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## **FINDING THE LEAST RESTRICTIVE ENVIRONMENT FOR PRESCHOOLERS UNDER THE IDEA: AN ANALYSIS AND PROPOSED FRAMEWORK**

Theresa M. DeMonte

*Abstract:* Under the Individuals with Disabilities Education Act, both school- and preschool-age children who qualify for special education services are entitled to education in the least restrictive environments appropriate to their needs. For school-age children, the presumptive least restrictive environment is the regular class where their nondisabled peers participate. By contrast, defining an analogous environment for preschool children is difficult, because public schools rarely provide preschool for children without disabilities. This Comment argues that the Act's language, principles, purposes, and implementing regulations suggest that the settings where a preschool child's nondisabled peers learn should be identified as that child's presumptive least restrictive environment. Examples of such settings may include the home, community, and regular preschool. This Comment then provides an analytical framework that courts can use when determining the least restrictive environment for a preschool child.

### **INTRODUCTION**

Nate is an adorable three-year-old whose favorite activities at preschool include singing at circle time, digging in the sand table, and playing restaurant in the pretend kitchen.<sup>1</sup> Though a casual observer might not immediately notice, Nate displays the classic symptoms of autism, including repetitive behaviors, restricted interests, impaired social skills, and disordered communication. Despite his significant impairments, Nate has been successfully participating in regular<sup>2</sup> preschool with the help of a trained aide who prompts him to respond appropriately to his teacher and peers.

Having heard that preschoolers with disabilities are entitled to educational services under federal law, Nate's parents approach the local school district. After conducting an evaluation, the district tells Nate's parents that he qualifies for services and may attend the district's autism preschool program for two hours per day. The classroom consists of six children, all diagnosed with autism, taught by one teacher and two aides.

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1. The author created this hypothetical for illustrative purposes.

2. Throughout this Comment, the term "regular" environments refers to public and private educational settings designed for the general population, while "special" environments are those designed specifically to meet the needs of children with disabilities.

Nate's parents urge the school district to consider keeping Nate in a preschool where he could participate with nondisabled children. The school district administration informs the parents that they only fund public programs. Because the district does not provide regular preschools for nondisabled children, Nate's parents are told they will either need to accept the autism preschool program or continue to fund the private program themselves.

The Individuals with Disabilities Education Act (IDEA) entitles children with disabilities, including preschool children such as Nate, to individualized educations in the least restrictive environment (LRE) appropriate to their needs.<sup>3</sup> Despite this requirement, parents of preschool children sometimes face obstacles with its implementation and find themselves torn between educating their child in a regular preschool or community setting at their own expense or foregoing a placement alongside nondisabled peers in order to secure free special education services.<sup>4</sup> The IDEA presumes that children will be educated in regular educational environments, unless their individual needs dictate that a special class or school is required.<sup>5</sup> Therefore, this Comment will refer to regular educational settings as the "presumptive" least restrictive environment. The presumptive least restrictive environment for school-age children is the regular class where nondisabled children are educated, and moving a child to a special setting requires justification based on the child's needs.<sup>6</sup> However, schools are often uncertain which environment constitutes the presumptive least restrictive environment for preschoolers—in part because there are often no generally available public education settings for nondisabled preschool children.<sup>7</sup>

This uncertainty about how the LRE provisions apply to preschoolers

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3. The IDEA entitles qualifying children ages three through twenty-one to receive a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A) (2006). An individualized education program is to be crafted for each child, *id.* § 1412(a)(4), and under a provision titled "Least restrictive environment," a child is to be educated with children who are not disabled "to the maximum extent appropriate," *id.* § 1412(a)(5)(A).

4. *See infra* Part III (citing cases in which schools denied preschool students placements in regular settings).

5. *See* 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.115 (2008) (denoting special classes and special schools as distinct from regular classes).

6. *See* 20 U.S.C. § 1412(a)(5) (noting that "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes . . . cannot be achieved satisfactorily").

