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Education

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EDUCATION

[U]niversal education should go along with and accompany the universal ballot in America; that the very best, firmest, and most enduring basis of our republic was the education, the thorough and the universal education of the great American people; and that the intelligence of the mass of our people was the light and life of the republic.[1]

A crucial contemporary controversy revolves around appropriate education for children. Specifically, parents, educators, and politicians fear that problems stemming from factors such as financial stress within the school districts and gang violence in schools riddle the current public school system.[2] Parents have begun to challenge the extent of their rights to direct the upbringing of their children in the educational context.[3] Home schooling, once the province of religious fundamentalists and ideologues "who rejected the institutional nature of public schools," has become increasingly mainstream.[4] In many states, voters and politicians hotly contest plans to organize school vouchers[5] and private school tax credits.[6] Congress increasingly is scrutinizing long-standing federal aid plans to support specific populations in public schools.[7]

This survey will examine the current educational debate as exemplified in three cases that came before the United States Court of Appeals

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1. A statement by Abraham Lincoln recollected by William Henry Herndon. DON E. FEHRENBACHER & VIRGINIA FEHRENBACHER, RECOLLECTED WORDS OF ABRAHAM LINCOLN 244 (1996).

2. Wendy Wheeler, Comment & Note, *Is Home Schooling Constitutional?*, 1995 BYU EDUC. & L.J. 78, 78 (discussing the myriad reasons parents are choosing to home school their children including increasing violence, poor academic standards, drug use in public schools and religious beliefs).

3. *See infra* notes 137–68 and accompanying text.

4. Barbara Kantrowitz & Pat Wingert, *Learning at Home: Does It Pass the Test?*, NEWSWEEK, Oct. 5, 1998, at 64, 66 (discussing the increasingly popular alternative of home schooling in America).

5. *See, e.g.*, Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. 1, 1–2 (1997) (discussing the likely outcome of state litigation over the constitutionality of vouchers that could encompass sectarian schools).

6. *See, e.g.*, LEGISLATIVE COUNCIL, COLO. GEN. ASSEMBLY, *Amendment 17: Income Tax Credit for Education*, *in* PUB. NO. 438, ANALYSIS OF 1998 BALLOT PROPOSALS 35, 36 (1998) (proposing a constitutional amendment to institute an income tax credit for Colorado parents who either home school their children or send them to private or public schools), *available at* <http://www.state.co.us/gov_dir/leg_dir/lcsstaff/ballot/analy-17.htm>; Jim Fisher, *Kempthorne Pressured to Drain School Budget*, LEWISTON MORNING TRIB., Feb. 9, 1999, at 10A (discussing pressures the Idaho governor faces as a supporter of private school tax credits); Ledyard King, *Private-School Tax Credit Killed*, VIRGINIAN-PILOT, Feb. 5, 1999, at B4 (describing the defeat of a private school tax credit bill amid heated debate); *Private-School Tax Credits Face Debate*, DESERET NEWS, Jan. 18, 1999, at B02.

7. *See, e.g.*, Carol Jouzaitis, *Senate Panel OKs Keeping School Lunches, Food Stamps—But With Cuts*, CHI. TRIB., June 15, 1995, at 18 (approving the maintenance of the federal lunch program in the Senate's welfare restructuring bill even though many conservative Republicans wanted to turn this program over to state regulation).

for the Tenth Circuit in 1997–98.[8] Part I examines the effect of the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA),[9] in relation to public education services for disabled children whose parents voluntarily placed them at private schools. Upon a Supreme Court remand, the Tenth Circuit reexamined the application of the IDEA to disabled children in private schools in *Fowler v. Unified School District No. 259, Sedgwick County, Kansas.*[10] In *O'Toole v. Olathe District Schools Unified School District No. 233*,[11] the Tenth Circuit held the Amendments, while making significant changes to the IDEA, did not change the interpretive standard that has controlled the application of the IDEA for the last fifteen years.[12] Part II discusses the rights of parents to direct the educational upbringing of their children. In *Swanson v. Guthrie Independent School District No. 1-L*,[13] the Tenth Circuit denied home schooled students a constitutional right to attend public schools on a part-time basis and further found a lack of any fundamental parental right to control all aspects of a child's education.[14]

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT[15]

A. *Background*

The genesis of the current enactment of the IDEA came in 1966, when Congress amended the Elementary and Secondary Education Act to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children."[16] A few years later, Congress began to address the limited opportunities for appropriate public educa-

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8. This survey address decisions rendered by the United States Court of Appeals for the Tenth Circuit between September 1, 1997, and August 31, 1998.

9. Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. § 1412 (Supp. III 1997)).

10. 128 F.3d 1431 (10th Cir. 1997) [hereinafter *Fowler II*]. In this case, the Tenth Circuit Court of Appeals upheld its previous determination that a school district must pay the same amount for special education services provided to a student voluntarily enrolled at a private school as it pays for such services for a public school student. *See infra* notes 55–76 and accompanying text. The court reconsidered the issue in *Fowler II* because the Supreme Court had vacated and remanded its first decision in light of the 1997 amendments to the IDEA. *See* Fowler v. Unified Sch. Dist. No. 259, Sedgwick County, Kan., 107 F.3d 797, 807–08 (10th Cir. 1997) [hereinafter *Fowler I*], *vacated and remanded by* Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Fowler, 521 U.S. 1115 (1997). For a discussion of *Fowler I*, see Bryan M. Schwartz, Tenth Circuit Survey, *Education: Balancing the Interests of Schools, Students, and the Community*, 75 DENV. U. L. REV. 801, 802–09 (1998) (focusing on statutory aspects of the IDEA).

