

SPECIAL EDUCATION, EQUAL PROTECTION AND EDUCATION FINANCE: DOES THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT VIOLATE A GENERAL EDUCATION STUDENT'S FUNDAMENTAL RIGHT TO EDUCATION?

INTRODUCTION

Nationwide, state and federally mandated costs of special education are forcing local school districts to drastically reduce funding and educational services to general education students in violation of their equal protection guarantees.¹ Parts I and II of this Note will establish that state and federal special education laws enacted over the past twenty-five years have caused, and continue to contribute to, a reduction in general education services.² Parts III and IV will analyze this phenomena from the perspective of the general education student.³ Part IV posits that such action taken under state law constitutes a violation of general education students' equal protection rights under many state constitutions.⁴ Part IV also argues that such action should constitute a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.⁵

¹ See discussion *infra* notes 6-24 and accompanying text; see also Albert Shanker, *Where We Stand*, U.S. NEWSWIRE, Dec. 8, 1995 (citing RICHARD ROTHSTEIN & KAREN HAWLEY MILES, *WHERE'S THE MONEY GONE?: CHANGES IN THE LEVEL AND COMPOSITION OF EDUCATION SPENDING* (1996)); *Special Education Programs Reauthorization: Testimony on the Individuals with Disabilities Education Act Before the Senate Comm. on Labor and Human Resources*, 105th Cong. 1-5 (Jan. 29, 1997) (statement of David S. Wolk, Superintendent of Schools, Rutland, Vermont).

² See *infra* notes 6-129 and accompanying text.

³ See *infra* notes 131-320 and accompanying text.

⁴ See *infra* notes 252-320 and accompanying text.

⁵ See *infra* notes 252-320 and accompanying text.

I. RECENT DEVELOPMENTS IN GENERAL EDUCATION SPENDING AND A BRIEF HISTORY OF SPECIAL EDUCATION LAW

A. *Recent Studies and Educators Reveal a Nationwide Reduction in General Education Funding*

Reductions in general education spending and services are directly attributable to the enactment of the Individuals with Disabilities Education Act ("IDEA") and statutes in every state enacted pursuant to IDEA requirements.⁶ Approximately ninety percent of students nationwide are general education students.⁷ State and national studies conducted over the past thirty years show that the share of all spending received by general education declined from approximately eighty percent in 1967 to fifty-six percent in 1996.⁸ During this time, expenditures devoted to special education more than quadrupled from four percent to seventeen percent.⁹ Additionally, the same studies show that while general education has received only twenty-six percent of all new education funds over the past thirty years, special education consumed nearly forty percent of these funds.¹⁰

While the average annual per pupil expenditure for general education students is approximately \$6000 in most states, it often costs more than four times that amount to educate a special education student.¹¹ The cost to educate one special education student can sometimes reach nearly \$200,000 annually.¹² Additionally, the costs of imple-

⁶ See, e.g., Steve Twedt, *Districts Hit Hard by Way State Funds Special Students*, PITTSBURGH POST-GAZETTE, Aug. 5, 1997, at A1; see also *infra* notes 24, 49 and accompanying text.

⁷ See, e.g., *Special Education Programs Reauthorization*, *supra* note 1. The term "general education" is used to describe any services or students which are not deemed "special education" as discussed in this Note. See *id.*

⁸ See ROTHSTEIN & MILES, *supra* note 1.

⁹ See *id.*

¹⁰ See *id.*; see also Twedt, *supra* note 6, at A1.

¹¹ See, e.g., Karen Avenoso, *Payzant Calling for Big Cuts in Special Education*, BOSTON GLOBE, Feb. 13, 1997, at A50 [hereinafter *Payzant*]; Kelly Burgess, *An Especially Challenging Dilemma*, PITTSBURGH POST-GAZETTE, May 24, 1995, at N2; *Special Ed Takes Bigger Budget Bite*, VIRGINIAN-PILOT LEDGER-STAR, Dec. 28, 1997, at B1; Kate Zernike, *Special Education, A System Disabled, Testing the Limits Pioneering Law Feels the Strain of Wide Demands*, BOSTON GLOBE, Mar. 30, 1997, at A1 [hereinafter Mar. 30, 1997].

¹² See David Shaw, *Cato-Meridian Board Concerned About Cost of Special Ed*, SYRACUSE POST STANDARD, Nov. 25, 1997, at B1; Kate Zernike, *Special Education, A System Disabled; Bad Behavior, Special Treatment; Many Students' Problems not Related to Education*, BOSTON GLOBE, Mar. 31, 1997, at A1 [hereinafter Mar. 31, 1997]. The highest expenditures for special education students occur when public schools must pay for private tutors, caretakers and placements in private facilities. See Zernike, Mar. 30, 1997, *supra* note 11, at A1.

menting special education mandates across the country are extremely high and continue to rise.¹³

Professional educators and school administrators fault the legally required rising costs of special education for cuts to general education funds and services.¹⁴ In Massachusetts, for example, educators commented that schools are forced to siphon money away from general education academic expenses to pay for special education students.¹⁵ In a 1996 report, the Massachusetts Association of School Superintendents warned that the increased cost of special education is seriously compromising regular education programs.¹⁶ The same report showed that money originally budgeted for raising school standards and creating new general education academic programs instead is being funneled into special education mandates.¹⁷ Additionally, Massachusetts special education expenditures have increased by thirty-five percent in recent years, requiring some districts to cut general education budgets by seven percent annually.¹⁸

Similarly, educators in other states fault special education for causing decreases in general education funding.¹⁹ The governor of Minnesota, for example, recently attempted to curb special education spending by decreasing state special education aid to local communities.²⁰ There, state lawmakers readily acknowledged that special education mandates drain money from general education.²¹ Nebraska legis-

¹³ See *infra* note 24. Commentators note, for example, that special education accounts for nearly 40% of expenditures in the Boston Public School System, although only 20% of the students are special education students. See Avenoso, *Payzant*, *supra* note 11, at A50. Additionally, in Virginia, special education costs have almost doubled in the past five years. See *Special Ed Takes Bigger Budget Bite*, *supra* note 11, at B1. Similarly, news accounts from New York note that the cost of special education services is up significantly. See Shaw, *supra* note 12, at B1. Likewise, in Alaska, school districts are reeling from the new demands for the increased costs of special education. See Rosemary Shinohara, *Special-Ed Costs Could Rise*, ANCHORAGE DAILY NEWS, Nov. 19, 1997, at B1.

¹⁴ See *infra* note 24.

¹⁵ See Zernike, Mar. 30, 1997, *supra* note 11, at A1; Zernike, Mar. 31, 1997, *supra* note 12, at A1; see also Lauren Markoc, *Special Ed Bill Worries Parents*, PATRIOT LEDGER, Jan. 13, 1998, at 1 (noting that the federal government contributes only seven percent of special education funding nationwide).

¹⁶ See Tim Cornell, *State Acts to Curb Bilingual Education*, BOSTON HERALD, Feb. 11, 1997, at 15.

¹⁷ See Karen Avenoso, *Special Education Siphoning School Funds*, BOSTON GLOBE, Feb. 11, 1997, at B1 [hereinafter *Special Education*].

¹⁸ See *id.*

¹⁹ See *infra* notes 20-24 and accompanying text.

²⁰ See Rob Hotakainen & Mary Jane Smetanka, *Paying for Special Education*, MINNEAPOLIS ST. PAUL STAR-TRIBUNE, Mar. 13, 1995, at 1A.

²¹ See *id.*

lators also recognized a problem as funds were shifted from general education to special education.²² Iowa school systems cut general education programming by nearly \$20 million over the past ten years to cover special education mandates.²³ Overall, educators nationwide note that special education costs continue to rise because of court mandates, and these costs are the primary reason for general education budget cuts.²⁴

B. *A Brief History of the Individuals with Disabilities Education Act*

In order to properly understand why special education costs have consumed such a large portion of education budgets nationwide, it is

²² See Deborah Shanahan, *Schools Forced to Look for Special Ed Savings*, OMAHA WORLD-HERALD, June 26, 1995, at 9SF.

²³ See *Special Education*, DES MOINES REGISTER, Oct. 5, 1996, at 5.

²⁴ See, e.g., Beth Fierking, *Special Education Mandates Come Under Increased Scrutiny*, GRAND RAPIDS PRESS, Apr. 2, 1995, at A6. In Massachusetts, the cost of special education rose from \$500 million to \$1.2 billion between 1985 and 1995, forcing communities to cut spending on general education. See *Time to Reform, Lawmakers Should Curb Special Education Abuses*, WORCESTER TELEGRAM & GAZETTE, Jan. 5, 1998, at A6; Zernike, Mar. 30, 1997, *supra* note 11, at A1. Legislators have noted that the high costs of special education are caused by unnecessary services at the expense of regular education students. See *Finneran Critical of Special Ed Costs*, BOSTON GLOBE, Oct. 25, 1997, at B8. Additionally, news stories note that soaring legal costs and the threat of litigation are scaring schools into providing special services to students who may not warrant them because recent court decisions have required schools to offer an even broader array of special education services. See Zernike, Mar. 30, 1997, *supra* note 11, at A1. Others have observed that parents believe they can demand any service, and schools believe the schools have to pay for it. See *id.* Additionally, even though experts say there is no question the law has accomplished its original intent, five out of six special education students are not disabled in the way the law envisioned. See *id.*

In Virginia, general education cuts have counterbalanced the increased costs for special education programs. See Isabel Gough, *Lancaster School Chief Outlines Funding Needs*, RICHMOND NEWS LEADER, Mar. 5, 1991, at 26. In New York, the number of general education teachers has decreased because of special education costs. See John Doherty, *Graying of 'Boomers' Spells School Tax Woes*, SYRACUSE HERALD AMERICAN, Apr. 28, 1996, at D1. In Arizona, millions were cut from general education budgets because of the increased costs of special education programs. See Lori Baker, *Washington District to Cut Budget*, ARIZONA REPUBLIC, July 16, 1997, at 6. In Illinois, increased costs are due to state and federal mandates, and Chicago schools are forced to make millions in general education cuts because of court-mandated special education programs. See Jacquelyn Heard, *Shrinkage of School Deficit Seen*, CHICAGO TRIBUNE, June 22, 1993, at 2; John O'Connor, *Many Issues in Subdistrict 7 Race*, SPRINGFIELD STATE JOURNAL-REGISTER, Nov. 2, 1995, at 9; Rosalind Rossi, *Schools Face \$416 Million Question*, CHICAGO-SUN TIMES, July 13, 1993, at 1. In Connecticut, education cost increases of over 25% are due to special education expenses. See Eric Rich, *Special Education Costs are Spiraling*, HARTFORD COURANT, Oct. 6, 1995, at B2. In Pennsylvania, general education parents are worried that their children are being shortchanged because special education costs over four times as much per student. See Burgess, *supra* note 11, at N2. Additionally, news accounts state that general education budget deficits are due to special education mandates. See Bernie Mixon, *District Faces a \$258,000 Deficit for Special Education*, HARRISBURG PATRIOT, Apr. 14, 1992, at 12.

first necessary to examine the IDEA, state special education statutes and the impetus for their enactment.²⁵ The IDEA was originally enacted as the Education for All Handicapped Children Act ("EAHCA") in 1975.²⁶ In 1990, Congress amended the EAHCA to its current form.²⁷ Congress passed the original law in 1975 in response to two landmark federal district court decisions which held that handicapped and "exceptional" children are entitled to a publicly supported education.²⁸ These court decisions held that the exclusion of exceptional children from a publicly supported education was a violation of Fifth and Fourteenth Amendment Equal Protection and Due Process guarantees of the United States Constitution.²⁹

1. Two Cases Provide the Impetus for National Special Education Legislation

The seminal case requiring a free, publicly supported education for special education students is *Mills v. Board of Education*.³⁰ In *Mills*, the United States District Court for the District of Columbia held in 1972 that a local school district was required by the United States Constitution to provide a publicly supported education for disabled children.³¹ In *Mills*, several disabled students brought suit against the Board of Education of the District of Columbia because they were denied a publicly supported education.³² Reasoning that the Fifth Amendment Equal Protection Clause of the United States Constitution was binding on the Board, the court held that disabled students were entitled to a publicly supported education.³³ The deprivation of these

²⁵ See discussion *infra* notes 26-47 and accompanying text.

