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The Disability Integration Presumption: Thirty
Years Later

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Abstract

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The Disability Integration Presumption: Thirty Years Later

RUTH COLKER*

The fiftieth anniversary of the Brown v. Board of Education decision has spurred a lively debate about the merits of “integration.” This article brings that debate to a new context – the integration presumption under the Individuals with Disabilities Education Act (“IDEA”). The IDEA has contained an “integration presumption” for more than thirty years under which school districts should presumptively educate disabled children with children who are not disabled in a fully inclusive educational environment. This article traces the history of this presumption and argues that it was borrowed from the racial civil rights movement without any empirical justification. In addition, the article demonstrates that Congress created this presumption to mandate the closing of inhumane, disability-only educational institutions but not to require fully inclusive education for all children with disabilities. This article examines the available empirical data and concludes that such evidence cannot justify a presumption for a fully inclusive educational environment for children with mental retardation, emotional or mental health impairments, or learning disabilities. While this article recognizes that structural remedies, such as an integration presumption, can play an important role in achieving substantive equality, such remedies also need periodic re-examination. Modification of the integration presumption can help it better serve the substantive goal of according an adequate and appropriate education to the full range of children who have disabilities while still protecting disabled children from inhumane, disability-only educational warehouses.

INTRODUCTION

Since the Supreme Court decided *Brown v. Board of Education*,¹ the pendulum has swung back and forth within the African-American civil rights community on the benefits of

*Heck-Faust Memorial Chair in Constitutional Law, Michael E. Moritz College of Law, The Ohio State University. I would like to thank research assistants Christopher Geidner, Liza Luebke and Lana Knox for their excellent research that formed the basis for this article, as well as thank librarians Sara Sampson and Kathy Hall in the Moritz Law Library for their outstanding assistance. I would also like to thank the participants at the faculty workshop at Seton Hall Law School and the Moritz College of Law for their helpful comments and suggestions on an earlier version of this manuscript. This article particularly benefitted from conversations with Martha Chamallas, James Brudney, Sarah Cole, Elizabeth Emens, and Marc Spindelman. Finally, I thank Roanne Flom and Amanda Lueck for sharing literature with me concerning children with visual impairments. The research for this article was made possible, in part, by a Distinguished Scholar grant from the Ohio State University.

¹347 U.S. 483 (1954).

integration. In the wake of the *Brown* decision, widespread enthusiasm existed for integration.²

With the rise of the critical race movement and frustrations with implementation of integration, that enthusiasm waned.³ More recently, the pendulum has swung back towards support for integration in celebration of *Brown*⁴ and in response to attacks on affirmative action.⁵

²See generally Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885 (1993); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990). This support, however, was not monolithic. Charles Ogletree insists that many African-Americans viewed integration "with suspicion or something worse Many communities at the center of the battle for integration, represented by the crusading lawyers of the NAACP, would have welcomed something less than the full integration demanded by the civil rights lawyers." CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004).

³The re-examination of *Brown*'s integration legacy occurred within twenty years of the Supreme Court's decision. See Derrick Bell, *Serving Two Masters*, 85 YALE L. J. 470, 516 (1975) (arguing that civil rights' attorneys "single-minded commitment" to maximum integration led them to ignore parents' interests in quality education). See also DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); ROY L. BROOKS, *INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY* (1996). For a general discussion of the tension that can sometimes exist between lawyers and their clients in the class action context, see Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

⁴See, e.g., SHERYL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); James E. Ryan, *Schools, Race and Money*, 109 YALE L. J. 249 (1999). An internet search reveals that hundreds of programs were devoted to discussions of *Brown* on its fiftieth anniversary. National Public Radio created a several part segment to discussion of *Brown*. See <http://www.npr.org/news/specials/brown50> (visited on October 20, 2004). Howard University School of Law devoted its homepage to discussions of *Brown*. See <http://www.brownat50.org> (visited on October 20, 2004).

⁵In response to challenges to affirmative action programs in higher education, proponents collected data showing the success of affirmative action. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Richard O. Lempert, D.L. Chambers & T.K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000). Affirmative action in higher education admissions can be understood as one strategy to the achievement of integration because it increases the diversity of the institution. Researchers have also sought to defend the importance of integration at the primary and secondary school levels. This research often discusses evidence favorable to integration and ignores any contrary evidence. See, e.g., Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 950-54 (2002) (reporting research that indicates that "minority students are afforded more educational opportunities and achieve greater success in racially diverse schools"); But see Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1528-29 (2003) (acknowledging disagreements about desegregation's short-term effects on academic achievement).

Critics of educational integration argue that it has failed African-American students. See Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401 (1993); Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992); Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470 (1976). Others argue that racial integration can be more successful. See Sharon Rush, *The Heart of Equal*

Although the debate about integration in education has historically been a debate that has taken place in the context of race, that discussion is also relevant to the disability context. The disability civil rights movement has not had a sufficient dialogue on the merits of integration.⁶ Borrowing from the racial civil rights movement,⁷ the disability plaintiffs' bar urged adoption of the "integration presumption." The judiciary⁸ and the legislature⁹ were quickly receptive to these efforts and adopted the integration presumption. Under the integration presumption, as formulated in 1974, children with disabilities are to be educated with children who are not disabled "to the maximum extent appropriate" unless "the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁰ The

Protection: Education and Race, 23 N.Y.U. REV. OF L. & SOCIAL CHANGE 1 (1997); Nathanie. R. Jones, *Letter*, 86 YALE L. J. 378 (1976). In the most recent contribution to this debate, Richard Sander argues that affirmative action in law school admissions has harmed the interests of African-American students. See, e.g., Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, ___ STANFORD L. REV. ___ (2004).

⁶Deborah Rhode argues that class counsel in a 1974 disability integration case that resulted in the closer of Pennhurst, a disability-only institution, ignored the views of many parents and guardians who did not favor deinstitutionalization. See Rhode, *supra* note 3, at 1211-12. She argues that deinstitutionalization at the Pennhurst facility would have been more successful if plaintiffs' counsel had been willing to share their clients' concerns about deinstitutionalization with the court. *Id.* at 1259-62.

⁷See U.S. Department of Health, Education and Welfare, Office of Education, PROGRESS TOWARD A FREE APPROPRIATE PUBLIC EDUCATION: A REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT 31 (January 1979) (referring to *Brown*).

⁸See *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972).

⁹See Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1400 et seq. (1975)).

¹⁰Education Amendments of 1974, Public Law 93-380, section 613(a)(13)(B). See also Individuals with Disabilities Education Act, 28 U.S.C. § 1412(a)(5). Although states are supposed to develop criteria to implement this rule, the state regulations do little more than restate the federal requirements. For example, the Ohio regulations call this rule a "least restrictive environment" rule and add the following two requirements to the federal rules:

- (c) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.
- (d) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

thirtieth anniversary of the enactment of the integration presumption has *not* led to discussion about whether that strategy has been historically successful and continues to be the most appropriate educational strategy for all children with disabilities. In this article, I seek to begin that discussion.¹¹

I will argue that Congress was correct to enact the integration presumption in 1974 but that the integration presumption, as interpreted by the courts, needs to be modified.¹² I will not argue for the

Operating Standards for Ohio's Schools Serving Children with Disabilities, Section 3301-51-09.

But those additional requirements offer little guidance. The first requirement does not ask what is *best* for the child. Instead, it presumes that integration is preferable and offers a rationale to avoid integration when *harm* is actually demonstrated. The second requirement merely states when removal should *not* occur, but doesn't ask when integration is *appropriate*. Although the federal statute speaks in terms of *appropriateness*, neither the federal nor state rules identify criteria for determining when a fully integrated environment is appropriate. Integration is blindly presumed to be appropriate.

¹¹Predictably, I will be criticized for even beginning that discussion. When Madeline Will, the Assistant Secretary of Education, United States Department of Education, decided to fund studies on the effectiveness of full inclusion on children with disabilities in 1986, she was criticized for supporting such research because integration is a moral imperative that does not require empirical justification. See Madeline Will, *Educating Children with Learning Problems: A Shared Responsibility*, 52 EXCEPTIONAL CHILDREN 411 (1986).

¹²I will *not* be considering the needs of the child with a disability versus the needs of typical children in the classroom because *all* children are entitled to an adequate and appropriate education in our society. There are three ways in which the interests of nondisabled children might be considered, none of which will be the focus of this article. First, nondisabled children might have a right to an education free from undue disruption from a child with a disability. But Congress has already written into the IDEA ample safeguards when children with disabilities are disruptive and therefore need to be separated from other children; those rules are beyond the scope of this article. See 20 U.S.C. § 1415 (k) (placement in alternative educational setting for disciplinary reasons). The topic of segregation for disciplinary reasons is beyond the scope of this article. Second, one might argue that the decision whether to educate children in a segregated or integrated environment might have a cost impact on nondisabled children. One researcher has suggested that full inclusion may be somewhat less expensive on a per pupil basis than other educational configurations. See Jay G. Chambers, *The Patterns of Expenditures on Students with Disabilities A Methodological and Empirical Analysis*, in FUNDING SPECIAL EDUCATION 89, 99-103 (THOMAS B. PARRISH et al. eds. 1999). Nonetheless, I will not consider the relative cost of segregation versus integration because it is only a minor factor in the general cost of educating children with disabilities. This article does not generally challenge Congress's decision to subsidize the cost of educating children with disabilities and to require that all children with disabilities receive an adequate and appropriate education. See 20 U.S.C. § 1400(d)(purposes of the IDEA). I do recognize that cost may be a significant factor for rural school districts with small numbers of children with disabilities who are dispersed over a broad geographical area. In that context, I recognize that school districts may have cost and efficiency arguments for favoring education not at a child's local school. As I discuss in Part IB, that problem is handled by courts that distinguish between the integration requirement and a local public school preference. Third, I recognize that some people might argue that we should offer children with disabilities a fully integrated education for the benefit of typically developing children who are then exposed to a more diverse classroom. If a consequence of integration is the attainment of more respect of children with disabilities by others, then that is certainly a positive argument for integration. But I assume that we should determine the correct educational configuration of resources from the perspective of what would be most likely to benefit children with

complete dismantling of the integration presumption but will suggest that it needs to be narrowed and reinterpreted so that it achieves its underlying purpose of encouraging school districts to limit their use of disability-only institutions while also serving the goal of creating individualized educational programs for children with disabilities within the regular public school. Those individualized programs should *not* be subject to an integration presumption.

The adoption of the integration presumption in 1975 under the Education for All Handicapped Children Act,¹³ now called the Individuals with Disabilities Education Act,¹⁴ has had a profound impact on the education of children with disabilities. In the first fifteen years of implementation, the number of students classified as disabled in learning and provided with special education services rose from 797,212 in 1976-77 to 2,214,326 in 1991.¹⁵ Further, a presumption that children should be educated in the most integrated setting possible¹⁶ or what is also called “the least

disabilities – a victim-oriented perspective. See Mari J. Matsuda, *Looking at the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. REV. 323 (1987). The question of whether typically developing children benefit from a disability-diverse classroom is beyond the scope of this article.

¹³Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §1400 et seq. (1975)).

¹⁴Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (1994 & Supp. IV 1998).

¹⁵Naomi Zigmond & Joseph Jenkins, *Special Education in Restructured Schools: Findings from Three Multi-Year Studies*, 76 PHI DELTA KAPPAN (1995).

¹⁶In order for states to receive funding under the IDEA, they must meet various criteria including the development of criteria for a free appropriate public education, individualized education program, the operation of the integration presumption, and various procedural safeguards. The integration presumption rule states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
28 U.S.C. § 1412(a)(5).

restrictive environment”¹⁷ has led to a sharp increase in the number of children with disabilities who are educated in the regular classroom. The percentage of students with disabilities who were educated entirely in regular classrooms increased by nearly 20 percent between 1986 and 1996 while the percentage served in resource rooms or separate classrooms decreased substantially.¹⁸ In 1996, the United States Department of Education estimated that 73% of students with disabilities received their instruction in general education classrooms and resource room settings, and that 95% of them were served in general education schools.¹⁹

Congress created the integration presumption in 1974 to hasten *structural change* in the alternatives available to children with disabilities – to hasten the closing of disability-only institutions and to hasten the creation of other alternatives for children with disabilities.²⁰ As the Supreme Court said in *Brown*, “If a segregated facility is built or kept open, society undoubtedly will place students there.”²¹ In 1974, disability-only institutions were prevalent and were rarely serving the needs of children with disabilities. They took children far from their home, isolating them not simply from typically-developing children but from their own families, and often offered them little or no education.²² The integration presumption has helped achieve the goal of closing most of those

¹⁷See 28 U.S.C. §1412(a)(5)(“least restrictive environment”).

¹⁸John H. Holloway, *Inclusion and Students with Learning Disabilities*, EDUCATIONAL LEADERSHIP 86 (2001).

¹⁹Spencer J. Salend, *The Impact of Inclusion on Students with and without Disabilities and Their Educators*, 20 REMEDIAL AND SPECIAL EDUCATION (1999).

²⁰I trace this history in Part I. Although this history is very clear, it has never been discussed in the case law under the IDEA. This article therefore makes an important contribution in identifying the underlying purpose of an important aspect of the IDEA.

²¹347 U.S. 483, 201 (1954).

²²See *infra* Part I.

schools; less than five percent of children are currently educated in disability-only schools.²³

The integration presumption, however, has led to more than the closing of disability-only institutions. It has also come to mean that school districts should presumptively favor educating children in the regular public school classroom over other educational configurations within the regular public school such as pull-out programs, resource rooms or special education classes.²⁴ This article questions that aspect of the integration presumption because, for some children, it hinders the development of an appropriate individualized educational program (“IEP”) as required by the IDEA.²⁵ The individualized education program that is developed must provide “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.”²⁶ As interpreted by the courts, this integration presumption tips the scale toward the most integrated environment possible within the public school building even if the evidence with respect to the individual child might support a less integrated environment.²⁷ School districts are required to justify separate services for children with disabilities but are not required to justify fully including a child with a disability into the regular classroom.

At first glance, the breadth of the integration presumption is baffling. Children only qualify

²³See *supra* note 19.

²⁴The language of the integration presumption dictates that result. See 28 U.S.C. § 1412(a)(5) (requiring justification for placement in any setting other than the regular classroom). For further discussion, see *infra* Part IB.

²⁵Section 1414(d) provides extensive requirements that school districts must follow for each child with a disability to create an individualized educational program. These plans must identify: (1) the child’s present level of achievement, (2) set annual, benchmark goals, and (3) specify the services that each child is to receive. 28 U.S.C. § 1414(d).

²⁶28 U.S.C. § 1414(d)(iv).

²⁷See *infra* Part IB.

for assistance under the IDEA if they are not able to attain adequate educational success under the regular education program.²⁸ They need an individualized educational program because the regular program does not meet their educational needs. Why then would we presume that the regular classroom is the best program for them? If anything, we might presume that the regular classroom poses problems for these children so that a school district should have to demonstrate that it has made significant and effective changes to the regular classroom before placing a child in that environment. As John Holloway has noted: “When we consider that many students were first identified as being learning disabled precisely because of their lack of academic success in general education classrooms, we must ask, ‘is it educationally reasonable to place these students back in inclusive classrooms?’”²⁹ But the IDEA makes the opposite presumption. It assumes that the regular classroom environment is superior to the other configurations that are often available to children with disabilities – special education, resource rooms, or pull-out programs – because it offers a more integrated education environment.

As early as 1978, some disability rights advocates did note the tension between individualized programs for children with disabilities and the integration presumption.³⁰ They

²⁸A child is labeled as a “child with a disability” under the IDEA only if the child, because of disability, “needs special education and related services.” 28 U.S.C. § 1401(3)(A)(ii).

²⁹Holloway, *supra* note 18, at 86.

³⁰For example, Thomas K. Gilhool and Edward A. Stutman described the tension between structural reform and individualized plans:

The studies show that individual process mechanisms can and often do function to assure a proper placement *among the alternatives available*, but they do not reliably or systematically function to generate alternatives not yet available. They are useful to individuals; they are not so useful to secure *structural* change. Therefore to place upon individual process mechanisms the burden of changing the configuration of placements to which children are assigned, when we know that overwhelmingly the placements for severely disabled children are in segregated settings, is to forfeit compliance with the integration imperative.

argued that the integration presumption was a vehicle to hasten structural changes even if that presumption did not serve the best interests of some children.³¹ They suggested that the need to close disability-only institutions and create more alternatives for children with disabilities was more important than creating the ideal individualized education program for each child.³² But now that disability-only institutions are used infrequently, it is time to refine the integration presumption to help it better achieve an adequate and appropriate education for children with disabilities.

Empirical data should help us decide the proper future direction for disability education policy.³³ Neither the racial integration movement nor the disability integration movement relied heavily on empirical data in formulating their arguments for integration.³⁴ Looking back on *Brown* and its aftermath, Judge Robert Carter, one of the plaintiffs' lawyers in *Brown*,³⁵ observes that the

Thomas K. Gilhool & Edward A. Stutman, *Integration of Severely Handicapped Students: Toward Criteria for Implementing and Enforcing the Integration Imperative of P.L. 94-142 and Section 504* in DEVELOPING CRITERIA FOR THE EVALUATION OF THE LEAST RESTRICTIVE ENVIRONMENT PROVISION (The United States Office of Education Bureau of Education for the Handicapped, Division of Innovation and Development, State Program Studies Branch 1978).

³¹*Id.*

³²*Id.*

³³This is not to suggest that empirical research is value-free. But it can help us better understand the consequences of social and educational policy. For a thoughtful discussion of the challenges of using empirical research responsibly, see Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure – Three Answers*, 2002 U. ILL. L. REV. 851 (2002).

