

Fall 3-2-2004

## Universal Preschool: A Solution to a Special Education Law Dilemma

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### Recommended Citation

Alefia E. Mithaiwala, *Universal Preschool: A Solution to a Special Education Law Dilemma*, 2004 BYU Educ. & L.J. 373 (2004).  
Available at: <https://digitalcommons.law.byu.edu/elj/vol2004/iss2/8>

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# UNIVERSAL PRESCHOOL: A SOLUTION TO A SPECIAL EDUCATION LAW DILEMMA

## I. INTRODUCTION

The Constitution of the United States does not provide a federal right to a public education. Rather, this right is given to students in grades kindergarten through twelve (K-12) by the various state constitutions.<sup>1</sup> The Individuals with Disabilities Education Act (IDEA), first enacted in 1975 as the Education for All Handicapped Children Act (EAHCA), however, does give a *federal* right to a “free appropriate public education” (FAPE) to all of our nation’s *disabled* students.<sup>2</sup> This congressional mandate surpasses state constitutions’ education rights because it applies not only to students in primary and secondary schools, but also to preschoolers ages three through five. The IDEA provides that disabled students must be educated in the “least restrictive environment” (LRE) that still meets the student’s educational needs.<sup>3</sup> In support of this requirement, the IDEA makes consistent reference to a preference for disabled children to be educated in “regular classes,” and specifically says that a disabled child must be educated in the school he or she would normally attend but for his or her disability.<sup>4</sup>

In the 1997 Amendments to the IDEA, Congress explicitly applied the FAPE and LRE requirements to preschool-aged children.<sup>5</sup> This means that preschoolers with disabilities must be educated in a “regular classroom” in a school that they would normally attend if not disabled.<sup>6</sup> However, because most school districts do not have public preschools, “regular” preschool classrooms are non-existent. This inconsistency creates a dilemma for both parents and school districts as they attempt to identify a disabled preschooler’s least restrictive environment.

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1. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 664 (1999) (“[T]he Constitution of almost every State in the country guarantees the State’s students a free primary and secondary public education.”).

2. The Individuals with Disabilities Education Act Regulations, 34 C.F.R. §§ 300.550, 300.551, 300.552 (1997).

3. *Id.*

4. *Id.*

5. 34 C.F.R. §300.552 (1997). *See also*, Preamble to the IDEA.

6. 34 C.F.R. at §300.552(c).

This paper addresses the LRE problem for disabled preschoolers and discusses universal preschool as a possible solution. Part II introduces the origins of the disability rights movement and the purpose and relevant provisions of the current regulating law—the IDEA. Part II also describes a landmark Supreme Court decision that defined the limits of a “free appropriate public education,” and how this landmark decision has affected the general delivery of special education to disabled students. Part III traces how the various circuit courts have interpreted the LRE provision with regard to K–12 disabled children. Part IV discusses how several courts have struggled to interpret the LRE provision with regard to preschool children. Part V addresses how universal preschool, a system whereby all three- to five-year-olds could have access to high quality preschool, could solve the LRE problem for disabled preschoolers.

## II. THE DISABILITY RIGHTS MOVEMENT AND FEDERAL DISABILITY LAW

Many would begin the story of disability rights for students with the 1954 landmark Supreme Court decision, *Brown v. Board of Education of Topeka*.<sup>7</sup> *Brown* was a class action suit brought by the parents of several minor African American plaintiffs in an effort to desegregate public schools. In that case, the Supreme Court, finding for the parents, held that “separate educational facilities are inherently unequal.”<sup>8</sup> While this decision called for the end to educational segregation for African American students specifically, it also “set the framework concerning the inherent inequality of separate education” for *any and all* students.<sup>9</sup> Essentially, it paved the way for disability rights by bringing to light “the importance of education to the ‘life and minds’ of children.”<sup>10</sup> In fact, the Supreme Court stated in *Brown*, “[t]oday, education is perhaps the most important function of state and local governments.”<sup>11</sup>

The two decades following *Brown* were marked by a growing lobbyist movement for disability rights and increasing self-advocacy through sit-ins, marches, and other forms of protest.<sup>12</sup> As a result, a federal bureau for the handicapped was created in 1966.<sup>13</sup> It began providing funds for

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

8. *Id.* at 495.

9. Alan Gartner & Dorothy K. Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 Harv. Educ. Rev. 367, 368 (1987).

10. *Id.*

11. *Brown*, 347 U.S. at 493.

12. See generally Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (Times Books 1993).

13. *Id.* at 64.

training special education teachers and for developing teaching materials.<sup>14</sup>

Less than twenty years after *Brown*, the courts handed down two key decisions regarding the education of disabled students. The first, in 1971, was *Pennsylvania Association of Retarded Citizens v. Commonwealth*<sup>15</sup> (*PARC*). This consent decree required Pennsylvania to provide free education to retarded children and made clear that placement in regular schools and regular classes was preferable to special schools or special classes.<sup>16</sup> This case is generally regarded as the first "right to education" case for the disabled, and the first case to establish the notion of LRE.<sup>17</sup> A year later, in *Mills v. Board of Education*,<sup>18</sup> a District of Columbia court expanded the *PARC* decision to ensure free education not just for retarded children, but also for *all* children with disabilities.<sup>19</sup> The *Mills* case had seven plaintiffs whose disabilities ranged from "behavior problem[s]" to epilepsy.<sup>20</sup> One of the key points in the decision was that it refuted the notion that schools should be excused from providing education to the disabled because doing so would be too expensive.<sup>21</sup> The court mandated that the school district provide an education regardless of cost, utilizing whatever private or public resources were necessary.<sup>22</sup> This case set the backdrop for future legislative provisions mandating that if public resources are not available to provide an appropriate education, then private resources can and must be utilized.<sup>23</sup> Such private resources include, for example, evaluations by private clinicians or enrollment in private schools.<sup>24</sup>

In response to the growing case law, Congress began passing legislation addressing the concern for the disabled.<sup>25</sup> The first relevant statute was the Rehabilitation Act of 1973.<sup>26</sup> Section 504 of this act states:

No otherwise qualified individual with a disability in the United

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14. *Id.*

15. *Pa. Assn. of Retarded Citizens (PARC) v. Cmmw.*, 334 F. Supp. 1257 (E.D. Pa. 1971)

16. *Id.* at 1258.

