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UNDUE DEFERENCE: TOWARD A DUAL SYSTEM OF BURDENS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

INTRODUCTION

Partlow State School and Hospital (“Partlow”), located in Tuscaloosa, Alabama, was established in 1919¹ as a public institution designed to *habilitate*² mentally retarded individuals. Its conditions were notorious. Hospital staff regularly employed a number of restraining methods—including placing patients in seclusion or under physical restraints—without orders from medical professionals.³ In one instance, a resident remained confined in a straitjacket for the better part of nine years.⁴ At least four Partlow residents died due to “understaffing, lack of supervision, and brutality.”⁵

In 1971, family members of Partlow residents filed a class action suit, alleging that Partlow was being operated in an unconstitutional manner.⁶ Finding for the plaintiffs, the court reasoned that, because the constitutional justification for civil commitment of mentally disabled individuals is habilitation, those who are civilly committed must be guaranteed individual habilitation in order to “lead a more useful and meaningful life and to return to society.”⁷

When one considers the notion of overly-restrictive placements for mentally disabled individuals, institutions like Partlow may come to mind. Today, however, “wrenching debates” concerning the scope of

1. Ala. Dep’t of Archives & History Tuscaloosa County, <http://www.archives.state.al.us/markers/ituscaloosa.html> (last visited July 17, 2007).

2. In its decision on the constitutionality of the conditions at Partlow, the Fifth Circuit defined “habilitate” as follows:

“Treatment” means care provided by mental health professionals that is adequate and appropriate for the needs of the mentally impaired inmate. Treatment also encompasses a humane physical and psychological environment. The term “habilitation”, as used by the parties . . . is a term used to describe that treatment which is appropriate to the condition of the mental retardate.

Wyatt v. Aderholt, 503 F.2d 1305, 1306 n.1 (5th Cir. 1974). The court went on to note that, even in cases where rehabilitation was impossible, habilitation was always intended to include care beyond “the subsistence level custodial care that would be provided in a penitentiary.” *Id.*

3. *Id.* at 1310–11.

4. *Id.* at 1311.

5. *Id.*

6. Wyatt v. Stickney, 344 F. Supp. 387, 389 (M.D. Ala. 1972).

7. *Id.* at 390.

individual services to be provided and the appropriateness of placements are common in special education conflicts.⁸ The debate over what constitutes inappropriate academic placement is much less transparent than in the days of Partlow,⁹ though no less polarizing.

In 1975, Congress passed the Individuals with Disabilities Education Act (IDEA),¹⁰ an effort to uniformly regulate the process whereby disabled children receive special education services. In part, the Act provides that every child must have access to a “free appropriate public education”¹¹ and requires that parents be involved in deciding what constitutes “appropriate.”¹² Additionally, educational placements must be minimally restrictive.¹³ Thus, the Act presumes that the placement that “maximizes education with children without disabilities is favored.”¹⁴

Although IDEA is expansive, it fails to allocate the burden of proof when disputes arise concerning its requirements.¹⁵ In 2005, the U.S. Supreme Court held that plaintiff-parents bear the burden of proof.¹⁶ How the presumption and the burden allocation will coexist requires

8. Jamiene S. Studley, Foreword, *Lawyers at the Education Crossroads*, 31 CREIGHTON L. REV. 1049, 1050 (1998).

9. Less transparent in the sense that the options at bar are generally not limited to institutionalization (on one end of the spectrum) and mainstreaming (on the other); as this Comment will discuss, what is considered an appropriate education is much more nuanced.

10. 20 U.S.C. §§ 1400–1482 (Supp. 2005).

11. § 1412(a)(1).

12. IDEA places great emphasis on “the ability of the parent to understand their child’s evaluation and placement, express their own view of an appropriate placement, and pursue their procedural remedies in the case of disagreement.” Christopher Thomas Leahy & Michael A. Mugmon, *Allocation of the Burden of Proof in Individuals With Disabilities Education Act Due Process Challenges*, 29 VT. L. REV. 951, 955 (2005) (citing Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 343 (2001)).

13. See generally Joshua Andrew Wolfe, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals With Disabilities Education Act*, 55 VAND. L. REV. 1627, 1638 (2002) (noting that the free and appropriate education requirement, which mandates that every child receive individual educational services tailored to her unique needs, appears on its face to conflict with the requirement that all special education students be mainstreamed to the maximum extent possible).

14. Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 41 (2006).

15. See *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg’l High Sch. Dist.*, 560 A.2d 1180, 1187 (N.J. 1989). See also Leahy & Mugmon, *supra* note 12, at 956 n.26. (“In this paper, use of the term ‘burden of proof’ encompasses the trial burdens of production and persuasion. . . . Usually the same party bears both burdens.”).

16. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (“We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an [individualized education program] is properly placed upon the party seeking relief.”). This Comment uses the term plaintiff-parents, because parents are generally the party challenging an individualized education program at the trial court.

further clarification and is the subject of this Comment. Part II discusses IDEA's statutory framework and Congress's intent, including a detailed explanation of the Act's least restrictive environment provisions.¹⁷ Part III argues that, in due process challenges to educational placements, a strong presumption should exist that mainstreaming is the most appropriate placement option.¹⁸ Finally, Part IV asserts that, without Supreme Court or congressional clarification of the presumption, statutory interpretation by lower courts may splinter, resulting in undue deference to local school districts.¹⁹ Moreover, minority students may be over-identified as requiring special education services.²⁰ This Comment concludes by arguing for enforcement of a uniform presumption that will simultaneously reduce confusion among lower courts and allow for an appropriate level of deference to school officials.²¹

II. BACKGROUND

This Part begins with a history of special education law, including a discussion of the two cases that provided the foundation for IDEA's adoption.²² It then briefly contrasts IDEA as it was originally proposed²³ with the statute as it was adopted. Next, this Part highlights important IDEA provisions, including the least restrictive environment requirement.²⁴ Finally, it discusses burden allocation under IDEA both before and after the Supreme Court's decision in *Schaffer v. Weast*.²⁵

A. *History of the Law*

By the mid-twentieth century, public opinion shifted from the belief that mentally ill citizens should be institutionalized to the belief that habilitative intervention better served the State's moral obligation.²⁶ Post-World War II public policy "assumed the virtual abolition of traditional mental hospitals and the creation in their place of commu-

17. See *infra* notes 22–114 and accompanying text.

18. See *infra* notes 115–183 and accompanying text.

19. See *infra* notes 184–200 and accompanying text.

20. See *infra* notes 201–208 and accompanying text.

21. See *infra* notes 209–211 and accompanying text.

22. See *infra* notes 26–43 and accompanying text.

23. As will be noted, IDEA had a different name in its original form.

24. See *infra* notes 44–84 and accompanying text.

25. See *infra* notes 85–114 and accompanying text.

26. See generally GERALD N. GROB, MENTAL HEALTH POLICY IN 20TH-CENTURY AMERICA, <http://mentalhealth.samhsa.gov/publications/allpubs/sma01-3537/chapter2.asp> (last visited July 17, 2007).

nity alternatives,” which coincided with a steady increase over the next two decades in community-based intervention to assist the mentally disabled.²⁷

Two district court decisions from the early 1970s provided the framework for IDEA.²⁸ First, in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania (PARC)*,²⁹ the parents of thirteen disabled children, along with the Pennsylvania Association for Retarded Children, sued the State among other parties.³⁰ Petitioners sought injunctions against several statutes that enabled the State to label children as “uneducable and untrainable” and, thereby, temporarily or permanently excluded them from free public education and training programs.³¹ As evidenced in amici briefs, the scope of exclusion was staggering. According to estimates by the State’s 1965 Pennsylvania Mental Retardation Plan, some seventy-thousand-to-eighty-thousand mentally disabled children between the ages of five and twenty-one were denied access “to any public education services in schools, home or day care or other community facilities, or state residential institutions.”³²

Petitioners challenged the statutes on both due process and equal protection grounds. As to the former, the statutes did not require prior notice to parents before changes were made to education placements—even drastic changes, such as total exclusion from all publicly funded education and job training programs.³³ Petitioners’ equal pro-

27. *Id.*

28. See William D. White, Comment, *Where to Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings*, 84 N.C. L. REV. 1013, 1015–16 (2006). On December 27, 1971, the General Assembly of the United Nations adopted the following resolution: “The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.” *Wyatt v. Stickney*, 344 F. Supp. 387, 390–91 n.6 (M.D. Ala. 1972) (emphasis added) (internal quotation marks omitted).