³⁴The Supreme Court's initial conclusions about the harmful effects of segregation on African-Americans were based on doll studies of nonrandom populations in which many African-American children showed a preference for a white doll or said the white doll looked like them. See *Brown v. Board of Education*, 347 U.S. 483, 494-95 n. 11 (1954). These studies, however, soon proved controversial and led some researchers to conclude that the children in the doll studies (who typically ranged from 3 to 7 years of age) were reacting to the color of the doll's skin rather than thinking in racial terms. For further discussion, see *infra* Part IIIA. Irrespective of how one feels about the validity of those studies, there were no studies available at the time about the effectiveness of integration, given the novelty of the idea. By 1966, however, the effects of desegregation efforts came under close scrutiny with the publication of a two volume study by the United States Department of Education. See JAMES S. COLEMAN et al., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) ("Coleman Report").

³⁵Robert L. Carter is a federal district judge in the Southern District of New York. For many years, he was the

civil rights lawyers should have relied more strongly on research from professional educators in formulating remedies.³⁶

Similarly, disability rights advocates did not initially develop the integration presumption from empirical literature on education.³⁷ Congress first adopted the integration presumption in 1974 on the basis of no empirical arguments.³⁸ That rule currently exists in the Individuals with Disabilities Education Act³⁹ which Congress re-authorizes every five years.⁴⁰ Thirty years after enacting the integration presumption, Congress and the United States Department of Education should re-examine the interpretation and implementation of that rule in light of the existing empirical evidence on the educational needs of children with disabilities.

Close examination of the available empirical evidence demonstrates that the integration

NAACP General Counsel, and a leading attorney in the *Brown* litigation. See Robert L. Carter, *A Reassessment of Brown v. Board* in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 20 (Derrick Bell ed., 1980).

³⁶Robert L. Carter, *A Reassessment of Brown v. Board* in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* (Derrick Bell ed., 1980) (“Up to that point [*Brown* decision], we had neither sought nor received any guidance from professional educators as to what equal education might connote to them in terms of their educational responsibilities. We felt no need for such guidance because of our conviction that equal education meant integrated education, and those educators who supported us never challenged this view.”) By contrast, Justice Clarence Thomas argues that the judiciary should not even consider the “unnecessary and misleading evidence of the social sciences” in determining the constitutionality of segregation in public education. *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

³⁷See *infra* Part IA.

³⁸The rule was first found in the Education Amendments of 1974. Public Law 93-380, section 613(a)(13)(B). For further discussion, see *infra* Part IA.

³⁹Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (1994 & Supp. IV 1998) [“IDEA”]. The integration presumption is found at 28 U.S.C. § 1412(a)(5). For further discussion, see *infra* Part IB.

⁴⁰In theory, Congress reauthorizes the IDEA every five years but the last two reauthorizations were in 1997 and 2004. The most recently enacted version of the IDEA can be found at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01350:@@X>. The current version contains the integration presumption at Section 612(a)(5).

presumption is too broad. Although a structural remedy is often effective as a means to enhance substantive equality, one needs to be careful to make sure that the structural remedy remains effective and is not causing unwanted side effects. It is simplistic to assume that a structural remedy always enhances the substantive equality rights of a group; one should be vigilant by occasionally re-examining it.⁴¹ The broad and varied umbrella that comes within the category “disabled”⁴² further complicates the issue of remedies.⁴³ We can identify a common substantive goal – the attainment of

⁴¹In general, I support the anti-subordination principle under which we should consider the history of discrimination against various groups in our society and recognize the importance of group-based remedies such as affirmative action to redress that history of discrimination. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986). Nonetheless, I also recognize that integration may not always be the best structural remedy to attain substantive equality. For example, I defend the existence in some situations of single-sex colleges. See *id.* at 1054-58. Structural remedies must be examined for their effectiveness under norms of substantive equality. This article examines the structural remedy of integration within the disability context and asks whether it achieves its goal of substantive equality for children with disabilities.

I do not mean to suggest, nonetheless, that structural remedies should be constantly re-examined. In this context, thirty years has passed since the remedy was adopted. That seems like an ample period of time to merit re-examination. Similarly, Justice Sandra Day O'Connor has recommended that race-based affirmative action be re-examined after twenty-five years. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2346 (2003). More frequent re-examination could undermine the effectiveness of a structural remedy because its opponents might refuse to comply with the remedy in the hope that it will be overturned.

⁴²See generally PAUL K. LONGMORE, *WHY I BURNED MY BOOK: AND OTHER ESSAYS ON DISABILITY* (2003); VOICES FROM THE EDGE: NARRATIVES ABOUT THE AMERICANS WITH DISABILITIES ACT (Ruth O' Brien ed. 2004); RUTH O'BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* (2001). The social construction of disability is a broad topic that is beyond the scope of this article. As a general matter, however, it is helpful to realize that individuals become disabled, in part, as a result of the physical and social environment in which they live. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990). The lack of a curb cut at an intersection makes the person who uses a wheelchair disabled when that person tries to cross a street. If principles of universal design were used when we designed structures, people who use wheelchairs would find themselves far less disabled. Another aspect of the social construction of disability is the wide range of conditions that we lump under the category “disability.” In this article, I will be focusing on the implications of the wideranging definition of disability because it creates policy challenges for Congress and the agencies in designing and implementing disability rules. It should also be noted that these definitional problems are also challenging for students who have multiple disabilities, for example, use a wheelchair and have cognitive impairments. It is important to think of children with multiple disabilities as we try to create and implement new policies.

⁴³Not only are there many types of impairments such as visual, auditory, cognitive, mobility, and emotional, but there is a vast range of experiences within each of those categories. Moreover, there are children with multiple impairments who cross-cut several categories of disability. See, e.g., Alana M. Zambone, *Summary* in THE LIGHTHOUSE HANDBOOK ON VISION IMPAIRMENT AND VISION REHABILITATION 1193 (Eds. Barbara Silverstone et al. 2000) (“The low prevalence and heterogeneous nature of the population of children with vision impairments challenge researchers to employ a variety of methodologies beyond traditional quantitative models ... The increasing number of children with

educational opportunities and positive outcomes for all children irrespective of their disability status.

But we need to be careful to fashion a set of remedies that can assist the range of children with disabilities.⁴⁴

In Part I, I will discuss the historical background to the integration presumption under federal education law and discuss the case law implementing the presumption. In Part II, I will survey the empirical literature concerning the education of children with disabilities and argue that the integration presumption is not warranted for certain categories of children with disabilities. In Part III, I will supplement the disability empirical literature with the racial empirical literature on the effectiveness of integration to develop a set of factors that school districts can use to determine the appropriate configuration of educational resources for children with disabilities.⁴⁵ In Part IV, I will suggest that courts should assess whether school districts have in place a full range of options for children with disabilities so that the most appropriate option can be selected for them under the factors discussed in Part III. If a school district is offering a range of educational options to children with disabilities in learning⁴⁶ then an integration presumption is not warranted.⁴⁷

vision impairments who have additional disabilities further complicates efforts to determine incidence and prevalence for a variety of reasons, including limitations in the ability to measure vision in this population and lack of attention to vision in the face of numerous medical concerns.”)

⁴⁴As Alana Zambone has noted: “To date, much of the controversy surrounding inclusion has not found its way into research of the characteristics of effective practices, models, and settings. Until it does, the field is at risk of basing practice on rhetoric and politics.” Zambone, *supra* note 43, at 1195.

⁴⁵As I will discuss in Part III, I recognize that disability is not race and that one needs to be cautious in extrapolating from race to disability. Nonetheless, I will argue that the extensive literature on racial integration can inform the disability discussion.

⁴⁶A disability in “learning” is a deliberately vague standard but is intended to encompass a broad of impairments including cognitive, mental health, visual and auditory. But it is not intended to include mobility impairments when the mobility impairment is not accompanied by another kind of significant impairment. Because there is no reason to presume that children with mobility impairments process information differently from other children, they should be presumptively educated in the regular classroom. I do not mean to suggest, however, that all children with cognitive,

I. THE INTEGRATION PRESUMPTION UNDER THE IDEA

A. *History*

Education has been an important topic in the civil rights struggle. The disability rights movement followed on the footsteps of the racial civil rights movement⁴⁸ in making education a top priority. Individuals with disabilities faced exclusion and segregation in education. In the early 1900's, states typically divided children into the categories of educable or uneducable. Uneducable

mental health, visual or auditory impairments learn in a “different way.” Or that they will necessarily learn in a “different way” throughout their lives. Nonetheless, at the time in a child’s life that a particular impairment affects the way the child learns, then a broad integration presumption is not warranted.

⁴⁷ Although I conclude that the integration presumption should be reinterpreted, I realize that my conclusions can be misused by those who have no commitment to children with disabilities. A derogatory cartoon in the on-line version of the *Washington Post* that features a drooling, cognitively impaired male in a wheelchair makes it clear that advocates for children with disabilities need to be vigilant to avoid backsliding. See <http://www.ucomics.com/tedrall/2004/11/08/>. In a “Ted Rall” cartoon, Charlie, who is a disfigured student with a disability is featured drooling while making utterances like “erp!” and “goomba goom!” and shown having an “accident” in the classroom. In the background, someone is saying, “The ‘special needs’ kids make people uncomfortable and slow the pace of learning.” In the last strip, Charlie, still looking disfigured and in a wheelchair, is introduced as the teacher. Rall apparently reported that the cartoon was supposed to “draw an analogy to the electorate – in essence, the idiots are now running the country.” See http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=100. After extensive controversy about the cartoon, Rall was dropped from doing cartoons for the *Washington Post*. See <http://www.washingtonpost.com/ac2/wp-dyn/A943-2004Nov20?language=printer>. During the IDEA reauthorization debate, Senator Tom Harkin criticized the Rall cartoon saying that it “was one of the most egregious things I have ever seen.” See 150 Cong. Rec. S11546 (Nov. 19, 2004) (Senator Harkin). Thus, I hope this article will be read in good faith by those who are trying to serve the interests of children with disabilities and not misused by those who might be willing to return to the days of warehousing students with disabilities in inhumane environments. Although I argue that the integration presumption is not warranted if a school district offers a range of educational options for children with disabilities, it would still operate to prohibit a school district from *only* offering segregated, disability-only options. The need to maintain a fallback integration presumption is reflected by commentary such as the Rall cartoon.

⁴⁸ African-Americans focused on inequality in education in their civil rights efforts, culminating in the historic decision in *Brown v. Board of Education*. 347 U.S. 483 (1954). The Court’s decision used strong language to highlight the importance of education, concluding that a public education must be “made available to all on equal terms.” *Id.* at 493. In addition, the *Brown* decision took the historical step of declaring that “separate can never be equal.” Congress soon followed this historic constitutional law decision with the Civil Rights Act of 1964. Title VI of that statute codified the central holding of *Brown* and became the vehicle for plaintiffs to seek to attain further educational equality. The literature on education for children with disabilities often cites those developments in arguing that children with disabilities should be educated in the most integrated environment possible. See, e.g., See U.S. Department of Health, Education, and Welfare, Office of Education, PROGRESS TOWARD A FREE APPROPRIATE PUBLIC EDUCATION: A REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142; THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (January 1979) [hereinafter “HEW Report”].

children were excluded from public school attendance.⁴⁹ Beginning in the 1920's, a new category was introduced: the trainable but not educable.⁵⁰ Children in the “trainable but uneducable” category were sometimes required to perform labor with little or no compensation, causing commentators to complain that they were the victims of slave labor.⁵¹ Children in the “uneducable” category were not educated at all.⁵² The number of children excluded from the public education system was massive. In 1974, it was estimated that there were one million children who were entirely excluded from the public schools due to disability. Of the six million children with disabilities attending public school, nearly half of them were probably receiving no special education services.⁵³

Congress first attempted to respond to this problem in 1966 when it added a new Title VI to the Elementary and Secondary Education Act [ESEA].⁵⁴ In 1970, Congress repealed Title VI of the ESEA and created a separate act, the “Education of the Handicapped Act.” It provided grants to the states in return for assurances that the states would design programs to “meet the special educational and related needs of handicapped children.”⁵⁵ This new law sought to consolidate the existing

⁴⁹See Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 873 (1975).

⁵⁰*Id.* at 874.

⁵¹“[A] 1972 study of 154 institutions in 47 states, which represent 76 percent of existing facilities for the mentally retarded, found that 32,180 of 150,000 residents were participating in a work program, 30 percent of these receiving no pay at all, and an additional 50 percent receiving less than \$10 per week.” Paul R. Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567 (1974).

⁵² Pennsylvania was typical of most states in excusing a school district from educating a child if the child is deemed “uneducable and untrainable.” See 24 Purd. Stat. Sec. 13-1375 (1972).

⁵³See Burgdorf & Burgdorf, *supra* note 49, at 875.

⁵⁴See Public Law 89-750.

⁵⁵Public Law 91-230, Section 613 (a)(1)

programs and strengthen the Bureau of Education of the Handicapped within the United States Department of Education. The law did not require states to educate all children with disabilities or specify *how* states were to educate children with disabilities but took an important historical step in giving states financial incentives to offer education to all children.

At about the same time, the courts also began to get involved in the exclusion of children with disabilities from the public education system, particularly children with mental retardation. A group of plaintiffs brought a class action against the Commonwealth of Pennsylvania, arguing that its system of denying a public education to children with mental retardation violated the due process and equal protection clauses of the Fourteenth Amendment.⁵⁶ Similarly, a class action suit was brought against the Board of Education of the District of Columbia, arguing that the system of excluding individuals with disabilities from the public school system violated the law of the District of Columbia as well as the equal protection and due process clauses.⁵⁷ The Pennsylvania case culminated with a consent agreement that was approved and adopted by the district court. The consent decree was broad-ranging and clause seven articulated the integration presumption. It stated:

It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of the general educational policy that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.⁵⁸

⁵⁶See *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

⁵⁷See *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972).

⁵⁸343 F. Supp. at 307 (clause 7).

This integration presumption went well beyond the court's findings. The court stated: "Plaintiffs do not challenge the separation of special classes for retarded children from regular classes or the proper assignment of retarded children to special classes. Rather plaintiffs question whether the state, having undertaken to provide public education to some children (perhaps all children) may deny it to plaintiffs entirely. We are satisfied that the evidence raises serious doubts (and hence a colorable claim) as to the existence of a rational basis of such exclusions."⁵⁹ Yet, clause seven created a rule governing the assignment of children to special classes – it created a presumption that placement in a regular class was preferable to placement in a special education class. It did not merely admit children with disabilities to the public schools; it suggested where they should receive their education within the building. Nowhere in the court's opinion did it explain why such a presumption was warranted. As we will see in Part III, there is not strong evidence that the placement of children with mental retardation in a regular classroom is better than placement in a special classroom.

In 1973, Congress held hearings on the Education for All Handicapped Children Act.⁶⁰ The draft then pending in the Senate contained an integration presumption.⁶¹ In the hearings that accompanied consideration of this bill, there was little discussion of this integration requirement. One speaker noted that many members of the deaf community prefer "to remain a society apart" and

⁵⁹*Id.* at 297.

⁶⁰*See* Hearings Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, United States Senate, 93rd Congress, First Session (S. 6). [Hereinafter Hearings]

⁶¹ It said:

To the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. S. 6, Section 2(a)(7)

would not seek to maximize integrated education.⁶² Another speaker spoke at length about various aspects of the bill and how they connected to the recent special education litigation but then only briefly mentioned: “I welcome the emphasis placed on integration, to the maximum extent appropriate, of institutionalized children into regular schools.”⁶³ Like other speakers, he was concerned with the need to provide an appropriate education to children with disabilities in a noninstitutionalized setting. He was not considering the exact form that education would take within a public school.

With the adoption of the Education Amendments of 1974, Congress enacted an integration presumption, requiring states to adopt procedures to effectuate that presumption.⁶⁴ The educable/noneducable distinction was entirely eliminated. Neither the House Report nor the Conference Report discussed the integration presumption and why it was considered important to the statute.⁶⁵ Based on the historical context in which courts were beginning to understand the need to close disability-only institutions, it appears that Congress was primarily concerned with using the integration presumption as a vehicle to closing disability-only institutions.

⁶²Hearings, *supra* note 60, at 87 (testimony of Dr. Philip Bellefleur).

⁶³*Id.* at 374 (statement of Professor Gunnar Dybwad, Advisory Committee on Special Education, Brandeis University).

⁶⁴The statute required states to develop:
procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily
Public Law 93-380, section 613(a)(13)(B).

⁶⁵*See* House Report No. 93-805; Conference Report No. 93-1026.

Congress' response to the needs of disabled children became much more sophisticated in 1975. The Act specifically stated the goal of "providing full educational opportunity to all handicapped children."⁶⁶ It also created much more significant procedural requirements for enforcing the statute. The integration presumption remained in the bill without change.⁶⁷ For the first time, the accompanying reports mentioned the Pennsylvania and D.C. litigation that had resulted in broadbased consent decrees.⁶⁸ The integration presumption was mentioned in the House Report with the use of a parenthetical clause but no justification was offered for this requirement.⁶⁹ The other reports similarly restated the existence of the requirement but offered no discussion of it. These brief recitations reinforce the notion that Congress was acting within the context of understanding the need to offer children with disabilities more educational options than merely inhumane, disability-only warehouses. But it is unlikely that Congress studied closely the consent decrees from the disability litigation.

The United States Department of Education was required to provide reports to Congress on

⁶⁶See P.L. 94-142, section 612(2)(A).

⁶⁷The statute provided:

Section 612. In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

. . . (5) The State has established (A) procedural safeguards as required by Section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature of severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . .

⁶⁸See House Report No. 94-332; Senate Report No. 94-168.

