The State of Justice:

Education of Children with Disabilities

"Not your father's old Chevrolet, any more."

The Universal Declaration of Human Rights, in Article 26, cites education as a fundamental human right and states that education shall be free, at least in the elementary and fundamental stages, and compulsory, and that education shall be directed to the full development of the human personality.

In 1973, the U.S. Supreme Court ruled in a Texas case that education is not a fundamental right in the U.S. Constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973).

Since then, it has been generally accepted that a state must examine its own constitution to determine its educational responsibilities.

In *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979), the Supreme Court of Appeals of the State of West Virginia, interpreting West Virginia constitutional language requiring a "thorough and efficient system of free school," found that Article XII, Section 1 of the West Virginia Constitution made education a fundamental, constitutional right in this state.

It went on to define a thorough and efficient system of schools as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."

The Ohio Supreme Court ruled four times from 1997 to 2002 that the state's funding system is unconstitutional. *DeRolph v. State*, 97 Ohio St. 3d 434, 780 N.E.2d 529 (2002). Unfortunately, it did not take the opportunity to interpret its constitutional language (which is similar to that in West Virginia and requires "a thorough and efficient system of common schools" OConst. Art. VI Section 2) as affording its citizens a fundamental right to quality education.

A 2007 effort to place a proposed Constitutional amendment before the voters in Ohio, "The Ohio Education Amendment," that would provide that it is a fundamental right for every student to have a high quality basic education, regardless of geographical location or financial environment, failed, although renewed efforts are still underway. See www.rightforohio.org

This background is fundamental to understanding federal law governing the education of children with disabilities, which started as the Education for All Handicapped Children Act of 1975 and is now the Individuals with Disabilities Education Improvement Act of 2004. (IDEIA) 20 U.S.C. Section 1400.

Board of Education V. Rowley, 458 U.S.176 (1982), is the lead United States Supreme Court case on what the statutory requirement of "Free Appropriate Public Education" (FAPE) means under the Education for All Handicapped Children Act of 1975 (Act), which was passed in response to Congress' perception that a majority of handicapped individuals in the United States "were either totally excluded from school or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."

The *Rowley* standard, which defined entitlement to FAPE as requiring only an "educational benefit," is often explained as requiring a school district to provide only a "Chevrolet" education instead of a "Cadillac." However, with the law as then constituted, the whole focus of the decision was on "access" to education, not "quality" education.

Unfortunately, many school districts, educators, lawyers, and hearing officers are wrongly holding onto to that premise despite the fact that it is obsolete, because the law has substantially changed focus since *Rowley* was decided in 1982, from

requiring just "access," to requiring "proven methods" of education, i.e.," results."

In particular, the 1997 and 2004 Amendments to IDEIA, provide, in pertinent part, as follows:

Congressional Findings: 20 USCA Section 1400 (c)

Section 1400 (c) (4), implementation of chapter has been impeded by low expectations, and an **insufficient focus on applying replicable research on proven methods of teaching and learning** for children with disabilities.

Section 1400 (c) (5), 30 years of research and experience have demonstrated that the education of children with disabilities can be more effective by having (A):

"High expectations" for disabled children to ensure their access in the general curriculum "to the maximum extent possible."

(i) meeting developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children &

(ii) being prepared to lead productive and independent adult lives, to the maximum extent possible.

(5)(E) supporting high-quality, intensive pre-service preparation and professional development for all personnel who work with children in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disability, **including the use of scientifically based instructional practices too the maximum extent possible.**

The amended legislative "purposes" included in 20 U.S.C. Section 1400 (d) contain the following additional pertinent language:

Purposes.

The purposes of this title are:

(a) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their **unique needs and prepare them for further education, employment, and independent living**.

(b) To ensure that the **rights of children** with disabilities **and parents** of such children **are protected.**

(Emphasis Mine)

The 1997 amendments show Congress' intent to incorporate state educational standards into special educational programming for disabled students. The statue now explicitly mandates that states establish performance goals for children with disabilities that are consistent with the goals and standards set for all children. 20 U.S.C.A. Section 1412 (a) (16) (West 2002), and establish "performance indicators" to assess their progress. (Id.) The definition of FAPE for students with disabilities incorporates, as a matter of law, minimum "state standards" of education. 20 U.S.C.A. Section 1401(8) (B)-(C) (West 2002).

Thus, the amendments change the focus of IDEA from merely providing access to an education as noted in *Rowley*, to requiring improved results and achievement for children with disabilities, and because *Pauley v. Kelly*, has held that an adequate education is not a minimal education, but one that "develops, as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically," this should be the standard utilized in West Virginia in determining the substantive requirements of FAPE in West Virginia Schools.

While *Pauley* did not deal with disabled students specifically, equal protection considerations under the West Virginia State Constitution, discussed in *Pauley*, would not justify unequal treatment to students just because they are disabled.

The continuing notion that our children with disabilities are only entitled to your father's "old Chevrolet" is as obsolete as GM's product mix over the last decade. It's time we get serious about ensuring a Free Appropriate Public Education to all children in West Virginia, including our most vulnerable.