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THE DISABILITY INTEGRATION PRESUMPTION: THIRTY YEARS LATER

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The fiftieth anniversary of the Brown v. Board of Education decision has spurred a lively debate about the merits of "integration." This Article brings that debate to a new context: the integration presumption under the Individuals with Disabilities Education Act (IDEA). The IDEA has contained

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an “integration presumption” for more than thirty years under which school districts should presumptively educate disabled children with children who are not disabled in a fully inclusive educational environment. This Article traces the history of this presumption and argues that it was borrowed from the racial civil rights movement without any empirical justification. In addition, this Article demonstrates that Congress created this presumption to mandate the closing of inhumane, disability-only educational institutions but not to require fully inclusive education for all children with disabilities. This Article examines the available empirical data and concludes that such evidence cannot justify a presumption for a fully inclusive educational environment for all children with disabilities. While this Article recognizes that structural remedies, such as an integration presumption, can play an important role in achieving substantive equality, such remedies also need periodic reexamination. Modification of the integration presumption can help it better serve the substantive goal of according an adequate and appropriate education to the full range of children who have disabilities while still protecting disabled children from inhumane, disability-only educational warehouses.

INTRODUCTION

Since the Supreme Court decided *Brown v. Board of Education*,¹ the African-American civil rights community has gone back and forth on the benefits of integration. In the wake of the *Brown* decision, it expressed widespread enthusiasm for integration.² With the rise of the critical race movement and frustrations with implementation of integration, that enthusiasm waned.³ More recently, the civil rights pen-

¹ 347 U.S. 483 (1954).

² See generally Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885, 885-86 (1993) (recounting the hope that *Brown* would equalize education for African Americans); James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1635-45 (1990) (arguing that school desegregation under the mandate of *Brown* can effectuate broad political reform). This support, however, was not monolithic. Charles Ogletree insists that many African Americans viewed integration “with suspicion or something worse. Many communities at the center of the battle for integration, represented by the crusading lawyers of the NAACP, would have welcomed something less than the full integration demanded by the civil rights lawyers.” CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 296 (2004).

³ The reexamination of *Brown*’s integration legacy occurred within twenty years of the Supreme Court’s decision. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 516 (1976) (arguing that civil rights attorneys’ “single-minded commitment” to maximum integration led them to ignore parents’ interests in quality education); see also DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 8, 102-22 (1987).

dulum has swung back towards support for integration in celebration of *Brown*⁴ and in response to attacks on affirmative action.⁵

(employing a fictional dialogue in which the characters “speculate about policies that might have more effectively improved the quality of education provided for black children, but were never much tried because of the civil rights community’s commitment to achieving school desegregation through racial balance”); ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* 199 (1996) (noting that racial integration has “failed many” and suggesting a policy of limited separation instead). For a general discussion of the tension that can sometimes exist between lawyers and their clients in the class action context, see Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186-1202 (1982). Rhode notes that “[s]chool desegregation cases provide the most well-documented instances of conflict” because of “balkanization within minority communities over fundamental questions of educational policy.” *Id.* at 1189.

⁴ See, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 291 (2004) (“[C]ultivating race and class integration, especially of the institutions that define social mobility—like schools[—] . . . [is] the only route to creating the kind of fully democratic society we imagine our very diverse country to be.”); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 307 (1999) (proposing two strategies to increase integration). An Internet search reveals that hundreds of programs were devoted to discussions of *Brown* on its fiftieth anniversary. See Howard University School of Law, *Brown CSO: Fulfilling the Promise*, <http://www.brownat50.org> (last visited Jan. 11, 2006) (providing information on *Brown* and celebrating and commemorating its anniversary); National Public Radio, *Looking Back: Brown v. Board of Education*, <http://www.npr.org/news/specials/brown50> (last visited Jan. 11, 2006) (offering a collection of radio interviews commemorating *Brown*’s anniversary).

⁵ In response to challenges to affirmative action programs in higher education, proponents collected data showing the success of affirmative action. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 290 (1998) (concluding on the basis of quantitative analysis that “academically selective colleges and universities have been highly successful in using race-sensitive admissions policies to advance educational goals important to them and societal goals important to everyone”); Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 495 (2000) (concluding that Michigan’s minority admissions program has helped the school achieve its academic and civic goals). Affirmative action in higher education admissions can be understood as one strategy for achieving integration because it increases the diversity of the institution. Researchers have also sought to defend the importance of integration at the primary and secondary school levels. This research often discusses evidence favorable to integration and ignores any contrary evidence. See, e.g., Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 950-54 (2002) (reporting research that indicates that “minority students are afforded more educational opportunities and achieve greater academic success in racially diverse schools”). But see Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1528-29 (2003) (acknowledging disagreements about desegregation’s short-term effects on academic achievement).

Critics of educational integration argue that it has failed African American students. See Bell, *supra* note 3, at 472 (“[R]acial balance may not be the relief actually

Although the debate about integration in education has historically been a debate that has taken place in the context of race, that discussion also has relevance to the disability context. The disability civil rights movement, however, has not had a sufficient dialogue on the merits of integration.⁶ Borrowing from the racial civil rights movement,⁷ the disability plaintiffs' bar urged adoption of the "integration presumption." The judiciary⁸ and the legislature⁹ were quickly receptive to these efforts and adopted the integration presumption. Under the integration presumption, as formulated in 1974, children with disabilities are to be educated with children who are not disabled "to the maximum extent appropriate" unless "the na-

desired by the victims of segregated schooling."); Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 54 (1992) (outlining specific areas in which black students, parents, and administrators are "turning away from [the] integrative ideal" of *Brown*); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1402-03 (1993) (arguing that judicially mandated integration "is seriously flawed because it conflates the process of integration with the ideal of integration" and defending the role of historically black colleges). Others argue that racial integration can be more successful. See Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 58 (1997) ("[I]ntegrating the schools is both necessary and essential if we are ever to achieve racial equality."); Nathaniel R. Jones, General Counsel, NAACP Special Contribution Fund, Letter to the Editors of the Yale Law Journal, *School Desegregation*, 86 YALE L.J. 378, 379 (1976) ("Desegregation would in fact go a long way toward eliminating . . . educational damages."). In a recent contribution to this debate, Richard Sander argues that affirmative action in law school admissions has harmed the interests of African American students. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 440 (2004).

⁶ Deborah Rhode argues that class counsel in a 1974 disability integration case that resulted in the closure of Pennhurst, a disability-only institution, ignored the views of many parents and guardians who did not favor deinstitutionalization. Rhode, *supra* note 3, at 1211-12. She argues that deinstitutionalization at the Pennhurst facility would have been more successful if plaintiffs' counsel had been willing to share their clients' concerns about deinstitutionalization with the court. *Id.* at 1259-61.

⁷ See STATE PROGRAM IMPLEMENTATION STUDIES BRANCH OF THE BUREAU OF EDUC. FOR THE HANDICAPPED, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUBL'N NO. (OE)79-05003, PROGRESS TOWARD A FREE APPROPRIATE PUBLIC EDUCATION: A REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 31 (1979) [hereinafter HEW REPORT] (referring to the result in *Brown* as part of the impetus behind early special education litigation efforts).

⁸ See Pa. Ass'n for Retarded Children v. Pennsylvania (*P.A.R.C.*), 343 F. Supp. 279, 302 (E.D. Pa. 1972) (approving a settlement that ended the exclusion of retarded children from Pennsylvania public schools); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972) (requiring that public schools in the District of Columbia cease denying retarded children a "regular public school education").

⁹ See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 781 (codified as amended at 20 U.S.C. § 1412(a)(5)(A) (2000)) (adopting the integration presumption).

ture or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”¹⁰ The thirtieth anniversary of the enactment of the integration presumption has *not* led to discussion about whether that strategy has been historically successful, and whether it continues to be the most appropriate educational strategy for all children with disabilities. In this Article, I seek to begin that discussion.¹¹ I will argue that Congress was correct to enact the integration presumption in 1974 but that the integration presumption, as interpreted by the courts, needs to be modified.¹² I will not argue for the com-

¹⁰ Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, § 613(a)(13)(B), 88 Stat. 579, 581-82 (1974) (codified as amended at 20 U.S.C. § 1412(a)(5)(A) (2000)). Although states are supposed to develop criteria to implement this rule, the state regulations do little more than restate the federal requirements. For example, the Ohio regulations call this rule a “least restrictive environment” rule and add the following two requirements to the federal rules:

(c) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

(d) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

OHIO ADMIN. CODE 3301-51-09 (2005). But those additional requirements offer little guidance. The first requirement does not ask what is *best* for the child. Instead, it presumes that integration is preferable and offers a rationale to avoid integration when *harm* is actually demonstrated. The second requirement merely states when removal should *not* occur, but does not ask when integration is *appropriate*. Although the federal statute speaks in terms of *appropriateness*, neither the federal nor state rules identify criteria for determining when a fully integrated environment is appropriate. Integration is blindly presumed to be appropriate.

¹¹ Predictably, I will be criticized for even beginning that discussion. In 1986, when Madeleine Will, the Assistant Secretary for the Office of Special Education and Rehabilitative Services, decided to fund studies on the effectiveness of full inclusion on children with disabilities, she was criticized for supporting such research on grounds that integration is a moral imperative that does not require empirical justification. See Madeleine C. Will, *Educating Children with Learning Problems: A Shared Responsibility*, 52 EXCEPTIONAL CHILD. 411, 413 (1986) (suggesting that “the burgeoning number of students who are failing to learn through conventional education methods” calls for “new strategies to increase the educational success of these students”).

¹² I will *not* be considering the needs of the child with a disability versus the needs of typically-developing children in the classroom because *all* children are entitled to an adequate and appropriate education in our society. There are three ways in which the interests of typically-developing children might be considered, none of which will be the focus of this Article. First, typically-developing children might have a right to an education free from undue disruption from a child with a disability. But Congress has already written ample safeguards into the IDEA, safeguards that provide for the separation of children with disabilities when they disrupt the classroom environment; those rules are beyond the scope of this Article. See 20 U.S.C.A. § 1415 (k) (West Supp.

plete dismantling of the integration presumption but will suggest that it needs to be narrowed and reinterpreted so that it achieves its underlying purpose—encouraging school districts to limit their use of disability-only institutions—while also serving the goal of creating individualized educational programs for children with disabilities within the regular public schools. Those individualized programs should *not* be subject to an integration presumption.

The adoption of the integration presumption in the Education for All Handicapped Children Act of 1975,¹³ now called the Individuals with Disabilities Education Act,¹⁴ has had a profound impact on the education of children with disabilities. In the first fifteen years of implementation, “the number of students classified as learning disabled . . . and provided with special education services in public

2005) (setting forth guidelines for the placement of children with disabilities in alternative educational settings for disciplinary reasons).

Second, one might argue that the decision whether to educate children in a segregated or integrated environment might have a cost impact on typically-developing children. One researcher has suggested that full inclusion may be somewhat less expensive on a per pupil basis than other educational configurations. Jay G. Chambers, *The Patterns of Expenditures on Students with Disabilities: A Methodological and Empirical Analysis*, in *FUNDING SPECIAL EDUCATION* 89, 99-103 (Thomas B. Parrish et al. eds. 1999). Nonetheless, I will not consider the relative cost of segregation versus integration because it is only a minor factor in the general cost of educating children with disabilities. This Article does not generally challenge Congress’s decision to subsidize the cost of educating children with disabilities and to require that all children with disabilities receive an adequate and appropriate education. See 20 U.S.C.A. § 1400(d) (West Supp. 2005) (setting out the purposes of the IDEA, namely protecting the rights and ability of children with disabilities to obtain a “free appropriate public education”). I do recognize that cost may be a significant factor for rural school districts with small numbers of children with disabilities who are dispersed over a broad geographical area. In that context, I recognize that school districts may have cost and efficiency arguments for favoring education outside a child’s local school. As I discuss in Part I.B, that problem is handled by courts that distinguish between the integration requirement and a local public school preference.

Third, I recognize that some people might argue that we should offer children with disabilities a fully integrated education for the benefit of typically-developing children who are then exposed to a more diverse classroom. If integration fosters greater respect for children with disabilities, then that is certainly a positive argument for integration. But I assume that we should determine the correct educational configuration of resources from the perspective of what would be most likely to benefit children with disabilities—a victim-oriented perspective. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 324 (1987) (suggesting that scholars adopt the view of those who have been discriminated against when developing theories of law and justice). The question of whether typically-developing children benefit from a disability-diverse classroom is beyond the scope of this Article.

¹³ Pub. L. No. 94-142, 89 Stat. 773.

¹⁴ 20 U.S.C.A. §§ 1400-1487 (West Supp. 2005).

schools rose from 797,212 in 1976-77 to 2,214,326 in 1991-92.”¹⁵ Further, a presumption that children should be educated in the most integrated setting possible¹⁶—what is also called “the least restrictive environment”¹⁷—has led to a sharp increase in the number of children with disabilities who are educated in the regular classroom. The percentage of students with learning disabilities who were educated entirely in regular classrooms increased by nearly twenty percent between 1986 and 1996, while the percentage of students receiving educational services in resource rooms or separate classrooms decreased substantially.¹⁸ In 1996, the U.S. Department of Education estimated that of the 5.5 million children receiving services under the IDEA (approximately fifty-one percent of whom had learning disabilities) about twenty-three percent received their instruction in separate classrooms, thirty percent received education in resource rooms, and ninety-five percent were served in general education schools.¹⁹

Congress created the integration presumption in 1974 to hasten *structural change* in the alternatives available to children with disabilities—to hasten the closing of disability-only institutions and the creation of other alternatives for children with disabilities.²⁰ In 1974, dis-

¹⁵ Naomi Zigmond et al., *Special Education in Restructured Schools: Findings from Three Multi-Year Studies*, 76 PHI DELTA KAPPAN 531, 532 (1995).

¹⁶ In order for states to receive funding under the IDEA, they must fulfill several requirements including the development of criteria for a free appropriate public education, the establishment of an individualized education program, the operation of the integration presumption, and the implementation of various procedural safeguards. The integration presumption rule states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C.A. § 1412(a)(5)(A) (West Supp. 2005).

¹⁷ *Id.* § 1412(a)(5).

¹⁸ John H. Holloway, *Inclusion and Students with Learning Disabilities*, EDUC. LEADERSHIP, Mar. 2001, at 86, 86.

¹⁹ U.S. DEP'T OF EDUC., EIGHTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (1996), available at <http://www.ed.gov/pubs/OSEP96AnIRpt>; see also Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students with and without Disabilities and Their Educators*, 20 REMEDIAL & SPECIAL EDUC. 114, 114 (1999) (reporting the results of the U.S. Department of Education study).

²⁰ I trace this history in Part I. Although this history is very clear, it has never been discussed in the case law under the IDEA. This Article therefore makes an important

ability-only institutions were prevalent, yet they were rarely serving the needs of children with disabilities attending or living in the institutions. They took children far from their homes, isolating them not simply from typically-developing children but from their own families, and often offered them little or no education.²¹ The integration presumption has helped achieve the goal of closing most of those schools; less than five percent of children with disabilities are currently educated in disability-only schools.²²

The integration presumption, however, has led to more than the closing of disability-only institutions. It has also come to mean that school districts should presumptively favor educating children in the regular public school classroom over other educational configurations within the regular public school, such as pull-out programs, resource rooms, or special education classes.²³ This Article will question this aspect of the integration presumption because, for some children, it hinders the development of an appropriate individualized educational program (IEP) as required by the IDEA.²⁴ The IEP that is developed must provide “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.”²⁵ As interpreted by the courts, this integration presumption tips the scale toward the most integrated environment possible within the public school building, even if the evidence with respect to the individual child might support a less integrated environment.²⁶ School districts are required to justify separate services for children with disabilities but are not required to justify fully including a child with a disability in the regular classroom.

At first glance, the breadth of the integration presumption is baffling. Children only qualify for assistance under the IDEA if they are not able to attain adequate educational success under the regular

contribution in identifying the underlying purpose of an important aspect of the IDEA.

²¹ See *infra* Part I.

²² Salend & Garrick Duhaney, *supra* note 19, at 114.

²³ The language of the integration presumption dictates this result. See 20 U.S.C.A. § 1412(a)(5) (West Supp. 2005) (requiring justification for placement in any setting other than the regular classroom). For further discussion, see *infra* Part I.B.

²⁴ The IDEA provides extensive requirements that school districts must follow for each child with a disability to create an IEP. These plans must (1) identify the child’s present level of achievement, (2) set annual benchmark goals, and (3) specify the services that each child is to receive. 20 U.S.C.A. § 1414(d) (West Supp. 2005).

²⁵ *Id.* § 1414(d)(1)(A).

²⁶ See *infra* Part I.B (discussing the integration presumption in practice and as interpreted by courts).

education program.²⁷ Each child needs an IEP because a regular program does not meet their educational needs. Why, then, would we presume that the regular classroom is the best program for them? If anything, we might presume that the regular classroom poses problems for these children such that a school district should have to demonstrate that it has made significant and effective changes to the regular classroom before placing a child with a disability in that environment. As John Holloway has noted: “When we consider that many students were first identified as being learning disabled precisely because of their lack of academic success in general education classrooms, we must ask, Is it educationally reasonable to place these students back in inclusive classrooms?”²⁸ But the IDEA makes the opposite presumption. It assumes that the regular classroom environment is superior to the other configurations that are often available to children with disabilities—special education, resource rooms, or pull-out programs—because it offers a more integrated education environment.

As early as 1978, some disability rights advocates did note the tension between individualized programs for children with disabilities and the integration presumption.²⁹ They argued that the integration presumption was a vehicle to hasten structural changes even if that presumption did not serve the best interests of some children.³⁰ They suggested that the need to close disability-only institutions and create

²⁷ A child is labeled as a “child with a disability” under the IDEA only if the child, because of disability, “needs special education and related services.” 20 U.S.C.A. § 1401(3)(A)(ii) (West Supp. 2005).

²⁸ Holloway, *supra* note 18, at 86.

²⁹ For example, Thomas K. Gilhool and Edward A. Stutman described the tension between structural reform and individualized plans:

As a practical matter, [individual process mechanisms] can and often do[] function to assure placement in the most integrated setting *among the settings available* for the appropriate education of a particular individual. Individualized determination procedures should, but as a practical matter usually do not, function to change the number and kind of alternative settings which are in fact available The burden of changing what is available must be discharged by systematic planning, reporting and enforcement mechanisms. The integration mandate cannot be implemented by individualizing devices alone.

Thomas K. Gilhool & Edward A. Stutman, *Integration of Severely Handicapped Students: Toward Criteria for Implementing and Enforcing the Integration Imperative of P.L. 94-142 and Section 504*, in STATE PROGRAM STUDIES BRANCH, U.S. OFFICE OF EDUC., DEVELOPING CRITERIA FOR THE EVALUATION OF THE LEAST RESTRICTIVE ENVIRONMENT PROVISION 195 (1978).

³⁰ *Id.*

more alternatives for children with disabilities was more important than creating the ideal IEP for each child.³¹ But now that disability-only institutions are used infrequently, it is time to refine the integration presumption to help it better achieve an adequate and appropriate education for children with disabilities.

Empirical data should help us decide the proper future direction for disability education policy.³² Neither the racial integration movement nor the disability integration movement relied heavily on empirical data in formulating their arguments for integration.³³ Looking back on *Brown* and its aftermath, Judge Robert Carter, one of the plaintiffs' lawyers in *Brown*,³⁴ observed that the civil rights lawyers involved in the school desegregation movement should have relied more strongly on research from professional educators in formulating remedies.³⁵

³¹ *Id.*

³² Empirical research can help us better understand the consequences of social and educational policy. For a thoughtful discussion of the challenges of using empirical research responsibly, see Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 853-73.