11. 144 F.3d 692 (10th Cir. 1998).

12. *See O'Toole*, 144 F.3d at 701.

13. 135 F.3d 694 (10th Cir. 1998).

14. *See Swanson*, 135 F.3d at 702.

15. Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. § 1412 (Supp. III 1997)).

16. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, sec. 161, § 601(a), 80 Stat. 1191, 1204.

tion for disabled children, appropriating funds to states upon the condition that they develop programs to meet the needs of handicapped students.[17] It was not until 1974, however, that Congress put any bite into the law, making each state grant for special education funding contingent upon the state adopting "a goal of providing full educational opportunities to all handicapped children, . . . a detailed timetable for accomplishing such a goal, and . . . a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal."[18]

Despite these stringent requirements, when Congress enacted the Education for All Handicapped Children Act of 1975,[19] many in Congress believed a majority of handicapped children in the United States "were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[20] Consequently, Congress drafted legislation granting states federal funding only if each state demonstrated that it had "in effect a policy that assures all handicapped children the right to a free appropriate public education."[21]

The IDEA's "free appropriate public education" requirement tailors itself to the unique needs of the handicapped child by means of an "individualized educational program" (IEP).[22] The IEP is a written statement prepared at a meeting between "a representative of the local educational agency," the child's teacher, the child's parents or guardians, and, whenever appropriate, the child. An IEP includes educational objectives and services to be provided.[23] The IDEA provides procedural requirements for any change of an IEP[24] and avenues for parent complaints regarding the provision of special education and related services.[25] While the law requires parental involvement in the development of an educational pro-

17. *See* Education of the Handicapped Act, Pub. L. No. 91-230, § 613(a) 84 Stat. 175, 179 (1970).

18. Education Amendments of 1974, Pub. L. No. 93-380, sec. 615(c)(1), § 613(b)(1)(C), 88 Stat. 484, 583.

19. Pub. L. No. 94-142, 89 Stat. 773 (1975).

20. H.R. REP. NO. 94-332, at 2 (1975).

21. Education for All Handicapped Children Act § 612(1), 89 Stat. at 780. Over the next two decades, the name and statutory language of the Act was changed to reflect new nomenclature, identifying persons covered under the Act as "disabled" rather than "handicapped." *Cf., e.g.*, Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, sec. 25(a)(5), § 612(3), 105 Stat. 587, 606. The general thrust of the statutory provision remained the same, however, even with subsequent linguistic changes. *Cf.* Pub. L. No. 105-17, § 101, 111 Stat. 37, 60 (1997) (codified as amended at 20 U.S.C. § 1412(a)(1)(A) (Supp. III 1997)).

22. *See* 20 U.S.C. § 1401(8) (Supp. III 1997) (defining the term "free appropriate public education"); *id.* § 1414(d) (giving the parameters for establishing and revising an IEP).

23. *Id.* § 1414 (d)(1)(B).

24. *See id.* § 1415(b).

25. *See id.* § 1415(e), (f).

gram for disabled students, parents have limited authority to dictate daily educational decisions for their children.[26]

1. Application of the IDEA Before the Amendments

Board of Education v. Rowley[27] drove the interpretation of the IDEA before the 1997 Amendments.[28] In *Rowley*, the United States Supreme Court granted certiorari to review the lower courts' interpretation of a free appropriate public education.[29] The Court determined that a child is receiving a free appropriate public education as defined by the IDEA "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction."[30]

The Court recognized that Congress, in its passage of the IDEA, sought to provide access to education for handicapped children, but "did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."[31] The Court determined that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[32] Thus, state-provided specialized services did not have "to maximize each child's potential commensurate with the opportunity provided other children."[33] The IDEA only secured access to special instruction and related services as a "basic floor of opportunity" to disabled children.[34] Ultimately, for a state program to be in compliance with the Act, educational agencies need to provide disabled children a mere opportunity for educational benefit.[35] Critics of the decision claim the Court's focus on the educational benefit standard and other factors sets low expectations for educational advancement and allows educational agencies to minimally comply with the provisions and policy goals of the IDEA.[36]

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26. *See infra* notes 56–76 and accompanying text.

27. 458 U.S. 176 (1982).

28. *See* Tara L. Eyer, Commentary, *Greater Expectations: How the 1997 IDEA Amendments Raise the Floor of Opportunity for Children with Disabilities*, 126 EDUC. L. REP. 1, 8 (1998).

29. *See Rowley*, 458 U.S. at 186.

30. *Id.* at 189.

31. *Id.* at 192.

32. *Id.*

33. *Id.* at 198.

34. *Id.* at 201.

35. *See id.* at 206–07.

36. *See* Eyer, *supra* note 28, at 1, 8 (1998) (including factors such as routinely granting passing marks and advancing children to the next grade level).

