the discretion of states in devising Medicaid programs.\(^7\) Thus Congress did not intend the discrimination prohibition of section 504 to limit a state's ability to construct a package of Medicaid services.\(^7\) However, the Court explicitly distinguished educational programs from Medicaid in this part of its holding, commenting that denying meaningful access to education would be particularly burdensome to the handicapped.\(^8\) The last argument the Court proffered for allowing Tennessee's inpatient

\(^7\) Choate, 469 US at 302-09.
\(^7\) Id at 302.
\(^7\) Id at 302 n 22.
\(^7\) Id at 303, citing 42 USC § 1396(a)(19).
\(^7\) The Court quoted the regulations as stipulating that, "aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement." Choate, 469 US at 305, citing 45 CFR § 84.4(b)(ii) (1984).
\(^7\) Id at 307.
\(^7\) Id.

\(^8\) The Court suggested that, "[i]n enacting the Rehabilitation Act and in subsequent amendments, Congress did focus on several substantive areas—employment, education, and the elimination of physical barriers to access—in which it considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high. But nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the
The Court envisioned that an analysis of disparate impact on the handicapped, broken down by class of handicap, for every action affecting Medicaid recipients, would be "well beyond" the accommodation required under earlier interpretations of the statute.

However, in a case challenging disparate impact in a school choice program, the Choate analysis reaches a result in favor of a handicapped plaintiff. First, a choice program is an all or nothing proposition, where offering some handicapped students an inadequate tuition credit denies them meaningful access to the program. While Choate's handicapped Medicaid beneficiaries received fourteen covered hospital days even if they required a longer stay, handicapped students holding a voucher insufficient to cover the costs of their education would not be accepted at all. Second, the benefit of a choice program is to provide a better education to students through competitive schools. But uniform vouchers may deny that better education to handicapped students because they would attend schools that did not participate in the competitive system. Third, the Choate Court distinguished education as a substantive area for which Congress favors ensuring equal opportunity over state discretion. Fourth, cost concerns are irrelevant here, as the proposed calibrated voucher system would merely re-route money which has already been allocated. Thus, all four Choate factors indicate that the disparate impact on the handicapped of a uniform voucher program would violate section 504. A low level of meaningful participation by handicapped students in a choice program would be evidence of discrimination under the Rehabilitation Act.

Regardless of the favorable dicta in Smith and Choate, the Court's holdings limit the reach of the Rehabilitation Act from providing relief to handicapped students excluded from uniform voucher programs. The Americans With Disabilities Act, enacted

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proportion mix of amount, scope, and duration limitations on services covered by State Medicaid. Id at 306-07 (footnotes and citations omitted).


* Id.

* Equal opportunity in education has been the law since Brown v Board of Educ.: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 US 483, 493 (1954).

six years after Smith, is arguably Congress's attempt to strengthen federal equal opportunity protection for the handicapped.

IV. The Americans with Disabilities Act of 1990

The ADA, enacted in July 1990, prohibits discrimination against the disabled by a broad range of entities, including government programs and services, private employers, and private businesses serving the public. The ADA protects any "qualified individual with a disability," defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity." The ADA was enacted in order to protect the disabled in areas not covered under earlier laws. Specifically, Congress intended the ADA to expand the protections guaranteed by the Rehabilitation Act, which prohibited only recipients of federal money from discriminating against the disabled.

The ADA prohibits public entities from excluding the handicapped from participating in government programs or denying program benefits to the handicapped. Section 202 of the ADA closely follows the language of section 504 of the Rehabilitation Act. The statute defines "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority." In sum, the ADA broadly prohibits the exclu-

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Id at § 201(2).

Attorney General Thornburgh testified that, "[o]ne of the [ADA's] most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections." Americans With Disabilities Act of 1990, H Rep No 101-485 part 2, 101st Cong, 2d Sess 48 (May 15, 1990), citing Americans With Disabilities Act of 1990, Hearings on HR2273 before the Subcommittee on Civil and Constitutional Rights of the Committee on Education and Labor, 101st Cong, 2d Sess 812 (1989).


29 USC § 794 (1982).


Id at § 201(1). It is important to note that the Rehabilitation Act included in its definition of programs covered: "a local educational agency (as defined in § 2891(12) of Title 20) system of vocational education, or other school system." 29 USC § 794(b)(2)(B). Although these words do not appear in § 201 of the ADA, Congress never acknowledged the difference. Instead, Congress chose a broad definition of public entity, which seems to in-
accommodation of and denial of benefits to the handicapped by state programs.