²⁶ See H.R. REP. NO. 94-332, at 2 (1975), cited in *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179-80 (1982).

²⁷ See Pub. L. No. 101-476, 104 Stat. 1103, 1142 (1990) (codified at 20 U.S.C. § 1415 (1997)) (modifying legislation found at Pub. L. No. 102-19).

²⁸ See *Rowley*, 458 U.S. at 180 & n.2 (citing *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971)).

²⁹ See *Mills*, 348 F. Supp. at 875-76; *Pennsylvania Ass'n*, 334 F. Supp. at 1258-59. The term "exceptional child" as used by these courts is synonymous with the present terminology of "special education." See *Mills*, 348 F. Supp. at 875-76; *Pennsylvania Ass'n*, 334 F. Supp. at 1258-59.

³⁰ 348 F. Supp. 866.

³¹ See *id.* at 875-76.

³² See *id.* at 868-69. The students were mentally retarded, emotionally disturbed, physically handicapped and hyperactive. See *id.* at 868. The pertinent language of the Fifth Amendment of the United States Constitution reads, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

³³ See *Mills*, 348 F. Supp. at 875.

students' equal educational opportunity violated the United States Constitution.³⁴

Furthermore, the *Mills* court held that this constitutional right of equal protection must be afforded despite the great expense involved.³⁵ Additionally, if sufficient funds are not available to finance all of the necessary services, then available funds must be expended equitably, and "cannot be permitted to bear more heavily on a disabled child than a normal child."³⁶ Thus, the court held that a publicly supported education is constitutionally required for disabled children despite the greater expense involved.³⁷

Similarly, in 1971, the United States District Court for the Eastern District of Pennsylvania held in *Pennsylvania Association for Retarded Children v. Pennsylvania* that disabled children could not be denied access to a free public program of education.³⁸ At issue was a state "school admission" statute which prevented disabled students who had not attained a mental age of five years from entering school.³⁹ The court reasoned that depriving these students of equal educational opportunity violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.⁴⁰ The court, therefore, enjoined the Commonwealth of Pennsylvania from applying the statute to disabled students.⁴¹ Thus, just as the *Mills* court had applied the Equal Protection guarantees of the Fifth Amendment, the *Pennsylvania Association* court applied the guarantees of the Fourteenth Amendment to disabled students in the several states.⁴²

2. Congress Responds to *Mills* and *Pennsylvania Association* with Landmark Legislation

In addition to *Mills* and *Pennsylvania Association*, courts prior to the enactment of the EAHCA held that providing public education for some children but not for others was a denial of Equal Protection and/or Due Process under the United States Constitution.⁴³ In re-

³⁴ See *id.*

³⁵ See *id.* at 876.

³⁶ *Id.*

³⁷ See *id.*

³⁸ 334 F. Supp. at 1258.

³⁹ See *id.* at 1260.

⁴⁰ See *id.* at 1258.

⁴¹ See *id.*

⁴² Compare *Mills*, 348 F. Supp. at 875-76 (involving violation of equal protection component of Fifth Amendment Due Process Clause), with *Pennsylvania Ass'n*, 334 F. Supp. at 1258 (involving violation of Fourteenth Amendment Equal Protection Clause).

⁴³ See, e.g., *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wisc. 1977) (denial of education for disabled students violated Equal Protection Clause); *Kruse v. Campbell*, 431 F. Supp. 180,

sponse, Congress enacted the EAHCA as part of an ambitious federal effort to promote the education of handicapped children.⁴⁴ The statute was passed in response to Congress's perception that a majority of handicapped children in the United States were either totally excluded from schools or were sitting idly in classrooms and not receiving an appropriate education.⁴⁵ Legislative history suggests that while Congress sought to open the door of public education to disabled students, it did not necessarily guarantee any particular level of education once inside.⁴⁶ Recognizing that state and local agencies lacked the necessary financial resources, Congress intended to offer free publicly supported education to special education students without lowering the educational opportunities available to other students.⁴⁷

C. The Individuals With Disabilities Education Act Requires a Free Appropriate Public Education

1. Statutory Requirements of the IDEA

Congress enacted the IDEA to assure that all children with disabilities have access to a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.⁴⁸ Congress recognized in the original enactment of the EAHCA that there were more than eight million children with disabilities in the United States, and that the special education needs of most of these children were not being met.⁴⁹ Although the IDEA leaves to the states the primary responsibility for developing and executing educational programs for children with disabilities, it imposes significant requirements to be followed in the discharge of that respon-

188-89 (E.D. Va. 1977) (requiring parents of disabled students to partially pay for education violates Equal Protection Clause); *Frederick v. Thomas*, 408 F. Supp. 832, 835 (E.D. Pa. 1976) (disabled students had proper claim where school failed to provide handicap-specific instruction, denying motion to dismiss); *Harrison v. Michigan*, 350 F. Supp. 846, 848 (E.D. Mich. 1972) (failure to provide education for disabled students violates Equal Protection Clause).

⁴⁴ See H.R. REP. NO. 94-332, at 2 (1975), cited in *Rowley*, 458 U.S. at 179.

⁴⁵ See *id.*

⁴⁶ See *Rowley*, 458 U.S. at 193.

⁴⁷ See S. REP. NO. 94-168, at 8 (1975); see also 120 CONG. REC. 15,271 (1974) (stating that Congress must ensure "education for all children which meets their unique needs"), cited in *Timothy v. Rochester Sch. Dist.*, 875 F.2d 954, 963 (1989).

⁴⁸ See 20 U.S.C. § 1400(c) (1990 & Supp. 1998). Congress recently amended the purpose of the IDEA to read "improving educational results for children with disabilities is an essential element of our national policy of ensuring quality of opportunity, full participation, independent living, and economic self sufficiency for individuals with disabilities." 20 U.S.C. § 1401(c). The purpose of the IDEA, therefore, has been expanded to ensure a quality education for disabled children, not merely equal educational opportunity. See *id.*

⁴⁹ See S. REP. NO. 94-168, at 8 (1975); see also 20 U.S.C. § 1400(b).

sibility.⁵⁰ The statute requires that "all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented"⁵¹ Further, the law requires that state educational plans must include procedures for the implementation and use of a "comprehensive system of personnel development" which complies with each student's individualized education plan.⁵² To accomplish this objective, local educational agencies must develop, implement, regularly review and revise an individual education plan for each disabled child.⁵³ The IDEA requires that all special education and related services which conform with an individualized education plan must be provided at public expense and supervision.⁵⁴ States are also responsible for assuring that disabled children are educated with children who are not disabled to the maximum extent appropriate.⁵⁵ Additionally, the statute assures that children with disabilities in private schools and facilities will be provided special education and related services by the state in conformance with an individualized education program for each child.⁵⁶

Compliance is ensured by permitting the withholding of federal funds upon determination that a state or local educational district has

⁵⁰ See *Rowley*, 458 U.S. at 183; see also 20 U.S.C. §§ 1412-1414.

⁵¹ 20 U.S.C. § 1412(2)(C). Special education is defined by statute to mean all "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a disabled child, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." 20 U.S.C. § 1401(16)(A).

⁵² See 20 U.S.C. § 1414(a)(1)(C); see also *id.* §§ 1401(a)(18) (defining "free appropriate education"); 1401(a)(20) (defining "individualized education plan").

⁵³ See *id.* § 1414(a)(5). An individualized education plan is defined by the statute as "a written statement for each child with a disability developed in any meeting by a representative of the local educational agency . . . [regarding] specially designed instruction to meet the unique needs of children with disabilities." *Id.* § 1401(a)(20). Such plan must include the specific educational services to be provided, and the extent to which each child will be able to participate in regular education programs. See *id.*

⁵⁴ See *id.* § 1412. The IDEA defines related services as "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, 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." 20 U.S.C. § 1401(a)(17).

⁵⁵ See *id.* § 1412(5). The process of placing special education students with general education students is colloquially known as "mainstreaming." See *id.*

⁵⁶ See 20 U.S.C. § 1413(a)(4)(B).

failed to satisfy the requirements of the IDEA.⁵⁷ The IDEA provides federal grants to states; states, in turn, give money to local educational agencies to help educate disabled students.⁵⁸ If a state electing to participate in this system of IDEA grants fails to ensure a free appropriate public education for students with disabilities, the government may withhold federal funds.⁵⁹

2. Judicial Interpretation of the IDEA Leads to Costly Measures

Although the statute itself mandates several specific obligations, the United States Supreme Court has refined many of the current requirements under the IDEA.⁶⁰ The United States Supreme Court and lower federal courts have required local school districts to provide expensive services to special education students by further refining terms like "free appropriate education" and "related services."⁶¹

⁵⁷ See *id.* § 1416(a); see also *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 183 (1982).

⁵⁸ See 20 U.S.C. § 1416(a).

⁵⁹ See *id.*

⁶⁰ See, e.g., *Florence County Sch. Dist. v. Shannon*, 510 U.S. 7, 16-17 (1993) (school must pay for private special education even if student was previously withdrawn from public system); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985) (public school districts must pay for private special education if such private placement is proper); *Rowley*, 458 U.S. at 203-04 (personalized special education must be provided at public expense and comply with individual IEP). The requirements mandated in *Burlington*, 471 U.S. 359 (1985) have been changed due to recent Congressional amendments to the IDEA. See IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). The IDEA Amendments of 1997 provide that public school districts are not required to pay for special education at private institutions if a free appropriate public education was otherwise available. See 20 U.S.C. § 1412(a)(10)(A).

⁶¹ See *supra* note 60; see also *Susquenita Sch. Dist. v. Raelce*, 96 F.3d 78, 84 (3d Cir. 1996) (school must pay for private school education during pendency of litigation); *Timothy v. Rochester Sch. Dist.*, 875 F.2d 954, 972-73 (1st Cir. 1989) (school must pay for special education even though student was severely retarded and did not show any benefit from the education); *Crawford v. Pittman*, 708 F.2d 1028, 1035 (5th Cir. 1983) (school must provide special education during the summer and lack of funds does not relieve school of this requirement); *Ronker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (schools must mainstream despite the difficult financial burden imposed); *Doe v. Berkeley Unified Sch. Dist.*, No. C-92-2863, 1993 WL 560704, at *9 (N.D. Cal. 1993) (public school district must pay for private residential treatment); *Parks v. Pavkovic*, 557 F. Supp. 1280, 1287 (N.D. Ill. 1983) (statute which required parents of special education students to pay for services conflicted with the EAHCA, violating the Supremacy Clause of the United States Constitution); *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47, 54-55 (N.D. Ala. 1981) (student's IEP violated the EAHCA because it did not mainstream him enough); *Hines v. Pitt County Bd. of Educ.*, 497 F. Supp. 403, 408 (E.D.N.C. 1980) (school could not refuse to provide special education even though school could not afford to expend extraordinary funds due to budget constraints). But see *Samantha v. Rutherford County Sch.*, 68 F.3d 965, 973 (6th Cir. 1995) (school does not have to pay for nurse to perform tracheostomy because it is medical

In 1984, for example, the United States Supreme Court held in *Irving Independent School District v. Tatro* that, in certain circumstances, local school districts must provide private nurses for special education students' individual needs.⁶² In *Tatro*, a special education student sought to compel the school district to pay for a private nurse in order to perform catheterization every three hours.⁶³ The Court reasoned that this supportive service is required for a disabled child to benefit from special education.⁶⁴ The Court rejected the idea that providing a private nurse was a medical service.⁶⁵ Thus, the Court held that local school districts must provide private nurses for similarly situated special education students.⁶⁶

Similarly, the United States Supreme Court in 1988 held in *Honig v. Doe* that local school districts may not suspend or expel dangerous or disruptive special education students if such behavior "grows out of" their disabilities.⁶⁷ In *Honig*, a local school district expelled a special education student because of disruptive and aggressive classroom behavior and an inability to conform to socially acceptable norms.⁶⁸ The Court reasoned, however, that Congress did not intend for special education students to be removed from the classroom setting.⁶⁹ The Court noted that Congress passed the IDEA after finding that school systems across the country had excluded one out of eight disabled children from classes, often using disruptive behavior as a pretext for exclusion.⁷⁰ Therefore, the Court acknowledged that the statute requires states to educate all disabled students regardless of the severity of their disabilities.⁷¹ Thus, the Court held that schools may not expel or suspend dangerous or disruptive special education students.⁷²

expense excluded under IDEA); *Granite Sch. Dist. v. Shannon*, 787 F. Supp. 1020, 1029-30 (D. Utah 1992) (school does not have to pay for nurse to maintain feeding tube because it is too financially burdensome, is a medical expenditure and mainstreaming cannot be achieved satisfactorily).