2. The 1997 Amendments

In 1997, Congress amended the IDEA[37] (Amendments) because Congress believed "that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education."[38] Congress set forth several broad goals in conjunction with this legislation. Members of Congress who drafted the Amendments emphasized "what is best educationally for children with disabilities" while still giving teachers and other educational professionals more flexibility in providing education for disabled students.[39] Additionally, Congress wanted to be certain parents had an enhanced role in deciding the best educational course for their disabled children.[40] While the law had been very successful over the course of its twenty-two year existence, the Amendments aimed to remedy the fact that "[t]oo many students with disabilities are failing courses and dropping out of school."[41]

Thus, the Amendments support a continuum of educational placements for disabled children that includes placement in "regular classes, special classes, special schools," and home instruction.[42] This legislative support of varying educational placements for disabled children may create tension between parents and educators. Even as the Act supports parental involvement and a wide range of educational options for children, the local educational agency has a tremendous amount of discretion in both placing children and determining which special educational services will be provided.[43] Despite congressional language that suggests a desire for parental involvement in the choice of appropriate education for their children, too much parental control may conflict with specific needs of local educational agencies. Local agencies must have flexibility in the educational options they offer to children with disabilities so the agencies can keep the costs of special educational services as low as possible.[44]

One significant aspect of the Amendments is a congressional response to increased litigation initiated by parents demanding IDEA funds

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37. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37, 37–105 (codified as amended at 20 U.S.C. §§ 1400–1419 (Supp. III 1997)).

38. S. REP. NO. 105-17, at 3 (1997).

39. *Id.* at 2.

40. *See id.*

41. *Id.* at 5. The Senate report notes that the number of disabled students involved in post-secondary education tripled, while the unemployment rate for such individuals benefiting from the act over the past 22 years is "almost half that of their older counterparts." *Id.*

42. *Id.* at 11.

43. *See infra* notes 71–76 and accompanying text (suggesting that local educational agencies have a great deal of discretion in placement and implementation of appropriate services).

44. *See* S. REP. NO. 105-17, at 2.

for their disabled children voluntarily placed in private schools.[45] The Amendments, for the first time, specifically deal with unilateral parental placement of disabled children in a private school.[46] The legislation states the total amount of money spent to provide special education and related services to children in the state placed voluntarily by their parents in private schools is limited to a proportional amount of the federal funds available.[47] This is an "amount consistent with the number and location of private school children with disabilities in the State."[48]

The Amendments also permit school districts to provide IDEA funded special education and related services on the premises of private and parochial schools.[49] Educational agencies must reimburse parents for the costs of special education services for privately placed disabled children only under certain conditions.[50] If, for example, an educational agency failed to offer a disabled child a free appropriate public education in a timely manner, an administrative law judge or court could order total reimbursement for the child's private or parochial education.[51] Even with an adequate IEP in place and a public school providing a free appropriate public education to the child, one interpretation of the new Amendments suggests that parents may not be deprived of all federal assistance for their disabled child even if they unilaterally place their child in a private school.[52]

At the time the Amendments were signed into law, the Department of Education (DOE) determined that it would take comments from the public to aid it in developing regulations to govern the education of disabled children under the amended IDEA.[53] As of January 20, 1998, the DOE had received over 4,500 written comments.[54] The DOE has yet to

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45. *See id* at 13. For a more detailed discussion of the broad effects of the Amendments, see Dixie Snow Huefner, *The Individuals with Disabilities Education Act Amendments of 1997*, 122 EDUC. L. REP. 1103, 1103 (1998) (discussing the myriad changes that "affect eligibility, evaluation, programming (IEPs), public and private placements, discipline, funding, attorneys' fees, dispute resolution, and procedural safeguards for students served under IDEA–Part B").

46. *See* S. REP. NO. 105-17, at 13 (noting that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools").

47. *See* 20 U.S.C. § 1412(a)(10)(A)(i)(I) (Supp. III 1997) ("Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.").

48. S. REP. NO. 105-17, at 13.

49. *See* 20 U.S.C. § 1412(a)(10)(A)(i)(II) ("Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.").

50. *See id.* § 1412(a)(10)(C).

51. *See id.* § 1412(a)(10)(C)(ii).

52. *See* discussion of *Fowler II*, *infra* notes 56–76 and accompanying text.

53. *See* Notice of Request for Advice and Recommendations, 62 Fed. Reg. 35,052 (1997).

54. *See* Department of Education, Statement of Regulatory and Deregulatory Priorities, 63 Fed. Reg. 61,235, 61,236 (1998).

post the amended regulations that should assist in the interpretation and application of the Amendments.[55]

B. *Tenth Circuit Cases*

1. *Fowler v. Unified School District No. 259, Sedgwick County, Kansas (Fowler II)*[56]

a. *Facts*

Michael Fowler, a deaf twelve-year-old boy, qualified as a disabled child under the IDEA.[57] After spending four years at a public school where the school district clustered students with hearing problems, Michael's parents voluntarily transferred him to a private school because they felt the private school could better serve Michael's needs.[58] The parents asked the school district to provide Michael with interpretive services at his private school.[59] The school district refused the request, and administrative proceedings upheld the district's denial of services.[60] On appeal, the district court ordered the school district to pay the entire cost of on-site interpretive services for Michael.[61] On appeal from that decision, the Tenth Circuit found the school district was responsible for paying for such special services only an amount up to "the average cost to the District to provide the same service to hearing-impaired students in the public school setting."[62] In light of the 1997 Amendments to the IDEA, the Supreme Court vacated that decision and remanded the case to the Tenth Circuit to consider the effects of the Amendments.[63]

b. *Decision*

On remand, the Tenth Circuit held that their prior interpretation of the pre-Amendment IDEA applied to the parties in this case.[64] Initially, the court analyzed whether the IDEA Amendments should apply retroactively. The court reasoned that absent a clear congressional indication that the Amendments merely clarified the proper implementation of the IDEA, the Amendments would apply "only to events occurring after the

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55. *See Fowler II*, 128 F.3d 1431, 1438 n.5 (10th Cir. 1997) (utilizing the proposed regulations in interpreting the IDEA).