A. The Smith Rule's Effect on the ADA

The Smith rule, limiting causes of action where plaintiffs may sue under the EAHCA, should not apply to the ADA, because Congress enacted the ADA without mentioning Smith while indicating an intent for the handicapped to have recourse to all remedies.

Arguably, if the ADA only expands the number of parties covered and not the substantive rights guaranteed by the Rehabilitation Act, Smith would prevent the handicapped from suing under the ADA where the EAHCA provides a cause of action. The reasoning in Smith that Congress would have intended handicapped students to avail themselves of the more specific remedies of the EAHCA would seem to apply to the ADA as well as to the Rehabilitation Act.91 Perhaps Congress enacted the ADA with knowledge that Smith limited the Rehabilitation Act, and since Congress did not explicitly reject the reasoning of Smith, the ADA might also be limited.

However, nothing in the ADA's legislative history refers either to Smith or to an intent to foreclose the ADA with respect to education programs. Indeed, if the general purpose of the ADA is to expand the protections of previously enacted laws,92 such an interpretation would be inconsistent with that purpose.93 Furthermore, the ADA, as the most recently enacted law, should supersede earlier statutes and judicial constructions. Since Congress intended to expand the protections of the handicapped, and was silent on the question of Smith's application to the ADA, we may reasonably include education agencies, without expressly naming them. Furthermore, the ADA seems implicitly to apply to education programs, since among the findings and purposes of the Act is the statement that discrimination exists in the "critical area" of education. Pub L No 101-336 § 2(a)(3). Moreover, another section, which explicitly amends the Rehabilitation Act, refers to standards applicable to education programs. See id at § 512(a)(C)(iv), ("[L]ocal educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol . . . to the same extent that such disciplinary action is taken against nonhandicapped students.").

93 The ADA expressly provides that it does not "invalidate or limit the remedies, rights, and procedures" of any Federal, State, or local law which might provide greater or equal protection for the disabled. Pub L No 101-336 § 501(b). While this protection does not speak to the EAHCA's potential limitation on the ADA, the section's legislative history conveys a congressional intent that the handicapped have recourse to all available remedies. See H Rep No 101-485 part 2 at 135 (cited in note 86); Americans With Disabilities Act of 1990, H Rep No 101-485 part 3, 101st Cong, 2d Sess 69-70 (May 15, 1990).
disregard Smith in order to achieve Congress’s purpose and allow the ADA its full vigor.

Moreover, even were Smith to limit suits brought under the ADA, Smith’s dicta would still retain causes of action against programs outside the EAHCA mandate: a school district that discriminated against the handicapped in its choice program would be subject to the discrimination provision of the ADA.

B. Congress's Preference for a Disparate Impact Test

Since the ADA was enacted so recently, and section 202 does not take effect until January 1992, the courts have not yet ruled on whether an “intent” or “effects” test will be used to identity discrimination under the law. Although the ADA’s legislative history does not set a clear standard, it suggests a preference for a disparate impact or effects test. Under an effects test, a uniform voucher program’s disparate impact on the handicapped would constitute discrimination under Title II of the ADA.

The legislative history of the ADA suggests that courts should scrutinize discriminatory effects on the handicapped at least as closely under the ADA as under the Rehabilitation Act. The Education and Labor Committee tried to offer a clear standard by which to review Title II discrimination, declaring, “it is . . . the Committee’s intent that section 202 also be interpreted consistent with Alexander v Choate.” The Committee understood Choate to mandate a disparate impact standard. However, the standard in

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** Pub L No 101-336 § 205(a).


** H Rep No 101-485 part 2 at 84 (Committee on Education and Labor).

** The Report explains in a section dealing with employment discrimination that, “[t]he Court in Choate explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminates by effect as well as by design.’’” H Rep No 101-485 part 2 at 61 (Committee on Education and Labor).
Choate is not as clear as the Committee asserted.\textsuperscript{98}

The House Committee on the Judiciary also commented extensively on the standards Congress expected courts to apply to discrimination in public programs. The Judiciary Committee argued first that integration of the handicapped may require short-term burdens for the sake of long-term gains.\textsuperscript{99}

The Judiciary Committee also focused on the importance of non-segregated services. Neither convenience nor cost was a valid justification for offering only separate services under the ADA, even if the separate services were equal to or better than integrated services.\textsuperscript{100} Congress permitted such services to exist, but they were not to be “used as a basis to exclude a person with a disability from a program that [was] offered to persons without disabilities, or to refuse to provide an accommodation in a regular setting.”\textsuperscript{101} The Judiciary Committee also pointed out that the public services title of the ADA requires “reasonable accommodation” for the handicapped that does not impose “undue hardship” on the entity making the accommodation or fundamentally alter the program.\textsuperscript{102} The Committee envisioned that the standard of hardship would vary from case to case, depending on all available resources, and the entity claiming undue hardship would have the burden of proof.\textsuperscript{103}