³³ The Supreme Court's initial conclusions about the harmful effects of segregation on African Americans were based on nonrandom studies in which African American children were asked to choose between a white doll and a black doll. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 n.11 (1954) (citing such a study, in which African American children associated positive personality traits with the white dolls). These studies, however, soon proved controversial and led some researchers to conclude that the young children in the doll studies preferred a doll whose skin most resembled the particular shade of their own skin, rather than making decisions in starkly racial terms. See *infra* Part III.A. Irrespective of how one feels about the validity of those studies, it is important to remember that there were no studies available at the time about the effectiveness of integration, given the novelty of the idea. By 1966, however, the effects of desegregation efforts came under close scrutiny with the publication of a two volume study by the U.S. Department of Education. See JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter COLEMAN REPORT] (fulfilling Congress's request for empirical data regarding racial integration in the nation's public schools).

³⁴ Robert L. Carter is a federal district judge in the Southern District of New York. For many years, he was the NAACP General Counsel, and he was a leading attorney in the *Brown* litigation. See Derrick Bell, *Introduction* to Robert L. Carter, *A Reassessment of Brown v. Board*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 20 (Derrick Bell ed., 1980).

³⁵ Robert L. Carter, *A Reassessment of Brown v. Board*, in SHADES OF BROWN, *supra* note 34, at 27 ("If I had to prepare for *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, I would seek to recruit educators to formulate a concrete definition of the meaning of equality in education, and I would base my argument on that . . ."). By contrast, Justice Clarence Thomas argues that the judiciary should not even consider the "unnecessary and misleading assistance of the social sciences" in determining the constitutionality of seg-

Similarly, disability rights advocates did not initially seek the integration presumption based on empirical literature on education.³⁶ In addition, Congress first adopted the integration presumption in 1974 without a foundation based on empirical arguments.³⁷ That rule currently exists in the Individuals with Disabilities Education Act (IDEA),³⁸ which Congress reauthorizes every five years.³⁹ Thirty years after enacting the integration presumption, Congress and the U.S. Department of Education should reexamine the interpretation and implementation of that rule in light of the existing empirical evidence on the educational needs of children with disabilities.

Close examination of the available empirical evidence demonstrates that the integration presumption is too broad. Although a structural remedy is often effective as a means to enhance substantive equality, one needs to be careful to make sure that the structural remedy remains effective and is not causing unwanted side effects. It is simplistic to assume that a structural remedy always enhances the substantive equality rights of a group; one should be vigilant by occasionally reexamining it.⁴⁰ The broad and varied umbrella of children's

regation in public education. *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

³⁶ See *infra* Part I.A.

³⁷ The rule was first introduced in the Education Amendments of 1974. Pub. L. No. 93-380, § 613(a)(13)(B), 88 Stat. 484, 582 (1974) (codified as amended at 20 U.S.C. § 613(a)(13)(B) (1975)). For further discussion, see *infra* Part I.A.

³⁸ 20 U.S.C.A. §§ 1400-1487 (West Supp. 2005). The integration presumption is found at 20 U.S.C. § 1412(a)(5) (West Supp. 2005). For further discussion, see *infra* Part I.B.

³⁹ In theory, Congress reauthorizes the IDEA every five years, but the last two reauthorizations were in 1997 and 2004. Pub. L. No. 108-446, 118 Stat. 2647 (2004); Pub. L. No. 105-17, 111 Stat. 37 (1997).

⁴⁰ In general, I support the antistatutory principle under which we should consider the history of discrimination against various groups in our society and recognize the importance of group-based remedies such as affirmative action to redress that history of discrimination. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-11 (1986) (arguing that the antistatutory perspective, rather than the antidifferentiation perspective, should be the standard of review in equal protection cases). Nonetheless, I also recognize that integration may not always be the best structural remedy to attain substantive equality. For example, I defend the existence of single-sex colleges in some situations. *Id.* at 1054-58. Structural remedies must be examined for their effectiveness under norms of substantive equality. This Article examines the structural remedy of integration within the disability context and asks whether it achieves its goal of substantive equality for children with disabilities.

I do not mean to suggest, nonetheless, that structural remedies should be constantly reexamined. In this context, thirty years have passed since the remedy was adopted. That seems like an ample period of time to merit reexamination. Similarly,

needs that comes within the category “disabled”⁴¹ further complicates the issue of remedies.⁴² We can identify a common substantive goal—the attainment of educational opportunities and positive outcomes for all children irrespective of their disability status. But we need to be careful to fashion a set of remedies that can assist the range of children with disabilities.⁴³

Justice Sandra Day O’Connor has recommended that race-based affirmative action be reexamined after twenty-five years. *See Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (stating that affirmative action policies should continue to face periodic review until race-neutral alternatives can be put in place). More frequent reexamination could undermine the effectiveness of a structural remedy because its opponents might refuse to comply with the remedy in the hope that it will be overturned.

⁴¹ For a general introduction to the panoply of perspectives on what it means to be “disabled,” see PAUL K. LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 1-19 (2003); RUTH O’BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* 3-6 (2001); *VOICES FROM THE EDGE: NARRATIVES ABOUT THE AMERICANS WITH DISABILITIES ACT* 3-25 (Ruth O’Brien ed., 2004). The social construction of disability is a broad topic that is beyond the scope of this Article. As a general matter, however, it is helpful to realize that individuals become disabled, in part, as a result of the physical and social environment in which they live. *See generally* MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 11-15 (1990) (explaining what the author calls the “dilemma of difference” in which specific traits lead to different social entitlements). For example, the lack of a curb cut at an intersection makes the person who uses a wheelchair disabled when that person tries to cross a street. If principles of universal design were used when we built structures, people who use wheelchairs would find themselves far less disabled.

Another aspect of the social construction of disability is the wide range of conditions that we lump under the category “disability.” In this Article, I will be focusing on the implications of the wide-ranging definition of disability because it creates policy challenges for Congress and the administrative agencies who design and implement disability rules. It should also be noted that these definitional problems are challenging for students who have multiple disabilities, such as those who use a wheelchair and have cognitive impairments. It is important to think of children with multiple disabilities as we try to create and implement new policies.

⁴² Not only are there many types of impairments such as visual, auditory, cognitive, mobility, and emotional, but there is a vast range of experiences within each of those categories. Moreover, there are children with multiple impairments who cross-cut several categories of disability. *See, e.g.*, Alana M. Zambone, *Summary of Part X, in 2 THE LIGHTHOUSE HANDBOOK ON VISION IMPAIRMENT AND VISION REHABILITATION* 1193, 1193 (Barbara Silverstone et al., eds. 2000) (“The increasing number of children with vision impairments who have additional disabilities further complicates efforts to determine incidence and prevalence for a variety of reasons, including limitations in the ability to measure vision in this population and lack of attention to vision in the face of numerous medical concerns.”).

⁴³ As Alana Zambone has noted: “To date, much of the controversy surrounding inclusion has not found its way into research of the characteristics of effective practices, models, and settings. Until it does, the field is at risk of basing practice on rhetoric and politics.” *Id.* at 1195.

In Part I, I will discuss the historical background of the integration presumption, its place in federal education law, and case law implementing the presumption. In Part II, I will survey the empirical literature concerning the education of children with disabilities and argue that the integration presumption is not warranted for certain categories of children with disabilities. In Part III, I will supplement the empirical literature on disability with the empirical literature on the effectiveness of racial integration to develop a set of factors that school districts can use to determine the appropriate configuration of educational resources for children with disabilities.⁴⁴ In Part IV, I will suggest that courts should assess whether school districts have in place a full range of options for children with disabilities so that the most appropriate option can be selected for them under the factors discussed in Part III. If a school district is offering a range of educational options to children with disabilities in learning,⁴⁵ then an integration presumption is not warranted.⁴⁶

⁴⁴ As I will discuss in Part III, I recognize that disability is not race and that one needs to be cautious in extrapolating from race to disability. Nonetheless, I will argue that the extensive literature on racial integration can inform the disability discussion.

⁴⁵ A disability in “learning” is a deliberately vague standard but is intended to encompass a broad range of impairments including cognitive, mental health, visual, and auditory impairments. It is not intended to include mobility impairments when the mobility impairment is not accompanied by another kind of significant impairment. Because there is no reason to presume that children with mobility impairments process information differently from other children, they should be presumptively educated in the regular classroom. I do not mean to suggest, however, that all children with cognitive, mental health, visual, or auditory impairments learn in a “different way,” or that they will necessarily learn in a “different way” throughout their lives. Nonetheless, a broad integration presumption is not warranted at the time in a child’s life that a particular impairment affects the way the child learns.

⁴⁶ Although I conclude that the integration presumption should be reinterpreted, I realize that my conclusions can be misused by those who have no commitment to children with disabilities. A derogatory cartoon in the online version of the *Washington Post* that features a drooling, cognitively impaired male in a wheelchair makes it clear that advocates for children with disabilities need to be vigilant to avoid backsliding. See Ted Rall, Editorial Cartoon, WASHINGTONPOST.COM, Nov. 8, 2004, available at <http://www.ucomics.com/rallcom/2004/11/08/>. In the Ted Rall cartoon, Charlie, who is a disfigured student with a disability, is featured drooling while making utterances like “erp!” and “goomba goom!” and shown having an “accident” in the classroom. Text representing narration says, “The ‘special needs’ kids make people uncomfortable and slow the pace of learning.” In the last frame, Charlie, still looking disfigured and in a wheelchair, is introduced as the teacher. Rall apparently reported that the cartoon was supposed to “draw an analogy to the electorate—in essence, the idiots are now running the country.” Dave Astor, *Washingtonpost.com Drops Ted Rall’s Cartoons*, EDITOR & PUBLISHER, Nov. 18, 2004, available at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=100. After extensive controversy about the cartoon, Rall was dropped from doing cartoons for washingtonpost.com. Michael Getler, Om-

I. THE INTEGRATION PRESUMPTION UNDER THE IDEA

A. *History*

Education has been an important topic in the civil rights struggle. The disability rights movement followed in the footsteps of the racial civil rights movement⁴⁷ in making education a top priority. Individuals with disabilities faced exclusion and segregation in education. In the early 1900s, states typically divided children into the categories of educable or uneducable. Uneducable children were excluded from public school attendance.⁴⁸ Beginning in the 1920s, a new category was introduced: the trainable but not educable.⁴⁹ Children in the “trainable but uneducable” category were sometimes required to perform labor with little or no compensation, causing commentators to complain that they were the victims of slave labor.⁵⁰ Children in the

budsman, *Drawing Complaints, Online & Off*, WASH. POST, Nov. 21, 2004, at B6. During the IDEA reauthorization debate, Senator Tom Harkin criticized the Rall cartoon saying that it “was one of the most egregious things I have ever seen.” 150 CONG. REC. S11546 (daily ed. Nov. 19, 2004) (statement of Sen. Harkin).

Thus, I hope this Article will be read in good faith by those who are trying to serve the interests of children with disabilities and not misused by those who might be willing to return to the days of warehousing students with disabilities in inhumane environments. Although I argue that the integration presumption is not warranted if a school district offers a range of educational options for children with disabilities, it would still operate to prohibit a school district from *only* offering segregated, disability-only options. The need to maintain a fallback integration presumption is reflected by commentary such as the Rall cartoon.

⁴⁷ African Americans focused on inequality in education in their civil rights efforts, culminating in the historic *Brown* decision. The Court’s decision used strong language to highlight the importance of education, concluding that a public education “must be made available to all on equal terms.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In addition, the *Brown* decision took the historical step of declaring that “[s]eparate educational facilities are inherently unequal.” *Id.* at 495. Congress soon followed this historic constitutional law decision with the Civil Rights Act of 1964. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., 42 U.S.C.). Title VI of that statute codified the central holding of *Brown* and became the vehicle for plaintiffs to seek to attain further educational equality. The literature on education for children with disabilities often cites those developments in arguing that children with disabilities should be educated in the most integrated environment possible. *See, e.g.*, HEW REPORT, *supra* note 7, at 31-32 (suggesting that early disability-rights litigation borrowed its anti-segregation stance from *Brown*).

⁴⁸ *See* Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 873 (1975) (noting that only those handicapped individuals functioning at a high academic level qualified for formal education in public schools).

⁴⁹ *Id.* at 874.

⁵⁰ For example:

“uneducable” or “untrainable” category were not educated at all.⁵¹ The number of children excluded from the public education system was massive. In 1974, it was estimated that there were one million children who were entirely excluded from public schools due to disability.⁵² Furthermore, of the six million children with disabilities who were attending public school, nearly half of them were probably receiving no special education services.⁵³

Congress first attempted to respond to this problem in 1966 when it added a new Title VI to the Elementary and Secondary Education Act of 1965 (ESEA).⁵⁴ In 1970, Congress repealed Title VI of the ESEA and created a separate act, the “Education of the Handicapped Act.”⁵⁵ The new act provided grants to the states in return for assurances that the states would design programs to “meet the special educational and related needs of handicapped children.”⁵⁶ This new law sought to consolidate the existing programs and established the Bureau of Education of the Handicapped within the U.S. Department of Health, Education and Welfare (HEW).⁵⁷ The law did not require states to educate all children with disabilities or specify *how* states were to educate children with disabilities. Nonetheless, it took an important historical step in giving states financial incentives to offer education to all children.

At about the same time, the courts also began to get involved in preventing the exclusion of children with disabilities from the public education system, particularly children with mental retardation. A group of plaintiffs brought a class action against the Board of Education of the District of Columbia, arguing that the system of excluding individuals with disabilities from the public school system violated the

[A] 1972 study of 154 institutions in 47 states, which represent 76 percent of existing facilities for the mentally retarded, found that 32,180 of 150,000 residents were participating in a work program, 30 percent of these receiving no pay at all, and an additional 50 percent receiving less than \$10 per week.

Paul R. Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567, 568 (1974).

⁵¹ Pennsylvania was typical of most states in excusing a school district from educating a child if the child is deemed “uneducable and untrainable.” See 24 PA. STAT. ANN. § 13-1375 (West 1992).

⁵² Burgdorf & Burgdorf, *supra* note 48, at 875.

⁵³ *Id.*

⁵⁴ Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191, 1204-08.

⁵⁵ Pub. L. No. 91-230, 84 Stat. 175 (1970).

⁵⁶ *Id.* § 604(a).

⁵⁷ *Id.* § 609.

law of the District of Columbia as well as the Equal Protection and Due Process Clauses.⁵⁸ Similarly, a class action was brought against the Commonwealth of Pennsylvania, arguing that its system of denying a public education to children with mental retardation violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁵⁹ The Pennsylvania case culminated with a consent agreement that was approved and adopted by the district court. The consent decree was broad-ranging, and Clause Seven articulated the integration presumption, stating:

It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the general educational policy that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.⁶⁰

This integration presumption went well beyond the court's findings. The court stated:

Plaintiffs do not challenge the separation of special classes for retarded children from regular classes or the proper assignment of retarded children to special classes. Rather plaintiffs question whether the state, having undertaken to provide public education to some children (perhaps all children) may deny it to plaintiffs entirely. We are satisfied that the evidence raises serious doubts (and hence a colorable claim) as to the existence of a rational basis for such exclusions.⁶¹

Yet, Clause Seven created a rule governing the assignment of children to special classes—it created a presumption that placement in a regular class was preferable to placement in a special education class. It did not merely require the admission of children with disabilities to the public schools; it suggested where they should receive their education within the building. Nowhere in the court's opinion did the judge explain why such a presumption was warranted. As we will see in Part III, there is not strong evidence that the placement of children with mental retardation in a regular classroom is better than placement in a special classroom.

⁵⁸ *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 873-75 (D.D.C. 1972).

⁵⁹ *Pa. Ass'n. for Retarded Children v. Pennsylvania (P.A.R.C.)*, 343 F. Supp. 279, 283 (E.D. Pa. 1972).

⁶⁰ *Id.* at 307.

⁶¹ *Id.* at 297.

In 1973, Congress held hearings on the Education for All Handicapped Children Act.⁶² The draft then pending in the Senate contained an integration presumption.⁶³ In the hearings that accompanied consideration of this bill, there was little discussion of an integration requirement. One speaker noted that many members of the deaf community preferred “to remain a society apart” and would not seek to maximize integrated education.⁶⁴ Another speaker discussed at length various aspects of the bill and how they connected to the recent special education litigation but then only briefly mentioned: “I welcome the emphasis placed on integration, to the maximum extent appropriate, of institutionalized children into regular schools.”⁶⁵ Like other speakers, he was primarily concerned with the need to provide an appropriate education to children with disabilities in a noninstitutionalized setting. He was not considering the exact form that education would take within a public school.

With the adoption of the Education of the Handicapped Amendments of 1974, Congress enacted an integration presumption, requiring states to adopt procedures to effectuate that presumption.⁶⁶ The educable/noneducable distinction was entirely eliminated. Neither

⁶² *Education for All Handicapped Children, 1973-74—Part 1: Hearing on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare, 93rd Cong. (1973).*

⁶³ It said:

To the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. at 11-12 (citing section 6(a) (6) of the then-pending draft of the bill).

⁶⁴ *Id.* at 87 (testimony of Dr. Philip Bellefleur, Council on the Education of the Deaf).

⁶⁵ *Id.* at 371-75 (statement of Professor Gunnar Dybwad, Advisory Committee on Special Education, Brandeis University).

⁶⁶ The statute required states to develop the following: procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, § 613(a) (13) (B), 88 Stat. 579, 582.

the House Report nor the Senate Conference Report discussed the integration presumption and why it was considered important to the statute.⁶⁷ Based on the historical context, in which courts were beginning to understand the need to close disability-only institutions, it appears that Congress was primarily concerned with using the integration presumption as a vehicle to closing disability-only institutions.

Congress's response to the needs of disabled children became much more sophisticated in 1975. The Education of All Handicapped Children Act of 1975 specifically stated the goal of "providing full educational opportunity to all handicapped children."⁶⁸ It also created much more significant procedural requirements for complying with the statute.⁶⁹ The integration presumption remained in the bill without substantive change. For the first time, the accompanying reports mentioned the landmark Pennsylvania and District of Columbia litigation that had resulted in broad-based consent decrees.⁷⁰ The integration presumption was mentioned in the House Report with the use of a parenthetical clause, but no justification was offered for this requirement.⁷¹ The other reports similarly restated the existence of the requirement but offered no discussion of it. These brief recitations reinforce the notion that Congress had begun to understand the need to offer children with disabilities more educational options besides inhumane, disability-only warehouses. But it seems unlikely that Congress closely studied the judicial opinions and consent decrees from the disability litigation.

The U.S. Department of Health, Education and Welfare (HEW) was required to provide reports to Congress on the implementation of the 1975 Act. It authored a major report in 1979 which would pre-

⁶⁷ See S. REP. NO. 93-1026, at 91-96 (1974) (Conf. Rep.) (discussing the amendments to the Education of the Handicapped Act but not addressing the integration presumption); H.R. REP. NO. 93-805, at 52-66 (1974) (discussing the purpose and history of the amendments but failing to mention the integration presumption).

⁶⁸ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612(2)(A)(i), 89 Stat. 773, 780.

⁶⁹ *Id.* § 615.

⁷⁰ See H.R. REP. NO. 94-332, at 3 (1975) (citing the *P.A.R.C.* litigation as the beginning of a "nationwide movement in both State and Federal courts establishing the principle that all handicapped children have a constitutional right to a public education"); S. REP. NO. 94-168, at 22-23 (1975) (quoting the *Mills* opinion as support for the notion that available education funds must be spent equitably on children with and without disabilities).