17. Gartner & Lipsky, *supra* n. 9, at 369.

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

19. *Id.* at 878.

20. *Id.* at 869-70.

21. *Id.* at 876.

22. *Id.*

23. 34 C.F.R. at § 300.554 (stating that the education agency must ensure that the LRE provisions of the IDEA "[are] effectively implemented, including, if necessary, making arrangements with public and private institutions . . .").

24. *Id.* at §§ 300.554, 300.502(b).

25. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 180 n. 2 (1982).

26. 29 U.S.C. § 794 (2001).

States . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . .<sup>27</sup>

Interestingly, Section 504 never caused any debate on the Congressional floor; instead, it was tacked onto the statute as an "afterthought" which simply mirrored the wording of the 1964 Civil Rights Act.<sup>28</sup>

Nevertheless, Section 504 stuck, and it, along with horrid exposés of institutional life by journalistic pioneers such as Burton Blatt and Fred Kaplan,<sup>29</sup> essentially began the exodus of disabled children from institutions, and into regular public schools.<sup>30</sup>

In 1975, Congress passed The Education for All Handicapped Children Act (EAHCA).<sup>31</sup> It was amended and renamed the Individuals with Disabilities Education Act (IDEA) in 1990. The IDEA is a funding statute that increases special education funding for school districts if they comply with certain requirements.<sup>32</sup> The language of the IDEA articulates several purposes. In the "Findings" portion, the drafters wrote, "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."<sup>33</sup>

The IDEA explicitly recognizes that disabled students, if educated, can be full members of society.<sup>34</sup> The drafters sought to ensure a right to a FAPE in the LRE for all students who are labeled as having at least one of thirteen specific disabilities *and* need specialized instruction.<sup>35</sup> The listed disabilities include: Autism, Deaf-blindness, Deafness, Emotional Disturbance, Hearing Impairment, Mental Retardation, Multiple Disabilities, Orthopedic Impairments, Other Health Impairments,

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27. *Id.* at § 794(a).

28. Shapiro, *supra* n. 12, at 65.

29. In 1974, Burton Blatt and Fred Kaplan published a photographic commentary on mental institutions in the United States. Their book was titled *A Christmas in Purgatory: A Photographic Essay on Mental Retardation* (Allyn and Bacon 1966). The authors' purpose was to expose the institutions as inhumane, and they did so with the use of a hidden camera attached to Kaplan's belt. Shapiro, *supra* n. 12, at 161.

30. Shapiro, *supra* n. 12, at 161.

31. Pub. L. No. 94-142, 89, Stat. 773 (1975) (codified at 20 U.S.C. §§1400-1485 (1988 & Supp. 1993)).

32. 34 C.F.R. at §§ 300.1-300.2.

33. 20 U.S.C. § 1400(c)(1) (1997).

34. 34 C.F.R. at § 300.1(a).

35. See 20 U.S.C. at § 1401(A).

Specific Learning Disability, Speech or Language Impairment, Traumatic Brain Injury, and Visual Impairment.<sup>36</sup>

The IDEA also attempts to ensure that disabled children are treated as individuals and that each child is evaluated on a case-by-case basis rather than lumped together with others based on their collective disabilities.<sup>37</sup> Toward this end, the IDEA provides that disabled students must each have an "individualized education plan" (IEP)<sup>38</sup> that is developed by a team, consisting of the parents of the child, his or her teachers, and any other individuals who might have knowledge or expertise concerning the child (including speech therapists, physical therapists, social workers, etc.).<sup>39</sup> This IEP serves as a blueprint for each particular child's journey through the educational system.

One other important legislative purpose was to provide parents with specific due process rights should their child's school fail to comply with the IDEA.<sup>40</sup> These judicial remedies include an exhaustion requirement whereby parents must utilize all of the listed administrative remedies before filing a civil suit.<sup>41</sup> Therefore, in order to obtain relief, a parent must first give notice to the school district that he or she seeks an administrative hearing,<sup>42</sup> which must then be conducted by an impartial hearing officer.<sup>43</sup> If the decision of the hearing officer is unacceptable, the parent(s) may appeal to the State Education Agency, which must conduct an impartial review of the decision.<sup>44</sup> If that decision is still unacceptable, *then* the parent(s) may bring a civil action.<sup>45</sup>

In 1982, after one family exhausted its administrative remedies, its civil case eventually found its way to the Supreme Court. This landmark case, *Board of Education of Hendrick Hudson Central School District v. Rowley*,<sup>46</sup> was the first case for the Supreme Court to consider the IDEA (at that time still the EAHCA).<sup>47</sup> The plaintiff was Amy Rowley, an eight-year-old deaf child. Though Amy had a hearing device and was an excellent lip reader, her parents requested that a sign language interpreter be placed in her classroom so that she would be able to maximize her

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36. See 34 C.F.R. § 300.7(c).