56. 128 F.3d 1431. For a procedural history of the *Fowler* cases, see *supra* note 10

57. *See Fowler II*, 128 F.3d at 1433.

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *Fowler I*, 107 F.3d 797, 807–08 (10th Cir. 1997), *vacated and remanded by* 521 U.S. 1115 (1997).

63. *See Fowler II*, 128 F.3d at 1433.

64. *See id.* at 1436. The Tenth Circuit did not substantively change its interpretation of the IDEA as it relates to federal funding for private school children but accentuated the need to calculate a proportionate share. *See id.* at 1437.

Act's effective date."[65] Consequently, the old IDEA applied to the payment of Michael's interpretive services provided at the private school he attended up to the effective date of the Amendments.[66] The school district, therefore, was obligated to pay "an amount up to, but not more than, the average cost to the District" for providing the same service to a hearing-impaired child at a public school.[67]

The school district's obligation to Michael's parents changed slightly, however, with the implementation of the Amendments. The court held that the Amendments provided that parents who placed their children voluntarily in private schools when a local agency has offered a free appropriate public education are not entitled to reimbursement "for the cost of the child's education, including any special education and related services."[68] Rather, in cases such a Michael's, "the local agency's sole obligation is to spend . . . a 'proportionate amount of Federal funds,' which amount is apparently to be derived from considering the 'number and location' of such students compared to the total population of students requiring special education and related services."[69] The Tenth Circuit remanded the case to the district court to determine the calculation of Michael's proportionate share of the funds the federal government gave to Michael's local school district under the IDEA.[70]

c. *Analysis*

Before *Fowler II*, some critics feared the 1997 Amendments to the IDEA would grant too much discretion to school districts because the districts would have unilateral authority to decide whether or not they would pay for a private school child's special education.[71] The proposed regulations for the governance of the IDEA suggest that the local agency will have the authority to decide which private school children will receive services, which services will be provided, and in what manner.[72] In a footnote, the court suggested that implementing these proposed regula-

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65. *Id.* at 1436.

66. *See id.*

67. *See id.*; *cf.* Julie F. Mead, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 EDUC. L. REP. 511, 527 (1998) (discussing the requirements under the statute for "equitable participation" that requires private school students to have the same opportunities available to them for IDEA benefits).

68. *Fowler II*, 128 F.3d at 1436.

69. *Id.* at 1437 (quoting Individuals with Disabilities Act Amendments of 1997, 20 U.S.C. § 1412(a)(10)(A)(i)(I) (Supp. III 1997)).

70. *See id.* at 1439.

71. *See, e.g.*, William L. Dowling, *Special Education and the Private School Student: The Mistake of the IDEA Amendments Act*, 81 MARQ. L. REV. 79, 83 (1997) (arguing that the 1997 Amendments limit a court's ability to require a school board to pay for the education of a disabled child at a private school).

72. *Cf.* Proposed Rules Department of Education, 62 Fed. Reg. 55,026, 55,094 (1997) (to be codified at 34 C.F.R. pt. 300) (proposed Oct. 22, 1997).

tions could lead to "the proportionate share of Federal funds [being] zero for any particular private school disabled student."[73]

Given the current absence of finalized interpretive regulations for the Amendments,[74] parents have little guidance in knowing whether a private school placement may effectively remove their children from federal funding as the local educational agency evaluation is determinative. This illustrates the inherent conflict between what parents subjectively believe is educationally best for their child, and the local school district's goals of flexibility and cost cutting in providing education.[75] Significantly, the *Fowler II* decision suggests that parents who place their disabled children in private schools do not risk cutting their children off from all federal funds for special education because such children should still be entitled to a proportionate share of the federal money available under the IDEA.

These unilateral parental placement decisions may, however, threaten prompt disbursement of funding to disabled children as the state, likely the school district itself, must determine the proportionate share of federal funding to which the child is entitled.[76] This calculation may be complicated enough to delay getting the necessary funding to the needy child and may give rise to a new and uncharted arena for litigation.

2. *O'Toole v. Olathe District Schools Unified District No. 233*[77]

a. *Facts*

Molly O'Toole was diagnosed with moderate to profound hearing loss.[78] She began her education at her local school district's hearing impaired program where school district employees and her parents developed an IEP for her in February 1993.[79] In June 1993, Molly's father had the Central Institute for the Deaf (CID), a private residential student program, evaluate Molly's special education needs. [80] In light of CID's evaluation, her parents requested another IEP meeting in August 1993, where the school district agreed to change Molly's IEP in accordance with CID's recommendations but decided to keep her enrolled in the

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73. *Fowler II*, 128 F.3d at 1438 n.5.

74. *See supra* notes 54–55 and accompanying text.

75. *See supra* text accompanying note 44.

76. *See Fowler II*, 128 F.3d at 1436–37 & n.4.

> The proposed regulations define 'proportionate amount' as 'an amount that is the same proportion of the [local educational agency's] total subgrant [under Part B] . . . as the number of private school children with disabilities . . . residing in its jurisdiction is to the total number of children with disabilities in its jurisdiction.'

Id. at 1437 n.4 (quoting Proposed Rules Department of Education, *supra* note 72, at 55094).

77. 144 F.3d 692 (10th Cir. 1998).

78. *See O'Toole*, 144 F.3d at 695.

79. *See id.* at 696. For a discussion of the nature of an IEP, see *supra* text accompanying notes 22–26.

