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The Strained Dynamic of the Least Restrictive Environment Concept in the IDEA

By Bonnie Spiro Schinagle and Marilyn J. Bartlett*

I. INTRODUCTION

A. Preliminary Remarks

“Disability” is not a simple term referring to a narrow state of existence.¹ Disability encompasses those with physical challenges as well as the entirety of human intellectual capability—from extreme impairment to extreme gift. Rigid adherence to placing children in the general education population is a dangerously simplified view; placement in the general public school environment can benefit some students but irretrievably damage others.² Thus, the individualization mandate of the Individuals with Disabilities in Education Act (“IDEA”)³ is theoretically sound, but elevating the mainstreaming concept to the level of a mandate is not.

What we propose here is acceptance of inclusion as a parent-driven mandate rather than a mechanically-applied rule. Parents, after all, know their children best. In the Authors’ experience, placement negotiations between parents and school districts are more a matter of jockeying for position in which school districts put their financial interests at the forefront.⁴ School districts have greater resources than do parents, resulting in an extreme imbalance in bargaining power.⁵ The Authors agree with Colker that inclusion should be a means to “improve the educational outcome for children with disabilities”⁶ and that those parents wishing to have their children participate in mainstream educational settings be supported.

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¹ This complexity was recognized by Congress in 1975. See H.R. REP. NO. 94-332, at 8 (1975); see also Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 799–800 (2006).

² H.R. REP. NO. 94-332, at 9 (“An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee [on Education and Labor] recognizes that this is not always the most beneficial place of instruction.”); see also Colker, *supra* note 1, at 796–97 (stating that for some children the integration presumption “hinders the development of an appropriate individualized education program” and with certain disabilities, such as dyslexia, infinite modifications are unlikely to enable a student to learn effectively in a general education classroom).

³ Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400–1491 (2012).

⁴ See *infra* note 9.

⁵ Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 423, 450–54 (2012) (noting that special education hearings can cost thousands in legal fees, that school districts have law firms on retainer and that liability insurance is available to cover special education claim defense costs); see also The Sandner Grp., *School Board Legal Liability (SBLL)*, OKLA. SCH. RISK MGMT. TRUST, <http://www.osrmt.org/SBLL.html> (last visited Apr. 25, 2015) (noting the availability of a school board legal liability insurance coverage with a \$500,000 defense coverage limit for defense of “administrative hearings seeking injunctive and declaratory relief in special education hearings”); ACE GRP., ACE SCHOLASTIC ADVANTAGE EDUCATORS LEGAL LIABILITY POLICY (2015), available at <http://www.acegroup.com/us-en/assets/617200-ace-scholastic-advantage-03.15.pdf> (noting the availability of coverage for claims arising out of Individual Education Plan/Special Needs Due Process Hearings or Desegregation). Chopp also notes that parents are further hampered by the fact that attorneys’ fees are reimbursable to the prevailing party, but that expert witness fees are not. Chopp, *supra* at 451 n.120 (citing 20 U.S.C. § 1415(i)(3)(B) (2006); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 323 (2006)).

⁶ Colker, *supra* note 1, at 808.

B. Article Overview

The IDEA guarantees accessibility to education in public school systems for students with a broad range of disabilities.⁷ The IDEA's mandate requiring educating disabled children in the "least restrictive environment" ("LRE") focuses on accomplishing that goal.⁸ Orthodox adherence to mainstreaming may once have served an important purpose, but it does not necessarily serve each child. In point of fact, the LRE requirement may well be at odds with the IDEA's current objectives of providing an education that promotes preparation for "further education, employment, and independent living."⁹

One of the initial motivations for the IDEA was to open the doors of public schools to students who were either excluded entirely or for whom resources were not available.¹⁰ Yet many parents find that their children's needs are not served by the public schools, even with the availability of a variety of public educational settings. Frequently, parents run in the opposite direction, seeking education for their children in specialized programs.¹¹ In those circumstances, school districts frequently assert restrictiveness as a defense to claims for private school tuition, and the implication is that those districts are motivated more by financial interests rather than

⁷ Qualifying disabilities are "[intellectual disabilities], hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities" for which the child, "by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A)(i)–(ii). Children aged three to nine are considered disabled if they "experience[e] developmental delays as defined by the State . . . in [one] or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development . . ." 20 U.S.C. § 1401(3)(B)(i). "Specific learning disability" is defined as "a disorder in [one] or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." 20 U.S.C. § 1401(30). "[P]erceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia" are included in this category, while learning problems that are "primarily the result of visual, hearing, or motor disabilities, of [intellectual disability], of emotional disturbance, or of environmental, cultural, or economic disadvantage" are not. 20 U.S.C. § 1401(30)(B), (C).

⁸ The objective of inclusion was "to improve student learning, including socialization . . . and educational attainment." Christian P. Wilkens, *Students with Disabilities in Urban Massachusetts Charter Schools: Access to Regular Classrooms*, 31 DISABILITY STUD. Q. 1, 3 (2011), available at <http://dsq-sds.org/article/view/1374/1541>. But even after passage of the IDEA, "special education remained primarily the domain of specialists; it was typically administered in separate schools, separate wings or separate classrooms, and taught by separate teachers. Students with disabilities—even those entirely capable of benefit—only gradually gained equal access to the regular curriculum or regular teachers." *Id.* at 4; see also Henry A. Beyer, *A Free Appropriate Public Education*, 5 W. NEW ENG. L. REV. 363, 364 (1983) (stating that in 1954 "the great majority of public school districts were segregating [children with mental or physical handicaps] from their nonhandicapped peers, were providing them with grossly inappropriate educations from which they could draw little benefit, or were excluding them entirely from public education systems").

⁹ 20 U.S.C. § 1400(d)(1)(A) (stating that the purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); see generally Colker, *supra* note 1, at 799 (positing that the integration presumption was adopted from the civil rights movement "without any empirical justification" and concluding that the presumption actually impedes the objective of allocating educational resources that are appropriate to students' individualized needs). The article caused quite a kerfuffle, resulting in responses by Mark C. Weber and Samuel Bagenstos. See RUTH COLKER, WHEN SEPARATE IS UNEQUAL 24 (2009) (arguing that a pure integrationist agenda was justified in a time when "individuals with disabilities were excluded from juries, had few educational opportunities, were disenfranchised, were often housed in inhumane warehouses . . . and had no 'right to live in the world'" and urging an individual approach for each student classified as disabled); see generally Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. 174 (2007) (responding to Ruth Colker's *The Disability Integration Presumption: Thirty Years Later*, *supra* note 1, and disagreeing that the integration presumption should be altogether abandoned and suggesting that integration be given greater weight if sought by the parent and less weight if sought by the school district); see Chopp, *supra* note 5, at 441. *C.f.* Samuel R. Bagenstos, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. 157, 161 (2007) (arguing that the integration presumption "requires nothing more than the most integrated setting appropriate to the individual child" and cautioning that abandonment of the integration presumption could revitalize reliance on segregated placements).

¹⁰ See 20 U.S.C. § 1400(c)(2)(A)–(D) (stating that before enactment of the Education for All Handicapped Children Act, now the IDEA, "the educational needs of millions of children with disabilities were not being fully met" because they "did not receive appropriate educational services," they were excluded entirely from the public school system, their disabilities were undiagnosed or the public schools lacked "adequate resources").

¹¹ See *infra* Part II.B and note 190.

morality or altruism.¹² Some courts consider the restrictiveness of the unilateral private placement in determining whether to award tuition reimbursement, while other courts do not.¹³

The “mainstreaming”¹⁴ requirement of the IDEA secures an important right. However, there are different concerns and interests depending on whether authorities are excluding a child from public education or where a parent, dissatisfied with the public education offered to their disabled child, has exercised his or her right to opt out of the public system. Those cases articulating tests to determine whether a school district has properly offered a continuum of placements and attempted inclusion are important, and the LRE should be a heavily-weighted factor in cases where parents assert a claim to have their child educated in a public school.¹⁵ When, however, a parent seeks reimbursement for private school tuition, public school authorities should not be permitted to challenge the private placement on the sole ground of restrictiveness.¹⁶ In such cases, blind insistence upon placement in the LRE tends to misdirect focus and serve to distract from an analysis of a child’s unique educational needs.¹⁷ Additionally, in private school tuition reimbursement cases, once it has been determined that the public school district has failed to provide a Free Appropriate Public Education (“FAPE”), the restrictiveness of the alternative environment selected by the parents should be given nominal weight in rare cases, but generally should not be a consideration.

This Article explores the history of the IDEA as it pertains to the LRE requirement, case law articulating the tests adopted to determine whether a school district has complied with the LRE requirement, and the different standards used to determine whether a parent’s unilateral private school placement is appropriate. Particular attention will be paid to the way in which

¹² See, e.g., Andrew S. Gordon, *Special Education In Massachusetts: Reevaluating Standards In Light Of Fiscal Constraints*, 26 NEW ENG. L. REV. 263, 284–87 (1991) (noting tensions in Massachusetts resulting from burden of special education costs resulting from a high qualitative standard in that state); see also Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN’S J.L. COMM. 675, 682 (2004) (discussing how Massachusetts’s repeal of heightened qualitative SPED mandate was driven by a desire to reduce costs).

¹³ Restrictiveness considered: *Muller ex rel. Muller v. Comm. on Special Educ. of E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 105 (2d Cir. 1998); *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 836–37 (2d Cir. 2014); *C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 991 (8th Cir. 2011). Restrictiveness not considered: *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 400 (6th Cir. 1998); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 770 (6th Cir. 2001). Residential placements are viewed somewhat differently: *Shaw v. Weast*, 364 Fed. App’x 47, 54 (4th Cir. 2010) (finding that a residential program selected by parents was overly restrictive where private day program offered by public district enabled child to attain educational benefit where her mental health issues were segregable from her educational needs); *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004, 1009 (9th Cir. 2009) (holding that a residential placement must be necessary to provide special education and related services and mainstreaming is a consideration in determining appropriateness).