29. 343 F. Supp. 279 (E.D. Pa. 1972).

30. *Id.* at 281–82.

31. *Id.* at 282 n.3.

32. *Id.* at 296 (emphasis in original). Importantly, the *PARC* court carefully explained that even disabled children who were receiving publicly-funded services were not necessarily guaranteed adequate services. Citing testimony by Dr. Edward R. Goldman, Commissioner of the Department of Welfare’s Office of Mental Retardation, the court noted that, at the time of its opinion, 4,159 school-aged children were confined in state institutions. Of this number, 1,700 were in “partial but inadequate programs,” and 3,259 had no access to educational or training programs of any kind. *Id.* Moreover, as a result of “a lack of space, the State housed 900 mentally retarded persons at Dallas State Correction Institution, 3,462 at State mental hospitals, and 104 in Youth Development Centers.” *Id.* at 297. Inclusion of this information indicates early recognition by the judiciary of the gross inappropriateness of many educational placements prior to IDEA.

33. *Id.* at 283.

tection argument asserted that these laws “necessarily assume[d] that certain retarded children [were] uneducable and untrainable” without any rational basis.³⁴

The *PARC* court never decided the constitutional issues, because the parties settled on a consent decree prior to its ruling.³⁵ Pursuant to the decree, the State Attorney General reinterpreted the meaning of the four challenged statutes to support the idea that every disabled child had the right to a free appropriate public education³⁶ tailored to her individual learning capacity.³⁷ This interpretation allowed the defendants to “effectuate this result [desired by petitioners] without conceding the unconstitutionality of the . . . statutes or upsetting the existing statutory scheme.”³⁸ The decree also stated that no disabled child would be assigned to special education status without a due process hearing.³⁹

Second, in *Mills v. Board of Education of the District of Columbia*,⁴⁰ the court held for the first time that denying publicly supported education to a learning-disabled child, while providing such education to non-learning-disabled children, violates the Fourteenth Amendment Due Process Clause.⁴¹ The opinion brimmed with concern for equal access to education.⁴² “The final judgment of the court included requiring procedures similar to those that Congress later mandated in the . . . IDEA[,]” such as “notification of parents before special educational placement; independent, free disability evaluation; and a hearing before the board with the ability to present witnesses” in disputes concerning special education services or general eligibility.⁴³ With these two cases, the judiciary sent a strong message that the systematic exclusion of disabled children from public education services was unconstitutional. Moreover, these decisions prompted Congress to respond by enacting a comprehensive federal law.

34. *Id.*

35. *PARC*, 343 F. Supp. at 285. See also White, *supra* note 28, at 1016.

36. The consent decree stipulated that “it [was] 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.” *PARC*, 343 F. Supp. at 285 (emphasis omitted).

37. *Id.* at 285–86.

38. *Id.* at 285.

39. *Id.* at 284.

40. 348 F. Supp. 866 (D.D.C. 1972).

41. *Id.* at 875 (“[T]he defendants’ conduct . . . denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.”); U.S. CONST. amend. XIV.

42. Indeed, much of the opinion borrowed language directly from the U.S. Supreme Court’s decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). See also White, *supra* note 28, at 1016.

43. White, *supra* note 28, at 1016.

B. Statutory Framework

IDEA began with the Education for All Handicapped Children Act of 1975 (EAHCA).⁴⁴ Congress passed EAHCA to address the problems faced by disabled students in public schools and to protect the rights of handicapped children and their parents.⁴⁵ Borrowing language from the *PARC* and *Mills* decisions,⁴⁶ the drafters evidenced a belief that equal access to education constitutes a fundamental due process right.⁴⁷

EAHCA underwent a series of amendments over the last three decades, including a name change in 1990 to the Individuals with Disabilities Education Act.⁴⁸ The current version of IDEA includes much of EAHCA's original language, but adds terms such as "free appropriate public education" and "individualized education program."⁴⁹ Included in the original EAHCA—and largely left intact in subsequent amendments—are three major requirements for education providers.⁵⁰ First, all states and school districts must provide a free appropriate public education to all children with disabilities.⁵¹ In order to determine what educational services are most appropriate, states and school districts must locate, identify, and evaluate those children who manifest learning disabilities.⁵² Second, each child selected to receive special services must have an individualized education program, which articulates a plan for intervention and provision.⁵³ Finally, "[t]o the maximum extent appropriate," schools must educate disabled children alongside their non-disabled peers.⁵⁴

44. See RICHARD APLING & NANCY LEE JONES, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): OVERVIEW OF MAJOR PROVISIONS (CRS Report RS20366) (updated Jan. 11, 2002), available at <http://usinfo.state.gov/usa/infousa/educ/files/ideaover.pdf>. EAHCA was passed as Pub. L. No. 94-142, 89 Stat. 773 (1975).

45. See White, *supra* note 28, at 1017. Congress described EAHCA's purpose as follows: "[T]o ensure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(a) (Supp. 2005).

46. See White, *supra* note 28, at 1015-16.

47. See MARK C. WEBER ET AL., SPECIAL EDUCATION LAW: CASES AND MATERIALS 287 (2004) "By calling the procedure the 'due process hearing,' the Act's drafters suggested that the hearing rights the Act created were sufficient, and perhaps necessary, to satisfy the requirements of the Fourteenth Amendment due process clause in the context of special education disputes." *Id.* at 287.

48. See Pub L. No. 101-476, 104 Stat. 1103, 1141-42 (1990).

49. See White, *supra* note 28, at 1018.

50. See APLING & JONES, *supra* note 44, at CRS-2.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

IDEA provides federal funding to ensure that all disabled children receive the free and appropriate public education articulated in *PARC*, *Mills*, and their progeny.⁵⁵ In 2005, IDEA mandated disbursement of special education services to over six million children nationwide.⁵⁶

1. *Free Appropriate Education*

IDEA is characterized by an “overarching requirement that all the activities of the state be directed toward ensuring that ‘[a] free appropriate public education is available to all children with disabilities.’”⁵⁷ The Supreme Court has characterized a free and appropriate public education as “educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.”⁵⁸ Although a free and appropriate education is the most important concept in IDEA, the statute itself provides little guidance regarding minimum standards for compliance.⁵⁹

The Supreme Court endeavored to define the term in *Board of Education v. Rowley*.⁶⁰ *Rowley* concerned a deaf student who was officially classified as a special education student.⁶¹ Although the school and the child’s parents agreed on many parts of the education plan, they disagreed on whether an in-class sign language interpreter was necessary. The case ultimately reached the Supreme Court. In an opinion that continues to influence special education decisions,⁶² the

55. Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L.J. 35, 35 (1996) (“As a condition of [receiving] the IDEA funding, each state must adopt state procedures that implement the IDEA procedural framework at the state and local levels.”).

56. Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL’Y 217, 221 (2005).

57. Leahy & Mugmon, *supra* note 12, at 954 (quoting 20 U.S.C. § 1412(a)(1)(A) (2000)).

58. *Id.* (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982)). As Leahy and Mugmon noted, the specific guarantees of a free appropriate public education under IDEA generally include personalized instruction and support services to help the student achieve some parallel in instruction to the grade levels of a regular education classroom and conformance with state standards for public education, all at public expense. See Leahy & Mugmon, *supra* note 12, at 954 (quoting William N. Myhill, *No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine a Free Appropriate Public Education*, 89 IOWA L. REV. 1051, 1057 (2004)).

59. See generally White, *supra* note 28, at 1018.

60. 458 U.S. 176 (1982).

61. *Id.* at 184.