\textsuperscript{98} Note also that in discussing the ADA’s effect on the insurance industry, the Committee on Education and Labor Report reverses its earlier interpretation of Choate, saying “as is stated by the U.S. Supreme Court, in Alexander v Choate, 469 US 287 (1985), employee benefit plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability, e.g., additional sick leave or medical coverage.” H Rep No 101-485 part 2 at 137 (Committee on Education and Labor). The best explanation for the Committee’s seeming self-contradiction may be that the Committee understood Choate’s holding as limited to medical disabilities. This construction is consistent with the construction advanced here. See text accompanying notes 71-80.

\textsuperscript{99} H Rep No 101-485 part 3 at 50 and n 50 (Committee on the Judiciary), citing Dopico v. Goldshmidt, 687 F2d 644, 650 (2d Cir 1982) and New Mexico Ass’n for Retarded Citizens v. New Mexico, 678 F2d 847, 855 (10th Cir 1982), for the proposition that substantial burdens may be placed on state and local agencies “in order to accomplish the Rehabilitation Act’s goals of nondiscrimination and integration.”

\textsuperscript{100} H Rep No 101-485, part 3 at 50 (Committee on the Judiciary) (cited in note 95).

\textsuperscript{101} Id, summarizing 45 CFR § 84.4(b)(3) (1985).

\textsuperscript{102} Id at 51.

\textsuperscript{103} The Judiciary Committee specified that providing readers to blind case workers, interpreters for the deaf, or equipping telephones for the hearing impaired would constitute reasonable accommodations, depending on the size and budget of the employer. Id at 51, citing 42 Fed Reg 22688 (May 4, 1977). Since these are potentially expensive alternatives, the cheap accommodation suggested by this Comment seems clearly within the “reasonable” parameter set by the statute.
These comments by congressional committees suggest that the ADA may require a voucher system to calibrate its vouchers to the costs of educating handicapped students. Calibrated vouchers do not impose an undue hardship on the state, since they cost the state no more than the current system of financing education for handicapped children. In fact, if some selective schools are able to educate handicapped students for less than public schools currently spend, the net cost to society of educating the handicapped might decrease under a calibrated voucher system. Moreover, the calibrated voucher system would promote integrated education. Even if implementation of the proposed system were to increase administrative costs initially, the Judiciary Committee considered such short-term burdens as necessary to achieving the ADA's long-term goals. Thus the calibrated voucher proposal is consistent with, if not required by, the standards imposed by two ADA congressional committee reports. Conversely, uniform vouchers would subvert the purposes of the ADA by effectively excluding the handicapped.

**CONCLUSION**

Handicapped students challenging uniform voucher choice programs may have three avenues of statutory redress, despite the Supreme Court's apparent preference for construing such statutes narrowly. The Court has interpreted the requirement for “appropriate” education under the EAHCA too narrowly for the statute to provide relief in this case; since handicapped students almost inevitably receive “some educational benefit” from public school programs, they cannot argue after Rowley that the state has denied them an appropriate education. Handicapped students might argue more successfully, however, that uniform vouchers will result in their being excluded from the mainstream.

Handicapped students might also seek relief under the Rehabilitation Act. Although the Supreme Court has held that the Rehabilitation Act is generally not available where the EAHCA provides redress, choice programs seem to fall within an exception to the Smith rule. Under the Choate disparate impact standard,
handicapped students are impermissibly discriminated against if they are unable to participate in the choice program to the same extent as the non-handicapped.

Handicapped students probably have a cause of action under the ADA. Because the ADA extends the protections made available under the Rehabilitation Act, arguments under the ADA resemble those under the Rehabilitation Act. However, the ADA provides greater protection than the Rehabilitation Act, and will likely be interpreted to require increased accommodation of the handicapped.

In a system where schools select students holding uniform vouchers, selective schools will naturally avoid students whose education costs exceed their voucher remittance. Because disabled students are more expensive to educate, selective schools will reject them. The ADA bars uniform voucher systems because they effectively deny handicapped students the benefits of a publicly-financed program.

Calibrating vouchers to the costs of educating students is one way of bringing choice programs into compliance with federal law. Though states might also comply, for example, by incorporating random selection of students into the choice program, this solution eliminates one of the competitive elements of the choice program and imposes perhaps unforeseen costs on the schools. Calibration ensures schools enough funds to educate all of their students while preserving crucial elements of competition and integration.