⁶⁹See House Report No. 94-332 at 5.

the implementation of the 1975 Act. It authored a major report in 1979.⁷⁰ Oddly, it described the genesis of the integration presumption which it labeled the “least restrictive alternative” as coming from the Supreme Court’s decision in *McColloch* [sic] v. *Maryland*,⁷¹ as well as *Brown* and the Pennsylvania and D.C. litigation.⁷² The reference to *McCulloch* does not occur in any of the reports accompanying the various disability, education bills so it is hard to know if Congress also derived the integration presumption from this seemingly irrelevant Supreme Court case from 1819 about the power of the federal government to create a national bank

The reference to *Brown*, however, does reflect two important possibilities: (1) that Congress thought the history of racial integration in education was relevant to the development of sound policy in the disability field and (2) that Congress thought that integration might be constitutionally mandated in the disability context. Although race and disability are different, Congress’ instinct to think that the disability community could benefit from insights from the racial civil rights community seems sound. It has been true – as predicted from analogy to race – that new educational opportunities would be created once the segregated options were eliminated. I will explore that analogy further in Part III to see what other insights might transfer from the race to the disability area.

It turns out, however, that Congress was wrong to think that integration is constitutionally required in the disability context. The courts have not attached strict scrutiny to disability

⁷⁰See U.S. Department of Health, Education, and Welfare, Office of Education, PROGRESS TOWARD A FREE APPROPRIATE PUBLIC EDUCATION: A REPORT TO CONGRESS ON THE IMPLEMENTATION OF PUBLIC LAW 94-142; THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT (January 1979) [hereinafter “HEW Report”].

⁷¹*McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819).

⁷²HEW Report, *supra* note 70, at 31.

classifications⁷³ although they have upheld Congress' policy preference for integration in the disability context.⁷⁴ This combination of legal doctrines puts Congress and the United States Department of Education in the position of being able to decide exactly how much integration is appropriate in the disability education context. Because strict scrutiny does not attach to disability, Congress arguably has more flexibility in thinking about remedial options in the disability context than in the race context. The constitutional law with respect to disability was not clear in 1974 so we should not chide Congress for failing to have a crystal ball.⁷⁵ But thirty years after the enactment of the integration presumption, we can confidently say that it is not constitutionally mandated.⁷⁶ Thus, the integration presumption, as a constitutional matter, does not need to be interpreted broadly so that each child is constitutionally entitled to an integrated education on the basis of disability. Instead, we should think of integration as a means to an end. It should be used as a tool when it will help improve the educational outcome for children with disabilities.

The Department of Education's report, however, also reflects a modest shift in thinking about the integration presumption. Instead of being applauded for closing disability-only institutions, the integration presumption is applauded for helping to place more children with mental retardation in regular classrooms.⁷⁷ Nonetheless, the report did note that one should exercise some caution in

⁷³See generally Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 689-93 (2000).

⁷⁴See *Olmstead v. L.C.*, 527 U.S. 581 (1999) (upholding requirement in ADA Title II that individuals who are under the care of the state are entitled to live in the most integrated setting possible).

⁷⁵The leading case on this issue was not decided until 1985. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (declining to apply heightened scrutiny to the category of mental retardation).

⁷⁶Most recently, in *Board of Trustees v. Garrett*, 531 U.S. 581 (2001), the Supreme Court repeated the conclusion that disability classifications are not entitled to heightened scrutiny.

⁷⁷For example, the HEW Report stated:

evaluating the appropriateness of a “mainstreaming” placement for some children with disabilities and called for the collection of additional data on the decisionmaking process.⁷⁸ It therefore did not endorse a strong integration presumption with respect to the placement of children within a public school building but acknowledged the level of uncertainty that existed in the literature.

It was not until 1986 that the United States Department of Education formally called for the collection of empirical data on the effectiveness of various types of programs that were available to children with disabilities. Madeline Will, the Assistant Secretary of Education and head of the Office of Special Education Programs, called for the restructuring of education for children with mild disabilities so that they could be educated in the regular classroom.⁷⁹ Recognizing that there was no empirical literature supporting this integrated approach, the Office of Special Education

While Figure 2.2 shows that separate classes continued to be the predominant placement for mentally retarded children in 1976-77, it is impressive from a historical perspective that the proportion whose primary placement is the regular classroom is now 39 percent.

HEW Report, *supra* note 70, at 36. Figure 2.2 reflected that 28 percent of children with mental retardation were educated in regular classes, and approximately 65 percent were educated in separate classes (but not separate school facilities).

⁷⁸

Though the 1976-77 data suggest that States are applying the principle of least restrictiveness to the education of the handicapped, monitoring will probably always be necessary, not only for too much segregation but also for inappropriate “mainstreaming.” The situation might arise, for example, that a school would have so much difficulty accommodating the increased number of referrals to its special education programs that it would feel compelled to make “less restrictive” assignments of newly identified handicapped children to regular classrooms. Such children could superficially be said to have been “mainstreamed,” even though they were being inappropriately served, a fact that might not be apparent unless placement decision-making processes were actually observed. In addition to monitoring the States, the Bureau has initiated a major study of placement decision-making.

In summary, it appears that many handicapped children are already receiving their education in a regular classroom setting and that appropriate alternative placements are in most cases available to accommodate handicapped children with special needs.

Id. at 39.

⁷⁹Madeline Will, *Educating Children with Learning Problems: A Shared Responsibility*, 52 EXCEPTIONAL CHILDREN 411, 413 (1986).

Programs established studies of the effectiveness of full inclusion as a research priority in 1985.⁸⁰ But some proponents of full inclusion objected to such research, arguing that integration is a moral imperative in the disability context, as it is in the race context and therefore does not need to be justified by empirical research.⁸¹ Beginning with Wills' funding of such research, more research was generated on the effectiveness of various methods of teaching children with disabilities – full inclusion, pull-out programs, or segregated special education. I will discuss that research in Part III below. Although Wills faced criticism for supporting disability integration research, we are indebted to her foresight in the availability of a range of research on the education of children with disabilities in a variety of settings.

We can therefore see that the Department of Education has had an important historical role in recognizing the possible limitations of the integration presumption and calling for research on its effectiveness. The integration presumption was not developed by Congress in 1974 to dictate the configuration of resources offered to children with disabilities in the regular, public school classroom. It was developed to close disability-only warehouses for children and encourage school districts to develop more humane environments in which children with disabilities could attain an

⁸⁰Genevieve Manset & Melvyn Semmel, *Are Inclusive Programs for Students with Mild Disabilities Effective?: A Comparative Review of Model Programs*, 31 JOURNAL OF SPECIAL EDUCATION 155, 156 (1997).

⁸¹See Will, *supra* note 79. Ironically, Justice Clarence Thomas now argues that we do not need social science data to support desegregation because it is racist to presume that “black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.” *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring). Whereas earlier commentators may have asserted we do not need empirical data because it is obvious that blacks would benefit from desegregation, Thomas argues that we do not need empirical data because it is ridiculous to presume that blacks learn better merely because they are surrounded by whites. By contrast, I argue that we should explore what conditions correlate with good educational outcomes so that we can structure public policy consistently with that data.

appropriate and adequate education. As we will see, the courts have interpreted the integration presumption inconsistently with its original purpose. In some cases, the courts have entirely ignored the integration presumption's purpose of removing children from disability-only institutions. In other cases, the courts have applied the integration presumption too broadly, allowing it to interfere with a proper placement decision for a child with significant impairments in learning. Congress could rewrite the presumption to return it to its original purpose or the agencies and the courts could help reorient the integration presumption to fulfill Congress' original purpose.⁸²

B. The Disability Presumption in Practice

In order for states to receive funding under the IDEA, they must meet various criteria including compliance with the integration presumption rule which states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁸³

Implementation of the integration presumption has been complicated with disputes frequently

⁸²The remedy to this problem will depend, on part, on one's view on the importance of legislative history and legislative intent. It is well known that Justice Scalia believes that the courts should interpret the text rather than Congress' intent. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). For a critique of this view, see William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301 (1998).

⁸³28 U.S.C. § 1412(a)(5). The integration presumption is *not* the same as a local school presumption. Sometimes, school districts are better able to integrate children into the mainstream classroom if they do not attend their local public school. This problem may be particularly true in rural school districts where schools are spread out and it is impossible to concentrate many specialists in each of the schools. See *Flour Bluff Independent School District v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996) (upholding school district's decision to place child at school 16 miles away from her home rather than 9 miles away from her home because of the broader range of services available at the school further from her home). Like the Fifth Circuit, the Tenth Circuit has held that the integration presumption does not include the right to be educated at the local public school. See *Murray v. Montrose County School District RE-1J*, 51

arising concerning the education of children with significant cognitive impairments or mental health impairments. The courts have varied in their willingness to implement the integration presumption in that context. As we will see below, the Sixth Circuit has been the strictest in implementing the disability presumption – applying it even in a case in which there arguably was evidence that the more segregated educational alternative was the better choice for the individual child. When faced with a similar fact pattern, the Fifth Circuit allowed the school district to overcome the disability presumption. Both the Fifth and Sixth Circuits appear to have taken the integration presumption seriously helping it to achieve some of its desired structural reforms even if the courts’ decisions did not necessarily reach the right educational result for the children in the litigation. By contrast, the Fourth and Eighth Circuit appear to be applying a weak version of the integration presumption that is not achieving the integration presumption’s desired structural reforms or benefitting the individual child. These inconsistent results suggest the need for clearer, national guidelines that are consistent with sound educational policy.⁸⁴

F.3d 921 (10th Cir. 1995). This article does not question that decision.

⁸⁴There is little consistency among the circuits in how they implement the integration presumption. The Third and Fifth Circuits have adopted a two-part test in which they first determine if education in a regular classroom can be achieved satisfactorily and, if not, determine whether the school district has placed the child in the most integrated environment possible. *See Daniel R.R. v. Bd. of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989); *Oberti v. Bd. of Education*, 995 F.2d 1204, 1215 (3rd Cir. 1993). A “satisfactory” regular classroom placement is therefore chosen even if other placements might be superior, through the operation of the integration presumption. The Ninth Circuit applies a modified version of that test, considering the costs of mainstreaming the child in determining whether the regular program is satisfactory. *See Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994); *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994). The Fourth, Sixth and Eighth Circuits use the following test: “In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.” *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983); *DeVries v. Fairfax County School Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. N.W. R-1 School District.*, 813 F.2d 158, 163 (8th Cir. 1987). In these circuits, even a showing that the more segregated setting is “superior” is not sufficient for the school district to institute that placement. The Tenth Circuit has not yet decided which framework to employ. *See L.B. and J.B. v. Nebo School District*, 379 F.3d 966, 977 (10th Cir. 2004).

By contrast, the integration presumption appears to have worked better for children who do not have impairments in learning – such as mobility impairments or serious illnesses – because there is general agreement between parents and the school district that these children should be educated in a regular classroom. For such children, the dispute between parents and school districts has frequently been *which* regular public school a child should attend to attain a fully inclusive education rather than *whether* they should be mainstreamed into a regular public school. Courts have sometimes approved the school district's decision to place the child in a regular public school other than the local public school, because of the greater provision of medical or other specialized services at the nonlocal public school.⁸⁵ Rather than involve the integration presumption, these cases have involved the question of whether children are entitled to be educated at their local public school.

The neighborhood public school problem can also arise in cases involving children with visual or auditory impairments. These children may need various kinds of services to enhance their ability to learn although there is general agreement that they can be taught in a regular classroom for most, if not all, of the school day.⁸⁶ A school district, however, may not be able to afford to place all of the specialized services for each child in each public school. In such fact patterns, the courts

⁸⁵See, e.g., *Kevin G. v. Cranston School Committee*, 130 F.3d 481 (1st Cir. 1997) (upholding decision to send student with several severe medical conditions to school with a full-time nurse); *Schuldt v. Mankato Independent School District No. 77*, 937 F.2d 1357 (8th Cir. 1991) (upholding decision to send child with spina bifida to a fully accessible school that was not the closest school to the student's home).

⁸⁶Nonetheless, the appropriate site for children with hearing impairments has been controversial. There has been a lively debate within the disability community about the Deaf Culture movement. See generally HARLAN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY* (1992). Some parents have argued strenuously about the value of a school in which the dominant mode of communication is American Sign Language. See Bonnie Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. SOC. & SCI. 24, 32-33 (1997). That debate has informed my argument that it is important for children to have genuine choices in educational format so that one educational format is not devalued. Hence, a deaf environment, as an educational alternative, should be one option for a deaf child. Even if the child does not choose that educational environment, the existence of the alternative should help send the message that a deaf culture environment is valued.

have typically sided with the school districts while noting that the cases do not involve the integration presumption, because the parents and school district are in agreement about the appropriateness of an education in the regular public classroom.⁸⁷

The question of whether Congress should mandate the education of children with disabilities at their closest neighborhood schools is an important issue that might have profound social implications, but it is beyond the scope of this article. For my purposes, it is sufficient to observe that neither parents nor school districts frequently litigate the integration presumption for children who do not have impairments in learning because there is general agreement that these children belong in the regular classroom. In addition, I have found that the presumption is infrequently litigated for children with visual or hearing impairments because school districts often try to place such children in the regular classroom.⁸⁸ Parents and school districts are more likely to disagree with respect to the education of children with cognitive or mental health impairments. Thus, I will focus on those children when examining the case law and empirical literature to see what we can learn about the most appropriate educational configuration for them.

1. Rigid Application of the Integration Presumption

⁸⁷See, e.g., *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991) (child with hearing impairment educated at a high school other than the one closer to his home so that he could have access to “cued speech” services); *Flour Bluff Independent School District*, 91 F.3d 689 (5th Cir. 1996) (child with hearing impairment educated at regional day school rather than regular school closer to the student’s home so that student could have access to broader range of services).

⁸⁸*But see* *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir. 1995) (upholding placement of children with auditory impairment in a school for the deaf 280 miles from his home where the evidence indicated that the child would receive no educational benefit from mainstreaming). Although there is not much litigation concerning children with visual or auditory impairments, it is still possible that school districts and parents have not been making appropriate decisions with respect to the education of those children. Alana Zambone, for example, argues that “much of the controversy surrounding inclusion [for children with visual impairments] has not found its way into research of the characteristics of effective practices, models, and settings. Until it does, the field is at risk of basing practice on rhetoric and politics.” Zambone, *supra* note 43, at 1195.

The most rigid example of application of the integration presumption comes from a Sixth Circuit case in which it appears that application of the integration presumption even trumped evidence that a child with mental retardation *regressed* in the somewhat more integrated environment.⁸⁹ At the time of the relevant Sixth Circuit litigation, Neill Roncker was nine years old and severely mentally retarded. His IQ was estimated to be below 50 and his mental age was estimated to be two to three years old with regard to most functions.⁹⁰ Although the case involved the meaning of the “least restrictive alternative” rule, the choices available to Neill were pretty limited. He could attend a segregated, “169 school” or he could attend a special education class at a regular school and therefore have access to typical children for lunch, gym or recess. At the 169 school, he would be educated with children of the same chronological and developmental age. In the special education program, he would be educated with other children with disabilities, many of whom would most likely be higher functioning. Because the special education program was housed in a regular public school, he would have access to typically-developing children for lunch and recess.

The school district recommended that Neill be placed in the 169 program. The parents objected and insisted that he be educated in the special education classroom within the regular public school. Everyone “agreed that Neill required special instruction; he could not be placed in educational classes with non-handicapped children.”⁹¹ For eighteen months, during the pendency of the litigation, Neill was educated in the program chosen by his parents – in a class for severely

⁸⁹See *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).

⁹⁰See *Id.* at 1060.

⁹¹*Id.* at 1061.

mentally retarded children at a regular elementary school. Apparently, Neill made no significant progress, or even regressed, in this classroom setting and the school district thought he would make more progress in the 169 program because he could be educated with children of his same age and ability.

The district court ruled for the school district finding that Neill should be educated in the 169 program.⁹² The Sixth Circuit reversed the district court, holding that it had not given sufficient weight to the “least restrictive alternative” rule. The court said that “Congress has decided that mainstreaming is appropriate” and “the states must accept that decision if they desire federal funds.”⁹³ Elsewhere, the Sixth Circuit described the mainstreaming rule as “a very strong congressional preference.”⁹⁴

In applying this strong congressional preference, the Sixth Circuit gave little weight to the available evidence concerning Neill’s education. In the court’s words, even in a situation where the “segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.”⁹⁵ Neill’s “progress, or lack thereof” was considered a “relevant factor” but not “dispositive” of the placement issue.⁹⁶ If the school district could mimic the 169 program at Neill’s regular, public school then that was the presumed superior outcome because of the mainstreaming available at the regular school.

⁹²*Id.* at 1058(citing decision of United States District Court for Southern District of Ohio, Carl B. Rubin, Chief Judge).

⁹³*Id.* at 1062.

⁹⁴*Id.* at 1063.

⁹⁵*Id.* at 1063.

The fact that Neill apparently did not really have the ability to interact with other children was not even a factor in applying the mainstreaming presumption.⁹⁷ According to the dissent, Neill's parents argued that he should be educated in the regular school environment even "if the only benefit from such placement is to avoid the stigma of attending a special school."⁹⁸ It was not necessary for the evidence to reflect that Neill benefitted from the interactions with typical children at lunch, recess, and gym. Apparently, Neill did not interact with the typical children; he only observed them.⁹⁹ His parents simply needed to invoke the mainstreaming presumption for Neill to be placed in a regular school.

The integration presumption appears to have been irrebuttable in *Roncker*. As the court said, "Since Congress has chosen to impose that burden; however, the courts must do their best to fulfill their duty."¹⁰⁰ Had the court required the competing options to be weighed against each other (without operation of a presumption), the outcome might have been different. For example, as I will discuss in Part II, there is empirical evidence that would have supported the school district's assertion that Neill would perform better in a more segregated environment. Coupled with the available evidence about Neill's own performance, the school district might have prevailed in the absence of the operation of the integration presumption.

Supporters of the integration presumption would cite the *Roncker* case as evidence of why an

⁹⁶*Id.* at 1063.