¹⁴ Though used interchangeably, the terms “mainstreaming” and “inclusion” are different from the concept of an education delivered in the LRE. “Regular classrooms” are deemed the mainstream. “Inclusion” implies the opposite of segregation, hence, “mainstreaming” and “inclusion” can rightly be viewed as synonymous but they are narrower than LRE, which can have many meanings, depending upon the placements that are possible for a disabled child. Monserud, *supra* note 12, at 696; see also Mark T. Keaney, *Examining Teacher Attitudes Toward Integration: Important Considerations For Legislatures, Courts, and Schools*, 56 ST. LOUIS L.J. 827, 828–29 (2012) (criticizing debate among legal scholars about the efficacy of the integration presumption for failure to account for teacher ability and attitudes toward inclusion of special education students in the general education classroom, arguing that legislative and judicial preference for inclusion is justified, and suggesting that factors impacting teacher attitude toward inclusion be addressed by legislatures, courts and schools).

¹⁵ See Monserud, *supra* note 12, at 765 (noting that in cases where parents have sought modifications in neighborhood schools, “[t]he LRE requirement has not proved to be empowering . . .”).

¹⁶ On another note, the IDEA takes a short-term view and fails to consider that many children need education in a highly-specialized setting for later success in mainstream education and in mainstream society.

¹⁷ Monserud, *supra* note 12, at 725 (discussing *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990) (weighing public school education in a mix of self-contained classes against private residential placement selected by parents, the court concluded that parent’s selection was overly restrictive and that public school placement properly permitted socialization)). Yet another scholar offers a compelling argument that the law’s insistence on protecting the right to education in the LRE is a protection against racial segregation. La Toya Baldwin Clark, *The Problem with Participation*, 9 AM. U. MODERN AM. 23 (2013).

different circuits have treated the issue of whether the LRE could be used as a defense to defeat parental claims for private school tuition reimbursement. The Authors agree with Weber¹⁸ that the application of the LRE standard should apply when parents are seeking inclusion, but should not be considered in evaluating unilateral private school placements in tuition reimbursement cases.

II. BRIEF HISTORY OF THE IDEA

At the dawn of American public education in the 1800s, people “with disabilities were often abused, condemned as incapable of being able to participate in social activities, and simply forgotten.”¹⁹ Interest in educating those with differences emerged toward the end of the nineteenth century, when Thomas Hopkins Gallaudet and Samuel Gridley opened schools for the education of the deaf, blind, and mute populations, as well as “the idiotic and feeble-minded.”²⁰ The effort did not extend to those with physical handicaps or who were incontinent.²¹ In 1850, the first school for youth with cognitive disabilities opened in Massachusetts.²² Though compulsory education also emerged in the nineteenth century, special classes served as “a mechanism to remove undesirables from the regular classroom.”²³ Simply being physically repulsive was a legally sufficient basis to bar a paralyzed child from the classroom.²⁴

The legal principle that “separate is not equal” set forth in *Brown v. Board of Education*²⁵ has been credited with inspiring pursuit of inclusion by disability advocates.²⁶ In the mid-1960s, Congress began funding states’ efforts toward improving education for the disabled.²⁷ The Elementary and Secondary Education Act of 1965²⁸ provided federal funding to the states for development of expanded special education programs and was replaced in 1970 by the Education for the Handicapped Act.²⁹ Neither statute, however, conferred individual rights or procedures for identifying or serving students as in today’s legislative schema.³⁰

State legislation developed in the 1970s expanded educational access for children with specialized needs.³¹ Chapter 766 of the Acts and Resolves of Massachusetts,³² enacted in 1972,

¹⁸ Mark C. Weber, Vincent de Paul Professor of Law, at DePaul University College of Law, is the author of *Disability Harassment* (2007), *Understanding Disability Law* (2007), *Special Education Law and Litigation Treatise* (3d ed. 2008), and co-author of *Special Education Law Cases and Material* (2d ed. 2007). Society of Vincent de Paul Professors, *Mark C. Weber*, DEPAUL UNIV., <http://offices.depaul.edu/svdpp/Members/Pages/Mark-Weber.aspx> (last visited Apr. 17, 2015).

¹⁹ 151 CONG. REC. S13,399–400 (daily ed. Nov. 18, 2005); see also COLKER, *supra* note 9, at 25–27 (“[U]ntil the nineteenth century, most individuals with disabilities received no education whatsoever, because they were feared and shunned by society.”).

²⁰ 151 CONG. REC. S13,399–400; COLKER, *supra* note 9, at 25–27; see also Daniel H. Melvin II, *Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 670–71 (1995) (noting a congressional preference for mainstreaming, but cautioning that each child’s case must be scrutinized).

²¹ COLKER, *supra* note 9, at 25–27; see also Melvin, *supra* note 20, at 603–04.

²² See 151 CONG. REC. S13,399–400.

²³ COLKER, *supra* note 9, at 26–27.

²⁴ *Id.* (citing *State ex. rel. Beattie v. Bd. of Educ.*, 172 N.W. 153 (Wis. 1919)).

²⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁶ Theresa M. DeMonte, Comment, *Finding the Least Restrictive Environment for Preschoolers Under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 160–61 (2010); Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 192 (2006); Melvin, *supra* note 20, at 607.

²⁷ See Beyer, *supra* note 8, at 367.

²⁸ Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27.

²⁹ *Id.*; Education Amendments of 1974, Pub. L. No. 93-380, 84 Stat. 175; Gordon, *supra* note 12, at 276 (noting that the EHA sought to stimulate development of resources and personnel without further guidelines).

³⁰ Beyer, *supra* note 8, at 367–68.

³¹ Beyer, *supra* note 8, at 367 (citing Comptroller General of the United States, *Disparities Still Exist in Who Gets Special Education* 3 (Sept. 30, 1981)) (“Prior to 1971, many state statutes contained provisions excluding from the educational system children with certain physical or mental conditions. In 1970, only fourteen states had statutes mandating appropriate education to children with handicaps. By 1974, however, this number had grown to forty-six.”).

³² MASS. GEN. LAWS ANN., ch. 766 (1972) (current version at ch. 71(b) (West 2015)).

was notable among those statutes.³³ Characterized as “the broadest and most comprehensive law regulating special education in the nation at the time,”³⁴ Chapter 766 required identification, evaluation and provision of a proper educational program pursuant to a team-formulated individualized educational plan and placement of the child in the least restrictive program.³⁵ This statute, in particular, has been called a model for the federal special education legislation enacted in the mid-1970s.³⁶

Concurrently, and in response to the continual exclusion of close to eight million students with special needs from public schools, disability advocates sought remedies in the courts.³⁷ *Pennsylvania Association for Retarded Children v. Pennsylvania* (“*PARC*”),³⁸ decided in 1971, and *Mills v. Board of Education*,³⁹ decided in 1972, are credited with having spurred the enactment of the Education of All Handicapped Children Act of 1975,⁴⁰ which ultimately evolved into the IDEA.⁴¹ The facts of *PARC* and *Mills* illustrate the nature and extent of exclusion from public education that led to enactment of what ultimately became the IDEA.

PARC was a class action suit concerning mentally retarded persons aged six to twenty-one.⁴² The decision enforced a consent agreement that required the State of Pennsylvania to provide, inter alia, “access to a free public program of education and training appropriate to [the] learning capacities to every mentally retarded child of the same age.”⁴³ Additionally, the agreement stated that “among the alternative programs of education and training required by statute to be available, placement in a regular public school class [was] preferable to placement in a special public school class and placement in a special public school class [would be] preferable to placement in any other type of program of education and training.”⁴⁴ Colker credits *PARC* with articulation of the integration presumption.⁴⁵

The seven plaintiffs in *Mills* were either intellectually disabled or exhibited behavioral problems due to emotional disturbance or hyperactivity.⁴⁶ They were excluded from school without hearings, placed in alternative schools, denied re-entry or excluded because the school could not afford them an appropriate education program.⁴⁷ The *Mills* plaintiffs sought to enjoin

³³ Gordon, *supra* note 12, at 263; Wilkens, *supra* note 8.

³⁴ Gordon, *supra* note 12, at 263.

³⁵ *Id.* at 266–69.

³⁶ *Id.* at 263.

³⁷ See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3, § 601(b)(1), 89 Stat. 773, 774 (“Congress finds that . . . there are more than eight million handicapped children in the United States today . . .”); see also *id.* sec. 3, § 601(b)(4), 89 Stat. 773, 774 (“one million of the handicapped children in the United States are excluded entirely from the public school system . . .”); see also Michael L. Perlin, “Simplify You, Classify You”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 614 (2009) (noting that Congressional studies revealed massive exclusion of disabled students from public schools; see also Gordon, *supra* note 26, at 189, 192 (noting that despite legislative response to historical exclusion of disabled students from public schools, it remains debatable whether inclusion or mainstreaming are the “best” settings).

³⁸ Pa. Ass’n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

³⁹ *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972).

⁴⁰ Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

⁴¹ See Colker, *supra* note 1, at 804–06; Melvin, *supra* note 20, at 601; Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken By The Individuals with Disabilities in Education Act*, 20 UNIV. DAYTON L. REV. 243 (1994); Gordon, *supra* note 12, at 284–88; Beyer, *supra* note 8, at 368 (crediting *PARC* and *Mills* with prompting congressional action to increase funding devoted to educating the handicapped).

⁴² Pa. Ass’n for Retarded Children, 343 F. Supp. at 282.

⁴³ *Id.* at 303.

⁴⁴ *Id.* at 307.

⁴⁵ Colker, *supra* note 1, at 803–04.

⁴⁶ *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 868 (D.D.C. 1972).