37. *Id.* at § 300.340–50.

38. *Id.* at § 300.341(a)(1).

39. *Id.* at § 300.344(a).

40. 20 U.S.C. at § 1400(d)(1)(B); 34 C.F.R. at §§ 300.503, 300.506–13.

41. 34 C.F.R. at § 300.512(d).

42. *Id.* at § 300.507(c).

43. *Id.* at § 300.508.

44. *Id.* at § 300.510.

45. *Id.*

46. *Rowley*, 458 U.S. at 176.

47. *Id.* at 187.

learning potential.<sup>48</sup> Looking to the legislative history, the Court found that the EAHCA's requirement of an "appropriate" education did not mean that the school district must "maximize each child's potential 'commensurate with the opportunity provided other children'."<sup>49</sup> Rather, the Court found that Congress's intent was simply to provide *access* to a free public education that conferred *some* educational benefit onto the disabled child.<sup>50</sup> Thus, because Amy was progressing from grade-to-grade and doing better than the average student in her classroom, the Court found that the school district's burden to provide her with a FAPE had been met.<sup>51</sup> This case set a very low standard for school districts to meet in educating disabled children; in fact, the Court stated that the Act simply provided a "basic floor of opportunity" which consists of no more than "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."<sup>52</sup>

*Rowley* is still good law today, and as long as a disabled child is receiving some educational benefit from his or her placement, the FAPE requirement will be satisfied. However, though the FAPE standard is low, the drafters of the IDEA created several additional hurdles that the school district must comply with in order to conform to the Act as a whole.<sup>53</sup> The other key provision of the IDEA, the "least restrictive environment," would in future cases prove to be a tough requirement for school districts to meet.<sup>54</sup>

### III. THE LRE FOR K-12 DISABLED CHILDREN: STANDARDS OF REVIEW

Though the Court addressed the meaning of the word "appropriate" in "free, appropriate public education" in *Rowley*, it has not yet addressed what constitutes an "appropriate" LRE. In fact, the Court has consistently denied certiorari on LRE cases.<sup>55</sup>

The various circuit courts are split on how to interpret the LRE

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48. *Id.* at 184-85.

49. *Id.* at 198.

50. *Id.* at 200.

51. *Id.* at 209-10.

52. *Id.* at 201.

53. See generally, 34 C.F.R. at § 300.500-17 (regarding parental due process rights); 34 C.F.R. at §300.519-29 (regarding specific discipline procedures); 34 C.F.R. at §300.550-56 (regarding the least restrictive environment for disabled children).

54. See e.g. *B.G. by F.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1140 (1988).

55. See e.g., *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *A.W. v. Northwest R-1 Sch. Dist.* 813 F.2d 158 (8th Cir. 1987); *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).

provision, which reads: "Each public agency shall ensure that to the maximum extent appropriate, children with disabilities . . . are educated with children who are non-disabled."<sup>56</sup> Currently, there are three separate (but similar) tests to determine whether a school district has provided an education for a disabled child in his or her LRE. The "Roncker Feasibility Test" was developed by the Sixth Circuit<sup>57</sup> in 1983 and was subsequently adopted by the Eighth<sup>58</sup> and Fourth<sup>59</sup> Circuits. In 1989, the Fifth Circuit adopted a more detailed test called the "Daniel R.R. Analysis,"<sup>60</sup> which has subsequently been employed by the Third<sup>61</sup> and Eleventh Circuits.<sup>62</sup> Finally, the Ninth Circuit, in 1994, developed the "Rachel H. Balancing Test," which combined aspects of both the Roncker and Daniel R.R. tests.<sup>63</sup>

### A. The Roncker Feasibility Test

In *Roncker*, Plaintiff's son, Neill Roncker, was a severely mentally retarded student. Though he was age nine, he had a mental age of two to three.<sup>64</sup> The school district wanted to place Neill in a school that exclusively served students with mental retardation, but his parents refused to accept this placement, insisting that he have some contact with his non-disabled peers.<sup>65</sup> Finding no statutory definition for LRE, the Sixth Circuit developed the "feasibility test," which asked whether it was feasible to provide the services Neill needed in the regular education classroom. The court considered the impact on the students and teachers of that classroom, as well as the cost of including Neill.<sup>66</sup> However, reminiscent of the *Mills* case, the court warned, "[c]ost is no defense . . . if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children."<sup>67</sup> Finding that the district court did not use a proper standard by which to judge whether Neill had been placed in the LRE, the circuit court

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56. 34 C.F.R. § 300.550(b)(1) (1997).

57. *Roncker*, 700 F.2d at 1063.

58. *A. W.*, 813 F.2d at 163.

59. *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989).

60. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

61. *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3d Cir. 1993).

62. *Greer v. Rome City Sch. Dist.*, 956 F.2d 1025 (11th Cir. 1992).

63. *Rachel H.*, 14 F.3d at 1404.

64. *Roncker*, 700 F.2d at 1060.

65. *Id.* at 1060-61.

66. *Id.* at 1063.