80. *See O'Toole*, 144 F.3d at 696.

district's program.[81] Molly's parents questioned the adequacy of the IEP and the school district's ability to meet Molly's needs; consequently, they enrolled Molly at CID.[82] When Mr. O'Toole requested that the school district reimburse him for Molly's educational expenses at CID; the district refused.[83] After exhausting their administrative appeals and losing at the district court level, Molly's parents appealed to the Tenth Circuit, challenging the sufficiency of Molly's IEP and arguing that Kansas law requires a higher standard of education than under federal law.[84]

b. *Decision*

The Tenth Circuit upheld the administrative law adjudication.[85] First, the court rejected the O'Toole's argument that a Kansas administrative regulation about placement of a disabled child evidences any intent to require school districts to provide a particular level of educational services.[86] Second, the court evaluated the adequacy of Molly's IEP to determine whether the IEP was "'reasonably calculated to enable [her] to receive educational benefits.'"[87]

The court decided it could only evaluate the adequacy of the IEP as of the time the school district and Molly's parents designed it because "'[n]either the statute nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement.'"[88] The fact that Molly's parents pulled her from the school before the school district could implement the amended IEP mandated that the court examine that IEP prospectively.[89] Given this, the court determined Molly's IEPs, even if not optimal, were designed to, and did, confer educational benefits in accordance with the IDEA.[90]

The court stressed that although Molly was happier and made more progress at CID, that did not necessarily make CID the appropriate educational setting for her.[91] The court adopted a recent Second Circuit analysis stating a "'disabled child is 'not entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.'"[92] Ultimately, because "Molly's

81. *See id.*
82. *See id.*
83. *See id.* at 696–97.
84. *See id.* at 697–98.
85. *See id.* at 709.
86. *See id.* at 700–01.
87. *Id.* (quoting Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 726 (10th Cir. 1996) (requiring the court to ask "whether the State complied with IDEA procedures, including whether the IEP conformed with the requirements of the Act")).
88. *Id.* (quoting Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3d Cir. 1995)).
89. *See id.* at 707–08.
90. *See id.* at 708.
91. *See id.*
92. *Id.* (quoting Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998)).

IEPs were reasonably calculated to confer educational benefit on her and she made sufficient progress toward" the goals set forth in the IEPs, they met the requirements of both Kansas's law and the IDEA.[93]

c. *Analysis*

The court seems to support the independent discretion of the district in both its refusal to pay for the private education of Molly O'Toole and its determination of the adequacy of her IEPs.[94] In fact, the court system may not be the best place to determine the adequacy of a student's IEP because courts are so removed from educational processes and goals. First, a court evaluation of a school's plan for a student unjustly shifts the focus from the needs of the student to the judicial proceedings.[95] Second, this exercise of judicial discretion undermines the ideal cooperative relationship between the parent and school system and can make that relationship unduly adversarial.[96]

The court did not examine the specific history and language of the Amendments and conformed to the "'basic floor of opportunity'" standard set forth in *Rowley*.[97] The fact that Congress specifically amended the IDEA to include an explicit indication of "how the child's disability affects the child's involvement and progress in the general curriculum"[98] as well as "a statement of measurable annual goals"[99] has led critics to suggest the *Rowley* "access" standard is no longer the correct measuring stick for IDEA compliance.[100] Rather, Congress designed the Amendments to improve the effectiveness of special education and increase the benefits afforded to children with disabilities "to the extent such benefits are necessary to achieve measurable progress."[101] Measurable progress suggests meaningful progress and not mere access to education as set forth in *Rowley*.[102]

The court rejected any new standard for determining what level of education the IDEA Amendments require educational agencies to offer to disabled students.[103] Indeed, the court made clear that the statutes and

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93. *Id.*

94. *See id.* at 701–08.

95. *Cf.* LaDonna L. Boeckman, Note, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 DRAKE L. REV. 855, 879 (1998).

96. *Cf. id.*

97. *O'Toole*, 144 F.3d at 698 (quoting Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982)).

98. 20 U.S.C. § 1414(d)(1)(A)(i) (Supp. III 1997).

99. *Id.* § 1414(d)(1)(A)(ii).

100. *See, e.g.*, Eyer, *supra* note 28, at 17 (suggesting that the courts should continue to define the "educational benefit" standard so that it complies with the Amendments that suggest meaningful educational progress).

101. *Id.* at 16.

102. *See id.* at 17.

103. *See* O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 (10th Cir. 1998).

regulations only mandate that a school "'provide an appropriate education, not the best possible education, or the placement the parents prefer.'"[104] Nor does the IDEA "require the best possible education or superior results."[105]

The O'Tooles' unilateral decision to enroll Molly at CID, despite the school district's willingness to implement CID's suggestions into Molly's IEP, eliminated the possibility of full reimbursement for Molly's CID tuition.[106] Arguably, however, the court could have ordered the school district to determine and distribute the proportionate share of the federal funds due to Molly under the IDEA. According to *Fowler II*, this proportionate share would have been available to her for special education and related services regardless of where she went to school.[107]

C. *Other Circuits*

Despite the controversy surrounding the application of the *Rowley* standard of "educational benefit" to disabled children,[108] no circuit court has determined that the *Rowley* standard should be modified based on the recent Amendments. Rather, like the Tenth Circuit in *O'Toole*, other circuits have found that the 1997 Amendments to the IDEA do not require the local educational agency to pay for services if the disabled child's parents voluntarily enroll her at a private school unless the local agency did not provide an adequate educational plan for the child.[109]

In *Foley v. Special School District of St. Louis County*,[110] the Eighth Circuit examined the language of the Amendments and their relationship to existing state law.[111] The Foleys argued that the IDEA provision permitting special educational services on-site at private schools preempted

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104. *O'Toole*, 144 F.3d at 708 (quoting Heather S. v. Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997)).