⁴⁷ *Id.*

the District of Columbia School District from refusing provision of a public education,⁴⁸ alleging that, with special services, they could be educated in regular classrooms or in special classrooms tailored to their needs in public schools. Borrowing the argument from *Brown*, they successfully argued that failure to provide special education was akin to racial segregation and those in need of special education had due process rights under the Fourteenth Amendment to a hearing prior to expulsion.⁴⁹ The district court entered a final decree requiring provision of “a free and suitable publicly-supported education regardless of the degree of the child’s mental, physical or emotional disability or impairment.”⁵⁰ The *Mills* decree ordered staffing of a special education department that would compile a list identifying causes for nonattendance, including “educable mentally retarded, trainable mentally retarded, emotionally disturbed, specific learning disability, crippled/other health impaired, hearing impaired, visually impaired, multiple handicapped.”⁵¹

Congress enacted the Education of the Handicapped Amendments in 1974 (“EHA”), which required states to develop:

[P]rocedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily⁵²

The legal guarantees of the IDEA, however, were born with enactment of the Education for All Handicapped Children Act (“Public Law 94-142”) in November of 1975.⁵³ Public Law 94-142 specifically articulated the goal of educating disabled students with their non-disabled peers.⁵⁴ Elements of *PARC* and *Mills*, were incorporated in Public Law 94-142—in effect codifying the

⁴⁸ *Id.*

⁴⁹ *Id.* at 876; Keaney, *supra* note 14, at 832; see Monsrud, *supra* note 12, at 688; see Beyer, *supra* note 8, at 364–65; see also DeMonte, *supra* note 26, at 160–61 (exploring the application of the LRE concept to preschool placements and stating that “[t]he IDEA had its genesis in a movement of parents and educators fighting to secure public education for children with disabilities” that was inspired from “the broader civil rights movement . . .”).

⁵⁰ *Mills*, 348 F. Supp. at 878.

⁵¹ *Id.* at 879; see also *id.* at 878–83 (requiring a due process and hearing procedure, as well as individual plans for each child in addition to the identification component).

⁵² Education Amendments of 1974, Pub. L. No. 93-380, § 613(a)(13)(B), 88 Stat. 484, 582; see also Colker, *supra* note 1, at 805, n.66.

⁵³ Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; see also Colker, *supra* note 1, at 806.

⁵⁴ See Colker, *supra* note 1, at 794–95; see Jennifer M. Saba, *Undue Deference: Toward A Dual System of Burdens Under the Individuals With Disabilities Education Act*, 57 DEPAUL L. REV. 133, 140 (2007).

holdings of those cases.⁵⁵ Congress amended Public Law 94-142 several times and its name changed to the Individuals with Disabilities in Education Act in the 1990 amendments.⁵⁶

The basic guarantees of the law have remained constant since the initial enactment in 1975 to the present.⁵⁷ Funding under the IDEA, like its predecessor, is dependent upon satisfaction of three requirements: (1) identification of all children entitled to classification under the Act,⁵⁸ (2) providing qualified children with an individualized and “Free Appropriate Public Education,”⁵⁹ and (3) delivered in the LRE.⁶⁰ The IDEA confers procedural guarantees assuring parents of an active role in the process of deciding the components of their child’s individualized education program (“IEP”).⁶¹ The Act also provides an administrative process with direct appeal to federal or state court.⁶²

The 1997 amendments to the IDEA added a provision permitting parents to seek private school tuition reimbursement if their school district has failed to make a FAPE available.⁶³ That provision is titled “[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency” and states:

⁵⁵ “The Education Amendments of 1974 . . . added important new provisions to the [EHA, requiring] States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decision regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped; and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature of severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily” 1975 U.S.C.C.A.N. 1425, 1430, 1432, 1975 WL 12452, at *8 (Leg. Hist.); see Pub. L. No. 94-142, sec. 3, § 601(b)(8), 89 Stat. 773, 775; see also Pub. L. No. 94-142, sec. 3, § 601(b)(9), 89 Stat. 773, 775 (“[I]t is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law”).

⁵⁶ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103; 1990 U.S.C.C.A.N. 1723, 1784 (1990). The IDEA was further amended in 1991, Pub. L. No. 102-119, 105 Stat. 587 (1994), in 1997, Pub. L. No. 105-17 (1997), and in 2004, Pub. L. No. 108-446 (2004).

⁵⁷ Saba, *supra* note 54, at 138; Gordon, *supra* note 26, at 194–96. The 1997 amendments included greater specification of the IEP team, Pub. L. No. 105-17, § 614(d)(1)(B), 111 Stat. 37, 85 (1997), and expanded the contents of the IEP, making it a comprehensive document with the objective of enabling a child “to be involved and progress in the general curriculum.” Pub. L. No. 105-17, § 614(d)(1)(A)(ii)–(iii), 111 Stat. 37, 84–85.

⁵⁸ 20 U.S.C. § 1412(a)(3) (2012) (describing the “child find” requirement).

⁵⁹ 20 U.S.C. § 1412(a)(1)(A) (requiring a state to submit a plan to the Secretary of Education reflecting policies guaranteeing availability of a FAPE “to all children with disabilities residing in the State between the ages of [three] and [twenty-one], inclusive, including children with disabilities who have been suspended or expelled from school”).

⁶⁰ 20 U.S.C. § 1412(a)(5)(A).

⁶¹ 20 U.S.C. § 1414(d) (2012) (providing for the development of an IEP for each child classified as disabled under the IDEA that specifies the setting in which a child is to be educated, the supplemental services and modifications, as well as annual goals).

⁶² 20 U.S.C. § 1415(b)(6)(A) (2012); see also N.Y.S. Ed. Law § 4404(1), 8 N.Y.C.R.R. 200.5(h)–(l) (setting forth requirements for mediation or the impartial due process hearing procedure). New York has a two-tiered administrative procedure. The initial complaint is heard by an Officer (“IHO”). N.Y.S. Ed. Law § 4404(1); 8 N.Y.C.R.R. 200.5(i), (j). An appeal may be taken to the second level for review by a State Review Officer (“SRO”). N.Y.S. Ed. Law § 4404(2); 8 N.Y.C.R.R. 200.5(k). Final determinations of the SRO may be appealed to either the state supreme or federal district court. N.Y.S. Ed. Law § 4404(3); 8 N.Y.C.R.R. 200.5(l).

⁶³ 20 U.S.C. § 1412(10)(C)(ii); see *Individuals with Disabilities Education Act Amendments of 1997*, Pub. L. No. 105-17, § 612(a)(10)(C)(ii), 111 Stat. 39, 63; C.B. ex rel. B.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 988 (8th Cir. 2011); see also Katie Harrison, *Direct Tuition Payments Under the Individuals with Disabilities in Education Act: Equal Remedies For Equal Harm*, 25 J. CIV. RTS. & ECON. DEV. 873, 880–81 (2011) (arguing that the statute should explicitly allow for prospective reimbursement for unilateral private school enrollment where a public school district has failed to make a FAPE available). Exception is taken to Ms. Harris’s suggested language to the extent that it would require a child to have “received special education and related services under the authority of a public agency” *Id.* at 902. This is antithetical to *Forest Grove School District v. T.A.*, which justified tuition reimbursement after finding a FAPE deprivation where parents provided the school district with independent evaluations and the school district refused to provide an IEP and special education services were never delivered within the public school. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240 (2009).

A court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.⁶⁴

Thus, parents now have two avenues available: (1) initiate an administrative due process proceeding to force their local educational authority to accommodate a child in the mainstream classroom or (2) enroll their child in a private school—generally specialized—and initiate a due process proceeding for tuition reimbursement. But the statute fails to provide guidance as to whether parents must take the statute's mainstreaming preference into account when selecting a private school.

The last significant amendments to the IDEA were made in 2004.⁶⁵ The currently-stated purpose of the IDEA focuses on providing children with disabilities an education “designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁶⁶ This reflects a positive shift in focus away from a pure integrationist agenda and towards a qualitative agenda that considers long-term outcomes.

Very little legislative history reflects the intention underlying the LRE preference.⁶⁷ Weber notes that the source for the “(integration) presumption's pedigree” was in “educational theory and practice” in the 1970s and that “the presumption is only tangentially related to deinstitutionalization.”⁶⁸ The integration presumption was adopted in Public Law 94-142, which amended the EHA in 1975.⁶⁹ Incidentally, it was only then that *PARC*⁷⁰ and *Mills*⁷¹ were mentioned as inspiration for the act.⁷²

The LRE requirement remains a part of the statute and case law has established tests to determine whether a school district has complied with that mandate. Where a parent has selected a private alternative, there is a split among the circuits as to whether the restrictiveness of the alternative educational placement may be considered.⁷³ There is a trend to consider restrictiveness of a unilateral private school selection, but it is a deemphasized factor in determining the appropriateness. Rather, the focus is on whether private school provides children with what they need to make progress and restrictiveness is incidental. One could envision a rare incident where restrictiveness might be a legitimate concern. The U.S. Supreme Court has not articulated standards by which a public school district must comply with the mainstreaming mandate, nor has it addressed the issue of whether restrictiveness of a unilaterally-selected private placement should be considered in resolving tuition reimbursement disputes.

⁶⁴ 20 U.S.C. § 1412(a)(10)(C)(ii).

⁶⁵ Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 20 U.S.C. §§ 1400–1450.

⁶⁶ 20 U.S.C. § 1400(d)(1)(A) (2012).

⁶⁷ Colker, *supra* note 1, at 807; *see* Weber, *supra* note 9, at 178.

⁶⁸ *See* Weber, *supra* note 9, at 179.

⁶⁹ Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; *see also* Colker, *supra* note 1, at 795.

⁷⁰ Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 283 n.8 (E.D. Pa. 1972) (noting that the plaintiffs' claims implicated equal protection issues).

⁷¹ Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).

⁷² Colker, *supra* note 1, at 805–06; *see also* S. Rep. No. 168, at 22–23 (1975) (citing Judge Waddy's opinion in *Mills*).

⁷³ *See infra* notes 100–05.