62. *Id.* at 184–85; accord *L.C. v. Utah State Bd. of Educ.*, 125 Fed. Appx. 252, 259 (10th Cir. 2005) (“We have made clear that we must be mindful of the Supreme Court’s caution in *Rowley* that the ‘appropriate’ education required by the Act is not one which is guaranteed to maximize the child’s potential.”) (internal quotation marks omitted) (citing *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 1028–29 (10th Cir. 1990); *Evanston Cmty. Consol. Sch. Dist. v. Michael M.*, 356

Court held that IDEA's scope was narrower than the plaintiffs urged.⁶³ The Court first acknowledged that "the face of the statute evince[d] a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child."⁶⁴ But the Court also noted that any substantive standards for education were conspicuously absent from IDEA and "ultimately construed the statute as primarily designed to provide [for] the availability of education [to] disabled children, as opposed to guaranteeing a *substantive* level of quality of education."⁶⁵ As one commentator noted, *Rowley* "viewed [IDEA] as a law of process, and not one of outcome."⁶⁶

2. *Least Restrictive Environment Provisions*

IDEA's cornerstone is that school districts must facilitate interaction between disabled students and their non-disabled peers. Indeed, IDEA's legislative history is filled with evidence of "Congress' unquestioned desire to wrest from school officials their former unilateral authority to determine . . . [educational] placement[s]," including placements that constituted total exclusion from publicly funded education.⁶⁷ Accordingly, when a state provides for a disabled child's free and appropriate public education, it must always focus on minimally restrictive placement.

In 1999, the Department of Education (DOE) promulgated its final amendments to the 1997 regulations. These amendments clarified how school districts could comply with least restrictive environment requirements.⁶⁸ They required that school districts provide a "contin-

F.3d 798, 802 (7th Cir. 2004) ("As *Rowley* pointed out, courts lack the specialized knowledge to resolve issues of educational policy. Once the school district has met the *Rowley* requirements, it has done enough.")).

63. *Rowley*, 458 U.S. at 210.

64. *Id.* at 189 (emphasis in original). This line in the Court's opinion might lead the reader to believe that the Supreme Court was going to side with the plaintiff-parents. In practice, the Supreme Court has shown enormous deference to local education agencies in its school-related decisions. For a prime example of this deference, see *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education . . . [schools] occupy a special niche in our constitutional tradition.").

65. See *White*, *supra* note 28, at 1018 (emphasis added).

66. *Id.* at 1020 (quoting Martin W. Bates, *Free Appropriate Public Education Under the Individuals with Disabilities Education Act: Requirements, Issues and Suggestions*, 1994 BYU EDUC. & L.J. 215, 217 (1994)).

67. *Honig v. Doe*, 484 U.S. 305, 321 (1988).

68. For a comprehensive list of DOE proposals, see Sarah E. Farley, Comment, *Least Restrictive Environments: Assessing Classroom Placement of Students With Disabilities Under the*

uum of alternative placement” options.⁶⁹ By continuum, the DOE intended that placements range from least restrictive—starting with regular classes and slightly modified classes—to most restrictive—such as home instruction, hospital instruction, or institutionalization.⁷⁰ The regulations also require that schools place special education students in the least restrictive setting appropriate on the continuum.⁷¹ Under DOE standards, slightly modifying the classroom curriculum for a disabled student does not render that environment inappropriate.⁷²

Importantly, the regulations were not limited to the classroom. If a school cannot include students in regular classes, it must include those students in regular non-academic activities to the maximum extent possible.⁷³ For instance, such inclusion could involve lunch or recess periods with non-disabled students. Thus, the DOE’s comprehensive regulations indicate that “least restrictive environment involves not only freedom from physical restraint, but [also] the freedom . . . to associate with . . . family and with able-bodied peers.”⁷⁴ Accordingly, before a school can remove a child from a regular classroom setting, it must offer the child “the full range of supplementary aids and services that if provided would facilitate the student’s placement in the regular classroom setting.”⁷⁵

IDEA, 77 WASH. L. REV. 809, 817 (2002). Some of these regulations cited by Farley were issued prior to 1999 but renumbered here.

69. *Id.* (quoting 34 C.F.R. § 300.551(b)(1) (1999)).

70. *Id.*

71. *Id.* (citing 34 C.F.R. § 300.551(a) (1999)).

72. *Id.* (citing 34 C.F.R. § 300.552(e) (1999)).

73. *Id.* at 817–18.

74. *Sherri A.D. v. Kirby*, 975 F.2d 193, 207 n.23 (5th Cir. 1992).

75. *See* Farley, *supra* note 68, at 818 (citing 34 C.F.R. § 300 app. A (Question 1) (1999)). Courts have developed different tests for determining whether the standard is met in placement challenges. *See* Michael Hazelkorn, *Reasonable v. Reasonableness: The Littlegeorge Standard*, 182 WEST’S EDUC. L. REP. 655, 659–63 (2004). The Third, Fifth, and Eleventh Circuits have adopted a test from *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989), under which a court must first determine “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily . . . [and, if not] whether the school has mainstreamed the child to the maximum extent appropriate.” *Id.* at 1048. *See* *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991) (opinion withdrawn in *Greer v. Rome City Sch. Dist.*, 956 F.2d 1025 (11th Cir. 1992) because of a question of jurisdiction; later reinstated in relevant part in *Greer v. Rome City Sch. Dist.*, 967 F.2d 470 (11th Cir. 1992)). The Fourth, Sixth, and Eighth Circuits have applied the *Roncker* test, which states the following: “[W]here the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.” *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). *See* *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987). Finally, the Ninth Circuit ap-

3. Parental Participation and Procedural Safeguards

In part, Congress enacted IDEA to address the wholesale exclusion of parents from special education service and placement decisions.⁷⁶ At the time of its enactment, “one of the main concerns of parents was that school officials were making decisions about placing children in special education, or refusing to do so, without giving the parents enough opportunity to participate in these decisions that so deeply affected their children’s futures.”⁷⁷ IDEA clearly defined channels for parental participation in developing individualized education programs.⁷⁸

proved a test that applies factors from both *Daniel R.R.* and *Roncker*. See *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). All three tests include a number of different factors for judicial consideration.

76. See, e.g., § 1400(c)(5)(B) (Supp. 2005) (providing that IDEA’s purpose is “strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home”); 20 U.S.C. § 1400(c)(8) (“Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.”).

77. WEBER, *supra* note 47, at 287.

78. The central mechanism for enforcing the provision of a free appropriate public education under IDEA is the individualized education program. Leahy & Mugmon, *supra* note 12, at 954–55. Leahy and Mugmon defined individualized education programs as “a written plan, created by a multi-disciplinary team, delineating a package of special educational and related services designed to meet the unique needs of a disabled child. The individualized education program includes summaries of the child’s abilities, outlines of educational goals, and specification of educational services to be provided.” *Id.* IDEA requires states receiving federal funds to develop an individualized education program for each disabled child in the district “and to implement the services specified therein within the least restrictive environment possible.” *Id.* (citing *Weast v. Schaffer*, 377 F.3d 449, 450 (4th Cir. 2004)). IDEA also provides for annual review and authorizes certain revisions to the individualized education program. Leahy & Mugmon, *supra* note 12, at 954, 955 (citing 20 U.S.C. § 1414(d)(4)(A) (2000)). The DOE calls the individualized education program the “cornerstone of special education.” White, *supra* note 28, at 1021–22 (quoting OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP’T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 16 (Lisa Küpper ed., 2000), available at <http://www.ed.gov/parents/needs/speced/iepguide/index.html>). Individualized education program teams are comprised of parents and school educators who have expertise regarding the child. The DOE’s individualized education program guide lists ten steps in the proper execution of such a program. *Id.* at 1022. These steps include the following, in chronological order:

[I]dentifying the disabled child; evaluating the child; determining IDEA eligibility; finding IDEA eligibility; scheduling an [individualized education program] team meeting; holding the [individualized education program] meeting and drafting the [individualized education program]; providing the services required for the child by the [individualized education program]; measuring the child’s progress and reporting to the parents; periodically reviewing the [individualized education program]; and reevaluating the child.

