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# Reflections on the New Individuals with Disabilities Education Improvement Act

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REFLECTIONS ON THE NEW INDIVIDUALS WITH  
DISABILITIES EDUCATION IMPROVEMENT ACT

*Mark C. Weber*\* \*\*

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## I. INTRODUCTION

The Individuals with Disabilities Education Improvement Act,<sup>1</sup> Orwellian title and all,<sup>2</sup> received its presidential signature on December 3, 2004.<sup>3</sup> The Act is already fully in effect,<sup>4</sup> and the United States Department of Education proposed regulations to implement it on June 21, 2005.<sup>5</sup> Although the new statute leaves the basics of federal special education law intact, it makes significant changes along the periphery. Special education is now much more closely aligned with the No Child Left Behind initiative of the Bush administration.<sup>6</sup> The new law allocates funds for the education of children not yet found eligible for special education and pushes school districts to provide services to special education-eligible children in religious and other private schools.<sup>7</sup> It changes the special education eligibility determination rules for children with learning disabilities.<sup>8</sup> It alters dispute resolution procedures, partly to promote settlement and partly to circumscribe parents' rights.<sup>9</sup> Finally, it makes disciplinary processes somewhat harsher for children with disabilities, while still retaining the requirement that no child with a disability ever be excluded entirely from school.<sup>10</sup>

What the new IDEIA does not do is provide clarity on important issues of interpretation of the current law. Two of those issues are the treatment of parent demands for less restrictive educational placements for their children and the disposition of parent requests for intensive out-of-school services for children with autism. Clarity on those issues is highly desirable, and Congress is the best mechanism to provide it. The issues have been argued in the courts and addressed at length by scholars.<sup>11</sup>

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1. Pub. L. No. 108-446, 118 Stat. 2647 (codified in scattered sections of 20 U.S.C.A. §§ 1400-1482 (West 2005)) [hereinafter IDEIA or Act]. For convenience, references to the new statute, as well as to the previous law and to the provisions of the Elementary and Secondary Education Act will be made to United States Code Annotated.

2. Though it may sound petulant, one might express the desire for fewer statutes whose titles promise "improvement," "reform," or "excellence" of one type or another. As this Article seeks to show, real improvement in the area of special education law will require a good deal more than retitling a law.

3. Acts Approved by the President, Public Papers of the Presidents, Dec. 13, 2004.

4. Pub. L. No. 108-446 § 302(a) (2004) (making the Act effective immediately with respect to the definition of "highly qualified" special education teachers, and making the Act effective July 1, 2005 with respect to other provisions).

5. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,782 (proposed June 21, 2005) (to be codified at 34 C.F.R. pts. 300, 301, 304).

6. See *infra* Part III.A.

7. See *infra* Part III.B.

8. See *infra* Part III.C.

9. See *infra* Part III.D.

10. See *infra* Part III.E.

11. See *infra* Part IV.

IDEIA could have addressed them but did not, and they remain on the legislative agenda.

Nevertheless, the changes Congress made in 2004 are not entirely off track. Some of the motivating ideas behind the new statute, such as the insistence that educators be held accountable for success of special education students as they are for general education students, and that children who need assistance to make educational progress need not always be labeled and set apart from their classmates, are bracing. There is a vision of special education in which children who need additional assistance to learn will receive that help without any fanfare, will in the vast number of instances make educational progress at the same rate and at the same level as their nondisabled peers, and will do so in the same classrooms and other educational settings that their classmates occupy. The new law has features that will promote that visionary result, even though much more needs to be done to achieve the goal.

This Article begins in Part II with two general observations about the new IDEIA: that continuity prevails over radical change, and that considerations of partisan and bureaucratic politics run as a theme through the smaller changes. Part III of the Article comments on five specifics of the new law: (1) coordination with No Child Left Behind; (2) allocation of funding for children with learning deficiencies who have not yet been found to meet special education eligibility criteria, and for children with disabilities in private schools; (3) eligibility determinations for children with learning disabilities; (4) due process hearing procedures; and (5) discipline rules for children with disabilities.<sup>12</sup> Part IV describes the current controversies over least restrictive environment and autism services, and proposes legislative clarifications. The Article's Conclusion describes a vision of special education that the new law, to some degree, helps to advance—a vision of special education that is not so much special as part and parcel of the educational enterprise as a whole.

## II. PRELIMINARY OBSERVATIONS

Two things stand out about the new law. One is that despite the changes the statute makes, continuity rules the day. IDEIA does not gut the federal special education law or diminish the law's protections to a significant degree. Thus, though one can argue whether it is the "improvement" its title promises, it does not restore the bad old days that preceded the passage of the Education for All Handicapped Children Act

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12. The goal here is not to cover every innovation in the law, but merely those that evoke a reaction from one longtime student of American special education legislation. For a more exhaustive description of the statute, see MARK C. WEBER, RALPH MAWDSLEY & SARAH REDFIELD, *SPECIAL EDUCATION LAW: CASES AND MATERIALS A-1 to A-14* (2004).

of 1975.<sup>13</sup> The second is that special education law, like other legal areas, cannot avoid becoming wrapped up in the politics of the moment, the petty squabbles and the broader trends that move Congress along one current or another. In the new law, this manifests itself in efforts to rein in the Department of Education and to promote private, at the expense of public, schooling.

To return to the first thought: Congress passed the 1975 law after finding that 1.75 million children of school age were entirely excluded from the public schools, and that 2.2 million were in programs that did not meet their educational needs.<sup>14</sup> Although the federal government had subsidized state efforts to educate children with disabilities since 1965,<sup>15</sup> children and their parents had no federal statutory right to an education adapted to their needs, and the spottiness of state efforts led to lawsuits and congressional lobbying.<sup>16</sup> After two cases, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*<sup>17</sup> and *Mills v. Board of Education*,<sup>18</sup> succeeded in establishing entitlements to education for classes of children with disabilities, Congress acted. It significantly increased the amounts given to states to educate children with disabilities,<sup>19</sup> but it required that the states taking the money guarantee each child with a disability in the state a free, appropriate public education<sup>20</sup> in the least restrictive environment.<sup>21</sup> The law received major amendments in 1990 and 1997,<sup>22</sup> but the basic requirements of free, appropriate public education and

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13. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C.A. §§ 1400-1482 (West 2005)).

14. H.R. REP. NO. 94-332, at 11-12 (1975). Some have quibbled about the accuracy of the count, but even the critics concede that the numbers were enormous. See William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7, 15-18 (1985).

15. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). Teacher training subsidies date to 1958. Expansion of Teaching in the Education of Mentally Retarded Children Act of 1958, Pub. L. No. 85-926, 72 Stat. 1777 (1958).

16. One count had thirty-six suits pending in 1974 on behalf of children with disabilities claiming a right to public education. Alan Abeson, *Movement and Momentum: Government and the Education of Handicapped Children-II*, 41 EXCEPTIONAL CHILD. 109, 113 (1974).

17. 334 F. Supp. 1257, 1258 (E.D. Pa. 1971); see also 343 F. Supp. 279 (E.D. Pa. 1972) (approving consent decree).

18. 348 F. Supp. 866, 878 (D.D.C. 1972).

19. 20 U.S.C. § 1411 (1976) (authorizing the federal government to fund 5% of state special education expenditures, then 10% in 1979, 20% in 1980, 30% in 1981, and 40% in 1982).

20. 20 U.S.C. § 1412(1) (1976).

21. 20 U.S.C. § 1412(5)(B).

22. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997); Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990). For a comprehensive discussion of the statutory development, see MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 1.3 (2d ed. 2002 & supp. III 2005).

education to the maximum extent with children without disabilities have remain unchanged.

They remain unchanged after IDEIA. All children with disabilities are still entitled to an education and related services adapted to meet their individual needs<sup>23</sup> as outlined on a document that continues to be known as an individualized education program (IEP).<sup>24</sup> Removal of children from the regular educational environment may occur only when supplementary aids and services cannot succeed in permitting the child to be educated there.<sup>25</sup> Parents continue to have a private right of action to enforce these and other statutory provisions by demanding a “due process hearing” and making appeals to courts, and they receive attorneys’ fees if they prevail.<sup>26</sup> Changes have been made on a number of specifics, however, including closer alignment with the No Child Left Behind initiative of the Bush Administration, funding of services for children who have not yet been identified as children with disabilities and for privately schooled children who have disabilities, determinations of special education eligibility for children with learning disabilities, the due process hearing procedures, and student discipline. These selected areas will be further developed below.<sup>27</sup>

The second general comment to be made is that special education law is not immune from ordinary politics. Some illustrations of that truth jump out at the reader of the new law, particularly the congressional effort to make special education teachers fit into the requirement of the No Child Left Behind law that all teachers be highly qualified.<sup>28</sup> The President and majority party in Congress did not want to leave special education behind in their most prominent intervention in the public school system. But two related observations that are a little more provocative deserve mention as well: First, Congress plainly does not like the United States Department of Education, and second, Congress is not too sure about public education in general.

The hostility towards the Department of Education comes out in both blatant and subtle ways. The blatant one is statutory language providing that “the Secretary shall issue regulations under this chapter only to the

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23. 20 U.S.C.A. § 1412(a)(1)(A) (West 2005). This provision establishes an age range that in most states comprises children from ages three through twenty-one. 20 U.S.C.A. § 1412(a)(1)(B). Infants and toddlers ages zero through two are covered under a separate part of the IDEIA. 20 U.S.C.A. §§ 1431-1444 (West 2005).

24. 20 U.S.C.A. § 1401(14) (West 2005).

25. 20 U.S.C.A. § 1412(a)(5)(A).

26. 20 U.S.C.A. § 1415 (West 2005).

27. *See infra* Part III.

28. *See* 20 U.S.C.A. § 1401(10) (defining “highly qualified”); *see also* No Child Left Behind Act, Pub. L. No. 107-10, 115 Stat. 1425 (2002) (codified at 20 U.S.C.A. §§ 6301-6320, 7801-7803 (West 2005) (Elementary and Secondary Education Act)). *See generally infra* Part III.A (discussing interrelation of new special education law and No Child Left Behind).

extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.”<sup>29</sup> Further,

[t]he Secretary may not implement, or publish in final form, any regulation . . . that . . . violates or contradicts any provision of this chapter; or . . . procedurally or substantively lessens the protections provided to children with disabilities under this chapter . . . (particularly as such protections relate[] to parental consent . . . , least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation.<sup>30</sup>

The comment period for the regulations must be at least seventy-five days.<sup>31</sup> The new Act also retains language from the previous iteration of the law disfavoring and restricting the Department’s less formal policy guidance and interpretations.<sup>32</sup>

The more subtle indication of antagonism is the level of detail in the law itself. The law is drafted with such elaborate specificity that pages of the proposed regulations do little but repeat the statutory language, on topics such as highly qualified special education teachers,<sup>33</sup> services for children in religious and other private schools,<sup>34</sup> eligibility for children with learning disabilities,<sup>35</sup> due process,<sup>36</sup> and discipline,<sup>37</sup> among others. The Notice of Proposed Rulemaking makes a virtue out of the necessity of reiterating the baroque language of the statute, stating that the Department “elected to construct one comprehensive, freestanding document that incorporates virtually all requirements from the new law along with the applicable regulations, rather than publishing a regulation that does not

29. 20 U.S.C.A. § 1406(a) (West 2005).

30. 20 U.S.C.A. § 1406(b).

31. 20 U.S.C.A. § 1406(c).

32. 20 U.S.C.A. § 1406(d)-(f).

33. Compare 20 U.S.C.A. § 1401(10), with 70 Fed. Reg. 35,837-38 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.18) (defining “highly qualified” special education teacher).

34. Compare 20 U.S.C.A. § 1412(a)(10)(A) (West 2005), with 70 Fed. Reg. 35,845-47 (proposed June 21, 2005) (to be codified at 34 C.F.R. §§ 300.130-.134) (governing services for children in religious and other private schools).

35. Compare 20 U.S.C.A. § 1401(30), with 70 Fed. Reg. 35,864 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.307) (defining specific learning disabilities).

36. Compare 20 U.S.C.A. § 1415(f) (West 2005), with 70 Fed. Reg. 35,871 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.511) (establishing due process hearing procedures).

37. Compare 20 U.S.C.A. § 1415(k), with 70 Fed. Reg. 35,874-77 (proposed June 21, 2005) (to be codified at 34 C.F.R. §§ 300.530-.536) (establishing discipline procedures).

include statutory provisions” in order “to create a single reference document” so that readers are not “forced to shift between one document for regulations and a separate document for the statute.”<sup>38</sup> But in truth, had the Department not repeated the language of the statute in the regulations, there would have been few regulations to draft. The statutory language is so comprehensive that little room for interpretation remained.

This distrust of the Department is surprising. Ordinarily, overdrafting and stern instructions to executive departments occur when Congress is in the hands of one political party and the executive in the hands of another.<sup>39</sup> Congress does not trust the cabinet secretaries and department heads to follow its ways rather than the ones of the president, so it makes its instructions—both direct commands and statutory text itself—as adamant and specific as possible. The legislative text grows, and grows harsh, accordingly. The IDEIA, however, was passed at a time when Republicans had control of both Congress and the presidency, albeit a lame-duck Congress with less Republican representation than the one sworn in the following month. Why be so directive, so downright hostile, to your friends?

The answer to that not-so-rhetorical question is: Whose friends? Republicans, who sought to abolish the Department of Education under the Reagan presidency, do not trust the permanent bureaucracy there,<sup>40</sup> even

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38. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,782, 35,783 (June 21, 2005).