III. TESTS ADOPTED TO DETERMINE WHETHER A SCHOOL DISTRICT HAS COMPLIED WITH THE LRE REQUIREMENT

A. Major Cases Articulating Tests to Determine Whether the LRE Requirement has been Satisfied by Public Schools: Roncker, Daniel R.R., Greer, Oberti, Rachel H., and Newington

The IDEA requires that qualified students be provided a FAPE.⁷⁴ No further qualitative description of what constitutes an “appropriate” education appears in the statute and is instead provided in case law.⁷⁵ The statute also requires states to effect policies permitting qualified students to be educated in the LRE.⁷⁶ Specifically, the statute states that:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁷⁷

These two cornerstone mandates appear in separate subsections with no indication of whether they are interrelated or whether one has precedence over the other.⁷⁸ Courts have articulated three tests to determine whether a school district has offered an educational setting that complies with the LRE requirement.

The first test, enunciated by the Sixth Circuit in *Roncker v. Walter*,⁷⁹ acknowledged that the issue of improper exclusion from a public school implicated different factors than the inquiry of whether the child’s education was “appropriate.”⁸⁰ In evaluating what constituted the LRE, the Sixth Circuit stated that the following factors should be considered:

⁷⁴ 20 U.S.C. § 1412(a)(1) (2012).

⁷⁵ In *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982), the Supreme Court held that an “appropriate” education meant nothing more than provision of a “basic floor of opportunity,” as reflected by passing grades and advancement from grade to grade. *Rowley*, 458 U.S. at 200–01. The child in *Rowley* was a hearing-impaired student enrolled in a regular class. *Id.* at 184. Her parents argued that an in-class sign language interpreter was necessary to achieve a FAPE. *Id.* The Court held that the child had been provided with an appropriate education since she was provided with “personalized instruction and related services” meeting her personal needs that allowed her to advance from grade to grade. *Id.* at 209–10. Justices White, Brennan, and Marshall vigorously dissented. These Justices criticized the majority opinion for being at odds with the statute’s intent to provide equal educational opportunity and pointed to legislative history indicating that the objective was to allow handicapped children “to achieve their maximum potential.” *Id.* at 214. The majority opinion noted that the legislative history relied upon by the dissent represented a passing comment and that when, as here, a statute requires action in exchange for funding, it functions as a contract whose requirements must be unambiguously stated. *Id.* at 204. Nonetheless, the low standard set by *Rowley* remains good law.

⁷⁶ 20 U.S.C. § 1412(a)(5).

⁷⁷ 20 U.S.C. § 1412(a)(5)(A).

⁷⁸ See *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989) (“[T]he act does not . . . provide any substantive standards for striking the proper balance between its requirement for mainstreaming and its mandate for a free appropriate public education.”).

⁷⁹ *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), cert. denied, 464 U.S. 864 (Oct. 3, 1983). In *Roncker*, the school offered segregated placement to a mentally retarded child that the IHO found overly restrictive and ordered placement of the child in a special class in a regular elementary school. *Id.* at 1061. The Ohio State Board of Education reversed, agreeing with the school district that the segregated setting offered educational opportunities that the child needed and that integration could be accomplished outside of the classroom. *Id.* The district court also ruled in favor of school district. *Id.* The Sixth Circuit vacated and remanded because the district court reviewed the administrative determination for “abuse of discretion” rather than by according “due weight” to the state proceedings. *Id.* at 1062.

⁸⁰ *Id.* at 1062–63.

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [Education for All Handicapped Children Act of 1975].⁸¹

The court further noted that cost was a “proper factor” to be considered, but could not be used as a defense by a school district that had “failed to use its funds to provide a proper continuum of alternative placements for handicapped children.”⁸²

The Fifth Circuit rejected the *Roncker* test in *Daniel R.R. v. State Board of Education*⁸³ as too intrusive on local autonomy.⁸⁴ *Daniel R.R.* also rejected an emphasis on educational benefit, noting that nonacademic benefit must be considered.⁸⁵ Accordingly, the *Daniel R.R.* court stated that the determination of whether a school district has satisfied the mandate of providing an education to a handicapped child in the LRE requires exploration of the following, nonexhaustive list of factors: (1) “whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child;” (2) “whether the school has mainstreamed the child to the maximum extent appropriate;” (3) the child’s overall experience, including non-academic benefits; and (4) the effect of the child on rest of the class either through disruptive behavior or because the other students’ needs will be ignored because the child needs excessive attention.⁸⁶ The parties did not raise the issue of cost, but the court noted that cost may properly be considered.⁸⁷ The *Daniel R.R.* test quickly superseded the *Roncker* test.

The Eleventh Circuit adopted the Fifth Circuit’s analysis in *Greer v. Rome City School District*.⁸⁸ The parents in *Greer* were intent on enrolling their child, who had Down Syndrome, intellectual impairment, and communications deficits, in a general education program in their community school.⁸⁹ The school district was intent on enrolling the child in a specialized class at a different school with inclusion in non-academic school activities.⁹⁰ An independent evaluator opined that the child would benefit from having peer models to imitate.⁹¹ Neither party suggested placement in a regular classroom with related services and supports such as a resource room, an itinerant special education teacher in the classroom and curriculum modification.⁹² The administrative proceeding leading to the appellate level review was brought by the school district

⁸¹ *Id.* at 1063.

⁸² *Id.*

⁸³ *Daniel R.R.*, 874 F.2d at 1039. In *Daniel R.R.*, the parents of a child with Down syndrome sought placement of their child in a regular class. *Id.* at 1038–39. But the child “failed to master any of the skills being taught” in the regular class and suitable modification would have changed the curriculum “almost beyond recognition.” *Id.* at 1039. Thus, placement of the child in a special education class was upheld because the child failed to attain any benefit in the regular classroom, even with provision of supplemental supports and services. *Id.* at 1046. The district court affirmed the IHO’s ruling in favor of the school district, which granted summary judgment on the grounds that the child could not receive educational benefit in the regular program. *Id.* at 1046. The Fifth Circuit affirmed, applying a different analysis that did not look to academic benefit, but to whether the district placement decision complied with the mainstreaming preference. *Id.* at 1050.

⁸⁴ *Id.* at 1046; *see also* Keaney, *supra* note 14, at 835–36 (agreeing that integration is important, but that its efficacy is undermined by teacher attitudes).

⁸⁵ *Daniel R.R.*, 874 F.2d at 1048.

⁸⁶ *Id.* at 1048–49; *see also* L.B. ex rel. K.B. v. Nebo Sch. Dist., 379 F.3d 966, 976–77 (10th Cir. 2004).

⁸⁷ *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991), *withdrawn and remanded* 967 F.2d 470 (11th Cir. 1992) (remanding for determination of whether decision appealed from was a final order, resulting in consent order reflecting that all pending issues had been resolved), *reinstated* 967 F.2d 470 (11th Cir. 1992).

⁸⁸ *Greer*, 950 F.2d at 696.

⁸⁹ *Id.* at 690–91.

⁹⁰ *Id.*

⁹¹ *Id.* at 692.

⁹² *Id.* at 691–92.

seeking approval of its offer of a placement in a segregated class.⁹³ The regional hearing officer and state hearing officer both ruled in favor of the school district on the grounds that the school's placement would promote the child's academic advancement.⁹⁴ The district court held that supplemental aids and services should have been considered as a means to accommodate the child in a regular classroom and that the self-contained classroom was therefore overly restrictive.⁹⁵ On appeal, the Eleventh Circuit stated that it was following the Fifth Circuit and applying a two-pronged test to evaluate whether a child has been offered the opportunity to be educated in the LRE.⁹⁶ Specifically, the court stated that it would look to (1) whether a child could be educated "satisfactorily" in a regular class with supplemental supports and services and (2) if not, and if the child is placed in a special class, whether the child has been mainstreamed "to the maximum extent appropriate." The court also followed the Fifth Circuit in admonishing that the inquiry is highly individualized and no single factor, including educational benefit, predominates.⁹⁷

In *Oberti v. Board of Education*,⁹⁸ the Third Circuit explicitly rejected the *Roncker* test as being insufficiently integrationist.⁹⁹ The court stated that the *Roncker* test "fails to make clear that even if placement in the regular classroom cannot be achieved satisfactorily for the major portion of a particular child's education program, the school is still required to include that child . . ." in activities with nondisabled children "wherever possible."¹⁰⁰ Instead, the court adopted and further expanded the *Daniel R.R.* test to consider steps taken by the school to accomplish inclusion and compliance with 34 C.F.R. § 300.551(a),¹⁰¹ mandating provision of "a continuum of alternative placements."¹⁰²

In *Sacramento City Unified School District v. Rachel H.*,¹⁰³ the Ninth Circuit adopted the following test to evaluate whether there has been compliance with the IDEA's mainstreaming mandate: (1) educational benefits in a regular classroom, supplemented with appropriate aids and services, as compared with educational benefits of special class; (2) non-academic benefits of interaction with non-disabled children; (3) the effect of the child's presence on the teacher and other children on the classroom, considering (a) whether "the child was disruptive, distracting or unruly" and (b) whether "the child would take up so much of the teacher's time that other students would suffer from lack of attention"; and (4) the cost of mainstreaming.¹⁰⁴ The *Rachel H.* blend of the *Roncker* and *Daniel R.R.* tests is more holistic and balanced.

⁹³ *Id.* at 692. The school district had initiated a hearing seeking to have an evaluation mandated that would justify their placement offer in a self-contained special class. *Id.* at 691.

⁹⁴ *Id.* at 693.

⁹⁵ *Id.*

⁹⁶ *Id.* at 696.

⁹⁷ *Id.* at 696–97.

⁹⁸ *Oberti v. Bd. of Educ. of Clemton Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993). When the district proposed a special education placement the parents filed a due process complaint. *Id.* at 1208. The IHO found in favor of the school district. *Id.* at 1209. The district court reversed and ordered the district to develop an inclusion plan. *Id.* at 1212. The Third Circuit affirmed. *Id.* at 1224.

⁹⁹ *Id.* at 1215.

¹⁰⁰ *Id.*

¹⁰¹ 34 C.F.R. § 300.551 states: "(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (b) The continuum required in paragraph (a) of this section must—(1) Include the alternative placements listed in the definition of special education under § 300.26 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement."

¹⁰² *Oberti*, 995 F.2d at 1218.

