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SCHAFFER'S REMINDER: IDEA NEEDS ANOTHER IMPROVEMENT

I. INTRODUCTION

A. Two Disabled Sons

Law is meaningless in the abstract. Only when you see a given law's effects, both good and bad, on the lives of actual people, can you begin to appreciate that law's strengths and failures. Often, new rules of law must be fashioned without that wider perspective; only after implementation can knowledge of that law's effects help improve it. In the interim, between a law's creation and its improvement, real people must struggle with the law's shortcomings.

I saw this phenomenon firsthand during my years working in the special education field. During this time, I became familiar with a retired man who had started a second family. One of the man's sons from his first family had difficulty reading and dropped out of high school as a result. The boy's difficulties began in a Midwest elementary school during the early 1960s, where neither his teachers nor his parents could explain his inability to grasp even the most basic concepts of written language. As he progressed into middle school, he exhibited several strengths that compounded the mystery, like a strong oral vocabulary and a high aptitude for solving mechanical and mathematical problems. His father, a wealthy man, paid for several experts to evaluate the boy and provide advice. Those experts diagnosed dyslexia (this dispelled one teacher's assumption that the boy's problem arose from a lack of discipline). The experts also convinced the school to implement a support program for the boy, exempting him from a foreign language requirement and allowing him extended test-taking time. While these accommodations made high school more tolerable for the boy, they did nothing to improve his ability to read, write, or spell; essentially, they amounted to assistance in completing his course work. Eventually, the severity of the boy's dyslexia overwhelmed the support program, and he withdrew from school in the early 1970s.

Unfortunately, this occurred only a few years before Congress extended the benefits of disability-based legislation to the learning disabled. The Education of All Handicapped Act (EAHC) changed the definition of a disabled student, expanding it beyond the traditional categories of physical impairment and low I.Q.¹ Under the new definition,² bright public school students with a specific reading disability, autism, or emotional difficulties could obtain the “full educational opportunity” promised by the Act (now called the Individuals with Disabilities Education Act (IDEA)).³

Years later, the same father had started a second family and sent another son to public school. Again, this boy encountered great difficulty reading and, after testing, received a diagnosis of dyslexia. The father, though concerned, was now aware of techniques for combating the disability, and assumed that his son’s school would implement those techniques. Upon further research, however, the father learned that he would have to pay separately for his son’s teachers to learn those techniques, and that the school could not necessarily implement them. In short, the school was only bound to provide accommodations to the boy, not the “remediation” that would follow from direct, one-on-one teaching using the most effective methods for overcoming dyslexia. Fortunately, the school’s administrators and teachers proved eager to develop a program that gave the boy far more support than was legally required. Most learning disabled students, however, are not so lucky. The happier story of the second son turned on research advances and on his family’s financial resources; but the story did not, as Congress would have hoped, arise from the strength of IDEA.

B. Background

Families of learning disabled (LD) students without access to additional income or such dedicated school districts find that the law offers little support. Although Congress has acknowledged the need for such support, the 1975 legislation and its amendments provide those LD students with little more than accommodations. IDEA does not present the word “accommodations” as the standard requirement for LD students, yet courts and school districts have implemented the law as if accommodations alone will satisfy the statute’s goals. While such accommodations benefit LD kids, those students cannot achieve

¹ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773-796 (codified as amended at 20 U.S.C. §§ 1400-1485 (2005)).

² The Education for All Handicapped Act of 1975 generally broadened the definition of “child with a disability” and specifically added learning disabilities to the definition. Pub. L. No. 94-142, § 4(a)(1), 89 Stat. 775 (codified as amended at 20 U.S.C. § 1401(3)(A)(i)).

³ 20 U.S.C. § 1412(a)(2).

Congress's goal of "full opportunity" without the added component of remediation. Accommodation involves removing requirements that apply to other students. Examples include untimed tests, allowing a calculator on math exams, and waiving a foreign language requirement. Remediation, on the other hand, consists of direct instruction to LD students, instruction that will alleviate or even eradicate the disability. Accommodation provides LD students with relief from the many burdens of a mainstream education; remediation allows those students to obtain the wherewithal to return to that challenging environment and compete in it successfully. In short, remediation can ultimately make accommodation unnecessary. Therefore, for LD students, the 1975 Act's mandate of full educational opportunity can only be satisfied through both accommodation *and* remediation. That gap between Congress's educational promises and the reality of many special education programs leaves most parents of most LD students with the painful choice between fighting a legal war and accepting an unnecessary ceiling for their child's progress. In a significant number of cases, parents bringing IDEA-based claims obtain services that amount to remediation.⁴ Yet those cases have not changed or heightened IDEA's substantive legal requirement; schools still need only provide an individualized education of some benefit to the disabled student. Many of the courts awarding remediation have simply concluded that the given student's disability is so severe, and the school's proposed plan so inadequate, that remediation constitutes the only means of satisfying IDEA's modest requirement of an individualized, beneficial education. Most LD students, however, do not find themselves in such dire circumstances, but still stand in dire need of IDEA's entitlement to a "full educational opportunity." The parents of this vast majority of LD students face an almost impossible task of obtaining the kind of educational services that would serve IDEA's purpose.

Parents' struggles with an LD child's school district would diminish considerably by instituting greater statutory requirements for teacher training. Particularly in the case of LD children with average or above-average intelligence, techniques for combating the disability almost always run counter to teachers' and school administrators' intuition.⁵ Many LD students often socialize with grace and excel at athletics, but also neglect assignments in order to avoid the embar-

⁴ See *Evans v. Board of Education*, 930 F. Supp. 83 (S.D.N.Y. 1996) and *Florence Co. School District Four v. Shannon Carter*, 510 U.S. 7, (1993) for two classic examples.