39. See Stephen H. Legomsky, *The Making of United States Refugee Policy; Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 677-78 (1995)

In response to broad assertions of presidential power, House Speaker Carl Albert and Senate Majority Leader Mike Mansfield opened the 93rd Congress with bold speeches that called for a more assertive congressional role. The resulting congressional resurgence continues today. Through a combination of more detailed legislation, expanded committee oversight of administrative agencies, and, for a while, legislative vetoes, congressional power has become a leading growth industry.

(footnote call numbers omitted). The legislative veto procedure was particularly popular during the Democratic Congress and Republican executive of the Nixon years. James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977) (noting that the number of legislative veto provisions in congressional enactments more than doubled from 1970 to 1975). Although that mechanism was found unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 959 (1983), observers noted that Congress can achieve control over agency decisions simply by taking matters into its own hands and refusing to delegate any meaningful authority. As Professor Tribe commented, “[n]othing in the Court’s reading of the Constitution in *Chadha* prevents Congress from reducing the regulatory agencies to the status of advisory study commissions.” 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-6, at 151 n.27 (3d ed. 2000).

40. See The Department of Education, PBS Online Backgrounders (Fall 1996), [http://www.pbs.org/newshour/backgrounders/departments\\_of\\_education.html](http://www.pbs.org/newshour/backgrounders/departments_of_education.html) (last visited Sept. 22,



if they may have a passing level of confidence in the political appointees. They certainly do not trust anyone who might head the Department after President Bush's second term is up,<sup>41</sup> and they want to make sure their policy initiatives survive their leader. Democrats, for their part, appear to have settled for severe-sounding language about what the regulations should contain, that the provisions not diminish rights, and so on, when they could not prevail against the Republicans on several substantive provisions of the law.<sup>42</sup>

And does Congress disfavor public education in general? Two aspects of IDEIA evidence congressional ambivalence, or worse, towards the enterprise of public schooling.<sup>43</sup> First is the alignment with No Child Left Behind. Accusations of congressional hostility towards public education surfaced early in the implementation of the No Child Left Behind statute.<sup>44</sup> That law requires remedial activity in schools whose students fail to meet adequate yearly progress towards proficiency standards over a period of several years.<sup>45</sup> The remedial actions include permissive transfers, supplemental private services, and ultimately, school reorganization or outsourcing operations to a private or other independent provider of

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2005) (describing the controversy over the Department of Education).

41. The boldness of President Clinton in using administrative agencies' rulemakings to advance his policy preferences has attracted comment, and Republican fear of what a future Democratic president might do if given too much leeway may be realistic. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (describing President Clinton's exercise of direct control over agencies' rulemaking to initiate policies, particularly in areas such as education).

42. An indication of what the Democrats wanted but did not get is found in the Minority Views section of the House Report. *See generally* H.R. REP. NO. 108-77, at 377-83 (2003) (demanding full funding of special education costs, greater protections for children in disciplinary matters, greater hearing rights for parents, and greater monitoring of state and school district compliance with federal law).

43. Initiatives to tie special education more closely to private schools had been expected because of the influence on Congress of the report on special education by a private think tank, the Fordham Foundation, which is closely allied with the voucher movement, *RETHINKING SPECIAL EDUCATION* (Chester E. Finn et al. eds., 2001). *See* Thomas B. Fordham Foundation, *Vouchers for Disabled Youngsters*, THE EDUCATION GADFLY (Apr. 8, 2004), available at <http://www.edexcellence.net/institute/gadfly/issue.cfm?id=143#1759>.

44. *See* Bess Keller, *Weaver Calls on Delegates to Make Covenant With Nation*, EDUC. WK., July 13, 2005, at 16 ("Mr. Weaver called on the delegates in his July 3 keynote speech to unite to 'defend public education and public school educators against the negative, mean-spirited, contrived attacks aimed at undermining and derailing the great institution of public education, while advancing the agenda of privatizing, charterizing, and voucherizing for personal gain.'"); *see also* Sam Dillon, *Some School Districts Challenge Bush's Signature Education Law*, N.Y. TIMES, Jan. 2, 2004, at A1 ("[I]n the presidential campaign, criticism of the law by Howard Dean, the former governor of Vermont, and other Democratic candidates has been drawing an enthusiastic response. School boards, Dr. Dean told a New Hampshire town meeting recently, call the law 'no school boards left standing.'").

45. 20 U.S.C.A. § 6316 (West 2005).

services.<sup>46</sup> School reorganization and outsourcing to private providers are anathema to teachers' unions<sup>47</sup> and others with a stake in contemporary public education.<sup>48</sup> With particular regard to special education, a school may become in need of improvement or corrective action if any of various subgroups of its students, including its students with disabilities, fails to make adequate progress towards meeting the standards.<sup>49</sup> By aligning the special education law with No Child Left Behind, specifically with the initiative's assessment and accountability provisions, Congress guaranteed that students with disabilities will be fully included in district-wide achievement measures, and that the assessments will count in determining the need for improvement or corrective action, and hence the need for resorting to the private education options listed in the law.<sup>50</sup>

As a second indication of congressional distrust of public schools, the new IDEIA codifies and strengthens the requirements that public school districts provide services to children with disabilities whose parents voluntarily place them in religious or other private educational institutions.<sup>51</sup> Although the new statute neither requires a free, appropriate education for those children nor expands the requirement of previous law that a proportionate amount of federal special education funds received by the state be allocated to them, it establishes that school districts must fulfill extensive duties of consultation with private schools and face various

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46. 20 U.S.C.A. § 6316(b).

47. See National Education Association, "No Child Left Behind" Act/ESEA, <http://www.nea.org/esea/index.html> (last visited Sept. 22, 2005). According to the National Education Association,

[t]he No Child Left Behind (NCLB) Act of 2001 (the latest revision of ESEA) presents real obstacles to helping students and strengthening public schools because it focuses on: punishments rather than assistance[;] rigid, unfunded mandates rather than support for proven practices[;] bureaucracy and standardized testing rather than teacher-led, classroom focused solutions . . . .

*Id.*

48. See Council of Chief State School Officers, Vouchers and Choice, <http://www.ccsso.org/content/pdfs/NCPetoSenateReVouchers021103.pdf> (last visited Aug. 8, 2005) (expressing opposition to unsuccessful voucher proposals previously attached to No Child Left Behind bill and questioning punitive measures contained in law as passed).

49. 20 U.S.C.A. § 6311(b)(2)(C)(v)(II)(cc) (West 2005).

50. A major ground for opposition to the new law is the reality that failure to make adequate progress towards proficiency for students in special education will occasion corrective action. Sam Dillon, *President's Initiative to Shake Up Education Is Facing Protests in Many State Capitols*, N.Y. TIMES, Mar. 8, 2004, at A12 ("In Oklahoma, a resolution introduced by a Democratic legislator criticized as 'inappropriate' provisions in the federal law that require special education students to achieve at the same rate as other students . . .").

51. 20 U.S.C.A. § 1412(a)(10)(A) (West 2005).

levels of supervision over decisions about how to allocate the services provided.<sup>52</sup>

### III. COMMENTS ON THE SPECIFICS OF IDEIA

The provisions of IDEIA cover a wide range of topics in 182 pages of Adobe Acrobat download. Though IDEIA left the central parts of the law unchanged, it modified much of the periphery. Areas in which the changes will have the most impact include: (1) coordination of the special education law with No Child Left Behind; (2) allocation of funds for children not yet found eligible for special education services and for private school children; (3) revision of eligibility determination for children with learning disabilities; (4) due process hearing procedures; (5) and student discipline.

#### A. *Coordination with No Child Left Behind*

Two central components of the No Child Left Behind initiative are enhancement of teacher qualifications and accountability for learning results. The IDEIA statutory and proposed regulatory provisions on both topics merit discussion.

##### 1. Highly Qualified Teachers

Under IDEIA, a highly qualified public elementary or secondary school special education teacher is one who has obtained full state certification or passed a special education licensing exam, holds a license, has not had the licensure provisions waived, and holds at least a bachelor's degree.<sup>53</sup> If the teacher teaches core academic subjects as defined by the No Child Left Behind law<sup>54</sup> exclusively to children who receive assessment against alternate achievement standards,<sup>55</sup> he or she may meet either the qualification standards set out in No Child Left Behind for an elementary, middle, or secondary school teacher who is new or not new to the profession<sup>56</sup> or the requirements for a highly qualified teacher as applied to an elementary school teacher.<sup>57</sup> As applied to a teacher who teaches at

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52. *See infra* Part III.B.2 (describing private school provisions).

53. 20 U.S.C.A. § 1401(10)(B) (West 2005). Charter school teachers may be treated differently. *See id.*

54. 20 U.S.C.A. § 7801(11) (West 2005). Currently, the core academic subjects are English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts (art education, theatre, music education), history, and geography. *Id.*

55. Essentially, these are children who have significant cognitive impairments. *See infra* text accompanying notes 78-79.

56. 20 U.S.C.A. § 7801(23)(A)-(C).

57. 20 U.S.C.A. § 7801(23)(B)-(C).

the secondary level, the teacher may meet the standard by having “subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.”<sup>58</sup>

Special education teachers who give instruction in two or more core academic subjects exclusively to children with disabilities (though not necessarily exclusively to children who are assessed against alternate standards) may qualify under the previously described No Child Left Behind standards,<sup>59</sup> or, if the teacher is not new to the profession, may demonstrate competence in all the core academic subjects that the teacher teaches, in the same way as would an experienced teacher (including under a single standard of evaluation covering multiple subjects).<sup>60</sup> If the teacher is both new and highly qualified in mathematics, language arts, or science, he or she may make the demonstration in the other core academic subjects no later than two years after starting employment.<sup>61</sup> Related services and paraprofessionals must meet state qualification standards.<sup>62</sup>

Arcane as all that may sound, it is neither more nor less than what is needed to establish what a highly qualified special education teacher is under the already-enacted No Child Left Behind provisions, and so it insures that special education is not left behind in the effort to improve teacher qualifications. The proposed regulations do little more than repeat what is in IDEIA, not even adapting the references to the section numbers of the Elementary and Secondary Education Act to those of the United States Code.<sup>63</sup> The regulators did make one, probably noncontroversial, decision by establishing that teachers in private schools that have special education students need not be highly qualified, even if the students are placed there by a state educational agency or local district as a means of furnishing the child an appropriate education when no public school program meets the child’s needs.<sup>64</sup> The drafters reasoned that the term “highly qualified” is part of “highly qualified public school teachers” and so does not apply to private institutions, even those deputized to serve children that public schools cannot.<sup>65</sup> The private schools are not going to object, and parents who seek private school placements for their children

58. 20 U.S.C.A. § 1401(10)(C)(ii).

59. *See* 20 U.S.C.A. § 7801(23)(A)-(C).

60. 20 U.S.C.A. § 1401(10)(D)(i)-(ii); *see* 20 U.S.C.A. § 7801(23)(C)(ii).

61. 20 U.S.C.A. § 1401(10)(D)(iii). The demonstration may be made under a high objective uniform state standard of evaluation (HOUSSE). *Id.*

62. 20 U.S.C.A. § 1412(a)(14)(B) (West 2005).

63. *See* 70 Fed. Reg. 35,782, 35,837-38 (June 21, 2005) (to be codified at 34 C.F.R. § 300.18).

64. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,847 (June 21, 2005) (to be codified at 34 C.F.R. § 300.146(b)).

65. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,782, 35,791 (June 21, 2005).

are unlikely to want to impose any legal restrictions that may diminish the number of placements that are available.<sup>66</sup> The Notice of Proposed Rulemaking also indicates that the regulators decided to permit general education teachers who are highly qualified in particular subjects to provide instruction in core academic subjects to children with disabilities, in consultation with teachers who are highly qualified in special education, but not in the core subjects.<sup>67</sup> This reading is in line with comments made in the legislative history of IDEIA.<sup>68</sup>

The regulators also made a conspicuous decision to do nothing with regard to the high objective uniform state standard of evaluation, or “HOUSSE,” by which special education teachers could demonstrate that they are highly qualified. Although the Notice of Proposed Rulemaking cites legislative history suggesting that these standards should be permitted and may cover multiple subject areas if they are at least as rigorous as other special education teacher standards, the regulators declined entirely to address the topic.<sup>69</sup> Perhaps the Department of Education did not want to incur further wrath from Congress by misinterpreting what the legislators wanted with respect to this method of demonstrating high qualifications.

The statute provides that the highly qualified requirement does not create a private right of action for failure to provide a highly qualified teacher,<sup>70</sup> but it is difficult to imagine that the issue will be kept out of disputes over whether children are receiving free, appropriate public education. Free, appropriate public education is that which, among other things, meets the standards of the state educational agency,<sup>71</sup> including the personnel standards, and it is well established that services provided by individuals who lack the required qualifications are not appropriate services.<sup>72</sup> Thus, parents will effectively have a private right of action

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66. The parents of one child with a disability litigated all the way to the Supreme Court to establish that a placement arranged by parents in a dispute with the public school system over appropriate services for their children did not need to meet state approval standards to qualify for public reimbursement if the parents ultimately prevailed in the placement dispute. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 9-10 (1993).

67. 70 Fed. Reg. 35,791 (June 21, 2005).

68. See H.R. CONF. REP. NO. 108-779, at note 21 (2004).

69. 70 Fed. Reg. 35,782, 35,784-85 (June 21, 2005) (citing H.R. CONF. REP. NO. 108-779, at note 21 (2004)).