Id. When any step of this process breaks down, IDEA provides a number of administrative and judicial remedies that an injured party may pursue.

IDEA includes elaborate processes for notice and hearings.⁷⁹ Such procedures were designed to “force . . . local school district[s] to justify a child’s placement and educational program.”⁸⁰ The processes provide the following steps: (1) an aggrieved parent may file a formal complaint;⁸¹ (2) if dissatisfied with the school’s response, the parent may request an administrative review in front of an impartial hearing officer;⁸² and (3) as a last resort, the parent may initiate a civil action in state or federal court, wherein the court may “grant such relief as it determines is appropriate.”⁸³ IDEA’s due process component is widely considered its most controversial feature and is frequently criticized by educators and legal commentators.⁸⁴

4. *Burden Allocation under IDEA Prior to Schaffer*

Despite IDEA’s elaborate provisions for notices, hearings, and the guaranteed right to bring a civil action, it is silent on the issue of burden allocation. Before *Schaffer*, burden allocation questions were largely controlled by two presumptions: (1) the *Rowley* presumption;⁸⁵ and (2) the least restrictive environment presumption embodied within the language of IDEA.⁸⁶

As previously noted, the *Rowley* Court held that, in a due process challenge, it is presumed that the program offered by the local school district satisfies the requirement of a free and appropriate public education.⁸⁷ Because the services that the school district offered to the

79. WEBER, *supra* note 47, at 287.

80. Leahy & Mugmon, *supra* note 12, at 955 (quoting Marchese, *supra* note 12, at 343) (internal quotations omitted).

81. *Id.* (citing 20 U.S.C. § 1415(b)(6) (2000)).

82. *Id.* (citing 20 U.S.C. § 1415(f)-(g) (2000)).

83. *Id.* at 956 (internal quotations omitted) (citing 20 U.S.C. §§ 1415(i)(2)(A), 1415(i)(2)(B)(iii) (2000)).

84. White, *supra* note 28, at 1014. In support of this statement, White cited Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 WEST’S EDUC. L. REP. 491 (1988). Goldberg and Kuriloff suggested that the due process model for dispute resolution in the special education setting is ineffective, because parents generally have a greater emotional stake in the outcome than schools. *See id.* at 491–96. Accordingly, procedural safeguards built into this model do little to persuade parents that justice has been served. *See id.*

85. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (presuming that the program offered by the local school district provided a free and appropriate public education).

86. The program that maximizes education with non-disabled students is favored. *See Farley, supra* note 68.

87. *Id.*

[T]he provision that a reviewing court base its decision on the preponderance of the evidence is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in

child enabled her to advance from grade to grade with relative ease, her individualized education program was appropriate.⁸⁸ The Court reasoned that the standard for appropriate education was not that which maximized the learning potential of children with disabilities.⁸⁹ Instead, the standard simply required meaningful access to public education—that is, some educational benefit.⁹⁰

Despite the guidance *Rowley* provided to lower courts, it did little to explain how its presumption interacted with the mainstreaming presumption in cases where the two were at odds—for example, cases in which a parent challenged her child's educational placement as overly restrictive. To reconcile this ambiguity, many jurisdictions held that the presumption favoring the school district did not govern where parents brought least restrictive environment claims.⁹¹

Roncker v. Walter distinguished between placement challenges and all other challenges.⁹² *Roncker* concerned the placement of a severely mentally retarded child.⁹³ The state board and the child's parents could not agree on educational placement. While the board recommended that he be placed in a class for severely mentally retarded children supplemented by interaction with non-disabled children during lunch and other non-academic school activities, the parents wanted him placed in a regular education classroom with special instruction.⁹⁴ Ultimately, the Sixth Circuit found in favor of the parents.⁹⁵ Citing a "strong [congressional] preference in favor of mainstreaming,"⁹⁶ the court distinguished *Rowley* by stating that,

the preparation of an [individualized education program] would be frustrated if a court were permitted simply to set state decisions at naught. The fact that § 1415(e) requires that the reviewing court receive the records of the state administrative proceedings carries with it the implied requirement that due weight shall be given to these proceedings.

Id. (internal quotation marks omitted). This language clearly conveys the *Rowley* court's belief that, except in egregious cases, courts are to defer to the judgment of educational officials.

88. *Id.* at 209–10.

89. *Id.* at 189–90.

90. *Id.* at 193–94, 200–01.

91. See, e.g., *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *A.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 162 (8th Cir. 1987); *Bd. of Educ., Sacramento City Unified Sch. Dist. v. Holland*, 786 F. Supp. 874, 878 (E.D. Cal. 1992). For further support of this proposition, see Weber, *supra* note 14, at 41 (providing a useful overview of IDEA provisions that require "additional clarification" from Congress and flagging burden of proof in least restrictive environment challenges as the most ill-defined provision of the statute).

92. 700 F.2d 1058 (6th Cir. 1983); see Weber, *supra* note 14.

93. 700 F.2d at 1060. The child had an IQ of less than fifty and was prone to seizures.

94. *Id.* at 1060–61.

95. *Id.* at 1063.

96. *Id.* at 1062–63.

while that case involved only appropriate education requirements, *Roncker* expressly involved the mainstreaming requirement.⁹⁷

Indeed, even before *Rowley*, dicta from various circuit court opinions suggested that courts afforded special status to placement challenges in IDEA hearings. In *Oberti v. Board of Education*, the Third Circuit stated that, “when IDEA’s mainstreaming requirement is specifically at issue, it is appropriate to place the burden of proving compliance with IDEA on the school. [Otherwise] the Act’s strong presumption in favor of mainstreaming would be turned on its head.”⁹⁸

Yet the *Roncker* approach was not universally accepted.⁹⁹ *School District of Wisconsin Dells v. Z.S.* concerned the placement of an autistic child with abnormally aggressive tendencies.¹⁰⁰ After a series of unsuccessful placements, the school district offered to pay for home instruction supplemented by occupational therapy.¹⁰¹ The child’s guardian opposed that placement option and requested placement in a public education classroom supplemented by full-time aide supervision.¹⁰² Ultimately, the Seventh Circuit adopted an approach that was extremely deferential to local school district decisions, even in placement challenges.¹⁰³ As Weber noted, by “[i]gnoring cases . . . that established that *Rowley* was not laying down a rule for least restrictive environment cases, and [departing from] the court’s own declaration that the Act expresses a strong preference for mainstreaming . . . the court stated that reasonableness was the standard and declared the school district’s decision ‘not unreasonable.’”¹⁰⁴

5. *The Schaffer Decision*

In *Schaffer v. Weast*, the Supreme Court further muddied the waters, holding that the burden of proof in a challenge to an existing

97. *Id.* at 1063. IDEA “does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference.” While decisions about appropriate education require deference to the school district’s decisions, “[t]he perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such disagreement is not, of course, any basis for not following the Act’s mandate.” *Id.* (emphasis in original).

98. 995 F.2d 1204, 1219 (3d Cir. 1993) (citation omitted).

99. Weber, *supra* note 14, at 36.

100. 295 F.3d 671, 672 (7th Cir. 2002).

101. *Id.* at 673.

102. *Id.*

103. *See id.* at 675.