⁶² 468 U.S. 883, 894-95 (1984).

⁶³ See *id.* at 885.

⁶⁴ See *id.* at 890.

⁶⁵ See *id.* at 892. According to statute, states are not responsible for providing medical services to special education students. See 20 U.S.C. § 1401(a)(17).

⁶⁶ See *Tatro*, 468 U.S. at 894.

⁶⁷ 484 U.S. 305, 308, 322-24 (1988).

⁶⁸ See *id.* at 306. Among other things, the special education student choked another student and kicked out a window during class. See *id.* at 313.

⁶⁹ See *id.* at 323.

⁷⁰ See *id.* at 324.

⁷¹ See *id.*

⁷² See *Honig*, 484 U.S. at 325. The Court noted that there is a limited public safety exception. See *id.* In cases where a student poses an immediate threat to herself or others, the student may be temporarily suspended for up to ten school days. See *id.* The IDEA Amendments of 1997 affirm the Court's decision in *Honig*. See IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37

These two cases illustrate just two of the many protections and services judicially required pursuant to the IDEA.⁷³ Among other requirements, federal courts have also held that local schools must pay for special education private school tuition, summer education and home tutors.⁷⁴ Courts consistently have held that special education and related services must be provided despite the greater expense incurred by local school districts.⁷⁵

D. States Pass Special Education Statutes to Conform with the Requirements of the Individuals with Disabilities Education Act

It is useful to examine the requirements of state special education statutes enacted pursuant to IDEA requirements to better explain the expenditures for special education.⁷⁶ Most state special education laws mirror the structure and provisions of the IDEA.⁷⁷ The state statutes, however, implement IDEA requirements in greater detail.⁷⁸ Currently, all fifty states have enacted special education statutes pursuant to the federal requirements of the IDEA.⁷⁹ Similarly, all fifty states currently

(1997). The IDEA now states that special education services must be provided to students who have been expelled or suspended. See 20 U.S.C. § 1412(a)(1)(A).

⁷³ See *supra* notes 62, 67.

⁷⁴ See *supra* notes 60-61.

⁷⁵ See, e.g., *Mills*, 348 F. Supp. at 876; see also *Raelee*, 96 F.3d at 84 (school must pay for private school education during pendency of litigation); *Timothy*, 875 F.2d at 972-73 (school must pay for special education even though student was severely retarded and did not show any benefit from the education); *Crawford*, 708 F.2d at 1035 (school must provide special education during the summer and lack of funds does not relieve school of this requirement); *Ronker*, 700 F.2d at 1063 (schools must mainstream despite the difficult financial burden imposed); *Doe v. Berkeley Unified Sch. Dist.*, 1993 WL 560704, at *9 (public school district must pay for private residential treatment); *Parks*, 557 F. Supp. at 1287 (statute which required parents of special education students to pay for services conflicted with the EAHCA, violating the Supremacy Clause of the United States Constitution); *Campbell*, 518 F. Supp. at 54-55 (student's IEP violated the EAHCA because it did not mainstream him enough); *Hines*, 497 F. Supp. at 408 (school could not refuse to provide special education even though school could not afford to expend extraordinary funds due to budget constraints). But see *Samantha*, 68 F.3d at 973 (school does not have to pay for nurse to perform tracheostomy because it is medical expense excluded under IDEA); *Shannon*, 787 F. Supp. at 1029-30 (school does not have to pay for nurse to maintain feeding tube because it is too financially burdensome, is a medical expenditure and mainstreaming cannot be achieved satisfactorily).

⁷⁶ See, e.g., CONN. GEN. STAT. § 10-76 et seq. (1997); N.H. REV. STAT. ANN. § 186-C et seq. (1989 & Supp. 1997); WYO. STAT. ANN. § 21-2-501 et seq. (Michie 1997).

⁷⁷ Compare 20 U.S.C. § 1400 et seq., with CONN. GEN. STAT. § 10-76 et seq.; N.H. REV. STAT. ANN. § 186-C et seq.; WYO. STAT. ANN. § 21-2-501 et seq.

⁷⁸ See, e.g., CONN. GEN. STAT. § 10-76 et seq.; N.H. REV. STAT. ANN. § 186-C et seq.; WYO. STAT. ANN. § 21-2-501 et seq.

⁷⁹ See, e.g., CONN. GEN. STAT. § 10-76 et seq.; N.H. REV. STAT. ANN. § 186-C et seq.; WYO. STAT. ANN. § 21-2-501 et seq.

receive some amount of federal funding pursuant to the IDEA.⁸⁰ This part of the Note will discuss the special education statutes of three representative states, New Hampshire, Connecticut and Wyoming, to illustrate how state laws are enacted pursuant to the IDEA requirements.⁸¹

For example, in New Hampshire, the purpose of the state special education law is to provide all children with equal educational opportunities.⁸² The law requires that each child in need of special education be entitled to attend an approved program capable of implementing the child's individualized education plan.⁸³ The state statute, furthermore, requires local school districts to provide services which are related to any educational objectives in the disabled child's individualized education plan.⁸⁴ Local school districts must pay all expenses incurred in order to implement the provisions of an individualized education plan.⁸⁵ In this respect, the New Hampshire special education statute mirrors the provisions of the IDEA.⁸⁶

Similarly, the Connecticut special education statute requires local districts to provide special education for any exceptional child.⁸⁷ The law calls for individualized education plans which must include a statement of all necessary services for a child requiring special education.⁸⁸ The state statute also requires local communities to pay for transportation, tuition, room, board and other items necessary as outlined in the individualized education plan.⁸⁹ The Connecticut special education statute, like New Hampshire's, follows the requirements of the IDEA.⁹⁰

The Wyoming special education statute, similarly, follows the requirements set forth in the IDEA.⁹¹ The law requires that every child

⁸⁰ See, e.g., CONN. GEN. STAT. § 10-76 et seq.; N.H. REV. STAT. ANN. § 186-C et seq.; WYO. STAT. ANN. § 21-2-501 et seq.

⁸¹ See, e.g., CONN. GEN. STAT. § 10-76 et seq.; N.H. REV. STAT. ANN. § 186-C et seq.; WYO. STAT. ANN. § 21-2-501 et seq. I have chosen to use these state statutes as representatives because they are used later in the Note as examples which discuss state equal protection analysis. See *infra* notes 131-251 and accompanying text.

⁸² See N.H. REV. STAT. ANN. § 186-C:1.

⁸³ See *id.* § 186-C:9.

⁸⁴ See *id.* § 186-C:9-a.

⁸⁵ See *id.* § 186-C:13.

⁸⁶ Compare N.H. REV. STAT. ANN. § 186-C et seq., with 20 U.S.C. § 1400 et seq.

⁸⁷ See CONN. GEN. STAT. § 10-76d(b). The state law defines an exceptional child as "one who has mental retardation, a physical handicap, neurological impairment, or who is autistic, traumatically brain injured, seriously emotionally disturbed, [or suffering from a learning disability] which impedes the child's rate of development." See *id.* § 10-76a(5).

⁸⁸ See *id.* § 10-76d(a)(10).

⁸⁹ See *id.* § 10-76d(c)(1).

⁹⁰ Compare CONN. GEN. STAT. § 10-76 et seq., with 20 U.S.C. § 1400 et seq.

⁹¹ See WYO. STAT. ANN. § 21-2-501 et seq.

in the state with a mental, physical or psychological disability which impairs learning is entitled to and must receive a free and appropriate education.⁹² The statute mandates that the local school districts must provide for the diagnosis, evaluation, education, training and related services for each student.⁹³ Related services for special education include, but are not limited to, room and board.⁹⁴ The statutes of these three states are representative of virtually all fifty states; they conform to the requirements of the IDEA.⁹⁵

II. SPECIAL EDUCATION MANDATES DIRECTLY REDUCE THE QUALITY OF GENERAL EDUCATION SERVICES PROVIDED

This part of the Note demonstrates that special education mandates are directly related to a reduction in the educational quality and services provided to general education students. Together, the following five reasons effectively illustrate that special education mandates reduce the services provided to general education students. First, the fact that funding for per pupil expenditures relates directly to the educational services provided demonstrates that providing more funding to special education leads to less funding for general education.⁹⁶ Second, most local school districts operating under fixed tax levy budgets show that the additional funds provided to special education comes at a cost to general education students.⁹⁷ Third, special education mandates are costly because: (a) expenditures are required by judicial decisions as discussed above; (b) the cost of special education is not a limiting factor under the IDEA; (c) more students than intended are classified as special education students; (d) more services than intended are provided under individualized education plans; and (e) local school districts are afraid to challenge both students classified as special education or services required under individualized education plans because of the high costs of IDEA litigation.⁹⁸ Fourth, the lack of federal funding creates a situation in which the state must fund special education to the detriment of general education.⁹⁹ Fifth, the lack of a similar requirement under the law to mandate local schools to provide services for general education students leads to the reduc-

⁹² See *id.* § 21-2-501.

⁹³ See *id.* § 21-2-502.

⁹⁴ See *id.*

⁹⁵ Compare WYO. STAT. ANN. § 21-2-501 et seq., with 20 U.S.C. § 1400 et seq.

⁹⁶ See *infra* text accompanying notes 102-04.

⁹⁷ See *infra* text accompanying notes 105-07.

⁹⁸ See *infra* text accompanying notes 108-22.

⁹⁹ See *infra* text accompanying notes 123-25.

tion of services provided to general education students.¹⁰⁰ Finally, a test case is provided to illustrate the actual effects upon a general education student.¹⁰¹

A. *Funding is Directly Related to the Level of Educational Services Provided*

The approach advocated here is premised on the fact that special education mandates create disparities in per pupil expenditures, decrease the amount of funding and infringe upon the educational opportunity of general education pupils. Thus, it is necessary to establish that differences in per pupil expenditures are directly related to the amount of educational services and the quality of education received by a student. First, professional educators consistently acknowledge that changes in per pupil expenditures relate directly to education quality and services.¹⁰² Administrators and educators realize that expenditures translate directly into student-teacher ratios, equipment purchases and extracurricular activities.¹⁰³ Additionally, courts wrestling with the issue of education finance have taken judicial notice of the fact that disparities in per pupil expenditures relate directly to the quality and availability of educational services.¹⁰⁴

B. *School Budgets are Generally Fixed*

Furthermore, the notion that special education mandates directly cause reductions to general education spending is based on the fact that nationwide, virtually all school districts operate with fixed budgets.¹⁰⁵ Most local school districts are funded through local budgets with money appropriated from an annual tax levy.¹⁰⁶ Therefore, the budgets

¹⁰⁰ See *infra* text accompanying notes 126-29.

¹⁰¹ See *infra* text accompanying note 130.

¹⁰² See, e.g., Zernike, Mar. 30, 1991 *supra* note 11, at A1; see also *supra* note 24.

¹⁰³ See, e.g., Zernike, Mar. 30, 1997, *supra* note 11, at A1; see also *supra* note 24.

¹⁰⁴ See, e.g., *infra* 185-87, 236-37, 248-49 and accompanying text. Although commentators do not uniformly agree that funding has a linear relationship with the quality of education, courts have nevertheless taken judicial notice that a lack of funding causes a reduction in educational services which is directly related to the overall quality of education. See *infra* 185-87, 236-37, 248-49 and accompanying text. The dissent in *San Antonio Independent School District v. Rodriguez* stated that a difference in available funds results in a difference in educational quality available for a student's public education. 411 U.S. 1, 85 (1973) (Marshall, Douglas, JJ., dissenting). Various state supreme courts also recognize that students receiving a lesser per pupil expenditure receive an education that is a "substantial degree lower in both breadth and quality" than those receiving higher per pupil expenditures. See, e.g., *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977).