¹⁰³ *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1993). In *Rachel H.*, the parents sought to have their mildly mentally retarded daughter educated in a regular class with support services. *Id.* at 1400. During pendency of the dispute, the child attended regular classes at a private school. *Id.* A hearing officer held for parents and the district court affirmed. *Id.* at 1400. The Ninth circuit affirmed, adopting the *Daniel R.R.* and *Greer*-influenced four-part test. *Id.* at 1404.

¹⁰⁴ *Id.* at 1404.

It was not until 2008 that the Second Circuit articulated which LRE test it would adopt. Specifically, *P. v. Newington Board of Education*¹⁰⁵ adopted the *Daniel R.R.* test with consideration of the factors enumerated in *Oberti*.¹⁰⁶ The Second Circuit acknowledged that the LRE requirement in the IDEA is not an “all or nothing” integrationist policy and that the educational facet was an “equally important objective.”¹⁰⁷ Time could easily account for this distinction; *Daniel R.R.*, *Greer*, *Oberti*, and *Rachel H.* all predated the 1997 IDEA amendments. *Newington* came afterward, and the 1997 amendments sought to “place emphasis on what is best educationally for children with disabilities” and reflected a concern with the “critical issue” of placing “greater emphasis on improving student performance”¹⁰⁸

The tests enunciated in *Roncker*, *Daniel R.R.*, *Oberti*, *Rachel H.*, and *Newington* are reasonable in instances where parents are seeking inclusion of their children in public school settings. These tests promote legitimate policy objectives of preventing public school districts from excluding children and honoring their mainstreaming obligations. The considerations—policy or otherwise—are completely different where parents feel that their child’s educational needs have not been met in the public system.

B. Cases Setting Standards for Evaluating Educational Settings Selected by Parents and Where Public School Districts have Asserted Restrictiveness as a Defense

In 1993, the U.S. Supreme Court decided *Florence County School District Four v. Carter*.¹⁰⁹ *Carter* established the rule that where a local educational authority has failed to offer a child a FAPE, the parents may enroll the child in a private school and seek tuition reimbursement so long as it is determined that the private school is appropriate for that child.¹¹⁰ The 1997 amendments to the IDEA codified this ruling.¹¹¹

Subsequently, *School Committee of Burlington v. Department of Education*¹¹² established the standard for determining whether a parent who rejects an IEP and unilaterally places their child in private school is entitled to tuition reimbursement. In *Burlington*, the Supreme Court held that “where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that ‘appropriate’ relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.”¹¹³ The Court also stated that “equitable considerations are relevant in fashioning relief.”¹¹⁴ Subsequently, this has become referred to as the three-pronged *Burlington* test, which considers: (1) whether the school district offered an appropriate program in the IEP, (2) whether

¹⁰⁵ *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 114, 120 (2d Cir. 2008) (describing an eight-year-old boy who failed to make progress despite numerous services provided and the school’s inclusion efforts and concluding court that the school district had mainstreamed the child to the maximum extent appropriate).

¹⁰⁶ *Id.* at 120–22.

¹⁰⁷ *Id.* at 122 (“While including students in the regular classroom as much as is practicable is undoubtedly a central goal of the IDEA, schools must attempt to achieve that goal in light of the equally important objective of providing an education appropriately tailored to each student’s particular needs.”).

¹⁰⁸ S. REP. NO. 105-17 (1997).

¹⁰⁹ *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993).

¹¹⁰ *Id.* at 15.

¹¹¹ See 20 U.S.C. § 1412(a)(10)(C)(ii) (2012) (“A court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.”); see also Michael J. Tentindo, *Private School Tuition At The Public’s Expense: A Disabled Student’s Right To A Free Appropriate Public Education*, 17 AM. U.J. GENDER SOC. POL’Y & LAW 81, 85 (2009).

¹¹² *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359 (1996). Though *Burlington* pre-dates the 1997 IDEA amendments permitting private school tuition reimbursement, it remains the test for determining whether tuition reimbursement is warranted.

¹¹³ *Id.* at 370.

¹¹⁴ *Id.* at 374.

the alternative selected by the parents was appropriate, and (3) whether the equities favor the parents.¹¹⁵

Carter established that private schools selected by parents are not subject to the same standards as public schools.¹¹⁶ Private schools in which parents unilaterally place their children will not be deemed ‘inappropriate’ because they do not develop IEPs, do not have state-certified teachers or are not on a list of state-approved schools.¹¹⁷ The Court did not otherwise address factors that should be considered in determining the appropriateness of a parent’s unilateral school selection.¹¹⁸ The Court, however, did not mention whether the parent’s unilateral private school selection can be scrutinized for restrictiveness. Moreover, codification of *Carter* in 20 U.S.C. § 1412(a)(10)(C) does not specify factors that should be considered in assessing a parent’s selection.¹¹⁹ The Court was silent on the issue of whether alternative placements selected by a parent must comply with the IDEA’s mainstreaming preference in particular.¹²⁰ Thus, the factor of restrictiveness remains in play. For example, the Sixth¹²¹ and Eighth Circuits¹²² do not consider restrictiveness in evaluating the appropriateness of a unilateral enrollment.¹²³ The Third Circuit has adhered to this position in some, but not all cases.¹²⁴ The Second Circuit considers restrictiveness, but in an extremely well-reasoned recent decision. In *C.L. v. Scarsdale Union Free School District*, the Second Circuit de-emphasized that lone factor, looking, instead, to the qualitative aspects of the private alternative selected by the parents.¹²⁵

¹¹⁵ See *Carter*, 510 U.S. at 12–13; *Walczak v. Fla. Union Sch. Dist.*, 142 F.3d 119, 128–29 (2d Cir. 1998); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 236 (2009); *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 184–85 (2d Cir. 2012) (“This framework is known as the *Burlington/Carter* test.”); see also *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 369 (2d Cir. 2006) (referring to the first two prongs of the test only), *cert. denied*, 552 U.S. 985 (2007). Section 1415(b)(2)(6)(A)(iii) provides that, after consideration of “a preponderance of the evidence” a court “shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(b)(2)(6)(A)(iii) (2012).

¹¹⁶ *Carter*, 510 U.S. at 14.

¹¹⁷ *Id.* at 13–14.

¹¹⁸ Some people interpret the Court’s reference to the decisions below in regard to the significant academic progress made by the child at issue as indicating an ‘appropriateness’ standard differing from the de minimis standard established in *Board of Education of Hendrick Hudson Central School District, Westchester Cnty. v. Rowley*, 458 U.S. 176, 201 (1982).

¹¹⁹ Case law reflects what parents *need not* prove. See *Frank G.*, 459 F.3d at 364. To wit—parents do not need to show that their placement meets IDEA standards for a FAPE, they do not need to show that the private school meets state standards or requirements, and unilateral selections are not subject to the same mainstreaming mandate as public schools. *Id.* at 364. All parents need to show is that the unilateral placement provides “educational instruction specifically designed to meet the unique needs of the handicapped child” that enable the child to benefit from instruction. *Id.* at 365 (citing *Rowley*, 458 U.S. 176, 188–89). In *C.L.*, influential factors in the finding that the unilateral placement was appropriate included consideration of the Eagle Hill program, including such factors as class size, close oversight, as well as the child’s progress as demonstrated by his increased enthusiasm for school, his increased confidence, and improvement in expressing himself and working independently. *Id.* at 834. The S.R.O.’s decision in *C.L.* accepting Scarsdale’s argument that the child had progressed in the public school illustrates that the determination of whether a child gains “appropriate” educational benefit offered by a public school program can be dangerously subjective. *Id.* F.3d at 834–35.

¹²⁰ See *Carter*, 510 U.S. at 13–14.

¹²¹ *Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 400 (6th Cir. 1998).

¹²² *C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981 (8th Cir. 2011).

¹²³ In *Board of Education Murphysboro v. Illinois State Board of Education*, the court noted that the restrictiveness of the unilateral placement was irrelevant, since the placement offered by the public school district was inappropriate and no other appropriate public placements were made available. *Bd. of Educ. Murphysboro v. Ill. State Bd. of Educ.*, 41 F.3d 1162, 1168 (7th Cir. 1994). Thus, faced with only one option, its restrictiveness was a non-issue. *Id.* at 1168. The court explicitly stated “the mainstreaming requirement was developed in response to school districts which were reluctant to integrate mentally-impaired children and their non-disabled peers. It was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums.” *Id.* at 1168.

¹²⁴ *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999); *Lauren W. v. DeFlaminis*, 480 F.3d 259, 276 (3d Cir. 2007).

¹²⁵ *C.L. v. Scarsdale Unions Free Sch. Dist.*, 744 F.3d 826, 839 (2d Cir. 2014).

In *Cleveland Heights-University Heights City School District v. Boss*, the Sixth Circuit considered a claim for private school tuition reimbursement.¹²⁶ After their child failed to progress in reading skills, Boss enrolled her child in a private school and sued the public school district for tuition reimbursement, which the court awarded.¹²⁷ The school district personnel asserted that the private school did not meet the IDEA's mainstreaming requirements.¹²⁸ The Sixth Circuit affirmed the determination that the IEP was inappropriate and held that mainstreaming was a requirement that is not applicable to a private school alternative selected by a parent.¹²⁹ The court specifically pointed out that the IDEA did not envision creating an untenable situation forcing parents to choose among "unpalatable alternatives" of paying for specialized private education or letting their child "languish" in a public institution failing to provide an appropriate education.¹³⁰ The court noted that a limitation requiring unilateral placements to satisfy the IDEA's mainstreaming requirement would "vitiating the remedy."¹³¹ In *Knable v. Bexley*,¹³² when the school district defended a tuition reimbursement claim by asserting that the private school selected by the parent was not the LRE, the Sixth Circuit noted that a school district cannot hide behind the shield of the mainstreaming requirement where it has not provided a student with a FAPE¹³³.