⁷¹ See H.R. REP. NO. 94-332, at 5 ("[T]his plan would insure that to the maximum extent possible handicapped children, including children in public and private institutions . . . are educated with children who are not handicapped.").

sumably have been read by the key members of Congress who worked on education and disability issues.⁷² Oddly, the report described the genesis of the integration presumption, which it labeled the “least restrictive alternative,” as coming from the Supreme Court’s decisions in *McCulloch v. Maryland*⁷³ and *Brown* and the outcomes of the litigation in Pennsylvania and the District of Columbia.⁷⁴ The reference to *McCulloch* does not occur in any of the reports accompanying the various disability-related education bills, so it is hard to know if Congress really derived the integration presumption from this seemingly irrelevant 1819 Supreme Court case concerning the power of the federal government to create a national bank.

The reference to *Brown* by the agency charged with developing federal education policy in the disability context, however, does reflect two important possibilities: (1) that Congress, like HEW, thought the history of racial integration in education was relevant to the development of sound policy in the disability field, and (2) that Congress, like HEW, thought integration might be constitutionally mandated in the disability context. Although race and disability are different, HEW’s instinct to think that the disability community could benefit from insights from the racial civil rights community seems sound. It has been true—as predicted from analogy to race—that new educational opportunities would be created once the segregated options were eliminated. In Part III, I will explore that analogy further to see what other insights might transfer from the race and education context to the disability and education context.

It turns out, however, that it is now clear that integration is not constitutionally required in the disability context. The Supreme Court has not attached strict scrutiny to disability classifications⁷⁵ although it has upheld Congress’s policy preference for integration in the disability context.⁷⁶ This combination of legal doctrines enables Congress and the U.S. Department of Education to decide exactly how much integration is appropriate in the disability education con-

⁷² HEW REPORT, *supra* note 7.

⁷³ 17 U.S. 316 (1819).

⁷⁴ HEW REPORT, *supra* note 7, at 31-32.

⁷⁵ See generally Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 689-93 (2000) (discussing the Supreme Court’s choice, in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), to apply rational basis scrutiny to an Equal Protection Clause case brought by mentally retarded plaintiffs).

⁷⁶ See *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999) (holding that Title II of the ADA “may require placement of [qualified] persons with mental disabilities in community settings rather than in institutions”).

text.⁷⁷ Because strict scrutiny does not attach to disability, Congress arguably has more flexibility in thinking about remedial options in the disability context than in the race context. The constitutional law with respect to disability was not clear in 1974, so we should not chide government officials for failing to have a crystal ball.⁷⁸ But thirty years after the enactment of the integration presumption, we can confidently say that it is not constitutionally mandated.⁷⁹ Thus, the integration presumption, as a constitutional matter, does not need to be interpreted broadly so that each child is constitutionally entitled to an integrated education on the basis of disability. Instead, we should think of integration as a means to an end. It should be used as a tool when it will help improve the educational outcome for children with disabilities.

The HEW Report, however, also reflects a modest shift in thinking about the integration presumption. Instead of being applauded for closing disability-only institutions, the integration presumption is applauded for helping to place more children with mental retardation in regular classrooms.⁸⁰ Nonetheless, the report did note that one should exercise some caution in evaluating the appropriateness of a “mainstreaming” placement for some children with disabilities and called for the collection of additional data on the decision-making process.⁸¹ It therefore did not endorse a strong integration presump-

⁷⁷ In 1979, Congress created the Department of Education and transferred power to administer the Education of the Handicapped Act from HEW to the Department of Education. Department of Education Organization Act, Pub. L. No. 96-88, § 301, 93 Stat. 668 (1979).

⁷⁸ The leading case on this issue was not decided until 1985. See *Cleburne*, 473 U.S. at 446 (declining to apply heightened scrutiny to the category of mental retardation).

⁷⁹ Most recently, in *Board of Trustees v. Garrett*, 531 U.S. 356, 366-68 (2001), the Supreme Court repeated the conclusion that disability classifications are not entitled to heightened scrutiny.

⁸⁰ For example, the HEW Report stated, “While Figure 2.2 shows that separate classes continued to be the predominant placement for mentally retarded children in 1976-77, it is impressive from a historical perspective that the proportion whose primary placement is the regular classroom is now 39 percent.” HEW REPORT, *supra* note 7, at 36. Figure 2.2 reflected that thirty-nine percent of children with mental retardation were educated in regular classes, and approximately fifty-one percent were educated in separate classes (but not separate school facilities). *Id.* at 171 fig.2.2.

⁸¹ The HEW Report stated the following:

Though the 1976-77 data suggest that States are applying the principle of least restrictiveness to the education of the handicapped, monitoring will probably always be necessary, not only for too much segregation but also for inappropriate “mainstreaming.” The situation might arise, for example, that a school would have so much difficulty accommodating the increased number of referrals to its special education programs that it would feel compelled to

tion with respect to the placement of children within a public school building but acknowledged the level of uncertainty that existed in the literature.

It was not until 1986 that the U.S. Department of Education formally called for the collection of empirical data on the effectiveness of various types of programs that were available to children with disabilities. Madeleine Will, Assistant Secretary of Education for the Office of Special Education and Rehabilitative Services, called for the restructuring of education for children with mild disabilities so that they could be educated in the regular classroom.⁸² Recognizing that there was no empirical literature supporting this integration approach, the Office of Special Education Programs established studies of the effectiveness of full inclusion as a research priority in 1985.⁸³ But some proponents of full inclusion objected to such research, arguing that integration is a moral imperative in the disability context, as it is in the race context, and therefore does not need to be justified by empirical research.⁸⁴ Beginning with Will's funding of such research, more re-

make "less restrictive" assignments of newly identified handicapped children to regular classrooms. Such children could superficially be said to have been "mainstreamed," even though they were being inappropriately served, a fact that might not be apparent unless placement decision-making processes were actually observed. In addition to monitoring the States, the Bureau [of Education for the Handicapped] has initiated a major study of placement decision-making.

In summary, it appears that many handicapped children are already receiving their education in a regular classroom setting and that appropriate alternative placements are in most cases available to accommodate handicapped children with special needs.

Id. at 39.

⁸² See Will, *supra* note 11, at 413-14 (discussing the challenge of providing special education services for students who, while not handicapped, have learning disabilities requiring "new strategies").

⁸³ Genevieve Manset & Melvyn I. Semmel, *Are Inclusive Programs for Students with Mild Disabilities Effective?: A Comparative Review of Model Programs*, 31 J. SPECIAL EDUC. 155, 156 (1997).

⁸⁴ See *id.* (discussing critics of Will's funding proposal). Ironically, Justice Clarence Thomas now argues that we should not rely on social science data because it is racist to presume, as the social science in *Brown* might be argued to, that

black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.

Missouri v. Jenkins, 515 U.S. 70, 122 (1995) (Thomas, J., concurring). Whereas earlier commentators may have asserted that we do not need empirical data because it is obvi-

search was generated on the effectiveness of various methods of teaching children with disabilities—full inclusion, pull-out programs, or segregated special education. I will discuss that research in Part III. Although Will faced criticism for supporting disability integration research, we are indebted to her foresight in the availability of a range of research on the education of children with disabilities in a variety of settings.

We can therefore see that HEW and the Department of Education have had an important historical role in recognizing the possible limitations of the integration presumption and calling for research on its effectiveness. The integration presumption was not developed by Congress in 1974 to dictate the configuration of resources offered to children with disabilities in the regular public school classroom. It was developed to close disability-only warehouses for children and encourage school districts to develop more humane environments in which children with disabilities could attain an appropriate and adequate education. As we will see, the courts have interpreted the integration presumption inconsistently with its original purpose. In some cases, the courts have entirely ignored the integration presumption's purpose of removing children from disability-only institutions. In other cases, the courts have applied the integration presumption too broadly, allowing it to interfere with a proper placement decision for a child with significant impairments in learning. Congress could rewrite the presumption to return it to its original purpose, or the agencies and the courts could help reorient the integration presumption to fulfill Congress's original purpose.⁸⁵

ous that blacks would benefit from desegregation, Thomas argues that we do not need empirical data because it is ridiculous to presume that blacks learn better merely because they are surrounded by whites. By contrast, I argue that we should explore what conditions correlate with good educational outcomes so that we can structure public policy consistently with that data.

⁸⁵ The remedy to this problem will depend, in part, on one's view of the importance of legislative history and legislative intent. It is well known that Justice Scalia believes that the courts should interpret the text rather than Congress's intent. See generally Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 22-23 (Amy Gutmann ed., 1997) (presenting a discussion of textualism as a judicial guide). For a critique of this view, see William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).

B. *The Disability Presumption in Practice*

In order for states to receive funding under the IDEA, they must meet various criteria, including compliance with the integration presumption rule, which states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁸⁶

Implementation of the integration presumption has been complicated, with disputes frequently arising concerning the education of children with significant cognitive or mental health impairments. The courts have varied in their willingness to implement the integration presumption in these contexts. As we will see below, the Sixth Circuit has been the strictest in implementing the integration presumption—applying it even in a case in which there arguably was evidence that the more segregated educational alternative was the better choice for the individual child.⁸⁷ When faced with a similar case, the Fifth Circuit allowed the school district to overcome the disability presumption.⁸⁸ Both the Fifth and Sixth Circuits appear to have taken the integration presumption seriously, helping the presumption achieve some of its intended structural reforms even if the courts' decisions did not necessarily reach the right educational result for the children in the litigation. By contrast, the Fourth and Eighth Circuits appear to be applying a weak version of the integration presumption that is

⁸⁶ 20 U.S.C.A. § 1412(a)(5) (West Supp. 2005). The integration presumption is *not* the same as a local school presumption. Sometimes, school districts are better able to integrate children into the mainstream classroom if they do not attend their local public school. This problem may be particularly true in rural school districts where schools are spread out and it is impossible to concentrate many specialists in each of the schools. *See, e.g.*, *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 695 (5th Cir. 1996) (upholding school district's decision to place child at school sixteen miles away from her home rather than nine miles away from her home because of the broader range of services available at the school further from her home). Like the Fifth Circuit, the Tenth Circuit has held that the integration presumption does not include the right to be educated at the local public school. *Murray v. Montrose County Sch. Dist.* RE-IJ, 51 F.3d 921, 929 (10th Cir. 1995). This Article does not question that decision.

⁸⁷ *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

⁸⁸ *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

neither achieving the integration presumption's desired structural reforms nor benefiting the individual child.⁸⁹ These inconsistent results suggest the need for clearer, national guidelines that are consistent with sound educational policy.⁹⁰

By contrast, the integration presumption appears to have worked better for children who do not have impairments in learning—children with mobility impairments or serious illnesses—because there is general agreement between parents and the school district that these children should be educated in a regular classroom. For such children, the dispute between parents and school districts has frequently been *which* regular public school a child should attend to attain a fully inclusive education rather than *whether* they should be mainstreamed into a regular public school. Courts have sometimes approved the school district's decision to place the child in a regular, but not local, public school because of the greater provision of medical or other specialized services at the nonlocal public school.⁹¹

⁸⁹ DeBlaay *ex rel.* DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); N.W. *ex rel.* A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).

⁹⁰ There is little consistency among the circuits in how they implement the integration presumption. The Third and Fifth Circuits have adopted a two-part test in which they first determine if education in a regular classroom can be achieved satisfactorily and, if not, determine whether the school district has placed the child in the most integrated environment possible. See *Daniel R.R.*, 874 F.2d at 1048 (explaining the two-part test as applied in the case of a boy with Down Syndrome); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir. 1993) (adopting the *Daniel R.R.* test in a case similar to *Daniel R.R.*). A “satisfactory” regular classroom placement is therefore chosen even if other placements might be superior, through the operation of the integration presumption. The Ninth Circuit applies a modified version of that test, considering the costs of mainstreaming the child in determining whether the regular program is satisfactory. See *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994) (adopting a four-factor balancing test that considers “(1) the educational benefits of placement fulltime in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the child] ha[s] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the child]”).

The Fourth, Sixth, and Eighth Circuits use the following test: “In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.” *Roncker*, 700 F.2d at 1063; see also *DeVries*, 882 F.2d at 879 (adopting the *Roncker* test; *A.W.*, 813 F.2d at 163 (holding that the *Roncker* test correctly interprets the Education for All Handicapped Children Act). In these circuits, even a mere showing that the more segregated setting is “superior” is not sufficient for the school district to institute that placement.

The Tenth Circuit has not yet decided which framework to employ. See *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004) (considering both the *Daniel R.R.* and *Roncker* tests, and finding them appropriate to different situations).

⁹¹ See, e.g., *Kevin G. v. Cranston Sch. Comm.*, 130 F.3d 481, 482 (1st Cir. 1997) (upholding decision to send a student with several severe medical conditions to a

Rather than involving the integration presumption, these cases have involved the question of whether children are entitled to be educated at their local public school.

The neighborhood public school problem can also arise in cases involving children with visual or auditory impairments. These children may need various kinds of services to enhance their ability to learn, although there is general agreement that they can be taught in a regular classroom for most, if not all, of the school day.⁹² A school district, however, may not be able to afford to place all of the specialized services for each child in each public school. In such circumstances, the courts have typically sided with the school districts while noting that the cases do not involve the integration presumption because the parents and school district are in agreement about the appropriateness of an education in the regular public classroom.⁹³

The question of whether Congress should mandate the education of children with disabilities at their closest neighborhood schools is an important issue that might have profound social implications, but it is beyond the scope of this Article. For my purposes, it is sufficient to observe that neither parents nor school districts frequently litigate the integration presumption for children who do not have impairments in learning because there is general agreement that these children be-

school with a full-time nurse rather than reassigning the nurse to the student's local school); *Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 1361 (8th Cir. 1991) (upholding decision to send child with spina bifida to a fully accessible school that was not the closest school to the student's home).

⁹² Nonetheless, the appropriate site for children with hearing impairments has been controversial. There has been a lively debate within the disability community about the Deaf Culture movement. See generally HARLAN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY*, at xi (1992) (challenging the view that deaf people are disabled and arguing that "the deaf community is a linguistic minority"). The deaf culture community strenuously advocates for schools in which the dominant mode of communication is American Sign Language. Bonnie Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 33-34 (1997). This debate has informed my argument that it is important for children and parents to have genuine choices in educational format so that one educational format is not devalued. Hence, a deaf environment, as an educational alternative, should be one option for a deaf child. Even if the child does not choose that educational environment, the existence of the alternative should help send the message that a deaf culture environment is valued.

⁹³ See, e.g., *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 695 (5th Cir. 1996) (child with hearing impairment educated at a regional day school rather than a regular school closer to the student's home so that the student could have access to broader range of services); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 153 (4th Cir. 1991) (child with hearing impairment educated at a high school other than the one closer to his home so that he could have access to "cued speech" services).

long in the regular classroom. In addition, I have found that the presumption is infrequently litigated for children with visual or hearing impairments because school districts often try to place such children in the regular classroom.⁹⁴ Parents and school districts are more likely to disagree with respect to the education of children with cognitive or mental health impairments. Thus, I will focus on those children when examining the case law and empirical literature to see what we can learn about the most appropriate educational configuration for them.

1. Rigid Application of the Integration Presumption

The most rigid example of the application of the integration presumption comes from a Sixth Circuit case in which it appears that application of the integration presumption even trumped evidence that a child with mental retardation *regressed* in the somewhat more integrated environment.⁹⁵ At the time of the relevant Sixth Circuit litigation, Neill Roncker was nine years old and severely mentally retarded. His IQ was estimated to be below fifty and his mental age was estimated to be two to three years old with regard to most functions.⁹⁶ Although the case involved the meaning of the “least restrictive alternative” rule, the choices available to Neill were pretty limited. He could attend a segregated school or he could attend a special education class at a regular school and therefore have access to typically-developing children for lunch, gym, or recess. At the segregated school, he would be educated with children of the same chronological and developmental age. In the special education program, he would be educated with other children with disabilities, many of whom would most likely be higher functioning. Because the special educa-

⁹⁴ *But see* Poolaw v. Bishop, 67 F.3d 830, 837-38 (9th Cir. 1995) (upholding placement of a child with auditory impairment in a school for the deaf 280 miles from his home where the evidence indicated that the child would receive no educational benefit from mainstreaming). Although there is not much litigation concerning children with visual or auditory impairments, it is still possible that school districts and parents have not been making appropriate decisions with respect to the education of those children. Alana Zambone, for example, argues that “much of the controversy surrounding inclusion [for children with visual impairments] has not found its way into research of the characteristics of effective practices, models, and settings. Until it does, the field is at risk of basing practice on rhetoric and politics.” Zambone, *supra* note 42, at 1195.

⁹⁵ *See* Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (“Neill’s progress, or lack thereof . . . is not dispositive . . .”).

⁹⁶ *Id.* at 1060.

tion program was housed in a regular public school, he would also have limited access to typically-developing children.

The school district recommended that Neill be placed in the segregated school. The parents objected and insisted that he be educated in the special education classroom within the regular public school. Everyone “agreed that Neill required special instruction; he could not be placed in educational classes with non-handicapped children.”⁹⁷ For eighteen months, during the pendency of the litigation, Neill was educated in the program chosen by his parents—in a class for severely mentally retarded children at a regular elementary school. Apparently, Neill made no significant progress, and even regressed, in this classroom setting, and the school district thought he would make more progress in the segregated school because he could be educated with children of his same age and ability.

The district court ruled for the school district, finding that Neill should be educated in the segregated school.⁹⁸ The Sixth Circuit reversed the district court, holding that it had not given sufficient weight to the “least restrictive alternative” rule. The court said that “since Congress has decided that mainstreaming is appropriate, the states must accept that decision if they desire federal funds.”⁹⁹ Elsewhere, the Sixth Circuit described the mainstreaming rule as “a very strong congressional preference.”¹⁰⁰

In applying this strong congressional preference, the Sixth Circuit gave little weight to the available evidence concerning Neill’s education. In the court’s words, even in a situation where the “segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.”¹⁰¹ Neill’s “progress, or lack thereof” was considered a “relevant factor” but “not dispositive” of the placement issue.¹⁰² If the school district could mimic the services offered by the segregated school at Neill’s regular public school, then that was the presumed superior outcome because of the mainstreaming available there. The fact that Neill apparently did not really have the ability to interact with other children was not even a factor in ap-

⁹⁷ *Id.* at 1061.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1062.

¹⁰⁰ *Id.* at 1063.

¹⁰¹ *Id.*

¹⁰² *Id.*

plying the mainstreaming presumption.¹⁰³ According to the dissent, Neill's parents argued that he should be educated in the regular school environment even "if the only benefit from such placement is to avoid the stigma of attending a special school."¹⁰⁴ It was not necessary for the evidence to reflect that Neill benefited from the interactions with typically-developing children at lunch, recess, and gym. Apparently, Neill did not interact with the typically-developing children; he only observed them.¹⁰⁵ His parents simply needed to invoke the mainstreaming presumption for Neill to be placed in a regular school.

The integration presumption appears to have been irrebuttable in *Roncker*. As the court said, "Since Congress has chosen to impose that burden . . . the courts must do their best to fulfill their duty."¹⁰⁶ Had the court required the competing options to be weighed against each other (without operation of a presumption), the outcome might have been different. For example, as I will discuss in Part II, there is empirical evidence that would have supported the school district's assertion that a child like Neill would perform better in a more segregated environment. Coupled with the available evidence about Neill's own performance, the school district might have prevailed in the absence of the operation of the integration presumption.

Supporters of the integration presumption would cite the *Roncker* case as evidence of why an integration presumption is necessary. This was not simply a case of determining which educational configuration made sense within a regular public school. It was a case involving the education of a child at a disability-only institution. It therefore went to the core of the purpose of the integration presumption—encouraging the closure of a disability-only institution.