¹⁰⁵ See, e.g., Frerking, *supra* note 24, at A6.

¹⁰⁶ See, e.g., Zernike, Mar. 30, 1997, *supra* note 11, at A1. Some communities, however, have

of most local school districts are fixed each year by community school boards or city councils.¹⁰⁷ Thus, local school districts operate unlike most businesses; if money is expended on one part of the school budget, it must be detracted from another.

C. *The Reasons Why Special Education Mandates are Costly*

1. State Law is Enacted Pursuant to the IDEA

Having established that per pupil expenditures relate directly to education quality and services, and recognizing that local school budgets are fixed, it is easier to understand how special education mandates flowing from the IDEA directly affect general education students.¹⁰⁸ Even though special education law is defined by state statute, such statutes are enacted pursuant to the minimum federal requirements of the IDEA.¹⁰⁹ Thus, local school districts are required to provide most types of private care, residential placement, tuition reimbursement, summer classes and the costs of mainstreaming for a special education student.¹¹⁰ As articulated earlier, the majority of IDEA cases have imposed costly requirements on local school districts.¹¹¹ Under the IDEA, therefore, the courts have consistently held that school districts must provide expensive special education services to disabled children.¹¹²

2. The Cost of Providing Special Education is Not Presently a Factor to be Considered by Courts

As discussed above, courts have emphasized that school budget limitations and lack of funding do not relieve school districts of their obligations under the IDEA.¹¹³ As in *Mills*, courts have reasoned that allowing a school to provide less funding than required by each student's individualized education plan is a violation of the Equal Protection Clause of the United States Constitution.¹¹⁴ As a result of the IDEA

instituted tax levy overrides, in which the overall school budget may be increased by raising the property tax of the community as a whole. *See id.* This option is rarely, if ever, used to supplement local school budgets. *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See supra* text accompanying notes 105-07.

¹⁰⁹ Compare 20 U.S.C. § 1400 et seq., with CONN. GEN. STAT. § 10-76 et seq.; N.H. REV. STAT. ANN. § 186-C et seq.; WYO. STAT. ANN. § 21-2-501 et seq. The IDEA does not require states to enact legislation which conforms to its requirements unless the state wishes to receive funding; all states, however, receive such federal grants. *See* 20 U.S.C. § 1400 et seq.

¹¹⁰ *See supra* notes 60-61.

¹¹¹ *See supra* notes 60-61.

¹¹² *See supra* notes 60-61.

¹¹³ *See, e.g., Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

¹¹⁴ *See id.*

and its strict judicial interpretation, local school districts have been required under state and federal law to provide every expense required to satisfy each student's individualized education plan.¹¹⁵

3. More Students and Services are Classified as Special Education; Schools Fear Challenging Individualized Education Plans

Special education mandates also require more funding because an increased number of students are classified as requiring special education.¹¹⁶ Even Congress recognizes that special education laws are interpreted much too broadly.¹¹⁷ Some commentators acknowledge that nearly eighty percent of special education students were not intended to be protected under special education statutes.¹¹⁸ Additionally, critics charge that special education statutes provide services that are unnecessary for the education of students.¹¹⁹ Furthermore, most local school districts choose to pay for the increased special education costs rather than challenge an individualized education plan in court because litigation expenses are even more costly.¹²⁰ School districts are further inhibited from challenging these costs because the IDEA requires them to pay for the student's legal fees if the student prevails.¹²¹ It is no wonder, therefore, that in ninety-five percent of cases, school districts settle with special education students before the cases even get to the hearing stage.¹²²

D. Federal Funding Accounts for Less Than Ten Percent of Special Education Costs

Special education costs cause further problems because they are funded primarily by local municipalities.¹²³ When the IDEA was enacted, the federal government proposed that it would contribute forty

¹¹⁵ See *supra* notes 60-61.

¹¹⁶ See, e.g., Zernike, Mar. 30, 1997, *supra* note 11, at A1. The IDEA Amendments of 1997, in fact, broadened the classification of special education students. See IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). The term "disability" may now include children who are merely experiencing "developmental delays" in physical, cognitive, communication, social, emotional, or adaptive development. See 20 U.S.C. § 1402(3). The IDEA, after the Amendments of 1997, specifically states that special education services must also be provided to students who have been suspended or expelled. See 20 U.S.C. § 1412(a)(1)(A).

¹¹⁷ See 20 U.S.C. § 1412(a)(1)(A); see also H.R. Rep. No. 105-95, at 89 ("Today, the growing problem is over identifying children with disabilities when they might not be truly disabled.").

¹¹⁸ See 20 U.S.C. § 1412(a)(1)(A).

¹¹⁹ See, e.g., Finneran *Critical of Special Ed Costs*, *supra* note 24, at B8.

¹²⁰ See, e.g., Zernike, Mar. 30, 1997, *supra* note 11, at A1.

¹²¹ See 20 U.S.C. § 1415(c)(4).

¹²² See, e.g., Zernike, Mar. 30, 1997, *supra* note 11, at A1.

¹²³ See *supra* notes 18-28 and accompanying text.

percent of the funding needed to cover all required expenditures.¹²⁴ The federal government, however, contributes only seven percent of the required costs nationwide, while the remainder of all special education expenditures falls upon states and local school districts.¹²⁵

E. *No Similar Mandate for General Education Students*

Finally, schools are not required by law to provide any specific level of funding for general education students.¹²⁶ Thus, the IDEA and state special education statutes effectively require local school districts to fund special education before they can fund general education. The resulting increases in special education costs are effectively siphoned from general education spending because local school districts across the country have fixed budgets constrained by annual tax levy amounts.¹²⁷ Moreover, reductions in funding to general education budgets have been widely recognized by courts and educators to translate to reductions in educational services such as teachers, supplies and other educationally related services.¹²⁸ Although Congress intended to provide educational access and opportunity to disabled students, legislative history makes it clear that Congress did not intend money to be siphoned from general education to special education.¹²⁹

F. *A Sample Scenario*

The full effect of special education mandates on general education students is better appreciated by examining a "test" student.¹³⁰ Consider the plight of a general education student who lives in Anytown, U.S.A. and attends Anytown Central High School. The high school has registered 1000 students for each of the past ten years. This year, 100 students are registered as students deserving special education and have submitted individualized education plans to the Anytown

¹²⁴ See 20 U.S.C. § 1411 (a).

¹²⁵ See Markoe, *supra* note 15, at 01. The recent IDEA Amendments of 1997 at least acknowledge that funding is a problem. See IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). The IDEA "funding formula" now accounts for each state's poverty rate. See 20 U.S.C. § 1411(c). At the same time, however, Congress placed a federal funding cap on IDEA grants. See *id.* IDEA annual grants to states may not exceed 1.5% of the prior year's funding. See *id.*

¹²⁶ Compare 20 U.S.C. § 1400 et seq. (IDEA), with 20 U.S.C. (education generally).

¹²⁷ See *supra* text accompanying notes 105-08.

¹²⁸ See *supra* text accompanying notes 102-04.

¹²⁹ See *supra* text accompanying notes 46-47; see also 20 U.S.C. § 1400(c); S. REP. No. 94-168 (noting that local and state financial resources were inadequate, and that an intent of the EAHCA was to "relieve the fiscal burden placed on the States and localities").

¹³⁰ The following scenario is a realistic model based upon the national statistics discussed above. See *supra* text accompanying notes 1-24.

School Board. Ten years ago, only fifty students were registered as special education students. For each of the past ten years, the budget of Anytown Central High School has remained constant at \$5 million (all monetary figures are real and discounted for inflation). This year, the school has allocated \$3.75 million for general education expenses and \$1.25 million for special education expenses. The high school reports to the state that its per pupil expenditure is \$5000 per student. The school spends, however, an average of \$4167 per pupil for general education students and \$12,500 per pupil for special education students.

Additionally, in order to comply with new judicial mandates and individualized education plans of special education students, the high school has been forced to increase its special education budget and reduce its general education budget approximately two percent for each of the past ten years. That is, five years ago, the school allocated approximately \$4.5 million for general education and \$500,000 for special education. Thus, ten years ago, the high school spent approximately \$4700 per pupil for general education students and \$10,000 per pupil for special education students.

Over the past ten years, \$750,000 has been diverted from general education to special education expenses. Ten years ago, Anytown Central High School employed thirty-eight general education teachers to maintain a student-teacher ratio of 25:1 and appropriated \$1.5 million for general education teaching staff. Today, after receiving a proportional share of the cuts, \$1.25 million is appropriated for general education teaching staff. As a result, during the past ten years, Anytown Central High School has been forced to fire seven general education teachers. The general education student-teacher ratio has grown to approximately 30:1. Moreover, the school has been forced to decrease all other portions of the general education budget, including, but not limited to new supplies, computing facilities and extracurricular opportunities.

III. AN OVERVIEW OF EQUAL PROTECTION GUARANTEES AND EDUCATION AS A FUNDAMENTAL RIGHT UNDER THE UNITED STATES AND STATE CONSTITUTIONS

A. *Brief History of Constitutional Equal Protection Analysis*

What legal recourse does a general education student have? Although there are several avenues by which a general education student could challenge the disparities in education financing, this part of the Note posits that such infringements constitute violations of general

education students' equal protection guarantees.¹³¹ Having been left without other recourse, the general education student must now turn to the United States and state constitutions in order to determine if this deprivation of educational services amounts to a constitutional deprivation of equal protection.¹³² The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws."¹³³ The Amendment, although drafted in the context of post-Civil War efforts to eliminate laws which sanctioned slavery, was written with general language, rather than words that focus on race.¹³⁴ Because of this language, the scope of the Equal Protection Clause was expanded by courts beyond merely race to require that all legislative classifications be based upon some reasonable ground and not mere arbitrary selection.¹³⁵

1. Equal Protection Standards and the Tiered Analysis

The United States Supreme Court developed a tiered analytical framework for scrutinizing challenges under the Equal Protection Clause.¹³⁶ The Court first suggested that a stricter standard of scrutiny should apply to legislation that restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation or statutes directed at particular religious, national, or racial minorities.¹³⁷ The Court currently employs two primary techniques when reviewing statutes under equal protection challenges: (1) the rational basis test and (2) judicial strict scrutiny.¹³⁸

¹³¹ See *infra* text accompanying notes 132-320. This Note declines to conduct an analysis based on the Due Process clauses of the federal and state constitutions. See, e.g., U.S. CONST. amend. XIV, § 1. This Note also declines to offer a remedy under the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. § 1501 et seq. It is useful, however, to observe that Congress recognized substantial problems with unfunded federal statutes. See *id.* § 1501(2). Congress enacted the UMRA in 1995 to end the imposition of federal mandates on local governments without adequate federal funding, as these impositions curtail essential local services. See *id.* § 1513(a). The IDEA, however, is exempt from the provisions of the UMRA because it enforces a statutory right prohibiting discrimination on the basis of handicap and disability. See *id.* § 1503(2).

¹³² See *infra* text accompanying notes 133-320.

¹³³ U.S. CONST. amend. XIV, § 1.

¹³⁴ See *id.*; see also CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW 3-9 (1997).

¹³⁵ See *Slaughter-House Cases*, 83 U.S. 36, 54, 71-72, 81 (1872) (noting a distinction between racial discrimination and economic regulation and the applicability of the Fourteenth Amendment to non-racial legislation).

¹³⁶ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 & n.4 (1938).

¹³⁷ See *id.* at 153 n.4.