⁹⁷*Id.* at 1064 (Kennedy, J., dissenting).

⁹⁸*Id.* at 1065. It seems unlikely that Neill would have been aware of a concept as abstract as "stigma." Was it his parents who were concerned about the stigma of having a severely disabled child?

⁹⁹*Id.* at 1065.

integration presumption is necessary. This was not simply a case of which educational configuration made sense within a regular public school. It was a case involving the education of a child at a disability-only institution. It therefore went to the core of the purpose of the integration presumption – encouraging the closure of a disability-only institution.

But the *Roncker* case raises the question of what justifications should be permitted for education at a disability-only institution. In this case, the choice was between having Neill educated in special education classrooms within the public school versus educated in a disability-only institution but among his own peers with respect to age and disability. Does he really benefit from being in a more integrated environment when he is segregated within that environment? As we will see in Part III, the evidence from our experience with racial integration is that integration does not have positive benefits when it is accompanied by classroom segregation through tracking or other mechanisms. Further, the evidence from the disability literature, which I examine in Part II, suggests that children with severe mental retardation are often unlikely to receive significant educational benefit from being educated in the regular classroom. Neill fits that pattern; no one suggested that he should be educated in the regular classroom.

A strong disability presumption against education in disability-only institutions makes sense for children without impairments in learning who can benefit from spending at least part of their day in a regular classroom where they are exposed to the regular curriculum. In a case like *Roncker*, however, the integration presumption seems to serve a cosmetic benefit – creating the appearance of integration through the placement in a regular public school – without the child having a meaningful

¹⁰⁰*Id.* at 1063.

integrated experience. The purpose of closing disability-only institutions was to close inhumane warehouses that were not serving the educational needs of children with disabilities. By contrast, the disability-only institution in the *Roncker* case appears to have been thoughtfully developed to create more options for children who could not flourish in the regular classroom. A strong articulation of the integration presumption did not serve the larger goal of enhancing Neill's education.

2. *Overcoming the Integration Presumption*

In another case involving a child with mental retardation, the Fifth Circuit in *Daniel R.R. v. State Board of Education*¹⁰¹ affirmed the school district's decision to place a child with severe mental retardation in a more segregated setting. Unlike *Roncker*, however, the more segregated setting was not housed in a disability-only institution. This case involved the question whether the child should be placed in a regular classroom versus a special education classroom. Because of the application of the integration presumption, the court did not, as an initial matter, weigh each educational alternative against each other. Instead, it evaluated the available educational programs only after determining that Daniel could not flourish at all in the regular classroom.¹⁰²

¹⁰¹874 F.2d 1036 (5th Cir. 1989).

¹⁰²For another problematic example of a school district insisting on a fully integrated education despite evidence of the program not working, see *Fisher v. Board of Education of the Christina School District*, ___ A.2d ___, 2004 WL 1874777 (Del. 2004). The child in that case, Thomas Fisher, was diagnosed as learning disabled in second grade. By fifth grade, a nationally certified school psychologist reported: "Despite having Thomas as a student for his entire school career, the school district has maintained his placement in an inclusion program, which provided accommodations and assistance but no remediation to improve his functional literacy skills. This has worsened Thomas's situation overall and has resulted in secondary behavior concerns ... Although the school district could have provided Thomas with an appropriate program and placement beginning in the first grade, this was never offered. Rather, the district continued to cling to its inclusion model as the only available option under the least restrictive environment criteria for program and placement." *Id.* at *2. After several years of litigation, Thomas' parents prevailed in succeeding in placing Thomas in a special school with a very low teacher-student ratio, consistent with the psychologist's recommendation. To reach that result, however, the Delaware Supreme Court had to conclude that "Thomas did not receive a meaningful educational benefit from the program provided by the School District." *Id.* at *6. As in *Daniel R.*, the court could only consider other educational possibilities *after* concluding that Thomas regressed in the regular educational program.

Daniel R. was a six year old boy who was severely mentally retarded. At the time of the litigation, he was in pre-kindergarten. His parents wanted Daniel to attend a special education class for half the day and a regular pre-kindergarten class for the other half of the day. Initially, the school district complied with the request but then decided to move Daniel out of the regular classroom. It proposed to have Daniel spend his entire academic day in the special education classroom but would mix with nonhandicapped children during lunch and recess. The parents objected to this change and eventually moved Daniel to a private school. The court's opinion contains no information about the private school – whether it was a regular private school or one devoted to children with disabilities.

The court permitted the integration presumption to be rebutted but only on the basis of very strong evidence. The school district took the position that it need not mainstream a child “who cannot enjoy an academic benefit in regular education.”¹⁰³ The parents took the position that the school district should mainstream Daniel “to provide him with the company of nonhandicapped students.”¹⁰⁴ The court identified several factors which could guide it in determining whether the integration presumption should be overcome in a particular case: (1) “whether the state has taken steps to accommodate the handicapped child in regular education,”¹⁰⁵ (2) “whether the child will receive an educational benefit from regular education;”¹⁰⁶ and (3) “what effect the handicapped child's presence has on the regular classroom environment and, thus, on the education that the other

¹⁰³874 F.2d at 1040.

¹⁰⁴*Id.* at 1040.

¹⁰⁵*Id.* at 1048.

¹⁰⁶That “inquiry must extend beyond the educational benefits that the child may receive in regular education” and must recognize the possibility that a child might “suffer from the [mainstreaming] experience.” *Id.* at 1049.

students are receiving.”¹⁰⁷

The court found that the evidence was so stark that the school district could overcome the integration presumption. It concluded that Daniel received no educational benefit from the regular classroom even with supplemental assistance because the curriculum would have to be modified “beyond recognition” for Daniel to benefit.¹⁰⁸ Further, the court found that Daniel did not participate in any class activities so that mainstreaming merely resulted in giving Daniel an “opportunity to associate with nonhandicapped students.”¹⁰⁹ Arguably, the mainstream classroom even caused some harm to Daniel because he was so exhausted that he sometimes fell asleep at school from the full day of programming and might have developed a stutter from the stress.¹¹⁰ Applying the final factor, the court found that Daniel’s presence harmed the other students because of the disproportionate time that the teacher had to devote to Daniel’s needs. The court found that the “instructor must devote all or most of her time to Daniel.”¹¹¹

The court was correct to take the integration presumption seriously because the option proposed by the school district resulted in the segregation of the child within the regular public school building. The parents preferred a more genuinely integrated approach under which he was educated in the regular classroom. Again, borrowing from the racial literature which I will discuss in Part III, one could surmise that Daniel would lose many of the benefits of integration if he were

¹⁰⁷*Id.* at 1049.

¹⁰⁸*Id.* at 1050.

¹⁰⁹*Id.* at 1050.

¹¹⁰*Id.* at 1051.

¹¹¹*Id.* at 1051.

segregated through special-education tracking.

The evidence from our experience with racial integration¹¹² might counsel us to examine closely whether the proposed tracking in a segregated environment within the public school is warranted. But disability is very different from race and there can be strong reasons for the need for a different style of teaching and different curriculum. The requirement that the school district demonstrate that Daniel could attain *no* educational benefit¹¹³ in the more integrated environment is unwarranted because our skepticism about the value of special education for children with mental retardation should not be profound. As I will discuss in Part II, there is evidence in support of that educational environment for many children with mental retardation.

The “no educational benefit” standard can have two adverse consequences. First, it can cause school districts to be afraid to recommend a more segregated setting for children with mental retardation even if their educational professionals make that recommendation on their genuine evaluation of the child’s best interests. Second, it can force school districts to exaggerate the facts to support a legal argument. *No* educational benefit is a very harsh standard. We can be skeptical of repeated requests by school districts to educate children in segregated settings without going so far as to require the existence of *no* educational benefit in the more integrated setting, especially when the empirical literature does not support deep skepticism.

An important feature of the school districts involved in the *Roncker* and *Daniel* litigation is

¹¹²See *infra* Part III.

¹¹³The Fifth Circuit used the same approach in *Brillon v. Klein Independent School District*, 100 Fed. Appx. 309 (5th Cir. 2004) to conclude that the school district court could educate the child, Ethan, in special education classrooms. The court concluded that the second grade curriculum “would have to be modified beyond recognition” for Ethan to participate in the regular school environment. *Id.* at 313.

that they appeared to have a full range of educational programs available. Inclusion in a regular classroom, special education programming within the regular public school, and disability-only institutions appeared to be available. The question was which of these programs fit the needs of Neill and Daniel, not whether a full range of programming should exist.

These cases stand in contrast to school districts that have not created a range of programming for children with disabilities because the integration presumption has not served the structural purpose of encouraging the creation of a range of programming. These cases will be discussed in the next section, showing that the integration presumption needs to continue to serve its core, structural purpose while also better serving children within school districts that offer a continuum of services.

3. *Disregarding the Integration Presumption*

The strongest argument for implementation of the integration presumption is that it is a vehicle to hasten structural reform by making available educational opportunities for children with disabilities other than disability-only institutions. The Fourth and Eighth Circuits have not implemented the integration presumption to achieve that structural end, demonstrating the continuing need for operation of an integration presumption.

The facts in *A.W. v. Northwest R-I School District*¹¹⁴ are similar to those in *Roncker*. A.W. was an elementary school-aged boy with Down's syndrome who the school district contended had severe mental retardation. The school district sought to place him in State School No. 2 and the parents wanted him to be educated in House Springs Elementary School. As in *Roncker*, everyone agreed that it did not make sense for A.W. to take academic classes with typical children. If he

¹¹⁴813 F.2d 158 (8th Cir. 1987).

attended House Springs, he would be educated in a special, self-contained classroom with a teacher trained to meet his special needs.¹¹⁵ Nonetheless, if he attended House Springs, he could interact with typical children on the bus to school, at lunch, at recess and in activities such as physical education. The trial court had concluded that A.W. would merely observe, rather than participate, with typical children during these various encounters.¹¹⁶

Although the record is unclear in *A. W.*, it appears as if the school district did not have a well-developed special education program at House Springs. In order to educate A.W., it would have to offer him a new room designed for his specific needs. That, in turn, raised the specter of substantial costs. As described by the trial court:

The specific difficulty with placement at the House Springs School is that there is no teacher who is certified to teach severely retarded children like A.W. The addition of a teacher is not an acceptable solution here since the evidence before the Court shows that the funds available are limited so that placing a teacher at House Springs for the benefit of a few students at best, and possibly only A.W., would directly reduce the educational benefits provided to other handicapped students by increasing the number of students taught by a single teacher at [State School No. 2].¹¹⁷

The district court ruled for the school district and the Eighth Circuit affirmed the district court opinion, finding that the district court could consider the cost to the school district of A.W.'s attendance at House Springs. Consideration of cost therefore trumped the integration presumption. The integration presumption did not become a vehicle to require the school district to educate children with disabilities in integrated settings rather than exclusively in separate schools. Possibly,

¹¹⁵*Id.* at 161 n.4.

¹¹⁶*Id.* at 161 n.5.

¹¹⁷813 F.2d at 161-62.

the Eighth Circuit did not understand the structural purpose behind the integration presumption rule and therefore allowed the cost of creating alternative placements to trump the integration presumption.

Similarly, the Fourth Circuit has been too eager to overcome the integration presumption without a demonstration that a school district has made available a range of educational programs for children with disabilities.¹¹⁸ Michael DeVries was a seventeen year old boy with autism and a measured IQ of 72. Despite low academic achievement results, Michael had successfully worked for three hours every other day as a hamburger assembler at a Burger King and commuted to work without assistance on public transportation. His mother wanted him to attend the local public high school which served 2,300 students but the school district insisted that he attend a private day school for children with disabilities or a local vocational school. DeVries's attorney sought to enter into evidence the fact that no autistic children and only a small percentage of multi-handicapped and retarded children attend their home-base schools in the Fairfax County School District.¹¹⁹ The district court excluded the proffered evidence and the court of appeals concluded that the refusal was a harmless error because there was unlikely to be any substantial probative value from that evidence.¹²⁰ If true, however, that evidence would help demonstrate that the school district was not making available a continuum of services in the public schools and was not engaging in an individualized decision about what services are appropriate for children with significant cognitive or mental health impairments. This case did *not* involve a fact pattern where a rural public school

¹¹⁸See *Devries v. Fairfax County School Board*, 882 F.2d 876 (4th Cir. 1989).

¹¹⁹*Id.* at 880.

¹²⁰*Id.* at 880.

system could not realistically place specialists at each of its schools and therefore sought to place children with disabilities at only some of its regular public schools. Instead, a public school system had apparently decided not to allocate resources for children with autism or cognitive impairments at its large public high school. That is exactly the type of problem that the integration presumption is supposed to solve. Had the court been more aware of the purpose behind the integration presumption, it might have used it more effectively to attain that structural reform.

In sum, the case law is unsatisfactory. On the most basic level, the integration presumption does not always lead to the structural reform of ensuring that school districts offer children with cognitive impairments the opportunity to be educated in a regular public school. In addition, none of the leading circuit court cases does a satisfactory job in determining what educational configuration makes sense for a child with mental retardation. The integration presumption arguably interfered with the Fifth and Sixth Circuit's evaluations, because it precluded an even-handed analysis in those circuits, and was not given sufficient weight by the Fourth and Eighth Circuits. The results in the Fourth and Eighth Circuits make it clear that there is a significant risk that more school districts might seek to educate children in disability-only institutions in the absence of an integration presumption.¹²¹ Thus, we need to return the integration presumption to its original purpose by using it to encourage school districts to create more than disability-only options for children while not overusing the presumption to the disservice of children within school districts that have available a

¹²¹The integration presumption worked well to avoid that problem recently in the Tenth Circuit. Despite evidence that the child, who had an autistic spectrum disorder, would benefit from placement in a regular educational program, the school district only offered to place her in a preschool populated predominantly with children with disabilities. *See* L.B. and J.B. v. Nebo School District, 379 F.3d 966 (10th Cir. 2004). It is important for courts to continue to conclude that school districts are in violation of the IDEA when they do not offer a continuum of placements for children with disabilities, and only offer a segregated placement. As I discuss in Part IV, my approach would achieve this result because school districts would not be permitted to offer only one educational option.

full continuum of educational options for children with disabilities.

In thinking about this issue, we also do not want to be too influenced by the recalcitrant school districts that may not be seeking to serve the interests of children with disabilities. Most school districts are probably genuinely interested in serving their children with disabilities, as well as genuinely interested in complying with the law and avoiding litigation. The Department of Education can help set background norms within a school district when it revises federal policy by reinterpreting existing rules. School districts are likely to be risk-adverse and follow federal law rather than seek litigation. At present, that background norm is a strong integration presumption that neither school districts nor parents are likely to challenge even if it is not serving the child's best interests.¹²² Parents are likely to be risk-adverse in the education setting and not challenge the school district's decision. They are unlikely to bring a lawyer to an IEP meeting and, as people who have to work cooperatively with the school district over time, are unlikely to wish to antagonize the school system by challenging their educational decisions.¹²³ Thus, the school district's recommendation is likely to govern the placement of the child in the school even if it is not consistent with sound

¹²²For example, when my son was three, the school district placed him in a special education class for preschoolers for roughly three hours each day. He spent the rest of the day in a typical preschool classroom. When he was in the special education classroom, children from the "typical" classes were brought in a few times a week for an hour or so to act as "typical" role models. The school district apparently brought in the typical role models to comply with the IDEA since they were otherwise educating these children for three hours per day in a segregated environment. From my vantage point as a parent, it appeared that they were mechanically complying with the integration presumption rather than asking whether those children needed exposure to "typical" role models since many of the children were spending six or more hours a day in regular classrooms in addition to the special education classroom. There are many reasons to think that the role modeling was ineffective, especially because many of the children with disabilities were preverbal and needed intensive one-on-one work with an adult. The children brought in as "typical" role models, given their young age, posed a considerable burden on the special education staff. The integration presumption, read broadly, however, precludes individualized consideration of whether the role modeling was appropriate and set an important background norm.

¹²³See David Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166 (1991).

educational practices.

At present, Congress has informed school districts to choose the most integrated setting possible for a child in the absence of evidence that the integrated setting is better for the child than a more segregated setting. On a routine basis, school districts therefore follow that policy without questioning its wisdom because Congress has not given it the authority to challenge that policy judgment. But, as we have seen, Congress did not have a strong basis for that policy judgment. Congress was aware that disability-only institutions were often secondclass warehouses for children and should be closed. Congress was not aware – because no evidence existed at the time – of whether resource rooms or pull-out programs generally worked better for children with disabilities than full inclusion. Yet, Congress has created a background norm that prefers the regular classroom over these other settings. Revision of the existing regulations interpreting the integration presumption could have an immediate and profound impact on school districts that seek to comply with federal law by giving them more freedom to consider the evidence of educational benefits within various settings for an individual child.

If we were to give school districts more leeway in choosing educational options for children with disabilities, what factors would we want them to consider? In the next two parts, I will examine the literature from disability and race to see what factors would be most appropriate.

II. DISABILITY-BASED EMPIRICAL LITERATURE

Although Congress has presumed that a fully integrated education is preferable for children with disabilities, education researchers have considered that issue to be an open question for many types of disabilities that affect a child's ability to learn. In Part IB, we saw the courts struggle with the integration presumption for children with cognitive impairments or mental health impairments.

Should they look for evidence of no educational benefit to overcome the integration presumption? Or is a more even-handed approach appropriate if the school district has available an array of educational alternatives? In this section, I will survey the literature on children with: (1) mental retardation, (2) emotional or behavioral impairments, and (3) learning disabilities to determine whether a presumption for full inclusion is appropriate and, if not, what factors might guide school districts and courts in thinking about the appropriate configuration of educational resources for these children. The bottom line from these studies is that 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.