But the *Roncker* case raises the question of what justifications should be permitted for education at a disability-only institution. In this case, the choice was between having Neill educated in special education classrooms within the public school versus having Neill educated in a disability-only institution where he would be among his own peers with respect to age and disability. Does he really benefit from being in a more integrated environment when he is segregated within

¹⁰³ *Id.* at 1064 (Kennedy, J., dissenting).

¹⁰⁴ *Id.* at 1065. It seems unlikely that Neill would have been aware of a concept as abstract as "stigma." Was it his parents who were concerned about the stigma of having a severely disabled child?

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1063.

that environment? As we will see in Part III, the evidence from our experience with racial integration is that integration does not have positive benefits when it is accompanied by classroom segregation through tracking or other mechanisms. Further, the evidence from the disability literature, which I examine in Part II, suggests that children with severe mental retardation are often unlikely to receive significant educational benefit from being educated in the regular classroom. Neill fits that pattern; no one suggested that he should be educated in the regular classroom.

A strong presumption against education in disability-only institutions makes sense for children who can benefit from spending at least part of their day in a regular classroom where they are exposed to the regular curriculum. In a case like *Roncker*, however, the integration presumption seems to serve a cosmetic benefit—creating the appearance of integration through the placement in a regular public school—without the child having a meaningful integrated experience. The purpose of closing disability-only institutions was to close inhumane warehouses that were not serving the educational needs of children with disabilities. The issue in the *Roncker* case should have been whether the disability-only institution was a high quality institution or a warehouse which provided little educational benefit to children. A strong articulation of the integration presumption diverted attention from that central issue and did not necessarily enhance Neill's education. He was placed in a regular public school irrespective of whether it could offer him more educational benefit than the segregated school. Despite the requirement that he received an "individualized" educational plan, the outcome of the case was decided on the basis of a presumption rather than individualized evidence of what program was most likely to benefit Neill.

2. Overcoming the Integration Presumption

In another case involving a child with mental retardation, the Fifth Circuit in *Daniel R.R. v. State Board of Education*¹⁰⁷ affirmed the school district's decision to place a child with severe mental retardation in a more segregated setting. Unlike *Roncker*, however, the more segregated setting was not housed in a disability-only institution. This case involved the question whether the child should be placed in a regular classroom or a special education classroom. Because of the application of the integration presumption, the court did not, as an

¹⁰⁷ 874 F.2d 1036 (5th Cir. 1989).

initial matter, weigh each educational alternative against the other. Instead, it evaluated the available educational programs only after determining that Daniel could not flourish at all in the regular classroom.¹⁰⁸

Daniel R.R. was a six-year-old boy who was severely mentally retarded. At the time of the litigation, he was in pre-kindergarten. His parents wanted Daniel to attend a special education class for half of the day and a regular pre-kindergarten class for the other half of the day. Initially, the school district complied with the request but then decided to move Daniel out of the regular classroom. It proposed to have Daniel spend his entire academic day in the special education classroom, allowing him to mix with typically-developing children only during lunch and recess. The parents objected to this change and eventually moved Daniel to a private school. The court's opinion contains no information about the private school—whether it was a regular private school or one devoted to children with disabilities.¹⁰⁹

The court permitted the integration presumption to be rebutted, but only on the basis of very strong evidence. The school district took the position that it need not “mainstream a child who cannot enjoy an academic benefit in regular education.”¹¹⁰ The parents took the position that the school district should mainstream Daniel “to provide him

¹⁰⁸ *Id.* at 1050-51. For another problematic example of a school district insisting on a fully integrated education despite evidence of the program not working, see *Fisher v. Board of Education*, 856 A.2d 552 (Del. 2004). The child in that case, Thomas Fisher, was diagnosed as learning disabled in second grade. By fifth grade, a nationally certified school psychologist reported:

Despite having Thomas as a student for his entire school career, the school district has maintained his placement in an inclusion program, which provided accommodations and assistance but no remediation to improve his functional literacy skills. This has worsened Thomas's situation overall and has resulted in secondary behavior concerns.

Although the school district could have provided Thomas with an appropriate program and placement beginning in the first grade, this was never offered. Rather, the district continued to cling to its inclusion model as the only available option under the least restrictive environment criteria for program and placement.

Id. at 555. After several years of litigation, Thomas's parents prevailed and succeeded in placing Thomas in a special school with a very low teacher-student ratio, consistent with the psychologist's recommendation. To reach that result, however, the Delaware Supreme Court had to conclude that “Thomas did not receive a meaningful educational benefit from the program provided by the School District.” *Id.* at 559. As in *Daniel R.R.*, the court could only consider other educational possibilities *after* concluding that Thomas regressed in the regular educational program.

¹⁰⁹ *Daniel R.R.*, 874 F.2d at 1040.

¹¹⁰ *Id.*

with the company of nonhandicapped students.”¹¹¹ The court identified several factors which could guide it in determining whether the integration presumption should be overcome in a particular case: (1) “whether the state has taken steps to accommodate the handicapped child in regular education,”¹¹² (2) “whether the child will receive an educational benefit from regular education;”¹¹³ and (3) “what effect the handicapped child’s presence has on the regular classroom environment and, thus, on the education that the other students are receiving.”¹¹⁴

The court found that the evidence was so stark that the school district could overcome the integration presumption. It concluded that Daniel received no educational benefit from the regular classroom even with supplemental assistance because the curriculum would have to be modified “beyond recognition” for Daniel to benefit.¹¹⁵ Further, the court found that Daniel did not participate in any class activities; thus, mainstreaming merely resulted in giving Daniel an “opportunity to associate with nonhandicapped students.”¹¹⁶ Arguably, the mainstream classroom even caused some harm to Daniel because he was so exhausted from the full day of programming that he sometimes fell asleep at school and might have developed a stutter from the stress.¹¹⁷ Applying the final factor, the court found that Daniel’s presence harmed the other students because of the disproportionate amount of time that the teacher had to devote to Daniel’s needs. The court found that the “instructor must devote all or most of her time to Daniel.”¹¹⁸

The court was correct to take the integration presumption seriously because the option proposed by the school district resulted in the segregation of the child within the regular public school building. The parents preferred a more genuinely integrated approach under which their child was educated in the regular classroom. Again, borrowing from the racial literature which I will discuss in Part III, one

¹¹¹ *Id.*

¹¹² *Id.* at 1048.

¹¹³ *Id.* at 1049. That “inquiry must extend beyond the educational benefits that the child may receive in regular education” when assessing whether the child will “suffer from the [mainstreaming] experience,” and may consider the benefits of integration on other areas of development. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1050.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1051.

¹¹⁸ *Id.*

could surmise that Daniel would lose many of the benefits of integration if he were segregated through special education tracking.

The evidence from the experience with racial integration in the United States¹¹⁹ suggests caution in considering whether proposed tracking in a segregated environment within the public school is warranted. But disability is dissimilar from race and there can be strong, legitimate reasons for a different style of teaching and curriculum for a child with a disability. The requirement that the school district demonstrate that Daniel could attain *no* educational benefit in the more integrated environment¹²⁰ is unwarranted because skepticism about the value of special education for children with mental retardation should not be so profound. As I will discuss in Part II, there is evidence in support of a segregated educational environment for many children with mental retardation.

The “no educational benefit” standard can have two adverse consequences. First, it can cause school districts to fear recommending a more segregated setting for children with mental retardation even if their educational professionals make that recommendation on their genuine evaluation of the children’s best interests. Second, it can force school districts to exaggerate the facts to support a legal argument. *No* educational benefit is a very harsh standard. Courts can be skeptical of repeated requests by school districts to educate children in segregated settings without going so far as to require the existence of *no* educational benefit in the more integrated setting, especially when the empirical literature does not support deep skepticism.

An important feature of the school districts involved in the *Roncker* and *Daniel R.R.* litigation is that the districts appeared to have a full range of educational programs available. Inclusion in a regular classroom, special education programming within the regular public school, and disability-only institutions all appeared to be available. The question was which of these programs fit the needs of Neill and Daniel, not whether a full range of programming should exist.

¹¹⁹ See *infra* Part III (discussing racial integration in education).

¹²⁰ See *Daniel R.R.*, 874 F.2d at 1050 (“[The court must] determine that education in the classroom cannot be achieved satisfactorily . . .”). The Fifth Circuit used the same approach in *Brillon v. Klein Indep. Sch. Dist.*, 100 Fed. Appx. 309, 315 (5th Cir. 2004), to conclude that the school district could educate the child, Ethan, in a special education classroom. The court concluded that the second grade curriculum “would have to be modified beyond recognition” for Ethan to participate in the regular school environment. *Id.* at 313 (internal quotation marks omitted).

These cases stand in contrast to those involving school districts that have not created a range of programming for children with disabilities, where the integration presumption has not served its structural purpose of encouraging the creation of a range of programming. These cases will be discussed in the next section, which will show that the integration presumption needs to continue to serve its core, structural purpose while also better serving children within school districts that offer a continuum of services.

3. Disregarding the Integration Presumption

The strongest argument for implementing the integration presumption is that it hastens structural reform by making educational opportunities other than disability-only institutions available for children with disabilities. Nonetheless, some courts have failed to implement the integration presumption to achieve this structural end. Examples from the Fourth and Eighth Circuits demonstrate the continuing need for operation of the integration presumption as a means of increasing the available educational options for disabled children.

The facts in *N.W. ex rel. A.W. v. Northwest R-1 School District*,¹²¹ an Eighth Circuit case, are similar to those in *Roncker*. A.W. was an elementary-school-aged boy with Down Syndrome who the school district contended had severe mental retardation. The school district sought to place him in State School No. 2, while his parents wanted him to be educated in House Springs Elementary School. As in *Roncker*, everyone agreed that it did not make sense for A.W. to take academic classes with typically-developing children. If he attended House Springs, he would be educated in a special, self-contained classroom with a teacher trained to meet his special needs.¹²² Nonetheless, were A.W. to attend House Springs, he could interact with typically-developing children on the bus to school, at lunch, at recess, and in activities such as physical education. The trial court had concluded, however, that A.W. would merely observe, rather than participate with, typically-developing children during these various encounters.¹²³

Although the record is unclear in *A.W.*, it appears as if the school district did not have a well developed special education program at House Springs. In order to educate A.W., the school district would

¹²¹ 813 F.2d 158 (8th Cir. 1987).

¹²² *Id.* at 161 n.4.

¹²³ *Id.* at 161 n.5.

have to offer him a new room designed for his specific needs. That, in turn, raised the specter of substantial costs. As described by the trial court:

The specific difficulty with placement at the House Springs School is that there is no teacher who is certified to teach severely retarded children like A.W. The addition of a teacher is not an acceptable solution here since the evidence before the Court shows that the funds available are limited so that placing a teacher at House Springs for the benefit of a few students at best, and possibly only A.W., would directly reduce the educational benefits provided to other handicapped students by increasing the number of students taught by a single teacher [sic] at [State School No. 2].¹²⁴

The district court ruled for the school district, and the Eighth Circuit affirmed the district court opinion, finding that the district court could consider the cost to the school district of A.W.'s attendance at House Springs.¹²⁵ Consideration of cost therefore trumped the integration presumption. The integration presumption did not become a vehicle to require the school district to educate children with disabilities in integrated settings rather than exclusively in separate schools. Possibly, the Eighth Circuit did not understand the structural purpose behind the integration presumption and therefore allowed the cost of creating alternative placements to trump the integration presumption.

Similarly, the Fourth Circuit has been too eager to overcome the integration presumption without a demonstration that a school district has made available a range of educational programs for children with disabilities. Michael DeVries was a seventeen-year-old boy with autism and a measured IQ of seventy-two.¹²⁶ Despite low academic achievement, Michael had successfully worked for three hours every other day as a hamburger assembler at a Burger King and commuted to work without assistance on public transportation. His mother wanted him to attend the local public high school which served 2300 students, but the school district insisted that he attend either a private day school for children with disabilities or a local vocational school. DeVries's attorney sought to enter into evidence the fact that no autistic children, and only a small percentage of multihandicapped and retarded children, attended their home-base schools within the school

¹²⁴ *Id.* at 161.

¹²⁵ *Id.* at 163.

¹²⁶ DeBlaay *ex rel.* DeVries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989).

district.¹²⁷ The district court excluded the proffered evidence and the court of appeals concluded that the refusal was a harmless error because there was unlikely to be any substantial probative value from that evidence.¹²⁸ If true, however, that evidence would have helped demonstrate that the school district was not making available a continuum of services in the public schools and was not engaging in an individualized decision about what services were appropriate for children with significant cognitive or mental health impairments.

This case did *not* involve a fact pattern where a rural public school system could not realistically place specialists at each of its schools and therefore sought to place children with disabilities at only some of its regular public schools. Instead, a public school system had apparently decided not to allocate resources for children with autism or cognitive impairments at its large public high school. This is exactly the type of problem that the integration presumption is supposed to solve. Had the court been more aware of the purpose behind the integration presumption, it might have used it more effectively to attain that structural reform.

In sum, the case law is unsatisfactory. On the most basic level, the integration presumption does not always lead to structural reforms that would ensure that school districts offer children with cognitive impairments the opportunity to be educated in a regular public school. In addition, none of the leading circuit court cases does a satisfactory job in determining what educational configuration makes sense for a child with mental retardation. The integration presumption arguably interfered with the Fifth and Sixth Circuits' evaluations because it precluded an even-handed analysis, while in the Fourth and Eighth Circuits the presumption was not given sufficient weight. The results in the Fourth and Eighth Circuits make it clear that there is a significant risk that more school districts might seek to educate children in disability-only institutions in the absence of an integration presumption.¹²⁹ The integration presumption should be returned to

¹²⁷ *Id.* at 880.

¹²⁸ *Id.*

¹²⁹ The integration presumption worked well to avoid that problem recently in the Tenth Circuit. Despite evidence that the child, who had an autism spectrum disorder, would benefit from placement in a regular educational program, the school district only offered to place her in a preschool populated predominantly by children with disabilities. See *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 968 (10th Cir. 2004) ("Although Nebo considered the mainstream setting of Appellants' choice, Nebo offered Park View as the only school placement that it thought appropriate for K.B."). It is important for courts to continue concluding that school districts are in violation of

its original purpose by being a vehicle to encourage school districts to create more than disability-only options for children while not displacing sound educational choices at school districts that have available a full continuum of educational options for children with disabilities.

In thinking about this issue, recalcitrant school districts that may not be seeking to serve the interests of children with disabilities should not be the prototypical model. Most school districts are probably genuinely interested in serving their children with disabilities, as well as genuinely interested in complying with the law and avoiding litigation.

There are at least three ways that these background norms can change. Congress could amend the IDEA to soften the articulation of the integration presumption. The Department of Education could promulgate regulations that provide a more flexible interpretation of the existing integration presumption. Or, the courts could try to interpret the integration presumption in a way that is more consistent with Congress's intentions. School districts are likely to be risk-averse and follow federal law rather than seek litigation if these changes were to be made. At present, the background norm is a strong integration presumption that neither school districts nor parents are likely to challenge even if it is not serving the child's best interests.¹³⁰ Parents are likely to be risk-averse in the education setting and are not likely to challenge the school district's decision. They are unlikely to bring a lawyer to an IEP meeting and, as people who have to work coopera-

the IDEA when they do not offer a continuum of placements for children with disabilities, instead offering only a segregated placement. As I discuss in the Conclusion, *infra*, my approach would achieve this result because school districts would not be permitted to offer only one educational option.

¹³⁰ For example, when my son was three, the school district placed him in a special education class for preschoolers for roughly three hours each day. He spent the rest of the day in a typical preschool classroom. When he was in the special education classroom, children from the "typical" classes were brought in a few times a week for an hour or so to act as "typical" role models. The school district apparently brought in the "typical" role models to comply with the IDEA since they were otherwise educating these children for three hours per day in a segregated environment. From my vantage point as a parent, it appeared that they were mechanically complying with the integration presumption rather than asking whether those children needed exposure to "typical" role models, since many of the children were spending six or more hours a day in regular classrooms in addition to the special education classroom. There are many reasons to think that the role modeling was ineffective, especially because many of the children with disabilities were preverbal and needed intensive one-on-one work with an adult. The children brought in as "typical" role models, given their young age, posed a considerable burden on the special education staff. The integration presumption, read broadly, however, precludes individualized consideration of whether the role modeling was appropriate and set an important background norm.

tively with the school district over time, they are unlikely to risk antagonizing the school system by challenging its educational decisions.¹³¹ Thus, the school district's recommendation is likely to govern the placement of the child in the school even if it is not consistent with sound educational practices.

If Congress, the Department of Education, or the courts were to give school districts more leeway in choosing educational options for children with disabilities, what factors should they require school districts to consider in determining educational placements? In the next two Parts, I will examine the literature from disability and race to see what factors would be most appropriate.

II. DISABILITY-BASED EMPIRICAL LITERATURE

Although Congress has presumed that a fully integrated education is preferable for children with disabilities, education researchers have considered this issue to be an open question for many types of disabilities that affect a child's ability to learn. In Part I.B, we saw the courts struggle with the integration presumption for children with cognitive impairments or mental health impairments. Should they look for evidence of no educational benefit to overcome the integration presumption? Or is a more even-handed approach appropriate if the school district has available an array of educational alternatives? In this Part, I will survey the literature on children with (1) mental retardation, (2) emotional or behavioral impairments, and (3) learning disabilities, to determine whether a presumption for full inclusion is appropriate and, if not, what factors might guide school districts and courts in thinking about the appropriate configuration of educational resources for these children. These studies support the conclusion that a fully integrated education, with proper support in the mainstream classroom, is appropriate for some children with disabilities, but it makes little sense to *presume* this result in advance of an individualized evaluation.

¹³¹ See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 169 (arguing that parents may be unwilling to jeopardize relationships with school officials by challenging educational decisions).

A. Mental Retardation

The argument for the integration presumption largely arose in the mental retardation context. Cases involving children with mental retardation resulted in the first consent decrees, which formed the basis for the integration presumption under the IDEA.¹³² A close examination of the empirical research underlying those arguments, however, reveals that the researchers did not necessarily argue for full inclusion. Instead, they argued for the closing of disability-only institutions for children with mental retardation.

In 1968, Lloyd Dunn called for the elimination of schools for children with mild mental retardation based on evidence from the racial civil rights movement showing that academically disadvantaged African American children in racially segregated schools made less progress than those of comparable ability in integrated schools.¹³³ But Dunn did not call for full integration. Instead, he proposed pull-out, remedial resource rooms, staffed by special education teachers as a way to achieve a more integrated and effective education, although he did note that full inclusion might work for children with IQs in the seventy to eighty-five range (mild mental retardation).¹³⁴ Dunn's literature review was based on studies of a mentally retarded population with IQs of up to eighty-five, and he only argued against special class placements for children in the IQ range of seventy to eighty-five, but his work was soon applied to arguments for full inclusion for children with IQs in the fifty to seventy range.¹³⁵

More recently, Douglas and Lynn Fuchs questioned studies that argue for full inclusion for children with mental retardation.¹³⁶ They

¹³² See *P.A.R.C.*, 343 F. Supp. 279 (E.D. Pa. 1972) (involving a class action on behalf of disabled children challenging their exclusion from public schools); *supra* Part I.A (discussing the history of the IDEA).

¹³³ Lloyd Dunn, *Special Education for the Mildly Retarded—Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5, 7 (1968).

¹³⁴ GARRY HORNBY ET AL., CONTROVERSIAL ISSUES IN SPECIAL EDUCATION 70 (1997) (noting that Dunn's argument applies to children with IQs between seventy and eighty-five).