7. Alefia Mithaiwala, Comment, *Universal Preschool: A Solution to a Special Education Law Dilemma*, 2004 BYU EDUC. & L.J. 373, 386–87 (discussing the preschool "LRE dilemma" and arguing that it exists "because most school districts do not have regular public preschool options for their three- to five-year-old population").

is ripe for clarification, and the critical importance of early intervention for disabled children<sup>8</sup> makes the LRE issue particularly high-stakes for this population. The Supreme Court has never decided an LRE case—much less one applying the requirement to preschoolers—and lower federal courts diverge on what constitutes the presumptive least restrictive environment for preschoolers.<sup>9</sup> Although legal journals provide a plethora of articles focusing on how the LRE requirement applies to older children,<sup>10</sup> they are short on scholarship dealing with these requirements as they apply to preschoolers.<sup>11</sup> This Comment helps resolve this uncertainty by explaining how the statutory and regulatory provisions of the IDEA apply to preschoolers.

Part I presents the history of the IDEA as it pertains to preschool students with disabilities, and Part II explores the background of its key provisions. Part III summarizes federal cases where preschool placement was at issue and shows that courts have applied differing analyses to the preschool LRE context. Part IV draws on the text of the IDEA, its

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8. See, e.g., U.S. DEP'T OF EDUC., TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, at IV-33 (2002), available at <http://www.ed.gov/about/reports/annual/osep/2002/section-iv.pdf> (reporting findings that document many positive results for children and their families after one year of early intervention).

9. Some of the circuit courts have adopted their own tests to discern whether a child is being educated in the least restrictive environment. E.g., *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994) (adopting a four-factor balancing test requiring courts to consider the educational and non-academic benefits of regular settings as well as the cost involved and the effects of the student on the teacher and other children); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (adopting a two-part test in which courts determine whether education in the regular class can be achieved satisfactorily before deciding whether the child has been mainstreamed to the maximum extent appropriate); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (adopting a test applicable when “a segregated facility is considered superior” requiring courts to determine whether similar services can be feasibly provided in a non-segregated setting); see *infra* Part III.

10. See Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189; Sarah E. Farley, Comment, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809 (2002); Joshua Andrew Wolfe, Note, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals with Disabilities Education Act*, 55 VAND. L. REV. 1627 (2002) (arguing that the LRE requirements conflict with the requirements for a free appropriate public education and need to be reconciled); Marc C. Weber, Response, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174 (2007), <http://www.pennumbra.com/responses/10-2007/Weber.pdf>.

11. The author found only one scholarly law journal article directly addressing the LRE provisions as they apply to preschoolers. The article proposed universal preschool as a catch-all solution, but did not explain how states without universal preschool were currently obligated under the IDEA to provide the LRE to preschoolers—the issue this Comment seeks to resolve. See Mithaiwala, *supra* note 7.

purposes, and its history to propose a framework courts should apply when the least restrictive environment for a preschool child is at issue. Courts should look first to the settings that the child's same-aged peers are learning in to determine the child's presumptive least restrictive environment. Second, they should ask whether the child can be successfully educated in these settings. This approach best implements the principles of the IDEA and comports with Congress's preference that children with disabilities receive their educations in regular settings.

### I. THE IDEA REFLECTS CONGRESS'S INCREASING EMPHASIS ON INCLUSION AND FAMILY-CENTERED EARLY INTERVENTION

The IDEA had its genesis in a movement of parents and educators fighting to secure public education for children with disabilities. These efforts spanned the twentieth century<sup>12</sup> and gained inspiration from both the broader civil rights movement<sup>13</sup> and the belief that inclusion in public education could help children with disabilities gain independence.<sup>14</sup> As momentum grew for nationwide change, Congress responded by enacting legislation that conditioned funding to the states on whether they provided children with disabilities access to appropriate public education.<sup>15</sup> Later, as research increasingly suggested that earlier intervention led to better outcomes, the right-to-education movement sought to improve services to preschoolers.<sup>16</sup>

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12. See LEOPOLD LIPPMAN & I. IGNACY GOLDBERG, *RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN* 5 (1973).

13. See *id.* at 12–15 (noting that the groundwork for a key “[r]ight to [e]ducation” case was laid by *Brown v. Board of Education*).