A. *Mental Retardation*

The argument for the integration presumption largely arose from the context of students with mental retardation. Cases involving children with mental retardation resulted in the first consent decrees that formed the basis for the integration presumption under the IDEA.¹²⁴ A close examination of the empirical research underlying those arguments, however, reveals that the researchers did not necessarily argue for full inclusion. Instead, they argued for the closing of disability-only institutions for children with mental retardation.

In 1968, Lloyd Dunn called for the elimination of schools for children with mild learning disabilities based on evidence from the racial civil rights movement that academically disadvantaged African-American children in racially segregated schools made less progress than those of

¹²⁴See *supra* Part IA.

comparable ability in integrated schools.¹²⁵ But Dunn did not call for full integration. Instead, he proposed pull-out, remedial resource rooms, staffed by special education teachers as a way to achieve a more integrated and effective education, although he did note that full inclusion might work with children with IQ's in the 70-85 range (mild mental retardation). Although Dunn's literature review was based on studies of a mentally retarded population with IQ's up to 85, and he only argued against special class placements for children in the IQ range of 70-85, his work was soon applied to arguments for full inclusion for children with IQ's in the 50-70 range.¹²⁶

Douglas and Lynn Fuchs question studies that argue for full inclusion for children with mental retardation.¹²⁷ They contend that such studies are seriously flawed because "the researcher rarely assigned the disabled students at random to special education and mainstream classes. Rather, in almost every case, school personnel had assigned students to programs to suit their own pedagogic purposes long before the researcher showed up, with the consequence that the mainstreamed students were stronger academically from the study's start."¹²⁸

Similarly, Bryan Cook argues that students with mental retardation frequently need the skills

¹²⁵Lloyd Dunn, *Special Education for the Mildly Retarded: Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILDREN 5-22 (1968).

¹²⁶For a general discussion of this problem, see GARRY HORNBY, MARY ATKINSON & JEAN HOWARD, CONTROVERSIAL ISSUES IN SPECIAL EDUCATION 68, 70 (1997). Carlberg and Kavale corroborated Dunn's conclusions, finding that students with mental retardation in regular class placements performed as well, academically, as those placed in special classes. Conrad Carlberg & Kenneth Kavale, *The Efficacy of Special Versus Regular Class Placements for Exceptional Children: A Meta-Analysis*, 14 JOURNAL OF SPECIAL EDUCATION 295, 304 (1980).

¹²⁷Douglas Fuchs & Lynn S. Fuchs, *What's "Special" About Special Education?*, 76 PHI DELTA KAPPAN 522 (March 1995).

¹²⁸Douglas Fuchs & Lynn S. Fuchs, *What's "Special" About Special Education?*, 76 PHI DELTA KAPPAN 522 (March 1995).

of a special education teacher that cannot be found in the regular classroom.¹²⁹ Although students with severe and obvious disabilities may be well accepted in the regular classroom, Bryan Cook argues that surveys of regular classroom teachers reveals that they “do not know how to provide instruction that meets the unique needs of students with obvious disabilities.”¹³⁰ Teachers “feel ill-prepared to discuss a student [with severe disabilities] with a parent and do not feel they know how to appropriately instruct that student.”¹³¹ Prior studies may have found that students with severe disabilities fare well in the regular classroom but Cook cautions that those results simply reflect a model of differential expectations. “Because teachers can readily recognize the disabilities of their included students with severe and obvious disabilities (e.g., autism, multiple disabilities), atypical behavior and performance appears to be anticipated, explained, and excused and does not, therefore, engender teacher rejection.”¹³² Tolerance should not be equated with genuine education.

Researchers on children with mental retardation are not uniform in their generalizations. Possibly, children with mild mental retardation fare better in the regular classroom than children with severe mental retardation. Rather than presume that a particular configuration of educational resources works for such children, however, it would make sense to weigh the evidence in a particular case and consider whether the regular classroom teacher has the skills necessary to provide the child with an appropriate and adequate education.

¹²⁹Bryan G. Cook, *A Comparison of Teachers' Attitudes Toward Their Included Students with Mild and Severe Disabilities – Statistical Data Included*, 34 JOURNAL OF SPECIAL EDUCATION 203 (2001).

¹³⁰*Id.* at 211.

¹³¹*Id.* at 211.

¹³²*Id.* at 209.

B. Emotional or Behavioral Impairments

The education literature does not support a strong integration presumption for children with emotional or behavioral impairments to be fully included in the regular classroom. Conrad Carlsberg and Kenneth Kavale reviewed 50 independent studies of special education versus full inclusion and, in general, found no effects based on type of placement. “Thus, regardless of whether achievement, personality/social, or other dependent variables were chosen for investigation, no differential placement effects emerged across studies.”¹³³ Nonetheless, they did find an effect based on type of disability. “The findings suggest no justification for placement of low-IQ children (SL [IQ 75 to 90] and EMR [IQ 50 to 75]) in special classes. Some justification in the form of positive gain in academic and social variables was found for special class placement of LD [learning disabled] and BD/ED [behaviorally, emotionally disturbed] children.”¹³⁴ The authors therefore concluded:

This finding suggests that the present trend towards mainstreaming by regular class placement may not be appropriate for certain children. Special class placement was not uniformly detrimental, but appears to show differential effects related to category of exceptionality. MacMillan (1971) warned that “special educators must not allow the present issue to become one of special class versus regular class placement lest they find themselves in a quagmire analogous to that which resulted from the nature-nurture debate over intelligence” (p. 8)¹³⁵

Similarly, Paul Sindelar and Stanley Deno reviewed seventeen studies and concluded that resource rooms were more effective than regular classrooms in improving the academic achievement of

¹³³Conrad Carlberg & Kenneth Kavale, *The Efficacy of Special Versus Regular Class Placements for Exceptional Children: A Meta-Analysis*, 14 JOURNAL OF SPECIAL EDUCATION 295, 304 (1980).

¹³⁴*Id.* at 304.

¹³⁵*Id.* at 304-05.

students with emotional and behavioral disorders.¹³⁶

The previous two literature reviews were conducted more than twenty years ago. In a more recent article, James Kauffman and John Wills Lloyd have offered an anecdotal assessment of what kinds of programs work best for students with severe emotional or behavioral disorders.¹³⁷ Based on interviews of teachers, administrators and mental health personnel, they have concluded that the following conditions are necessary for educating these students:

1) a critical mass of trained, experienced, and mutually supportive personnel located in close proximity to one another and 2) a very low pupil/staff ratio (approximately 5:1 for students in a day or residential treatment and 1:1 for the most severely disabled students.)¹³⁸

Kaufmann and Lloyd conclude that regular classrooms are extremely unlikely to meet those criteria. On the other hand, they conclude that “special schools and classes can be made safe, accepting, valuing, and productive environments for these students.”¹³⁹

C. *Learning Disabilities*

Studies of children with learning disabilities suggest that they often fare poorly in the regular classroom. Sindelar and Deno found that resource rooms were more effective than regular

¹³⁶Paul T. Sindelar & Stanley L. Deno, *The Effectiveness of Resource Programming*, 12 *Journal of Special Education* 17-28 (1979).

¹³⁷James M. Kauffman & John Wills Lloyd, *Inclusion of All Students with Emotional or Behavioral Disorders? Let's Think Again*, 76 *PHI DELTA KAPPAN* 542 (1995)

¹³⁸*Id.*

¹³⁹*Id.* It is important to note that Kaufmann and Lloyd are discussing children with severe emotional or behavioral disorders. They recognize that children with severe mental health disabilities have historically been institutionalized in inappropriate settings, therefore spurring on calls for inclusion. Nonetheless, they conclude that “overenthusiasm for the regular school and the regular classroom as the sole placement options for students with disabilities has the potential for creating an equal tyranny.” *Id.*

classrooms in improving the academic achievement of students with learning disabilities.¹⁴⁰ Similarly, Carlberg and Kavale found that students with learning disabilities in special classes (both self-contained and resource programs) had a modest academic advantage over those remaining in the regular classroom.¹⁴¹

One reason that these early studies reported such poor results for students in regular classrooms is that these students may not have been receiving adequate support in the regular classrooms. By contrast, they were receiving special services if they were in self-contained special education classes or pull-out programs.

Naomi Zigmond sought to examine strong inclusion models to see if they produced better results than pull-out programs for children with learning disabilities.¹⁴² She examined three inclusion models which focused on restructuring mainstream instruction to increase the classroom teacher's capacity to accommodate learning activities that met a greater range of student needs. These were well-funded programs sponsored by major research universities seeking to incorporate validated teaching techniques. She found that the percentage of students with learning disabilities who made average or better gains than typical students was an average of 37% across sites. Even worse, 40% of the students in the study recorded gains of less than half the size of the grade level averages – what she described as a “disturbing rate.” Based on these findings, she concluded: “Taken together,

¹⁴⁰Paul T. Sindelar & Stanley L. Deno, *The Effectiveness of Resource Programming*, 12 JOURNAL OF SPECIAL EDUCATION 17-28 (1979).

¹⁴¹Conrad Carlberg & Kenneth Kavale, *The Efficacy of Special Versus Regular Class Placements for Exceptional Children: A Meta-Analysis*, 14 JOURNAL OF SPECIAL EDUCATION 295, 304 (1980).

¹⁴²Naomi Zigmond et al., *Special Education in Restructured Schools: Findings from Three Multi-Year Studies*, PHI DELTA KAPPAN 531-540 (1995).

the findings from these three studies suggest that general education settings produce achievement outcomes for students with learning disabilities that are neither desirable nor acceptable.”¹⁴³

Admittedly, the Zigmond study did not compare students receiving full inclusion with students receiving pull-out services.¹⁴⁴ As Zigmond notes, however, the results from her study are deeply disappointing for full inclusion because the three projects “invested tremendous amounts of resources – both financial and professional – in the enhancement of services for learning disabled students in the mainstream setting.”¹⁴⁵ It is certainly possible that pull-out programs which invested equal amounts of resources would produce better results.¹⁴⁶

¹⁴³*Id.*

¹⁴⁴One problem with many of these studies is that they compare one group of children with disabilities to another group of children with disabilities, rather than comparing them to typical children. Children with mental retardation may do better in a regular classroom than in a resource room but, overall, they may make insignificant academic progress. One goal of special education is to help children with disabilities narrow the gap between their performance and that of their typical peers. None of these studies were able to report such findings. The goal of the IDEA is to provide children with disabilities an *adequate* education. It is hard to know if the education is adequate if one does not measure progress over time, comparing children with disabilities to typically developing children.

Douglas Martson designed a study that overcame that problem. Douglas Marston, *A Comparison of Inclusion Only, Pull-Out Only, and Combined Service Models for Students with Mild Disabilities*, 30 THE JOURNAL OF SPECIAL EDUCATION 121 (1996). He compared the reading progress of students in three different delivery models: inclusion only, combined services, and pull-out only. In the combined services model, students received special instruction in a pull-out resource room and in general education through a team-teaching model. He found that students in a combined-services model made the most progress. The students in the combined services model typically moved from the fifteenth to the twentieth percentile whereas students in the full inclusion or resource-only model typically made no progress in comparison with typical children. *Id.* at 130.

Interestingly, however, Martson found that special education resource teachers did not pursue fully inclusive models when they were given the latitude to do so. “Of the average 946 minutes per week they devoted to direct instruction with students with disabilities, 561 minutes, or 59%, of their instructional time occurred in pull-out settings.” Special education teachers, themselves, therefore realized the relative ineffectiveness of full inclusion and tried to incorporate a more collaborative model into full inclusion programs. Special education teachers also preferred the combined services model. Of the three teaching models, 71.2% showed moderate or significant satisfaction with the combined services model, 58.9% with the pull-out only model, and 40.3% with the inclusion only model. To the extent that we value these teachers as having expertise based on professional experience, the data are not very supportive of a full inclusion model. *Id.* at 129.

¹⁴⁵*Id.*

¹⁴⁶The Zigmond study focused on the poor results that were achieved for a majority of students in a well-funded full inclusion program. Critics of her study emphasize that she had no basis upon which to conclude that resource rooms

Genevieve Manse and Melvyn Semmes conducted a broad-based review of eight different inclusive models for elementary students with mild disabilities, primarily with learning disabilities.¹⁴⁷ They compared the results in inclusive programs with pull-out programs. Only two of the eight models yielded supportive findings in reading, and only two of the five models report math results found positive results in math. They concluded that “inclusive programming effects are relatively unimpressive for most students with mild disabilities, especially in view of the extraordinary resources available to many of these model programs.”¹⁴⁸ They concluded “that a model of wholesale inclusive programming that is superior to more traditional special education service delivery models does not exist at present.”¹⁴⁹

or pull-out programs would have produced better results for these students. Moreover, critics argue that it is unrealistic to expect students with disabilities to make progress comparable to their peers. Hence, Nancy Waldron and James McLeskey argue: “[W]e would concur with several other investigators (Affleck et al., 1988; Bear & Proctor, 1990) who contend that the criterion for judging ISP’s should not be whether students with disabilities are making progress that is comparable to grade-level peers which is tantamount to saying that the disability must be ‘cured’) (McLeskey & Waldron, 1995), but rather a more appropriate criterion should be that students with disabilities make at least as much progress in an inclusive setting as they would make in a noninclusive setting.” Nancy L. Waldron & James McLeskey, *The Effects of an Inclusive School Program on Students with Mild and Severe Learning Disabilities*, 64 EXCEPTIONAL CHILDREN 395-405 (1998). Using such criterion, they found that students with severe learning disabilities made comparable progress in reading and math in pull-out and inclusion settings, but students with mild learning disabilities were more likely to make gains commensurate with typical children in reading when educated in inclusive environments than when receiving special education services in a resource room. Madhabi Banerji and Ronald Dailey also included that an inclusive model worked well for the students with disabilities. See Madhabi Banerji & Ronald Dailey, *A Study of the Effects on an Inclusion Model on Students with Specific Learning Disabilities*, 28 JOURNAL OF LEARNING DISABILITIES 511 (1995). Their sample sizes, however, were small and they had no comparison group for the study; hence, their study is of limited utility.

¹⁴⁷Manset and Sammel, *supra* note 80.

¹⁴⁸*Id.* at 177.

¹⁴⁹*Id.* at 178. Bryan G. Cook also concluded that inclusive programming may be ineffective for students with mild disabilities. Bryan G. Cook, *A Comparison of Teachers’ Attitudes Toward Their Included Students with Mild and Severe Disabilities – Statistical Data Included*, 34 JOURNAL OF SPECIAL EDUCATION 203 (2001). He surveyed the teachers of 173 students with hidden disabilities, as well as students with obvious disabilities, who were receiving inclusive programming. He found that teachers were far more likely to want to exclude students with *mild* disabilities from their classrooms than children with severe disabilities (16.7% compared with 31.8%). He explained this difference based on a model of “differential expectations.” “Students with mild or hidden disabilities are violating expectations and are rejected because they fall outside of teachers’ instructional tolerance and pose classroom management problems. In a

Researchers who support a presumption for full inclusion models base their arguments on moral rather than empirical arguments. For example, Waldron and Moleskin conclude from their data that children should be presumptively educated in an integrated setting although their data only supports that conclusion for children with mild disabilities with respect to reading.¹⁵⁰ If one does not accept as given that the IDEA presumption is appropriate, then one is left with a very limited empirical justification for the integration presumption.

Even Waldron and Moleskin, however, are not so naive as to suggest that full inclusion is always best for children with disabilities. They note that “poorly designed, bad inclusive programs, which do not meet the needs of students with disabilities, are being implemented in many parts of the country.”¹⁵¹ They therefore argue that “it seems to be an opportune time to begin studying how effective inclusive programs are developed and what barriers exist to the development and implementation of these programs.”¹⁵² Alternatively, one could say it is time to begin studying *when* inclusive programs are likely to be effective and when other kinds of approaches might be effective. One barrier to the development and implementation of effective programs may be an unwarranted

sense, because they do not appear significantly different from nondisabled classmates, students with hidden disabilities are held responsible and are blamed for aberrant behavior and performance.” *Id.* at 209. Cook therefore concludes: “Considering teachers’ frequent rejection of students with mild and hidden disabilities, it appears that their inclusion should not be a foregone conclusion, particularly for those students exhibiting attitudinal and behavioral problems.” *Id.* at 210.

¹⁵⁰ To draw a broader conclusion, they must rely on a theoretical or moral argument about the benefits of full inclusion. They argue: “if students with disabilities make comparable progress in two settings, then they should be educated in the less restrictive setting, as per the [Least Restrictive Environment] provision of IDEA.” Nancy L. Waldron & James McLeskey, *The Effects of an Inclusive School Program on Students with Mild and Severe Learning Disabilities*, 64 EXCEPTIONAL CHILDREN 395-405 (1998).

¹⁵¹ *Id.*

¹⁵² *Id.*

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integration presumption.

One justification for a full inclusion model is that it is considered less stigmatizing to children to be educated in their regular education setting. Jenkins and Heinen, however, found that older students tended to prefer a pull-out program because they considered it to be less embarrassing than inclusion programs.¹⁵³ Similarly, Padeliadu and Zigmond reported that children found a special education placement to be a more supportive, enjoyable and quiet learning environment than their general education classroom.¹⁵⁴ Based on a survey of the literature, Lisa Aaroe and J. Ron Nelson concluded that “students tended to support and enjoy receiving instruction in the resource room” although they also recognized the need to study students’ preferences more fully.¹⁵⁵ Examining the preferences of children with disabilities, Marty Abramson also concluded that “many children in special classes prefer to remain in special education programs” because social acceptance did not accompany integration.¹⁵⁶ The problem is not simply that these children are not accepted by their classmates; they are often not accepted by their classroom teacher. “A number of studies have indicated that regular classroom teachers perceive handicapped children to be socially and academically inferior to regular children. However, it is these very teachers who will be required to

¹⁵³Jenkins, J.R. & Heinen, A, *Students’ Preferences for Service Delivery: Pull-out, in-class, or integrated models*, 55 EXCEPTIONAL CHILDREN 516-523 (1989).