⁵ Christine Gorman, *The New Science of Dyslexia*, TIME, July 28, 2003, at 53, 53 (discussing the special gifts of dyslexia and the false assumptions made about students who suffer from the condition).

rassment of revealing their weaknesses; as a result, their disability often eludes detection.⁶ In a pattern that defies documentation but pervades the U.S. education system, teachers will often conclude that the LD student willfully neglects his work out of sloth or defiance.⁷ This assumption simply gains reinforcement in teachers' minds when the student speaks intelligently and knowledgably on topics not addressed in the classroom or in assigned readings.⁸

Even when accurate diagnosis of a learning disability *does* occur, schools often fail to fully address the difficulty.⁹ As opposed to the physically handicapped and the retarded, LD students require more than accommodations. Untimed tests and the removal of a foreign language requirement certainly benefit LD students immensely, but such measures do not, alone, provide the same opportunity for an LD student to reach the potential that the accommodations, standing alone, provide for the other handicapped groups. For example, since most wheelchair-bound children will remain in that physical state permanently, providing handicap access to the school may constitute all the help a school district can give such students.¹⁰ Similarly, few low-I.Q. students ever achieve a higher intelligence, and so remedial instruction that accommodates their limited intellect suffices in providing them a parallel opportunity to achieve their potential.¹¹

A bright LD child requires more than accommodation to reach his full capability. In cases of children with autism, Asperger's Syndrome, attention deficit disorder (ADD), attention deficit hyperactivity disorder (ADHD), auditory processing disorder, and dyslexia, the disability can be ameliorated or even rendered inconsequential.¹² Neurological and cognitive research has produced scientifically proven techniques for remediating bright LD children and adoles-

⁶ See *Social and Emotional Problems Related to Dyslexia*, FACT SHEET 49 (Int'l Dyslexia Assoc., Balt., Md.), May 2004, at 3, <http://www.interdys.org/fact%20sheets/Soc-Emo%20FS%20N.pdf> [hereinafter IDA] (explaining how the special talents of dyslexics lead observers to doubt the diagnosis).

⁷ See Gorman, *supra* note 5, at 53.

⁸ See IDA, *supra* note 6, at 1 (“[Dyslexics’] teachers see a bright, enthusiastic child who is not learning to read and write. Time and again, dyslexics and their parents hear, ‘He’s such a bright child; if only he would try harder.’ Ironically, no one knows exactly how hard the dyslexic is trying.”).

⁹ See Press Release, U.S. Dep’t of Educ., To Raise Achievement of Students with Disabilities, Greater Flexibility Availability for States, Schools (Dec. 14, 2005), at 2-3 (commenting on the pervasive failure of schools to understand learning disabilities and to challenge LD students accordingly).

¹⁰ See IDA, *supra* note 6, at 2.

¹¹ *Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001) (citing the common presumption that one’s low I.Q. will remain low throughout life).

¹² *Id.* at 54.

cents.¹³ Although these techniques are most effective for mildly LD students, severely disabled LD students can nonetheless achieve academic progress by receiving such remediation.¹⁴

Even though some of these techniques gained prominence as early as the 1950s, state education departments and individual school districts have been slow to implement them. Even the lucky LD student who obtains a diagnosis and accommodations seldom receives the proven benefit of specialized instruction.¹⁵ In comparison, consider a physically handicapped child. Imagine that this child possesses the capability (through proper physical therapy) to walk again. Her school will not simply *accommodate* the disability through ramps and elevators, but will provide the relevant therapy as well.¹⁶ Providing comparable therapy to the dyslexic or Asperger's child,¹⁷ though, requires training more esoteric and novel than what a physical therapist receives. LD therapy also demands a compassion and perception that is harder to summon when the child does not struggle in the visible and heart-tugging manner of the physically handicapped. The LD student has therefore confronted the U.S. education system for ages with a challenge that schools cannot meet with Sign Language interpreters and Braille books.

Congress has announced its awareness of the need for remediation. Through the No Child Left Behind Act of 2001, Congress has encouraged schools to provide the type of reading instruction proven by science to remediate the learning disabled.¹⁸ Given Congress's endorsement of those effective teaching techniques, why does IDEA still fail in its mission of providing full educational opportunity to LD students? To phrase the question differently, why does IDEA grant accommodation and not remediation?

The answer lies in IDEA's textual weaknesses and a misguided Supreme Court decision. The statute sets important educational goals for schools, including "the full opportunity" mentioned earlier and even "equal protection of the law," relative to non-LD students.¹⁹ Yet,

¹³ See Gorman, *supra* note 5, at 54 (quoting Dr. Sally Shaywitz, a Yale neurologist who conducts brain-scan research on LD subjects: "The good news is we really understand the steps of how you become a reader and how you become a skilled reader").

¹⁴ See *id.*

¹⁵ *Id.* at 55.

¹⁶ Wade F. Horn & Douglas Tynan, *Time To Make Special Education "Special" Again*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 23, 40 (Chester E. Finn, Jr., et al. eds. 2001).

¹⁷ Asperger's Syndrome is generally believed to be a mild form of autism.

¹⁸ Gorman, *supra* note 5, at 54 ("When the U.S. government launched . . . No Child Left Behind, its administrators made clear that their funding would only go to reading programs that are based on solid evidence of the sort that has been uncovered in dyslexia research.").

¹⁹ 20 U.S.C. § 1400(c)(6) (2005).

the Act sets forth little guidance for how schools might meet those goals. In the 1982 case *Board of Education v. Rowley*,²⁰ the Court attempted to provide that missing guidance. In interpreting the meaning of the “free appropriate public education” guaranteed by IDEA,²¹ the Court ruled that the Act only requires “some educational benefit” and a “basic floor of opportunity” for the disabled.²² Writing for the majority, Justice Rehnquist explained that schools meet this standard when they merely provide “access” to the disabled.²³ For the most part, schools have been able to satisfy that requirement by simply providing accommodations.

As a result of IDEA’s vague wording, and the low standard articulated in *Rowley* (and in the many decisions thereunder), the Supreme Court has again applied IDEA in a manner inconsistent with congressional intent. In the 2005 case *Schaffer v. Weast*,²⁴ the Court held that parents, not school districts, carry the burden of proof in IDEA-based complaint hearings; that is, parents must prove that the school has not met the *Rowley* standard. Since, under *Rowley*, school districts already had negligible IDEA responsibilities, *Schaffer* further darkens the already bleak landscape for LD students. The only clear hope for brightening it again lies in Congress’s ability to amend IDEA.