14. See *id.* at 12–13 (noting that others drew on the language in *Brown* that education “is a principal instrument for . . . helping [a child] to adjust normally to his environment. It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education” and applied it to children with disabilities (internal citations omitted)).

15. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)).

16. This research was presented to the Senate Committee on Labor and Public Welfare by parents, teachers, and experts in special education. See S. REP. NO. 94-168, at 1, 81–82 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1425, 1479 (“[W]e feel that it is imperative to point out that the benefits of early identification and education, both in terms of prevention of future human tragedy, and in the long-term cost effectiveness of tax dollars, are so great as to justify continued emphasis upon preschool education for handicapped children.”). The continued efforts of advocates led to the passage of laws providing broader services to preschoolers. See *infra* Part I.B.

A. *By Enacting Comprehensive Special Education Reforms, Congress Recognized Two Principles: The Right to Educational Opportunity and the Right to Integration*

As recently as the mid-1970s, schools across the nation routinely excluded millions of children with disabilities or warehoused them in inadequate special education programs.<sup>17</sup> Although it took many years for this issue to gain national prominence, local efforts addressing the problem began as early as the end of the nineteenth century, when some cities established special classes for mildly impaired children.<sup>18</sup> Heartened by the possibilities such schools offered, parents of children with disabilities formed local grassroots organizations and advocated for their children's right to education.<sup>19</sup>

These groups' tireless advocacy bore fruit: their efforts persuaded many legislators and school boards that the benefits of educating disabled children were worth the costs.<sup>20</sup> California became the first state to mandate special education services for cognitively impaired children, and several other states followed suit.<sup>21</sup>

As their children began receiving long-sought special education, parents began to view the frequent segregation of their children from regular classrooms as unjust.<sup>22</sup> The Court's landmark decision in *Brown v. Board of Education*,<sup>23</sup> holding that separate education based on race is inherently unequal,<sup>24</sup> resonated with many advocates for children with disabilities.<sup>25</sup> They adopted the rhetoric of the civil rights movement and looked to the courts to vindicate these children's rights.<sup>26</sup>

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17. See 20 U.S.C. § 1400(c)(2) (congressional findings).

18. LIPPMAN & GOLDBERG, *supra* note 12, at 5 (1973) (noting that Providence, Springfield, Boston, and Chicago began offering special classes for cognitively impaired children before 1900).

19. See *id.* at 10–11. The influence of these local groups converged in 1950 when parents founded the National Association for Retarded Children (NARC), which was among the first national organizations to advocate on behalf of children with disabilities. See *id.*

20. See *id.*

21. *Id.* at 6 (“[B]y the early 1950s first California and then other states were beginning to mandate special educational services for the mentally retarded.” (internal citation omitted)).

22. See *id.* at 10.

23. 347 U.S. 483 (1954).

24. *Id.* at 493.

25. See LIPPMAN & GOLDBERG, *supra* note 12, at 12–13 (1973).

26. See, e.g., *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868 (D.D.C. 1972) (holding that exclusion of children with disabilities from schools violated procedural due process and equal protection); *Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania*, 334 F. Supp. 1257, 1258–59 (E.D. Pa. 1971) (noting that action brought on behalf of mentally retarded children deprived of free public education alleged in its complaint the unconstitutionality of such practices under the Equal Protection Clause).

Across the country, advocates filed lawsuits asserting that schools were excluding children with disabilities from public education in violation of the Due Process and Equal Protection Clauses of the Constitution.<sup>27</sup> In many cases, the decisions confirmed that children with disabilities were entitled to educations suited to their needs.<sup>28</sup> States without laws addressing the education of disabled children responded by passing laws entitling children with disabilities to appropriate educations.<sup>29</sup>

By 1975, all but two states had enacted such legislation.<sup>30</sup> Despite these laws, many states were unable to accommodate all children, and claimed that lack of funds hindered their compliance.<sup>31</sup> With millions of children in limbo—unable to receive the services to which they were legally entitled—Congress took action. In 1975, it enacted a comprehensive national policy called the Education for All Handicapped Children Act (EAHCA).<sup>32</sup> This law amended the Education of the Handicapped Act, and conditioned federal funds on the provision of free appropriate public educations to children with disabilities.<sup>33</sup> By creating incentives for the states to adopt federal policy, Congress took a more active role in enabling children with disabilities to become productive citizens.<sup>34</sup>

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27. See H.R. REP. NO. 94-332, at 3–4 (1975) (noting that since *PARC* and *Mills* there had been forty-six completed or pending cases in twenty-eight states).