In *C.B. v. Special School District No. 1*,¹³⁴ the Eighth Circuit declined to accept restrictiveness of environment as a defense to a claim for tuition reimbursement under the IDEA.¹³⁵ The child at issue was dyslexic.¹³⁶ The parents kept the child in public school through fifth grade.¹³⁷ At that point, they unilaterally enrolled him in a specialized school and sued for tuition reimbursement.¹³⁸ The public school had offered a program that served learning-disabled students with behavioral issues.¹³⁹ The district court held that the public school district had failed to offer a FAPE.¹⁴⁰ However, the district court also held that the services offered at the segregated private school could have been offered at the specialized public school program.¹⁴¹ The district court denied tuition reimbursement because the specialized public school program constituted the LRE.¹⁴² The Eighth Circuit reversed and stated that it joined the position of the Third and Sixth Circuits "that a private placement need not satisfy [an LRE] requirement to be 'proper' under the [IDEA]."¹⁴³

The Third Circuit's position as to whether the restrictiveness of a parent's private school selection should be considered in evaluating the right to reimbursement is unclear. In *Warren G. v. Cumberland County School District*, the Third Circuit held that the LRE requirement was *not* a factor in determining the appropriateness of a private school selected by a parent after the public

¹²⁶ *Boss*, 144 F.3d at 392.

¹²⁷ The suit involved a claim for two consecutive school years, 1993–1994 and 1994–1995. Tuition for 1993–1994 was not awarded because the appeal from the administrative decision was untimely. *Id.*

¹²⁸ *Id.* at 400.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 400 n.7.

¹³² *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001).

¹³³ *Id.* at 770.

¹³⁴ *C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981 (8th Cir. 2011).

¹³⁵ *Id.* at 991.

¹³⁶ *Id.* at 986.

¹³⁷ *Id.* at 985–86.

¹³⁸ *Id.* at 986.

¹³⁹ *Id.* at 985.

¹⁴⁰ *Id.* at 986.

¹⁴¹ *Id.* at 986–87.

¹⁴² *Id.*

¹⁴³ *Id.* at 991.

educational authority's failure to offer a FAPE.¹⁴⁴ Dissatisfied with the IEP offered by the school district, the parents in this case removed their children to a specialized private school serving children with specific learning disabilities.¹⁴⁵ At the appellate level, the public school district asserted that the private school selected by the parents was inappropriate because it was a restrictive environment.¹⁴⁶ The Third Circuit agreed with the district court that "imposition of the [LRE] requirement on private placements would vitiate the parental right of unilateral withdrawal."¹⁴⁷ However, in *Lauren W. v. DeFlaminis*,¹⁴⁸ though parent's choice of school was not challenged on the grounds of restrictiveness of the setting, the court nonetheless stated that "a private placement is 'proper' if it (1) is 'appropriate,' i.e., it provides 'significant learning' and confers 'meaningful benefit,' and (2) is provided in the least restrictive educational environment."¹⁴⁹ The court in *DeFlaminis* cited to *Ridgewood Board of Education v. N.E.*¹⁵⁰ for this proposition.¹⁵¹ The *Ridgewood* court stated: "[a] private placement may be proper if it is appropriate and provided in the least restrictive educational environment" and referred to the *Oberti* standards in assessing whether the parent's private placement constituted the least restrictive educational environment.¹⁵²

In the Second Circuit, restrictiveness is still a factor used to assess the appropriateness of a parent's unilateral private school selection. In *Muller v. East Islip School District*, restrictiveness of the private school selected by a parent was considered in assessing the appropriateness of the parental choice.¹⁵³ However, the parents' choice was otherwise educationally appropriate and sufficient to overcome the educational setting's restrictiveness.¹⁵⁴ *Frank G. v. Board of Education*, however, stated that parents are not required to consider the restrictiveness of a school they select.¹⁵⁵ The primary inquiry is on "educational benefit" and whether the education meets the child's individually unique needs.¹⁵⁶ This places parents in a

¹⁴⁴ Warren G. ex rel. Tom G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 83–84 (3d Cir. 1999).

¹⁴⁵ *Id.* at 82.

¹⁴⁶ *Id.* at 83.

¹⁴⁷ *Id.* at 84; see also *A.Y. v. Cumberland Valley Sch. Dist.*, 569 F. Supp. 2d 496, 502, 511–12 (M.D. Pa. 2008) (noting that while appropriateness and restrictiveness are factors to be considered in evaluating a private placement, greater weight is given to appropriateness, but holding that administrative record was insufficient to determine appropriateness of private placement in that particular case); *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 568 (E.D. Pa. 2013) (holding that restrictiveness of private placement does not render it "inappropriate" for reimbursement purposes").

¹⁴⁸ *Lauren W. v. DeFlaminis*, 480 F.3d 259, 259 (3d Cir. 2007).

¹⁴⁹ *Id.* at 276 (citing *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 248 (3d Cir. 1999)).

¹⁵⁰ *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 238 (3d Cir. 1999) (noting that a less restrictive, but inappropriate setting is not preferable to a more restrictive setting that provides a child with an appropriate education. In other words, educational appropriateness should not be sacrificed in favor of a less restrictive setting. However, the appellate court remanded the issue on whether the private placement was considered to the district court).

¹⁵¹ *Lauren W.*, 480 F.3d at 276.

¹⁵² *N.E.*, 172 F.3d at 248 (citing *Oberti v. Bd. of Educ. of Clemton Sch. Dist.*, 995 F.2d 1204, 1213 (3d Cir. 1993)).

¹⁵³ *Muller ex rel. Muller v. Comm. on Special Educ. of E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 105 (2d Cir. 1998) (holding that failure to classify child as disabled was improper); see also *M.S. ex rel. S.S. v. Bd. of Educ.*, 231 F.3d 96, 105 (2d Cir. 2000), *cert. denied*, 532 U.S. 942 (noting that parents had failed to establish that education provided at their selected private school served their child's educational needs and that it was an overly restrictive setting); *L.K. ex rel. Q. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 492 (S.D.N.Y. 2013) (finding that parents failed to adduce evidence demonstrating that specialized school met their child's education and social needs); *Weaver v. Millbrook Cent. Sch. Dist.*, 812 F. Supp. 2d 514, 525 (S.D.N.Y. 2011) (holding that parents failed to demonstrate that specialized school was appropriate for their child or that child could not succeed in a mainstream environment).

¹⁵⁴ *Muller*, 145 F.3d at 105.

¹⁵⁵ *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2d Cir. 2006), *cert. denied*, 552 U.S. 985 (2007) (stating that the ultimate issue is whether the unilateral placement meets the child's unique needs and enables them to receive educational benefit).

¹⁵⁶ *Id.* at 364–65; see also *M.S.*, 231 F.3d at 100–01 (noting that the SRO found that private placement was inappropriate both because it failed to address child's spelling and language needs and failed to produce progress in those areas and because it was overly restrictive).

bind. While they do not have to consider restrictiveness in selecting a private school when they feel FAPE has been denied, they still must be prepared to confront a school district challenge or judicial scrutiny on those very grounds. More recently in *C.L.*, the Second Circuit clarified the weight to be given to 'restrictiveness' in evaluating a private school selected by a parent whose child has not been offered a FAPE.¹⁵⁷ Specifically, on appeal, the *C.L.* court held that restrictiveness alone is an improper ground to deem an alternative selected by the parent as inappropriate.¹⁵⁸

The child in *C.L.* had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), a nonverbal learning disability executive function weakness.¹⁵⁹ *C.L.* attended public school from kindergarten through third grade.¹⁶⁰ When *C.L.* was in kindergarten in school year 2004–2005, the school developed a Section 504 Accommodation Plan ("504 plan").¹⁶¹ This plan remained in place throughout *C.L.*'s tenure in the public school and, among other things, provided occupational therapy, pull-out services in the school's learning center and speech and language therapy.¹⁶² During the spring of *C.L.*'s third-grade year, his parents arranged for several

¹⁵⁷ See *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826 (2d Cir. 2014).

¹⁵⁸ *Id.* at 839. The court was influenced by the IHO's findings of "progress" reflected in objective test scores, but also in evidence about the child's increased enthusiasm about attending school, his improvement in expression, and improved ability to work independently. *Id.* at 834.

¹⁵⁹ Amanda Morin, *Understanding Executive Functioning Issues*, UNDERSTOOD FOR LEARNING & ATTENTION ISSUES, <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/executive-functioning-issues/understanding-executive-functioning-issues> (last visited Apr. 25, 2015) (explaining how executive function affects the ability to plan, organize, strategize, pay attention, remember details, or to manage time, including keeping track of time and finishing work on time or asking for help).

¹⁶⁰ *C.L.*, 744 F.3d at 832.

¹⁶¹ *Id.* at 832. Section 504 of the Rehabilitation Act of 1973 provides that:

(a) No otherwise qualified individual with a disability in the United States, as defined in section 705 of this title, shall, solely by reason of he or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

(b) For the purposes of this section, the term "program or activity" means all of the operations of

(2)(B) a local educational agency (as defined in section 7801 of [the Elementary and Secondary Education Act of 1965]), system of vocational education, or other school system.

Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (2012). Eligibility for an IEP does not necessarily establish a disability under Section 504. *Ellenberg v. N.M. Military Inst.*, 572 F.3d 815, 820 (10th Cir. 2009). Qualification for protection under Section 504 as a disabled person is determined by reference to regulations contained in the Code of Federal Regulations. *Id.* at 820. Key to qualification is "substantial limitation" of a "major life activity." *Id.* The purposes of the IDEA and Section 504 differ, however, in that "Section 504 provides relief from discrimination, but the IDEA [provides] relief from inappropriate educational placement decisions, regardless of discrimination." *Id.* at 821–22. Exhaustion of administrative remedies under the IDEA is a requirement for asserting claims under Section 504 for relief that is also cognizable under the IDEA. *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 245 (2d Cir. 2008); see also 20 U.S.C. § 1415(l) (2012). In *C.L.*, the court stated that relief under Section 504 is predicated on a showing of "bad faith or gross misjudgment" and that this was not shown, notwithstanding the district's failure to classify *C.L.* under the IDEA. *C.L.*, 744 F.3d at 841.