104. Weber, *supra* note 14, at 43 (quoting *Z.S.*, 295 F.3d at 676 (holding that the “critical issue . . . was whether the school administrators were unreasonable . . . in thinking it would be a mistake to send *Z.S.* back to his regular public school”) (citation omitted)).

individualized education program rests squarely on the moving party.¹⁰⁵ Initially, the hearing officer assigned the burden of proof to the parents.¹⁰⁶ Despite the proffered testimony of doctors and disability experts, the hearing was decided in favor of the school district.¹⁰⁷ On appeal, the District Court of Maryland reallocated the burden of proof to the school district and remanded the case.¹⁰⁸ Considering the same evidence from the initial hearing, the trial court found for the parents.¹⁰⁹ The school district appealed.¹¹⁰ The Fourth Circuit reversed, and the Supreme Court granted certiorari to decide which party bears the burden of persuasion in an administrative hearing assessing the appropriateness of an individualized education plan.¹¹¹

In affirming the Fourth Circuit's decision, the Supreme Court looked first to the text of the statute, but found no guidance there.¹¹² Because the statute lacked express instructions regarding the burden of proof, the Court relied upon the traditional presumption: plaintiffs bear the burden of persuasion in evidentiary hearings.¹¹³ Yet the Court failed to address how its holding would impact challenges to

105. 546 U.S. 49, 49 (2005). *Schaffer* concerned Brian, a seventh grade student diagnosed with attention deficit hyperactivity disorder. *Id.* at 54. He had attended a private school through seventh grade, at which point school officials proposed placing Brian in a school that could better accommodate his individual needs. *Id.* The school system determined that Brian was eligible for special education services pursuant to IDEA. *Id.* Brian's parents opposed the school's initial individualized education program proposal, which would have placed Brian in one of two public middle schools. *Id.* They enrolled Brian in a private school that specialized in instructing learning-disabled students, initiated a due process hearing challenging the initial individualized education program, and requested compensation for the cost of the private school placement. *Id.* at 55.

106. *Id.* at 55. *Schaffer* concerned only the burden of persuasion, whereas the rest of this Comment combines the burden of persuasion and the burden of production into the term burden of proof. For a breakdown of the delicate distinction between these two terms, see Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 51-58 (1961) (reprinted in IRVING YOUNGER & MICHAEL GOLDSMITH, *PRINCIPLES OF EVIDENCE* 811 (1984)).

107. *Schaffer*, 546 U.S. at 55.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 55-56.

112. *Id.* at 56 ("When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute.").

113. *Schaffer*, 546 U.S. at 56 ("The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.") (citing MCCORMICK ON EVIDENCE § 337, at 949 (Edward W. Cleary ed., 3d ed. 1984)). The Court's opinion exemplified extraordinary deference to local school districts. *See id.* at 59 ("Petitioners in effect ask this court to assume that every [individualized education plan] is invalid until the school district demonstrates that it is not. [IDEA] does not support this conclusion. IDEA relies heavily upon the *expertise of school districts* to meet its goals.") (emphasis added).

educational placements in favor of mainstreaming where the presumption generally favors the challenging party.¹¹⁴

III. ANALYSIS

The *Schaffer* decision, a procedural reinforcement of *Rowley*'s presumption in favor of deference to local school districts, has the potential to further erode IDEA's least restrictive environment presumption in placement determinations. Such a result is inconsistent with legislative intent, general considerations of fairness and policy, and other remedial federal statutes.

This Part begins by discussing how true presumptions impact judicial decision-making.¹¹⁵ It then provides an overview of the competing considerations underlying the least restrictive environment presumption—individual achievement and normal peer association—ultimately concluding that both goals are best achieved through mainstreaming.¹¹⁶ Next, this Part discusses how courts have reduced this presumption to a virtual nullity.¹¹⁷ It concludes that recent judicial decisions are inconsistent with legislative intent and with general fairness considerations.¹¹⁸

A. *Procedural Implications of the Schaffer Decision*

“The party with the obligation of persuading a judge” on an issue bears the burden of proof.¹¹⁹ No uniform rule currently exists to guide courts in allocation decisions; rather, such questions are considered on an ad hoc basis.¹²⁰ Accordingly, allocating the burden of proof to plaintiffs is a mere presumption. A party who is assigned the burden of proof and is unable to persuade the judge of some fact will lose.¹²¹ In many special education cases, the evidence is equally bal-

114. *See id.* at 49–62.

115. *See infra* notes 119–123 and accompanying text.

116. *See infra* notes 124–142 and accompanying text.

117. *See infra* notes 143–150 and accompanying text.

118. *See infra* notes 151–183 and accompanying text.

119. Leahy & Mugmon, *supra* note 12, at 956 (citing *Wilkins v. Am. Exp. Isbrandt Lines, Inc.*, 446 F.2d 480, 484 (2d Cir. 1971) (“Inherent in [our adversary] system is the general rule that, as between two parties, he who desires to have judicial action taken in his behalf has the burden of producing the evidence which is a prerequisite to such action.”)).

120. Indeed, the ad hoc nature of allocation questions led the Minnesota Supreme Court to conclude that, “[w]here the burden of proof should rest ‘is merely a question of policy and fairness, based on experience in the different situations.’” *Rustad v. Great N. Ry.*, 142 N.W. 727, 728 (Minn. 1913) (quoting 9 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2486 (3d ed. 1940)).

121. Leahy & Mugmon, *supra* note 12, at 956 (citing Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 *HASTINGS L.J.* 239, 244 (1988)).

anced; thus, the burden of proof becomes the deciding factor.¹²² To the extent that the party who bears the burden of proof in such a situation will lose, burden of proof allocation is critical.¹²³ Accordingly, the *Schaffer* decision has far-reaching implications for special education law. It should not control in least restrictive environment cases in which the mainstreaming presumption justifies departure from the default allocation rule.

B. *Maintaining a Presumption in Favor of Mainstreaming*

As noted above, under IDEA's least restrictive environment provisions, "the presumption is that the program that maximizes education with children without disabilities is favored."¹²⁴ True presumptions provide the following evidentiary decision-making rule: if a party that supports the presumption can introduce into evidence proof of *B*—the basic fact—then the fact finder can conclude that *P*—the presumed fact—is true.¹²⁵ Inputting IDEA's requirements into the above formula, one might assume that *B* represents the availability of placement in an educational setting alongside non-disabled students. Although there is no federal constitutional right to education in this country, all state constitutions currently require public education systems.¹²⁶ As to the second part of the rule, courts might infer that, because the availability of mainstream public education is universal, represented by *B*, placement in a mainstream classroom is appropriate for all children, represented by *P*.

But, as legal commentators have noted, any attempt to reconcile the relationship between the least restrictive environment presumption and free and appropriate public education is much less formulaic.¹²⁷ Scholars and judges who endeavor to fashion such a formula ask, "[d]oes appropriateness drive placement, or is placement the starting

122. Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals With Disabilities Education Act*, 108 W. VA. L. REV. 27, 29 (2005).

123. *Id.* at 29–30.

124. Weber, *supra* note 14, at 41.

125. See Ronald J. Allen & Craig R. Callen, *Teaching "Bloody Instructions": Civil Presumptions and the Lessons of Isomorphism*, 21 Q.L.R. 933, 934 (2003). For an overview of the continuum of evidentiary weight courts may attach to a presumption, see *Harris v. Israel*, 515 F. Supp. 568, 570–71 (E.D. Wis. 1981).

126. Michelle R. Holleman, Comment, *All Children Can Learn: Providing Equal Educational Opportunities for Migrant Students*, 4 THE SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 113, 116 (2001).

127. Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 562 (1999).

point for any consideration of an appropriate education?"¹²⁸ Two competing social values appear to drive IDEA's least restrictive environment focus: (1) "the individual rights of association"; and (2) the desire that a student be placed in an environment that will maximize her individual learning capabilities and amount of social interaction.¹²⁹ When these two rights collide, a number of questions arise that require careful consideration by an individualized education program team.¹³⁰ What constitutes restrictive? Further, is restrictive a relative term, necessarily defined on a case-by-case basis? Moreover, will mainstreaming in the present lead to greater need for restriction in the future?¹³¹ "Presumptively, . . . segregating placement is more harmful than regular school placement. . . . [But] when it is shown that such a placement is necessary for appropriate education purposes in order to satisfy the individual's interests or valid state purposes . . . the presumption [is] overcome."¹³²

Yet recent research on mainstreaming indicates that these two goals—individual achievement and normal association with peers—are rarely mutually exclusive.¹³³ Such data establish a clear trend toward improved academic, social, and behavioral interactions among disabled students and their non-disabled peers.¹³⁴ The academic benefits of mainstreaming are profound. Since the enactment of IDEA, students with disabilities are more likely to graduate and more likely to attend college or find gainful employment.¹³⁵ In fact, graduation rates of disabled students increased by 14% between 1984 and 1997.¹³⁶ Studies also show that special education students who are mainstreamed develop better social behaviors through interaction with students in the general population.¹³⁷ The benefits that non-disabled students receive from mainstreaming are equally noteworthy. Main-

128. *Id.* at 545 (quoting LAWRENCE M. SIEGEL, *LEAST RESTRICTIVE ENVIRONMENT: THE PARADOX OF INCLUSION* 134 (1994)).