70. 20 U.S.C.A. § 1412(a)(14)(E) (West 2005).

71. 20 U.S.C.A. § 1401(9) (West 2005).

72. See, e.g., *Evanston Cmty. Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798, 803 (7th Cir. 2004) (requiring compensatory services on account of the school district’s failure to have services delivered by fully certified personnel even if the services themselves met professional standards); *Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 931 (11th Cir. 1989) (finding that the school district program failed the appropriate education standard: “Although the board contends that the special educational programming afforded Drew was meaningful, individualized and provided under a small staff to student ratio by experienced professionals, there was ample evidence at trial to demonstrate that these professionals were untrained in the special needs of autistic children.”).

to enforce the highly qualified teacher standards by invoking their due process rights to challenge the appropriateness of the special education services offered to their children when the teachers fail to meet the standards.

## 2. Accountability and Assessment

“Chicago ain’t ready for reform yet,”<sup>73</sup> declared ward boss Paddy Bauler. Whether public schools are ready for accountability remains to be seen, but Congress intends to impose it on them by means of standards-based assessment and corrective action measures under the No Child Left Behind initiative. Parents of children in special education perceive this, and similar measures, as double edged. On the one hand, they know that unless their children are included in assessments and the schools penalized if the children with disabilities do not meet achievement standards, the result will be, as the name of an Illinois advocacy group proclaims, Our Children Left Behind.<sup>74</sup> On the other hand, no group is more skeptical of mass testing programs than parents of children with disabilities, who frequently see a disconnect between test results and real learning.<sup>75</sup>

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73. Godfrey Sperling, *Political Reporting—The Way It Was*, CHRISTIAN SCI. MONITOR, Oct. 29, 2002, available at <http://www.csmonitor.com/2002/1029/p11s01-cogs.html> (last visited Sept. 23, 2005). Sperling wrote,

Bauler had received a lot of local attention when the first Richard Daley became mayor. Daley had narrowly beaten his reform opponent after some city precincts, long in the Democratic machine's grip, came through with a nearly 100 percent vote for Daley. Bauler made Page 1 of local papers the next day when he was photographed dancing on top of a table in his political headquarters while shouting, “Chicago ain't ready for reform yet,” over and over.

*Id.*

74. The organization’s website states that it “was created in Spring, 2003 to serve as an information resource for students, parents, and organizations concerned about Congressional activities reauthorizing the Individuals with Disabilities Education Act [IDEA].” Our Children Left Behind, <http://www.ourchildrenleftbehind.com> (follow “message board” hyperlink) (last visited Sept. 23, 2005); see Jay Mathews, “No Child” Closes the Gap: Harder for Special Needs, Low-Income Students to be Left Behind, WASH. POST, Oct. 11, 2005, available at [http://www.washingtonpost.com/wp-dyn/content/article/2003/11/11/AR2005032304288\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2003/11/11/AR2005032304288_pf.html) (discussing comments of several advocates for children with disabilities with positive views of the No Child Left Behind accountability requirements); see also Diana Jean Schemo, *School Achievement Reports Often Exclude the Disabled*, N.Y. TIMES, Aug. 30, 2004, at A10 (describing the exclusion of children with disabilities from assessment and reporting of student achievement).

75. Concerns about the disconnect are well justified. See Alfie Kohn, *Standardized Testing and Its Victims*, EDUC. WK., Sept. 27, 2000, available at <http://www.alfiekohn.org/teaching/edweek/staiv.htm> (detailing deficiencies of standardized testing regimes). Concerns have also been raised over the value of emphasizing instruction in skills that are assessed under No Child Left Behind for students who may need more basic lessons. See Daniel de Vise, *Trying Times for Special Ed*, WASH. POST, Apr. 26, 2005, at B01. The author writes:

Parents are thus in the unenviable position of demanding inclusion in an enterprise they know to be of uncertain value because exclusion would be worse. Already, stories have circulated of methods school officials are using to avoid having the scores of special education students cause schools to fail adequate yearly progress, either by pushing more general education students who are performing at a level of proficiency into the special education cohort (hence raising the scores) or getting the absolute number of students with disabilities low enough for all their scores to be excluded as statistically insignificant.<sup>76</sup> Under pressure from states, the United States Department of Education agreed to triple the number of students who can be considered to have met proficiency standards by passing alternate assessments.<sup>77</sup> Alternate assessment is intended for

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Shykell Pinkney is in the seventh grade, but her developmental age is three months. Her teacher communicates with Shykell the only way possible, by holding two or three symbols in front of her face and watching to see whether her head turns to focus on one of them.

. . . She cannot write, point or speak. But her teacher, Paula Gentile, had to spend nearly 30 hours testing her on a battery of academic tasks – 10 in reading, 10 in math – to measure her academic performance under the federal No Child Left Behind law.

*Id.*; see also Jay Mathews, *Examining No Child Left Behind*, WASH. POST, Mar. 9, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A42360-2004Mar9.html>. Matthew writes:

Paul Smith, a high school teacher in Wisconsin, said he had to cut back on life skills lessons—opening a bank account, getting a doctor’s appointment—for students with severe cognitive disabilities because the state was insisting on better reading scores. “They may have not marketable skills,” he said, “but at least they will be able to identify a topic sentence.”

*Id.*

76. Schemo, *supra* note 74 (“But states are skirting the law in a range of ways. About a dozen have raised the minimum number of disabled students that must be enrolled before the school has to report on their progress as a separate group.”); see also Stepanie Banchemo & Darnell Little, *New Rules Help Raise Test Scores: Schools Learning How to Navigate Federal Reforms*, CHI. TRIB., Dec. 15, 2004, available at <http://www.chicagotribune.com/news/local/chi-0412150299dec15,1,1462195.story?coll=chi-news-hed>. The article states:

The Tribune analysis shows about 140 schools skirted the roster [of schools failing to show adequate yearly progress] only because they did not have to count the results of students who transferred into the school late, or count tests in which students did not answer enough questions. Sixteen schools stayed off the list simply because the state changed the way it determines student-test-participation rates, the analysis shows.

*Id.*

77. See *infra* note 80 and accompanying text.

children with significant cognitive disabilities, who could be expected not to be able to achieve conventional assessment standards, even with accommodations.<sup>78</sup> Although federal regulations cap at 1% the number of students whose scores on alternate assessments may be considered in determining proficiency,<sup>79</sup> the Department of Education in 2005 announced that it would permit an additional 2% of students to have proficiency determined by use of alternate assessments, stating that this step would allow greater flexibility for evaluating “students with persistent academic disabilities who need more time and instruction to make substantial progress toward grade-level achievement.”<sup>80</sup>

### B. Allocation of Funds

IDEIA allows special education funds to be diverted to providing services to children who do not meet the eligibility standards of the special education law, and it strengthens provisions under which funding for special education is to be provided to children whose parents have placed them in religious or other private schools. Whether these are true diversions of funds or simply sensible allocations of them is a moot question in the sense that the British use the term.

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78. Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68699 (proposed Dec. 9, 2003) (explaining the proper use of alternate assessments).

79. 34 C.F.R. § 200.13(c)(ii) (2005). Waivers may permit a slight increase in the number. For example, Virginia requested three years’ permission to count 3.5% of children as proficient based on alternate assessments. Although the Department of Education denied that request, Letter from Raymond Simon, Assistant Sec’y for Elementary and Secondary Educ., U.S. Dep’t of Educ. & Troy R. Justesen, Acting Deputy Assistant Sec’y for Special Educ. & Rehabilitative Servs., U.S. Dep’t of Educ., to Thomas M. Jackson Jr., President, Va. Bd. of Educ. (May 25, 2004), *available at* <http://www.ed.gov/policy/elsec/guid/stateletters/aava.html>, it allowed a one-year increase to 1.13%, Letter from Raymond Simon, Assistant Sec’y for Elementary and Secondary Educ., U.S. Dep’t of Educ. & Troy R. Justesen, Acting Deputy Assistant Sec’y for Special Educ. & Rehabilitative Servs., U.S. Dep’t of Educ., to Thomas M. Jackson, President, Va. Bd. of Educ. (July 28, 2004), *available at* <http://www.ed.gov/policy/elsec/guid/stateletters/aava2.html>. In light of the 2005 general decision to allow an additional 2% of children to be counted as proficient under alternate assessment on the basis of persistent academic disabilities, however, Virginia seems to have lost the battle but won the war. *See infra* note 80 and accompanying text.

80. Press Release, U.S. Dep’t of Educ., Secretary Spellings Announces More Workable, “Common Sense” Approach to Implement No Child Left Behind Law (Apr. 7, 2005), *available at* <http://www.ed.gov/news/pressreleases/2005/04/04072005.html>. There is some justification for a figure greater than 1%, because the public school population probably has a larger fraction of children with diminished ability to learn than the general student population does. Ordinary parochial and private schools draw off children functioning in the typical range and do not serve children with severe disabilities, leaving this latter category of children overrepresented in public school. Whether this fact supports a 3% figure for alternate assessment is far more doubtful, however. The number appears to have been plucked from the air.



## 1. Early Intervening Services

Up to 15% of federal special education money may be used for early intervening services for children who have not formally been found to have a disability and who need special education;<sup>81</sup> the apparent goal of the services is to boost those children's performance so that they never will need to be found eligible and to receive ordinary special education services. This innovation responds to critics who contend that eligibility standards under the law may be artificial and keep many children who need special attention from obtaining federally funded services.<sup>82</sup> For example, the President's Commission on Excellence in Special Education found that "[t]he current system uses an antiquated model that waits for a child to fail, instead of a model based on prevention and intervention. . . . This means students with disabilities do not get help early when that help can be most effective."<sup>83</sup>

What neither the statutory provisions nor their implementing rules address, however, is the problem that led to the imposition of stringent eligibility provisions in the first place: When federal money is provided for special education with too few eligibility strings attached, general education absorbs it and the federal goal of helping children with disabilities is frustrated.<sup>84</sup> The amended law preserves 85% of the federal money for children that Congress can comfortably consider to be the true beneficiaries of the legislation.<sup>85</sup> Whether the amount up to 15% will go to the at-risk students for whom it is intended is anyone's guess. The statute identifies these students simply as those "who need additional academic and behavioral support to succeed in a general education environment,"<sup>86</sup> and it permits the funds to be used for, among other things, professional development defined in a very broad fashion.<sup>87</sup> The regulations could have further narrowed the beneficiary group and restricted the professional development or other permissible expenditures

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81. 20 U.S.C.A. § 1413(f) (West 2005).

82. See Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 60 MO. L. REV. 441, 448-49 (2004).

83. PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 7 (2002), available at <http://www.ed.gov/inits/commissionsboards/whspecialeducation/>.

84. This concern led to the statutory requirements that federal money be used only for the excess costs of special education over general education, 20 U.S.C.A. § 1413(a)(2)(A)(i), and not used to supplant local or state expenditures for special education, § 1413(a)(2)(A)(ii). Supplanting the local effort effectively diverts the federal special education funds into general education. See generally WEBER, *supra* note 22 §§ 18.3, 18.5 (discussing excess cost and non-supplanting requirements).

85. See 20 U.S.C.A. § 1413(f)(1).

86. *Id.*

87. 20 U.S.C.A. § 1413(f)(2)(A).

so that the funds would not be lost in school districts' overall training and supplemental services budgets, but instead they merely parrot the statutory language.<sup>88</sup>

A possible side benefit of providing services outside the conventional special education eligibility determination framework is that the students might be subject to less of the stigma that can accompany identification as having one of the disabilities specified in the law.<sup>89</sup> It remains to be seen whether this will be the case or whether "You're so EIS!" will become the new playground insult.<sup>90</sup>

## 2. Services for Children in Private Schools

The new law does not expand the amount of funding that must be spent on children with disabilities placed by their parents in private schools, but it alters the allocation requirements and strives to insure that funding actually is provided. The fundamental duty is that the state educational agency and local school districts must provide services to private school children with disabilities consistent with the number and location of those children in the state, and that districts must devote funding to the education of the children in the amount of federal special education money that is proportionate to the number of children enrolled in private schools within the district.<sup>91</sup> The school district has to employ a child-find process, in consultation with private school representatives, to learn the number of children with disabilities in private schools, so as to determine the proportionate amount to allocate.<sup>92</sup> The allocations are to be proportionate to the number of private school children going to private schools in the district,<sup>93</sup> not proportionate to the number of private school students resident there, as the previous law required.<sup>94</sup>

Beyond these basics, IDEIA incorporates a number of provisions, specifically obligations to consult with private school representatives about whom to serve and how to serve them, that previously were found

88. See 70 Fed. Reg. 35,860 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.226). The Notice of Proposed Rulemaking does, however, contain an extensive discussion of the non-supplanting requirement's interaction with allocations of funds for early intervening services. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,782, 35,796 (June 21, 2005).

89. See Garda, *supra* note 82, at 444 ("IDEA eligibility results in educational benefit, services, and, unfortunately, a potentially damaging stigma . . .").

90. The designation "at-risk" is sometimes used as a supposedly less stigmatizing designation than a disability category, but efforts to diminish stigma by changing labels may not take sufficient account of the ways of the young. I once heard a child on a school playground yelling at another that she was stupid and the other shouting back, "You're at-risk!"

91. See 20 U.S.C.A. § 1412(a)(10)(A)(i)(I) (West 2005).

92. 20 U.S.C.A. § 1412(a)(10)(A)(i)(II).