II. THE STATUTE

Like tribes of old who would accept mysterious illnesses and deaths as the work of the gods, the U.S. Education system for decades treated the disabled child as a pitiable victim of ill fortune who could never be “mainstreamed” or taught to overcome the disability. Aware of this problem, Congress in 1975 enacted IDEA (EAHC at the time). The statute purports to “ensure that all children with disabilities have available to them a free appropriate public education . . . to meet their unique needs and prepare them for . . . independent living.”²⁵ As a Spending Clause statute, IDEA provides funding to states in exchange for compliance.²⁶ During 1999–2000, the funding amounted to a total of \$3.7 billion, or over \$70 million per state.²⁷ In accepting these funds, states essentially waive their control over their own education

²⁰ 458 U.S. 176 (1982).

²¹ 20 U.S.C. § 1412(a)(1)(A).

²² *Rowley*, 458 U.S. at 200.

²³ *Id.* at 194 n.18.

²⁴ 126 S. Ct. 528 (2005).

²⁵ 20 U.S.C. § 1400(d)(1)(A).

²⁶ *See id.* § 1412(a).

²⁷ THE ADVOCACY INST., STUDENTS WITH LEARNING DISABILITIES: A NATIONAL REVIEW 6 (2002), http://www.advocacyinstitute.org/resources/LD_Review02.pdf.

system to the extent such independence would contravene the Act's provisions.

To meet the requirements of IDEA, state education departments must ensure that school districts within their domain conduct evaluations of any struggling student to determine whether a disability exists.²⁸ If that assessment identifies a disability, the district must work with the child's parents and the school's other professionals (the school psychiatrist, the special education director, etc.), to develop an Individualized Education Plan (IEP).²⁹ A proper IEP includes a detailed explanation of the student's deficiencies, the services and accommodations that the school will provide to address those deficiencies, and annual goals toward which school staff and the student will strive together.³⁰

If the parents (or, in rare cases, the school) disapproves of the IEP, the Act empowers that party to obtain an "impartial due process hearing,"³¹ administered by a hearing officer not employed by the state's education department or by any school district under its umbrella. Section 1415 provides numerous procedural safeguards and guidelines, including the parent's right to counsel at the hearing³² and the right to appeal the hearing officer's decision through a federal civil suit.³³ Although the Act assigns states the task of establishing and maintaining procedures, there is actually little room in section 1415 for states to develop their own procedural rules. That section sets elaborate notice requirements,³⁴ specifies time limits for stages of the hearing process,³⁵ and establishes the burden of proof as a preponderance of the evidence.³⁶ Strangely, though, the Act does *not* tell us on *whom* the burden of proof rests. There was no agreement among the federal circuit courts as to whom to assign the burden; different courts assigned the burden to different parties. Thus, the issue was unresolved until November 2005, when the Supreme Court decided *Schaffer v. Weast*.³⁷

²⁸ 20 U.S.C. §1412(a)(3)(A).

²⁹ *Id.* § 1414(d).

³⁰ *Id.* § 1414(d)(1)(A)(i)(I)-(V) (outlining the contours of the states' obligation to create an IEP).

³¹ *Id.* § 1415(f).

³² *Id.* § 1415(h)(1).

³³ *Id.* § 1415(i)(2).

³⁴ *Id.* § 1415(c).

³⁵ *Id.* § 1415(c)(2)(c).

³⁶ *Id.* § 1415(i)(C)(iii).

³⁷ 377 F.3d 449, 451 (4th Cir. 2004), *aff'd*, *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

III. THE CASE

Throughout elementary school, Brian Schaffer found it increasingly difficult to succeed in school. Upon entering junior high school, his problems grew so severe that his private school teachers recommended he transfer to a school better equipped to address his needs.³⁸ The Schaffers chose the local public school, Montgomery County Middle School, where staff diagnosed him with attention deficit hyperactivity disorder (ADHD).³⁹ The school crafted an IEP after the diagnosis, but the Schaffers found it inadequate for Brian's needs and requested an IDEA-based hearing. In Maryland these hearings are supervised by an administrative law judge (ALJ).⁴⁰

Both the Schaffers and the school district presented testimony by experts whose credentials the ALJ found "impressive."⁴¹ In fact, the ALJ viewed the evidence from both the parents and the school to be so persuasive, and the case so close, as to make the outcome turn on the assignment of the burden of proof.⁴² Taking note of the divided views among the circuits courts, the ALJ interpreted IDEA to endorse a presumption that schools will make proper placements for disabled students.⁴³ Based on that view, he placed the burden on the parents and thus found the IEP to be in compliance with IDEA.⁴⁴

The Schaffers then filed a claim in a Maryland federal district court where the ALJ's decision was reversed. In his majority opinion, Judge Messite cited Wigmore for the proposition that, although the burden of proof normally rests on the party seeking relief, an exception applies in the event of unfairness (Wigmore's fairness exception).⁴⁵ Here, Judge Messite found the fact that schools possess much more "expertise" in the realm of special education (than typical parents do) sufficiently "unfair," and remanded the case with an order to assign the burden to the school.⁴⁶

In an outcome the district court surely foresaw, the ALJ then found for the parents. When the school appealed *that* ruling to the same district court that had just remanded the case, the Southern District of

³⁸ Charles Lane & Lori Aratani, *High Court To Hear Md. Special-Ed Case*, WASH. POST, Oct. 5, 2005, at B1.

³⁹ *Brian S. v. Paul L. Vance*, 86 F. Supp. 2d 538, 539 (D. Md. 2000), *rev'd*, *Weast v. Schaffer*, 240 F. Supp. 2d 396 (D. Md. 2002).

⁴⁰ *Id.* at 540.

⁴¹ *Id.*

⁴² *Weast v. Schaffer*, 377 F.3d 449, 451 (4th Cir. 2004), *aff'd*, *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

⁴³ *Brian S.*, 86 F. Supp. 2d at 540.

⁴⁴ *Id.*

⁴⁵ *Id.* at 544-45.

⁴⁶ *Id.*

Maryland naturally affirmed the ALJ's updated judgment.⁴⁷ The Court of Appeals for the Fourth Circuit reversed and remanded the case with the burden again placed on the Schaffers.⁴⁸ In reaching that decision, the court of appeals applied the same reasoning that was initially embraced by the ALJ: that, by assigning the implementation of IDEA to local school authorities, Congress created a presumption that schools would fashion appropriate IEPs.⁴⁹ From this viewpoint, placing the burden on the school would be inapposite to Congress's intentions.