28. S. REP. NO. 94-168, at 7 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1431 (noting that more than thirty-six court decisions had recognized that children with disabilities have the right to receive appropriate educations); see, e.g., *Mills*, 348 F. Supp. 866; *PARC*, 334 F. Supp. 1257.

29. See Frederick J. Weintraub & Joseph Ballard, *Introduction: Bridging the Decades, in SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS* 1, 3 (Joseph Ballard et al. eds., 1982).

30. *Id.*

31. S. REP. NO. 94-168, at 7, reprinted in 1975 U.S.C.C.A.N. 1425, 1431 (noting that lack of financial resources had prevented compliance with court decisions requiring states to educate children with disabilities).

32. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)).

33. *Id.* § 612, 89 Stat. at 780 (codified as amended at 20 U.S.C. § 1412) (“In order to qualify for assistance . . . a State shall demonstrate . . . that the . . . State has in effect a policy that assures all handicapped children the right to a free appropriate public education.”).

34. See S. REP. NO. 94-168, at 9, reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (“[O]ver the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee’s belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school.”).

*B. Congress Has Increasingly Emphasized Early Educational Intervention for Preschoolers with Disabilities*

The 1975 amendments did not ensure that preschool children would receive the same entitlements as school-age children with disabilities. While the EAHCA generally required states to educate children with disabilities ages three to twenty-one, it exempted states from educating children ages three through five if doing so was inconsistent with state law or practice.<sup>35</sup> States that elected to educate a subset of preschool children with disabilities, however, were subject to the requirements of the EAHCA with respect to those children.<sup>36</sup> Thus, states could dodge the Act's requirements by declining to serve preschoolers altogether.<sup>37</sup>

The lack of a full mandate for preschool education in the final bill was contentious.<sup>38</sup> The Senate Subcommittee on the Handicapped had proposed a version that mandated services for children ages three through five.<sup>39</sup> In the hearings preceding the EAHCA's passage, Congress heard ample testimony that preschool-age children stood to benefit the most from special education services because early intervention could ameliorate the disabling effects of many conditions.<sup>40</sup> Ultimately cost concerns trumped these arguments, and after being reported to the full committee, the preschool mandate was dropped.<sup>41</sup> Several dissenting senators acknowledged the states' fiscal concerns, but emphasized that foregoing a full preschool mandate could cost taxpayers *more* education dollars in the long run because children deprived of effective early educational intervention may require more intensive services later.<sup>42</sup>

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35. *See id.* at 18–19, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1442–43 (listing the reasons a state could be exempted, and noting that the exemption did not apply when a state tried to abandon providing services).

36. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612, 89 Stat. 773, 780–81 (codified as amended at 20 U.S.C. § 1412 (2006)).

37. Assuming, that is, that the state was not abandoning services previously provided. *See* S. REP. NO. 94-168, at 18–19, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1442–43.

38. The Senate Report included the dissenting views of five senators who asserted that failure to provide a full mandate for preschool children “diluted” the commitment of the Act to such children and cited testimony indicating that “special educational services provided to handicapped children before ‘normal’ school age were often the most beneficial, since much more could be done at an earlier age to ameliorate, alter, or develop skills to compensate for certain handicapping conditions.” *Id.* at 81–82, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1479–80.

39. *Id.* at 82, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1480.

40. *Id.* at 81–82, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1479–80.