93. See *id.*

94. See 34 C.F.R. § 300.451(a) (2005).

only in the Department of Education regulations.<sup>95</sup> It then goes one step further by requiring school districts to obtain a written affirmation that a timely and meaningful consultation took place and by conferring on private schools the ability to file complaints with the state educational agency, and ultimately the United States Department of Education, if they do not like what the school district offers their students.<sup>96</sup>

The new law does not alter previous regulatory provisions establishing that children eligible for special education who are placed in private school by their parents for religious or other reasons lack an individual entitlement to special education and related services,<sup>97</sup> and that the parents can exercise due process hearing rights only with respect to complaints about failure to identify, locate, and evaluate their children, not complaints about failure to serve them or to serve them as fully as the parents would like.<sup>98</sup> Accordingly, the proposed regulations retain those provisions.<sup>99</sup>

The departure from previous law and practice, then, is the congressional addition of an exclamation point to the old regulatory provisions, by writing them into the statute and strengthening the procedural obligations placed on school districts. Those who generally favor the option of private schooling, either on philosophical grounds of supporting parental rights<sup>100</sup> and promoting diverse educational choices,<sup>101</sup> or on practical grounds of saving tax dollars by keeping children out of public schools,<sup>102</sup> may welcome the new emphasis on services for children

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95. Compare 20 U.S.C.A. § 1412(a)(10)(A)(iii), with 34 C.F.R. § 300.454(b). Although this adoption of regulatory provisions may cast doubt on the conclusion that Congress is at odds with the Department of Education, the fact that Congress saw fit to write the provisions into the statute indicates a fear that the Department might eventually change its mind and gut the rules.

96. 20 U.S.C.A. § 1412(a)(10)(A)(iv)-(v).

97. 34 C.F.R. § 300.454(a) (2004); see *K.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017, 1019 (7th Cir. 1997) (“[T]he [1997] Amendments [to the federal special education law] unambiguously show that participating states and localities have no obligation to spend their money to ensure that disabled children who have chosen to enroll in private schools will receive publicly funded special-education services generally ‘comparable’ to those provided to public-school children.”).

98. 34 C.F.R. § 300.457(a)-(b) (2005).

99. 70 Fed. Reg. 35,846-47 (proposed June 21, 2005) (to be codified at 34 C.F.R. §§ 300.137(a) (no individual right to services), 300.140(a) (no due process rights)).

100. See *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (upholding the substantive due process right to send one’s child to private school); see also Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems be Overcome?*, 43 DEPAUL L. REV. 1 (1993) (discussing the arguments for school choice based on parental rights).

101. See Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53 (advocating expansion of parents’ school choices).

102. See *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (“By educating a substantial number of students [private sectarian and nonsectarian] schools relieve public schools of a correspondingly

in the private schools. Those on the other side of the divide will react accordingly.

One dubious judgment by Congress, however, even if strengthening the private school provisions merits applause, is to force school districts to allocate a proportionate amount of their federal funds based on the numbers of private school children who attend school in their district, not who reside there, when the federal aid allocation formula is not based solely on the number of children with disabilities attending school in a district. The allocation of federal funds the school district receives depends on a formula that in part considers amounts received historically and in part considers the number of children (with *and* without disabilities) who attend public and private school in the district.<sup>103</sup> Think of the beleaguered school district that happens to have within its boundaries a disproportionate number of private schools that adapt their programs for children with disabilities. Students with disabilities whose parents want private schooling are drawn to those receptive schools. The district then is forced to spend a proportionate amount of its funds on the disproportionate number of private school students who have disabilities coming into the district boundaries for private school. Meanwhile, the school district next door has a large number of private schools that ruthlessly exclude all students with disabilities.<sup>104</sup> It receives federal funds based in part on the total number of students enrolled in school in its boundaries, including those in the private schools, but need not spend anything on the private school students because none are disabled enough to be eligible for services. Of course, what Congress did has some justification. The logistics of delivering services will be easier if the district where the private school students spend most of their school day is responsible for them. Paying for the services will be the rub.

Perhaps a more immediate problem is that of how to determine how many children attend private school in the school district, when child-find efforts have traditionally been made on the basis of residency in the district. On this issue, the Department of Education has issued a regulatory guidance essentially telling school districts, for the 2005-06 school year, to make the best guess they can based on the data currently available.<sup>105</sup>

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great burden—to the benefit of all taxpayers.”).

103. 20 U.S.C.A. § 1411(f)(2) (West 2005).

104. Because schools and other entities controlled by religious organizations are exempt from the public accommodations provisions of the Americans with Disabilities Act, 42 U.S.C.A. § 12187 (West 2005), and even schools subject to that law need not engage in fundamental alteration of programs, 42 U.S.C.A. § 12182(b)(2)(ii)-(iii) (West 2005), exclusion of students with disabilities is very much a reality in private educational institutions.

105. Memorandum from U.S. Dep’t of Educ. to Chief State Sch. Officers 2 (June 27, 2005), available at [http://www.ode.state.oh.us/exceptional\\_children/children\\_with\\_disabilities/pdf/OSEP%2005-09%20private%20schools.pdf](http://www.ode.state.oh.us/exceptional_children/children_with_disabilities/pdf/OSEP%2005-09%20private%20schools.pdf).

A final issue concerns where to provide the services. *Zobrest v. Catalina Foothills School District*<sup>106</sup> held in 1993 that a school district could provide publicly funded sign language interpretation services on the site of a religious school without violating the First Amendment's Establishment Clause.<sup>107</sup> In the legislative history of IDEIA, the House Committee Report expressed a strong preference for on-site services for private school children:

The Committee wishes to make clear that local educational agencies should provide direct services for parentally-placed private school students with disabilities (as for most students) on site at their school, unless there is a compelling rationale for such off-site services. Such intent indicates the preference that providing services on site at the private school is more appropriate for the student and less costly in terms of transportation and liability.<sup>108</sup>

The intention never made its way into the statutory language, however, and does not appear anywhere in the proposed regulations, though it is repeated in the Notice of Proposed Rulemaking.<sup>109</sup> One wonders whether the statement will have any effect when it is buried in materials that will not be reproduced in the Code of Federal Regulations. Public school districts are typically unenthusiastic about providing services off their own premises.<sup>110</sup> Perhaps they would prefer to see the language stay buried.

### C. Children with Learning Disabilities

The innovation IDEIA makes with regard to children with learning disabilities is to permit school districts not to use the discrepancy between a student's ability and achievement to determine the presence of the disabling condition.<sup>111</sup> This provision arises from distrust over

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106. 509 U.S. 1, 13-14 (1993).

107. *Id.*; see U.S. CONST. amend. I, cl. 1.

108. H.R. REP. NO. 108-77, at 95 (2003).

109. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,782, 35,789 (June 21, 2005).

110. See, e.g., *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995) (upholding the refusal to provide on-site services at a private school for a child with disabilities).

111. 20 U.S.C.A. § 1414(b)(6)(A) (West 2005). This section states:

[W]hen determining whether a child has a specific learning disability . . . , a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

conventional methods, such as IQ testing,<sup>112</sup> for finding learning disabilities, as well as questions about the integrity of the learning disabilities category itself and what its significance should be in educational decisionmaking.<sup>113</sup> The Notice of Proposed Rulemaking urges that the use of discrepancy between IQ subtests of ability and achievement be abandoned, and the proposed regulations themselves go so far as to transmute the statute's language barring anyone from permitting school districts to use something other than ability-achievement discrepancy to allowing states to forbid districts from using ability-achievement discrepancy.<sup>114</sup>

Passing the difficulty in the regulation of how a statutory license to local school districts to do something becomes a license for states to prohibit the opposite, there remains the central problem of how to determine the existence of a learning disability once the ability-achievement discrepancy standard is gone. The statute permits using "a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation,"<sup>115</sup> and the proposed regulations echo this language while also permitting "use of other alternative research-based procedures for determining whether a child has a specific learning disability."<sup>116</sup> The Notice of Proposed Rulemaking says that the Department of Education "strongly recommends" using the model of systematic assessment of the student's response to high quality general education instruction, but it notes that other permissible models may look to "strengths and weaknesses in achievement, or simply rely on an absolute level of low achievement."<sup>117</sup>

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*Id.*

112. *See, e.g.*, *Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1087, 1089-90 (9th Cir. 2002) (refusing to require that IQ testing be used in determining a discrepancy between ability and achievement and affirming the finding that the child lacked eligibility for special education on grounds of learning disability).

113. *See, e.g.*, MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997) (expressing dissatisfaction with the current treatment of students with learning disabilities in schools); Anne Proffitt Dupre, Book Review, 49 J. LEGAL EDUC. 301 (1999) (reviewing KELMAN & LESTER, *supra*); *see also* Robert A. Garda Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. (forthcoming 2005) (raising eligibility and service design issues with respect to children identified as having mental retardation and learning disabilities).

114. 70 Fed. Reg. 35,864 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.307(a)(1)) ("In addition, the criteria adopted by the State . . . [m]ay prohibit the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability . . .").

115. 20 U.S.C.A. § 1414(b)(6)(B).

116. 70 Fed. Reg. 35,864 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.307(a)(3)-(4)).

117. *Id.* at 35,802.

The Notice quite correctly points out that these methods of assessment have the virtue of being directly linked to instruction and may work better than other models for identifying students most likely to need special education and related services in order to learn.<sup>118</sup> Two problems arise, however. First, if low achievement despite exposure to high quality instruction is the criterion, there is no ground on which to distinguish students with learning disabilities from students with cognitive impairments or a variety of other disabling conditions, conditions that may well call for different instructional strategies.<sup>119</sup> Second, what about the child who is managing to get by despite a learning disability but who could be lifted to a much higher level of achievement with the intervention of special education services?<sup>120</sup> If an absolute low level of achievement is used as a screen for eligibility, the child will never obtain services despite the ability to derive significant benefit from the intervention in reaching his or her full educational potential.

#### D. Due Process Hearing Procedure

There are a number of minor changes in the dispute resolution process of the special education law,<sup>121</sup> but the big news has to do with attorneys'

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118. *See id.*

119. *See, e.g.*, Heather S. v. Wisconsin, 937 F. Supp. 824, 831 (E.D. Wis. 1996) (ruling that a child with a seizure disorder met the eligibility criteria under the other-health-impaired category rather than the learning disability category and upholding placement in the cognitive disabilities program rather than in the learning disabilities program).

120. *See, e.g.*, Westchester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417, 421 (E.D. Pa. 2002) (finding that a child with attention deficit disorder was eligible for special education because of the discrepancy between ability and achievement despite satisfactory grades). The leading case on the meaning of the appropriate education guarantee ruled that a child had been provided appropriate education when the special education services that were being given to her enabled her to perform above the average level in her class and to advance easily from grade to grade. Bd. of Educ. v. Rowley, 458 U.S. 176, 209-10 (1982). The Court, however, did not hold that *eligibility* for special education services should be conditioned on the child's performance at a below-average level or on the failure to advance easily from grade to grade. *See id.* The United States Department of Education has consistently interpreted the federal special education law as forbidding states from imposing as an eligibility requirement a child's failure to progress from grade to grade. Letter to Anonymous, 41 Individuals with Disabilities Educ. L. Rep. 212 (U.S. Dep't of Educ., Off. of Special Educ. & Rehabilitative Servs. 2004). Even as a standard for the level of services that must be provided, *Rowley's* adequacy approach is subject to significant limits and exceptions. *See infra* text accompanying notes 201-04 (discussing least restrictive environment cases); *see also* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 354 (1990) (discussing various situations in which courts have imposed appropriate education obligations that exceed adequacy standards); *cf.* Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 561 ("[T]his paper concludes that the 'some educational benefit' standard no longer accurately reflects the requirements of the IDEA.").

121. The more modest changes include imposition of pleading rules, specifically the

fees, procedures to facilitate settlement, hearing officer qualifications, and hearing decision enforcement.

### 1. Attorneys' Fees

The new law permits school districts and states that prevail at due process to recover attorneys' fees against parents or their attorneys, not just for court activities but also for the due process hearing itself.<sup>122</sup> A court may award fees against the attorney of a parent who files a due process complaint "that is frivolous, unreasonable, or without foundation," or who continues to litigate after the litigation clearly becomes "frivolous, unreasonable, or without foundation."<sup>123</sup> It may award fees against the parent or the parent's attorney if the complaint was presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.<sup>124</sup> The court confronting a demand for fees by the school district or state is to employ the standard of *Christiansburg Garment Co. v. EEOC*,<sup>125</sup> which requires that the action be truly groundless,<sup>126</sup> not merely wrong on the merits or questionable in light of what is known at the beginning<sup>127</sup> of the litigation.<sup>128</sup>

This change merely brings to actions that go to due process the liability for fees for frivolous litigation that had previously existed for actions filed in court; indeed it may be somewhat weaker than the customary rule for imposing fees on baseless litigation, because the actual parties, the parents,

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opportunity to challenge the sufficiency of complaints and amendment procedure. *See* 20 U.S.C.A. § 1415(c)(2) (West 2005). Default limitations are also imposed for due process hearings and court proceedings. *See* 20 U.S.C.A. §§ 1415(f)(3)(C)-(D) (due process), 1415(i)(2)(C) (court).

122. 20 U.S.C.A. § 1415(i)(3)(B)(i)(II)-(III).

123. 20 U.S.C.A. § 1415(i)(3)(B)(i)(II).

124. 20 U.S.C.A. § 1415(i)(3)(B)(i)(III).

125. 434 U.S. 412 (1978).

126. *Id.* at 421.

127. *Id.* at 422 ("Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.")