129. *Id.* at 546.

130. *Id.* at 562.

131. *Id.*

132. *Id.* at 546 (quoting H. RUTHERFORD TURNBULL III, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* 163 (3d ed. 1990)).

133. See, e.g., NAT'L RESEARCH CTR. ON LEARNING DISABILITIES, *TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA*, <http://www.nrcl.d.org/resources/osep/historyidea.pdf> (last visited July 17, 2007).

134. *Id.*

135. NAT'L RESEARCH CTR. ON LEARNING DISABILITIES, *supra* note 133.

136. *Id.*

137. LYNN NEWMAN, *FACTS FROM NLTS2* (July 2006), available at <http://ies.ed.gov/ncser/pdf/20063001.pdf>.

streaming promotes awareness of differences and increased comfort with disabled students, rather than stigmatization and phobia.¹³⁸

Even teachers benefit from the additional support provided by collaborative planning and from the additional instruction that regular education students provide to their disabled peers in an inclusive educational setting. Students in general education programs can help reinforce appropriate behavior by example and through normal peer interactions.¹³⁹ In terms of academic achievement, peer instruction is sometimes more effective than teacher instruction, particularly where the disabled student feels more comfortable with his peers than with an adult.¹⁴⁰ For example, the film *Educating Peter* portrayed the regular education classroom experience of Peter, a third-grader with Down's Syndrome.¹⁴¹ In one scene, the teacher and her students brainstormed about how to respond to Peter's outbursts, how to reinforce positive behavior, and how to handle negative behavior.¹⁴²

Assuming that IDEA supports a clear-cut presumption that mainstreaming is the most appropriate educational placement for children with disabilities, what quantum of proof must a proponent of an alternative placement furnish in order to overcome that presumption?¹⁴³ As evidenced by presumptions in civil proceedings, the potential exists for remarkable variation among jurisdictions. In will contests, for example, a presumption of undue influence can sometimes attach to the proceedings through the introduction of certain evidence.¹⁴⁴ Until 2002, a party seeking enforcement of a will in Florida was only required to provide a reasonable explanation for testamentary favors to rebut this presumption.¹⁴⁵ In Arkansas, for example, the same party must proffer evidence to establish proof beyond

138. *Id.*

139. See HEATHER DORN, EFFECTS OF INCLUSION ON CHILDREN WITH SPECIAL NEEDS AND THEIR PEERS, <http://www.uwsp.edu/Education/pshaw/Portfolios/Heather%20Dorn/BlockI205/inclusion.htm> (last visited July 17, 2007).

140. *Id.*

141. *Id.*; EDUCATING PETER (Ambrose Video Publ'g 1992).

142. DORN, *supra* note 139.

143. The ambiguous use of the word "proponent" is intentional. In some cases, a parent is the party who advocates a more restrictive placement and is charged with rebutting the presumption of mainstreaming.

144. See, e.g., *In re Urich's Estate*, 242 P.2d 204, 211-13 (Or. 1952) (considering a variety of facts, including the involvement of the will's proponent in the drafting of the will and the testator's mental infirmity, in finding a presumption of undue influence).

145. See EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 7:11 (2007) (explaining that, in 2002, the Florida General Assembly passed a law superseding the prior case law on the undue influence presumption). This amendment was first interpreted in *Hack v. Janes*, 878 So. 2d 440 (Fla. Dist. Ct. App. 2004).

a reasonable doubt that no undue influence occurred.¹⁴⁶ Between these two ends of the spectrum lie a variety of possible quanta of evidence.¹⁴⁷

The quantum of evidence question in least restrictive environment challenges is similarly imprecise. The *Z.S.* case shows that at least one jurisdiction allows a mere showing of reasonableness by the school district to outweigh the presumption.¹⁴⁸ Given the Court's historic deference to the wisdom of school administrators and educators,¹⁴⁹ a reasonableness standard will reduce the least restrictive environment presumption to a virtual nullity. This result surely cannot represent the intent of IDEA's drafters. As Weber noted, "if Congress wants the presumption taken seriously, it needs to clarify that the presumption applies so as to overcome any contrary rule of deference to school district decisionmaking."¹⁵⁰ Resolution of this issue is necessary for IDEA's continued effectiveness. Its policy preference appears to favor mainstreaming. Accordingly, only a presumption applied with some teeth can give full effect to Congress's intent in drafting IDEA.

C. *Analogy to Other Remedial Federal Statutes*

In addition to the academic benefits afforded special education and regular education students, the mainstreaming presumption is consistent with congressional intent in other areas of law. A general emphasis on integration is reflected in a number of federal statutes pertaining to disabled populations. This trend reflects congressional

146. See *Pyle v. Sayers*, 39 S.W.3d 774, 777-78 (Ark. 2001).

147. A sampling of how different jurisdictions handle the presumption of undue influence in contested will cases is illustrative. Florida and Vermont require the proponent to rebut presumed undue influence by a preponderance of the evidence. See, e.g., *Diaz v. Ashworth*, No. 3D06-2150, 2007 WL 1484550, at *3 (Fla. Dist. Ct. App. May 23, 2007); *In re Estate of Roche*, 736 A.2d 777, 779 (Vt. 1999). Tennessee requires the proponent to rebut presumed undue influence by clear and convincing evidence. See, e.g., *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995).

148. See *supra* notes 100-04 and accompanying text.

149. See, e.g., *Eckmann v. Bd. of Educ. of Hawthorn Sch. Dist. No. 17*, 636 F. Supp. 1214, 1225 (N.D. Ill. 1986) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . [Our] system of public education . . . relies necessarily upon the discretion and judgment of school administrators and school board members."); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (holding that teachers and administrators, who stand in *loco parentis* over students, enjoy broad discretion in promulgating policies to protect the health and welfare of the students and may adopt policies that, in other settings, would be unconstitutional); see also *supra* note 64 and accompanying text.

150. Weber, *supra* note 14, at 43.

intent.¹⁵¹ As noted by William D. White in his article on burden allocation under IDEA, “the logical comparison of the IDEA to other federal remedial statutes is . . . informative. IDEA is best viewed as similar to other remedial federal statutes, such as Title II or the [Americans with Disabilities Act] (ADA).”¹⁵²

For instance, under the ADA,¹⁵³ an employee bears the initial burden of showing that an accommodation of the employee’s disability would allow the employee to remain in a normal work environment.¹⁵⁴ The burden then shifts to the employer to show that the proposed accommodation constitutes an undue hardship.¹⁵⁵ The policy preferences behind such a burden allocation are clear: Congress enacted the ADA to rectify wholesale exclusion of disabled Americans from gainful employment opportunities.¹⁵⁶ Disabled Americans are a “discrete and insular minority” who have faced discriminatory employment practices and need federal protection in order to gain access into the workforce.¹⁵⁷ The burden allocation in employment discrimination cases reflects a preference that, whenever possible, employers should not marginalize disabled employees, but should accommodate them.¹⁵⁸

Statutes such as the ADA suggest that parents should bear the initial burden of proving that their children are disabled and qualified for services under IDEA.¹⁵⁹ If a school district then resists placement in a mainstreamed classroom with reasonable accommodations, the burden should shift to the local school district to show why such accommodations are not possible. IDEA, like the ADA, intends to reintegrate a historically marginalized group into society. Eliminating

151. White, *supra* note 28, at 1037–38.

152. *Id.* at 1045.

153. 42 U.S.C. §§ 12101–12213 (2000).

154. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited July 17, 2007).

155. *Id.*

156. *Id.*

157. 42 U.S.C. § 12101(a)(7) (2000).

158. See Robert L. Mullen, *The Americans With Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175 (1994).

In a real sense . . . [the ADA] is an affirmative action law . . . in that compliance with the ADA is not to be passively achieved. . . . [S]pecific, legally enforceable responsibilities are created for both public and private parties in order to help bring about a much greater level of participation by people with disabilities within all facets of American society.