67. *Id.*



remanded the case.<sup>68</sup>

### B. *The Daniel R.R. Test*

Daniel was a six-year-old boy with Down's Syndrome. Because his mental age was that of a three-year-old, the school district originally placed him in a pre-kindergarten classroom.<sup>69</sup> There, he failed to master basic skills and the school district moved him to a special education classroom where he was only able to interact with his non-disabled peers during lunch and recess.<sup>70</sup> Dissatisfied, Daniel's parents exhausted their administrative appeals and filed suit against the school district alleging that the special education classroom was not Daniel's least restrictive environment.<sup>71</sup> The Fifth Circuit declined to apply the *Roncker* feasibility test, and instead devised its own.<sup>72</sup> This test considered whether education in a regular classroom, with supplementary aids and services, could be achieved satisfactorily for a given child. If it could not, the court then asked if the child was mainstreamed to the maximum extent appropriate.<sup>73</sup> Several factors informed the court's decision, though it emphasized that the factors it utilized were not exhaustive, and that each LRE case must be decided on a case-by-case basis.<sup>74</sup>

The court first inquired as to what supplemental aids and services could be given to Daniel to help him achieve in a regular education environment, and what effort the school district had made to provide those aids and services.<sup>75</sup> Next, the court looked to see whether Daniel was receiving educational benefit in the regular classroom, including non-academic benefit from modeling his peers. Finally, the court considered the impact Daniel's inclusion would have on the regular education classroom. This included how the material would be taught, the pace of the learning, and any disruption that may take place due to Daniel's inclusion.<sup>76</sup> Evaluating all of these factors, the court held for the school district and found that the placement in the special education classroom *was* Daniel's least restrictive environment.<sup>77</sup> This follows Congress's intent, for while the IDEA has a preference for including

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68. *Id.* at 1063–64.

69. *Daniel R.R.*, 874 F.2d at 1039.

70. *Id.*

71. *Id.* at 1040.

72. *Id.* at 1046–49.

73. *Id.* at 1048.

74. *Id.*

75. *Id.* at 1048–49.

76. *Id.* at 1049.

77. *Id.* at 1050.

students in regular education classrooms, the Act recognizes that such a placement may not *always* be appropriate.<sup>78</sup>

### C. *The Rachel H. Balancing Test*

Rachel H. was a mentally retarded eleven-year-old student who spent her first two years of school in special education classrooms. When she was in second grade, her parents advocated for her full-time placement in a regular education classroom.<sup>79</sup> The school district sought instead to place her in a special education class for academic subjects, and in a regular education class for art, music, recess, and lunch. Feeling that Rachael learned academic skills best in a regular education setting, her parents brought suit.<sup>80</sup> The district court developed a test that combined aspects of the Roncker and *Daniel R.R.* tests, and found for the parents.<sup>81</sup> On appeal, the Ninth Circuit adopted the district court's test and affirmed the lower court's decision for Rachel's parents. The Ninth Circuit's test looked at four specific factors to determine the LRE for Rachel. These were: "1) the educational benefits of placement in a full-time regular education class; 2) the non-academic benefits of such placement; 3) the effect Rachel had on the teacher and children in the regular class; and 4) the costs of mainstreaming Rachel."<sup>82</sup> While the court ultimately held for Rachel, it did not specifically determine her appropriate placement. It only said that the test put forth by the court should be used in evaluating Rachel's placement.<sup>83</sup> Furthermore, the court failed to clarify how much weight should be given to each factor of the test in the case of a tie. This has contributed to a disparity in applications of the *Rachel H.* test in the various district courts within the Ninth Circuit.<sup>84</sup>

## IV. THE LEAST RESTRICTIVE ENVIRONMENT FOR A PRESCHOOLER

In the 1997 Amendments to the IDEA, Congress made it explicit that the LRE provision also applies to disabled *preschool* children.<sup>85</sup> This

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78. 34 C.F.R. § 300.550(b)(2)(1997).

79. *Rachel H.*, 14 F.3d at 1400.

80. *Id.*

81. *Id.* at 1404.

82. *Id.*

83. *Id.* at 1405.

84. See Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 Wash. L. Rev. 809, 831 (2002).

85. 34 C.F.R. § 300.552(a)(2)(1997) ("In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that the placement is made in conformity with the LRE provisions of this subpart . . .").

means that the preference for preschoolers, as well as K-12 students, is for them to be educated in "regular classrooms" and to be "educated in the school that he or she would attend if nondisabled."<sup>86</sup> The IDEA also includes a separate section that details how states may receive funding to assist them in providing special education and related services to disabled three- to five-year-old children.<sup>87</sup> Most school districts, however, do not have a regular education preschool. Thus, while states will generally have enough funding to educate their disabled preschoolers, the question becomes *where* to educate them.

If a school district does not offer a public preschool program, the "regular" environment for that district's preschoolers will be: 1) the home; 2) a day care center; or 3) a private preschool program. For a disabled preschooler, a private preschool program will generally be preferable to a home-based program or day care because only there will the child receive interaction with non-disabled students as well as educational benefit—both of which are mandated by the IDEA.<sup>88</sup> Interestingly, several courts have held that such private preschool options are preferable for a disabled preschooler, *even if* the school district does in fact have a public preschool option.<sup>89</sup> These holdings are in line with Congressional intent to provide disabled children with whatever resources necessary to ensure access to an education.<sup>90</sup>

#### A. Case Law for Preschool LRE

In *Board of Education of LaGrange School District Number 105 v. Illinois State Board of Education (LaGrange)*,<sup>91</sup> the school district sought to place three-year-old Ryan, who had Down's Syndrome, in a public preschool program at Brook Park Elementary School that was limited to disabled preschoolers.<sup>92</sup> Ryan's parents objected to this placement, claiming that inclusion in a *classroom and program* (not just a school) with non-disabled students was Ryan's least restrictive environment. For Ryan's parents, a "regular" classroom was one that included non-disabled

86. 34 C.F.R. at § 300.552(c); see 34 C.F.R. at §§ 300.550(b)(2), 552(e).