128. *See* 150 Cong. Rec. S11655 (daily ed. Nov. 19, 2004) (colloquy of Sens. Kennedy and Gregg). Mr. Kennedy stated:

By adding at Note 231 sections detailing the limited circumstances in which local educational agencies and State educational agencies can recover attorney's fees, specifically Sections 615(i)(3)(B)(i)(II) and (III), the conferees intend to codify the standards set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). According to *Christiansburg*, attorney's fees may only be awarded to defendants in civil rights cases where the plaintiffs [sic] claims are frivolous, without foundation or brought in bad faith. Is that your understanding as well?

*Id.* Mr. Gregg stated, "Mr. President, the Senator from Massachusetts is correct and that is my understanding as well." *Id.*



are liable only for conduct with an improper purpose, rather than that which is frivolous on the merits.<sup>129</sup> Nevertheless, the change will have a chilling effect on parents and their attorneys, inducing some parents to forgo valid claims for fear of an incorrect decision that the claim is frivolous.<sup>130</sup> What remains unclear is the magnitude of the effect. Little evidence of improper parental due process hearing litigation was presented in the legislative history of IDEIA,<sup>131</sup> so there is not much to be gained from the provision. What needs to be learned is how much will be lost.

## 2. Settlement Promotion

Procedures to facilitate settlement received a major reworking in IDEIA. Mediation must now be available for all matters, even those arising before the filing of a due process hearing request, or completely independent of a request.<sup>132</sup> Notably, there is no provision for attorneys' fees against the parents for a frivolous or improper request for mediation, and it may be hard to imagine just what would constitute such a frivolous request. But the imposition of fees for baseless due process hearing complaints, combined with the availability of mediation for all disputes, even those for which due process hearings are not contemplated, suggests that mediation requests might take the place of due process hearing requests in instances where the parents are fearful of attorneys' fees liability. This may not be a bad thing. A parent may lack the sophistication to know precisely what is wrong with the child's educational program and may lack the skills to compose a sensible due process complaint. But there may be something wrong, procedurally or with the substance of the program, that an experienced mediator from outside the target school system will recognize and induce the school system to fix.<sup>133</sup> Reports on the success of the existing mediation provisions suggest that mediation may well fill this beneficial role.<sup>134</sup>

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129. 20 U.S.C.A. § 1415(i)(3)(B)(i)(III).

130. Even the threat of government sanction that may ultimately be found invalid will discourage people from exercising their rights. *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

131. The topic is not discussed in any of the congressional reports.

132. 20 U.S.C.A. § 1415(e)(1).

133. The mediator must be impartial, and not an employee of the school system involved in the dispute, though under the proposed regulations the person may be an employee of another school system. 70 Fed. Reg. 35,808 (proposed June 21, 2005); see 70 Fed. Reg. 35,870 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.506(c)).

134. See Damon Huss, Comment, *Balancing Acts: Dispute Resolution in U.S. and English Special Education Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 347, 359 (2003) ("The mediation provision's design . . . nurtures and protects positive relationships between parents and the educational authorities."). The mediation process is, however, vulnerable to the power disparity between school district insiders and inexperienced parent complainants, particularly parents who cannot afford lawyers. See *id.* at 361-62. Reviews of mediation typically are mixed. See Grace E.

For due process disputes that are not mediated, IDEIA introduces something called a “resolution session,” essentially an unmediated settlement conference between the parents and relevant school district personnel, including someone with decisionmaking authority from the district.<sup>135</sup> Unless the parent brings an attorney, the school district may not bring one.<sup>136</sup> Whether this new mechanism will accomplish anything worthwhile is unclear. It does not solve the problem of the power disparity between the repeat-player district and the single-time-player parent.<sup>137</sup> Although removal of the school attorney equalizes matters a little for the parents who have no lawyer, neither the statute’s terms nor the proposed regulations specify how far away the school district lawyer must stay. It takes little imagination to conjure something like a grand jury proceeding in which someone is continually leaving the room to consult with the attorney.<sup>138</sup>

If the parent and school district reach an agreement in the resolution session, the parties execute a legally binding document, which may be enforced directly in court; either party, however, may void the settlement agreement within three business days of the day it was signed.<sup>139</sup> Unlike the situation with mediation discussions,<sup>140</sup> there is no explicit provision guaranteeing confidentiality of resolution session discussions.<sup>141</sup> Like agreements reached at the resolution session, agreements reached at

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D’Alo, *Accountability in Special Education Mediation: Many a Slip ‘Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 240-42 (2003) (reporting on the basis of a Pennsylvania study that mediators were more successful in averting due process hearings than in building lasting relationships between parents and schools or achieving other objectives); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 60-61 (1997) (reporting on the basis of a New Jersey study, “[p]articipants in this study generally expressed only mild satisfaction with mediation and perceived it only as a modestly fair procedure,” and noting power imbalance concerns).

135. 20 U.S.C.A. § 1415(f)(1)(B)(i)(I)-(II). The procedure may be waived if both parties agree. 20 U.S.C.A. § 1415(f)(1)(B)(i)(IV).

136. 20 U.S.C.A. § 1415(f)(1)(B)(i)(III).

137. See *supra* note 134 (discussing power disparities in mediation). See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (discussing litigation advantages held by litigants such as institutional defendants who repeatedly make use of the judicial system).

138. See *United States v. Soto*, 574 F. Supp. 986, 990 (D. Conn. 1983) (“Customarily, federal courts allow a non-immunized Grand Jury witness the opportunity to leave the Grand Jury room at any time, and consult with his or her attorney between questions.” (emphasis omitted)).

139. 20 U.S.C.A. § 1415(f)(1)(B)(iii)-(iv).

140. 20 U.S.C.A. § 1415(e)(2)(G).

141. Presumably, however, Federal Rule of Evidence 408 and its state equivalents would bar admission at hearing of offers to compromise and conduct or statements made in compromise negotiations at the resolution session. FED. R. EVID. 408.

mediation may be enforced directly in court, without any requirement of exhaustion of administrative remedies.<sup>142</sup>

IDEIA does not include any provision for binding arbitration, a proposal made by the President's Commission on Excellence in Special Education<sup>143</sup> and included in the original House bill.<sup>144</sup> The benefits of an arbitration procedure are hard to discern,<sup>145</sup> it is unlikely to be any less expensive or any faster than an administrative hearing, and would lack the many procedural protections that the hearings carry, including appeals. Congress wisely eschewed the option.

### 3. Hearing Officer Qualifications

Five years ago, a federal court in Maryland declared that "there is no federal right to a competent or knowledgeable [hearing officer]."<sup>146</sup> There is now.<sup>147</sup> Perhaps someone in Congress saw the opinion in that case and

142. 20 U.S.C.A. § 1415(e)(2)(F)(ii). The mediation provision does not have a three-day period for voiding the agreement. *See id.* Some courts have enforced settlements in special education cases without requiring exhaustion, even without the benefit of the provision explicitly providing jurisdiction for enforcement of mediation and resolution session agreements. *See McClendon v. Sch. Dist.*, No. 04-1250, 2004 WL 2440661, at \*2 (E.D. Pa. Oct. 29, 2004) (enforcing settlement); *Reid v. Sch. Dist.*, No. 03-1742, 2004 WL 1926324, at \*3, \*6 (E.D. Pa. Aug. 27, 2004) (entering damages judgment when district reneged on settlement); *see also Sch. Bd. v. M.C.*, 796 So. 2d 581, 583 (Fla. 2d DCA 2001) (holding that an action to enforce settlement should be brought in court rather than be the subject of new due process hearing).

143. PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, *supra* note 83, at 35.

144. H.R. 1350, 108th Cong. § 205 (2003) (establishing voluntary binding arbitration procedures in section 615(e)(2) of IDEA).

145. *See* Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN'S L.J. 1, 16 (2004) ("Binding arbitration is not really an appealing endeavor, and may well lead to a lose-lose situation between home and school."). *But see* Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 EDUC. L. REP. 35, 38 (2005) (proposing "the arbitration model of a single-session hearing without judicial appeal with very limited exceptions").

146. *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 583 (D. Md. 2000).

147. 20 U.S.C.A. § 1415(f)(3)(A)(ii)-(iv). According to this section,

[a] hearing officer . . . shall, at a minimum

- . . . possess knowledge of, and the ability to understand, the provisions of this title . . . , Federal and State regulations pertaining to this title . . . , and legal interpretations of this title . . . by Federal and State courts;
- . . . possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- . . . possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

*Id.*

was sufficiently outraged to include statutory language specifically overruling it.

#### 4. Hearing Officer Decision Enforcement

In the past, there has been no obvious means by which hearing officer decisions could be enforced. The remedies provision of the special education law does not seem readily applicable, for it establishes merely that a “party aggrieved by the findings and decision” of the hearing officer may file suit.<sup>148</sup> Courts have entertained actions to enforce decisions, however, reasoning either that 42 U.S.C. § 1983 provides a remedy to enforce a final administrative decision,<sup>149</sup> or that the remedy in the special education law implicitly covers the situation.<sup>150</sup> The new IDEA does not clarify where the ability to sue resides, but given the unanimity of the courts that it resides somewhere,<sup>151</sup> that is of no major importance. What is more noteworthy is that the proposed regulations recognize the ability to use the courts to enforce hearing officer decisions while at the same time appearing to concede that state educational agencies have been ineffective at hearing officer decision enforcement. Although the regulations previously provided that a “complaint alleging a public agency’s failure to implement a due process decision must be resolved by the [State Educational Agency],”<sup>152</sup> the proposed rules delete the provision with the explanation in the Notice of Proposed Rulemaking that “[t]he enforcement and implementation of due process hearing decisions are matters in the province of State and Federal courts.”<sup>153</sup>

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148. 20 U.S.C.A. § 1415(g)(2)(A).

149. *E.g.*, *Robinson v. Pinderhughes*, 810 F.2d 1270, 1274-75 (4th Cir. 1987). The Fourth Circuit has not departed from this decision even though it has ruled that there is no cause of action for damages under § 1983 for violations of the Individuals with Disabilities Education Act. *Sellers v. Sch. Bd.*, 141 F.3d 524, 532 n.6 (4th Cir. 1998).

150. *E.g.*, *Hark v. Sch. Dist.*, 505 F. Supp. 727, 731 (E.D. Pa. 1980) (stating that a plaintiff could be aggrieved not because of the hearing result but in spite of the hearing result).

151. *See, e.g.*, *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 115-16 (1st Cir. 2003) (holding that parents and students may sue under IDEA to enforce decision); *Porter v. Bd. of Trs.*, 307 F.3d 1064, 1065 (9th Cir. 2002) (holding that parents need not exhaust state remedies before filing suit under IDEA to enforce decision); *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 285 (3d Cir. 1996) (holding that parents and students did not have to exhaust the state appellate administrative process to sue under IDEA to enforce decision).

152. 34 C.F.R. § 300.661(c)(3) (2005).

153. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,782, 35,790 (June 21, 2005); *see* 70 Fed. Reg. 35,848-49 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.152) (designating minimum state complaint procedures).

### E. Discipline Procedures

IDEIA represents continuity, rather than abrupt change, for discipline procedures as well as many other aspects of special education law. In particular, it requires that no child can be excluded entirely from special education services for disciplinary reasons, but instead guarantees that free, appropriate public education must be available to all age-eligible children with disabilities, “including children with disabilities who have been suspended or expelled from school.”<sup>154</sup> As under previous law, that education may be provided in another setting if the behavior was not a manifestation of the child’s disability or the child engaged in one of several specified serious violations of school rules.<sup>155</sup> The important aspects of the new statute are an interesting provision requiring individualized treatment of children with disabilities,<sup>156</sup> the addition of infliction of serious bodily injury as a basis for exclusion of children from school even if their conduct is a manifestation of their disabilities,<sup>157</sup> tweaking of the manifestation rules,<sup>158</sup> a change in the maintenance of placement rule,<sup>159</sup> and modifications of the rules governing when a child is deemed disabled and thus protected by the law though not previously found eligible for special education.<sup>160</sup>

#### 1. Zero Tolerance and Individual Treatment

IDEIA contains a new provision that appears to be a slap at zero-tolerance policies, widely prevalent codes that treat various kinds of misbehavior in a uniform way without any consideration of extenuating circumstances or mitigating factors.<sup>161</sup> The language provides: “School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with

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154. 20 U.S.C.A. § 1412(a)(1)(A) (West 2005). A child who has been removed from the current placement, even for reasons of weapons possession, use or possession of drugs, or infliction of serious bodily injury on another, must “continue to receive educational services . . . so as to enable the child to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the child’s IEP.” 20 U.S.C.A. §§ 1415(k)(1)(G), 1415(k)(1)(D)(i) (West 2005).

155. 20 U.S.C.A. §§ 1415(k)(1)(D)(i), 1415(k)(1)(F)(ii), 1415(k)(1)(G).

156. *See infra* Part III.E.1.

157. *See infra* Part III.E.2.

158. *See infra* Part III.E.3.

159. *See infra* Part III.E.4.

160. *See infra* Part III.E.5.

161. *See generally* Elizabeth Amon, *School Rules Blues: “Zero Tolerance” Leads to Injustice for Pupils*, *Advocates Say*, NAT’L L.J., June 25, 2001, at A1 (describing zero-tolerance policies and listing criticisms of them).

a disability who violates a code of student conduct.”<sup>162</sup> As a provision of supreme federal law, it overrides any contrary state or local provision establishing a disciplinary regime that does not account for unique circumstances or use a case-by-case approach to misconduct by students with disabilities.<sup>163</sup> Since the special education disciplinary provisions themselves require consideration of the unique situation of the child with a disability in various situations,<sup>164</sup> the added impact of the new provision may not be great, but it may play a yet-undetermined role in future discipline cases.