The case eventually made its way to the Supreme Court, where Justice O'Connor wrote a majority opinion based on the same theory.⁵⁰ O'Connor reasoned that the Schaffers were effectively asking the "Court to assume that every IEP is invalid until the school district demonstrates that it is not."⁵¹ The Court did not agree with that assumption. Rather, the majority felt that Congress's silence on the burden issue justified the view that the burden should be allocated to the party seeking relief.⁵² But since the schools create the IEPs, they generally would have no reason to change them; thus, the Court's decision is better read as placing the burden of proof for IDEA hearings on families of the disabled.

IV. WHY THE BURDEN OF PROOF MATTERS IN IDEA CASES, AND WHY IT SHOULD REST ON SCHOOLS

A. The Wrong Arguments

The written opinions of the district court and the two Supreme Court dissenters provide a long list of reasons why schools should carry the burden in these cases. Although the burden should indeed lie with schools, none of the reasons successfully justify that radical shift from the standard rule. The best reason to place the burden on schools arises from the nature of IDEA itself.

1. The Schaffer Dissents

In the opening salvo of her dissent, Justice Ginsburg lobs a recent Supreme Court case back at Justice O'Connor's default adherence to

⁴⁷ *Weast*, 377 F.3d at 451-52. The school district appealed the case on the ground that the ALJ had incorrectly applied the burden on remand.

⁴⁸ *Id.* at 456.

⁴⁹ *Id.* at 455-56.

⁵⁰ *Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005).

⁵¹ *Id.*

⁵² *Id.* at 535.

the old rule.⁵³ In *Alaska Department of Environmental Conservation v. EPA*,⁵⁴ the Court held that the Environmental Protection Agency (EPA) always carries the burden of proof in cases where a state environmental agency seeks to reverse an EPA “stop” order.⁵⁵ In that case, the Alaskan state agency had granted a mining permit that the EPA found objectionable.⁵⁶ Although the EPA had the choice of blocking the permit through an injunction, it chose simply to order its own reversal, or stop order, of the state agency’s permit. The state then sued in federal court to block the EPA’s bold move. The matter reached the Supreme Court, which assigned the burden of proof to the EPA even though the agency was the defendant.⁵⁷

Although Ginsburg invokes this case as precedent in her *Schaffer* dissent, a close analysis reveals that the majority view in *Schaffer* actually conforms with *Alaska Department of Environmental Conservation*. Although the EPA was the defendant, it sought to change an existing directive: the state agency’s permit for the mining company. Parents bringing an action pursuant to section 1415 of IDEA are in the same position: they wish to change an existing IEP. The Supreme Court therefore acted consistently in first placing the burden on the EPA and then placing it on parents.

Justice Breyer’s *Schaffer* dissent springs from section 1415’s directive to states that they “establish and maintain” procedures for implementing IDEA.⁵⁸ Based on this clause, Breyer argues that the Court should leave the burden question up to the states.⁵⁹ In suggesting this compromise position between Ginsburg’s and the majority’s, Breyer overlooks two aspects of the statute. First, section 1415 dictates so many procedural rules to the states that the “establish and maintain” language carries little significance. Second, an inconsistent pattern of burden assignment among the states would run counter to the Act’s express purpose “to ensure equal protection of the law” for students with disabilities.⁶⁰

⁵³ *Id.* at 537-38, (Ginsburg, J., dissenting).

⁵⁴ 540 U.S. 461 (2004).

⁵⁵ *Id.* at 494.

⁵⁶ *Id.* at 478-79.

⁵⁷ *Id.* at 494.

⁵⁸ 20 U.S.C. § 1415(a) (2005).

⁵⁹ *Schaffer v. West*, 126 S. Ct. 528, 541 (2005) (Breyer, J. dissenting).

⁶⁰ 20 U.S.C. § 1400(c)(6).

2. *The District Court*

The Maryland District Court, as noted earlier, analyzed the burden issue on equity grounds.⁶¹ Finding that schools have significantly more expertise than parents in these matters, the court invoked Wigmore's fairness exception. Under this argument, the training, resources, and expert knowledge among a school's teachers and administrators make them far more capable of satisfying the burden of proof than parents.⁶² The Supreme Court countered this observation by pointing out a vital detail from the statute: under section 1415, the school must share all that expertise with the parents as part of the IEP and hearing process.⁶³ Specifically, after a school conducts an evaluation of a child, IDEA requires the school to describe all tests and procedures used in its conclusions, to explain why it chose the proposed course of action, and to list the sources consulted in reaching that decision.⁶⁴ Furthermore, the school has to explain why the IEP team decided *against other* means of addressing the child's problem.⁶⁵ In her majority opinion, Justice O'Connor argues that this vast wealth of information, combined with the parents' right to counsel and the right to use other experts, serve to level the playing field between the school and the parents.⁶⁶

B. A Better Rationale

Although Justice O'Connor presents the more convincing side of the debate, she uses her salient point to arrive at the wrong conclusion. Section 1415's imposition on schools actually *supports* the assignment of the burden to them. Since a school will have already produced all explanatory material before a hearing begins,⁶⁷ the school's IEP team will hardly be able to do much more in attempting to meet its burden of persuasion. All of the information that the school must share with the parents comprises the bulk of the evidence it will produce in an IDEA hearing. Although the school might hire experts to testify on its behalf, as the Montgomery County school district did at

⁶¹ Justice Ginsburg also raised this point in her dissent. See *Schaffer*, 126 S. Ct. at 538 (Ginsburg, J., dissenting).

⁶² *Brian S. v. Paul L. Vance*, 86 F. Supp. 2d 538, 544 (D. Md. 2000), *rev'd*, *Weast v. Schaffer*, 240 F. Supp. 2d 396 (D. Md. 2002).

⁶³ *Schaffer*, 126 S. Ct. at 536-37.

⁶⁴ 20 U.S.C. § 1415(c)(1).

⁶⁵ *Id.* § 1415(c)(1)(E).

⁶⁶ *Schaffer*, 126 S. Ct. at 536-37.