87. *Id.* at § 301.1.

88. 34 C.F.R. at §300.550(b)(1).

89. These preschool programs generally fail to be a "regular" environment when they have too many disabled children in them. See e.g. *Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v. Jeff S. ex rel. Alec S.*, 184 F. Supp. 2d 790 (C.D. Ill. 2002).

90. 34 C.F.R. at § 300.554 (stating that the education agency must ensure that the LRE provisions of the IDEA "are effectively implemented, including, if necessary, making arrangements with public and private institutions . . .").

91. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. St. Bd. of Educ.*, 184 F.3d 912 (7th Cir. 1999).

92. *Id.* at 914.

students.<sup>93</sup> Thus, they sought to have the school district either create a public program that included non-disabled children, or fund his placement at a private preschool.<sup>94</sup>

The Commentary to the LRE regulation<sup>95</sup> for preschool students provides:

Public agencies that do not operate programs for nondisabled students are not required to initiate such programs to satisfy the requirements regarding placement in the LRE . . . For these public agencies, some alternative methods for meeting the requirements include:

- 1) Providing opportunities for participation (even part time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);
- 2) Placing children with disabilities in private school programs for non-disabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and
- 3) Locating classes for preschool children with disabilities in regular elementary schools.

In each case, the public agency must ensure that each child's placement is in the LRE in which the unique needs of that child can be met . . .<sup>96</sup>

The school district argued that the Brook Park placement was satisfactory because the third alternative in the Commentary is satisfied when school districts use preschool classes with disabled children, as long as they are in a regular elementary school.<sup>97</sup> The district court found otherwise and the Seventh Circuit affirmed, holding that the school district failed to evaluate Ryan's unique needs and capabilities, and that such "mainstreaming by osmosis" was not Ryan's individual LRE.<sup>98</sup>

A federal district court in Illinois (located within the Seventh Circuit) refined the holding in *LaGrange* by finding that simple compliance with one of the three alternative methods articulated in the Commentary, without a meaningful analysis of that particular child's LRE, was unsatisfactory. In *Board of Education of Paxton-Buckley-Loda Unit School District Number 10 v. Jeff S. ex rel. Alec S.*,<sup>99</sup> the school district

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93. *Id.*

94. *Id.*

95. 34 C.F.R. § 300.552.

96. *LaGrange*, 184 F.3d at 915-16.

97. *Id.* at 916.

98. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. St. Bd. of Educ.*, 1998 WL 792479 (N.D. Ill. 1998).

99. *Paxton-Buckley-Loda*, 184 F. Supp. 2d at 790.

sought to place Alec, a hearing impaired child, in a public program "for non-special education students who may be behind in normal developmental areas . . . ." <sup>100</sup> This program, on its face, satisfied the first alternative listed in the Commentary, which allows school districts to put disabled children in preschool programs operated by "other public agencies." <sup>101</sup> However, the district court held that the evidence clearly demonstrated that Alec could be educated in a regular preschool program, <sup>102</sup> and ordered that the school district reimburse Alec's parents for his placement in a private preschool program where he had steady interaction with his non-disabled peers and where he was benefited by being exposed to appropriate language models. <sup>103</sup> Thus, in both *LaGrange* and *Alec S.*, the courts found that a "regular" preschool classroom is not one in which *all* students were disabled or developmentally delayed. However, other courts have held that classrooms that have a *mix* of non-disabled and disabled students will still often not meet a child's LRE.

For example, in *T.R. v. Kingwood Township Board of Education*, <sup>104</sup> the Third Circuit held that the school district's "hybrid" public preschool program, consisting of 50 percent disabled children and 50 percent non-disabled children, would only be the LRE in two circumstances: "first, where education in a regular classroom (with the use of supplementary aids and services) could not be achieved satisfactorily; or second, where a regular classroom is not available within a reasonable commuting distance of the child." <sup>105</sup> The court found that the school failed to take into account a "continuum of alternate placements" as required by 34 C.F.R. § 300.551, and thus remanded the case to determine whether regular classroom options were available within a reasonable distance for the child. <sup>106</sup> Thus, in the Third Circuit, a 50/50 composition does not constitute a "regular classroom," except in limited circumstances.

On the other hand, in *L.B. v. Nebo School District*, <sup>107</sup> a federal district court in Utah (located in the Tenth Circuit) found that a public preschool comprised of 50 percent non-disabled children and 50 percent children <sup>108</sup> with many different levels of disability *was* the least restrictive

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100. *Id.* at 796.

101. *LaGrange*, 184 F.3d at 916.

102. *Paxton-Buckley-Loda*, 184 F. Supp. 2d at 800.

103. *Id.* at 803-04.

104. *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572 (3d Cir. 2000).

105. *Id.* at 579.

106. *Id.* at 579-80.

107. *L.B. v. Nebo Sch. Dist.*, 214 F. Supp. 2d 1172 (C.D. Utah 2002).