41. *Id.*

42. *Id.* (“We are cognizant of the concerns of the States regarding their financial capacity to



In the wake of the EAHCA, the cost-benefit debate continued. Ten years after its enactment, only twenty-one states and the District of Columbia offered educational services to all preschool children with disabilities.<sup>43</sup> To remedy this, Congress amended the Education for the Handicapped Act in 1986,<sup>44</sup> giving states greater incentives to serve all qualifying preschool children with disabilities beginning at age three.<sup>45</sup> These amendments also added provisions that conditioned grants on providing services to infants and toddlers with disabilities from birth through age two.<sup>46</sup> In addition to offering states a carrot in the form of increased funding, the new law also came with a stick: states that failed to provide free appropriate public education to all qualifying preschoolers by 1991 risked losing funds and grants they received under the old law.<sup>47</sup>

Most of the key features of the 1986 amendments remain today, and all states currently provide education to preschool children with qualifying disabilities.<sup>48</sup>

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provide a [sic] full educational services to this group of children. Nevertheless, we feel that it is imperative to point out that the benefits of early identification and education, both in terms of prevention of future human tragedy, and in the long-term cost effectiveness of tax dollars, are so great as to justify continued emphasis upon preschool education for handicapped children.”).

43. H. REP. NO. 99-860, at 42 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2401, 2444 (“Currently, all states participate in the state grant program for children 6 to 17, but as of July 1985, only 21 states, 4 territories, and the District of Columbia served all handicapped children from age 3.”).

44. *See* Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145 (codified as amended in scattered sections of 20 U.S.C. (2006)).

45. Pascal L. Trohanis, *An Introduction to PL 99-457 and The National Policy Agenda for Serving Young Children with Special Needs and Their Families*, in POLICY IMPLEMENTATION & PL 99-457: PLANNING FOR YOUNG CHILDREN WITH SPECIAL NEEDS 1, 5–13 (James J. Gallagher et al. eds., 1989).

46. *Id.* at 2–3.

47. Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, § 619(b)(1), 100 Stat. 1145, 1156 (“[T]he Secretary shall make a grant to any State which . . . has a State plan . . . which includes policies and procedures that assure the availability under the State law and practice of such State of a free appropriate public education for all handicapped children aged three to five, inclusive.”); *see* Trohanis, *supra* note 45, at 13 (“[T]he new law builds in some penalties for states that do not achieve a full mandate for FAPE covering 3- through 5-year-olds by the 1990–1991 school year. Failure to comply will result in loss of the new preschool grant money, as well as funds generated under Part B of the State Plan formula for this population group, as well as designated EHA discretionary grants, including those for research, training, and demonstration activities.”).

48. *See* U.S. DEP’T OF EDUC., TWENTY-SEVENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, at II-76 (2005), *available at* <http://www.ed.gov/about/reports/annual/osep/index.html> (listing all fifty states under a table tallying children ages three through five served under the IDEA) [hereinafter TWENTY-SEVENTH ANNUAL REPORT].

C. *The IDEA and Its Amendments Expressed a Stronger Commitment to Educating Preschoolers in a Seamless Fashion in the Least Restrictive Environment*

In 1990, Congress reauthorized the Education for the Handicapped Act and renamed it the Individuals with Disabilities Education Act (IDEA).<sup>49</sup> The following year, Congress enacted amendments<sup>50</sup> in part to “facilitate the development of a comprehensive ‘seamless’ system of services for children, aged birth to 5, inclusive, and their families . . . .”<sup>51</sup> The amendments required that services for infants and toddlers take place in “natural environments,” including home and community settings, “to the maximum extent appropriate.”<sup>52</sup> Additionally, the new law required states to develop policies and procedures to ensure a smooth transition for children as they prepared to enter public school.<sup>53</sup> The amendments also allowed the service plan of an infant or toddler to continue through age five whenever appropriate.<sup>54</sup>

The IDEA’s 1997 amendments explicitly included the term “least restrictive environment,”<sup>55</sup> which had previously appeared only in the implementing regulations.<sup>56</sup> The Department of Education issued subsequent regulations stating that the LRE provisions apply fully to preschool children.<sup>57</sup>

Congress most recently amended the IDEA in 2004 by passing the Individuals with Disabilities Education Improvement Act.<sup>58</sup> In doing so,

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49. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1141–42.

50. Individuals with Disabilities Education Act (IDEA) Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587.

51. H.R. REP. NO. 102-198, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 310, 313.

52. IDEA Amendments of 1991, Pub. L. No. 102-119, § 12, 105 Stat. 587, 595–596 (codified as amended at 20 U.S.C. § 1432(4)(G) (2006)).