⁶⁷ See *Jenkins v. Squillacote*, 935 F.2d 303 (D.C. Cir. 1991) (holding that school districts must provide parents with more than a mere summary explanation and that the exhaustive explanation required by IDEA may *not* be deferred until the time of the hearing).

the Schaffers' hearing, those experts will be working from the same testing material that the family will have already received from the school. Assigning the burden of proof to schools, therefore, does not impose on them much more of a burden than section 1415's procedural requirements already do.⁶⁸

1. Board of Education v. Rowley

Indeed, if a school actually adheres to the IDEA's requirement of a "free and appropriate education," as developed by case law, it will find little difficulty satisfying the burden.⁶⁹ The Supreme Court made the task easy for schools in *Rowley*. There, the proposed IEP for the deaf student Amy Rowley included routine tutoring from a speech therapist and use of a hearing aid/amplification device.⁷⁰ The parents requested a Sign Language interpreter in place of the device, but the school concluded that the interpreter was unnecessary, and the presiding examiner at the subsequent hearing agreed.⁷¹

The Supreme Court, in a majority opinion by Justice Rehnquist, upheld the hearing officer's decision. In language that established the still-current standard for IDEA compliance, the Court ruled that the "free appropriate public education" required by IDEA called only for a program "sufficient to confer some educational benefit upon the handicapped child."⁷² Rehnquist repeatedly emphasized that Congress's use of the phrase "appropriate education" demanded only *access* to an education with benefits, *not* opportunities equivalent to those enjoyed by nonhandicapped kids.⁷³

To support such a minimalist standard, Rehnquist cited a few phrases in the statute and in IDEA's legislative history. He quoted from IDEA's provision requiring school districts to provide services that will "assist a handicapped child to benefit from special education."⁷⁴ In reviewing IDEA's legislative history, Rehnquist seized on one Congressman's statement that its purpose was to create

⁶⁸ Justice Ginsburg, in her dissent, shrewdly points out that, since nine states filed amicus briefs in favor of assigning the burden of proof to school districts, the burden could not possibly create undue costs or labor for those states. *Schaffer*, 126 S. Ct. at 539-40 (Ginsburg, J., dissenting).

⁶⁹ See Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners at 6, *Schaffer v. West*, No. 04-698, 126 S. Ct. 528 (2005) (stating that "[i]n order to prevail, the school districts need only explain why their proposed IEP meets the standards of the IDEA").

⁷⁰ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 184 (1982).

⁷¹ *Id.* at 195.

⁷² *Id.* at 200.

⁷³ *Id.* at 189-90.

⁷⁴ *Id.* at 188 (quoting 20 U.S.C. § 1401(17) (codified at § 1401(26)(A))).

a “basic floor of opportunity” for such children.⁷⁵ With those two phrases (“some benefit” and “floor of opportunity”), Rehnquist molded a soft standard through which school districts have since avoided remediation.

Rehnquist defended his approach as an act of deference to the legislative branch, but he handpicked those phrases from many equally prominent ones. He noted that the legislative record included an explanation of IDEA as providing “full educational opportunities,” and quoted one section of IDEA that requires states to set a goal of “maximum benefits for handicapped children.”⁷⁶ Yet he shrugged off these items as “isolated phrases” and “too thin a reed” to use for guidance. Rehnquist insisted that Congress did *not* intend IDEA to provide a “full educational opportunity,” even though that phrase, unlike “some benefit” and “floor of opportunity,” merits its own section heading within section 1412.⁷⁷ However, the language of the statute itself clearly expresses Congress’s intention that schools provide much more than “some benefit” to disabled students. Dissenting in *Rowley*, Justice White points to a line in the Congressional record that describes the Act’s purpose as helping each handicapped kid to “achieve his or her maximum potential.”⁷⁸ Nonetheless, the *Rowley* standard has become the authoritative measurement of IDEA compliance.⁷⁹

2. *Nothing Lost and Everything Gained*

Given the *Rowley* standard, then, a school satisfies the burden of proof through merely showing, by a preponderance of the evidence, that its special education program provides “some benefit” to the disabled student. If the school has provided that “access” to a “basic floor of opportunity,” or if a new IEP proposal provides for such minimal assistance, then the school need not worry about the burden of proof at an IDEA hearing.⁸⁰ Simply following section 1415’s pro-

⁷⁵ *Id.* at 200.

⁷⁶ *Id.* at 194 n.18.

⁷⁷ *Id.* at 204 n.26.

⁷⁸ *Id.* at 214 (White, J., dissenting) (quoting H.R. REP. NO. 94-332, at 13, 19 (1975)).

⁷⁹ See, e.g., *Tucker v. Calloway Bd. of Educ.*, 136 F.3d 495 (6th Cir. 1998) (explaining that a “free appropriate education” is not one that maximizes the student’s potential but is rather one that simply provides benefits to the student); *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566 (8th Cir. 1998) (holding that the education need not be the best possible for a dyslexic, so long as she is benefiting from it); *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994) (applying the basic floor of opportunity and benefits standard); *Leonard v. McKenzie*, 869 F.2d 1558, 1561 (D.C. Cir. 1989) (quoting *Rowley*, 458 U.S. at 200) (describing the Act as providing a “basic floor of opportunity”).

⁸⁰ Rare is the case in which the family wins. In one D.C. Circuit case that exemplifies those rarities, the school had provided none of the three central types of therapy promised in the

cedural requirements will compel compliant schools, well before any possible hearing, to produce the information that will later satisfy the burden of persuasion.

Therefore, the only time a school will fail to meet the burden is *if it fails to provide the bare minimum of necessary services to a disabled child*. The *Schaffer* case itself demonstrates this awful reality. When the burden rested on parents, they could not prove that the education provided by Montgomery County Middle School was inadequate. Once the burden shifted, however, the ALJ held the IEP to be insufficient.⁸¹ The burden places no grave imposition on schools, but it places the gravest on LD students and their families. By assigning the burden to schools, the Supreme Court would have simply fulfilled the least demanding manifestation of IDEA's purpose: ensuring that LD students benefit from their special education programs. For this reason the traditional rule of burden assignment should be discarded. If ever Wigmore's fairness exception carried meaning, it carries plenty here.