108. *Id.* at 1178 ("[T]he district offered alternatives to plaintiffs, including a preschool class comprised of half typically-developing children . . .").

environment for K.B., a child with autism spectrum disorder.<sup>109</sup> The parents wanted K.B. placed in a private preschool with his non-disabled peers, but with the use of a shadow aide. The school district argued that because the child relied very heavily on her aide, such a placement was not the LRE.<sup>110</sup> The court found that the language of the IDEA asserting that a child should be educated with non-disabled peers to the “maximum extent *appropriate*” indicated that not *all* children should be mainstreamed.<sup>111</sup> Thus, a 50/50<sup>112</sup> composition may constitute a “regular classroom” in some areas.<sup>113</sup>

Finally, in *M.E. ex rel. C.E. v. Board of Education for Buncombe County*,<sup>114</sup> a federal district court case in North Carolina (located within the Fourth Circuit), a school district proposed to place C.E., an autistic preschooler, in a public preschool program consisting of 60 percent non-disabled students, and 40 percent disabled students.<sup>115</sup> The court did not explicitly address the LRE requirement, but instead found that the parents failed to carry their burden of proof to show that the school district’s proposed placement would not provide C.E. with free appropriate public education, as mandated by the IDEA.<sup>116</sup> The district court granted the school district’s motion for summary judgment, implicitly holding that the 60/40 placement was appropriate for C.E.

### *B. Application of the Case Law and the Resulting Confusion*

The various outcomes for Ryan B., Alec S., N.R., K.B., and C.E. demonstrate that a school district’s compliance with the statute and its commentary, on its face, will not be sufficient in and of itself. The school district must also take care to ensure that its placement of a preschooler is *that* child’s LRE. This requires a factual analysis for each child and depends on his or her individual capabilities.

Unfortunately, these few preschool LRE cases have provided little understanding as to exactly what constitutes a “regular” preschool environment. If a school district seeks to develop a preschool program that will be considered “regular,” what percentage of its students must be

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109. *Id.* at 1177.

110. *Id.* at 1186.

111. *Id.* at 1187 (emphasis added).

112. *Id.* at 1178.

113. *Id.* at 1186–87.

114. *M.E. ex rel. C.E. v. Bd. of Educ. for Buncombe County*, 186 F. Supp. 2d 630 (W.D.N.C. 2002), *rev’d and remanded*, *M.E. ex rel. C.E. v. Buncombe County Bd. of Educ.*, 72 Fed. Appx. 940 (4th Cir. Aug. 18, 2003) (reversed and remanded on procedural issues).

115. *Id.* at 633.

116. *Id.* at 640–41.

non-disabled versus disabled? While the upper limit of what constitutes a "regular" composition has been somewhat established by the few cases discussed above at between 40 to 50 percent disabled children, the lower limit has not been established in the courts. However, according to a 1999–2000 national poll taken by the National Center for Education Statistics, the natural proportion of students with disabilities in elementary and secondary schools is 13.22 percent.<sup>117</sup>

Thus, it seems that the "magic number" of how many disabled children can be in a preschool classroom and that classroom still be considered "regular," may lie somewhere between 13 and 50 percent. While somewhat helpful theoretically, this range is too wide to provide school districts with practical standards by which to develop legally defensible public preschool programs for their disabled students. Furthermore, it leaves open the question of what kind of levels of disabilities may be included. For example, would a classroom consisting of 25 percent emotionally disturbed students, 15 percent learning disabled students, and 60 percent non-disabled students be considered a "regular" educational environment? What about a classroom engineered to consist of 55 percent non-disabled students, 40 percent severely mentally retarded students, and 5 percent hearing impaired students? In that case, would the hearing impaired students really be in their least restrictive environment when 40 percent of their peer models have significantly lower academic and language capabilities than they do?

## V. UNIVERSAL PRESCHOOL

The dilemma of ascertaining the composition of a "regular" preschool classroom exists because most school districts do not have regular public preschool options for their three- to five-year-old population. By enacting a federal system of universal preschool, whereby all three- to five-year-olds would have access to high quality preschool if their parents desired, the number of public preschools would drastically increase. This would create "regular preschool classrooms" in which disabled preschoolers could be included. Universal preschool would save school districts not only the cost of litigating against parents dissatisfied with self-contained preschools for disabled children only, but also the cost of paying for the placement of these children in private preschools that *do* meet their individual least restrictive environments.

In addition to helping to solve the LRE dilemma for disabled

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117. Natl. Ctr. for Educ. Statistics, *Table 52: Children 0–21 Years Old Served In Federally Supported Programs For The Disabled, By Type Of Disability: 1976–77 to 1999–2000* <<http://nces.ed.gov/programs/digest/d02/tables/dt052.asp>> (March 2002).

preschoolers, the concept of universal preschool has many other benefits that have been articulated by politicians, sociologists, psychologists, educators, and policy makers over the past decade. For example, Dr. Isabel V. Sawhill, Senior Fellow at the Brookings Institution, a Washington D.C.-based think tank, argues that too many students come to school not ready to learn, and lacking language skills, social skills and motivation.<sup>118</sup> She argues that targeting students when their brains are developing the fastest provides long-term gains in overall school achievement and social adjustment.<sup>119</sup> The National Education Association has echoed these sentiments and added that there are significant economic and social benefits as well.<sup>120</sup>

One famous study of preschool programs, the Abecedarian Early Childhood Intervention Project in North Carolina, found that middle-class children who participated in the program's high quality preschool earned approximately \$143,000 more in their lifetimes than children in the control group.<sup>121</sup> Further, the mothers of children in these projects earned \$133,000 more over their lifetimes than mothers whose children did not participate.<sup>122</sup> The study also indicated that individual school districts would save on average \$11,000 per child over the course of each child's enrollment in K-12 because the children who received high quality preschool were less likely to need remedial or special educational services.<sup>123</sup> This study, which was conducted by the National Institute of Early Education Research, also showed on average, a \$4 return on each tax dollar expended.<sup>124</sup>

As for economically disadvantaged students, a separate longitudinal study is currently being conducted in Chicago. A cost-benefit analysis of the Chicago Child-Parent Center Program has thus far shown a 40 percent reduction in special education placement, a 33 percent reduction in juvenile arrests, and a 40 percent reduction in grade retention.<sup>125</sup> These social, economic, and educational benefits, combined with the increased ability to fulfill LRE requirements, make a very strong

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118. Isabel V. Sawhill, *Kids Need an Early Start: Universal Preschool Education May Be The Best Investment Americans Can Make In Our Children's Education-And Our Nation's Future*, Blueprint Mag. <<http://www.ndol.org/blueprint/fall/99/solutions10.html>> (Fall 1999).