¹³⁸ See ANTIEAU & RICH, *supra* note 134, at 3-9. The Court has more recently established a

a. *Rational Basis Test*

The rational basis test is the lowest standard of judicial review for an equal protection challenge.¹³⁹ Using this level of judicial review, courts will not deem a statute unconstitutional as long as there is some rational relation between a legitimate state objective and the means selected by the legislature in the state statute.¹⁴⁰ Thus, a law will not be stricken unless it is purely arbitrary.¹⁴¹ As long as the legislature could rationally have decided that a statute would meet a conceivable state objective, it will be deemed constitutional.¹⁴²

b. *Judicial Strict Scrutiny*

Courts may also apply judicial strict scrutiny.¹⁴³ When courts apply strict scrutiny, a statute is deemed unconstitutional unless it is absolutely necessary for a compelling state purpose, and is drafted narrowly with no less burdensome alternative.¹⁴⁴ Moreover, under strict scrutiny, the state has the burden of proving that the statute is narrowly tailored to meet the compelling state interest.¹⁴⁵ Thus, courts have noted that judicial strict scrutiny analysis is nearly always fatal for statutes challenged under the Equal Protection Clause.¹⁴⁶

The strict scrutiny test is generally applied in only two cases: (1) if the statute is based upon a suspect classification, or (2) if the statute impairs a fundamental right. If strict scrutiny is not applicable, the court defaults to the rational basis test.¹⁴⁷ The Supreme Court thus far has recognized only race, religion and national origin as suspect classes which trigger strict scrutiny.¹⁴⁸ In addition to these suspect classes, the

middle level standard of review, often called heightened scrutiny. *See id.* at 121-23. This standard, for example, is generally applied in cases involving gender. *See id.*

¹³⁹ *See id.* at 3-9.

¹⁴⁰ *See, e.g.,* *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991); *Schweiker v. Wilson*, 450 U.S. 221, 230, 234 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

¹⁴¹ *See, e.g.,* *Gregory*, 501 U.S. at 470-71; *Schweiker*, 450 U.S. at 230, 234; *Clover Leaf*, 449 U.S. at 464; *Lindsley*, 220 U.S. at 78-79.

¹⁴² *See, e.g.,* *Gregory*, 501 U.S. at 470-71; *Schweiker*, 450 U.S. at 230, 234; *Clover Leaf*, 449 U.S. at 464; *Lindsley*, 220 U.S. at 78-79.

¹⁴³ *See* ANTIEAU & RICH, *supra* note 134, at 3-9.

¹⁴⁴ *See, e.g.,* *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235 (1995); *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

¹⁴⁵ *See, e.g.,* *Miller*, 515 U.S. at 904; *Adarand*, 515 U.S. at 227, 235; *Cleburne*, 473 U.S. at 440; *Bernal*, 467 U.S. at 219.

¹⁴⁶ *See, e.g.,* *Bernal*, 467 U.S. at 220 n.6.

¹⁴⁷ *See* ANTIEAU & RICH, *supra* note 130, at 3-9.

¹⁴⁸ *See, e.g.,* *Cleburne*, 473 U.S. at 440. The Court recognized gender as a class which receives special consideration and utilizes a middle level of scrutiny for this analysis. *See supra* note 138.

Court has recognized that certain interests are "fundamental," and deserve a heightened level of protection under the Equal Protection Clause.¹⁴⁹ For example, the Court has held that the rights to marry, procreate, vote, access the judicial system and travel are fundamental rights.¹⁵⁰ If a statute infringes upon the exercise of one of these fundamental rights, then the Court will apply judicial strict scrutiny.¹⁵¹ Although a general education student is not a member of a protected class, education is sometimes deemed a "fundamental right". An equal protection challenge may succeed, therefore, because special education infringes upon general education services.¹⁵²

B. *Brief History of Education as a Fundamental Right Under the United States Constitution*

1. *Brown v. Board of Education* and the Importance of Education

In 1954, in *Brown v. Board of Education*, the United States Supreme Court held that the "separate but equal" segregation of children in public schools solely on the basis of race deprived minority children of equal educational opportunities and equal protection of the laws.¹⁵³ In so ruling, the Supreme Court discussed the importance of education.¹⁵⁴ The Court stated that it must consider public education in light of its full development and its present place in society.¹⁵⁵ In what has become frequently-cited language, the Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and

¹⁴⁹ ANTIEAU & RICH, *supra* note 134, at 6.

¹⁵⁰ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630, 634 (1969) (holding right to travel fundamental); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666-67 (1966) (holding right to vote fundamental); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding right to marry and procreate fundamental).

¹⁵¹ See ANTIEAU & RICH, *supra* note 134, at 6-7, 12.

¹⁵² See *infra* text accompanying notes 153-320.

¹⁵³ See *Brown v. Board of Educ.*, 347 U.S. 483, 493-95 (1954).

¹⁵⁴ See *id.* at 493.

¹⁵⁵ See *id.* at 492-93.

in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁵⁶

2. The Supreme Court Narrowly Fails to Hold that Education is a Fundamental Right
 - a. San Antonio Independent School District v. Rodriguez: *The Majority*

In 1973, in *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court in a 5-4 decision held that a Texas education finance scheme, which caused funding disparities between local communities, was constitutional.¹⁵⁷ In a decision authored by Justice Powell, the Court did not reach the conclusion that there is a fundamental right to education under the United States Constitution for purposes of equal protection analysis.¹⁵⁸ Therefore, the Court did not apply judicial strict scrutiny when analyzing the state education finance scheme.¹⁵⁹ The Court concluded that the state plan rationally furthered a legitimate state interest.¹⁶⁰

In *Rodriguez*, local school districts and public school students claimed that the Texas system of financing public education violated the Equal Protection Clause because it relied on local property taxes.¹⁶¹ Districts with a high property tax base spent more on education than those with a low property tax base.¹⁶² The Court chose not to apply judicial strict scrutiny because the state action did not burden a fundamental right.¹⁶³ In deciding what rights are fundamental, the Court

¹⁵⁶ *Id.* at 493. Although the Court in *Brown* failed to reach the issue of education as a fundamental right, this language is often cited by courts declaring education as a fundamental right for equal protection purposes. See, e.g., *Horton v. Meskill*, 376 A.2d 359, 372 (1977) (citing language in *Brown*, 347 U.S. at 493).

¹⁵⁷ 411 U.S. 1, 37-38 (1973).

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* at 39.

¹⁶⁰ See *id.* at 55.

¹⁶¹ See *id.* at 1-8.

¹⁶² See *Rodriguez*, 411 U.S. at 7-9. The court noted that education spending ranged from approximately \$305 per pupil in some districts to \$815 per pupil in others. See *id.* at 15-16.

¹⁶³ See *id.* at 40. The Court considered and rejected two possible applications of judicial strict scrutiny to the state education finance scheme. See *id.* This article does not discuss the Court's rejection of wealth as a suspect classification. See *id.* at 28-29.

stated that the importance of a service is not a determining factor.¹⁶⁴ The Court assessed whether there is a right to education explicitly or implicitly guaranteed by the United States Constitution.¹⁶⁵ Thus, the Court in *Rodriguez*, while acknowledging that education is extremely important to society, reasoned that because the right is neither explicitly nor implicitly guaranteed by the Constitution, it is not fundamental.¹⁶⁶

Additionally, the Court reasoned that judicial strict scrutiny was not appropriate because regulation of education was traditionally a power reserved for the states.¹⁶⁷ The Court was apprehensive of imposing a rigorous standard of scrutiny which would affect all local fiscal schemes under the United States Constitution.¹⁶⁸ Specifically, the Court realized that the potential impact of *Rodriguez* on the system of federalism was great and could possibly abrogate systems of public education in virtually every state.¹⁶⁹ The Court also speculated that to declare an education funding system based on local taxes unconstitutional may lead to the impermissibility of other local services such as police and fire protection.¹⁷⁰ It upheld the constitutionality of the education finance scheme, even though it created a disparity in education per pupil expenditures, because it was rationally related to a legitimate state interest.¹⁷¹

b. *The Rodriguez Dissent*

The *Rodriguez* dissent advanced many arguments why education should have been recognized as a fundamental right under the United States Constitution. The dissent argued that considering a right to be fundamental is not dependent on it being implicitly or explicitly guaranteed by the Constitution.¹⁷² The dissent noted that the Court has recognized a number of rights as fundamental, even where those rights are not implicitly or explicitly found in the Constitution.¹⁷³ Specifically, the dissent observed that the right to travel, the right to procreate, the

¹⁶⁴ See *id.* at 30.

¹⁶⁵ See *id.* at 33.

¹⁶⁶ See *id.* at 29 (citing *Brown*, 347 U.S. at 493).

¹⁶⁷ See *Rodriguez*, 411 U.S. at 40.

¹⁶⁸ See *id.* at 41.

¹⁶⁹ See *id.* at 44.

¹⁷⁰ See *id.* at 54.

¹⁷¹ See *id.* at 55.

¹⁷² See *Rodriguez*, 411 U.S. at 62 (Brennan, J., dissenting), 98-99 (Marshall, Douglas, JJ., dissenting).

¹⁷³ See *id.* at 99. (Marshall, Douglas, JJ., dissenting).

right to criminal appeal and the right to vote have each been recognized by the Court as fundamental, but are nowhere mentioned in the Constitution.¹⁷⁴ The dissent reasoned that the "fundamentality" of a right is a function of the right's importance to effectuate a constitutionally guaranteed right.¹⁷⁵

Therefore, as the nexus between an explicitly or implicitly guaranteed right and another interest tightens, the interest becomes fundamental, and a more rigorous degree of judicial scrutiny must be applied when analyzing infringements of that right.¹⁷⁶ The dissent further reasoned that education is inextricably linked to, and is a necessary component for, participation in the voting process.¹⁷⁷ Additionally, the dissent noted that education is necessary in order to participate in the marketplace of free ideas guaranteed by the First Amendment and the political process of our government.¹⁷⁸ Thus, the dissent reasoned that education is a fundamental right because it is necessary to effectuate these other constitutional guarantees.¹⁷⁹ The dissent observed that the pivotal position of education to success in American society lends it an importance that is undeniable.¹⁸⁰

Furthermore, the dissent criticized the *Rodriguez* decision because it allows unequal, invidious discrimination to occur as long as it is in furtherance of a permissible state goal.¹⁸¹ The dissent recognized that the decision was an abrupt departure from prior state and federal education finance equal protection decisions.¹⁸² The dissent acknowledged that substantial disparities in per pupil expenditures produced a discriminatory impact on schoolchildren.¹⁸³ The dissent further noted that a difference in available funds directly results in a difference in educational quality available for a student's public education.¹⁸⁴

Additionally, the dissent stated that it was the stark differences in the treatment of schoolchildren, not a minimum absolute amount allocated that is the crux of an equal protection challenge.¹⁸⁵ The dissent refuted the notion that the Constitution guarantees only some

¹⁷⁴ See *id.* at 99-101 (Marshall, Douglas, JJ., dissenting).

¹⁷⁵ *Id.* at 62 (Brennan, J., dissenting).

¹⁷⁶ See *id.* at 62-63 (Brennan, J., dissenting).

¹⁷⁷ See *Rodriguez*, 411 U.S. at 63 (Brennan, J., dissenting).

¹⁷⁸ See *id.* at 63 (Brennan, J., dissenting), 113-14 (Marshall, Douglas, JJ., dissenting).

¹⁷⁹ See *id.* at 62-63 (Brennan, J., dissenting).

¹⁸⁰ See *id.* at 113 (Marshall, Douglas, JJ., dissenting).

¹⁸¹ See *id.* at 68 (White, Douglas, Brennan, JJ., dissenting).

¹⁸² See *Rodriguez*, 411 U.S. at 70-71 (Marshall, Douglas, JJ., dissenting).

¹⁸³ See *id.* at 72 (Marshall, Douglas, JJ., dissenting).

¹⁸⁴ See *id.* at 85 (Marshall, Douglas, JJ., dissenting).

¹⁸⁵ See *id.* at 82 (Marshall, Douglas, JJ., dissenting).

level of educational adequacy.¹⁸⁶ The dissent asserted that once a state has established public education for its citizens, any finance scheme which provides some students with less resources than others is discriminatory.¹⁸⁷ Finally, the dissent disagreed with the majority's assertion that cases of education finance disparity are similar to cases involving commercial economic disparity.¹⁸⁸ Because such cases are generally not analyzed using judicial strict scrutiny, the dissent reasoned that the constitutional importance of the interest and the invidiousness of the discrimination are ignored.¹⁸⁹

3. The Supreme Court Leaves Room for Argument in *Plyler v. Doe*

In 1982, the United States Supreme Court carved out an exception to *Rodriguez* in *Plyler v. Doe*.¹⁹⁰ In *Plyler*, the Court applied a heightened level of judicial scrutiny to invalidate a state law which prohibited illegal aliens from receiving an education.¹⁹¹ Although the Court acknowledged *Rodriguez* by stating that education had not been deemed a fundamental right, it nevertheless noted that education is more than a governmental benefit indistinguishable from other forms of social welfare legislation.¹⁹² The Court reasoned that the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of a child mark the distinction.¹⁹³

The Court in *Plyler* noted that education is of supreme importance, is vital for the preservation of a democratic system of government and is fundamental to maintaining the fabric of our society.¹⁹⁴ Additionally, the Court acknowledged its language in *Brown* that education is the most important function of state and local governments and the great expenditures for education demonstrate our recognition of this importance.¹⁹⁵ Thus, the Court applied a heightened level of scrutiny and not the rational basis test to invalidate a Texas law which denied education to illegal immigrants.¹⁹⁶

¹⁸⁶ See *id.* at 90 (Marshall, Douglas, JJ., dissenting).