C. Presumptions

In the *Schaffer* case, the Fourth Circuit and the Supreme Court majority presented a troubling and thought-provoking point: the assignment of the burden to schools would imply that teachers and administrators are not adequately performing their jobs. While this proposition may give us pause, what other explanation can be found for IDEA's existence? At a minimum, Congress presumed that enough schools were failing in their duties (resulting from financial difficulties, inadequate training, etc.) to justify a multibillion dollar disbursement each year to the states. If special education departments had been performing their task successfully, IDEA would not exist.

As the *Rowley* majority noted, as of 1975, almost two million handicapped kids received no education, and over two million more were not receiving an "appropriate" one.⁸² By passing IDEA to address that crisis, Congress certainly did not expect those numbers to vanish overnight. Many of the Act's purposes are stated as goals, not instant realities. Congress obviously did not presume the existence of an effective special education system as of 1975, and IDEA has sur-

IEP: speech, occupational, and physical. *Argueta v. District of Columbia*, 355 F. Supp. 2d 408 (D.D.C. 2005).

⁸¹ *Schaffer v. Vance*, 2 F. App'x 232, 233 (4th Cir. 2001).

⁸² *Rowley*, 458 U.S. at 191.

vived many amendments,⁸³ this suggests that the central goal of an appropriate education for disabled kids has not yet been accomplished. Quality special education programs can be found throughout the country, and in almost all of them any observer will find dedicated and resourceful staff. Yet, the assumption that those programs generally meet Congress's standard of an "appropriate" education deviates from the history of the Act.

In *Schaffer*, the Supreme Court and the Fourth Circuit seemed to suggest that the presumption that schools perform sufficiently commenced with IDEA's passage. Specifically, the Fourth Circuit argued that Congress, by giving schools the job of developing IEPs, deferred to their wisdom and thus created the presumption.⁸⁴ Yet, the court here blurred the distinction between assigning a task and conferring deference; these two acts do not always overlap. After all, who else would develop IEPs for specific students but the schools who teach them? Congress simply gave the job of developing IEPs to the obvious parties. In doing so, Congress did not create a presumption of the quality of the special education stemming from those IEPs.

D. The Only Meaningful Enforcement

The Supreme Court's ruling in *Schaffer* poses other problems. The enforcement of IDEA's provisions takes one of three forms: the U.S. Secretary of Education withholds funds from a noncompliant state, the Secretary refers the matter to the Department of Justice, or a parent brings a section 1415 complaint.⁸⁵ The first two methods happen so rarely that finding individual cases is difficult and requires research back over many years.⁸⁶ The third method, in contrast, is common: 3,274 IDEA due process hearings occurred in 2000 alone.⁸⁷ Given these statistics, it is clear that the parental complaint system is the only meaningful enforcement that the Act authorizes.⁸⁸

⁸³ Amendments to the Act occurred in 1997, 1999, and 2004.

⁸⁴ *Weast v. Schaffer*, 377 F.3d 449, 455-56 (4th Cir. 2004), *aff'd*, *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

⁸⁵ The statute lists more than these, but the ones not mentioned here are corrective and mediation measures that lead, upon failure, to one of these three.

⁸⁶ In 1994, the U.S. Department of Education attempted to withhold the annual funds from the state of Virginia. Even then, the Fourth Circuit stayed that order pending extensive procedure below. *Va. Dep't of Educ. v. Riley*, 23 F.3d 80 (4th Cir. 1994).

⁸⁷ THE ADVOCACY INST., *supra* note 27, at 5.

⁸⁸ The No Child Left Behind Act features much more robust enforcement procedures. Any school failing to meet state-created goals initially receives more aid to correct the problem. If the failing school still falls short of the required goals, even with the extra money, the staff gets replaced. The enforcement process continues onto several more steps, if necessary: the U.S. Department of Education will then replace the school's curriculum and finally, as a last resort, convert the school to charter status. See Erin Kucerik, *HOT TOPIC: The No Child Left Behind*

Placing the burden of proof on parents further weakens an already weak check on negligent schools.⁸⁹ IDEA's language contains many vague adjectives that leave room for *Rowley's* kind of minimal application of IDEA. Congress devoted much attention to procedural requirements, using clear and concrete words to give school districts guidance. Yet, while the statute features clear substantive *goals* for children, like "full educational opportunity,"⁹⁰ even the closest review of the Act's text and history reveals paltry guidance as to what substantive steps schools should take to reach those goals. For example, section 1414 directs schools to a list of items to consider when developing an IEP. Although the list includes "the academic . . . needs of the child,"⁹¹ it does not include the best or even preferable educational approaches for specific disabilities, even though section 1415 requires schools to explain their choice of approaches to parents.

The 2004 amendment to the Act partially clarifies Congress's expectations for IEPs. Naming the amendment "Individuals with Disabilities Education Improvement Act of 2004," Congress inserted a new requirement that the school's services to disabled students be based on "peer-reviewed research."⁹² Also, an IEP team must now consider not just the "academic" needs of a student but her "developmental" and "functional" ones as well.⁹³ Considering the developmental needs of a student and applying peer-reviewed research to those needs will improve special education considerably. Yet, the new language still leaves too much confusion as to what level of services a school must provide. Who are the "peers" who would review the research? Are they the faculty of graduate education programs, education psychologists in private practice who publish in scholarly journals, or agency staff at the U.S. Department of Education? Would mere approval by those reviewers satisfy the statute, or does the peer-review requirement necessitate that the given teaching technique be proven as effective? Although the 2004 amendment marks an advance in the cause of disabled kids, the persistent ambiguity of the language therein still allows courts to apply the modest *Rowley* standard.

Act of 2001: Will It Live Up to Its Promise?, 9 GEO. J. ON POVERTY L. & POL'Y 479 (2002) (discussing the accountability provisions in No Child Left Behind).

⁸⁹ See *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 1325 (11th Cir. 2005) ("The IDEA's central mechanism for the remedying of perceived harms is for parents to seek changes to a student's program." (quoting *Polera v. Bd. of Educ.*, 288 F.2d 478, 483 (2d Cir. 2002))).

⁹⁰ 20 U.S.C. § 1412(a)(2) (2005).

⁹¹ *Id.* § 1414(d)(3).

⁹² *Id.* § 1414(d)(1)(A)(i)(IV).

⁹³ *Id.* § 1414(d)(3)(A)(iv).