53. *Id.* § 5, 105 Stat. 587, 591 (codified as amended at 20 U.S.C. § 1412(a)(9)).

54. *Id.* § 6, 105 Stat. 587, 591 (codified as amended at 20 U.S.C. § 1414(d)(2)(B)).

55. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 61 (codified as amended at 20 U.S.C. § 1412 (2006)).

56. Jean B. Crockett, *The Least Restrictive Environment and the 1997 Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 552 (1999) (“There is no definition given in this section for the term LRE, but a cross-reference is made to Sec. 1412 (a)(5)(A) where the term now appears, for the first time, within the text of the law. . . . The words “least restrictive environment” have officially been transferred from the federal regulations into the statute.”).

57. *Id.* at 555–56 (“References to the LRE provisions can be found explicitly in several sections of the reauthorized federal code. . . . A reference that these LRE provisions apply to preschool children with disabilities now appears in [then] Sec. 300.552.”).

58. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400–1482 (2006)).

Congress highlighted the IDEA's primary purpose of preparing children with disabilities for integrated adult lives<sup>59</sup> by requiring each child's educational plan to address functional, as well as academic, areas of limitation.<sup>60</sup> In its findings, Congress emphasized that the education of children with disabilities would be enhanced by "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."<sup>61</sup>

The central role the family plays in the child's education is particularly evident with respect to very young children. The law currently provides that an interdisciplinary team will craft an Individualized Family Service Plan for infants and toddlers.<sup>62</sup> The plan must include a statement of the family's strengths and needs that relate to the enhancement of the child's development, and a statement of outcomes expected for the family as a whole and for the child as an individual.<sup>63</sup>

The modern IDEA reflects Congress's commitment to promoting individualized, inclusive educations for children with disabilities.<sup>64</sup> The Act entitles such children to a free appropriate public education (FAPE)

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59. "Improving 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." 20 U.S.C. § 1400(c)(1) (2006) (congressional findings).

60. See 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2006) ("[An individualized education program includes] a statement of measurable annual goals, *including academic and functional goals*, designed to . . . meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." (emphasis added)). For preschool children, such goals might address self-help activities, social skills, and participation in the community.

61. *Id.* § 1400(c)(5)(B).

62. *Id.* § 1436; see *id.* § 1436(d) (requiring that the plan contain a statement of the family's resources, priorities, and concerns, as well as a statement of outcomes or results expected for the family as a whole). Congress took a family-systems approach in drafting the Individualized Family Service Plan requirements because it "recognized that the capacity of infants and toddlers to succeed in any educational program depends on that child's family" and an effective effort to help infants and toddlers must "includ[e] the goal of enhancing families' capacity to meet the special needs of their infants and toddlers with disabilities." Matthew J. Stowe & H. Rutherford Turnbull III, *Legal Considerations of Inclusion for Infants and Toddlers and for Preschool-Age Children*, in *EARLY CHILDHOOD INCLUSION: FOCUS ON CHANGE* 79 (Michael J. Guralnick ed., 2001).

63. 20 U.S.C. § 1436(d)(2)–(3).

64. *Id.* § 1412(a)(1)(A). Not all children who have impairments that might be considered a disability will necessarily qualify to receive services under the IDEA. The IDEA defines "child with a disability" as a child having at least one of a list of enumerated impairments and who, "by reason thereof, needs special education and related services." *Id.* § 1401(3)(A).

from ages three through twenty-one.<sup>65</sup> The educational services a child receives are listed on the child's individualized education program (IEP), a written plan crafted by a multidisciplinary team that includes the child's parents.<sup>66</sup> The IDEA also expresses Congress's preference that children with disabilities be educated in regular environments alongside their nondisabled peers when consistent with their needs.<sup>67</sup> If the child's parents believe the IEP fails to confer a free appropriate public education in the least restrictive environment, they may challenge its adequacy<sup>68</sup> by pursuing mediation or requesting a due process hearing before an impartial hearing officer.<sup>69</sup> After exhausting administrative remedies, parents can file a civil action in state or federal court.<sup>70</sup>