¹⁵⁴Padeliadu, Susana & Zigmond, Nancy, *Perspectives on Students with Learning Disabilities About Special Education Placement*, 1 LEARNING DISABILITIES RESEARCH & PRACTICE 15-23 (1996).

¹⁵⁵Lisa Aaroe & J. Ron Nelson, *Views About Key Curricular Matters from the Perspectives of Students with Disabilities*, 1 CURRENT ISSUES IN EDUCATION (1998), available at <http://cle.ed.asu/volume1/number8/>.

¹⁵⁶Marty Abramson, *Implications of Mainstreaming A Challenge for Special Education* in THE FOURTH REVIEW OF SPECIAL EDUCATION 315, 325 (1980).

accept handicapped children into their classrooms.”¹⁵⁷ By contrast, special education teachers have typically become educators in order to teach children with special needs. They are more likely to have a positive attitude about these children, given their educational background. Hence, there is little theoretical or empirical basis to presume that children with disabilities would face less stigmatization in the regular classroom, although more research is certainly warranted on this topic.

Even if one accepts the data that suggest that children with mental and emotional disorders, as well as other disabilities, fare better in special education, one might ask whether regular education could be transformed to be more effective for these students. Douglas Fuchs and Lynn Fuchs suggest that the answer is “no.” They conclude: “We have found that the instructional adaptations that general educators make in response to students’ persistent failure to learn are typically oriented to the group, not to the individual, and are relatively minor in substance, with little chance for helping students with chronically poor learning histories.”¹⁵⁸ Thus, they observe that regular education is a “productive learning environment for 90% or more of all students” but it is hard to make it a productive learning environment for the 10% who may have a different learning style.¹⁵⁹

The empirical literature regarding children with mental retardation, emotional impairments, or learning impairments does not support an integration presumption. Instead, these studies suggest that these children often benefit from education by special education teachers for at least some of the day, and often attain more educational benefits when not in a fully inclusive environment. The

¹⁵⁷*Id.* at 333.

¹⁵⁸Douglas Fuchs & Lynn S. Fuchs, *What’s “Special” About Special Education?*, 76 PHI DELTA KAPPAN 522 (1995).

¹⁵⁹*Id.*

research on effective strategies for children with disabilities, however, is relatively new and has faced serious research design challenges. We would certainly benefit from the continued funding of such research as we seek to design educational configurations that are likely to assist children with a range of disabilities. We would also benefit from exploring the literature on racial integration to see what factors might counsel towards successful integration experiences.

III. RACE-BASED RESEARCH

The empirical literature on disability and education is relatively new and complicated by research design problems. That literature is certainly helpful as we try to develop checklists for school districts to consider in designing educational configurations for children with disabilities. The rich literature on race and integration, however, can also be helpful to our thinking about disability. Given the controversial nature of racial integration and affirmative action, it is difficult even to survey the existing literature on race without being accused of having an ulterior political agenda.¹⁶⁰ My goal is straightforward – I hope to learn from the dialogue in the racial civil rights area in order to suggest principles that might guide the development of programs in the disability context.

Disability, of course, is not race. Many differences exist between the two categories.¹⁶¹ Individuals with disabilities typically live with individuals who are not disabled. They come from all socio-economic classes and live in virtually all school districts. Although society may “create”

¹⁶⁰In his forthcoming article on the effects of affirmative action in American law schools, Professor Richard Sander finds it necessary to begin his study by disclosing what he describes as his “biases” as a white researcher, father of a biracial child, and author of previous work that was supportive of affirmative action. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, __ STANFORD L. REV __ (2004). My agenda in this article is to bring a higher level of sophistication to the discussion of integration for children with disabilities. I do *not* hope to influence the rich debate in the racial civil rights movement concerning the effectiveness of integration in that context but I *do* hope to learn from their dialogue.

¹⁶¹Talking about sameness and difference is treacherous. See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

disabilities with unnecessary steps and door handles that are not easily grasped, the term “disability” can also have an underlying medical basis.¹⁶² Individuals are not necessarily born disabled; they may become disabled through an illness or an accident. Eventually, in fact, we all are likely to become disabled before our death.

By contrast, race is a socially constructed, nonbiological category.¹⁶³ In the United States, racial minorities tend to concentrate in the lower socio-economic categories and live in racially segregated communities. *De jure* segregation in race and disability may stem from very different factors and lead to different kinds of harms. Similarly, the means necessary to achieve desegregation in both of these contexts may be very different. Whereas racial desegregation in the educational arena may require steps to overcome segregated housing patterns, disability desegregation may require steps to permit the attendance at neighborhood schools. Educational integration in the disability context does not require the transformation of housing patterns or a modification of how we fund schools, as it does in the race context.¹⁶⁴

Nonetheless, some important similarities exist between the experiences of African-Americans and individuals with disabilities. Both groups were subject to antipathy and substandard educational and living conditions based on a notion of white and able-bodied supremacy. Even after courts tried

¹⁶²For a critique of the medical model of disability, see RUTH O'BRIEN, *CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE* (2001).

¹⁶³For two excellent discussions of this issue, see IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION'S DEFINITION* (1993).

¹⁶⁴See, e.g., James E. Ryan, *Schools, Race and Money*, 109 *YALE L.J.* 249 (1999). Similarly, Professor Cashin's book on racial integration focuses extensively on housing. See CASHIN, *supra* note ___. See also Meredith Lee Bryant, *Combating School Resegregation Through Housing A Need for a Reconceptualization of American Democracy and the Rights it Protects*, 13 *HARV. BLACK LETTER L.J.* 127 (1997); John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 *HAMLIN J. PUB. L. & POL'Y* 337 (1996).

to end *de jure* segregation, both groups have had to face forced resegregation with its attendant supremacist perspective.¹⁶⁵ And integration has proven challenging for both groups as researchers wonder whether racial desegregation and disability mainstreaming have led to positive outcomes.¹⁶⁶

While we need to be careful not to overgeneralize in transferring race-based empirical studies to the disability context, on balance, this literature would seem to offer some useful insights for the disability rights community. For example, some education researchers have argued that poor African-American children have benefitted from being educated in schools with middle-class white children despite the racial and socio-economic differences between these two groups.¹⁶⁷ Others have argued that it can be harmful for the self-esteem of poor, minority children to be educated in a white, middle-class environment.¹⁶⁸ The race literature can inform us about the challenges of bringing children together across such differences in the classroom. What factors lead to success? What factors lead to failure? Are some of these factors generalizable to disability?

Of course, we should not make the mistake of developing disability policy solely on the basis of evidence about the racial experience with integration. I have already surveyed much of the

¹⁶⁵See generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993).

¹⁶⁶See *infra* Part IIIB.

¹⁶⁷The United States Department of Education commissioned an important study of the effects of desegregation in 1966. See JAMES S. COLEMAN et al., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966). This report supported the argument that placing low-income African-American students in schools with middle-class white students would enhance their educational achievement. The study concluded: “if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.” *Id.* at 22.

¹⁶⁸See NANCY ST. JOHN, *SCHOOL DESEGREGATION* 73 (1975) (finding that desegregation is likely to harm the self-esteem of minority children if they are placed in daily contact with other children who they perceive to have higher economic or academic standards).

leading literature on disability. Read together, both literatures can therefore guide us in developing policy prospectively.

Two topics that are widely discussed in the race context have application to the disability context: the research on self-esteem and academic achievement. Considerable research in the race context exists on these two variables because the Supreme Court in *Brown* predicted positive outcomes from desegregation with respect to those factors.¹⁶⁹ When parents seek an integrated environment for their child with a disability, they often seek to have their child improve their image of themselves, and develop both improved social skills and academic skills. Although there is a wealth of information available on the issue of racial integration in education, I will focus on the research on those two topics.¹⁷⁰

A. *Self-Esteem & Aspirations*

In *Brown*, the Supreme Court relied, in part, on the conclusion that segregation harmed the self-esteem of African-American children to justify integration.¹⁷¹ Whether the Supreme Court was correct in 1954 when it found that segregation had a harmful effect on the self-esteem of African-American children has been the subject of considerable controversy.¹⁷² Today, researchers are not

¹⁶⁹The Supreme Court concluded that segregation has a harmful effect on the “hearts and minds” of minority children. *Brown*, 347 U.S. at 494.

¹⁷⁰If my goal were to inform the racial civil rights debate, my investigation would have to include other topics such as housing and school funding. Thus, it would be wrong to take my discussion of these empirical studies to propose policy outcomes in the racial context.

¹⁷¹The Supreme Court’s initial conclusions about the harmful effects of segregation on African-Americans were based on doll studies of nonrandom populations in which many African-American children showed a preference for a white doll or said the white doll looked like them. See *Brown v. Board of Education*, 347 U.S. 483, 494-95 n. 11 (1954).

¹⁷²The original doll studies were reported in Kenneth Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Preschool Children*, 10 J. SOCIAL PSYCHOLOGY 591 (1939). These studies were interpreted as reflecting low self-esteem among African-American children. Beginning in the 1970’s, however,

concerned with the validity of those 1954 studies. Instead, they ask two questions related to self-esteem: (1) does integration affect a child's feelings of self worth? And (2) does integration affect a child's aspirations for the future?

Although those two questions are related, they are not identical. For example, integration could negatively impact a student's feelings of self-worth while also helping to inspire the student to seek higher levels of education and employment in the future. Early researchers have tended to focus on self-esteem issues while more recent researchers have tended to focus on long-term aspirations. The *Brown* decision may therefore have immediately focused attention on self-esteem but, over time, researchers begun to wonder if that was one of the most important criteria to investigate. They argue that the purpose of the *Brown* litigation was to raise the educational and employment aspirations and attainments of African-Americans so research should focus on the connection between those criteria and integration. Because many studies investigate both self-esteem and aspirations, I examine together their connection to integration.

Nancy St. John has examined both self-esteem and students' aspirations. She observed that

researchers began to use more sophisticated survey instruments that examined personal self-esteem directly and concluded that the self-esteem of African-Americans was at least as high as that of whites. See Morris Rosenberg, *Self-Esteem Research: A Phenomenological Corrective* in SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS 175, 175 (Jeffrey Prager, Douglas Longshore, and Melvin Seeman eds. 1986). Over time, the doll studies from the 1940's and 1950's came under serious attack. *Id.* at 177. Some researchers concluded that the children in the doll studies (who typically ranged from 3 to 7 years of age) were reacting to the color of the doll's skin rather than thinking in racial terms. African-American children with darker skin were picking the "black doll" as looking more like them, and African-American children with lighter skin were picking the "white doll." When research was expanded to include white children in these studies, it was found that more white than African-American children identified with the other racial category. As with African-American children, it appeared that darker skinned white children identified with the darker doll and vice versa. "In sum, if a black child with light color skin says he looks more like a white doll than a dark doll, it may not be that he is disidentifying with his race and expressing racial self-hatred; it may simply be that he does look more like the white doll than the dark. Many children are thus responding literally to skin color." *Id.* at 196. Schofield argues that the research which concluded that African-American children in segregated environments have low self-esteem was "not well founded" and "flawed." See Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students* in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 607 (eds. James A. Banks & Cherry A. McGee. Banks 1995).

“the way in which desegregation is implemented, on the one hand, and the particular needs of individual children, on the other, may condition the outcome.”¹⁷³ St. John identified a number of facts that correlate with positive self-esteem outcomes for minority children. First, she found that desegregation can have a positive effect by giving minority children an increased feeling of control – which they can select to attend a previously white school. Thus, she found that the availability of the choice of attending a previously white school correlated with increased self-esteem for minority children *even when most minority children remained in segregated schools*.¹⁷⁴ Similarly, she suggested that it is harmful to the self-esteem of black children for their local school to be closed and for the children to be forced to be bused to a majority white school because they are then being taught “that there is nothing of value in the black community.”¹⁷⁵

Second, she found that desegregation is likely to harm the self-esteem of minority children if they are placed in daily contact with other children who they perceive to have higher economic or academic standards. Hence, lower-class children had the worse self-esteem results when placed in a majority white, middle class school because this new environment made them more aware of their existing deprivations. She even used a disability reference when making this argument: “[T]hey may feel currently discriminated against if academic handicaps prevent access to certain courses,

¹⁷³NANCY ST. JOHN, SCHOOL DESEGREGATION 88 (1975) (reviewing over 60 studies). Her work has been criticized for failing to distinguish between types of desegregation programs. *See* Schofield, *supra* note 172, at 599.

¹⁷⁴*Id.* at 91. The theme that the existence of school choice can enhance the self-esteem and academic performance of minority children is also consistent with the literature on Afro-centric schools. *See generally* Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993). Some of the studies of Afro-centric schools suggest that they can help lower the suspension and dropout rates for African-American males. Some studies suggest that one negative consequence of desegregation is an increase in the suspension rates for minority students. *See generally* Schofield, *supra* note 172, at 604 (summarizing studies).

¹⁷⁵ST. JOHN, *supra* note 173, at 91.

activities, or honors in the new school.”¹⁷⁶ She suggested that such children might fare better in predominantly black schools with “facilities, staff, and curricula that are visibly and dramatically superior.”¹⁷⁷

Third, St. John found that children’s self-esteem was influenced by others expectations of them. “In a desegregated school ... a black child does not necessarily escape the depressing effect of low expectations of others.”¹⁷⁸ She argues that schools should try to raise the expectations of teachers and peers for the academic performance of minority children irrespective of whether the

¹⁷⁶*Id.* at 94.

¹⁷⁷*Id.* at 94. Morris Rosenberg found further support for St. John’s assertion that a desegregated environment can be harmful to the self-esteem of African-American children if they compare unfavorably with those around them. *See* Morris Rosenberg, *Self-Esteem Research: A Phenomenological Corrective* in *SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS* (Jeffrey Prager, Douglas Longshore, and Melvin Seeman eds. 1986). He found that in segregated environments that African-American children tend to compare themselves primarily to each other, leading to higher self-esteem. “Despite lower socioeconomic status, poorer academic performance, and higher rates of family rupture, then, the social comparison principle is still entirely consistent with high self-esteem among black children.” *Id.* at 184. Arguably, this self-esteem data is inconsistent with the academic achievement data which suggests that minority children benefit academically from being educated with children from higher socio-economic backgrounds. *See infra* Part IIIC.

This self-esteem finding of St. John has been controversial. St. John first reported that finding in 1969. *See* Nancy St. John & M.S. Smith, *SCHOOL RACIAL COMPOSITION, ACHIEVEMENT AND ASPIRATION* (1969). Examining the self-esteem data, Schofield concludes: “The major reviews of school desegregation and African American self-concept or self-esteem generally conclude that desegregation has no clear-cut consistent impact The conclusion that self-esteem is not a problem for African American students, combined with the evidence that desegregation does not have any strong consistent impact on self-esteem, understandably led to a sharp diminution in the amount of research on these topics after the mid-1970s.” Schofield, *supra* note 172, at 607. Others have suggested that African-American students who attend primarily black schools may have higher aspirations and self-esteem in the early grades but, over time, their high aspirations prove to be unrealistic, because they are less likely to attend college than those who attended majority white schools. *See* J. Veroff & S. Peele, *Initial Effects of Desegregation on the Achievement Motivation of Negro Elementary School Children*, 25 *JOURNAL OF SOCIAL ISSUES* 71 (1969). Writing more recently, Amy Stuart Well and Robert Crain argue that an integrated educational environment does correlate strongly with higher educational and career aspirations while noting that studies of this phenomenon are challenging because of self-selection biases in the samples. Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 *REVIEW OF EDUCATIONAL RESEARCH* 531, 552 (1994) (“It is quite likely, for instance, that some of the personal characteristics of black students that would lead them to self-select a desegregated school – less fear of whites, more motivation to achieve in a ‘white world,’ etc. – are similar to the characteristics sought by white employers in prospective employees.”) In an earlier study, Crain found that attending an integrated school correlated with better occupational opportunities for African-Americans, particularly African-American men. *See School Integration and Occupational Achievement of Negroes*, 75 *THE AMERICAN JOURNAL OF SOCIOLOGY* 593 (1969).

¹⁷⁸ST. JOHN, *supra* note 173, at 95.

children are educated in a majority black or majority white environment. “[S]ustained high expectations on the part of staff can probably have a facilitating effect on pupil motivation even in a predominantly black school.”¹⁷⁹ Similarly, Gary Orfield argues that schools with substantial white enrollment “can offer minority students a higher set of educational expectations and career options.”¹⁸⁰ Hence, “desegregated schooling has a positive effect on the number of years of school completed and on the possibility of attending college.”¹⁸¹ In other words, minority children benefit from the higher educational and career expectations that tend to be present in schools with substantial white enrollments even if those environments may have a negative impact on self-esteem.

Fourth, St. John argued that black/white ratios are important factors affecting desegregation and self-esteem. “[C]onditions will be most favorable for a minority group if its numbers are sufficient to exert pressure without constituting a power threat to the majority group. This means perhaps the avoidance of less than 15% and more than 40% of black children in a school.”¹⁸²

In sum, St. John argued that “the factors that will probably determine whether the desegregated classroom is, on balance, academically facilitating rather than threatening are lack of interracial tension and either initial similarity in achievement level of black and white children or else supportiveness of school staff, availability of school academic policies that favor overcoming

¹⁷⁹*Id.* at 95.

¹⁸⁰See generally Gary Orfield & Chungmei Lee, *Brown at 50: King’s Dream or Plessy’s Nightmare?* 24 (January 2004) (available at www.civilrightsproject.harvard.edu) (viewed October 12, 2004).

¹⁸¹*Id.* at 24.