Id. at 180. The onus is clearly on the employer to show compliance with the law.

159. White, *supra* note 28, at 1046.

the presumption in favor of mainstreaming is wholly inconsistent with this policy-preference, which is reflected not only in IDEA, but also in other similar, remedial federal statutes.

D. Fairness

Fairness dictates that the mainstreaming presumption should be vigorously safeguarded. When one party possesses superior knowledge, fairness may require that the burden of proof must be allocated to that party.¹⁶⁰ In special education placement challenges where mainstreaming is impossible, the school district is the only party that has evidence to prove it.¹⁶¹ Consequently, the school district may fairly be expected to advance some evidence to support its position that mainstreaming cannot work. If such evidence is not introduced, a proper inference may be made that the school district opposes mainstreaming, not because the placement is inappropriate, but because mainstreaming does not fit the school's own interests.¹⁶²

In *Schaffer*, the Fourth Circuit rejected the argument that school districts possess superior knowledge in IDEA due process challenges, pointing to IDEA provisions that require schools to grant parents access to academic information.¹⁶³ As Leahy and Mugmon pointed out, however, this rationale fails on two important counts: First, it ignores the fact that, "despite their experience with their own child, parents lack a comprehensive understanding of the *cumulative*, institutional knowledge gained by representatives of the school district from their experiences with *other* similarly disabled children";¹⁶⁴ and second, the argument fails to recognize that parents often lack the sophistication to interpret education records, even if they have full access to such records.¹⁶⁵ Leahy and Mugmon noted that, "the access to information provided by the IDEA does not necessarily have any correlation to parents' abilities to use that information productively."¹⁶⁶

160. Leahy & Mugmon, *supra* note 12, at 963 (citing *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965) (allocating the burden of proof to the party who controls the relevant information needed to decide the dispute)).

161. Weber, *supra* note 14, at 45 ("The presumption should lie against the side with the better ability to disprove the proposition. Obviously, that is the school in the situation of a contest over the placement of a child with a disability.").

162. *Id.*

163. *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004).

164. Leahy & Mugmon, *supra* note 12, at 964 (emphasis in original) (internal quotation marks omitted) (quoting *Weast*, 377 F.3d at 458 (Luttig, J., dissenting)).

165. *Id.*

166. *Id.* at 964–65 (citing *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965) (stating that access to evidence alone does not determine the assignment of the burden of proof;

In reality, parents mounting due process challenges typically occupy an inferior bargaining position to school officials. Many due process challenges look more like David and Goliath matches than genuine attempts to arbitrate disputes.¹⁶⁷ There are many reasons why this may be so. First, although IDEA mandates parental access to all of the child's educational records and evaluations prior to the due process hearing¹⁶⁸—the provision that persuaded the *Schaffer* court—these provisions are in no way equivalent to the rigorous discovery requirements in civil litigation.¹⁶⁹ The school controls the records and witnesses needed for the parents' case.¹⁷⁰ The person most familiar with a disabled child's educational progress and most qualified to speak at these hearings is often the child's teacher, an employee of the adverse party.¹⁷¹

Schools also possess a level of expertise on academic affairs that parents often do not.¹⁷² Unlike parents, schools have the benefit of interacting with a cross-section of students for extended periods of time. This perspective is incredibly useful in substantive due process challenges involving education services.¹⁷³

More importantly, initiating and sustaining a special education due process challenge can require significant financial resources.¹⁷⁴ The attorneys and experts necessary to parents' cases often charge exorbitant fees. This barrier is mitigated only slightly by IDEA provisions that compensate prevailing parents for their attorney expenses and require school districts to inform parents of low-cost legal service providers.¹⁷⁵ In addition, the sheer length of the process often deters parents from initiating or sustaining challenges.¹⁷⁶ Working parents may not have the time necessary to devote to this process, so they are

the court must also consider which party has the ability to explain the records and interpret any ambiguities they may contain)).

167. *See id.* at 952.

168. 20 U.S.C. § 1415(b)(1) (2000).

169. Anne E. Johnson, Note, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof at IDEA Due Process Hearings to Balance Children's Rights and Schools' Needs*, 46 B.C. L. REV. 591, 619 (2005).

170. *Id.* at 619–20 (providing an extensive and useful overview of the competing considerations courts must weigh in allocating burdens under due process challenges).

171. *Id.* at 619.

172. *Id.* at 619–20.

173. *See id.*

174. *Id.* at 620.

175. *Id.*; 20 U.S.C. § 1415(i)(3)(B) (2000). *See also* Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 41–43 (1999) (outlining various reasons why parents may experience difficulty in winning IDEA disputes).

176. *See* Johnson, *supra* note 169, at 620.

forced to either choose not to engage in it or mount challenges that are easily defeated by savvy school legal teams.¹⁷⁷

Finally, parents face emotional and social pressures that might deter them from challenging a school district's educational placement decision.¹⁷⁸ Particularly in smaller school districts, parents may be reluctant to challenge educators with whom they have worked and with whom they frequently interact outside of hearings.¹⁷⁹ Parents challenging a placement may receive backlash not only from school officials, but also from others in the community who believe that they are requesting preferential treatment for their children.¹⁸⁰ In general, school district officials assume that parents cannot objectively determine what services are appropriate for their children, and parents labor under the impression that school district officials are not interested in parental participation or will limit parental participation with sophisticated legal maneuvers.¹⁸¹

Given these obstacles, parents who exercise their due process rights often fare poorly. One study in Illinois reported that, over a five-year period, hearing officers granted parents' requests in only 30.5% of due process hearings.¹⁸² While school districts retained attorneys in 94% of cases, parents retained representation in only 44% of cases.¹⁸³ In

177. See Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 281-82 (1994).

178. See Johnson, *supra* note 169, at 620.

179. *Id.*

180. Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of DeRegulation*, 32 HARV. C.R.-C.L. L. REV. 301, 311-12 (1997).

181. See Johnson, *supra* note 169, at 620; see also Stephen C. Shannon, Note, *The Individuals With Disabilities Education Act: Determining "Appropriate Relief" in a Post-Gwinnett Era*, 85 VA. L. REV. 853 (1999).

[S]tudies indicate that educators tend to focus on a child's weaknesses and faults as a way of coercing parental compliance with the school personnel's recommendation. Others observe that school personnel do not allow parents to give constructive input on their child's needs or simply do not incorporate parents' input into an [individualized education program] recommendation. Parents report that school officials tend to blame them for their child's problems, particularly when the nature of the child's disability is undetermined. Several studies note the extensive use of educational and medical terminology that accompany [individualized education program] meetings, which often has the effect of excluding parents from the dialogue.

Id. at 879. These tactics operate as a formidable barrier for parents who might otherwise welcome the opportunity to actively participate in the individualized education program process.

182. Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002*, at 4-7 (Dec. 2002), available at <http://www.geocities.com/fishstep/Archer.html> (providing an overview of due process statistics in Illinois, demonstrating that parents occupy uneven ground in due process challenges).

183. *Id.* at 6.

light of such statistics, it is clear that the playing field is not level for parents dissatisfied with their child's education.

IV. IMPACT

Presumptions are appropriate "when policy demands it, when inability to obtain access to evidence justifies it, or when the proposition is more probably correct in the run of litigated cases."¹⁸⁴ As the previous Part demonstrated, the mainstreaming presumption meets each of these criteria. The most recent revision of IDEA,¹⁸⁵ however, failed to clarify an important issue: how the mainstreaming presumption is to be preserved in a judicial environment that defers to the wisdom of school districts on most education decisions. Absent clarification, the result may further splinter jurisdictions interpreting IDEA and dilute IDEA's fundamental focus: the integration of disabled children, a historically marginalized population, into general education classrooms.