105. *Id.* (quoting Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 613 (8th Cir. 1997)).

106. *See id.* at 697.

107. *See Fowler II*, 128 F.3d 1431, 1436–37 (10th Cir. 1997).

108. *See* Eyer, *supra* note 28, at 2.

109. *See, e.g.*, Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 134 (2d Cir. 1998) (holding that since the school district's IEP "complied with requirements of IDEA, it cannot be ordered to reimburse the parents" for their voluntary enrollment of their child in private school); Tucker v. Calloway County Bd. of Educ., 136 F.3d 495, 506 (6th Cir. 1998) (holding that parents "are not entitled to dictate educational methodology or to compel a school district to supply a specific program for their disabled child"); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 255–56 (5th Cir. 1997) (stating that the IEP was reasonably calculated to provide the student with a meaningful educational benefit and his placement in public system was appropriate); Donald B. v. Board of Sch. Comm'rs, 117 F.3d 1371, 1375 (11th Cir. 1997) (concluding that the school district was not required to transport student three blocks from private school to public school for speech therapy as this did not deprive him "of a genuine opportunity for equitable participation in a special education program").

110. 153 F.3d 863 (8th Cir. 1998)

111. *See Foley*, 153 F.3d at 864 (addressing 20 U.S.C. § 1412(a)(10)(A)(i)(II) (Supp. III 1997)).

a state statute prohibiting public school educators on the premises of private schools.[112] The court held that the IDEA gives students and parents no individual rights to services provided at a specific location.[113] Furthermore, state law may effectively deny any provision of special educational services on-site at private schools.[114]

Only one other circuit has formally adopted the "proportionate share" rationale set forth in *Fowler II*. In *Russman v. Board of Education of the Enlarged City School District* (*Russman II*),[115] the Second Circuit decided that states need provide only those services to children voluntarily enrolled in private schools that can be purchased with a proportionate share of the allocated federal funds.[116] In that case, the parents of a mentally retarded student deserving of special education services contended that the school district must provide those services on the premises of the private Catholic school where her parents voluntarily enrolled her.[117]

Like *Fowler I*, the Supreme Court vacated and remanded the Second Circuit's first disposition of the case in light of the 1997 Amendments to the IDEA.[118] In the first proceeding, the court upheld the district court's grant of summary judgment to the Russmans and determined that the school district must provide an on-site teacher and teacher's aide to Colleen at her private school.[119]

On remand, however, the Second Circuit held in favor of the school district.[120] The court reiterated the *Fowler* court's position that a local agency's only obligation is "to expend a proportionate share of the federal" funding received under the IDEA for children voluntarily enrolled in private schools when the local agency was willing and able to provide a free appropriate public education.[121] The Second Circuit further clarified a local educational agency's obligations to disabled children at private schools. The court found the statute, in light of the legislative history, could not be interpreted to require local school districts to provide special education services on-site at private schools.[122] Rather, the local educational agency may, at its sole discretion, determine where it shall provide services and clearly is under no statutory obligation to provide such special services on site.[123]

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112. *See id.* at 865 (overruling the inferred preemption).
113. *See id.*
114. *See id.*
115. 150 F.3d 219 (2d Cir. 1998) [hereinafter *Russman II*].
116. *See Russman II*, 150 F.3d at 221.
117. *See id.* at 220.
118. *See* Board of Educ. of the Enlarged City Sch. Dist. v. Russman, 521 U.S. 1114 (1997).
119. *See* Russman v. Sobol, 85 F.3d 1050, 1057 (2d Cir. 1996) [hereinafter *Russman I*].
120. *See Russman II*, 150 F.3d at 222.
121. *Id.*
122. *See id.*
123. *See id.*

II. THE RIGHT OF HOME SCHOOLED STUDENTS TO BENEFIT FROM PUBLIC SCHOOL EDUCATION

A. *Background*

Providing public school facilities and services for its residents is one of the most significant functions of a state.[124] However important this interest is, it must be balanced against parents' right to make the most basic decisions about the upbringing of their children, including the right to guide and direct their education.[125] In the early days of our government, Congress deemed that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[126] In *Meyer v. Nebraska*,[127] the Supreme Court recognized the right of parents to make the most fundamental decisions about their children.[128] The Court held that a state statute prohibiting the teaching of any language other than English infringed upon the rights of parents.[129] The Court stated "[e]vidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[130] Soon after, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,[131] the Court struck down a state statute requiring public school attendance as it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[132]

Although the Supreme Court has not specifically dealt with the issue of home schooling, the Court determined that the parental right to direct a child's education does fall within the First and Fourteenth Amendments of the Constitution.[133] If a constitutionally protected right exists, then the government may not interfere with private educational decisions concerning one's child without a compelling reason.[134] An ex-

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124. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (discussing the state's responsibility for the education of its citizens and its power to "impose reasonable regulations" thereon).

125. *Cf. Yoder*, 406 U.S. at 214 (stating that "a [s]tate's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests").

126. Act to Provide for the Government of the Territory North-West of the River Ohio, 1 Stat. 50, 52 (1789).

127. 262 U.S. 390 (1923).

128. *See Meyer*, 262 U.S. at 399–401.

129. *See id.* at 401.

130. *Id.*

131. 268 U.S. 510 (1925).

132. *Society of the Sisters*, 268 U.S. at 534–35.

133. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (illustrating that the Due Process Clause of the Fourteenth Amendment encompasses a broader range of liberty rights than those specifically enumerated in the Constitution).

134. *See* Murphy v. Arkansas, 852 F.2d 1039, 1041–43 (1988) (recognizing the state has a compelling interest in the education of a child, the court found no persuasive arguments to indicate

amination of the relevant case law, however, leads to the conclusion that "there is no broad, if any, fundamental nonreligious right to home instruction."[135] Additionally, the state interest in the upbringing and education of its future citizens suffices to allow the government some level of control in educational policies and practice within the state, thereby abridging parental direction.[136]

B. *Tenth Circuit Case*—Swanson v. Guthrie Independent School District No. 1-L[137]

1. Facts

Her parents home schooled Annie Swanson since she began school because they wished to instruct her on Christian principles that the public school curriculum excludes.[138] Through a special agreement between the school superintendent and Annie's parents, Annie attended certain classes at the public school on a part-time basis for her whole seventh grade year.[139] The next year, the school board and a new superintendent developed a policy mandating full-time enrollment for all students in the public schools.[140] The board felt that because part-time students did not count for state financial aid purposes, allowing Annie to attend on a part-time basis would set a precedent for other part-time students to take advantage of public school facilities on an "as wanted" basis without any increase in state funding.[141] After the district court granted summary judgment for the school district, the plaintiffs appealed.[142]

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the parents had a fundamental right to unlimited supervision of their child's education); *see also* Wisconsin v. Yoder, 406 U.S. 205, 214–15, 234 (1972) (holding the religious beliefs of the Amish were First and Fourteenth Amendment interests that prevented the state from compelling Amish children from attending formal high school).

135. Perry A. Zirkel, *The Case Law Concerning Home Instruction*, 29 EDUC. L. REP. 9, 11 (1986) (recognizing the "power of the state to compel attendance at some school," and noting the void in Supreme Court cases addressing home instruction). *But see Yoder*, 406 U.S. at 235 (suggesting "that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements").

136. *Cf. Murphy*, 852 F.2d at 1042, 1043.

137. 135 F.3d 694 (10th Cir. 1998).

138. *See Swanson*, 135 F.3d at 696.

139. *See id.*

140. *See id.* at 696–97.

141. *Id.*; *cf.* Eugene C. Bjorklun, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 EDUC. L. REP. 1, 5 (1996) (stating the school district argument that "a public school's primary responsibility is to serve its own students and allowing home schooled students to participate could take some opportunities away from the regularly enrolled students"); David W. Fuller, Comment & Note, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599, 1626 (1998) (stating that "the principal justification school districts offer when denying home-schoolers permission to opt into classes or extracurricular activities is that of administrative inconvenience").

142. *See Swanson*, 135 F.3d at 696.

2. Decision

The Tenth Circuit held that the school board's policy pertaining to part-time students was "a neutral rule of general applicability."[143] The policy allowed the "[d]efendants to prove a reasonable relationship between the part-time attendance policy and a legitimate purpose of the school board" which warranted an affirmation of the grant of summary judgment.[144]

The Swansons' argued that the part-time attendance policy discriminated specifically against Christian home schoolers.[145] The court rejected that argument as the policy did not prohibit the Swansons' "from home-schooling Annie in accordance with their religious beliefs."[146] In fact, the school board's full-time attendance policy applied to all home schooled students regardless of their families' basis for this educational choice.[147] Significantly, only a full-time student could take advantage of the school district's educational opportunities.[148]

The court determined "that parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject."[149] Additionally, the court found that no parental right allows parents to dictate that their children can attend public school for only part of the day despite a contrary but neutral school board policy.[150] The Swansons' claims were "mere invocation[s]" of a general right and did not suffice to make a "colorable showing of infringement of recognized and specific constitutional rights."[151]

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143. *Id.* at 703.

144. *Id.*

145. *See id.* at 698.

146. *Id.*

147. *See id.*

148. *See id.* at 699–700.

149. *Id.* at 699. The court relied on cases that have limited the rights of parents to direct their children's education in that they cannot exempt a child from reading programs they did not approve of, a school's community service program, or from sexually explicit assemblies. *See id.*; *see also* Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 457 (2d Cir. 1996) (challenging a mandatory school community service program); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 529 (1st Cir. 1995) (objecting to an allegedly indecent compulsory AIDS and sex education program in a public high school); Fleishchfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 682 (7th Cir. 1994) (claiming that a grade school supplemental reading program indoctrinated children in values opposed to plaintiffs' Christian beliefs, thus violating the Establishment and Free Exercise Clauses of the First Amendment); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1061 (6th Cir. 1987) (controverting the forced reading of school books which inculcate values in violation of religious beliefs).

150. *See Swanson*, 135 F.3d at 702.

151. *Id.* at 700.

3. Analysis

The Tenth Circuit declined to extend the concept of parental rights so that parents of home schooled students could dictate all elements of their child's education.[152] Arguably, the court protected the states' "wide range of power for limiting parental freedom and authority in things affecting the child's welfare" in the educational context.[153] The rationale for this arises from the state interest in securing a child's development into a productive adult citizen of the state.[154] This, however, conflicts with the views of proponents of parental rights who dislike the increased amount of state intervention into the lives of families.[155] Critics of the parental rights movement argue that proposed legislative reforms[156] "go too far towards isolating parental authority from the oversight of the community, to the detriment of children's interests and rights."[157] Regardless, the Supreme Court has yet to state that parents have a fundamental right to direct the upbringing of their child in its totality, although choices about family life rank as "of basic importance in our society."[158]

In the home school arena, without this fundamental parental right to direct the totality of a child's education, states and public school districts will continue to exercise a great deal of discretion in their designated role as the trustees of public education.[159] Parents who wish to complement their child's home education by enrolling their students part-time in public schools likely must rely on the state legislatures and local policies, not federal law to do so.