¹⁸²*Id.* at 100.

handicaps, avoidance of competition, and above all individualization of instruction.”¹⁸³ These factors may lead to more beneficial desegregated schools but St. John also reminds the reader: “[M]any of these same factors could transform a ghetto school into a setting in which a strong yet realistic academic motivation is fostered.”¹⁸⁴ St. John was careful not to challenge the integration presumption directly. She showed how desegregation could be achieved more successfully but also noted that many of these same observations could improve majority black schools.

These observations can be helpful in thinking about the integration presumption in the disability context. First, it may be important for children to have *choices* – to be able to choose a resource room or a regular classroom with supplementary assistance rather than be told that only one option is available to them. If a student then chooses a more segregated option – such as a resource room – the student may not feel as if he or she was forced into that segregated option. The option, itself, may become more valued as a result of the exercise of choice.¹⁸⁵

Second, it may be better for children’s self-esteem to be clustered with children like themselves in terms of chronological age and ability rather than be clustered with children who are substantially different from them. That self-esteem benefit, however, only makes sense if the children are taught by teachers who have high expectations for their achievement. By virtue of their training, special education teachers may be inclined to have higher expectations for children with

¹⁸³*Id.* at 103.

¹⁸⁴*Id.* at 103.

¹⁸⁵For example, I was assisting a high school student with a disability who the school district wanted to assign to a different school, because his mother had moved. The student had mental health problems and reacted very poorly to change. With a letter from a health care professional, we successfully persuaded the school not to insist that the child change schools as part of his IEP. After moving, however, the child decided that he wanted to attend the local public school. When changing schools became a matter of his own choice, he felt better about the decision. In the end, the school district attained the placement that it desired but the presence of choice made the decision feel better to the child.

disabilities than regular classroom teachers.

The self-esteem observation from the racial context may be particularly important in the disability context because of the literature that suggests that some children also receive an increased academic performance benefit by being clustered with children of similar chronological age and ability. As we will see in Part IIIB, the racial data is different than the disability data in this respect. In the race area, African-American children are sometimes found to perform better academically if they were placed with children of higher socio-economic background. The self-esteem and academic performance data therefore can go in somewhat different directions. Self-esteem might suffer but academic performance might improve through integration. In the disability context, however, academic performance for some categories of children is *unlikely* to improve as a result of integration as we have seen in Part II. Hence, the self-esteem and academic performance data may point in the same direction, counseling less enthusiastic support for a strong integration presumption in the disability context.

Third, the racial evidence suggests that children with disabilities should not be “tokens” within the regular classroom if they are educated in that environment. This recommendation, however, is a bit complicated to transfer to the disability field because some disabilities are invisible and it is unlikely that a school will have more than ten percent disabled students, given the overall numbers of the disability population. Further, there is such a wide range of disabilities. Does a child with a learning disability really identify with a child with a hearing impairment or a mobility impairment? The literature on the harms of tokenism may again counsel towards a softening of the integration presumption in the disability context because of the difficulties of placing more than token numbers of children with disabilities in a classroom. One way around the tokenism problem

can be the use of integrated, regional schools rather than integrated, local schools. As we briefly saw in Part IB, some school districts send children with disabilities to regular public schools but not necessarily to their *neighborhood* public school in order to achieve a clustering of individuals with disabilities at a particular public school. That clustering is controversial because children do not get to attend their local public school but it is possible that it has some self-esteem benefits by allowing children with disabilities to attend an integrated environment. The problem with these kinds of clusterings, however, is the lack of *choice*. The lack of choice may undermine the self-esteem benefit because a nondisabled sibling has an option not available to the child with a disability.¹⁸⁶

Fourth, students with disabilities might benefit by having teachers with visible disabilities to improve their self-esteem and serve as role models to help raise their expectations for their own performance. Because of the diversity of disabilities, however, this can be a difficult recommendation to implement. Will a child with an auditory impairment benefit by having a teacher who uses a wheelchair due to a mobility impairment? The presence of these visibly disabled teachers in the classroom may also help the typically-developing children have more respect for individuals with disabilities, including their own classmates. But, again, this solution only works well in the context of visible disabilities. It may be hard for children with invisible disabilities to identify role models and teachers with invisible disabilities, themselves, may want to consider

¹⁸⁶One solution the tokenism problem is for school districts to create disability-centered schools that both disabled and nondisabled students can choose to attend. In Columbus, a private school called the Oakstone Academy has been created to serve the needs of children with autism spectrum disorder. See <http://www.ccde.org/index.jsp?nav=about.jsp>. The school accepts children with autism and typically-developing children. The curriculum is based on the educational needs of children with autism. The small class size and dedicated teaching staff, however, also make it an attractive school for typically-developing children. In this environment, children with autism are “normal” yet are also mainstreamed with typically-developing children. It may be expensive for school systems to support such programs but they do reflect the literature on the appropriate educational environment for some children with disabilities.

“outing” themselves to a child with a disability as a mechanism for enhancing self-esteem.

B. Academic Performance Research

Like the self-esteem research, the research examining the correlation between academic performance and integration is mixed.¹⁸⁷ Writing in 2002, Gary Orfield argues: “There is important evidence in the educational literature that minority students who attend more integrated schools have increased academic achievement, as most frequently measured by test scores.”¹⁸⁸ But Orfield also acknowledges that “the magnitude and persistence of these benefits ... have been widely debated in education research, particularly those that came from the first year of mandatory desegregation plans of the type that was common in the 1960's and 1970's.”¹⁸⁹

The first major study on the effects of desegregation on minority students was commissioned by the United States Department of Education and published in 1966. School desegregation was in its infancy at the time of that study. In the South, desegregation had not yet taken place with nearly

¹⁸⁷Martin Patchen conducted a review of studies that measured the impact of interracial contact on the academic achievement of African-American children in grade school. He found that “these results do not provide any support for the proposition that attending more racially mixed grade schools will improve academic outcomes for black students. There was, in fact, a tendency in the opposite direction – i.e., for blacks who attended more racially mixed grade school classes to get lower grades and achievement scores in high school.” MARTIN PATCHEN, *BLACK-WHITE CONTACT IN SCHOOLS: ITS SOCIAL AND ACADEMIC EFFECTS* 260 (1982). Patchen amplified these studies by others by conducting his own study of the relationship between integration and the performance level of minority students. He concluded that: “[O]ur results have provided no support for the proposition that greater contact with whites in grade school will improve academic outcomes for blacks. Neither the amount nor the nature of interracial contact which blacks experienced in grade school had any impact on their general cognitive abilities at the end of grade school (as indicated by IQ scores). Not did more interracial contact in grade school have a positive effect on black students’ effort, grades or achievement scores in high school.” *Id.* at 292.

Writing a few years earlier, Meyer Weinberg came to a slightly different conclusion. Weinberg conducted a broad-ranging literature review in 1975 of the relationship between school desegregation and academic achievement. Nearly every study that he examined concluded that desegregation has a neutral or positive effect on the academic achievement of minority children. Further, he found that there is virtually no evidence that desegregation lowers the achievement levels of whites. See Meyer Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 *LAW AND CONTEMPORARY PROBLEMS* 241 (1975).

¹⁸⁸Orfield, *supra* note 180, at 23.

¹⁸⁹*Id.* at 23-24.

all children attending single-race schools.¹⁹⁰ The Coleman Report was therefore more readily able to study the characteristics of students and their schools – such as socio-economic status, aspirations of students, and qualifications of teachers – than the impact of race, itself. The Coleman Report found that “a pupil’s achievement is strongly related to the educational backgrounds and aspirations of the other students in the school.”¹⁹¹ It indicated that “children from a given family background, when put in schools of different social composition, will achieve at quite different levels.”¹⁹² It found that this effect was particularly pronounced for minority students.¹⁹³

The Coleman study had a very important effect on the school integration movement because it found: “*Attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of self.*” In general, as the educational aspirations and backgrounds of fellow students increase, the achievement of minority group children increases.”¹⁹⁴ Similarly, the study found that “as the proportion white in a school increases, the achievement of students in each racial group increases.”¹⁹⁵ The study attributed these results to higher educational background and aspirations, not better school

¹⁹⁰The Coleman study reported that in the south that 91% of white elementary school students reported that they attended schools which were “mostly white.” Coleman Report, *supra* note 34, at 18 (Table 7). Nationally, those figures were 89%. *Id.*

¹⁹¹Coleman Report, *supra* note 34, at 22.

¹⁹²*Id.* at 22.

¹⁹³*Id.*

¹⁹⁴*Id.* at 302 (italics in original).

¹⁹⁵*Id.* at 307.

facilities or race, itself.¹⁹⁶ The Coleman study bolstered arguments for desegregation as well as arguments for programs to “infuse poor families with the values, orientations, child rearing strategies, and life styles of the middle class.”¹⁹⁷

The use of the Coleman study to support arguments for desegregation is a bit surprising given the small number of students in the Coleman study who were attending desegregated schools. Although it may have been true that the few minority children who attended majority-white schools performed better than other minority children, this hypothesis could not be tested on the 81% of minority children who did *not* attend majority-white schools.¹⁹⁸ The strongest finding from the Coleman study – “that a pupil’s achievement is strongly related to the educational backgrounds and aspirations of the other students in the school”¹⁹⁹ – is not a race-dependent conclusion.

Following the Coleman study, other researchers questioned the validity of its race-based

¹⁹⁶“The higher achievement of all racial and ethnic groups in schools with greater proportions of white students is largely, perhaps wholly, related to effects associated with the student body’s educational background and aspirations. This means that the apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average found among white students.” *Id.* at 307.

¹⁹⁷See Mickelson, *supra* note 5, at 1527.

¹⁹⁸Coleman Report, *supra* note 34, at 18 (Table 7). There are selection bias problems with the Coleman study’s sample of minority students who attended majority-white schools. It does not distinguish between students in an integrated environment due to desegregation or due to neighborhood schooling. The Coleman report notes that African-American students fare better when they have a “greater sense of control” yet the study does not control for the different ways in which a student might find himself or herself in a desegregated classroom. It is possible that most of the minority students in the Coleman study who were in desegregated environments were there as a matter of “choice” rather than mandatory desegregation. A 2002 study supports the argument that the Coleman study overgeneralized in reporting this result for all African-American children. The new study found that higher ability African-Americans benefit from integration but that other African-Americans may not experience a benefit. See Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* (January 2002) (available at <http://www.nber.org/papers/w8741>) (NBER working paper series).

¹⁹⁹Coleman Report, *supra* note 34, at 22.

generalizations.²⁰⁰ They also highlighted the methodological problems of many of other studies in this area.²⁰¹ Writing in 1975, Meyer Weinberg recognized that it was hard to compare the various studies that had been conducted because they used different methodologies and there were too many factors to control.²⁰² Nonetheless, he was able to identify seven characteristics which he concluded correlated with successful desegregation programs.

1. a relative absence of interracial hostility among students,
2. teachers and administrators who understand and accept minority students, encouraged and reinforced by aggressive in-service training programs,
3. the majority of students in a given classroom are from middle and/or upper socioeconomic classes,
4. desegregation at the classroom as well as the school level, particularly in elementary schools,
5. no rigid ability grouping or tracking, particularly in elementary schools,²⁰³
6. an absence of racial conflict in the community over desegregation, and
7. younger children are involved (though this last conclusion should be considered very tentative).²⁰⁴

²⁰⁰See, e.g., David J. Armor, *The Evidence on Busing*, 28 PUBLIC INTEREST 90 (1972); David J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995); BEYOND DESEGREGATION: THE POLITICS OF QUALITY IN AFRICAN AMERICAN SCHOOLING (Mwalimu J. Shujaa ed., 1996) (questioning evidence that desegregation is necessarily a superior educational environment for African-American children).

²⁰¹See Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students* in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION (eds. James A. Banks & Cherry A. McGee. Banks 1995).

²⁰²Like St. John, Weinberg has been criticized for not selecting studies based on strict methodological criteria. See Schofield, *supra* note 172, at 600.

²⁰³Mickelson also argues that "tracking helps to maintain white privilege by placing whites disproportionately into higher tracks than their comparably able black peers." Mickelson, *supra* note 5, at 1513.

²⁰⁴Weinberg, *supra* note, at 269. Reviewing various studies, including Weinberg's, Schofield affirms Weinberg's conclusion about the importance of integration in the early years. "One suggestion that emerges repeatedly in the reviews is that desegregation may be most effective when carried out in elementary school, especially in the early elementary years." Schofield, *supra* note 172, at 601.

More recent studies have often replicated Weinberg's findings.²⁰⁵ Phyllis Hart and Joyce Germaine Watts echo some of the same conclusions from the Colorado study. But they also note that tracking often does not occur on the basis of objective criteria; that African-American and Latino students who meet the objective criteria for a college preparatory curriculum are often not placed in that curriculum. For example, they found that "when African American and Latino students score in the *top 25th* percentile, only 51% and 42%, respectively, are programmed into [college preparatory math], compared to 100% Asians and 87.5% Whites."²⁰⁶

Vivian Gunn Morris and Curtis L. Morris studied the desegregation experience in Tuscumbia, Alabama.²⁰⁷ They concluded that integration had a significant negative effect on minority students. The authors suggest that schools need to be smaller, have increased parental involvement, and incorporate African-American history into the curriculum to improve the quality of

²⁰⁵In 2002, Diane Pollard drew conclusions similar to that of Weinberg. She observed that a number of studies have found that white teachers have low expectations for minority students and that "not surprisingly, these teacher expectations and behaviors often lead to resistance and rebellion on the part of students." See Diane S. Pollard, *Who Will Socialize African American Students in Contemporary Public Schools?* in AFRICAN AMERICAN EDUCATION: RACE, COMMUNITY, INEQUALITY AND ACHIEVEMENT: A TRIBUTE TO EDGAR G. EPPS 3,5 (Walter R. Allen, Margaret Beale Spencer, Carla O'Connor eds. 2002). Her findings are consistent with Weinberg's observation that it is important for teachers and administrators to understand and accept minority students in order for them to perform well.

Elaine Gantz Berman reached conclusions similar to Weinberg based of her experience in working with an integrated public high school in Denver, Colorado. See Elaine Gantz Berman, 5 POVERTY & RACE 7 (1996). The school was racially integrated for 25 years by busing Anglo children into a predominantly Hispanic and African-American community. Although the school gained an excellent reputation for its college preparatory program, few Latinos or African-Americans participated in that program. Not only did the Anglo students predominate the college preparatory classes but they held most of the school's leadership positions. Only a handful of African-American males even graduated from the school each year. Berman concludes: "It is clear from looking at numerous educational indicators that an integrated student body has not improved outcomes for low-income students of color at Manual High School. And it is equally clear that Manual is not racially 'integrated' Rather, it is desegregated." *Id.* By having a two-track system, and the integration of students from different socio-economic backgrounds, Weinberg would have predicted this disappointing result in Colorado.

²⁰⁶Phyllis Hart and Joyce Germaine Watts, 5 POVERTY & RACE 8 (1996).

²⁰⁷VIVIAN GUNN MORRIS & CURTIS L. MORRIS, THE PRICE THEY PAID: DESEGREGATION IN AN AFRICAN AMERICAN COMMUNITY (2002).

education for minority students.²⁰⁸

Some of these observations might be relevant to the development of programs that achieve successful integration of children with disabilities into the regular classroom. First, they suggest that schools might need to accompany mainstreaming efforts with educational programming for all students to improve tolerance and acceptance of difference. Tolerance and diversity programming, however, is complicated in the disability context because of the prevalence of invisible disabilities. For example, a child with autism might engage in what we consider anti-social behavior by ignoring other children and refusing to cooperate in play activity, or by failing to look her speaker in the eye when conversing. In some sense, autism is an invisible disability although the behavior, itself, once manifested is not invisible. Should the class discuss autism before the autistic child is placed in the classroom or will that discussion only magnify the perception that the child with autism is different? With visible disabilities, diversity programming may be easier. For example, there are documentaries that demonstrate respectful ways to converse with people who are in wheelchairs or who are visually impaired.²⁰⁹ Such programming could be used routinely in the classroom even if no student is obviously disabled. Tailoring diversity training to the composition of the classroom, however, could pose privacy problems for children with invisible disabilities.

²⁰⁸Eric Hanushek, John Kain and Steven Rivkin studied the effects of desegregation on the Texas public school system and came to different conclusions. See Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *New Evidence About Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* (January 2002) (available at <http://www.nber.org/papers/w8741>). They concluded that “achievement for black students is negatively related to the black enrollment share. But the full analysis provides a more complex picture – the adverse effects of racial composition are concentrated on higher ability blacks.” *Id.* at 3.

²⁰⁹I have used a short locally produced film called “The Ten Commandments” for this purpose. *The 10 Commandments of Communicating with People with Disabilities*, produced by Irene M. Ward and Associates, 4949 Hayden Run Road, Columbus, OH 43221-5930, 614-889-0888. <http://www.wireneward.com> I highly recommend the film for this purpose, because it is entertaining and informative.

Second, the racial studies suggest that all teachers need to have special education training so that they can bring disability-centered skills and curriculum into the classroom. This argument might, indeed, benefit many children in the classroom who are not technically labeled as “disabled” but have subtle differences in their style of learning. A teacher with special education training may have more delivery models for educating students and be more attentive to what works. The presence of more special education teachers in the regular classroom may benefit a wide range of students.²¹⁰

Third, the racial findings suggest that we should be skeptical of tracking results and make sure that disabled students are placed with the appropriate ability level if tracking does occur. Nonetheless, disability is somewhat different than race with respect to the tracking issue. The reason students have IEP’s is because they have an impairment in learning. If we ignore those differences and insist that they learn only in the regular classroom, they may not develop the special skills needed to maximize their ability to learn.