## II. THE IDEA ENSURES AN "APPROPRIATE" EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT

The IDEA entitles qualifying preschool children to the same benefits as their school-age counterparts: a free appropriate public education in the least restrictive environment.<sup>71</sup> The meaning and application of these entitlements has been contested,<sup>72</sup> and the special situation of preschool children raises even more difficulties.<sup>73</sup>

### A. *Congress Crafted Procedures to Assure Appropriate, Individualized Educations for Children with Disabilities*

Congress requires that the environment in which a child with disabilities is educated—his or her placement—be in the least restrictive environment in which the substantive content of the child's IEP can be successfully implemented, with the use of supplementary aids and

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65. *Id.* § 1412(a)(1)(A).

66. *See id.* § 1414(d).

67. *See id.* § 1412(a)(5)(A).

68. *Id.* § 1415(b).

69. *Id.* § 1415(f).

70. *Id.* § 1415(i)(2).

71. *See id.* § 1412(a)(1)(A) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive."); *id.* § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled.").

72. *See, e.g.,* Bd. of Educ. v. Rowley, 458 U.S. 176, 187 (1982) (contesting provision of free appropriate public education); Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994) (contesting LRE); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (contesting LRE).

73. *See infra* Part II.D.3.

services.<sup>74</sup> The substantive content of the child's IEP is delivered when a child can achieve his or her individual annual goals.<sup>75</sup> The IEP team crafts these goals with an eye to helping the child bridge the educational gap his or her disability creates.<sup>76</sup> The team describes this educational gap in a statement explaining how the student's disability "affects the child's involvement and progress in the general education curriculum,"<sup>77</sup> which is the same curriculum as that used for nondisabled children.<sup>78</sup> There is no general curriculum for preschool children;<sup>79</sup> instead, the statute instructs that a preschooler's statement may describe how the disability affects his or her participation in "appropriate activities" for that age group.<sup>80</sup>

"Appropriate activities" has a potentially expansive meaning that is not limited by the Act or its regulations. In response to public comments, the Department of Education explained that "appropriate activities" refers to "age-relevant developmental abilities or milestones that typically developing children of the same age would be performing or would have achieved."<sup>81</sup> The IEPs of preschool children are designed to improve the child's participation in appropriate activities and thereby receive the appropriate educations they are entitled to under the IDEA.

### *B. Courts Have Struggled to Define the Meaning of "Appropriate Education"*

At the center of the IDEA is the right to receive a free appropriate public education.<sup>82</sup> The Supreme Court addressed the meaning of the

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74. *See generally* 20 U.S.C. § 1412.

75. *Id.* § 1414(d)(1)(A)(i).

76. *See id.* § 1414(d)(1)(A)(i)(I)–(II). The child's annual goals serve the purpose of "meet[ing] the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability." *Id.* § 1414(d)(1)(A)(i)(II).

77. *Id.* § 1414(d)(1)(A)(i)(I)(aa).

78. Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,535, 12,592 (Dep't of Educ. Mar. 12, 1999) (describing the general curriculum as "the same curriculum as for nondisabled children").

79. *Id.* at 12,593 (noting that preschool children are "of an age for which there is not a general curriculum for nondisabled children").

80. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(bb).

81. Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities; Final Regulations, 64 Fed. Reg. 12,405, 12,471 (Dep't of Educ. Mar. 12, 1999).

82. *See* 20 U.S.C. § 1401(9)(A)–(D). This section defines a free appropriate public education as:

[S]pecial education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State

word “appropriate” in the seminal case *Board of Education v. Rowley*,<sup>83</sup> holding that an education is not appropriate within the meaning of the Act unless both procedural<sup>84</sup> and substantive standards are met.<sup>85</sup> The Supreme Court first found that the Act’s statutory findings and text suggested that Congress primarily intended to provide disabled children with *access* to education, and did not intend to guarantee a particular educational outcome.<sup>86</sup>

The Court held that the requisite procedural standard for an “appropriate” education is achieved when schools comply with statutorily specified procedures, and the substantive standard is reached when a child’s educational program consists of individualized special education and related services that are calculated to confer an educational benefit.<sup>87</sup>

After *Rowley*, lower courts grappled with an issue the Court failed to address—what *level* of educational benefit meets the appropriate standard? *Rowley* foreclosed the interpretation that “appropriate” requires a potential-maximizing benefit; the broadest possible reading of *Rowley* suggests that an education is “appropriate” when a child receives *some* educational benefit, no matter how insignificant.<sup>88</sup> Lower courts

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educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

*Id.* (formatting modified for brevity). Although the IDEA was enacted in 1990, the free appropriate public education requirement has been in force since the EAHCA was enacted in 1975. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612, 89 Stat. 773, 780 (codified as amended at 20 U.S.C. § 1412 (2006)).