¹³⁵ For a general discussion of this problem, see *id.* at 68-70 (reviewing the development of more recent theories that extend Dunn's work to lower-IQ groups). Carlberg and Kavale corroborated Dunn's conclusions, finding that students with mental retardation in regular class placements performed as well, academically, as those placed in special classes. Conrad Carlberg & Kenneth Kavale, *The Efficacy of Special Versus Regular Class Placement for Exceptional Children: A Meta-Analysis*, 14 J. SPECIAL EDUC. 295, 304 (1980).

¹³⁶ Douglas Fuchs & Lynn S. Fuchs, *What's "Special" About Special Education?*, 76 PHI DELTA KAPPAN 522 (1995).

contended that such studies were seriously flawed because “the researcher rarely assigned the disabled students at random to special education and mainstream classes. . . . [S]chool personnel had assigned students to programs to suit their own pedagogic purposes long before the researcher showed up, with the consequence that the mainstreamed students were stronger academically from the study’s start.”¹³⁷

Similarly, Bryan Cook argued that students with mental retardation frequently need the skills of a special education teacher that a regular classroom teacher is unlikely to have.¹³⁸ Although students with severe and obvious disabilities may be well accepted in the regular classroom, Cook argued that surveys of regular classroom teachers reveal that they “do not know how to provide instruction that meets the unique needs of students with obvious disabilities.”¹³⁹ Teachers “feel ill-prepared to discuss a student [with severe disabilities] with a parent and do not feel they know how to appropriately instruct that student.”¹⁴⁰ Prior studies may have found that students with severe disabilities fare well in the regular classroom, but Cook cautioned that those results simply reflected a model of differential expectations. “Because teachers can readily recognize the disabilities of their included students with severe and obvious disabilities (e.g., autism or multiple disabilities), atypical behavior and performance appears to be anticipated, explained, and excused and does not, therefore, engender teacher rejection.”¹⁴¹ Tolerance should not be equated with genuine education.

Researchers of children with mental retardation are not uniform in their generalizations. Possibly, children with mild mental retardation fare better in the regular classroom than children with severe mental retardation. Rather than presuming that a particular configuration of educational resources works for such children, however, it would make sense to weigh the evidence in a particular case and to consider whether the regular classroom teacher has the skills necessary to provide the child with an appropriate and adequate education.

¹³⁷ *Id.* at 526.

¹³⁸ Bryan G. Cook, *A Comparison of Teachers’ Attitudes Toward Their Included Students with Mild and Severe Disabilities*, 34 J. SPECIAL EDUC. 203, 210 (2001).

¹³⁹ *Id.* at 211.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 209.

B. Emotional or Behavioral Impairments

The education literature does not support a strong presumption that children with emotional or behavioral impairments should be fully included in the regular classroom. Conrad Carlberg and Kenneth Kavale reviewed fifty independent studies comparing special education with full inclusion and, in general, found no differences based on type of placement. "Thus, regardless of whether achievement, personality/social, or other dependent variables were chosen for investigation, no differential placement effects emerged across studies."¹⁴² Nonetheless, they did find an effect based on type of disability. "The findings suggest no justification for placement of low-IQ children . . . in special classes. Some justification in the form of positive gain in academic and social variables was found for special class placement of LD [learning disabled] and BD/ED [behaviorally, emotionally disturbed] children."¹⁴³ The authors therefore concluded:

This finding suggests that the present trend towards mainstreaming by regular class placement may not be appropriate for certain children. Special class placement was not uniformly detrimental, but appears to show differential effects related to category of exceptionality. MacMillan (1971) warned that "special educators must not allow the present issue to become one of special class versus regular class placement lest they find themselves in a quagmire analogous to that which resulted from the nature-nurture debate over intelligence."¹⁴⁴

Similarly, Paul Sindelar and Stanley Deno reviewed seventeen studies and concluded that "resource programs can be effective in improving the achievement of children identified by teachers as exhibiting learning or behavior problems."¹⁴⁵

The previous two literature reviews were conducted more than twenty years ago. In a more recent article, James Kauffman, Teresa M. Riedel, and John Wills Lloyd offered an anecdotal assessment of what kinds of programs work best for students with severe emotional or behavioral disorders.¹⁴⁶ Based on interviews of teachers, administrators,

¹⁴² Carlberg & Kavale, *supra* note 135, at 304.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 304-05 (quoting Donald L. MacMillan, *Special Education for the Mildly Retarded: Servant or Savant?*, 2 FOCUS ON EXCEPTIONAL CHILD. 1, 8 (1971)).

¹⁴⁵ Paul T. Sindelar & Stanley L. Deno, *The Effectiveness of Resource Programming*, 12 J. SPECIAL EDUC. 17, 24 (1978).

¹⁴⁶ See James M. Kauffman et al., *Inclusion of All Students with Emotional or Behavioral Disorders? Let's Think Again*, 76 PHI DELTA KAPPAN 542, 543-44 (1995) (discussing the

and mental health personnel, the researchers concluded that the following conditions are necessary for educating these students: “1) a critical mass of trained, experienced, and mutually supportive personnel located in close physical proximity to one another and 2) a very low pupil/staff ratio (approximately 5:1 for students in day or residential treatment and 1:1 for the most severely disabled students).”¹⁴⁷

Kauffman and his colleagues concluded that regular classrooms are extremely unlikely to meet those criteria. On the other hand, they noted that “special schools and classes can be made safe, accepting, valuing, and productive environments for these students.”¹⁴⁸

Hence, as with students with mental retardation, the empirical literature does not support an integration presumption. Rather, it supports a more individualized approach where one assesses which environment might be most productive for the individual student.

C. *Learning Disabilities*

Studies of children with learning disabilities suggest that they often fare poorly in the regular classroom. Sindelar and Deno found that resource programs were effective in improving the academic achievement of students with learning disabilities as compared with the achievement of students simply placed in regular classrooms without resource support.¹⁴⁹ Similarly, Carlberg and Kavale found that students with learning disabilities in special classes (both self-contained and resource programs) had a “modest academic advantage . . . over those placed in regular classes.”¹⁵⁰

One reason that these early studies reported such poor results for students in regular classrooms is that these students may not have been receiving adequate support in the regular classrooms. By con-

common characteristics of the most effective programs for students with emotional or behavioral disorders).

¹⁴⁷ *Id.* at 544.

¹⁴⁸ *Id.* at 546. It is important to note that this study is discussing children with severe emotional or behavioral disorders. Kauffman and his colleagues recognize that children with severe mental health disabilities have historically been institutionalized in inappropriate settings, therefore spurring on calls for inclusion. Nonetheless, they conclude that “overenthusiasm for the regular school and the regular classroom as the sole placement options for students with disabilities has the potential for creating an equal tyranny.” *Id.*

¹⁴⁹ Sindelar & Deno, *supra* note 145, at 24.

¹⁵⁰ Zigmond et al., *supra* note 15, at 532.

trast, they were receiving special services if they were in self-contained special education classes or pull-out programs.

Naomi Zigmond sought to examine strong inclusion models to see if they produced better results than pull-out programs for children with learning disabilities. She analyzed three inclusion models which focused on restructuring mainstream instruction to increase the classroom teacher's capacity to accommodate learning activities that met a greater range of student needs.¹⁵¹ These were well-funded programs sponsored by major research universities seeking to incorporate validated teaching techniques. She found that the percentage of students with learning disabilities who made average or better gains than typically-developing students was an average of thirty-seven percent across sites.¹⁵² Forty percent of the students in the study recorded gains of less than half the size of the grade level averages—what she described as a “disturbing rate.”¹⁵³ Based on these findings, she concluded “that general education settings produce achievement outcomes for students with learning disabilities that are neither desirable nor acceptable.”¹⁵⁴

Admittedly, the Zigmond study did not compare students in full-inclusion placement with students receiving pull-out services.¹⁵⁵ As

¹⁵¹ *Id.*

¹⁵² *Id.* at 533-40.

¹⁵³ *Id.* at 538.

¹⁵⁴ *Id.* at 539.

¹⁵⁵ One problem with many of these studies is that they compare one group of children with disabilities to another group of children with disabilities, rather than comparing them to typically-developing children. Children with mental retardation may do better in a regular classroom than in a resource room but, overall, they may make insignificant academic progress. One goal of special education is to help children with disabilities narrow the gap between their performance and that of their typically-developing peers. None of these studies were able to report such findings. The goal of the IDEA is to provide children with disabilities an *adequate* education. It is hard to know if the education is adequate if one does not measure progress over time, comparing children with disabilities to typically-developing children.

Douglas Martson designed a study that overcame that problem. He compared the reading progress of students in three different delivery models: inclusion only, combined services, and pull-out only. Douglas Marston, *A Comparison of Inclusion Only, Pull-Out Only, and Combined Service Models for Students with Mild Disabilities*, 30 J. SPECIAL EDUC. 121, 123-24 (1996). In the combined services model, students received special instruction in a pull-out resource room and in general education through a team-teaching model. *Id.* at 123. Marston found that students in a combined-services model made the most progress. *Id.* at 125-27. The students in the combined-services model typically moved from the fifteenth to the twentieth percentile, whereas students in the full-inclusion or resource-only model often made no progress in comparison with typically-developing children. *Id.* at 130.

Zigmond notes, however, the results from her study are deeply disappointing for full inclusion because the “three projects invested tremendous amounts of resources—both financial and professional—in the enhancement of services for [learning disabled] students in the mainstream setting.”¹⁵⁶ It is certainly possible that pull-out programs that invested equal amounts of resources as those invested in full-inclusion programs would produce better results.¹⁵⁷

Interestingly, however, Martson found that special education resource teachers did not pursue fully inclusive models when they were given the latitude to do so. “[O]f the average 946 minutes per week they devoted to direct instruction with students with disabilities, 561 minutes, or 59%, of their instructional time occurred in pull-out settings.” *Id.* at 129. Special education teachers, themselves, therefore realized the relative ineffectiveness of full inclusion and tried to incorporate a more collaborative model into full-inclusion programs. Special education teachers also preferred the combined services model. Of the three teaching models, 71.2% showed moderate or significant satisfaction with the combined-services model, 58.9% with the pull-out only model, and 40.3% with the inclusion-only model. *Id.* To the extent that we value these teachers as having expertise based on professional experience, the data are not very supportive of a full-inclusion model.

¹⁵⁶ Zigmond et al., *supra* note 15, at 539.

¹⁵⁷ The Zigmond study focused on the poor results that were achieved for a majority of students in a well-funded, full inclusion program. Critics of this study emphasize that there was no basis upon which to conclude that resource rooms or pull-out programs would have produced better results for these students. Moreover, critics argue that it is unrealistic to expect students with disabilities to make progress comparable to their peers. Nancy Waldron and James McLeskey argue the following:

[W]e would concur with several other investigators who contend that the criterion for judging [Inclusive School Programs] should not be whether students with disabilities are making progress that is comparable to grade-level peers (which is tantamount to saying that the disability must be ‘cured’), but rather a more appropriate criterion should be that students with disabilities make at least as much progress in an inclusive setting as they would make in a noninclusive setting.

Nancy L. Waldron & James McLeskey, *The Effects of an Inclusive School Program on Students with Mild and Severe Learning Disabilities*, 64 *EXCEPTIONAL CHILD* 395, 402 (1998) (citations omitted). Using such criterion, Waldron and McLeskey found that students with severe learning disabilities made comparable progress in reading and math in pull-out and inclusion settings, but students with mild learning disabilities were more likely to make gains commensurate with typically-developing children in reading when educated in inclusive environments than when receiving special education services in a resource room. *Id.* at 402-03. Madhabi Banerji and Ronald Dailey also argue that an inclusive model works well for students with disabilities. See Madhabi Banerji & Ronald A. Dailey, *A Study of the Effects of an Inclusion Model on Students with Specific Learning Disabilities*, 28 *J. LEARNING DISABILITIES* 511, 521 (1995) (“The data . . . were in agreement with regard to certain findings, indicating some clearly beneficial effects of the inclusion SLD [specific learning disabilities] model . . .”). Their sample sizes, however, were small, and they had no comparison group for the study; their study is therefore of limited utility.

Genevieve Manset and Melvyn Semmel conducted a broad-based review of eight different inclusive models for elementary-school students with mild disabilities, primarily learning disabilities.¹⁵⁸ They compared the results from inclusive programs with pull-out programs. Only two of the eight models yielded supportive findings for full-inclusion programs in reading, and only two of the five models found positive results in math.¹⁵⁹ Manset and Semmel concluded that “inclusive programming effects are relatively unimpressive for most students with mild disabilities, especially in view of the extraordinary resources available to many of these model programs.”¹⁶⁰ They added “that a model of wholesale inclusive programming that is superior to more traditional special education service delivery models does not exist at present.”¹⁶¹

Researchers who support a presumption for full-inclusion models base their arguments on moral rather than empirical arguments. For example, Waldron and McLeskey conclude from their data that children should be presumptively educated in an integrated setting, although their data only supports that conclusion for children with mild disabilities with respect to reading.¹⁶² If one does not accept as given that the IDEA presumption is appropriate, then one is left with a very limited empirical justification for the integration presumption.

¹⁵⁸ Manset & Semmel, *supra* note 83, at 155.

¹⁵⁹ *Id.* at 177.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 178. Bryan Cook also concluded that inclusive programming may be ineffective for students with mild disabilities. Cook, *supra* note 138, at 210-11. He surveyed the teachers of 173 students with hidden disabilities, as well as students with obvious disabilities, who were receiving inclusive programming. *Id.* at 206-07. He found that teachers were far more likely to want to exclude students with *mild* disabilities from their classrooms than children with severe disabilities (16.7% compared with 31.8%). *Id.* at 209. He explained this difference based on a model of “differential expectations.” “Students with mild or hidden disabilities are violating expectations and are rejected because they fall outside of teachers’ instructional tolerance In a sense, because they do not appear significantly different from nondisabled classmates, students with hidden disabilities are held responsible and are blamed for aberrant behavior and performance.” *Id.* Cook therefore concludes, “[C]onsidering teachers’ frequent rejection of students with mild and hidden disabilities, it appears that their inclusion should not be a foregone conclusion, particularly for those students exhibiting attitudinal and behavioral problems.” *Id.* at 210.

¹⁶² To draw a broader conclusion, Waldron and McLeskey must rely on a theoretical or moral argument about the benefits of full inclusion. They argue that, “if students with disabilities make comparable progress in two settings, then they should be educated in the less restrictive setting, as per the [“Least Restrictive Environment”] provision of IDEA.” Waldron & McLeskey, *supra* note 157, at 402.

Even Waldron and McLeskey, however, are not so naïve as to suggest that full inclusion is always best for children with disabilities. They note that “poorly designed, *bad* inclusive programs, which do not meet the needs of students with disabilities are being implemented in many parts of the country.”¹⁶³ They therefore argue that “it seems to be an opportune time to begin studying how effective inclusive programs are developed and what barriers exist to the development and implementation of these programs.”¹⁶⁴ Alternatively, one could say it is time to begin studying *when* inclusive programs are likely to be effective and when other kinds of approaches might be more effective. One barrier to the development and implementation of effective programs may be an unwarranted integration presumption.

One justification for a full-inclusion model is that it is considered less stigmatizing to children to be educated in the regular education setting.¹⁶⁵ Jenkins and Heinen, however, found that older students tended to prefer a pull-out program because they considered it to be less embarrassing than an inclusion program.¹⁶⁶ Similarly, Padeliadu and Zigmond reported that children found a special education placement to be a more supportive, enjoyable, and quiet learning environment than their general education classroom.¹⁶⁷ Based on a survey of the literature, Lisa Aaroe and J. Ron Nelson concluded that “students tended to support and enjoy receiving instruction in the resource classroom,” although they also recognized the need to study

¹⁶³ *Id.* at 403.

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., Joseph R. Jenkins & Amy Heinen, *Students' Preferences for Service Delivery: Pull-out, In-Class, or Integrated Models*, 55 EXCEPTIONAL CHILD. 516, 516 (1989) (noting that a common criticism of pull-out programs is that they attach “stigmas to the children who are pulled out”).

¹⁶⁶ See *id.* at 519 (finding that children who prefer pull-out programs do so because they view this option as “less embarrassing than having a specialist come into the classroom”). But see *id.* (observing that children who preferred inclusion frequently cited embarrassment at being “pulled-out” as the reason for their opposite choice). The authors concluded, however, that the effect of this data is to demonstrate that, “counter to the perception of many educators,” students “apparently view pull-out as no more embarrassing and stigmatizing than in-class services.” *Id.* at 520.

¹⁶⁷ See Susana Padeliadu & Naomi Zigmond, *Perspectives of Students with Learning Disabilities About Special Education Placement*, 1 LEARNING DISABILITIES RES. & PRAC. 15, 22 (1996) (finding that the majority of children “liked going to special education class,” due to the extra help they received and the “special treats or games and reinforcement systems” employed in these programs). But see *id.* at 21 (explaining that other students noted that pull-out programs caused them to miss instruction on a particular subject or to miss recreation and free-time activities that took place during the scheduled time of the special education classes).

students' preferences more fully.¹⁶⁸ Examining the preferences of children with disabilities, Marty Abramson also concluded that "many children in special classes prefer to remain in special education programs" because social acceptance did not accompany integration.¹⁶⁹

The problem is not simply that these children are not accepted by their classmates; they are often not accepted by their classroom teacher. As Abramson notes, "[a] number of studies have indicated that regular classroom teachers perceive handicapped children to be socially and academically inferior to regular children. However, it is these very teachers who will be required to accept handicapped children into their classrooms."¹⁷⁰ By contrast, special education teachers have usually become educators in order to teach children with special needs. Because of their educational background and interests, they are more likely to have a positive attitude about children with disabilities. In conclusion, there is little theoretical or empirical basis from which to presume that children with disabilities would face less stigmatization in the regular classroom, although more research is certainly warranted on this topic.

Even if one accepts the data that suggest that children with mental and emotional disorders, as well as other disabilities, fare better in special education, one still might ask whether regular education could be transformed to be more effective for these students. Douglas and Lynn Fuchs suggest that the answer is "no." They conclude, "We have found that the instructional adaptations that general educators make in response to students' persistent failure to learn are typically oriented to the group, not to the individual, and are relatively minor in substance, with little chance for helping students with chronically poor learning histories."¹⁷¹ They observe that, although regular education provides a "productive learning environment for [ninety percent] or more of all students," it is hard to make it a productive learning environment for the ten percent who may have a different learning style.¹⁷²

¹⁶⁸ Lisa Aaroe & J. Ron Nelson, *Views About Key Curricular Matters from the Perspectives of Students with Disabilities*, CURRENT ISSUES IN EDUC., Nov. 18, 1998, <http://cie.asu.edu/volume1/number8/index.html>.

¹⁶⁹ Marty Abramson, *Implications of Mainstreaming: A Challenge for Special Education*, in THE FOURTH REVIEW OF SPECIAL EDUCATION 315, 325 (Lester Mann & David A. Sabatino eds., 1980).

¹⁷⁰ *Id.* at 333.

¹⁷¹ Fuchs & Fuchs, *supra* note 136, at 528.

¹⁷² *Id.* at 529.

The empirical literature regarding children with mental retardation, emotional impairments, or learning impairments does not support an integration presumption. Instead, these studies suggest that such children often benefit from education by special education teachers for at least some of the day and often attain more educational benefits when not in a fully inclusive environment. The research on effective strategies for children with disabilities, however, is relatively new and has faced serious research design challenges. We would benefit from the continued funding of such research as we seek to design educational configurations that are likely to assist children with a range of disabilities. We would also benefit from exploring the literature on racial integration to see what factors might counsel towards successful integration experiences.