In a similar vein, IDEA defines “special education” to mean “instruction . . . to meet the unique needs of a child with a disability.”⁹⁴ Does that language call on schools to *remediate* a remediable disability (like temporary speech loss that can be diminished through therapy) or merely *accommodate* it (like waiving the student’s requirement to participate in class discussions)? In *Rowley*, the majority certainly chose the narrowest view possible, one that undermines the clear statutory goal of providing full opportunity to disabled students. Ironically, it was IDEA’s vague substantive standards that the Court used to undermine that goal. Given IDEA’s textual weaknesses, *Schaffer*’s weakening of IDEA’s only effective enforcement measure will render the statute’s express purpose all but nominal.

V. AMEND!

Since *Rowley* and *Schaffer* now stand as controlling precedent, Congress’s amendment power offers the only reliable solution to IDEA’s inadequacies. As it has many times before, Congress should amend IDEA, this time to set a clearer substantive standard under which courts can determine whether a given school district has provided a “free and appropriate education” to a disabled student. Technically, the U.S. Department of Education could address this problem without Congress’s help by issuing new regulations that require remediation for students in need of it. Yet, such a measure would carry little effect, as schools voluntarily remediating would simply continue to do so, and schools failing to do so would ignore the requirement because of its unenforceability. Such regulations are unenforceable: parents can only enforce IDEA requirements at due process hearings and in court, not regulatory schemes issued by the Department of Education. Thus, the only meaningful hope for the majority of LD families rests in Congress’s amendment power. As Rehnquist pointed out in *Rowley*, “Congress . . . can impose no burden upon the States unless it does so unambiguously.”⁹⁵ Schools and courts have needed that clear-cut mandate for the duration of IDEA’s existence.

The *Rowley* opinion also repeated the standard refrain of any court deferring to legislative power: courts do not possess the expertise to create these type of standards.⁹⁶ Of course, the *Rowley* court proceeded to do just that. But in so doing, Rehnquist correctly acknowledged the special wherewithal of Congress, which can review the many advances that have been made in neuroscience and cognitive

⁹⁴ *Id.* § 1401(29).

⁹⁵ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 190 (1982).

⁹⁶ *Id.* at 208.

research.⁹⁷ It can also conduct hearings to examine different experts on the best means of remediating particular learning and physical disabilities.

If Congress did create a clearer substantive standard, the states could hardly protest that Congress was trespassing on their traditional power to develop curricula as they see fit. In accepting the many millions of dollars that IDEA compliance yields, states, as noted earlier, waive their right to exercise that power fully, at least in the sphere of special education. In the event that Congress wants to tread lightly on federalism issues, the amendment need not spell out every method that schools must use. For example, Congress could simply require that states employ the best current teaching method for each disability, as endorsed by the U.S. Department of Education. If Congress can call on schools to use the best special education teaching methods in the No Child Left Behind Act, and if it can also demand that any teaching be based on peer-reviewed research (in the 2004 amendment), certainly it can require those best methods in a new amendment.⁹⁸ Congress need not ignore that certain methods for teaching dyslexics and Asperger's children have been established as the most effective, currently available approaches. By requiring those methods in cases where the IEP team confirms one of those conditions, Congress would make its generalized mandates more specific, and thus more effective.

The amendment should also address the issue of remediation versus accommodation. In *Rowley*, Rehnquist denounced the notion that IDEA provides equal opportunity "regardless of [the student's] capacity."⁹⁹ This view ignores the distinction between students whose disability never changes (the permanently blind) and those whose disability can be diminished through proper teaching methods (like dyslexics and students with mild speech impairments). *Rowley* lumps all disabled students into the first category by only promising "access" at a "base floor of opportunity." In other words, the courts have essentially construed IDEA to provide accommodation, *not* remediation.

Not everyone who works in the area of special education law agrees with this assertion. Some practitioners have successfully argued in due process hearings that IDEA *does* require remediation.¹⁰⁰

⁹⁷ *Id.* ("We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

⁹⁸ Gorman, *supra* note 5, at 54.

⁹⁹ *Rowley*, 458 U.S. at 199.

¹⁰⁰ See *Evans v. Bd. of Educ.*, 930 F. Supp. 83 (S.D.N.Y. 1996). The hearing officer had

That success, however, does not reflect an established judicial or statutory rule. In the course of my work on this article, I discussed this debate with four lawyers currently in practice as advocates for families in IDEA-based due process hearings. In answering the article's central question (Does IDEA require remediation?), the four lawyers gave four different responses. One said that the statute indisputably requires it. A second said that the statute actually requires neither remediation nor accommodation but rather just the "individualized benefit" articulated in *Rowley*, regardless of whether the services amount to either of those two categories. The last two attorneys both stated simply that the statute does not require remediation, but those two explained their answers in different ways. The first emphasized that justifying his answer would be difficult; the other more confidently asserted her position while cautioning against use of the word remediation, as that word creates confusion in the legal community.

Such divergence in opinions among four learned practitioners highlights the need for Congressional clarification. Courts have perhaps inadvertently contributed to the terminology confusion described by the last lawyer. The word remediation almost never appears in a court's opinion, but when it did, the court implicitly defined the term far differently than special education professionals do. In *Independent School District No. 283 v. S.D.*,¹⁰¹ the court mentioned in dicta that "IDEA does not demand that the State cure the disabilities which impair a child's ability to learn, but requires a program of remediation which would allow the child to learn notwithstanding her disability."¹⁰² The goal of *accommodation* is to allow a child to learn "notwithstanding her disability." Remediation's goal is to make accommodation less necessary or not necessary at all, so that the child can learn not despite the disability, but rather as if it did not exist.¹⁰³ Since reaching that second goal may take a long time for many LD students, they need both accommodation and remediation in the interim. The standard set by this court addresses the first goal but not the second. While using the word remediation, all the court requires of school districts is accommodation.

"directed the [School] District to put in place immediately a program similar to that outlined in the October 1994 IEP, [and] also to update it." *Id.* at 92. Although this arrangement failed to satisfy the family, both the IEP and that update included remediation. *Id.* at 91-92.

¹⁰¹ 948 F. Supp. 860 (D. Minn. 1995).

¹⁰² *Id.* at 885.

¹⁰³ Gorman, *supra* note 5, at 54 ("Some studies suggest that the right kinds of instruction provided early enough may rewire the brain so thoroughly that the neurological glitch disappears entirely.").