As a threshold matter, many states statutorily guarantee the right of parents to educate their children at home.[160] Home schooling, however,

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152. *See id.* at 699.

153. Prince v. Massachusetts, 321 U.S. 158, 167 (1944).

154. *See Prince*, 321 U.S. at 168; *see also* David Fisher, Note, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 407 (1997) (acknowledging that a state can "compel school attendance, regulate child labor, and demand that children be vaccinated (whether or not this violates parents' personal and religious view of medical treatment)").

155. *See* Fisher, *supra* note 154, at 399.

156. *See, e.g.*, The Parental Rights and Responsibilities Act of 1995, S. 984, 104th Cong. § 2(b)(6) (reestablishing a four-part process for analyzing parental rights that are in conflict with a government interest).

157. Fisher, *supra* note 154, at 401. "This extended right of parental control results in a dangerous and unnecessary cession of state power that necessarily tramples on the fundamental rights of children." *Id.*

158. M.L.B. v. S.L.J., 117 S. Ct. 555, 564 (1996) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)). *But see* Lehr v. Robertson, 463 U.S. 248, 258 (1983) (stating that the "relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection").

159. *See* Runyon v. McCrary, 427 U.S. 160, 178 (1976) (noting that "while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation").

160. *See* Fuller, *supra* note 141, at 1612 & n.62 (listing state statutes guaranteeing the right to home school).

cannot usually provide activities such as band, chorus, certain classroom activities, and many sports without some level of cooperation with an established educational institution.[161] To ensure such cooperation, states (or local agencies) should enact laws that allow some type of public school access to students who are educated primarily at home. So far, thirteen states have enacted such statutes.[162]

Illustratively, in the arena of high school sports, the courts have determined that a student's participation in sports is a privilege and not a right, and consequently does not receive due process protection.[163] Generally, a student's right to participate in sports does not rise to the level of a fundamental right as the latter rights "have their genesis in the express[ed] and implied protections of personal liberty recognized in federal and state constitutions."[164] The right to participate in extracurricular activities is not analogous to the right to free speech in both state and federal constitutions; government cannot accord fundamental status to the right to participate in extracurricular activities.[165] Rather, this right is subject to the whims of local educational agency regulations.[166] Such an unprotected status can, depending on the jurisdiction, isolate home schooled students from local educational agency benefits.[167]

Finally, full-time attendance policies can unduly burden the home schooled student as they allow exclusion of students from a benefit that they (or their parents) support through taxes. Ironically, in Annie Swanson's case, the court implies that the determining factor in the disposition was the parent's exercise of an educational choice that excluded Annie from public education and not the school board's policy against part time attendance.[168]

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161. *See* Betty Jo Simmons, *Classroom at Home*, AM. SCH. BOARD J., Feb. 1994, at 47, 47.

162. *See* Fuller, *supra* note 141, at 1615 & n.73.

163. *See* Derwin L. Webb, *Home-Schools and Interscholastic Sports: Denying Participation Violates United States Constitutional Due Process and Equal Protection Rights*, 26 J.L. & EDUC. 123, 123 (1997) (inferring that participation in sports and other extracurricular activities in public schools is usually a privilege not a right). *But see* Boyd v. Board of Dirs. of the McGehee Sch. Dist. No. 17, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (holding that a high school football player who had the potential to obtain a college scholarship had a constitutionally protected property interest in participation in sports as participation was a "vital and indispensible" part of his attempt to win a scholarship).

164. Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 560 (Tex. 1985) (holding that students do not have a constitutionally protected interest in participation in extracurricular activities); *see also* Webb, *supra* note 163, at 127.

165. *See Stamos*, 695 S.W.2d at 560.

166. *Cf.* Webb, *supra* note 163, at 125 (listing numerous criteria on which state boards or athletic associations base their admissions regulations).

167. *Cf. id.*

168. *See* Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 700 (10th Cir. 1998) (stating that there is no constitutional protection to pick and choose which classes or activities your child will attend and which ones they will not).

C. *Other Circuits*

Other circuits have yet to address home schooling and its constitutional implications. The Tenth Circuit's analysis in *Swanson* makes the case somewhat of an anomaly in the federal system.

III. CONCLUSION

Education of children fundamentally concerns parents and politicians alike. While the 1997 Amendments to the IDEA were supposed to clarify the appropriate level of funding allocated per student, the fact that each state may now be required to determine what proportionate share of federal funds each child receives may delay the actual disbursement of funds. Clearly, a delay in providing educational services was not the purpose of the Amendments, but such delay threatens to emerge as more complicated calculations determine allocation of funds to disabled children. The Amendments confer a great deal of authority upon local educational agencies to determine the best educational solutions for disabled children and while parents involve themselves in the approval of these decisions, the legal trend seems to be one of deference to schools' choices and not parental demands.

Likely, the current debate on the appropriate level of state and parental involvement in the direction a child's education will continue, barring a Supreme Court determination that directing a child's education is a fundamental parental right. Home schooling remains a viable and legal option for parents; however, without state support or legislative action, parents will continue to struggle to enroll their children in public school programs on a part-time basis. Local educational agencies legally and effectively may ban home schooled children from participation in publicly funded activities.

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