III. RACE-BASED RESEARCH

The empirical literature on disability and education is relatively new and complicated by research design problems. This literature is certainly helpful as we try to develop checklists for school districts to consider in designing educational configurations for children with disabilities. The rich literature on race and integration, however, can also be helpful to our thinking about disability. Given the controversial nature of racial integration and affirmative action, it is difficult even to survey the existing literature on race without being accused of having an ulterior political agenda.¹⁷³ My goal is straightforward—I hope to learn from the dialogue in the racial civil rights area in order to suggest principles that might guide the development of programs in the disability context.

Disability, of course, is not race. Many differences exist between the two categories.¹⁷⁴ Individuals with disabilities frequently live with

¹⁷³ In his article on the effects of affirmative action in American law schools, Professor Richard Sander found it necessary to begin his study by disclosing what he describes as his “biases” as a white researcher, father of a biracial child, and author of previous work that was supportive of affirmative action. See Sander, *supra* note 5, at 369-70 (analyzing whether the benefits to black students of affirmative action in legal education outweigh the costs, but observing that such analysis cannot escape the writer’s own biases). My agenda in this Article is to bring a higher level of sophistication to the discussion of integration for children with disabilities. I do *not* hope to influence the rich debate in the racial civil rights movement concerning the effectiveness of integration in that context, but I *do* hope to learn from their dialogue.

¹⁷⁴ Talking about sameness and difference is treacherous. See MINOW, *supra* note 41, at 20-21 (discussing the “dilemma of difference”—also framed as “a choice between integration and separation” or “similar treatment and special treatment”—and noting

individuals who are not disabled. They come from all socioeconomic classes and live in virtually all school districts. Although society may “create” disabilities with unnecessary steps and door handles that are not easily grasped, the term “disability” can also have an underlying medical basis.¹⁷⁵ Individuals are not necessarily born disabled; they may become disabled through an illness or an accident. Eventually, in fact, we all are likely to become disabled before our death.

By contrast, race is a socially constructed, nonbiological category.¹⁷⁶ In the United States, racial minorities tend to have lower socioeconomic status and live in racially segregated communities. De jure segregation in race and disability may stem from very different factors and lead to different kinds of harms. Similarly, the means necessary to achieve desegregation in both of these contexts may be very different. Whereas racial desegregation in the educational arena may require steps to overcome segregated housing patterns, disability desegregation may instead require steps to permit accessibility to and attendance at neighborhood schools. Educational integration in the disability context depends on structural changes affecting schools themselves; it does not require the transformation of housing patterns as it does in the race context.¹⁷⁷

that the dilemma exists because the “problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently”).

¹⁷⁵ For a critique of the medical model of disability, see O'BRIEN, *supra* note 41, at 2 (“[I]t is sociopolitical obstructions, not physical or mental impairments, that restrict disabled people.”).

¹⁷⁶ For two excellent discussions of this issue, see generally F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION I (1991) (addressing and exploring the question of how “a person get[s] defined as black, both socially and legally, in the United States”); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, at xiii (1996) (asserting that “[r]aces are not biologically differentiated groupings but rather social constructions” and noting that, similar to “other social categories, race is highly contingent, specific to times, places, and situations”).

¹⁷⁷ See, e.g., Ryan, *supra* note 4, at 272, 275-80 (describing residential segregation and its significant contribution to the creation and perpetuation of “urban schools that are isolated by race and poverty”). Similarly, Professor Cashin's book on racial integration focuses extensively on housing. See CASHIN, *supra* note 4, at 3 (“Housing—where we live—is fundamental in explaining American separatism.”); see also Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need for a Reconceptualization of American Democracy and the Rights It Protects*, 13 HARV. BLACKLETTER L.J. 127, 130 (1997) (challenging assumptions that residential segregation is a private choice and arguing that it is attributable to government involvement and social forces); John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 337-38 (1996) (asserting that a “metropolitan solution” is needed to remedy the inequality and inadequacy plaguing public schools in Minneapolis and St. Paul).

Nonetheless, some important similarities exist between the experiences of African Americans and individuals with disabilities. Both groups were subject to antipathy and substandard educational and living conditions based on a notion of white and able-bodied supremacy. Even though courts have tried to end de jure segregation, both groups have had to face forced resegregation with its attendant supremacist perspective.¹⁷⁸ And integration has proven challenging for both groups as researchers wonder whether racial desegregation and disability mainstreaming have led to positive outcomes in terms of academic performance.¹⁷⁹

While we need to be careful not to overgeneralize in transferring race-based empirical studies to the disability context, on balance, this literature would seem to offer some useful insights for the disability rights community. For example, some education researchers have argued that poor African-American children have benefited from being educated in schools with middle-class white children despite the racial and socioeconomic differences between these two groups.¹⁸⁰ Others have argued that it can be harmful for the self-esteem of poor, minority children to be educated in a white, middle-class environment.¹⁸¹ The race literature can inform us about the challenges of bringing children together across such differences within the classroom environment. What factors lead to success? What factors lead to failure? Are some of these factors generalizable to disability?

¹⁷⁸ See CASHIN, *supra* note 4, at xiv (arguing that, despite the rightful elimination of “[s]tate-ordered segregation,” our society maintains a “tacit agreement to separate along lines of race and class”); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 16 (1993) (describing the social model of the “inspirational disabled person” who is able to “overcome” disability and observing its oppressive effects upon the disabled, as it fosters the notion that disabled individuals ought to be “heroic superachievers” and suggests that those who “overcome” disability are superior to those who do not).

¹⁷⁹ See *infra* Part III.B (surveying the existing research on the academic performance of students after racial integration).

¹⁸⁰ The U.S. Department of Education commissioned an important study of the effects of desegregation in 1966. See JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) (reporting the findings of the study). This report supported the argument that placing low-income African American students in schools with middle-class white students would enhance their educational achievement. The study found that “if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.” *Id.* at 22.

¹⁸¹ See NANCY H. ST. JOHN, SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN 49 (1975) (finding that black children in segregated schools tend to have higher self-esteem than black children in desegregated schools).

Of course, we should not make the mistake of developing disability policy solely on the basis of evidence about the racial experience with integration. In Part II, I surveyed much of the leading literature on disability. Read together, both bodies of literature can guide us in developing policy prospectively.

Two topics that are widely discussed in the race context have application to the disability context: self-esteem and academic achievement. Considerable research in the race context exists on both self-esteem and academic achievement because the Supreme Court in *Brown* predicted positive outcomes from desegregation with respect to both factors.¹⁸² When parents seek an integrated environment for their disabled children, they often seek to have the children improve their image of themselves and develop both improved social skills and academic skills. Although there is a wealth of information available on the issue of racial integration in education, I will focus on the research on those two topics.¹⁸³

A. *Self-Esteem and Aspirations*

In *Brown*, the Supreme Court justified integration by relying, in part, on the conclusion that segregation harmed the self-esteem of African-American children.¹⁸⁴ Whether the Supreme Court was correct in 1954 when it found that segregation had a harmful effect on the self-esteem of African-American children has been the subject of considerable controversy.¹⁸⁵ Today, researchers are not concerned with

¹⁸² The Supreme Court concluded that segregation has a harmful effect on the “hearts and minds” of minority children. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

¹⁸³ If my goal were to inform the racial civil rights debate, my investigation would have to include other topics, such as housing and school funding. Thus, it would be wrong to take my discussion of these empirical studies to propose policy outcomes in the racial context.

¹⁸⁴ The Supreme Court’s initial conclusions about the harmful effects of segregation on African Americans were based on doll studies of nonrandom populations in which many African American children showed a preference for a white doll or said the white doll looked like them. *See Brown*, 347 U.S. at 494-95 n.11 (citing several psychological studies).

¹⁸⁵ The original doll studies were reported in Kenneth B. Clark & Mamie K. Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Pre-school Children*, 10 J. SOC. PSYCHOL. 591 (1939). These studies were interpreted as reflecting low self-esteem among African American children. *See, e.g.*, Morris Rosenberg, *Self-Esteem Research: A Phenomenological Corrective*, in *SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS* 175, 175 (Jeffrey Prager et al. eds., 1986) (describing the results of the doll study as “reflecting low self-esteem among black children”). Beginning in the 1960s, however, researchers began to use more sophisticated surveys

the validity of those 1954 studies. Instead, they ask two questions related to self-esteem: (1) Does integration affect a child's feelings of self-worth? and (2) Does integration affect a child's aspirations for the future?

Although the above two questions are related, they are not identical. For example, integration could negatively impact a student's feelings of self-worth while also helping to inspire the student to seek higher levels of education and employment in the future. Early research tended to focus on self-esteem issues while more recent research has tended to focus on long-term aspirations. The *Brown* decision may have immediately focused attention on self-esteem but, over time, researchers have begun to wonder if that was the most important criterion to investigate. They argue that the purpose of the *Brown* litigation was to raise the educational and employment aspirations and attainments of African Americans, so research should focus on the connection between those criteria and integration. Because many studies investigate both self-esteem and aspirations, I examine together their connection to integration.

Nancy St. John examined both self-esteem and students' aspirations. She observed that "the way in which desegregation is implemented, on the one hand, and the particular needs of individual children, on the other, may condition the outcome."¹⁸⁶ St. John

that examined personal self-esteem directly and concluded that the self-esteem of African Americans was at least as high as that of whites. *Id.* at 176-77. Over time, the doll studies from the 1940s and 1950s came under serious attack. *Id.* at 177. Some researchers concluded that the children in the doll studies (who typically ranged from three to seven years of age) were reacting to the color of the doll's skin rather than thinking in racial terms. *Id.* at 177, 196. African American children with darker skin were picking the "black doll" as looking more like them, and African American children with lighter skin were picking the "white doll." *Id.* at 196. When research was expanded to include white children in these studies, it was found that more white than African American children identified with the other racial category. *Id.* As with African American children, it appeared that darker-skinned white children identified with the darker doll and vice versa:

In sum, if a black child with light color skin says he looks more like a white doll than a dark doll, it may not be that he is disidentifying with his race and expressing racial self-hatred; it may simply be that he does look more like the white doll than the dark. Many children are thus responding literally to skin color.

Id. Schofield argues that the research that concluded that African American children in segregated environments have low self-esteem was "not well founded" and "flawed." Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 607 (James A. Banks ed., 1995).

¹⁸⁶ ST. JOHN, *supra* note 181, at 88 (reviewing more than sixty studies). Her work has been criticized for failing to distinguish between types of desegregation programs.

identified a number of facts that correlate with positive self-esteem outcomes for minority children. First, she found that desegregation can have a positive effect by giving minority children an increased feeling of control—they can choose to attend a previously white school.¹⁸⁷ She found that the availability of the choice of attending a previously white school correlated with increased achievement for minority children *even when most minority children remained in segregated schools*.¹⁸⁸ Similarly, she noted the view of some black activists that it is harmful to the self-esteem of black children when their local school is closed and they are forced to be bused to a majority white school because they are then being taught “that there is nothing of value in the black community.”¹⁸⁹

Second, she found that desegregation is likely to harm the self-esteem of minority children if they are placed in daily contact with other children whom they perceive to have higher economic or academic standards. Hence, lower-class children had the worst self-esteem results when placed in a majority white, middle-class school because this new environment made them more aware of their existing deprivations.¹⁹⁰ She even used a disability reference when making this argument: “[T]hey may feel currently discriminated against if academic handicaps prevent access to certain courses, activities, or honors in the new school.”¹⁹¹ She suggested that such children might fare equally well in predominantly black schools with “facilities, staff, and curricula that are visibly and dramatically superior.”¹⁹²

See, e.g., Schofield, *supra* note 185, at 599 (noting that St. John “did little or no selection of studies on methodological criteria”).

¹⁸⁷ ST. JOHN, *supra* note 181, at 89.

¹⁸⁸ *Id.* at 91. The theme that school choice can enhance the self-esteem and academic performance of minority children is also consistent with the literature on “Afro-centric” schools. *See generally* Michael John Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 1128-31 (1993) (evaluating proposals for African American male education). Some of the studies of Afro-centric schools suggest that they can help lower the suspension and dropout rates for African American males. *See id.* at 1112-13. Some studies suggest that one negative consequence of desegregation is an increase in the suspension rates for minority students. *See generally* Schofield, *supra* note 185, at 604 (summarizing studies of suspension rates and desegregation).

¹⁸⁹ ST. JOHN, *supra* note 181, at 91 (quoting STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER* 52-54 (1967)).

¹⁹⁰ *Id.* at 93-94.

¹⁹¹ *Id.* at 94.

¹⁹² *Id.* Morris Rosenberg found further support for St. John’s assertion that a desegregated environment can be harmful to the self-esteem of African American children if the children feel they compare unfavorably with those around them.

Third, St. John found that children's self-esteem was influenced by others' expectations of them. "In a desegregated school . . . a black child does not necessarily escape the depressing effect of low expectations of others."¹⁹³ She argued that schools should try to raise the expectations of teachers and peers regarding the academic performance of minority children, irrespective of whether or not the children are educated in a majority black or majority white environment: "sustained high expectations on the part of staff can probably have a facilitating effect on pupil motivation even in a predominantly black

Rosenberg, *supra* note 185, at 184. He found that in segregated environments, African American children tend to compare themselves primarily to each other, leading to higher self-esteem. "Despite lower socioeconomic status, poorer academic performance, and higher rates of family rupture, then, the social comparison principle is still entirely consistent with high self-esteem among black children." *Id.* Arguably, this self-esteem data is inconsistent with the academic achievement data, which suggests that minority children benefit academically from being educated with children from higher socioeconomic backgrounds. *See infra* Part III.B (evaluating the effect of desegregation on academic performance of minority children).

St. John's self-esteem finding, which was first reported in 1969, has been controversial. Examining the self-esteem data, Schofield concludes:

The major reviews of school desegregation and African American self-concept or self-esteem generally conclude that desegregation has no clear-cut consistent impact The conclusion that low self-esteem is not a problem for African American students, combined with the evidence that desegregation does not have any strong consistent impact on self-esteem, understandably led to a sharp diminution in the amount of research on these topics after the mid-1970s.

Schofield, *supra* note 185, at 607.

Others have suggested that African American students who attend primarily black schools may have higher aspirations and self-esteem in the early grades but that, over time, their high aspirations prove to be unrealistic, because they are less likely to attend college than those who attended majority white schools. Joseph Veroff & Stanton Peele, *Initial Effects of Desegregation on the Achievement Motivation of Negro Elementary School Children*, 25 J. SOC. ISSUES 71, 79 (1969). Writing more recently, Amy Stuart Wells and Robert Crain argue that an integrated educational environment does correlate strongly with higher educational and career aspirations, while noting that studies of this phenomenon are challenging because of self-selection biases in the samples. Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 552 (1994) ("It is quite likely . . . that some of the personal characteristics of black students that would lead them to self-select a desegregated school—less fear of whites, more motivation to achieve in a 'white world,' etc.—are similar to the characteristics sought by white employers in prospective employees."). In an earlier study, Crain found that attending an integrated school correlated with better occupational opportunities for African Americans, particularly African American men. *See* Robert L. Crain, *School Integration and Occupational Achievement of Negroes*, 75 AM. J. SOC. 593, 597 (1970) (noting that "Negro alumni of integrated schools [tended to be] in 'integrated' jobs").

¹⁹³ ST. JOHN, *supra* note 181, at 95.

school.”¹⁹⁴ Similarly, Gary Orfield and Chungmei Lee noted that schools with substantial white enrollment “can offer minority students a higher set of educational and career options.”¹⁹⁵ Hence, “desegregated schooling has a positive effect on the number of years of school completed and on the probability of attending college.”¹⁹⁶ In other words, minority children benefit from the higher educational and career expectations that tend to be present in schools with substantial white enrollments even if those environments may have a negative impact on self-esteem.

Fourth, St. John argued that black/white ratios are important factors affecting desegregation and self-esteem. “[C]onditions will be most favorable for a minority group if its numbers are sufficient to exert pressure without constituting a power threat to the majority group. This means perhaps the avoidance of less than 15% and more than 40% of black children in a school.”¹⁹⁷

In sum, St. John argued:

[T]he factors that will probably determine whether the desegregated classroom is, on balance, academically facilitating rather than threatening are lack of interracial tension and either initial similarity in achievement level of black and white children or else supportiveness of school staff, availability of school academic policies that favor overcoming handicaps, avoidance of competition, and above all individualization of instruction.¹⁹⁸

These factors may lead to more beneficial desegregated schools, but St. John reminded the reader that “many of these same factors could transform a ghetto school into a setting in which a strong yet realistic academic motivation is fostered.”¹⁹⁹ St. John was careful not to challenge the integration presumption directly. She showed how desegregation could be achieved more successfully but also noted that many of these same observations could improve majority black schools.

These observations can be helpful in thinking about the integration presumption in the disability context. First, it may be important

¹⁹⁴ *Id.*

¹⁹⁵ GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 24 (2004), available at <http://www.civilrightsproject.harvard.edu/research/resseg04/brown50.pdf>.

¹⁹⁶ *Id.*

¹⁹⁷ ST. JOHN, *supra* note 181, at 100.

¹⁹⁸ *Id.* at 103.

¹⁹⁹ *Id.*

for children to have *choices*—to be able to choose a resource room or a regular classroom with supplementary assistance rather than be told that only one option is available to them. If a student then chooses a more segregated option—such as a resource room—the student may not feel as if he or she was forced into that segregated option. The option itself may become more valued as a result of the exercise of choice.²⁰⁰

Second, it may be better for children's self-esteem to be clustered with children like themselves in terms of ability and chronological age, rather than to be clustered with children who are substantially different from them. That self-esteem benefit, however, only makes sense if the children are taught by teachers who have high expectations for the children's achievement. By virtue of their training, special education teachers may be inclined to have higher expectations for children with disabilities than regular classroom teachers.

The self-esteem observation from the racial context may be particularly important in the disability context because of the literature suggesting that some children also receive an increased academic performance benefit by being clustered with children of similar ability and chronological age. As we will see in Part III.B, the racial data is different from the disability data in this respect. In the race area, African-American children are sometimes found to perform better academically if they are placed with children of higher socioeconomic background. The self-esteem and academic performance data, therefore, can go in somewhat different directions. Self-esteem might suffer, but academic performance might improve through integration. In the disability context, however, academic performance for some categories of children is *unlikely* to improve as a result of integration.²⁰¹ Hence, the self-esteem and academic performance data may point in the same direction, counseling less enthusiastic support for a strong integration presumption in the disability context.

²⁰⁰ For example, I was assisting a disabled high school student whom the school district wanted to assign to a different school because his mother had moved. The student had mental health problems and reacted very poorly to the change. With a letter from a health care professional, we successfully persuaded the school not to insist that the child change schools as part of his IEP. After moving, however, the child decided that he wanted to attend the local public school. When changing schools became a matter of his own choice, he felt better about the decision. In the end, the school district attained the placement that it desired, but the presence of a choice made the decision feel better to the child.

²⁰¹ See *supra* Part II.