Indeed, the IEP for the student in that case provided actual remediation *before* the parents filed a claim: she had been receiving one-on-one remedial reading instruction in the multisensory method from which dyslexics derive the greatest benefit.¹⁰⁴ The parents did not file the claim in order to obtain remediation, but rather to have their daughter repeat the third grade and be assigned to the same tutor every year.¹⁰⁵ Therefore, the case did not turn on what level of services IDEA requires, but rather on how much discretion schools may exercise under IDEA in making placements for disabled students. By mentioning the minimal requirements of IDEA, the court was merely explaining how the school exceeded the statute's demands.

Other federal court opinions have also inadvertently propelled the current confusion regarding IDEA's requirements. The IEP for the dyslexic student in *Evans v. Board of Education*¹⁰⁶ provided accommodation but not the specific multisensory remediation that his mother had requested.¹⁰⁷ The staff of the student's public school did not possess the training necessary to offer that kind of remedial instruction; so the mother requested that the school pay for his placement at a private school whose staff had been trained in that proper technique (called the "Orton-Gillingham" method).¹⁰⁸ Even with the public school's accommodations, the student, Frank, was still failing every course and deriving no meaningful education by attending the school. Given those extreme circumstances, the court reasoned that the remediation requested by the mother amounted to the *only* way in which the school could meet *Rowley's* requirement of access and an individualized benefit.¹⁰⁹

Some observers of the *Evans* decision and those like it might conclude that IDEA requires remediation, but the *Evans* court's remedy should not be construed as a substantive expansion of *Rowley's* rule. The uniquely severe nature of the disability in that case led the court to order remediation, but that order does not amount to a rule requiring remediation in all cases where the student stands to gain a full educational opportunity only through such services. Rather, the specific facts of that case called for a result that less severely disabled students would likely not obtain in the same court. If mere accommodation had allowed Frank to pass some classes and gain some access to his education, the court would not likely have ordered remediation.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 874.

¹⁰⁶ 930 F. Supp. 83 (S.D.N.Y. 1996).

¹⁰⁷ *Id.* at 91, 100.

¹⁰⁸ *Id.* at 92-93.

¹⁰⁹ *Id.* at 87, 100, 102.

Yet, ironically, less severely disabled students have a greater chance of advancing beyond the need for accommodation should schools remediate them. In amending IDEA to expressly require remediation for those more typical students, Congress would lend substance to the stirring rhetoric of the Act's text.

That distinction between accommodation and remediation probably helps account for the thousands of due process hearings every year. An amendment that requires schools to apply the best teaching methods for remediation will likely result in fewer complaining parents and fewer students left languishing in special education programs. Every classroom and special education program in the country would feel the repercussions of such a change. Researchers estimate that up to 20 percent of all schoolchildren suffer from a specific reading disability alone.¹¹⁰ The Senate Report for the statute states that "[w]ith proper education services, many [disabled students] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society."¹¹¹ In IDEA, Congress therefore proclaims its goal to make disabled students independent, a goal left unfulfilled in too many cases.¹¹² Mere accommodation only makes the bright LD student's dependence more comfortable and enduring.

A new amendment could allow the entire IEP team, as a whole, to make the determination that remediation would benefit the student in a manner that accommodation alone would not. The amendment could require remediation only in the cases where the team makes that determination. That narrowing limitation on the requirement would balance the traditional deference to schools' expertise with the individual student's entitlement to a free, appropriate education.¹¹³

Congress, however, could simply nullify *Schaffer's* harm by placing the burden of proof in section 1415 hearings back on the school districts. Obviously, LD children will gain more from an amendment requiring remediation. If Congress fails to make either change, though, it will share responsibility with the Supreme Court for the failure of the nation's special education system.

¹¹⁰ Gorman, *supra* note 5, at 53.

¹¹¹ S. REP. NO. 94-168, at 9 (1975).

¹¹² 20 U.S.C. § 1400(c)(1) (2005).

¹¹³ Gorman, *supra* note 5, at 54.

VI. CONCLUSION

As one might expect, the costs of remediation will run much higher than those of accommodation. Ironically, though, by spending the greater amount of money necessary to educate LD students appropriately, Congress will likely save more money in the long term. The latest research indicates that remediation would ultimately make special education programs unnecessary for the majority of LD students.¹¹⁴ Once an LD student is fully remediate, she can reenter the mainstream, sometimes without accommodations. At present, about three million American students with remediable learning disabilities are enrolled in special education programs.¹¹⁵ That number represents half of all the students in special education programs generally.¹¹⁶ Since Congress currently spends several billion dollars per year on those programs,¹¹⁷ an amendment that enables kids to depart special education would constitute not only a moral milestone but a financially prudent one as well.

The *Rowley* dissenters cited two shining moments in the legislative history of IDEA. Justice Blackmun quoted Congress's intent to establish "equal educational opportunity" for disabled students.¹¹⁸ Justice White cited the goal of leading disabled students to their "maximum potential" in his argument that IDEA does require equal educational opportunity.¹¹⁹ The *Rowley* majority, and the cases decided thereunder, have successfully kept such equality from becoming a reality. The *Rowley* opinion expressly denigrates the equality standard as "unworkable" and "too complex," language that recalls, disturbingly, the arguments against racial equality in schools at the turn of the last century.¹²⁰ What, exactly, is so intolerable about an attempt at educa-

¹¹⁴ *Id.* at 54-55.

¹¹⁵ *Id.* at 55.

¹¹⁶ THE ADVOCACY INST., *supra* note 27, at 1.

¹¹⁷ *Id.* at 6.

¹¹⁸ Bd. of Educ. v. Rowley, 458 U.S. 176, 210 (1982) (Blackmun, J., concurring) (quoting S. REP. NO. 94-168 (1975)).

¹¹⁹ *Id.* at 214 (White, J., dissenting).

¹²⁰ *Id.* at 198-99 (majority opinion); see *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899). In this case, black taxpayer-residents of a Georgia county had sued to compel that county to spend equal tax dollars on students of both races. The Supreme Court responded to the plaintiffs' request by asserting that "it is impracticable to distribute taxes equally." *Id.* at 542.

tional equality? Congress holds the power to answer that question in an inspiring step.

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