¹⁶² In October of 2004, while he was in kindergarten, *C.L.* received speech therapy once a week. *C.L.*, 744 F.3d at 832. Pre-reading instruction at the school's learning resource center was started in January of 2005. *Id.* After an occupational therapy evaluation in March 2005, the school convened a committee that determined that *C.L.* was entitled to a 504 plan. *Id.* The resultant plan provided for one thirty-minute one-on-one pull-out occupational therapy session weekly. *Id.* at 832. For academic year 2005–2006, the plan was revised to provide for weekly speech and language therapy with five other students, pullout-instruction at the learning center in four sessions each week with six other students and occupational therapy twice a week in a one-on-one setting and once a week in a group of four other students. *Id.* The only change to *C.L.*'s 504 plan for school year 2006–2007, second grade, was the elimination of the group occupational therapy sessions. *Id.* Instead, *C.L.* was assigned occupational therapy sessions twice weekly in a one-on-one setting only. *Id.* Despite his occupational therapy, an independent occupational therapy evaluation revealed that *C.L.* remained impaired. *Id.* Consequently, his parents arranged for private occupational therapy in May 2007 to address *C.L.*'s visual-motor integration, visual perception, and motor coordination needs. *Id.* at 832–33. The parents also secured a psychoeducational evaluation that showed weaknesses in language, executive functioning and math. *Id.* at 833. The parents met again with the 504 committee. *Id.* The committee noted, among other things, that *C.L.* was better able to focus in his small group at the learning center than in class, and added fifteen hours of an in-class aide. *Id.* at 833. In June 2007, the parents secured an independent neurodevelopmental evaluation. *Id.* That evaluation agreed with the accommodations of the 504 plan, but suggested that the parents investigate specialized schools for

evaluations—occupational therapy, psychoeducational and neurodevelopmental—one of which suggested that the parents investigate specialized private schools serving students with attentional and learning issues.¹⁶³ As C.L.’s third-grade year, 2007–2008, drew to a close, his parents asked that the school district’s Committee on Special Education (“CSE”) review C.L.’s evaluations to determine whether he qualified for an IEP.¹⁶⁴ The district conducted additional evaluations, but ultimately concluded that C.L. was entitled to the Section 504 accommodations only, and not an IEP.¹⁶⁵ In June 2008, C.L.’s parents notified the district that they were enrolling their son in Eagle Hill, “a specialized private school.”¹⁶⁶ C.L. progressed in all areas at this school.¹⁶⁷ C.L.’s parents initiated a due process proceeding seeking tuition reimbursement in June 2009.¹⁶⁸

The impartial hearing officer (“IHO”) concluded that the “substantial array” of modifications and services provided to C.L. evidenced that the child should have been classified under the IDEA and provided with an IEP.¹⁶⁹ The IHO further held that the 504 plan was an inadequate substitute for an IEP, since the 504 plan kept C.L. in a general education class that was too large for the child.¹⁷⁰ The IHO reviewed the services provided at Eagle Hill, the private school in which he had been enrolled, discussed the progress he had made at Eagle Hill, and concluded that together with consideration of the equities, tuition reimbursement was justified.¹⁷¹ The State Review Officer (“SRO”) overruled this decision.¹⁷² Specifically, the SRO found that Eagle Hill’s specialized program could not be deemed appropriate because C.L. had made some progress in the general educational setting.¹⁷³ The “restrictiveness” of the specialized setting—and only that factor—justified denial of tuition reimbursement to C.L.’s parents.¹⁷⁴ The district court deferred to the SRO on the grounds that there was evidence supporting the SRO’s conclusions.¹⁷⁵ But the Second Circuit reversed, noting that it was not eliminating restrictiveness as a factor in examining a parent’s selection.¹⁷⁶

The *C.L.* court noted that parents are not subject to the same educational strictures as public school districts and are not bound by the same mainstreaming obligations.¹⁷⁷ Citing to *Carter*, the court noted that the mainstreaming requirement was explicitly devised to prevent exclusion from public schools and was not meant to “restrict parental options” when failed by their public school districts.¹⁷⁸ The court stated that “[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public

their son. *Id.* at 833. In the beginning of school year 2007–2008, as C.L. began third grade, the 504 Committee met again, and this time, the parents asked that the committee consider classifying C.L. under the IDEA. *Id.* at 833–34. After the school district conducted its own evaluations, it rejected the request and changed the 504 plan only to the extent of reducing the number of sessions in the learning center, because C.L. was resistant to attending. C.L.’s parents moved him to Eagle Hill at the beginning of his fourth grade year. *Id.* at 834.

¹⁶³ *Id.* at 832.

¹⁶⁴ *Id.* at 833.

¹⁶⁵ *Id.* at 834.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 834–35.

¹⁶⁹ *Id.* at 835.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 837 (“Hence, while the restrictiveness of a private placement is a factor, by no means is it dispositive.”).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 837 (citing *Carter ex rel. Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991)).

school, would undermine the right of unilateral withdrawal” and concluded that restrictiveness of a private placement is not a dispositive factor.¹⁷⁹ The court elaborated, stating:

Restrictiveness may be relevant in choosing between two or more otherwise appropriate private placement alternatives, or in considering whether a private placement would be more restrictive than necessary to meet the child's needs, but where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option.¹⁸⁰

The Second Circuit declined to accord the deference ordinarily given to an SRO's decision since, in this case, the SRO failed to engage in a reasoned decision.¹⁸¹ Specifically, the SRO failed to consider the services provided at Eagle Hill or C.L.'s progress, whereas the IHO's decision thoroughly considered and discussed these factors.¹⁸² The SRO failed to assess “what the school had to offer” academically¹⁸³ and held, in effect, that Eagle Hill was inappropriate because it was restrictive.¹⁸⁴ Thus, the court reinstated the decision of the IHO that Eagle Hill represented an appropriate placement and rewarded tuition reimbursement to C.L.'s parents.¹⁸⁵

The authors' opinion is that educational benefit should be the sole factor considered in evaluating a parent's private school selection where a FAPE has not been offered or provided. It is an undisputed fact that a private school setting, by definition, is a more restrictive environment. Moreover, a rule limiting the inquiry to educational benefit is logically consistent with the *Carter* analysis that unilateral private school placements are not subject to the same standards as public schools.¹⁸⁶

IV. ANALYSIS

It is no longer reasonable for courts to be overly solicitous of the integration presumption at the cost of a child's education.¹⁸⁷ Social conditions existing at the time the IDEA came into being were the driving force behind the integration presumption; students were regularly being excluded from public education or not being educated at all.¹⁸⁸ In point of fact, in *Burlington*, the Court noted that the IDEA reflected a congressional response to “the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes.”¹⁸⁹

¹⁷⁹ *Id.* (citations omitted).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 830.

¹⁸² *Id.*

¹⁸³ *Id.* at 839.

¹⁸⁴ *Id.* at 830, 839.

¹⁸⁵ *Id.* at 840.

¹⁸⁶ *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993).

¹⁸⁷ *See, e.g., Colker, supra* note 1, at 811–12.

¹⁸⁸ Gabriela Brizuela, *Making An “IDEA” A Reality: Providing a Free and Appropriate Public Education for Children With Disabilities Under the Individuals With Disabilities Education Act*, 45 VAL. U. L. REV. 595, 597, 601 (2011); DeMonte, *supra* note 26, at 161; Colker, *supra* note 1, at 802–05; Perlin, *supra* note 37, at 614; Gordon, *supra* note 26, at 189; Melvin, *supra* note 20, at 603, 605, 615–17; Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective And Proposal For Change*, 27 U. Mich. J. L. Ref. 331, 344–46, 395 (1994) (proposing that an appropriate education be defined as “one designed to lead toward full integration or reintegration into the regular public education system”); Beyer, *supra* note 8, at 364–65.

¹⁸⁹ *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1996); *see also C.B. ex rel. B.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981, 991 (8th Cir. 2011) (“The overriding purpose of the [IDEA] is to provide an education for disabled children that is both free and appropriate.”).

The climate of society at-large and the educational sector has changed since the enactment of the IDEA. Inclusion goals that were normative at the IDEA's inception are now by and large descriptive; today, the notion of excluding a child from a mainstream school on the grounds of repugnance would, alone, be unfathomable. However, integration was and is not the sole objective of the IDEA. A FAPE is one cornerstone, pitted against the ideal of inclusivity. These competing interests create an unresolved tension.¹⁹⁰ The 1997 amendments announced a commitment to improving and increasing the "educational achievement" of the children served under the IDEA, but within public schools.¹⁹¹ The 2004 amendments continued the qualitative focus.¹⁹² A policy objective requiring public educational agencies to prepare all students, including those served by the IDEA, to ultimately function in and contribute to society and the economy at-large, to the extent possible, makes good economic sense.¹⁹³ The focus on guaranteeing individually-tailored education that looks to long-term outcomes is a positive.

The tests applied to determine whether public schools have offered to educate a child in the LRE are sufficient to protect the interests of those parents arguing for inclusion.¹⁹⁴ However, tuition reimbursement lawsuits reflect concerns about the quality of education being delivered in the public school and long-term results. More often than not, parents are running away from the open public school doors.¹⁹⁵ Weber noted that:

[I]n many instances, the children are already in integrated public school programs, and whatever is happening is not good. Adequate support services may not be offered. Services promised may not be delivered. The general education teachers may not be cooperating. Class sizes may be too large. Physical or verbal harassment may be occurring. A disability-only school, particularly a private school, looks extremely attractive. When parents resist for these reasons, one is hard-pressed to say they are wrong.¹⁹⁶

Frequently, integration is illusory; children are placed in specialized classes that share space with general education students, with only token interaction at a distance.¹⁹⁷

The public school placement offered in *M.H. v. New York City Department of Education* is a prime example of special education children being placed in specialized classes.¹⁹⁸ The parents in that case sought tuition reimbursement for the Brooklyn Autism Center ("BAC").¹⁹⁹

¹⁹⁰ *Oberti v. Bd. of Educ. of Clemtion Sch. Dist.*, 995 F.2d 1204, 1214 n.18 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695 (11th Cir. 1991); see also Weber, *supra* note 9, at 183 (noting that services and school settings must be adequate to support a child's needs in order to accomplish inclusion).