## 2. Serious Bodily Injury

Federal special education law previously allowed the removal of a child with a disability from the child’s current educational placement for up to forty-five days<sup>165</sup> for a violation of a school rule, even if the misconduct was a manifestation of the child’s disability, in two circumstances: (1) if the child brought a weapon to school, school premises, or a school function, and (2) if the child knowingly possessed or used illegal drugs or sold or solicited the sale of a controlled substance, at school, on school premises, or at a school function.<sup>166</sup> To these two conditions, IDEIA adds a third: if the child inflicts serious bodily injury upon another person while at school, with bodily injury defined as it is in the federal criminal code.<sup>167</sup> One would hope that the occasions for invoking this provision will be few.

## 3. Manifestation Rules

Previous law established that a child’s misconduct had to be considered a manifestation of his or her disability, and thus not a basis for removal from the child’s current educational placement (absent the weapons or

162. 20 U.S.C.A. § 1415(k)(1)(A) (West 2005).

163. *Cf.* *G. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 304 (4th Cir. 2003) (establishing the supremacy of federal requirements over state requirements under IDEA).

164. *See, e.g.*, 20 U.S.C.A. § 1415(k)(1)(E) (requiring determination whether misconduct is a manifestation of disability).

165. IDEIA clarifies that this is “school days,” 20 U.S.C.A. § 1415(k)(1)(G), that is, under the proposed regulations, “any day, including a partial day, that children are in attendance at school for instructional purposes.” 70 Fed. Reg. 35,837 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.11(c)(1)).

166. 20 U.S.C.A. § 1415(k)(1)(A)(ii) (West 2004).

167. 20 U.S.C.A. § 1415(k)(7)(D) (West 2005). Bodily injury is “a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.” 18 U.S.C.A. § 1365(h)(4) (West 2005). The bodily injury is serious when it involves “a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” 18 U.S.C.A. § 1365(h)(3).

drugs situations described above) unless, after reviewing relevant information, the individualized education program team determined that:

(I) in relationship to the behavior . . . , the child's IEP [individualized education program] and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.<sup>168</sup>

This language has been replaced with a passage saying that the school district, the parent, and relevant members of the individualized education program team must review the information and determine: "(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's [i.e., the school district's] failure to implement the IEP."<sup>169</sup> If either condition applies, the conduct must be determined to be a manifestation of the disability.<sup>170</sup>

The obvious goal of the statutory change is to diminish the number of cases in which the school district must find that the behavior was a manifestation of the disability and cannot remove the child from the current educational setting. Failure to provide an appropriate education covers a broader range of circumstances than failure to implement services called for on the IEP. Impairment of the ability to understand the consequences of actions or control behavior covers a broader range than conduct that has a direct and substantial relation to the disability. The difference between the two statutory approaches mirrors the split in the courts' view of the question of behavior as a manifestation of disability in the period before the 1997 codification of the manifestation principle.<sup>171</sup>

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168. 20 U.S.C.A. § 1415(k)(4)(C)(ii) (West 2004).

169. 20 U.S.C.A. § 1415(k)(1)(E)(i) (West 2005).

170. 20 U.S.C.A. § 1415(k)(1)(E)(ii).

171. *Compare* Sch. Bd. v. Malone, 762 F.2d 1210, 1216 (4th Cir. 1985) (applying a broad view of manifestation to cover a child with a learning disability with a need for peer approval involved as a go-between in drug transactions), *with* Doe v. Maher, 793 F.2d 1470, 1480 n.8 (9th Cir. 1986) ("[A] handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls."), *aff'd in part, modified in part sub nom.* Honig v. Doe, 484 U.S. 305 (1988).

There may be little that an advocate of one or the other view can do to persuade someone convinced of the opposite position.<sup>172</sup> What both may agree on, however, is that school districts should strive to avoid student misconduct in the first place by creating for each child with behavioral difficulties a behavior intervention plan, and by incorporating this plan into the child's individualized education program. The new statute, unfortunately, does nothing to change the statutory language that explicitly requires a behavioral intervention plan only after a determination has been made that a child has engaged in serious misconduct warranting disciplinary action.<sup>173</sup> Although some courts have held that school district programs that lack adequate behavioral intervention services do not meet the basic standard of providing appropriate education,<sup>174</sup> others have accepted school districts' excuses for failure to have adequate plans in place when children act out.<sup>175</sup> A statutory change to endorse the view of the first category of courts would have been salutary.

#### 4. Maintenance of Placement in Discipline Appeals

Under pre-IDEIA law, in case of an appeal from a disciplinary removal decision, the child could be removed from the current placement and kept in an interim alternative educational setting until the hearing decision, but in no case for more than forty-five days, and an expedited hearing was to be afforded.<sup>176</sup> Under IDEIA, the child is to remain in the interim alternative educational setting until the hearing decision or the period of removal imposed for the disciplinary infraction ends, whichever occurs

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172. Discipline policy for students with disabilities has given rise to substantial controversy. See, e.g., Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 6 (2000) (arguing that the 1997 IDEA amendments fail to improve school discipline and undermine public schools); Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 127 (2000) (illustrating gaps left by the 1997 IDEA amendments in the area of school discipline).

173. 20 U.S.C.A. §§ 1415(k)(1)(D)(ii), 1415(k)(1)(F).

174. *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1028 (8th Cir. 2003) (finding a denial of appropriate education); *Chris D. v. Montgomery County Bd. of Educ.*, 743 F. Supp. 1524, 1532 (M.D. Ala. 1990) (requiring placement at a private school offering behavior modification program); *Liscio v. Woodland Hills Sch. Dist.*, 734 F. Supp. 689, 699 (W.D. Pa. 1989) (requiring placement in specialized school for academic subjects), *aff'd*, 902 F.2d 1561 (3d Cir. 1990) (unpublished table decision).

175. See, e.g., *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 616 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 628 (2004) (finding no denial of appropriate education in failure to provide more intensive behavioral intervention plan, in light of rapid deterioration of child's behavior).

176. 20 U.S.C.A. §§ 1415(k)(1)(A)(ii), 1415(k)(7)(B)-(C) (West 2004).



first.<sup>177</sup> As before, an expedited hearing is to take place.<sup>178</sup> The impact of this change is uncertain. Even under previous law, the interim placement could be extended by agreement of the parties.<sup>179</sup> Moreover, courts have entered injunctions to keep children with disabilities from their current placements on the ground that the child's behavior constitutes an ongoing threat to the child or others,<sup>180</sup> either implicitly or explicitly<sup>181</sup> finding that their authority to do so was not preempted by the specifics of the special education law regarding hearing officer authority to order the removal of children with disabilities on the ground of dangerousness.<sup>182</sup> It is not clear how many children who will violate school rules and will be kept out of their current placements for longer than forty-five days pending hearing would not have been excluded for extended periods by operation of agreements or injunctions (or agreements on the threat of injunctions).

### 5. Deeming a Child Disabled

IDEIA and the law that preceded it both provide that a child not yet determined to be an eligible child with a disability may assert the protections against imposition of ordinary discipline found in the special education law if the school district had knowledge that the child was in fact a child with a disability before the misconduct occurred.<sup>183</sup> What has changed is the set of circumstances under which the school district must be deemed to have that knowledge. Under the new law, deeming occurs if the parent of the child expressed concern, in writing, to supervisory or administrative personnel of the district, or to the child's teacher, that the child needed special education and related services; or the parent requested

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177. 20 U.S.C.A. § 1415(k)(4)(A) (West 2005). The period may not exceed that which would apply to a child without disabilities. 20 U.S.C.A. § 1415(k)(1)(C).

178. 20 U.S.C.A. § 1415(k)(4)(B). The state or school district must arrange for the hearing; the hearing is to "occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing." *Id.*

179. 20 U.S.C.A. § 1415(k)(7)(A) (West 2004).

180. *E.g.*, *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228 (8th Cir. 1994); *Walton Cent. Sch. Dist. v. Kirk*, 28 Individuals with Disabilities Educ. L. Rep. 597 (N.D.N.Y. 1998); *Roslyn Union Free Sch. Dist. v. Geffrey W.*, 740 N.Y.S.2d 451, 453 (App. Div. 2002). The Supreme Court recognized the existence of this power on the part of the courts before the enactment of the 1997 revisions to the special education statute, which codified manifestation review and permitted exclusion from current settings in various circumstances. *See Honig v. Doe*, 484 U.S. 305, 325-26 (1988). Interim services, of course, must continue even if a court grants an injunction to keep the child from the current placement. *See id.* at 326 (discussing change of placement).

181. *Gadsden City Bd. of Educ. v. B.P.*, 3 F. Supp. 2d 1299, 1302 (N.D. Ala. 1998). *But see Gilbert Unified Sch. Dist. v. K.M.*, 39 Individuals with Disabilities Educ. L. Rep. 187 (D. Ariz. 2003) (requiring a school district to exhaust the hearing officer procedure).

182. *Cf.* 20 U.S.C.A. §§ 1415(k)(3)(A), 1415(k)(3)(B)(ii)(II) (West 2005) (granting the hearing officer the authority to order a temporary change of placement for dangerous child).

183. 20 U.S.C.A. § 1415(k)(5)(A) (West 2005); 20 U.S.C.A. § 1415(k)(8)(A) (West 2004).

an evaluation; or the teacher of the child or other district personnel expressed specific concerns about a pattern of behavior directly to the director of special education or other supervisory personnel.<sup>184</sup> The revision removes the requirement that the school be deemed to have knowledge if the behavior or performance of the child demonstrated a need for such special education and related services,<sup>185</sup> and removes an exception to the “expressed concern in writing” provision for a parent who is illiterate or has a disability preventing compliance.<sup>186</sup> The new law also contains exceptions to the deeming requirement for instances where the parent has not allowed an evaluation of the child or has refused special education services, and where the child has been evaluated and found not to be a child with a disability for purposes of the law.<sup>187</sup>

The impact of the restrictions on deeming may be less than one might expect. After all, the changes merely affect when the school has to be found to have knowledge that the child has a disability. They do not affect the numerous other situations in which knowledge may exist irrespective of deeming rules. Fact-intense litigation may be the result of eliminating the various means of making the showing without presentation of more direct evidence of knowledge.

#### F. *Summary of Changes*

The changes outlined above are merely those that appear most worthy of comment at the present time. Other new provisions that may gather significance over the years are permission for waivers to use three-year individualized education programs for up to fifteen states;<sup>188</sup> allowance for four-year general paperwork reduction waivers for up to fifteen states;<sup>189</sup> requirements to gather data on ethnic disproportionality in services and other topics;<sup>190</sup> elimination of short-term objectives on the individualized education program unless the child is assessed under alternate standards;<sup>191</sup> a clarification that related services do not include surgically implanted devices, expanded by the proposed rules to also exclude optimization of the device’s functioning;<sup>192</sup> and various alterations to funding

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184. 20 U.S.C.A. § 1415(k)(5)(B) (West 2005).

185. *See* 20 U.S.C.A. § 1415(k)(8)(B)(ii) (West 2004).

186. *See* 20 U.S.C.A. § 1415(k)(8)(B)(i) (West 2004).

187. 20 U.S.C.A. § 1415(k)(5)(C) (West 2005).

188. 20 U.S.C.A. § 1414(d)(5)(A)(i)-(ii) (West 2005).

189. 20 U.S.C.A. § 1414(d)(5)(A)(ii).

190. 20 U.S.C.A. § 1418(d) (West 2005).

191. 20 U.S.C.A. § 1414(d)(1)(A)(i).

192. 20 U.S.C.A. § 1401(26)(B) (West 2005); Notice of Proposed Rulemaking, 70 Fed. Reg. 35, 782-35, 839 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.34(b)). The statutory provision appears to be aimed primarily at cochlear implants. *See generally* RUTH COLKER ET AL.,

mechanisms.<sup>193</sup> Even the sum total of the changes, however—both the five areas highlighted in the previous subsections and the others listed in this paragraph—represent more continuity than dramatic change. Would that one could say with assurance that those changes made are changes for the better, but a more guarded assessment seems more sensible.

#### IV. CLARITY, PLEASE

Enough of continuity with previous law. There are several topics flagged by contemporary scholars on which Congress could have spoken, and, had it done so, could have broken a pattern of serious conflict in the interpretation of the special education statute.<sup>194</sup> Opinions will, of course, differ on how these issues should be resolved, but at the least, resolving the controversies in one direction or the other should be on the agenda for lawmakers in the future. The disputes include the operation of presumptions in cases in which parents seek less restrictive environments for their children than school districts are willing to offer, and the availability of intensive applied behavioral analysis programs for children with autism.<sup>195</sup>

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THE LAW OF DISABILITY DISCRIMINATION 125 n.1 (4th ed. 2003) (discussing cochlear implants and collecting sources on the topic).

193. See, e.g., 20 U.S.C.A. § 1411 (West 2005).

194. The regulators could conceivably issue some form of useful interpretation on the first issue, but given the congressional restriction on permissible regulations, it seems only Congress can act to resolve matters of this significance. See *supra* text accompanying notes 29-32.