¹⁸⁷ See *Rodriguez*, 411 U.S. at 92 (Marshall, Douglas, JJ., dissenting).

¹⁸⁸ See *id.* at 110 (Marshall, Douglas, JJ., dissenting).

¹⁸⁹ See *id.* (Marshall, Douglas, JJ., dissenting).

¹⁹⁰ 457 U.S. 202, 223-24 (1982).

¹⁹¹ See *id.* at 224.

¹⁹² See *id.* at 221.

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *Plyler*, 457 U.S. at 222-23.

¹⁹⁶ See *id.* at 224. Although the strict scrutiny standard was not used, the heightened standard required that the state must show that the statute was necessary to further a substantial state interest. See *id.*

C. *Brief History of Education as a Fundamental Right Under State Constitutions and Three Examples*

It appears that neither state nor federal courts have ruled on the issue of whether special education laws violate general education students' equal protection rights.¹⁹⁷ The closest analogue is a line of cases concerned with the constitutionality of state education finance schemes.¹⁹⁸ Over the past twenty-five years, seventeen of the thirty-four states facing education finance challenges have struck down education finance statutes because they violated provisions of their state constitutions.¹⁹⁹ It should be noted that every state constitution grants a right to an education.²⁰⁰ In cases where state courts held that education finance statutes were unconstitutional, the factual issue involved wealthy school districts spending more per pupil than poor school districts.²⁰¹ Although the analysis is slightly different in the case at hand, many state courts which have struck down education finance statutes have held that education is a fundamental right under their state constitutions.²⁰² Additionally, many of those state courts have applied judicial strict scrutiny to analyze violations of equal protection.²⁰³

¹⁹⁷ Numerous Westlaw and Lexis searches have produced no caselaw on this matter. Additionally, legal periodical searches have produced no articles concerning this argument.

¹⁹⁸ See, e.g., *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) reversing decision of 693 A.2d 417 (N.J. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Alabama Coalition for Equity v. Hunt*, 624 So. 2d 107 (Ala. 1993); *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Tennessee Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139 (Tenn. 1993); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

¹⁹⁹ See generally *Claremont*, 703 A.2d 1353; *Abbott*, 710 A.2d 450; *DeRolph*, 677 N.E.2d 733; *Brigham*, 692 A.2d 384; *Roosevelt*, 877 P.2d 806; *Alabama Coalition*, 624 So. 2d 107; *McDuffy*, 615 N.E.2d 516; *McWhorter*, 851 S.W.2d 139; *Rose*, 790 S.W.2d 186; *Helena*, 769 P.2d 684; *Edgewood*, 777 S.W.2d 391; *Dupree*, 651 S.W.2d 90; *Washakie*, 606 P.2d 310; *Pauley*, 255 S.E.2d 859; *Seattle*, 585 P.2d 71; *Horton*, 376 A.2d 359; *Serrano*, 557 P.2d 929.

²⁰⁰ See, e.g., CONN. CONST. art. 8, §§ 1-4; N.H. CONST. pt. II, art. 83; WYO. CONST. art. 7, §§ 1-12.

²⁰¹ See, e.g., *infra* notes 213, 228-29, 242 and accompanying text.

²⁰² See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 747, 776; *Brigham*, 692 A.2d at 396; *Roosevelt*, 877 P.2d at 238, 242, 244; *Alabama Coalition*, 624 So. 2d at 147, 151, 156-57; *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989); *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766; see also *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 256 (N.D. 1994) (holding statute constitutional although deciding education is fundamental right and applying strict scrutiny); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (same).

²⁰³ See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 747, 776; *Roosevelt*, 877 P.2d

Of the nineteen states which have decided whether education is a fundamental right for purposes of education funding inequities, thirteen states have said that it is.²⁰⁴ Six states, however, have held that education is not a fundamental right for equal protection purposes.²⁰⁵ Of the thirteen states which have held that education is a fundamental right for equal protection purposes, eleven states have held that judicial strict scrutiny should apply when analyzing education funding disparities.²⁰⁶ The other two states have held that even though strict scrutiny is the normal test for an infringement of a fundamental right, where financial inequalities exist, the court will use the rational basis test.²⁰⁷

Finally, of the eleven states which have applied strict scrutiny equal protection analysis to state education finance statutes, eight of them have struck down the schemes as unconstitutional.²⁰⁸ The Note will analyze the equal protection claim of a general education student under state constitutions where education has been deemed a fundamental right in the representative states of New Hampshire, Connecticut and Wyoming.²⁰⁹ It is necessary to examine the states that have held that education is a fundamental right.

at 238, 242, 244; *Bismarck*, 511 N.W.2d at 259; *Scott*, 443 S.E.2d at 386; *Alabama Coalition*, 624 So. 2d at 147, 151, 156-57; *Skeen*, 505 N.W.2d at 315; *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766.

²⁰⁴ See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 747, 776; *Brigham*, 692 A.2d at 396; *Roosevelt*, 877 P.2d at 238, 242, 244; *Alabama Coalition*, 624 So. 2d at 147, 151, 156-57; *Skeen*, 505 N.W.2d at 315; *Kukor*, 436 N.W.2d at 579; *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766; see also *Bismarck*, 511 N.W.2d at 256 (holding statute constitutional although deciding education is fundamental right and applying strict scrutiny); *Scott*, 443 S.E.2d at 142 (same).

²⁰⁵ See, e.g., *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 733 (Idaho 1993); *East Jackson Pub. Sch. v. State*, 348 N.W.2d 303, 305 (Mich. 1984); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 786 (Md. 1983); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982); *Olsen v. State*, 554 P.2d 139, 144-45 (Or. 1976).

²⁰⁶ See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 747, 776; *Brigham*, 692 A.2d at 396; *Roosevelt*, 877 P.2d at 238, 242, 244; *Alabama Coalition*, 624 So. 2d at 147, 151, 156-57; *Skeen*, 505 N.W.2d at 315; *Kukor*, 436 N.W.2d at 579; *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766; see also *Bismarck*, 511 N.W.2d at 256; *Scott*, 443 S.E.2d at 142. States generally employ the same equal protection analysis employed by the United States Supreme Court and the federal court system.

²⁰⁷ See, e.g., *Brigham*, 692 A.2d at 397; *Kukor*, 436 N.W.2d at 580.

²⁰⁸ See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 776; *Roosevelt*, 877 P.2d at 242, 244; *Alabama Coalition*, 624 So. 2d at 151, 156-57; *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766.

²⁰⁹ See generally *Claremont*, 703 A.2d 1353 (N.H. 1997); *Washakie*, 606 P.2d 310 (Wyo. 1980); *Horton*, 376 A.2d 359 (Conn. 1977). These three states were chosen to provide a summary of analysis regarding states that have held that education is a fundamental right.

1. New Hampshire

In 1997, in *Claremont School District v. Governor of New Hampshire*, the New Hampshire Supreme Court held that the state system of financing public education was unconstitutional under the state constitution.²¹⁰ In *Claremont*, a local school district sought a declaratory judgment stating that education is a fundamental right in the state of New Hampshire.²¹¹ The court determined that education is a fundamental right and that the cause of any education funding disparity must be examined with judicial strict scrutiny.²¹² In arriving at this decision, the court focused both on constitutional interpretation and "common sense."²¹³

First, the *Claremont* court noted that public education differs from all other services of the state.²¹⁴ Furthermore, the court reasoned that no other governmental service plays such a seminal role in developing and maintaining a citizenry capable of furthering the economic, political and social viability of the state.²¹⁵ The court recognized that society places tremendous value on education as the key to individual opportunities which form the "foundation for our democratic institutions and our place in the global economy."²¹⁶ Specifically, the *Claremont* court noted that the "very existence of government was declared by the framers to depend upon the intelligence of its citizens."²¹⁷

The *Claremont* court further reasoned that "even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and First Amendment rights."²¹⁸ The court noted that because rights such as voting and free speech are recognized as fundamental, it is "illogical to place the means to exercise those rights on less substantial constitutional footing than the rights themselves."²¹⁹

After holding that education is a fundamental right under the New Hampshire Constitution, the *Claremont* court stated that in order to deliver a constitutionally adequate public education for all children, the cause of any funding disparity must be examined by a standard of

²¹⁰ 703 A.2d 1353, 1360-61 (Conn. 1997).

²¹¹ See *id.* at 1358.

²¹² See *id.* at 1359.

²¹³ *Id.* at 1358.

²¹⁴ See *id.*

²¹⁵ See *Claremont*, 703 A.2d at 1358.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See *id.* at 1359.

strict judicial scrutiny.²²⁰ In applying strict scrutiny to the state education finance scheme, the court noted that comparable funding must be assured in order that every school district will have the funds necessary to provide such education.²²¹ Thus, the *Claremont* court held that education is a fundamental right, that state infringement of this right must be examined with judicial strict scrutiny and that comparable educational funding must be assured to pass constitutional muster.²²²

2. Connecticut

Although *Claremont* is a recent case, the occurrence of states striking down state education finance structures is not a recent development.²²³ In 1977, the Supreme Court of Connecticut held in *Horton v. Meskill* that the right to education is fundamental under the Connecticut Constitution and any infringement of that right must be strictly scrutinized.²²⁴ In *Horton*, public school students sought a declaratory judgment to render the state education finance scheme unconstitutional.²²⁵ The Connecticut public schools were financed such that a disparity of per pupil expenditures existed between communities.²²⁶ Local school districts raised the majority of educational funding through local tax assessments which resulted in funding differences.²²⁷

In arriving at its decision, the *Horton* court began by referencing the *Rodriguez* decision.²²⁸ The Connecticut Supreme Court recognized that decisions of the United States Supreme Court defining fundamental rights are only persuasive authority and are to be followed only when they provide more individual protection than is guaranteed by a state constitution.²²⁹ The *Horton* court specifically noted that the "strength of the *Rodriguez* dissenting opinion has had great impact on state education financing decisions."²³⁰ The court also recited the language from *Brown* where the United States Supreme Court stated that

²²⁰ See *Claremont*, 703 A.2d at 1359.

²²¹ See *id.*

²²² *Id.* at 1358-59.

²²³ See generally *Horton v. Meskill*, 376 A.2d 359 (1977).

²²⁴ *Id.* at 372-74.

²²⁵ See *id.* at 361.

²²⁶ See *id.* at 366. For example, the average per pupil expenditure in one community was approximately \$1245, while the average expenditure in another community was approximately \$813. See *id.* at 366-67.

²²⁷ See *id.* at 367-68. Approximately 70% of education funding came from local tax levy; 25% came from the state; only 5% came from federal sources. See *id.* at 366.

²²⁸ See *Horton*, 376 A.2d at 371 (citing *Rodriguez*, 411 U.S. at 133-34).

²²⁹ See *id.*

²³⁰ *Id.* at 372.