This Part begins by predicting that, absent further clarification by Congress or the Supreme Court, circuit courts will continue to split on how they assess least restrictive environment challenges to existing individualized education programs.¹⁸⁶ As a result, courts will likely err on the side of deference to school districts.¹⁸⁷ Finally, this Part discusses over-identification of minority students in special education services and predicts that, without clarification of the presumption, segregation of students along racial lines may continue.¹⁸⁸

A. *Incongruity in IDEA Cases*

The Supreme Court's decision in *Schaffer* will likely have one of two effects on IDEA interpretation. Courts may either continue to distinguish between challenges to placement and challenges to other parts of an individualized education program, or they may view *Schaffer* as dispositive on all individualized education program challenges and afford the mainstreaming presumption no evidentiary weight.

Absent further Congressional or Supreme Court clarification, the latter outcome is more likely. Courts may view the least restrictive environment presumption as inconsistent with the burden of proof allocation in cases where a school district opposes mainstreaming. A Sixth Circuit case decided before *Schaffer* suggested that courts want

184. Weber, *supra* note 14, at 44.

185. Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C. §§ 1400-1482 (2000)).

186. See *infra* notes 189-190 and accompanying text.

187. See *infra* notes 191-200 and accompanying text.

188. See *infra* notes 201-208 and accompanying text.

guidance on this issue.¹⁸⁹ That court noted that “[a]bsent more definitive authorization [from the Congress or the Supreme Court] . . . we decline . . . to reverse the traditional burden of proof.”¹⁹⁰ *Schaffer* provided the definitive authorization requested by the Sixth Circuit. Following that decision, even those courts that originally ignored the *Rowley* presumption—a presumption in favor of the school district—on placement challenges will likely view their position as inconsistent with Supreme Court precedent. Although *Schaffer* did not specifically deal with a placement challenge, courts may construe it to apply in that circumstance.

B. *Undue Deference to School Districts*

Support for full inclusion of learning-disabled students is far from universal, even among special education advocates.¹⁹¹ For example, the Learning Disabilities Association of America supports segregation for students when the decision is made in accordance with a continuum of placements analysis.¹⁹² Teachers unions are similarly skeptical of blanket, full-inclusion policies. The American Federation of Teachers has called for a moratorium on placement of disabled students in regular classrooms until further research supports the notion that such placements work.¹⁹³ Over three-fourths of teachers polled by the American Federation of Teachers opposed full-inclusion policies.¹⁹⁴ The National Education Association takes “a more moderate stance,” supporting full-inclusion policies only when schools properly train teachers and provide them with necessary resources.¹⁹⁵

In contrast to the lack of support for inclusion voiced by special education advocacy groups and teachers unions, school districts often vocally oppose full-inclusion policies based on fiscal concerns.¹⁹⁶ Regular education placements require appropriate support services that some school districts are unable to fund.¹⁹⁷ “Moreover, some state funding systems tie state special education allocations to the location where services are provided, thus furnishing incentives for restrictive

189. *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990).

190. *Id.*

191. Martha M. McCarthy, *Inclusion of Children With Disabilities: Is it Required?*, 95 WEST'S EDUC. L. REP. 823, 830 (1995).

192. *Id.* Conversely, the Council for Exceptional Children supports blanket inclusion of children with disabilities in neighborhood schools. *Id.*

193. *Id.* at 830.

194. *Id.*

195. *Id.*

196. *Id.* at 831.

197. McCarthy, *supra* note 191, at 831.

placements.”¹⁹⁸ Such state fiscal arrangements provide incentive for exclusion.¹⁹⁹

Without a strong presumption for mainstreaming, courts are likely to defer to educators and school administrators. This outcome is particularly likely given the disparity in information access between parents and school administrators.²⁰⁰ Any school district that can set forth a reasonable explanation for segregation—ranging from limited financial resources to academic strategies—will likely find the court sympathetic to its oversight.

C. *Impact on the Minority Student Population*

Minorities present special difficulty in special education placements. Recent studies have shown that minorities are over-identified by school officials as learning-disabled.²⁰¹ Such data are relatively scant, because states were not required to aggregate special education data by race and ethnicity before the 1997 IDEA reauthorization.²⁰² This pattern has grave implications for minority students. The number of non-English-speaking students entering schools is rising. Between 2000 and 2003, “[n]ineteen states . . . reported an increase of more than 50 percent in English language learners.”²⁰³ Schools may find it increasingly difficult to distinguish between learning delays related to language barriers and learning disabilities that require special education classification. Teachers may believe that they are unable to either accommodate these students or properly diagnose them. Consequently, they may over-enroll non-English-speaking students in segregated classrooms under the care of special education instructors.²⁰⁴

English-speaking minorities are also over-identified as special education students.²⁰⁵ The idea that such over-identification is the result of any invidious segregation effort on the part of school officials is

198. *Id.*

199. *Id.*

200. *See supra* notes 167–83 and accompanying text.

201. NAT'L CTR. FOR LEARNING DISABILITIES, MINORITY STUDENTS IN SPECIAL EDUCATION: DISPROPORTIONALITY AND LEARNING DISABILITIES (LD), *available at* <http://www.nclld.org> (last visited July 17, 2007).

202. *See* Pub. L. No. 105–17, 111 Stat. 37 (codified in 20 U.S.C. § 6311(h)(1)(C), 6311(h)(2)(B) (2000)).

203. U.S. DEPT. OF EDUC., RESOURCES PLUS REFORMS EQUALS RESULTS, <http://www.ed.gov/about/offices/list/ods/resources-reform/index.html> (last visited July 17, 2007).

204. For a comprehensive overview of the phenomenon of over-identification of minority students in special education programs, see generally Jordan L. Wilson, Note, *Missing the Big IDEA: The Supreme Court Loses Sight of the Policy Behind the Individuals With Disabilities Education Act in Schaffer v. Weast*, 44 Hous. L. Rev. 161, 183–86 (2007).

205. NAT'L CTR. FOR LEARNING DISABILITIES, *supra* note 201.

beyond the scope of this Comment; however, over-identification as learning-disabled and exclusion from mainstreamed classrooms go hand-in-hand. Learning disabilities can be, in part, products of social construction.²⁰⁶ For example, minority students who are learning delayed as a result of any number of factors known to impact cognitive development—such as poverty and absent parents²⁰⁷—may be placed in segregated classrooms where they languish, developing a kind of “learned helplessness.”²⁰⁸

V. CONCLUSION

The importance of the judicial enforcement of IDEA’s mainstreaming requirement is underscored by the many barriers to inclusion.²⁰⁹ “[C]ourts have the crucial responsibility to scrutinize school district findings and conclusions” that effectuate the exclusion of learning-disabled children from regular education classrooms.²¹⁰ Unfortunately, the Supreme Court’s decision in *Schaffer* relieves courts of this obligation, instead deferring to school districts without proper attention to either Congress’s legislative intent or the multitude of reasons, other than the individual interests of the child, that a school district might have for urging segregated placements for learning-disabled students.

In future IDEA reauthorizations, Congress should clarify the least restrictive environment presumption if it is to be effective. An effective presumption in favor of mainstreaming should require school districts to defend, on its merits, any individualized education program that removes a disabled child from the general student population. Only by giving that presumption teeth can IDEA’s fundamental purpose be realized. “It is the vision of special education as something not all that special. . . . The vision . . . of children with disabilities . . . mixed in with other children, without any stigma imposed on those who learn in different ways or with additional support.”²¹¹

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206. Tami Vollmar, *Laying a Foundation for a Better Understanding of Learning Disabilities*, <http://www.msu.edu/user/vollmart/docs/LDRResearchBrief.pdf> (last visited July 17, 2007).

207. SPECIAL EDUCATION NEWS, POVERTY AND DISABILITY: TWO STRIKES AGAINST?, (Mar. 12, 2000), <http://www.specialnews.com/disabilities/disabnews/povanddisab031200.html>.

208. See ETHNIC MINORITY EMPOWERMENT, available at <http://jan.ucc.nau.edu/~jar/Cummins.html> (last visited July 17, 2007).

209. Daniel H. Melvin II, Comment, *The Desegregation of Children With Disabilities*, 44 DEPAUL L. REV. 599, 668 (1995).

210. *Id.* (internal quotations omitted).

211. Weber, *supra* note 14, at 51.

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