119. *Id.*

120. See generally Natl. Educ. Assn., *Keeping the Promise to America's Preschoolers*, 6 and 13 <<http://www.nea.org/lac/bluebook/preschoolers.pdf>> (accessed Mar. 2, 2004).

121. *Id.* at 16.

122. *Id.*

123. *Id.*

124. *Id.* at 14.

125. Scott Scrivner & Barbara Wolf, *Universal Preschool: Much to Gain but Who Will Pay?* Found. for Child Dev. p. 4 <<http://www.ffcd.org/pdfs/wolfe.pdf>> (October 2002).



argument for the implementation of universal preschool.

### A. *The History of Universal Preschool*

The concept of universal preschool is not new; rather, it has existed for many years in other developed nations including France, Belgium, Sweden, and Italy. The programs in these countries serve between 95–99 percent of children ages three through six with free, full time, academically-based programs.<sup>126</sup>

France, for example, offers a free six-hour preschool program to all three- to four-year-olds, with extended care available to parents for a fee based upon their individual salaries. The children are educated in *écoles maternelles* (translated to “nursery schools”),<sup>127</sup> with an average class size of approximately 25 students.<sup>128</sup> Each class is taught by a teacher and a part-time aide. The lead teachers must have a three-year university degree, supplemented by a one-year training program paid for by the French government.<sup>129</sup> They receive the same level of training and the same salary as regular elementary school teachers. Further, because teachers in France are widely respected, the turnover rate is very low at 10 percent.<sup>130</sup> Teacher salaries and training, as well as the preschool curriculum, are all provided by the national French government, while the local governments must provide the funding for the part-time aides and the school facilities. After all is calculated, the average cost per student is approximately \$5,500.<sup>131</sup> In areas that are economically disadvantaged, the national government provides extra funding per student, thereby reducing the class sizes and providing specialized teachers where needed.<sup>132</sup>

Within the United States, there are several states that have initiatives to provide universal preschool, including Georgia, New York, and Oklahoma.<sup>133</sup> The oldest and best developed program is in Georgia.<sup>134</sup> In 1995, Georgia enacted the School Readiness Program and opened it at first to all four-year-olds whose parents are residents of Georgia.<sup>135</sup> The

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126. *Id.* at 24.

127. Neil Coffey, *French-English Dictionary* <<http://www.french-linguistics.co.uk/dictionary/>> (accessed Jan. 5, 2004).

128. Scrivner, *supra* n. 125, at 25.

129. *Id.*

130. *Id.*

131. *Id.* (This is based upon 1999 figures and on estimates taken from Paris, France.).

132. *Id.* at 25.

133. *Id.* at 10.

134. *Id.* at 11.

135. The Ga. Off. of Sch. Readiness, *Georgia Pre-K Program* <<http://www.osr.state.ga.us/whatisprek.html>> (accessed May 3, 2004).

program provides funding to public schools to begin pre-K programs, or subsidizes private preschools already in existence. It costs approximately \$3,580 per child and is funded by the Georgia lottery.<sup>136</sup> It requires that the preschools accepting this funding offer at least 6.5 hours of early childhood education and run for a full school year (180 days). Extended care is available in some preschools, for a small fee to parents not to exceed \$70 per week.<sup>137</sup> The preschool curriculum is set by the Georgia state government, and teachers whose schools are part of the program must have at least a two-year Associates degree. The class size maximum is 20 students, and the staff to student ratio must be at least 1 to 10.<sup>138</sup> Finally, those schools that utilize this funding are subject to the IDEA and must admit disabled students non-discriminatingly.<sup>139</sup>

### B. Policy Arguments Against Universal Preschool

As with any policy issue, there are politicians and policy makers who are opposed to universal preschool. Two key arguments have been made. First, opponents argue that "public preschool for younger children is irresponsible, given the failure of the public school system to educate the children currently enrolled."<sup>140</sup> The second argument is that universal preschool will cost the United States billions of dollars that might be better invested elsewhere.<sup>141</sup>

With regard to the first argument, our nation's public schools have been under attack since publication of *A Nation at Risk* in the early 1980's.<sup>142</sup> This was a comprehensive study conducted by the National Commission on Excellence in Education, which sparked education policy makers into action with powerful language such as: "[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as Nation and a people."<sup>143</sup> Since that time, a variety of education reform ideas, including school vouchers, charter schools, standardized testing, school uniforms, etc.,

136. Scrivner, *supra* n. 125, at 11–12.

137. *Id.*

138. *Id.* at 12.

139. The Ga. Off. of Sch. Readiness, *The Georgia Pre-K Program Information and Guidelines* p. 5 <<http://www.osr.state.ga.us/FY1Guide2004.pdf>> (July 1, 2001).

140. Darcy Ann Olsen, *Universal Preschool is No Golden Ticket: Why Government Should Not Enter the Preschool Business* p. 1 <<http://www.cato.org/pubs/pas/pa333.pdf>> (Feb. 9, 1999).