"education is perhaps the most important function of state and local governments . . . such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."²³¹

Thus, the Connecticut Supreme Court held that the state system of financing education is an interference with a "fundamental right" to education, and requires strict judicial scrutiny.²³² The *Horton* court, in applying strict scrutiny to the state education finance scheme, further held that variations in funding produce variations in the quality of instruction.²³³ Specifically, the court realized that students receiving a lesser per pupil expenditure received an education that was a "substantial degree lower in both breadth and quality" than those receiving higher per pupil expenditures.²³⁴

Finally, the *Horton* court stated that discrimination in providing educational services is not excusable merely because an "adequate" level of benefits is afforded to all.²³⁵ The court noted that "[t]he Equal Protection Clause is not addressed to minimal sufficiency, but rather to the unjustifiable inequalities of state action."²³⁶ Thus, the state education finance structure was deemed unconstitutional because it infringed upon a fundamental right to education in the State of Connecticut; such funding disparities did not survive the judicial strict scrutiny of the Equal Protection Clause of the Connecticut Constitution.²³⁷ The decision effectively mandated an equal per pupil expenditure throughout the state.²³⁸

3. Wyoming

In 1980, in *Washakie County School District v. Herschler*, the Supreme Court of Wyoming held that (1) the state school financing scheme was unconstitutional because it failed to afford equal protection to all students and (2) education is a fundamental right deserving judicial strict scrutiny.²³⁹ In *Washakie*, local school districts and public school students sought a declaratory judgment holding that the state education finance structure was a violation of equal protection guar-

²³¹ *Id.* (citing *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

²³² *See id.* at 372-74.

²³³ *See Horton*, 376 A.2d at 374.

²³⁴ *See id.*

²³⁵ *See id.* at 373.

²³⁶ *Id.*

²³⁷ *See id.* at 374-75.

²³⁸ *See Horton*, 376 A.2d at 374-75.

²³⁹ 606 P.2d 310, 315, 333 (Wyo. 1980).

antees under the Wyoming Constitution because of disparities in per pupil expenditures.²⁴⁰ First, the court referred to *Rodriguez*, and noted that a state may go beyond rights as defined by the United States Supreme Court.²⁴¹ The *Washakie* court then concluded that education is a fundamental right in Wyoming.²⁴² In doing so, the court recited the language in *Brown*, where the Court stated that "education is the most important function of state and local governments"²⁴³ The court then reasoned that any state action affecting a fundamental interest must be reviewed with judicial strict scrutiny.²⁴⁴ The court stated that when a fundamental right is burdened, even if there is a compelling state interest such as providing education, the state must prove that there is no less onerous or burdensome alternative by which this objective may be achieved.²⁴⁵

Importantly, the court rejected the contention that funding does not relate to the quality of education.²⁴⁶ In fact, the court specifically stated that "it is nothing more than an illusion" to believe that the disparity in financial resources does not relate directly to the quality of education.²⁴⁷ Thus, the court reasoned that there is no practicable method of achieving equality of education without achieving equality of financing.²⁴⁸

Because education was a fundamental right requiring judicial strict scrutiny, the court held that the state had not met its burden of showing no less onerous alternatives.²⁴⁹ The court posited that different levels of state assistance could equalize the local spending disparities and, therefore, equalize the differences in educational opportunity.²⁵⁰ Thus, the court held that the state education finance scheme was unconstitutional because the disparity in per pupil education expenditures was a violation of equal protection guarantees.²⁵¹

The three examples of state law discussed here reveal that in many states: (1) education is a fundamental right under state constitutions; (2) disparities of educational funding are infringements of this right;

²⁴⁰ See *id.* at 315.

²⁴¹ See *id.* at 332-33.

²⁴² See *id.* at 333.

²⁴³ See *id.* at 333-34 (citing *Brown*, 347 U.S. at 493).

²⁴⁴ See *Washakie*, 606 P.2d at 333.

²⁴⁵ See *id.*

²⁴⁶ See *id.* at 334.

²⁴⁷ *Id.*

²⁴⁸ See *id.*

²⁴⁹ See *Washakie*, 606 P.2d at 335.

²⁵⁰ See *id.*

²⁵¹ See *id.*

(3) these infringements should be reviewed under judicial strict scrutiny; and (4) state statutes which cause a disparity in educational funding have been found unconstitutional under state constitutions.

IV. ARE THE EQUAL PROTECTION GUARANTEES OF A GENERAL EDUCATION STUDENT VIOLATED BECAUSE OF SPECIAL EDUCATION MANDATES?

Part I of this Note established that federal and state special education statutes cause reductions in funding for general education budgets.²⁵² Part II established that reductions in funding are directly attributable to reductions in education quality and services.²⁵³ The analysis now examines these reductions as a violation of a general education student's equal protection guarantees.

Special education mandates do not violate a general education student's equal protection guarantees unless education is a fundamental right.²⁵⁴ That is, if education is a fundamental right, then special education statutes are probably unconstitutional because they infringe upon a general education student's right to education. As discussed in Part II, special education mandates cause a direct reduction in general education services.²⁵⁵ If education is not a state or federal fundamental right, however, then special education statutes analyzed under the rational basis test appear to be rationally related to the legitimate state objective of providing special education students with a free appropriate education.²⁵⁶

Courts must apply strict scrutiny when analyzing special education statutes which infringe upon general education if education is a fundamental right.²⁵⁷ Finally, a court applying strict scrutiny would likely presume that such special education statutes are unconstitutional because they are not narrowly drafted, and there are other less burdensome alternative.²⁵⁸

²⁵² See *supra* notes 1-95 and accompanying text.

²⁵³ See *supra* notes 96-130 and accompanying text.

²⁵⁴ See *supra* notes 143-52 and accompanying text.

²⁵⁵ See *supra* notes 96-130 and accompanying text.

²⁵⁶ See *supra* notes 139-42 and accompanying text; see also *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991); *Schweiker v. Wilson*, 450 U.S. 221, 230, 234 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

²⁵⁷ See *supra* notes 143-52 and accompanying text; see also *Shapiro v. Thompson*, 394 U.S. 618, 630, 634 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666-67 (1966); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

²⁵⁸ See *supra* notes 145-46 and accompanying text; see also *Miller v. Johnson*, 515 U.S. 900,

A. *Special Education Statutes Violate a General Education Student's Equal Protection Guarantees Under State Law*

The test student discussed earlier realized that special education mandates caused reductions in the general education budget at Anytown Central High School over the past ten years. This Part of the analysis posits that such a student has a valid claim under the equal protection clauses of most state constitutions. A student has a valid state claim because (1) education is a fundamental right under many state constitutions as discussed in Part III; (2) special education statutes infringe upon that right as discussed in Parts I and II; (3) judicial strict scrutiny must apply to such infringements; and (4) such statutes fail the strict scrutiny test.²⁵⁹

State equal protection clauses virtually mirror the Equal Protection Clause of the United States Constitution, declaring that no state shall "deny to any person . . . the equal protection of the laws."²⁶⁰ As discussed in Part III, a majority of states confronted with the issue have decided that education is a fundamental right under state constitutions and infringements of this right must be analyzed with judicial strict scrutiny.²⁶¹

Furthermore, education is clearly burdened because variations in funding produce variations in the quality of instruction.²⁶² In fact, as the court noted in *Washakie*, "it is nothing more than an illusion to believe that the disparity in financial resources does not relate directly to the quality of education."²⁶³ As discussed in *Horton*, decreased per pupil expenditures lead to an education that is "substantially decreased in both breadth and quality."²⁶⁴

Additionally, as the court stated in *Washakie*, there must be no less onerous alternative by which this objective is achieved.²⁶⁵ As sug-

904 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235 (1995); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

²⁵⁹ See *infra* notes 260-320 and accompanying text.

²⁶⁰ Compare U.S. CONST. amend. XIV, § 1, with CONN. CONST., art. 1, § 1 (1997) (all men . . . are equal in rights), 20 (no person shall be denied the equal protection of the law); N.H. CONST. pt. 1, arts. 1 (1988 & Supp. 1997) (all men are born equally free and independent), 2 (equality of rights under the law shall not be denied or abridged), 12 (every member of the community has a right to be protected by it); WYO. CONST., art. 1, § 1 (1997) (all members of the human race are equal), 34 (all laws of a general nature shall have a uniform operation).

²⁶¹ See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 747, 776; *Roosevelt*, 877 P.2d at 238, 242, 244; *Bismarck*, 511 N.W.2d at 259; *Scott*, 443 S.E.2d at 386; *Alabama Coalition*, 624 So. 2d at 147, 151, 156-57; *Skeen*, 505 N.W.2d at 315; *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766.

²⁶² See *supra* notes 102-06 and accompanying text.

²⁶³ 606 P.2d 310, 333 (1980).

²⁶⁴ 376 A.2d 359, 374 (1977).

²⁶⁵ See 606 P.2d at 333.

gested by the *Washakie* court, statutes can be written such that general education budgets are not infringed upon; statutes can, for example, require equalized expenditures.²⁶⁶ Furthermore, spending limits could be placed upon the implementation of individualized education plans. The statutes could be narrowly tailored to ensure that special education students do not take advantage of broad language; statutes could delineate the types of disabilities covered and the types of services provided.²⁶⁷ Additionally, special education statutes are only partially funded by states and the federal government.²⁶⁸ Clearly, the least onerous special education statute is one that is completely federally or state funded. Such a statute would not force local school districts to reduce general education budgets. Thus, a special education statute in Anytown, U.S.A. which infringes upon a general education budget probably would not survive judicial strict scrutiny.²⁶⁹

Furthermore, merely providing an adequate level of education for a general education student does not excuse a state from an equal protection violation.²⁷⁰ As discussed earlier, even under state constitutions, equal protection clauses are not addressed to minimal sufficiency, but rather to the unjustifiable inequalities of state action.²⁷¹ These stark differences provide the crux of an equal protection challenge.²⁷²

It seems likely that a general education student's equal protection challenge under most state constitutions would be successful. Most state courts dealing with the issue have held that education is a fundamental right deserving judicial strict scrutiny.²⁷³ Furthermore, the above analysis indicates that state statutes which decrease general education funding will most likely fail a strict scrutiny analysis, and courts will strike them down as unconstitutional.²⁷⁴

²⁶⁶ See *id.* at 335-36.

²⁶⁷ See Zernike, Mar. 30, 1997, *supra* note 11 (noting that special education students take advantage of the broad language of special education statutes).

²⁶⁸ See, e.g., Markoe, *supra* note 15, at 1; see also *supra* notes 123-25 and accompanying text.

²⁶⁹ See *supra* notes 145-47 and accompanying text; see also *Miller*, 515 U.S. at 904; *Adarand*, 515 U.S. at 227, 235; *Cleburne*, 473 U.S. at 440; *Bernal*, 467 U.S. at 219.

²⁷⁰ See, e.g., *Horton*, 376 A.2d at 373; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 82, 90, 92 (1973) (Marshall, Douglas, JJ., dissenting).

²⁷¹ See, e.g., *Horton*, 376 A.2d at 373.

²⁷² See, e.g., *Rodriguez*, 411 U.S. at 82, 90 (Marshall, Douglas, JJ., dissenting).

²⁷³ See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 747, 776; *Roosevelt*, 877 P.2d at 238, 242, 244; *Bismarck*, 511 N.W.2d at 259; *Scott*, 443 S.E.2d at 386; *Alabama Coalition*, 624 So. 2d at 147, 151, 156-57; *Skeen*, 505 N.W.2d at 315; *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766.

²⁷⁴ See *supra* notes 259-73 and accompanying text.

B. *Special Education Statutes Should Violate a General Education Student's Equal Protection Guarantees Under Federal Law*

The special education statutes of all fifty states merely conform to the minimum standards set forth in the Individuals with Disabilities Education Act.²⁷⁵ Therefore, if state special education statutes violate general education students' protection guarantees under state constitutions, it is the IDEA that infringes on the rights of general education students.²⁷⁶ The IDEA, a federal law, can only be challenged under the Equal Protection Clause of the United States Constitution, which does not explicitly guarantee the right to an education; the IDEA, therefore, is constitutional as analyzed under current federal law.²⁷⁷

In order for a general education student to prevail against the inequities produced by the IDEA or any state action which decreases educational funding, the United States Supreme Court must recognize education as a fundamental right under the United States Constitution.²⁷⁸ If statutes such as the IDEA, which indirectly cause decreases in educational services, were analyzed using judicial strict scrutiny, they would suffer the same fate as their state counterparts.²⁷⁹ Clearly, it can be argued that the IDEA is not narrowly tailored, and there are less burdensome alternatives.²⁸⁰ For example, the statute could be rewritten such that the federal government must provide more than seven percent of the funding for special education. In the alternative, the statute could be redrafted, placing spending caps on individual special education students, specifying certain disabilities or prohibiting special education programs from burdening general education.²⁸¹ Overall, if the IDEA were to survive judicial strict scrutiny, it must be re-crafted such that it does not infringe upon general education funding.²⁸²

²⁷⁵ Compare 20 U.S.C. § 1400 et seq. (1990 & 1998 Supp.), with CONN. GEN. STAT. § 10-76 et seq. (1997); N.H. REV. STAT. ANN. § 186-C et seq. (1988 & 1997 Supp.); WYO. STAT. ANN. § 21-2-501 et seq. (Michie 1997).