195. One open topic with respect to interpretation of the federal special education law is which party has the burden of persuasion at a hearing on the issue of whether the school district is offering the child an appropriate education. *Weast v. Schaffer*, 377 F.3d 449, 452, 456 (4th Cir. 2004) (placing the burden of proving that IEP did not provide appropriate education on a parent challenging the program), *cert. granted*, 125 S. Ct. 1300 (2005). The Supreme Court's grant of certiorari presumably means that the question will be resolved soon. This does not mean that it will be resolved to the satisfaction of the current Congress, however, so overturning the result in the *Schaffer* case, see *supra* notes \_\_\_ and accompanying text, could also be on the agenda, whatever that result may be. There are, of course, additional open issues of great contemporary importance as well, such as the availability of compensatory damages relief in special education cases, see Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465 (2002); Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079 (2002) [hereinafter Weber, *Harassment*]; Mark C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83 (2002), and the proper interpretation of the appropriate education requirement, see Johnson, *supra* note 120, at 561-62; Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. LEGAL COMMENT. 675 (2004), but let the two issues identified in the text suffice for the present discussion while the others percolate in the courts and the scholarship.

### A. *Presumptions Regarding Placement in the Least Restrictive Environment*

Under *Board of Education v. Rowley*,<sup>196</sup> the presumption is that the program offered by the local school district satisfies the requirement of providing free, appropriate public education.<sup>197</sup> Under the least restrictive environment provisions of the statute, the presumption is that the program that maximizes education with children without disabilities is favored.<sup>198</sup> What happens if the parents challenge the program offered by the local school district on the ground that it does not maximize education with children without disabilities, and demand a less restrictive setting for the child? Which presumption governs?

The usual answer has been that the *Rowley* presumption does not govern when parents bring least restrictive environment claims. The least restrictive environment presumption controls. A year after the *Rowley* decision, in *Roncker v. Walter*<sup>199</sup> the Sixth Circuit Court of Appeals confronted a challenge by parents to a school district's decision to place a child with multiple developmental disabilities in a specialized county school for children with mental retardation.<sup>200</sup> The court vacated a decision upholding the school system's choice of a segregated placement, instructing the district court on remand to apply the "strong [congressional] preference in favor of mainstreaming."<sup>201</sup> The court said that *Rowley* was simply inapplicable:

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196. 458 U.S. 176 (1982). *Rowley* involved a claim for sign language interpretation services for a deaf first-grader who was already receiving the use of a wireless hearing aid system, tutoring, and speech therapy. *Id.* at 184. The Court ruled that since the services already being offered enabled the child to perform better than the average child in her class and to advance easily from grade to grade, the appropriate education standard was met in her case without the addition of the interpretation services. *Id.* at 209-10. In the course of the decision, the Court held that the standard for appropriate education is not that which maximizes the potential of children with disabilities proportionally to the maximization of children without disabilities. *Id.* at 189-90. Instead, the standard requires meaningful access to public education, that is, some adequate educational benefit. *Id.* at 192-94, 200-01. The Court further stated that the decisions of the state and local educational authorities about educational methods and theories should not be second-guessed. *Id.* at 207-08.

197. *See id.* at 207-08.

198. 20 U.S.C.A. § 1412(a)(5)(A) (West 2005). The statute provides:

To the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [must] occur[] 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.

199. 700 F.2d 1058 (6th Cir. 1983).

200. *Id.* at 1060-61.

201. *Id.* at 1062-63.

*Rowley* involved the appropriate education requirement while the present case involved the mainstreaming requirement.<sup>202</sup> Decisions about appropriate education require deference to school district choices, but “[t]he perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept” on the part of school authorities.<sup>203</sup>

Courts have generally followed *Roncker* and distinguished *Rowley* when parents demand a less restrictive setting for their child than the one offered by the school district.<sup>204</sup> The cases are hardly uniform, however,<sup>205</sup> and the educator Michael Hazelkorn has pointed out in a recent article, the Seventh Circuit’s 2002 decision in *School District v. Z.S.*<sup>206</sup> adopted an approach that employs extreme deference to the decision of the school district even when least restrictive environment is at issue, simply asking whether the decision is reasonable.<sup>207</sup> In *Z.S.*, the presumption in favor of school district decisionmaking<sup>208</sup> erases the least restrictive environment presumption altogether.

*Z.S.* involved a child with characteristics of autism and other disabling conditions and who displayed abnormally aggressive behavior throughout his school career.<sup>209</sup> After a placement in a mental health facility, an unsuccessful return to public school, an unsuccessful placement at a specialized school, and a delay of one month, the school district offered to provide him with home instruction six hours a week and occupational therapy another hour a week.<sup>210</sup> The child’s guardian challenged that decision, requesting instead that he be returned to public school with

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202. *Id.* at 1062.

203. *Id.* at 1063.

204. See Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL’Y 147, 151-56 (2001) [hereinafter Weber, *Least Restrictive Environment*] (discussing additional leading authorities); see also WEBER, *supra* note 22, § 9.2 n.87 (collecting cases). For a recent example of a court employing such an approach, see *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004) (“[T]he [least restrictive environment] requirement is a specific statutory mandate. It is not, as the district court . . . mistakenly believed, a question about educational methodology.”).

205. See WEBER, *supra* note 22, § 9.2 nn.60-61 (collecting cases).

206. 295 F.3d 671 (7th Cir. 2002).

207. Michael Hazelkorn, *Reasonable v. Reasonableness: The Littlegeorge Standard*, 182 EDUC. L. REP. 655, 679-80 (2004). Littlegeorge is the name of the legal guardian of *Z.S.* *Id.* at 663. Hazelkorn is assistant superintendent of the school district that was sued in *Z.S.*, and as his article notes, he was closely involved in defending the school district. *Id.* at 666-67, 670-71. However, the article, though by no means expressing disapproval of the result in the case, stresses just how extreme the court’s position is in its deference to the school’s placement decision. *Id.* at 679 (“[T]he court in [*Z.S.*] has in effect established a new standard that is highly deferential to schools.”).

208. *Z.S.*, 295 F.3d at 676-77.

209. *Id.* at 672.

210. *Id.* at 673.

behavior control provided by a full time aide.<sup>211</sup> The guardian won at the hearing officer level but lost in the district court, and the circuit court affirmed.<sup>212</sup> Although the bulk of the opinion discusses the standard of review to be employed in special education cases by the district court for hearing officer decisions and courts of appeals for district court decisions, at the end the court turned to the legal standard for the hearing officer in evaluating the case in the first instance.<sup>213</sup> The court held that the “critical issue . . . was whether the school administrators were unreasonable . . . in thinking it would be a mistake to send Z.S. back to his regular public school.”<sup>214</sup> Ignoring cases cited in the first paragraph of the opinion that established that *Rowley* was not laying down a rule for least restrictive environment cases, and not applying the court’s own declaration that the Act “expresses a strong preference for ‘mainstreaming’ (the statutory term is ‘least restrictive environment’),”<sup>215</sup> the court stated that reasonableness was the standard and declared the school district’s decision “not unreasonable.”<sup>216</sup>

It is possible that the same decision could have been reached in *Z.S.* had the court applied a presumption in favor of education to the maximum extent appropriate with children without disabilities. If no additional services would enable the child to succeed in the mainstreamed environment because of his behavior or other considerations, the presumption in favor of mainstreaming would be overcome. But a presumption in favor of the least restrictive setting is no presumption at all when the question the court asks is merely whether a school district made a reasonable choice of educational methods under the *Rowley* standard. In light of *Z.S.*, it appears that if Congress wants the presumption taken seriously, it needs to clarify that the presumption applies so as to overcome any contrary rule of deference to school district decisionmaking.

One prominent authority recently questioned the desirability of continuing to have a presumption in favor of the least restrictive environment. Professor Colker argues that the justification for the presumption originally lay with the need to close inhumane state schools for children with mental retardation and other severe disabilities.<sup>217</sup> She contends that more restrictive settings will sometimes be more effective

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211. *Id.* at 673.

212. *Id.* at 673, 677.

213. *Id.* at 675-76. The court endorses applying a clear-error or substantial-evidence standard, at least when little or no new evidence is heard by the district court. *Id.* at 675.

214. *Id.* at 676 (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)).

215. *Id.* at 672 (quoting 20 U.S.C. § 1412(a)(5) (1999)).

216. *Id.* at 677.

217. Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. (forthcoming 2005) (manuscript at 2, on file with author), available at <http://ssrn.com/abstract=691464>.

in educating children with disabilities; thus “a fully integrated education, with proper support in the mainstream classroom, is appropriate for some children with disabilities but it makes little sense to *presume* that that result is the best result in advance of an individualized evaluation.”<sup>218</sup> Unpacking the evidence that Colker presents, it emerges that the primary reason integrated programs are sometimes less successful than separate schooling is that the integration is done badly: Teachers in mainstreamed settings are poorly trained at instructing students with mental retardation, mainstream classrooms have excessive student-teacher ratios to provide optimal education of such children, and peers as well as authority figures frequently harass or otherwise impose stigma on children with disabilities, especially students who have learning disabilities and emotional or intellectual impairments.<sup>219</sup> The rest of the criticism of the integration presumption is that there is a shortage of controlled studies showing mainstreaming to be more effective educationally.<sup>220</sup>

Although Colker’s paper demonstrates the need to improve mainstreamed education, that is, to add services to make it work,<sup>221</sup> to improve teacher training, and to enforce prohibitions on harassment,<sup>222</sup> the research provides no basis to remove the judicial presumption in favor of mainstreamed education. A presumption should be applied in favor of a particular proposition when policy demands it, when inability to obtain access to evidence justifies it, or when the proposition is more probably correct in the run of litigated cases.<sup>223</sup> The policy in favor of integration is strong. As Senator Stafford, one of the drafters of the original Education for All Handicapped Children Act, remarked, the underlying social purpose of the law was to bring children with disabilities into the ordinary classroom so that these children could learn to work with children without disabilities and children without disabilities would learn to work with them.<sup>224</sup> Considerations of access to evidence also support the presumption. The presumption should lie against the side with the better ability to disprove the proposition. Obviously, that is the school in the situation of a contest over the placement of a child with a disability. If mainstreaming cannot work, it is the school system that will have the

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218. *Id.* at 42.

219. *Id.* at 44, 46, 51-52.

220. *See, e.g., id.* at 49.

221. For additional argument in support of strengthening supportive services, see Weber, *Least Restrictive Environment*, *supra* note 204, at 148-49, 158.

222. For additional argument in support of strengthening prohibitions on harassment, see Weber, *Harassment*, *supra* note 195, at 1085.

223. Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12-13 (1959).

224. Robert T. Stafford, *Education for the Handicapped: A Senator’s Perspective*, 3 VT. L. REV. 71, 72 (1978).

evidence of it, so one should presume that an integrated setting is better until that is disproved. Finally, is the integrated setting better in the run of instances? Although Colker may argue that it is not, the key question is not exactly that. It is not whether mainstreaming is better<sup>225</sup> for the larger number of children, but instead whether it is better in the larger number of litigated cases.<sup>226</sup> When parents push for a more integrated program all the way to a due process hearing or beyond and the school system resists, it is unlikely that the parents are the ones caught in the vise of standard operating procedure. School officials are more likely protecting their own interests, not those of the student, in such a contest.

Be all that as it may, *Z.S.* highlights the need for clarification of the least restrictive environment presumption embodied in the special education law, if the presumption is to be effective. If it is to be abolished, it should be a considered congressional decision, not an off-hand ruling by a court preoccupied with other issues.

### B. Autism Programs

A second issue on which congressional action would be welcome is that of educational programs for children with autism. The incidence of autism has skyrocketed in recent years, either because of changes in environmental conditions that are not fully understood or because of trends in diagnosis and reporting.<sup>227</sup> At the same time, therapies have emerged

225. This argument, of course, bypasses the issue of what "better" means, specifically whether some things that defy measurement, such as learning how to learn from, value, and get along with others who are different, may be of greater importance to one's development as a human being than things that are measured in educational testing. This consideration overlaps to some degree with the policy issue discussed in the text, but it operates to further undermine the position of those who would challenge the mainstreaming presumption on grounds of measurable educational efficacy as though that were the only goal of schooling. Of course, if schools do not implement mainstreaming properly, and students are subjected to isolation or harassment within mixed classes, the less measurable goals will be frustrated as well. That, however, is a reason to implement mainstreaming properly, not to abandon it.

226. See Cleary, *supra* note 223, at 13.

227. Useful statistics and discussions of causation and response are found on the website of the Autism Society of America. See, e.g., Autism Society of America, What Is Autism?, <http://www.autism-society.org/site/PageServer?pagename=whatisautism> (last visited Sept. 23, 2005).

Autism is the most common of the Pervasive Developmental Disorders, affecting an estimated 1 in 166 births (Centers for Disease Control Prevention, 2004). Roughly translated, this means as many as 1.5 million Americans today are believed to have some form of autism. And this number is on the rise. Based on statistics from the U.S. Department of Education and other governmental agencies, autism is growing at a startling rate of 10-17 percent per year.



that offer significant hope for enabling children with autism to make developmental gains and, over time, to hold their own in educational and other settings.<sup>228</sup> These therapies, variously referred to as applied behavioral analysis, discrete trial training, or Lovaas therapy, may not be as effective as their proponents believe they are, but they are backed by solid evidence of enabling children to make substantial developmental progress.<sup>229</sup> Before the development of these new therapies, children with autism were frequently institutionalized.<sup>230</sup> Parents are desperate to find solutions that will enable their children to integrate educationally and socially on a plane of equality with other children.<sup>231</sup>

The problem for the schools is less that they entertain skepticism about these therapies, although some school systems do. It is more that these therapies are quite expensive<sup>232</sup> and require great departure from the way schools ordinarily do things. A program may require forty hours a week of one-on-one behavioral drills in the home with a specially trained individual.<sup>233</sup> Parents demanding the programs are rarely interested in in-school programs providing fewer hours of mixed therapeutic intervention, even though some districts have made significant investments in creating mixed-therapy, school-based programs.<sup>234</sup> The programs being demanded

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*Id.*

228. For an accessible discussion, see Laurie Tarkan, *Autism Therapy Is Called Effective, But Rare*, N.Y. TIMES, Oct. 22, 2002, at F1.