Third, the racial evidence suggests that children with disabilities should not be “tokens” within the regular classroom if they are educated in that environment. It is a bit complicated, however, to transfer this recommendation to the disability field because some disabilities are invisible, and because it is unlikely that any school will have more than ten percent disabled students, given the overall numbers of the disability population. Further, there is such a wide range of disabilities. Does a child who has a learning disability really identify with a child who has a hearing impairment or a mobility impairment? The literature on the harms of tokenism may again counsel towards a softening of the integration presumption in the disability context because of the difficulties of placing more than a token number of children with disabilities in any one classroom. One way around the tokenism problem could be the use of integrated, regional schools rather than integrated, local schools. As we briefly saw in Part I.B, some school districts attempt to cluster individuals with disabilities at a particular school by sending children with disabilities to a public school that is not necessarily their local public school. That clustering is controversial because children do not get to attend their local public school, although it is possible that that clustering also provides some self-esteem benefits in allowing children with disabilities to attend school in an integrated environment. The problem with these kinds of clusterings, however, is the lack of student *choice*. This lack of choice may undermine any self-esteem benefit because a nondisabled sibling has an option not available to the child with a disability.²⁰²

Fourth, students with disabilities might benefit by having teachers with visible disabilities to serve as role models to help raise students’ expectations for their own performance and to improve the students’ self-esteem. Because of the diversity of disabilities, however, this may

²⁰² One solution to the tokenism problem is for school districts to create disability-centered schools that both disabled and typically-developing students can choose to attend. In Columbus, Ohio, a private school called the Oakstone Academy has been created to serve the needs of children with autism spectrum disorder. See CCDE-Childrens Center for Developmental Enrichment, Introducing the Oakstone Academy, <http://www.ccde.org/index.jsp?nav=about.jsp> (last visited Jan. 17, 2006) (describing the programming and purpose of the academy). The school accepts both children with autism and typically-developing children. The curriculum is based on the educational needs of children with autism. The small class size and dedicated teaching staff, however, also make it an attractive school for typically-developing children. In this environment, children with autism are “normal,” yet they are also mainstreamed with typically-developing children. It may be expensive for school systems to support such programs, but such programs do reflect the literature on the appropriate educational environment for some children with disabilities.

be a difficult recommendation to implement. Will a child with an auditory impairment benefit from having a teacher who uses a wheelchair due to a mobility impairment? The presence of these visibly disabled teachers in the classroom may also help the typically-developing children have more respect for individuals with disabilities, including their own classmates. But, again, this solution only works well in the context of visible disabilities. It may be hard for children with invisible disabilities to identify role models and teachers with invisible disabilities. Teachers with such disabilities may want to consider “outing” themselves to a child with a disability as a mechanism for enhancing that child’s self-esteem.

B. Academic Performance Research

Like the self-esteem research, the research examining the correlation between academic performance and racial integration has been mixed.²⁰³ Writing in 2004, Gary Orfield and Chungmei Lee argued, “[t]here is important evidence in the educational literature that minority students who attend more integrated schools have increased academic achievement, as most frequently measured by test scores.”²⁰⁴ But Orfield and Lee also acknowledged that “[t]he magnitude and persistence of these benefits . . . have been widely debated in educa-

²⁰³ Martin Patchen conducted a review of studies that measured the impact of interracial contact on the academic achievement of African American children in grade school. MARTIN PATCHEN, *BLACK-WHITE CONTACT IN SCHOOLS: ITS SOCIAL AND ACADEMIC EFFECTS* (1982). He found no support for the idea that black students performed better academically in racially mixed schools. “There was, in fact, a tendency in the opposite direction—i.e., for blacks who attended more racially mixed grade school classes to get lower grades and achievement scores in high school.” *Id.* at 260. Patchen confirmed and amplified these studies by conducting his own study of the relationship between integration and the performance level of minority students. *See id.* at 257-94. He concluded that “[n]either the amount nor the nature of interracial contact which blacks experienced in grade school had any impact on their general cognitive abilities at the end of grade school (as indicated by IQ scores). Nor did more [such contact] have a positive effect on black students’ effort, grades, or achievement scores in high school.” *Id.* at 292.

Writing a few years earlier, Meyer Weinberg came to a slightly different conclusion. Weinberg conducted a broad-ranging literature review in 1975 of the relationship between school desegregation and academic achievement. Meyer Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 *LAW & CONTEMP. PROBS.* 241 (1975). Nearly every study that he examined concluded that desegregation has a neutral or positive effect on the academic achievement of minority children. *Id.* at 268. Further, he found that there is “virtually no evidence . . . that desegregation lowers the achievement levels of whites.” *Id.* at 243.

²⁰⁴ Orfield & Lee, *supra* note 195, at 23.

tion research, particularly those that came from the first year of mandatory desegregation plans of the type that was common in the 1960's and 1970's."²⁰⁵

The first major study on desegregation's effects on minority students was commissioned by the U.S. Department of Health, Education, and Welfare, and published in 1966.²⁰⁶ School desegregation was in its infancy at the time of that study. In the South, desegregation had not yet taken place, with nearly all children attending single-race schools.²⁰⁷ The Coleman Report was therefore more readily able to study the characteristics of students and their schools—such as socioeconomic status, aspirations of students, and qualifications of teachers—than the impact of race, itself. The Coleman Report found that “a pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school.”²⁰⁸ It indicated that “children from a given family background, when put in schools of different social composition, will achieve at quite different levels.”²⁰⁹ It found that this effect was particularly pronounced for minority students.²¹⁰

The Coleman Report had a very important effect on the school integration movement because it found that “[a]ttributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff. . . . [A]s the educational aspirations and backgrounds of fellow students increase, the achievement of minority group children increases.”²¹¹ Similarly, the study found that “as the proportion [of] white [students] in a school increases, the achievement of students in each racial group increases.”²¹² The Coleman Report attributed these results to higher educational background and aspirations, not to bet-

²⁰⁵ *Id.* at 23-24.

²⁰⁶ COLEMAN REPORT, *supra* note 33.

²⁰⁷ The Coleman study found that in the South, 91% of majority, or white, elementary school students were reported to attend schools which were “mostly white.” *Id.* at 18 tbl.7. Nationally, that figure was eighty-nine percent. *Id.*

²⁰⁸ *Id.* at 22.

²⁰⁹ *Id.*

²¹⁰ *See id.* (“[I]f a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.”).

²¹¹ *Id.* at 302.

²¹² *Id.* at 307.

ter school facilities or to race itself.²¹³ The Coleman Report bolstered arguments for desegregation as well as arguments for programs to “infuse poor families with the values, orientations, child rearing strategies, and life styles of the middle class.”²¹⁴

The use of the Coleman Report to support arguments for desegregation is a bit surprising given the small number of students in the study who were attending desegregated schools. Although it may have been true that the few minority children who attended majority-white schools performed better than other minority children, this hypothesis could not be tested on the eighty-one percent of minority children who did *not* attend majority-white schools.²¹⁵ The strongest finding from the Coleman Report—“that a pupil’s achievement is strongly related to the educational backgrounds and aspirations of the other students in the school”²¹⁶—is not a race-dependent conclusion.

Following the Coleman Report, other researchers questioned the validity of its race-based generalizations.²¹⁷ They also highlighted the

²¹³ *Id.* at 307 (“[H]igher achievement of all racial and ethnic groups in schools with . . . a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average found among white students.”).

²¹⁴ Mickelson, *supra* note 5, at 1527 (describing the Coleman Report).

²¹⁵ COLEMAN REPORT, *supra* note 33, at 18 tbl.7 (providing data on classmate racial makeup, among other factors). There are selection bias problems with the Coleman sample of minority students who attended majority-white schools. It does not distinguish between students in an integrated environment due to desegregation or due to neighborhood schooling. The Coleman Report notes that African American students fare better when they have a “greater sense of control,” *id.* at 23, yet the study does not control for the different ways in which a student might find herself in a desegregated classroom. It is possible that most of the minority students in the Coleman study who were in desegregated environments were there as a matter of “choice” rather than mandatory desegregation. A 2002 study supports the argument that the Coleman Report overgeneralized in reporting this result for all African American children. The new study found that higher-ability African Americans benefit from integration, but that other African Americans may not experience a benefit. See Eric A. Hanushek et al., *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement 2* (Nat’l Bureau of Econ. Research, Working Paper No. 8741, Jan. 2002), available at <http://www.nber.org/papers/w8741> (isolating more variables than Coleman by analyzing Texas data for a relationship between race, racial composition of the classroom, ability level, and scholastic achievement).

²¹⁶ COLEMAN REPORT, *supra* note 33, at 22.

²¹⁷ See, e.g., DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 98 (1995) (“Although some studies show a correlation between desegregation and black achievement, the relationship is generally weak and inconsistent compared to the effect of educational and economic factors.”); David J. Armor, *The Evidence on Busing*, 28 PUB. INT. 90, 109 (1972) (“It seems clear from the studies of integration programs we have reviewed that four of the five major premises of the integration policy model are not supported by the data . . . [T]he model is open to serious question.”);

methodological problems of many of the other studies in this area.²¹⁸ Writing in 1975, Meyer Weinberg recognized that it was hard to compare the various studies that had been conducted because they used different methodologies, and there were too many factors to control.²¹⁹ Nonetheless, he was able to identify seven characteristics which he concluded correlated with successful desegregation programs:

1. a relative absence of interracial hostility among students,
2. teachers and administrators who understand and accept minority students, encouraged and reinforced by aggressive in-service training programs,
3. the majority of students in a given classroom are from middle and/or upper socioeconomic classes,
4. desegregation at the classroom as well as at the school level, particularly in elementary schools,
5. no rigid ability grouping or tracking, particularly in elementary schools,²²⁰
6. an absence of racial conflict in the community over desegregation, and
7. younger children are involved (though this last conclusion should be considered very tentative).²²¹

Ronald D. Henderson et al., *High-Quality Schooling for African American Students*, in BEYOND DESEGREGATION: THE POLITICS OF QUALITY IN AFRICAN AMERICAN SCHOOLING 162, 162-63 (Mwalimu J. Shujaa ed., 1996) (questioning evidence that desegregation is necessarily a superior educational environment for African American children).

²¹⁸ See Schofield, *supra* note 185, at 598-99 (discussing methodological difficulties inherent in desegregation studies).

²¹⁹ Like St. John, Weinberg has been criticized for not selecting studies based on strict methodological criteria. See *id.* at 600 (“Bradley and Bradley (1977) concur with Weinberg (1977) that a majority of the studies conclude that desegregation has positive effects on the achievement of African American students. However, they note that each of the studies showing positive effects suffers from methodological problems.”).

²²⁰ Mickelson also argues that “tracking helps to maintain white privilege by placing whites disproportionately into higher tracks than their comparably able black peers.” Mickelson, *supra* note 5, at 1514.

²²¹ Weinberg, *supra* note 203, at 269. Reviewing various studies, including Weinberg’s, Schofield affirms Weinberg’s conclusion about the importance of integration in the early years. “One suggestion that emerges repeatedly in the reviews is that desegregation may be most effective when carried out in elementary school, especially in the early elementary years.” Schofield, *supra* note 185, at 601.

More recent studies have often replicated Weinberg's findings.²²² Phyllis Hart and Joyce Germaine Watts echoed some of the same conclusions. They noted that tracking often does not occur on the basis of objective criteria, and that African American and Latino students who meet the objective criteria for a college preparatory curriculum are often not placed in that curriculum.²²³ For example, they found that "when African American and Latino students score in the top 25th percentile, only 51% and 42%, respectively, are programmed into [college preparatory math], compared to 100% Asians and 87.5% Whites."²²⁴

²²² In 2002, Diane Pollard drew conclusions similar to that of Weinberg. She observed that a number of studies have found that white teachers have low expectations for minority students and that "[n]ot surprisingly, these teacher expectations and behaviors often lead to resistance and rebellion on the part of students." Diane S. Pollard, *Who Will Socialize African American Students in Contemporary Public Schools?*, in *AFRICAN AMERICAN EDUCATION: RACE, COMMUNITY, INEQUALITY AND ACHIEVEMENT: A TRIBUTE TO EDGAR G. EPPS* 3, 5 (Walter R. Allen et al. eds., 2002). Her findings are consistent with Weinberg's observation that it is important for teachers and administrators to understand and accept minority students in order for them to perform well.

Elaine Gantz Berman reached conclusions similar to Weinberg based on her experience in working with an integrated public high school in Denver, Colorado. See Elaine Gantz Berman, *Is Racial Integration Essential to Achieving Quality Education for Low-Income Minority Students, in the Short Term? In the Long Term?*, *POVERTY & RACE* (Poverty & Race Research Action Council, Washington, D.C.), July/Aug. 1996, at 7, available at <http://www.prrac.org/news.php> (select "Vol. 5, No. 4" from drop-down menu) (using the Denver experience to explain why racial integration is not essential to achieving quality education). The school was racially integrated for twenty-five years by busing Anglo children into a predominantly Hispanic and African American community. Although the school gained an excellent reputation for its college preparatory program, few Latinos or African Americans participated in that program. Not only did the Anglo students predominate in the college preparatory classes, but they also held most of the school's leadership positions. Only a handful of African American males even graduated from the school each year. Berman concluded, "It is clear from looking at numerous educational indicators that an integrated student body has not improved outcomes for low-income students of color at Manual High School. And it is equally clear that Manual is not racially 'integrated.' Rather, it is desegregated." *Id.* Given a two-track system and the integration of students from different socioeconomic backgrounds, Weinberg would have predicted this disappointing result in Colorado.

²²³ See Phyllis Hart & Joyce Germaine Watts, *Is Racial Integration Essential to Achieving Quality Education for Low-Income Minority Students, in the Short Term? In the Long Term?* *POVERTY & RACE* (Poverty & Race Research Action Council, Washington, D.C.), July/Aug. 1996, at 8, available at <http://www.prrac.org/news.php> (select "Vol. 5, No. 4" from drop-down menu) (positing that because they come from "less desirable" schools and thus are seen as "less capable," minority students are placed in low-level classes early on and that this placement follows them throughout high school).

²²⁴ *Id.*

Vivian Gunn Morris and Curtis Morris studied the desegregation experience in Tuscumbia, Alabama.²²⁵ They concluded that integration had a significant negative effect on minority students.²²⁶ The Morrises suggested that schools need to be smaller, to have increased parental involvement, and to incorporate African American history into the curriculum in order to improve the quality of education for minority students.²²⁷

Some of these observations might be relevant to the development of programs that achieve successful integration of children with disabilities into the regular classroom. First, they suggest that schools might need to accompany mainstreaming efforts with educational programming for all students to improve tolerance and acceptance of difference. Tolerance and diversity programming, however, is complicated in the disability context because of the prevalence of invisible disabilities. For example, a child with autism might engage in what we consider antisocial behavior by ignoring other children and refusing to cooperate in play activity or by failing to look her speaker in the eye when conversing. In some sense, autism is an invisible disability, although the behavior itself, once manifested, is not invisible. Should the class discuss autism before the autistic child is placed in the classroom? Or will that discussion only magnify the perception that the child with autism is different? With visible disabilities, diversity programming may be easier. For example, there are documentaries and training programs that demonstrate respectful ways to converse with people who are in wheelchairs or who are visually impaired.²²⁸ Such programming could be used routinely in the classroom even if no student is obviously disabled. Tailoring diversity training to the composi-

²²⁵ VIVIAN GUNN MORRIS & CURTIS L. MORRIS, *THE PRICE THEY PAID: DESEGREGATION IN AN AFRICAN AMERICAN COMMUNITY* (2002).

²²⁶ *See id.* at 73-109 (providing examples of this negative effect, including discrimination, a diminished sense of security, and a weaker sense of community pride in the school's achievements).

²²⁷ *See id.* at 94-101 (summarizing conclusions and policy proposals for minority educational improvement). *But cf.* Hanushek et al., *supra* note 215, at 29-30 (studying the effects of desegregation on the Texas public school system and reaching different conclusions). Hanushek concluded that "achievement for black students is negatively related to the black enrollment share. But the full analysis provides a more complex picture—the adverse effects of racial composition are concentrated on higher ability blacks." *Id.* at 3.

²²⁸ *See, e.g.*, IRENE M. WARD & ASSOCS., *THE 10 COMMANDMENTS OF COMMUNICATING WITH PEOPLE WITH DISABILITIES* (1994), available at <http://www.ireneward.com/tc.html> (delivering a disability awareness message via humorous vignettes on video and in a resource guide).

tion of the classroom, however, could pose privacy problems for children with invisible disabilities.

Second, as the racial studies suggest, all teachers need to have special education training so that they can bring disability-centered skills and curricula into the classroom. This training might benefit many children in the classroom who are not technically labeled as “disabled” but who have subtle differences in their style of learning. A teacher with special education training may have more delivery models for educating students and may be more attentive to what works. The presence of more special education teachers in the regular classroom could benefit a wide range of students.²²⁹

Third, the racial findings suggest that we should be skeptical of tracking results and that we should make sure that disabled students are placed with the appropriate ability level if tracking does occur. Nonetheless, disability is somewhat different from race with respect to tracking, as students have IEPs because they may have a learning impairment. If we ignore this key difference and insist that they learn only in a regular classroom, students with disabilities may not develop the special skills needed to learn effectively.

Fourth, it appears from the racial studies that it is important to start mainstreaming at the youngest possible age, preferably preschool. In this respect, it is worth noting that the IDEA provides qualifying disabled children with the right to a free and appropriate public education as early as the age of three,²³⁰ even though typically-developing children do not usually have the right to a free public education until age five.²³¹ But it is not clear that mainstreaming is always preferable with young, pre-verbal children who are disabled. The education of preschoolers usually occurs in a small classroom setting with a low teacher-student ratio. Preschool education for children with disabilities is often one-on-one and very intense. Although

²²⁹ For example, I noticed that my daughter’s classroom had headphones on the wall. When I inquired, the regular classroom teacher (who had special education training) explained that the headphones were placed there to be used by children with attention deficit disorder who had problems with distractibility. But the teacher encouraged *any* child to use the headphones if they were having trouble concentrating and wanted to block out the noise. An innovation from the special education field—teaching children how to overcome their distractibility—was able to benefit any child in the regular classroom.

²³⁰ See 20 U.S.C.A. § 1412(a)(1)(A) (West Supp. 2005) (generally conditioning funding under the IDEA on a state’s provision of a free appropriate public education to disabled children between the ages of three and twenty-one).

²³¹ See, e.g., N.Y. EDUC. LAW § 3202.1 (McKinney Supp. 2004) (providing residents between the ages of five and twenty-one access to free public education).

mainstreaming may make sense when disabled children enter grade school, it is not clear that it is beneficial during the preschool years, when the optimal special education environment is particularly intensive and nearly one-on-one. As class size grows, and teacher-student ratios expand, mainstreaming may be more beneficial.

Fifth, the racial findings strongly suggest that parental involvement is important to the success of integration efforts. Children do better when their parents are involved in their education.²³² In this respect, the process-oriented nature of the IDEA is excellent because it involves the parents directly with the school district in developing an individualized education plan.²³³ In fact, school districts cannot create an IEP without the consent of a child's parents.²³⁴ While this policy provides strong motivation for parents to be involved in the education of their disabled children, it also allows a lack of parental involvement to have a profound and negative impact on such a child's education. If parents have more than one child, it may be easier for them to be involved with their disabled child's school if that child attends the regular public school with her siblings. Hence, it does make sense to consider family situations when analyzing the effectiveness of various educational configurations.

Finally, the racial studies indicate that small, intimate schools may attain better integration results than large, formal schools.²³⁵ Chil-

²³² See, e.g., MORRIS & MORRIS, *supra* note 225, at 101 (citing numerous studies demonstrating that "family involvement . . . can contribute to positive educational outcomes for children").

²³³ See 34 C.F.R. pt. 300, app. A.II (2004) ("The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child.")

²³⁴ 20 U.S.C.A. § 1414(a)(1)(D) (West Supp. 2005).

²³⁵ Schofield, however, cautions us to remember the context in which these studies were conducted when interpreting the results. As she notes, the schools examined in these studies have often actively resisted the desegregation changes that were studied:

[They are] a summary of what has occurred, often under circumstances in which little if any serious attention was paid to creating a situation likely to improve either academic achievement or intergroup relations. Seeing racially and ethnically heterogeneous schools as having the *potential* to improve student outcomes, and focusing more attention on the actual *nature* of the students' experiences to assure that they are as constructive as possible, should enhance the likelihood of improving present outcomes.

Schofield, *supra* note 185, at 611.