¹⁹¹ S. REP. NO. 105-17 (1997).

¹⁹² 20 U.S.C. § 1400(d)(1)(A) (2012) (stating that the statute's purpose was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); see also Chopp, *supra* note 5, at 441.

¹⁹³ Goldman, *supra* note 35, at 244.

¹⁹⁴ See discussion *infra* Part III.

¹⁹⁵ See *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 837 (2d Cir. 2014) (stating that parents who feel their children have been denied a FAPE "are often forced to turn to specialized private schools that educate only disabled children").

¹⁹⁶ Weber, *supra* note 9, at 185.

¹⁹⁷ See, e.g., Colker, *supra* note 1, at 844 (mentioning Oakstone Academy in Ohio, which features small class sizes and enrollment of autistic and neurotypicals in the same classroom).

¹⁹⁸ *M.H. v. N.Y.C. Dep't of Educ.*, 712 F. Supp. 2d 125, 134 (S.D.N.Y. 2010), *aff'd*, 685 F.3d 217 (2d Cir. 2012). M.H.'s claims were heard in tandem with those of M.S., another autistic student enrolled in BAC. *Id.* at 223. Whereas it was found that M.H. had been denied a FAPE, the opposite result obtained with respect to the companion M.S. case. *M.H.*, 685 F.3d at 258.

¹⁹⁹ *M.H.*, 685 F.3d at 229.

The IEP, that was contested by the parents and found inappropriate by the court placed the child in a segregated, small special class in a special school with related services.²⁰⁰ BAC provided individualized education in a segregated classroom, but recess, hallways and two non-academic classes were shared with typically-developing students at the host school.²⁰¹ The New York Department of Education (“N.Y. D.O.E.”) argued that the one-on-one setting was overly restrictive, but the court held that BAC was appropriate.²⁰² The court noted that the public school placement offered by the N.Y. D.O.E. merely gave lip service to the LRE concept; testimony established that there was no real social interaction between mainstream and disabled students.²⁰³ Though housed in a school with mainstream programs, children in the special education program offered to *M.H.* used a separate entrance, separate cafeteria and separate classes.²⁰⁴ By any measure, this is unjustified tokenism that fails to serve the IDEA’s purposes.

The authors acknowledge that some parents still have to fight for integration. Those parents at least find protection in the strong body of law supportive of inclusion. Others, however, are presented with sub-standard public educational options and are forced to fight for specialized placements. An ill-kept secret is that punitive litigation is a tactic regularly used by school districts to threaten or wear down parents.²⁰⁵ School districts, defending against private placement claims on the grounds of restrictiveness are not really advancing lofty integrationist ideals; instead, cost considerations are the real impetus,²⁰⁶ or they simply cannot deliver.²⁰⁷

²⁰⁰ *M.H.*, 712 F. Supp. 2d at 134.

²⁰¹ *Id.* at 144.

²⁰² *M.H.*, 685 F.3d at 252–54.

²⁰³ *Id.* at 254.

²⁰⁴ *Id.*

²⁰⁵ S. Rep 108-185, S. Rep. No. 185, 108th Cong., 1st Sess. 2003, 2003 WL 22536141, at *6 (Leg. Hist.). The 2004 amendments acknowledged this: “The committee is discouraged to hear that many parents, teachers, and school officials find that some current IDEA provisions encourage an adversarial, rather than a cooperative, atmosphere, in regards to special education.” *Id.* See also *infra* note 5 (noting that school districts are able to secure liability insurance coverage funding the defense of actions claiming IEP deficiencies and that attorneys’ fees may be recovered by parents who are the substantially prevailing party, but that expert witness fees are not recoverable).

²⁰⁶ EDUC. LAW CTR., FUNDING, FORMULAS, AND FAIRNESS: WHAT PENNSYLVANIA CAN LEARN FROM OTHER STATES’ EDUCATION FUNDING FORMULAS 2 (2013), available at http://www.elc-pa.org/ELC_schoolfundingreport.2013.pdf (explaining how the IDEA provides nominal monetary support for special education and that local school districts primarily shoulder the load); see also Bd. of Educ. Minutes from the N. Shore Sch. Dist. (Feb. 16, 2012), available at http://www.northshore.k12.ny.us/Board_of_Ed/Minutes/2012/2-16-12-Minutes.pdf (showing how the Superintendent responds to complaints about amounts budgeted to special education).

²⁰⁷ Special education students comprised thirteen percent of the total population in 2011–2012, amounting to 6.4 million students out of a total elementary and secondary school population of fifty-five million. GRACE KENA ET AL., NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2014 54–55 (Thomas Nachazel & Allison Dziuba eds., 2014), available at <http://nces.ed.gov/pubs2014/2014083.pdf>. Of those 6.4 million students classified under the IDEA, ninety-five percent are enrolled in regular schools. *Id.* Outcomes for these students, however, are substandard. For instance, 74.9 percent of all high school students in New York graduated high school in four years in June 2013, whereas only 48.7 percent of students with disabilities graduated from high school in four years for the same period and 37.2 percent of the total graduating cohort were college and career ready, while only 5.4 percent of the disabled students were college and career ready. SPECIAL EDUC. TECHNICAL ASSISTANCE NETWORKS, NEW YORK’S STATE SYSTEMIC IMPROVEMENT PLAN (SSIP) FOR RESULTS DRIVEN ACCOUNTABILITY IN SPECIAL EDUCATION 18 (2014), available at http://media.wix.com/ugd/10c789_01ae2271dcd9460db847f1c96648d9d6.pdf; see also *Graduation Rate Data*, N.Y. STATE EDUC. DEP’T (June 23, 2014), <http://www.p12.nysed.gov/irs/pressRelease/20140623/home.html> (follow “Graduation Rate and Enrollment Outcomes by Student Subgroup” hyperlink) (showing also that the dropout rate of all students for the 2009 four-year cohort was 7.8 percent among all students, with a 6.8 percent dropout rate among the general education population and a remarkable 13.9 percent dropout rate among students with disabilities). Cf. MARIE C. STETSER & ROBERT STILLWELL, NAT’L CTR. FOR EDUC. STATISTICS, PUBLIC HIGH SCHOOL FOUR-YEAR ON-TIME GRADUATION RATES AND EVENT DROPOUT RATES: SCHOOL YEARS 2010–11 AND 2011–12 9 (2014), available at <http://nces.ed.gov/pubs2014/2014391.pdf> (citing national figures showing an overall graduation rate of eighty percent graduation rate among all students and a sixty-one percent graduation rate for disabled students as of June 2012). The national dropout rate among all students in the United States in 2012 was seven percent. *Fast Facts: Dropout Rates*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=16> (last visited May 12, 2015). The dropout rate for IDEA classified students ages fourteen to twenty-one in 2012 was 19.7 percent. *Annual Disability Statistics Compendium: Table 11.7: Special Education—Dropout Rate[1] Among Students Ages 14 to 21 Served Under IDEA, Part B: 2011-2012*, INST. ON DISABILITY, UNIV. OF

V. CONCLUSION

Integration for integration's sake may have been valid when the IDEA was initially passed, and though inclusion remains a policy concern, it is no longer a pressing one. The greater concern is qualitative. If the IDEA seeks to emphasize a qualitative agenda, then a blanket integration presumption does not serve this objective. However, sometimes it is legitimate to sacrifice educational benefit for the greater social benefit of being surrounded by mainstream peers. The analysis must be truly individualized—and the identity of party advancing an argument for inclusion is significant. However, if a parent is seeking inclusion, the LRE standard should be vigorously upheld; if a school district has failed to offer a FAPE and tuition reimbursement is sought, restrictiveness should not be a permissible defense or a consideration in assessing the appropriateness of the private school.

N.H., <http://disabilitycompendium.org/compendium-statistics/special-education/11-7-special-education-dropout-rate-among-students-ages-14-21-served-under-idea-part-b> (last visited May 12, 2015); see also CHRIS CHAPMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 1972–2009 9 (2011), available at <https://nces.ed.gov/pubs2012/2012006.pdf> (noting that dropout rates for students with disabilities was reported to be twice that of non-disabled students nationally, 15.5 as compared to 7.8 percent). Ultimately, a lower educational level translates into a reduced earning capacity. See *Digest of Education Statistics: Table 502.30: Median Annual Earnings of Full-time Year-round Workers 25 to 34 Years Old and Full-time Year-Round Workers as a Percentage of the Labor Force, by Sex, Race/Ethnicity, and Educational Attainment: Selected Years, 1995 Through 2012*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d13/tables/dt13_502.30.asp. Specific Learning Disabilities (“SLD”) account for 40.7 percent of the IDEA classified student population and includes students with dyslexia, dysgraphia, auditory/visual processing disorders and nonverbal learning disabilities. CANDACE CORTIELLA, NAT'L CTR. FOR LEARNING DISABILITIES, DIPLOMAS AT RISK, A CRITICAL LOOK AT THE GRADUATION RATE OF STUDENTS WITH LEARNING DISABILITIES 6 (2013), available at <http://www.ncl.org/wp-content/uploads/2014/11/DiplomasatRisk.pdf>. This report states:

In the 2010–2011 school year, 221,000 students with SLD left high school. Of these, just sixty-eight percent (151,000 students) left with a regular diploma while nineteen percent (43,000 students) dropped out. Twelve percent (26,000) of students with SLD left school with a certificate—a document recognizing the student's completion of a school program but not recognized for postsecondary education or employment.

This low rate of high school graduation with a regular diploma has a serious impact on the employment rate and earnings of students with SLD. According to the Bureau of Labor Statistics, the unemployment rate for those with less than a high school diploma is over twelve percent—almost double that of all workers. The median weekly earnings is \$471—a bit more than half that of all workers.

Id. at 7 (citation omitted).