229. See Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 246 (2005) (collecting sources) (“Studies indicate [applied behavioral analysis] is an effective approach in teaching children with autism. What is more controversial in the literature is whether ABA can ‘cure’ autism, and also whether to be effective it must be the only approach used, and be used at intensive levels such as 20 to 40 hours per week.”) (footnote numbers omitted).

230. See Autism Society of America, Treatment and Education, <http://www.autism-society.org/site/PageServer?pagename=TreatmentEducationOverview> (last visited Sept. 23, 2005) (“A generation ago, many people with autism were placed in institutions.”).

231. See Seligmann, *supra* note 229, at 246.

232. See Tarkan, *supra* note 228 (reporting an average cost of \$33,000 per year).

233. See *Dong v. Bd. of Educ.*, 197 F.3d 793, 797 (6th Cir. 1999) (describing typical discrete trial training program).

234. See *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 859 (6th Cir. 2004). The court described the school district’s attitude after establishing its own specialized program for autistic children:

The School System seemed to suggest, at oral argument, that it is entitled to invest in a program such as TEACCH [Treatment and Education of Autistic and Related Communication Handicapped Children] and then capitalize on that investment by using the TEACCH program exclusively. But this is precisely what it is *not* permitted to do, at least without fully considering the individual needs of each child.

do not conform to usual school methods or hours. If the parents' wishes are granted, services must be provided not in groups but one-on-one, typically at home, and for periods that far exceed the ordinary six-to-seven-hour school day.<sup>235</sup>

Not surprisingly, many schools resist parents' demands for these programs. Initially, the courts generally sided with the schools, typically ruling that although the programs might be superior to what the schools offered, the schools have the power to choose educational methods and need merely provide an adequate education.<sup>236</sup> A number of cases have been decided in favor of the parents,<sup>237</sup> however, and a strong trend has recently emerged for courts to rule in favor of parents demanding the programs. Remarkably, over the last two years, five federal circuit courts of appeal decisions have either directly or indirectly supported parents' demands for applied behavior analysis-style programs.<sup>238</sup>

In a recent article,<sup>239</sup> Professor Seligmann discusses the controversy over requests that schools be forced to provide specialized autism interventions and analyzes a leading case denying the services, *T.B. v. Warwick School Committee*.<sup>240</sup> As Seligmann points out, courts that apply the *Rowley* some-educational-benefit standard and that follow *Rowley* in deferring to school district decisionmaking are hard pressed to uphold parents' demands.<sup>241</sup> *T.B.* is such a case in which *Rowley* comes home to

*Id.*

235. See, e.g., *id.* at 846.

236. See, e.g., *T.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 86 (1st Cir. 2004); *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1038 (8th Cir. 2000); *Dong*, 197 F.3d at 803; *Wagner v. Bd. of Educ.*, 340 F. Supp. 2d 603, 617 (D. Md. 2004); *J.P. v. West Clark Cmty. Schs.*, 230 F. Supp. 2d 910, 950 (S.D. Ind. 2002); *C.M. v. Bd. of Educ.*, 85 F. Supp. 2d 574, 595 (W.D.N.C. 1999).

237. See, e.g., *D.F. v. Ramapo Cent. Sch. Dist.*, 348 F. Supp. 2d 92, 96-97 (S.D.N.Y. 2004); *Bd. of Educ. v. Michael M.*, 95 F. Supp. 2d 600, 611-12 (S.D. W. Va. 2000); *T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 847 (N.D. Ill. 1999), *aff'd sub nom. Bd. of Educ. v. Kelly E.*, 207 F.3d 931 (7th Cir. 2000); see also cases cited *infra* note 243.

238. *County Sch. Bd. v. Z.P.*, 399 F.3d 298, 311 (4th Cir. 2005) (overturning reversal of a hearing officer decision that upheld parents' chosen applied behavioral analysis program and rejected the school district's proposal of a different program); *Deal*, 392 F.3d at 866 (requiring reimbursement for applied behavioral analysis services); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 978-79 (10th Cir. 2004) (awarding reimbursement to parents for applied behavioral analysis services and other services provided to the child in support of private mainstream education); *Bucks County Dep't of Mental Health/Mental Retardation v. Pennsylvania*, 379 F.3d 61, 75 (3d Cir. 2004) (affirming reimbursement under the Individuals with Disabilities Education Act Infants and Toddlers Program for parent's time in personally providing Lovaas therapy to daughter); *G. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003) (reversing and remanding denial of reimbursement for Lovaas services).

239. Seligmann, *supra* note 229, at 220-21.

240. 361 F.3d 80 (1st Cir. 2004).

241. Seligmann, *supra* note 229, at 268 ("Because of the *Rowley* deference standards, the reviewing court will not feel free to reject the school district's IEP even if it believes, on the

roost.<sup>242</sup> Those courts that decide in the opposite direction look for ways to diminish the relevance of *Rowley*.<sup>243</sup> Thus, they may assert that the program offered by the district does not confer adequate educational benefit, but they buttress their decisions by also relying on procedural failings on the part of the schools in the schools' decisions to deny the parents' request.<sup>244</sup> The school district may have failed to have a key individual at the meeting at which the decision was made.<sup>245</sup> Or the school might have an unofficial policy never to approve applied behavior analysis services, irrespective of the child's needs, violating the requirement that decisionmaking be truly individual.<sup>246</sup>

One way that parents can succeed on the merits without showing procedural violations and without the obstacle of *Rowley* is to rely on least restrictive environment considerations. The approach may not work if the court allows *Rowley*'s views about deference to school districts to trump least restrictive environment, but the majority approach remains that deference to local decisions about educational methods does not prevail when the parent challenges the placement decision on least restrictive environment grounds.<sup>247</sup> At first, it might seem paradoxical to say that a program featuring forty hours a week of one-on-one instruction at home is a less restrictive setting than placement in a group classroom in a public school building, even if the class is largely self-contained for children with disabilities. But the Tenth Circuit adopted precisely that view in a recent decision.

In *L.B. v. Nebo School District*,<sup>248</sup> the court rejected a school district's proposal for a young child with autism of a non-mainstreamed, mixed<sup>249</sup> preschool placement, some speech and occupational therapy, and eight to fifteen hours a week of applied behavioral analysis services.<sup>250</sup> The court upheld the parents' position that the child should have continued in a private, mainstreamed preschool class chosen by her parents, in which she had the assistance of an aide, and that she should have received thirty-five

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evidence, that the school district is wrong about how to appropriately meet the child's needs.").

242. *Id.* at 219, 267. *But see Deal*, 392 F.3d at 861-65 (stating that a program without adequate applied behavioral analysis services may fail meaningful-benefit standard of *Rowley*).

243. Seligmann, *supra* note 229, at 268.

244. *Id.*

245. *E.g.*, *Deal*, 392 F.3d at 859-61 (relying in part on the absence of a regular education teacher at meetings).

246. *E.g.*, *id.* at 855, 858, 859 (relying in part on evidence of a predetermined policy never to approve applied behavioral analysis programs).

247. *See supra* text accompanying notes 199-204.

248. *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 978 (10th Cir. 2004).

249. *See id.* at 968 n.1 (describing the district's preschool as a mixed environment focusing on special education while incorporating some typical children).

250. *Id.* at 968.

to forty hours of applied behavioral analysis services delivered primarily at home, to enable her to succeed in the mainstreamed preschool.<sup>251</sup> The parents did not request funding for the private preschool tuition, but they did demand the costs of the aide and applied behavioral analysis program.<sup>252</sup>

The evidence showed that the treatment of the behavior, social, and communication problems in the applied behavioral analysis program “was necessary to [her] ability to function in a mainstream school environment.”<sup>253</sup> The district contended that only eight to fifteen weekly hours of the therapy would be needed for the child to make educational progress.<sup>254</sup> The court, however, applied a test not of whether that amount would permit educational progress, but whether it would permit her to succeed in a mainstreamed educational setting.<sup>255</sup> The court appears to have been moved by the fact that although the child had quite severe disabilities, the program she received enabled her not just to make some educational progress, but to thrive. “Academically, [she] was the most advanced child at her private, mainstream preschool . . . .”<sup>256</sup> Removing her to a non-mainstreamed school like the one offered by the district would likely cause regression; most children who receive only ten hours a week of applied behavioral analysis cannot be successfully integrated into a mainstream classroom, and thirty or forty hours may be the minimum needed.<sup>257</sup>

The court stressed that the least restrictive environment requirement is an essential mandate, and it stated that the case turned on the consideration listed in the statute: whether the education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.<sup>258</sup> The answer had to be affirmative. A mainstream placement was succeeding, even surpassing expectations, both academically and in nonacademic matters such as social skills.<sup>259</sup> The thirty-five to forty hours of services at home were needed to support the mainstreamed placement, and so they had to be provided by the school district.<sup>260</sup>

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251. *Id.* at 968, 978.

252. *Id.* at 970.

253. *Id.* at 971-72.

254. *Id.* at 968.

255. *Id.* at 976-77.

256. *Id.* at 971.

257. *Id.* at 972.

258. *Id.* at 977-78.

259. *Id.* at 978.

260. *Id.* (“[Her] parents are entitled to reimbursement for the reasonable cost of the services provided to [her] in support of her mainstream preschool education.”).

The case is important not simply in showing how attention to the least restrictive environment mandate can take the inquiry out of the *Rowley* some-educational-benefit inquiry. It also develops the least restrictive environment inquiry itself, focusing on the mandate for related services to make mainstreaming work.<sup>261</sup> By making the ruling, the court overturned the tyranny of the six-to-seven hour school day by mandating thirty or more hours of weekly services at home on top of a regular preschool day. Standard operating procedure of the school was cast to the wind. How typical a case *L.B.* is remains uncertain. For some children, perhaps no level of outside services can make them succeed in a mainstreamed educational setting the rest of the day. These children, however, may be the ones most likely to succeed on a claim that intensive services are needed simply for them to make educational progress. *L.B.* provides them with precedent to overturn the attitudinal obstacles imposed by districts insisting on services only during the school day and only in the school building.

Even if those obstacles can be overcome, however, there remains the problem of cost. Seligmann refers to this issue as “the [e]lephant in the [r]oom” in the discussion of intensive autism services.<sup>262</sup> The school district in *L.B.* specifically disavowed reliance on cost considerations.<sup>263</sup> In other special education cases, courts have proven willing to impose obligations upon school districts that are very costly to fulfill.<sup>264</sup> Indeed, the United States Supreme Court required a school district to provide clean, intermittent catheterization to a student who needed it to remain in school the full school day,<sup>265</sup> just as it required a school district to maintain a quadriplegic child’s ventilator, including cleaning the breathing apparatus and maintaining the child’s breathing manually while the ventilator was being serviced.<sup>266</sup>

Nevertheless, there is no doubt that if a source of federal money were provided specifically for extraordinary interventions that may permit children to make great educational progress and promote long-term placement in general education classrooms, school districts would be more willing to agree to provide the services. Thus, the second area in which congressional action would be welcome is the creation of a funding stream

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261. See Weber, *Least Restrictive Environment*, *supra* note 204, at 148 (stressing a positive entitlement to services contained in the least restrictive environment obligation).

262. Seligmann, *supra* note 229, at 285.

263. *L.B.*, 379 F.3d at 977.

264. See, e.g., *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (requiring reimbursement of tuition for private school, and noting that “[t]here is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA”).

265. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 895 (1984).

266. *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999).

for intensive services for autism. If there are serious methodological reasons for opting not to provide applied behavioral analysis services, let school districts defend those decisions on the merits. But considerations of standard operating procedure and cost should be taken off the table.

#### V. CONCLUSION: NOT-QUITE-SO-SPECIAL EDUCATION

The improvements embodied in Individuals with Disabilities Education Improvement Act may be a little difficult to discern. The stress is on continuity, and most changes are, at best, double-edged. Some areas where real improvement could be achieved were not touched. But there is ground for optimism. The vision behind the primary congressional goal of coordinating the special education law with No Child Left Behind is that children with disabilities will indeed not be left behind. In other words, they will be performing at grade level or better, with the aid of specialized services, technology and accommodations, in the ordinary classrooms of the nation.<sup>267</sup> Only the tiny fraction of children with irremediable and very severe cognitive disabilities will have their progress measured against standards keyed to something other than academic achievement in line with that of nondisabled peers.<sup>268</sup> In the words of the President's Commission on Excellence in Special Education, the schools will finally recognize that "[c]hildren placed in special education [should be] . . . a gateway to more effective instruction and strong intervention."<sup>269</sup>

It is the vision of special education as something not all that special which should be driving reform. The vision should be that of children with disabilities whose progress is indistinguishable from that of their peers, due to intense and effective services and accommodations not restricted by the hours of the ordinary school day or the strictures of traditional educational programming. It is the vision of those children doing so, while mixed in with other children, without any stigma imposed on those who learn in different ways or with additional support.

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267. Pub. L. No. 108-446, 118 Stat. 2647, 2649 (codified in scattered sections of 20 U.S.C.A. §§ 1400-1482 (West 2005)).

268. *See supra* Part III.A.2.

269. PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, *supra* note 83, at 6.