²⁷⁶ See *supra* notes 277-82 and accompanying text.

²⁷⁷ See U.S. CONST. amend. XIV, § 1 (Equal Protection Clause); see also U.S. CONST. art. VI (Supremacy Clause).

²⁷⁸ Cf. *Rodriguez*, 411 U.S. at 37-38.

²⁷⁹ See *supra* notes 145-46 and accompanying text; see also *Miller*, 515 U.S. at 904; *Adarand Constructors, Inc.*, 515 U.S. at 227, 235; *Cleburne*, 473 U.S. at 440; *Bernal*, 467 U.S. at 219.

²⁸⁰ See, e.g., *Miller*, 515 U.S. at 904; *Adarand*, 515 U.S. at 227, 235; *Cleburne*, 473 U.S. at 440; *Bernal*, 467 U.S. at 219.

²⁸¹ See, e.g., *Markoe*, *supra* note 15, at 1.

²⁸² See *supra* notes 145-46 and accompanying text; see also *Miller*, 515 U.S. at 904; *Adarand*, 515 U.S. at 227, 235; *Cleburne*, 473 U.S. at 440; *Bernal*, 467 U.S. at 219.

1. The United States Supreme Court Should Recognize Education as a Fundamental Right under the United States Constitution

- a. *The Court Has Already Recognized Other Non-Explicit Rights as Fundamental*

In order for the test student from Anytown Central High School to prevail against the IDEA, she must first get around the United States Supreme Court's decision in *Rodriguez*.²⁸³ First, the Court in *Rodriguez* disregarded its own prior decisions when it reasoned that in order for a right to be fundamental, it must be explicitly or implicitly guaranteed in the text of the United States Constitution.²⁸⁴ As discussed in Part III, the rights to travel, procreate, criminally appeal and vote are not explicitly or implicitly guaranteed in the text of the United States Constitution.²⁸⁵ The Court has afforded, however, each of these rights fundamental status and has analyzed infringements of these rights with judicial strict scrutiny.²⁸⁶

- b. *Education is Inextricably Intertwined with Other Constitutional Rights*

Second, the Court in *Rodriguez* neglected its prior reasoning by failing to recognize that other fundamental rights are intrinsically interwoven with constitutionally guaranteed rights.²⁸⁷ In their dissents, Supreme Court Justices Douglas, Brennan and Marshall noted that the fundamentality of a right is a function of the right's importance to effectuate a constitutionally guaranteed right.²⁸⁸ Therefore, as the nexus between an explicitly or implicitly guaranteed right and another interest tightens, the interest becomes fundamental, and a more rigorous degree of judicial scrutiny must be applied when analyzing infringements of the subject.²⁸⁹ For example, the right to vote, although not explicitly guaranteed in the United States Constitution, is a necessary component to participate in the governmental process.²⁹⁰ Additionally,

²⁸³ See *Rodriguez*, 411 U.S. at 38-40 (failing to deem education a fundamental right under the United States Constitution).

²⁸⁴ See *id.* at 62-63 (Brennan, J., dissenting).

²⁸⁵ See *id.* at 99-101 (Marshall, Douglas, JJ., dissenting).

²⁸⁶ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 630, 634 (1969) (holding right to travel fundamental); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666-67 (1966) (holding right to vote fundamental); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding right to marry and procreate fundamental).

²⁸⁷ See *Rodriguez*, 411 U.S. at 62-63 (Brennan, J., dissenting).

²⁸⁸ See *id.* at 63 (Brennan, J., dissenting), 113-14 (Marshall, Douglas, JJ., dissenting).

²⁸⁹ See *id.* at 62-63 (Brennan, J., dissenting).

²⁹⁰ See *id.* at 63 (Brennan, J., dissenting).

the right to travel is necessary for a citizen to exercise his or her rights of constitutionally guaranteed liberty.²⁹¹

Similarly, education is a necessary component for a citizen to exercise his or her constitutionally guaranteed right of free speech.²⁹² Education is needed for a citizen to vote and participate in the governmental process; the rights of free expression and voting themselves hinge upon the adequacy of one's education.²⁹³ As the Court recognized in *Brown*, education is required "in the performance of our most basic public responsibilities," even service in the armed forces.²⁹⁴ Education is the very foundation of good citizenship.²⁹⁵ It is a principal instrument for awakening children to cultural values and for preparing them for later professional training.²⁹⁶ The Court itself has doubted whether any child can reasonably be expected to succeed in life if he or she is denied the opportunity of an education.²⁹⁷

c. *The United States Supreme Court Inappropriately Worked Backwards in Rodriguez*

Third, in performing its fundamental rights analysis in *Rodriguez*, the Court worked backwards from a pre-determined end.²⁹⁸ A proper fundamental rights analysis looks *first* to see if the burdened right is fundamental.²⁹⁹ If a right is deemed fundamental, then a court must apply judicial strict scrutiny; this method is standard equal protection analysis utilized by courts and commentators.³⁰⁰ The Court in *Rodriguez*, however, based its decision on the "inappropriateness of the strict-scrutiny test," and worked backwards to conclude that education should not be a fundamental right. The Court justified the means of its decision by its unwillingness to apply strict scrutiny in similar cases.³⁰¹ The 5-4 majority was overly influenced by the fact that to decide otherwise would invalidate school financing statutes nationwide and

²⁹¹ See *id.* at 99-101 (Marshall, Douglas, JJ., dissenting):

²⁹² See *Rodriguez*, 411 U.S. at 63 (Brennan, J., dissenting), 113-14 (Marshall, Douglas, JJ., dissenting).

²⁹³ See *Rodriguez*, 411 U.S. at 63 (Brennan, J., dissenting).

²⁹⁴ 347 U.S. 483, 493 (1954).

²⁹⁵ See *id.*

²⁹⁶ See *id.*

²⁹⁷ See *id.*

²⁹⁸ See *Rodriguez*, 411 U.S. at 40.

²⁹⁹ See, e.g., *Shapiro*, 394 U.S. at 630, 634; *Harper*, 383 U.S. at 666-67; *Skinner*, 316 U.S. at 541.

³⁰⁰ See, e.g., *Miller*, 515 U.S. at 904; *Adarand*, 515 U.S. at 227, 235; *Cleburne*, 473 U.S. at 440; *Bernal*, 467 U.S. at 219.

³⁰¹ See *Rodriguez*, 411 U.S. at 40.

was less concerned that the state statutes infringed upon a fundamental interest.³⁰²

d. *General Education Reductions are Ultimately Caused by the Requirements of a Federal Statute*

Fourth, the problem presented by this Note is much more significant than the facts presented in *Rodriguez*. The Court in *Rodriguez* wanted to tread lightly in the area of education, a responsibility traditionally left to the states.³⁰³ *Rodriguez*, however, dealt with the constitutionality of state finance laws enacted entirely under the color of state law.³⁰⁴ The problem addressed by this Note is created and perpetuated by federal law: the IDEA.³⁰⁵ Therefore, it would be misleading for the Court to apply the same analysis in this case.

The Court cannot fail to deem education a fundamental right under the pretext of states' rights when Congress has itself fundamentally infringed upon those very rights left to the states. Thus, when dealing with the problem presented by this Note, the import of education as a fundamental right is central to a general education student's equal protection claim.

e. *Current Federal Law Condone Discrimination*

Finally, failing to recognize education as a fundamental right allows unequal, invidious discrimination to occur as long as it is rationally related to a permissible state goal.³⁰⁶ Substantial disparities in per pupil expenditures produce a discriminatory impact on schoolchildren.³⁰⁷ Failure to recognize education as a fundamental right means that the Court will fail to strictly scrutinize any infringements to that right.³⁰⁸ Thus, unless education is deemed a fundamental right under the United States Constitution, federal action which causes great educational funding disparity will essentially be condoned.³⁰⁹ The Equal Protection Clause was not established to guarantee a minimum level

³⁰² See *id.* at 44, 54.

³⁰³ See *id.* at 40.

³⁰⁴ See *id.* at 1-8.

³⁰⁵ See 20 U.S.C. § 1400 et seq.

³⁰⁶ See *Rodriguez*, 411 U.S. at 68 (White, Douglas, Brennan, JJ., dissenting).

³⁰⁷ See *id.* at 72.

³⁰⁸ See, e.g., *Shapiro*, 394 U.S. at 618, 630, 634; *Harper*, 383 U.S. at 666-67; *Skinner*, 316 U.S. at 541.

³⁰⁹ See *Rodriguez*, 411 U.S. at 68 (White, Douglas, Brennan, JJ., dissenting).

of constitutional adequacy.³¹⁰ Rather, it was established to guarantee equal protection of the laws.³¹¹

Had one justice voted the other way in *Rodriguez*, it seems clear that the discrimination against general education students caused by the IDEA would not be tolerated. Even if the Court fails to categorize education as a fundamental right, however, it is completely plausible that the unique circumstances and discrimination caused by the IDEA would lead it to invalidate the law.³¹² The United States Supreme Court has consistently recognized the vital importance of education.³¹³ In *Brown*, the Court used the importance of education as the vehicle for racial desegregation.³¹⁴ In *Plyler*, the Court again stressed the importance of education, used a heightened level of scrutiny and invalidated a law burdening access to education.³¹⁵ Here, the Court may focus on the vital importance of education to invalidate a law which causes a direct reduction in general education services nationwide.

CONCLUSION

Clearly, some of the effects of the IDEA have run counter to its original intention.³¹⁶ The combination of the circumstances and arguments advanced in this Note could lead the Court to apply heightened or strict scrutiny without finding education to be a fundamental right.³¹⁷ Applying any heightened level of scrutiny to the invidiously discriminatory effects of the IDEA upon general education students would most likely lead to the invalidation of the law.³¹⁸ Thus, federal efforts to rectify the discriminatory effects of the IDEA must focus upon the issue of special education costs and services. Congress cannot mandate such costly services and fail to provide adequate funding. Failure to do so imposes a cost upon localities which manifests itself as inequality and a reduction in general education services.

This Note does not purport to resolve the discriminatory impact upon general education students caused by the IDEA. It does, however,

³¹⁰ See *id.* at 82 (Marshall, Douglas, JJ., dissenting).

³¹¹ See U.S. CONST. amend. XIV, § 1.

³¹² Cf. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

³¹³ See *id.* at 221.

³¹⁴ See 347 U.S. 483, 493 (1954).

³¹⁵ See 457 U.S. at 224, 230.

³¹⁶ See *supra* notes 46-47 and accompanying text.

³¹⁷ Cf. *Plyler*, 457 U.S. at 224, 230.

³¹⁸ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235 (1995); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

argue that general education students have possible recourse under the law. Under most state constitutions, such deprivations would likely be found unconstitutional because education is a fundamental right and judicial strict scrutiny applies.³¹⁹ As we have seen, however, state special education statutes are enacted pursuant to IDEA requirements.³²⁰ Thus, outside of a legislative solution, this problem will ultimately be resolved only if education is deemed a fundamental right under the United States Constitution.

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³¹⁹ See, e.g., *Claremont*, 703 A.2d at 1359; *DeRolph*, 677 N.E.2d at 747, 776; *Roosevelt*, 877 P.2d at 238, 242, 244; *Bismarck*, 511 N.W.2d at 259; *Scott*, 443 S.E.2d at 386; *Alabama Coalition*, 624 So. 2d at 147, 151, 156-57; *Skeen*, 505 N.W.2d at 315; *Washakie*, 606 P.2d at 333; *Pauley*, 255 S.E.2d at 679; *Horton*, 376 A.2d at 646; *Serrano*, 557 P.2d at 766.

³²⁰ Compare 20 U.S.C. § 1400 et seq., with CONN. GEN. STAT. § 10-76 et seq.; N.H. REV. STAT. ANN. § 186-C et seq.; WYO. STAT. ANN. § 21-2-501 et seq.