Fourth, it appears that it is important to start mainstreaming at the youngest possible age, preferably preschool. In this respect, it is good to note that the IDEA provides each child with the right to a free and appropriate public education as early as the age of three, even though typically-developing children do not usually get a free public education until age five. But it is not clear that mainstreaming is always preferable with young, pre-verbal children who are disabled. The education of preschoolers occurs in a small classroom setting with a small teacher-student ratio. Preschool

²¹⁰For example, I noticed that my daughter’s classroom had headphones on the wall. When I inquired, the regular classroom teacher (who had special education training) explained that the headphones were placed there to be used by children with attention deficit disorder who had problems with distractibility. But the teacher encouraged any child to use the headphones if they were having trouble concentrating and wanted to block out the noise. An innovation from the special education field – teaching children how to overcome their distractibility – was able to benefit any child in the regular classroom.

education for children with disabilities is often one-on-one and very intense. Although mainstreaming may make sense when children enter grade school, it is not clear that mainstreaming is important during the preschool years when special education is often designed to create an intensive, nearly one-on-one environment for the child. As class size grows, and the teacher-student ratios expand, mainstreaming may be more beneficial.

Fifth, parental involvement seems to be important to the success of integration efforts. Children do better when their parents are involved in their education. In this respect, the process-oriented nature of the IDEA is excellent because it involves the parents directly with the school district in developing an individualized education plan. In fact, school districts cannot create IEP's without the consent of the parents. A lack of parental involvement can therefore have a profound and negative impact on a child's education. If parents have more than one child, their involvement with the school may be easier if the child attends the regular public school with other siblings. Hence, it does make sense to consider family factors when considering the effectiveness of various educational configurations.

Finally, small, intimate schools may attain better integration results than large, formal schools. Children with disabilities, however, often find that they can only get access to the range of services that they need at larger schools. For some children, the special education classroom may operate as a "safe space" within that larger, formal environment especially if the child has faced harassment in the regular classroom. Size is certainly a factor that should be considered in fashioning an IEP.²¹¹

²¹¹Schofield, however, cautions us to remember the context in which these studies were conducted when interpreting the results. As she notes, the schools examined in these studies have often actively resisted the desegregation

D. Racial and Disability Segregation: Intersectional Challenges

Some civil rights advocates have expressed the concern that the emphasis on disability identification may be leading to increased racial re-segregation. African-American students, particularly African-American male students, are overrepresented in special education classes that are held apart from the regular classroom.²¹² Janet Eyler described this problem as early as 1983. She and her colleagues argued that special education programs have become “ghettos for black children.”²¹³ Nonetheless, Eyler is cautious in arguing that special education assignments have been made intentionally to resegregate schools. Special education data by race was not gathered nationally before 1973 so it is hard to know if the disproportionate placement of African-American children in special education is in response to desegregation or an increased focus on the importance of special education. Eyler reported “some evidence that special education assignment for black children may increase immediately after the establishment of busing to integrate and that this may be a specific response to desegregation.”²¹⁴

changes that were studied. They are “a summary of what has occurred, often under circumstances in which little if any serious attention was being paid to creating a situation likely to improve either academic achievement or intergroup relations. Seeing racially and ethnically heterogeneous school as having the *potential* to improve student outcomes, and focusing more attention on the actual *nature* of the students’ experiences to assure that they are as constructive as possible, should enhance the likelihood of improving present outcomes.” Schofield, *supra* note 172, at 611. Many of the factors that I have identified with respect to positive integration outcomes focus on creating a more positive school environment for minority children. If resistance to integration on the basis of disability is less profound than resistance to racial integration, it may be that integration has a better chance of success in the disability context. The large number of race-based studies with varied outcomes, however, should at least make us cautious in thinking that we can properly measure the outcomes of whatever integration efforts take place.

²¹²See Alan Gartner & Dorothy Kerzner Lipsky, *Over-Representation of Black Students in Special Education: Problem or Symptom?*, 7 POVERTY & RACE 3 (September/October 1998).

²¹³Janet Eyler, Valerie J. Cook & Leslie E. Ward, *Resegregation: Segregation Within Desegregated Schools* in THE CONSEQUENCES OF SCHOOL DESEGREGATION (Christine H. Rossell & Willis D. Hawley eds. 1983).

²¹⁴*Id.* at 137.

Nearly fifteen years after Eyler and others observed the overrepresentation of African-Americans in special education, Congress responded to the problem. In 1997, it created reporting requirements in the IDEA so that it could keep track of this problem and urged states to take corrective action.²¹⁵ Hence, irrespective of whether an African-American male is educated in a segregated or desegregated public school, he is at risk of being labeled “mentally retarded” or “severe emotionally disturbed” and placed outside of regular classes in an environment segregated by race and the stigma of disability. (This problem does not occur for Latinos who are, in fact, likely to be *underrepresented* in special education programs.²¹⁶)

The special education data therefore makes the integration/segregation question even more complicated. An integration presumption under the IDEA may be a tool to protect African-American males from unnecessary segregation on the basis of disability. Is an integration presumption the best way to respond to this problem? Or are other steps more effective, such as revising testing methods for identification of children with disabilities, so that there is less dependence on standardized tests?²¹⁷

The special education data is hard to interpret because it assumes that the high incidence of African-Americans identified as disabled is a red flag. At the same time, researchers criticize the underrepresentation of Latinos and Asian-Americans in such programs.²¹⁸ The assumption is that the

²¹⁵See 28 U.S.C. § 1418(1)(A).

²¹⁶Gartner & Lipsky, *supra* note 212, at 3.

²¹⁷Gartner & Lipsky argue that special education placement is too frequently based upon intelligence tests that mistakenly consider intelligence to be a “fixed and largely heritable characteristic, that can be precisely measured and provide an accurate predictor as to one’s future success in school and life.” *Id.* at 4.

²¹⁸Language barriers may cause the misidentification of such students, as well as other factors. For example, I

rate of representation for whites is the appropriate level. Data supporting the conclusion that African-Americans are disproportionately excluded from college preparatory programs even when their objective test scores support such placements do lend support to skepticism about the accuracy of special education placement decisions for African-Americans. It is easy to hypothesize that schools have unduly low expectations for African-Americans. But we also need to be careful in not overreacting by making it too hard for African-Americans who need special education services to qualify for such services. Because of the relationship between conditions of poverty and mental retardation, some overrepresentation of African-Americans is, unfortunately, to be expected. (Lead paint and other environmental conditions are more likely to affect poor children.) Irrespective of whether Congress maintains the integration presumption, it is important to monitor special education placements by race, as currently required by the IDEA, in order to ensure that special education placement is not a vehicle to achieve racial resegregation.

IV. CONCLUSION

The integration presumption in the disability context has led to some profound changes in our society. The enforced segregation of children with disabilities from mainstream society through a refusal to educate or the warehousing in disability-only institutions has typically ended. Nonetheless, about one-fourth of children with disabilities continue to receive their education outside the regular

had a student with a visible disability several years ago who spoke English as a second language. After reading two of his exams, I suspected he had a learning disability. He was tested and showed very strong evidence of a learning disability although that disability had not been previously detected. It appears that his reading and writing problems were often attributed to English being a second language rather than to a learning disability. Also, as a student with one visible disability, his teachers may not have considered the possibility that he had more than one disability. School districts need to be attentive to the special education needs of children whose first language is not English or who have other visible disabilities.

classroom.²¹⁹

The disability discussion has not changed to reflect the challenges posed by full inclusion. Congress and the United States Department of Education – with no suggestion to the contrary from the disability rights movement – continues to recite the mantra of full inclusion. And the media often supports this mantra.²²⁰ Congress recently reauthorized the IDEA without even tinkering with the integration presumption.²²¹

It is time for us to examine the cold data about the success and failures of full integration for children with disabilities. The Department of Education can develop checklists or criteria that will help guide school districts and parents in deciding what combination of educational resources are most likely to be effective for an individual child. They can develop these checklists while also

²¹⁹See Salend, *supra* note 19.

²²⁰The *New York Times Magazine* recently ran a heart-wrenching story about Thomas Ellenson, a kindergartener with cerebral palsy who was educated in a full immersion public school classroom in New York City. It is a wonderful success story but, unfortunately, typical of success stories for children with severe disabilities who have a successful integrated experience. Thomas is the son of two devoted parents – a father who owns his own advertising company and a mother who is a physician and scientist. When the father arranged a dinner party to thank the teachers and therapists who had helped Thomas through preschool, the *mayor* happened to enter the restaurant, agree to join their conversation and then agree to offer them assistance in structuring a full inclusion program for Thomas in kindergarten. Not only did the school district probably spend more than \$100,000 to create a successful experience for Thomas but the father spent \$15,000 out of his own pocket to supplement this program (and later got reimbursed for his expenditure).

The outcome is the perfect storybook ending. Thomas has a great year, the full immersion program continues into first grade, and parents of typically developing children want to be in Thomas' class to benefit from the smaller class size and additional resources. Although Thomas has severe physical problems and does not engage in verbal communication, he appears to have the cognitive capacity to learn the regular curriculum. The combination of upper class parents who are extremely involved in the classroom and typical cognitive functioning make this experiment a predictable success.

The problem with these wonderful stories (I, too, cried when one of his disabled classmates died) is that it reinforces the notion that integration is the silver bullet and does not cause the reader to pause and consider what factors led to Thomas' success in the mainstream classroom and how realistic it is to replicate those results elsewhere. Lisa Belkin, *The Lessons of Classroom 506: What Happens When a Boy with Cerebral Palsy Goes to Kindergarten Like all the Other Kids*, THE NEW YORK TIMES MAGAZINE, SEPT. 12, 2004, at 41.

The *New York Times* story is in contrast to the *Washington Post* cartoon that ridiculed integration efforts. See *supra* note 47. Neither publication furthered a genuine dialogue on disability education.

²²¹See http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1350enr.txt.pdf

watching to ensure that disability-only institutions do not re-open and African-American children are not disproportionately resegregated through disability mislabeling. It is time for the federal government to pay attention to thirty years of educational research on educational outcomes for children with disabilities and develop a more nuanced approach to the education of children with disabilities.

The integration presumption should be refocused so that it continues to serve its historical purpose of preventing school districts from only offering segregated, disability-only education but not to presume that a fully inclusive education is necessarily the best educational option when a school district offers a continuum of educational alternatives. The continuum of services regulation should play a bigger role in the IEP process with a school district failing to meet its procedural requirements if it is not offering a continuum of services within the public school building.²²²

Under the continuum of services regulation, the IDEA already requires that:

- (a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- (b) the continuum required in paragraph (a) of this section must –
 - (1) Include the alternative placements listed in the definition of special education under § 300.26 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
 - (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.²²³

Increased emphasis on the continuum of services rule, and less emphasis on an integration presumption for full inclusion, would often attain better results in these cases.

(viewed November 29, 2004) (section 612(a)(5)).

²²²34 C.F.R. § 300.551

²²³*Id.*

Roncker, Daniell R.R., and *A.W.* could have been decided correctly with more emphasis on the continuum of services rule. In *A.W.*, the school district was not offering a continuum of services. Cost should not be a defense to a school district's general obligation to provide an array of educational outcomes. Because an array of options did not exist, the school district could not demonstrate that it had created an individualized educational plan that would serve *A.W.*'s needs. By contrast, in *Roncker* and *Daniell R.R.*, the school did apparently have an array of available educational options. Because an array of options existed, the courts' tasks should have been to evaluate those options and determine if the school district had selected an appropriate educational option. It should not be necessary for a school district to demonstrate that no educational benefit would arise from the most integrated option in order for a school district to propose a less integrated option for an individual child.

If a school district satisfies the continuum of services test, then it should be expected to follow a checklist prepared by the United States Department of Education to determine whether it has chosen the appropriate placement for an individual child. Although experts in the field should convene to develop such a checklist,²²⁴ my own review of the literature suggests that the following

²²⁴The Department of Education has taken a correct step in that direction by issuing disability-specific guidance. For example, the Department has issued guidance on the education of children who are blind or visually impaired. *See* 65 Fed. Reg. 36586 (June 8, 2000). These guidelines recognize the importance of the continuum of services rule. *Id.* at 36591-92. These guidelines do not directly question the validity of the integration presumption but do note problems with its implementation when they state: "[S]ome students have been inappropriately placed in the regular classroom although it has been determined that their IEPs cannot be appropriately implemented in the regular classroom even with the necessary and appropriate supplementary aids and services. In these situations, the nature of the student's disability and individual needs could make it appropriate for the student to be placed in a setting outside of the regular classroom in order to ensure that the student's IEP is satisfactorily implemented. In making placement determinations regarding children who are blind or visually impaired, it is essential that groups making decisions regarding the setting in which appropriate services are provided consider the full range of settings that could be appropriate depending on the individual needs of the blind or visually impaired student, including needs that arise from any other identified disabilities that the student may have." *Id.* Although these guidelines hint at an individualized process under which there is no presumption for a fully inclusive education, they never make that direct point. Instead, they recite the integration presumption before

factors are some of the factors that should be on the checklist:

- Is the child's self-esteem likely to be enhanced by being clustered with children of similar chronological age and ability? If so, what settings offer that kind of clustering?
- Do the teachers have sufficiently high expectations for the child's development?
- Will the child with a disability be a "token" in a particular classroom setting? If so, is that fact likely to lead to adverse consequences?
- Does the school district offer educational programming to children in the regular classroom to improve their tolerance of disability diversity?
- Which teachers have special education training? Do the regular classroom teachers have any special education training? Does the regular classroom teacher know how to adapt the classroom for the child with a disability?
- If "tracking" exists, are we confident that the child with a disability has been placed in the correct "track?" Were accommodations made available so that testing and other measurements were accurate?
- Did racial bias possibly influence the determination of the child's disability status and appropriate placement?
- How old is the child? Is mainstreaming made more or less difficult because of the child's age?
- Are the parents involved in the child's education? Would the parents be more likely to be involved in one kind of educational configuration than another?
- Is one classroom setting or school smaller or larger than another? Is size of the classroom or building likely to be a factor in the child's educational success?
- What is the teacher/student ratio in the various classrooms? Is there reason to believe that a smaller teacher/student ratio would particularly benefit this child?

Those factors were not closely examined in any of the leading integration presumption cases.

The *A. W.* case would certainly come out differently under consideration of these factors because the school district could not demonstrate it had a continuum of services at all. But there is no way to

making the points noted above. *See Id.* at 36591 ("[B]efore a disabled child can be removed from the regular classroom, the placement team, which includes the child's parents, must consider whether the child can be educated in less restrictive settings with the use of appropriate supplementary aids and services and make a more restrictive placement only when they conclude that education in the less restrictive setting with appropriate supplementary aids and services cannot be achieved satisfactorily." *Id.*

know how the Fifth and Sixth circuit cases would be decided, given the paucity of the factual records and the limited scope of the issues considered by the courts.

If implemented, these factors would begin to allow us to move toward a goal of developing an *individualized* and adequate educational program for each child under a continuum of services model.²²⁵ School districts that cannot demonstrate that they have available a full range of programs would be presumptively deemed in violation of the IDEA if parents were not satisfied with the single educational option made available to that child, especially if that single option were a separate educational facility. If the school district had available a continuum of services then courts would presume they were acting in good faith so long as they considered the checklist factors in determining the child's placement. The Supreme Court properly recognized more than two decades ago that the courts lack the specialized knowledge and experience necessary to resolve complicated questions of educational policy.²²⁶ Courts are well equipped, however, to ensure that procedural safeguards are

²²⁵If implemented, it is important for courts to consider these factors within the educational alternatives available in a particular case so that the decision can be very concrete. In some cases, the courts appear to have considered many of these factors but at too high a level of abstraction. For example, in *Sacramento City Unified School District Bd. of Education v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), the court appeared to make a very individualized assessment of whether Rachel would perform better in the regular classroom or the special education classroom, and concluded that the regular classroom offered her the superior learning environment. That conclusion was drawn from appropriate factors. Rachel's social and academic progress was assessed and the special qualities of her regular classroom teacher were considered. The problem with the decision, however, was that the regular classroom that was evaluated was *not* the classroom where Rachel would be educated within the school district because it was a private school classroom from her previous grade. At the end of the opinion, the court recognized this limitation of its analysis when it said: "we cannot determine what the appropriate placement is for Rachel at the present time." *Id.* at 1405. But it insisted that future decisions should be made on the basis of the "principles" set forth in the court's opinion, which included the integration presumption. *Id.* Thus, in the future, the scales would be tipped in favor of the regular classroom because of Rachel's success in a regular, private school classroom in the hands of an apparently gifted teacher. The court failed to ask which classroom in the regular public school environment would best replicate the experience that Rachel had in the private school classroom. It is not clear whether the integrated nature of that classroom led to Rachel's success in that classroom or whether that teacher's particular skills led to Rachel's success. The court assumed that all regular, integrated classrooms would be equally beneficial to Rachel without considering the uniqueness of each classroom environment.

²²⁶*Board of Education v. Rowley*, 458 U.S. 176, 207-07 (1982).

being followed. For that reason, the IDEA is a very process-driven statute. At present, however, the IDEA and its regulations do not contain sufficient safeguards to ensure that school districts choose the most appropriate educational placement for an individual child once the disability-only option has been rejected. The development of a checklist by educational professionals could help guide school districts to make better decisions.

The rigid integration presumption served a useful purpose. It helped us move to a system where only five percent of children with disabilities are educated in disability-only institutions. Now, it is time to focus our attention on the 95% of children with disabilities who spend their day in the regular public school. What is the most appropriate configuration of resources for those children? Is the regular classroom the best place for them to be receiving their education? In particular, is the regular classroom the best place for children with significant cognitive or mental health impairments? This article has sought to begin and reshape the discussion concerning those children so that we can better meet the goals of the IDEA by truly creating an individualized education program for them. I welcome vigorous debate on what factors school districts should consider in determining the appropriate configuration of educational resources, once the integration presumption has been abandoned. As long as educational policy is governed by the integration presumption, however, that discussion is unlikely to occur. We need to have the courage to abandon the existing integration presumption in order to develop more appropriate individualized education programs for our children in the future.