Many of the factors that I have identified with respect to positive integration outcomes derive from efforts to create a more positive school environment for minority children. If resistance to integration on the basis of disability is less profound than resistance to racial integration, it may be that integration has a better chance of success in the disability context. The large number of race-based studies with varied outcomes,

dren with disabilities, however, often find that only larger schools offer them access to the range of services that they need. For some children, the special education classroom may operate as a “safe space” within that larger, formal environment, especially if the child has faced harassment in the regular classroom. School size is certainly a factor that should be considered in fashioning an IEP.

C. *Racial and Disability Segregation: Intersectional Challenges*

Some civil rights advocates have expressed the concern that the emphasis on disability identification may be leading to increased racial resegregation. African American students are overrepresented in special education classes that are held apart from the regular classroom.²³⁶ Janet Eyler and her colleagues described this problem as early as 1983, arguing that many special education programs have become “ghettos for black children.”²³⁷ Nonetheless, they were hesitant to conclude that special education assignments had been made intentionally to resegregate schools.²³⁸ Special education data by race was not gathered nationally before 1973, so it was hard to determine if the disproportionate placement of African American children in special education was a response to desegregation or to increased recognition of the importance of special education.²³⁹ Eyler reported “some evidence that special education assignment for black children may increase immediately after the establishment of busing to integrate and that this may be a specific response to desegregation.”²⁴⁰

Nearly fifteen years after Eyler and others observed the overrepresentation of African Americans in special education, Congress responded to the problem. In 1997, it created reporting requirements

however, should at least make us cautious in thinking that we can properly measure the outcomes of whatever integration efforts take place.

²³⁶ See Alan Gartner & Dorothy Kerzner Lipsky, *Over-Representation of Black Students in Special Education: Problem or Symptom?*, POVERTY & RACE (Poverty & Race Research Action Council, Washington, D.C.), Sept./Oct. 1998, at 3, available at <http://www.prrac.org/news.php> (select “Vol. 7, No. 5” from drop-down menu) (documenting the disproportionate representation of African American children in special education classes held outside of the regular classroom in the U.S. public school system).

²³⁷ Janet Eyler et al., *Resegregation: Segregation Within Desegregated Schools*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 126, 135 (Christine H. Rossell & Willis D. Hawley eds., 1983).

²³⁸ *Id.* at 137.

²³⁹ *Id.*

²⁴⁰ *Id.*

in the IDEA so that it could keep track of this problem²⁴¹ and required states to take corrective action.²⁴² Irrespective of whether African Americans are educated in a segregated or desegregated public school, they are at risk of being labeled “mentally retarded” or “severely emotionally disturbed” and placed outside of regular classes in an environment segregated by race and the stigma of disability. This problem does not occur for Latino students, who are, in fact, likely to be *underrepresented* in special education programs.²⁴³

The special education data therefore makes the integration/segregation question even more complicated. An integration presumption under the IDEA may operate as a tool to protect African Americans from unnecessary segregation on the basis of disability. But is an integration presumption the best way to respond to this problem? Or are other steps more effective, such as revising testing methods for identification of children with disabilities, so that there is less dependence on standardized tests?²⁴⁴

The special education data can be hard to interpret because it is based on the assumption that the rate of representation for whites is at the appropriate level. The high incidence of African American children identified as disabled is assumed to be a red flag. At the same time, researchers criticize the underrepresentation of Latinos and Asian Americans in special education programs.²⁴⁵ Data indicating that African Americans are disproportionately excluded from col-

²⁴¹ See 20 U.S.C.A. § 1418(a)(1)(A) (West Supp. 2005) (requiring annual reporting on special education assignments, broken down by race).

²⁴² See § 1418(d)(2) (requiring review and revision of relevant policies, practices, and procedures if data show racial disproportion in special education assignments).

²⁴³ Gartner & Lipsky, *supra* note 236, at 3.

²⁴⁴ Gartner and Lipsky argue that special education placement is too frequently based upon “so-called intelligence tests” that mistakenly consider intelligence to be “a fixed and largely heritable characteristic, that can be precisely measured and provide an accurate predictor as to one’s future success in school and life.” *Id.* at 4.

²⁴⁵ See, e.g., *id.* at 3 (noting that the underrepresentation of Latinos and Asian Americans “presents a different set of problems that must be faced”). Language barriers, as well as other factors, may cause the misidentification of Latino and Asian American students. For example, several years ago, I had a student with a visible disability who spoke English as a second language. After reading two of his exams, I suspected he had a learning disability. He was tested and showed very strong evidence of a learning disability, although that disability had not been previously detected. It appears that his reading and writing problems were often attributed to English being his second language, rather than to a learning disability. Also, his teachers may not have considered the possibility that, as a student with one visible disability, he had a non-visible disability as well. School districts need to be attentive to the special education needs of children whose first language is not English and to those who have other, visible disabilities.

lege preparatory programs, even when their objective test scores warrant inclusion, does lend support to skepticism about the accuracy of special education placement decisions for African Americans. It is easy to hypothesize that schools have unduly low expectations for African Americans. But we also need to be careful not to overreact by making it too hard for African Americans who need special education services to qualify for such services. Because of the relationship between conditions of poverty and mental retardation, some overrepresentation of African Americans is, unfortunately, to be expected.²⁴⁶ Irrespective of whether Congress maintains the integration presumption, it is important to monitor special education placements by race, as currently required by the IDEA, in order to ensure that such placements are not vehicles for racial resegregation.

CONCLUSION

The integration presumption in the disability context has led to some profound changes in our society. The enforced segregation of children with disabilities from mainstream society, whether by refusing to educate them or by warehousing them in disability-only institutions, has typically ended. Nonetheless, about one in four children with disabilities continues to receive her education outside the regular classroom.²⁴⁷

Although full inclusion has been shown to pose significant challenges, the disability discussion has not changed to reflect these challenges. Both Congress and the U.S. Department of Education—with no suggestion to the contrary from the disability rights movement—continue to recite the mantra of full inclusion. And the media often supports this mantra.²⁴⁸ Congress recently reauthorized the IDEA without even tinkering with the integration presumption.²⁴⁹

²⁴⁶ Lead paint and other environmental hazards are more likely to affect poor children. See PRESIDENT'S TASK FORCE ON ENVIRONMENTAL HEALTH RISKS AND SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING 2 (2000) (finding that low-income children are much more likely to be exposed to poisonous lead hazards).

²⁴⁷ See Salend & Duhaney, *supra* note 19, at 114 (“[A]pproximately 73% of students with disabilities receive their instructional program in general educational classrooms . . .”).

²⁴⁸ *The New York Times Magazine* recently ran a heart-wrenching story about Thomas Ellenson, a kindergartener with cerebral palsy who was educated in a full-immersion public school classroom in New York City. Lisa Belkin, *The Lessons of Classroom 506: What Happens When a Boy with Cerebral Palsy Goes to Kindergarten Like All the Other Kids*, N.Y. TIMES MAG., Sept. 12, 2004, at 40. It is a wonderful success story but, unfortunately, typical of successful integrated experiences for children with severe dis-

It is time for us to examine the cold data about the successes and failures of full integration for children with disabilities. The Department of Education can develop checklists or criteria that will help guide school districts and parents in deciding what combination of educational resources are most likely to be effective for an individual child. The Department should do so while also monitoring to ensure that disability-only institutions do not reopen and that African-American children are not disproportionately resegregated through disability mislabeling. It is time for the federal government to pay attention to thirty years of research on educational outcomes for children with disabilities and to develop a more nuanced approach to the education of those children.

The Department of Education and the courts should refocus their attention so that the continuum of services regulations should be given greater weight than the integration presumption. The integration presumption should serve its historical purpose of preventing school districts from only offering segregated, disability-only educa-

abilities, which can occur only where extremely motivated parents team with districts willing and able to devote large amounts of resources to the disabled child. Thomas is the son of two devoted parents: a father who owns his own advertising company and a mother who is a physician and scientist. *Id.* at 42. At a dinner party the father arranged to thank the teachers and therapists who had helped Thomas through preschool, the Mayor happened to enter the restaurant, agreed to join their conversation, and then offered them assistance in structuring a full-inclusion program for Thomas in kindergarten. Not only did the school district spend at least \$35,000 to create a successful experience for Thomas, but Thomas's father spent \$15,000 out of his own pocket, *id.* at 104, (for which he was later reimbursed, *id.* at 110) to supplement this program.

The outcome is the perfect storybook ending. Thomas has a great year, the full-immersion program continues into first grade, and parents of typically-developing children want their children to be in Thomas's class in order to benefit from the smaller class size and additional resources. *Id.* at 110. Although Thomas has severe physical problems and does not engage in verbal communication, he appears to have the cognitive capacity to learn the regular curriculum. The combination of upper-class parents who are extremely involved in the classroom and a child with typical cognitive functioning make this experiment a predictable success.

The problem with wonderful stories like Thomas's (I, too, cried when one of his disabled classmates died) is that it reinforces the notion that integration is the silver bullet. These stories do not cause the reader to pause and consider what factors led to Thomas's success in the mainstream classroom or how realistic it is to replicate those results elsewhere. While *The New York Times Magazine* story is in contrast to the *washingtonpost.com* cartoon that ridiculed integration efforts, see Rall, *supra* note 46, neither publication furthered a genuine dialogue on disability education.

²⁴⁹ See Individuals with Disabilities Education Improvement Act of 2004, H.R. 1350, 108th Cong. § 612(a)(5) (2004) (enacted) (keeping the integration presumption in the "Least Restrictive Environment" paragraph).

tion, but the integration presumption should not be understood to dictate that a fully inclusive education is necessarily the best educational option when a school district offers a continuum of educational alternatives. The continuum of services regulation should play a bigger role in the IEP process, with a school district failing to meet its procedural requirements if it does not offer a continuum of services within the public school building.²⁵⁰

Under the “continuum of services” regulation, the IDEA already requires that

- (a) Each public agency . . . ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- (b) The continuum required in paragraph (a) of this section must—
 - (1) Include the alternative placements listed in the definition of special education under § 300.26 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
 - (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.²⁵¹

Increased emphasis on the continuum of services rule, and less emphasis on an integration presumption favoring full inclusion, would often attain better results in these cases.

Roncker, *Daniel R.R.*, and *A.W.* could have been decided correctly with more emphasis on the continuum of services regulation. In *A.W.*, the school district was not offering a continuum of services.²⁵² Cost should not be a defense to a school district’s general obligation to provide an array of educational outcomes. Because an array of options did not exist, the school district could not demonstrate that it had created an individualized educational plan that would serve *A.W.*’s needs. By contrast, in *Roncker* and *Daniel R.R.*, the school did apparently have an array of available educational options.²⁵³ Because

²⁵⁰ See 34 C.F.R. § 300.551 (requiring a continuum of alternative placements).

²⁵¹ *Id.*

²⁵² *N.W. ex rel. A.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 161 n.5 (8th Cir. 1987).

²⁵³ *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1043 (5th Cir. 1989) (finding that the El Paso school district had an adequate “continuum of alternate placements” since the district had “experimented with a variety of alternative placements and supplementary services,” including mixed placements, instructor adjustments, and placements in special education that included socialization with non-disabled children); *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1061 (6th Cir. 1983) (examining school district and finding that various options existed from total integration to total

an array of options existed, the courts' tasks should have been to evaluate those options and to determine whether the school district had selected an appropriate educational option. It should not be necessary for a school district to demonstrate that *no* educational benefit would arise from the most integrated option in order for a school district to propose a less integrated option for an individual child.

If a school district satisfies the continuum of services test, then it should be expected to follow a checklist prepared by the U.S. Department of Education to determine whether it has chosen the appropriate placement for an individual child. Although experts in the field should convene to develop such a checklist,²⁵⁴ my own review of the literature suggests that the following factors are some of the factors that should be included:

segregation, including mixed placement allowing education in a disabled-only environment, with social activities mixed).

²⁵⁴ The Department of Education has taken a correct step in that direction by issuing disability-specific guidance. For example, the Department has issued guidance on the education of children who are blind or visually impaired. *Educating Blind and Visually Impaired Students: Policy Guidance*, 65 Fed. Reg. 36,586 (June 8, 2000). These guidelines recognize the importance of the continuum of services rule. *See id.* at 36,592 ("In making decisions . . . it is essential that groups making placement determinations regarding the setting in which appropriate services are provided consider the full range of settings that could be appropriate . . ."). These guidelines do not directly question the validity of the integration presumption but do note problems with its implementation when they state:

[S]ome students have been inappropriately placed in the regular classroom although it has been determined that their IEPs cannot be appropriately implemented in the regular classroom even with the necessary and appropriate supplementary aids and services. In these situations, the nature of the student's disability and individual needs could make it appropriate for the student to be placed in a setting outside of the regular classroom in order to ensure that the student's IEP is satisfactorily implemented. . . . In making placement determinations regarding children who are blind or visually impaired, it is essential that groups making decisions regarding the setting in which appropriate services are provided consider the full range of settings that could be appropriate depending on the individual needs of the blind or visually impaired student, including needs that arise from any other identified disabilities that the student may have.

Id.

Although these guidelines hint that there should be an individualized process under which there is no presumption for a fully inclusive education, they never make that direct point. Instead, they recite the integration presumption before making the points noted above. *See id.* at 36,591 ("[B]efore a disabled child can be removed from the regular classroom, the placement team . . . must consider whether the child can be educated in less restrictive settings with the use of appropriate supplementary aids and services . . .").

- (1) Is the child's self-esteem likely to be enhanced by being clustered with children of similar chronological age and ability? If so, what settings offer that kind of clustering?
- (2) Do the teachers have sufficiently high expectations for the child's development?
- (3) Will the child with a disability be a "token" in a particular classroom setting? If so, is that fact likely to lead to adverse consequences?
- (4) Does the school district offer educational programming to children in the regular classroom to improve their tolerance of disability diversity?
- (5) Which teachers have special education training? Do the regular classroom teachers have any special education training? Does the regular classroom teacher know how to adapt the classroom for the child with a disability?
- (6) If "tracking" exists, are we confident that the child with a disability has been placed in the correct "track"? Were accommodations made available so that testing and other measurements were accurate?
- (7) Did racial bias possibly influence the determination of the child's disability status and appropriate placement?
- (8) How old is the child? Is mainstreaming made more or less difficult because of the child's age?
- (9) Are the parents involved in the child's education? Would the parents be more likely to be involved in one kind of educational configuration than another?
- (10) Is one classroom setting or school smaller or larger than another? Is size of the classroom or building likely to be a factor in the child's educational success?
- (11) What is the teacher/student ratio in the various classrooms? Is there reason to believe that a smaller teacher/student ratio would particularly benefit this child?

These factors were not closely examined in any of the leading integration presumption cases. The *A.W.* case would certainly come out differently under consideration of these factors because the school district could not demonstrate that it had a continuum of services at all.²⁵⁵ But there is no way to know how the Fifth and Sixth Circuit cases would be decided, given the paucity of the factual records and the limited scope of the issues considered by the courts.

²⁵⁵ *A.W.*, 813 F.2d at 160 (discussing a school district in which the options for educating a retarded student were limited to a regular school or a school specifically designated for and exclusively serving disabled children).

If implemented, these factors would begin to allow us to move toward a goal of developing an *individualized* and adequate educational program for each child under a continuum of services model.²⁵⁶ School districts that could not demonstrate that they had available a full range of programs would be deemed presumptively in violation of the IDEA if parents were not satisfied with the single educational option made available to their child, especially if that single option were a separate educational facility. If the school district did have available a continuum of services then courts would presume that it was acting in good faith so long as that district considered the checklist factors in determining the child's placement.

The Supreme Court properly recognized more than two decades ago that the courts "lack the specialized knowledge and experience necessary to resolve 'persistent and difficult questions of educational policy.'"²⁵⁷ Courts are well equipped, however, to ensure that procedural safeguards are being followed. For that reason, the IDEA is a very process-driven statute. At present, however, the IDEA and its regulations do not contain safeguards sufficient to ensure that school

²⁵⁶ Successful implementation requires courts to consider these factors within the educational alternatives available in a particular case so that the decision can be very concrete. In some cases, the courts appear to have considered many of these factors but at too high a level of abstraction. For example, in *Sacramento City Unified School District Board of Education v. Rachel H.*, the court appeared to make a very individualized assessment of whether Rachel would perform better in the regular classroom or the special education classroom, and concluded that the regular classroom offered her the superior learning environment. 14 F.3d 1398, 1399-1402 (9th Cir. 1994). That conclusion was drawn from appropriate factors. Rachel's social and academic progress was assessed and the special qualities of her regular classroom teacher were considered. *Id.* The problem with the decision, however, was that the regular classroom that was evaluated was *not* the classroom in which Rachel would be educated within the school district; it was a private school classroom from her previous grade. At the end of the opinion, the court recognized this limitation of its analysis when it said, "we cannot determine what the appropriate placement is for Rachel at the present time." *Id.* at 1405. But the court insisted that future decisions should be made on the basis of the "principles" set forth in the court's opinion, which included the integration presumption. *Id.*

Thus, in the future, the scales would be tipped in favor of the regular classroom because of Rachel's success in a regular, private school classroom in the hands of an apparently gifted teacher. The court failed to ask which classroom in the regular public school environment would best replicate the experience that Rachel had in the private school classroom. It is not clear whether the integrated nature of that classroom led to Rachel's success there, or whether that teacher's particular skills led that success. The court assumed that all regular, integrated classrooms would be equally beneficial to Rachel without considering the uniqueness of each classroom environment.

²⁵⁷ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 209 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

districts choose the most appropriate educational placement for an individual child once the disability-only option has been rejected. The development of a checklist by educational professionals could help guide school districts to make better decisions.

The rigid integration presumption served a useful purpose. It helped us move to a system where only five percent of children with disabilities are educated in disability-only institutions. Now, it is time to focus our attention on the ninety-five percent of children with disabilities who spend their day in the regular public schools. What is the most appropriate configuration of resources for those children? Is the regular classroom the best place for them to be receiving their education? In particular, is the regular classroom the best place for children with significant cognitive or mental health impairments? This Article has sought to begin, and reshape, the discussion concerning those children so that we can better meet the goals of the IDEA by creating a truly individualized educational program for them. I welcome vigorous debate on what factors school districts should consider in determining the appropriate configuration of educational resources when a continuum of educational alternatives exists and the integration presumption is not needed. As long as educational policy is governed by the integration presumption, however, that discussion is unlikely to occur.²⁵⁸ We need to have the courage to abandon the existing integration presumption when school districts offer a contin-

²⁵⁸ It is disappointing that advocates for individuals with disabilities seem as resistant to examining the integration presumption today as they were in 1985 when Madeleine Will suggested studying the effectiveness of full inclusion. *See supra* notes 83-84. For example, Professor Mark Weber quotes a 1978 statement by Senator Robert Stafford to support the policy basis underlying the integration presumption without questioning what empirical data could have supported that statement in both 1978 and beyond. *See* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 44 (2006). Weber recognizes that my survey of the existing empirical literature casts doubt on whether the integration presumption is better in the "run of cases." *Id.* at 45. Nonetheless, he insists that the correctness of the integration presumption should be measured by whether it is appropriate in the run of "litigated" cases. *Id.* Although I have attempted to show that the presumption has not worked well in some of the most well-known litigated cases, I would also disagree with Weber that litigated cases should be the focal point in deciding the appropriateness of the presumption. Litigated cases form only a small fraction of all cases involving IEPs. Yet the background norms reflected in federal education policy as embodied in the text of the IDEA and its regulations inform nearly all IEP meetings. Increased emphasis on the continuum of services regulation and more attention to the appropriate individualized outcome for each child would better serve most children with disabilities without sacrificing the gains that have been made in closing many outmoded disability-only institutions.

uum of educational alternatives in order to develop more appropriate individualized education programs for our children in the future.