141. The Century Found., *Universal Preschool Idea Brief* No. 5, p. 4 <[http://www.policyideas.org/Issues/Education/Universal\\_Preschool.pdf](http://www.policyideas.org/Issues/Education/Universal_Preschool.pdf)> (Mar. 2000) (estimating a cost of up to 40 billion dollars).

142. Natl. Commn. on Excellence in Educ., *A Nation at Risk: the Imperative for Education Reform* (Washington, D.C.: Supt. of Docs., U.S. G.P.O. Distributor 1983).

143. *Id.* at 5.

have swept through our legislatures. Universal preschool is another education reform measure; it differs, however, in that it seeks to remedy education at the root of the problem—when children are building their educational foundations.

The federal government enacted a similar program in 1964 called Head Start.<sup>144</sup> This program continues to provide funding to public school districts in order to provide preschool programs for low-income families.<sup>145</sup> It mirrors the universal preschool philosophy in many ways, but limits its reach to low-income families. In addition, the program seeks to provide not only education, but also health and social services to young children, and parenting information, resources, and training to parents.<sup>146</sup> Thus far, research conducted on Head Start programs has shown short-term academic gains, but no “lasting impact on children’s cognitive, social, or emotional development, let alone [a reduction in] teenage pregnancy rates, delinquency, or welfare use.”<sup>147</sup>

Opponents of universal preschool argue that if Head Start has failed to produce long-term gains, then universal preschool will fail to do so as well.<sup>148</sup> However, this argument ignores the key differences between Head Start and universal preschool. First, children enrolled in Head Start lack the important peer modeling that comes from being around students of all economic and racial groups. Second, universal preschool will have a primary focus on education, whereas academic instruction is only one of the many goals of Head Start.

The argument that public K–12 education is already failing to educate our students ignores the fact that by giving preschool-aged children access to early childhood education, they will be better prepared for their K–12 educational experiences. Further, this argument also ignores the fact that universal preschool does not necessarily require that all preschools be *public*. Rather, it calls for publicly *funded* preschools—whereby private, high quality preschools that are already doing a good job of educating preschoolers could receive government subsidies that would enable them to expand their programs to families who ordinarily could not afford such private preschools. Finally, universal preschool, unlike K–12 education, would not be compulsory. Parents would still

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144. U.S. Dept. of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Head Start Bureau, *Head Start: A Child Development Program* <<http://www.head-start.lane.or.us/general/HHS-brochure.html#components>> (accessed Mar. 4, 2004).

145. *Id.*

146. *Id.*

147. Olsen, *supra* n. 140, at 20.

148. *Id.*

have the option of keeping their children at home or enrolling them in some other program if they choose.

The second argument against universal preschool is that it will cost the government billions of dollars. However, supportive policy makers have suggested several means to finance such an expansive project. First, the government could design a system whereby parents of preschoolers would be taxed in proportion to their incomes or design a system where parental contributions would be based on an ability to pay.<sup>149</sup> Second, some funding could come from eliminating the federal Head Start Program and enrolling students from that program into regular preschools where they would benefit not only from higher quality preschool environments, but also from peer modeling of students who are not all from low-income and disadvantaged backgrounds.<sup>150</sup>

Third, money is currently being wasted by "America's prison-industrial complex, which now houses many more drug criminals than violent criminals."<sup>151</sup> The government could impose a "moratorium on new prison construction which would free up hundreds of millions of dollars. . . ."<sup>152</sup> The government could then use those resources to address the root of juvenile delinquency by investing in education and preschool rather than continuing to address only the outcome of the problem by jailing young citizens. Fourth, some legislators and policy makers have recently proposed eliminating the senior year of high school and replacing it with preschool.<sup>153</sup> They argue that the 12th grade year is typically a waste of time for many seniors and that public education resources would be more intelligently spent educating minds when they are most formidable.<sup>154</sup> They further point out that 46 states already allow seniors to take college courses while they are in high school.<sup>155</sup> A final argument to address the projected billion-dollar cost is that the government need not invest in universal preschool all at once. Instead, it should follow Georgia's lead and start with four year olds. When this proves successful, the federal government can then expand to include three year olds as well.

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149. See generally Scrivner, *supra* n. 125.

150. David B. Kopel, *Guns, Gangs, and Preschools: Moving Beyond Conventional Solutions to Confront Juvenile Violence*, 1 Barry L. Rev. 63, 106 (Summer 2000).

151. *Id.*

152. *Id.*

153. Steven K. Paulsen, *Senior Year A Waste of Time? Some Lawmakers Propose Eliminating 12th Grade*, The Associated Press <[http://www.thedailycamera.com/bdc/state\\_news/article/0,1713,BDC\\_2419\\_2437191,00.html](http://www.thedailycamera.com/bdc/state_news/article/0,1713,BDC_2419_2437191,00.html)> (Nov. 18, 2003) (accessed Nov. 21, 2003).

154. *Id.*

155. *Id.*

## VI. CONCLUSION

Determining the least restrictive environment for preschoolers in the United States presents a dilemma in special education law. The LRE provision of the IDEA requires that students be educated in a "regular education environment" to the "maximum extent appropriate."<sup>156</sup> The circuit courts are split on the proper test or standard by which to measure the LRE for K-12 students. Similarly, with regard to preschool students, the courts have not yet enunciated a rational standard that school districts can apply. In fact, even the task of defining "regular" has proven difficult because most school districts do not operate regular public preschools. By utilizing public and private resources, as the IDEA mandates, the concept of universal preschool, in addition to providing many other social, economic and educational benefits, will also provide a solution to this LRE dilemma for disabled preschool children.

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156. 34 C.F.R. at § 300.550.

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