83. 458 U.S. 176 (1982).

84. *Id.* at 206–07. Congress envisioned the IEP procedural requirements as the primary guarantors of substantive validity. The legislative history from PL 94-142 suggests that the procedures surrounding evaluation, eligibility determinations, placement, and prior written notice requirements were the primary way Congress sought to ensure that children received appropriate educations. The Senate Report notes:

[T]he individualized written educational plan . . . would require school systems to develop an expertise and ability to provide services guaranteed to assure educational progress . . . [By emphasizing] the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.

S. REP. NO. 94-168, at 11–12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435–36.

85. *Rowley*, 458 U.S. at 206–07.

86. *Id.* at 192 (citing S. REP. NO. 94-168, at 11 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435). Also, the Court noted that Congress did not intend to *optimize* the education of each child with a disability. *Id.* at 197 n.21.

87. *Id.* at 201, 203–04.

88. See *id.* at 203 (indicating that an appropriate education must “permit the child to benefit educationally”).

largely rejected this reading, reasoning that Congress would not have spent millions of dollars and repeatedly emphasized individualized instruction unless it intended to confer more than a de minimis educational benefit; instead, they have held that an appropriate education is one that is designed to provide a *meaningful* educational benefit.<sup>89</sup>

Courts use different formulations to assess the substantive appropriateness of an IEP, but relevant factors may include the child's current abilities,<sup>90</sup> the child's potential,<sup>91</sup> whether the educational benefit is non-trivial,<sup>92</sup> and whether significant learning occurred.<sup>93</sup>

### C. *Courts Had Applied the Principle of Least Restriction to Other Contexts*

The history and purposes of the least restrictive alternative movement lend context to the LRE provisions in the Act and provide a backdrop against which the placement of preschoolers can be examined. The LRE requirements had their genesis in the legal principle that the government cannot impinge on individuals' rights without justification, a principle long recognized by American jurisprudence.<sup>94</sup> Broadly stated, the least

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89. Lower courts have stated this requirement differently. *See, e.g.*, *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (“[W]e agree that the IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue.”); *L.T. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004) (“IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is ‘reasonably calculated’ to provide an ‘appropriate’ education.” (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992–93 (1st Cir. 1990))); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (noting that an appropriate education “must be gauged in relation to child’s potential” and that it requires “significant learning” and “meaningful benefit” (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182–85 (3d Cir. 1988))); *Polk*, 853 F.2d at 180 (“[T]he [IDEA] calls for more than a trivial educational benefit.”). *But cf.* *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292–93 (11th Cir. 2001) (noting that “[t]he Supreme Court has said that a student is only entitled to some educational benefit,” and holding that plaintiff failed to show that his IEP was “not reasonably calculated to confer the basic floor of educational benefits”).

90. *See Deal*, 392 F.3d at 864.

91. *Id.* at 862; *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (citing *Ridgewood*, 172 F.3d at 247).

92. *Polk*, 853 F.2d at 180.

93. *Ridgewood*, 172 F.3d at 247 (citing *Polk*, 853 F.2d at 182).

94. *See, e.g.*, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821) (promoting “the least possible power adequate to the end proposed” as the extent to which the government may punish (emphasis added)). Scholars disagree on the origins of the least restrictive alternative principle. *See, e.g.*, JAMES W. ELLIS ET AL., *THE LEAST RESTRICTIVE ALTERNATIVE: PRINCIPLES AND PRACTICES* 65 n.11 (1981) (citing *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), holding that a milk inspection scheme was overly broad and infringed on interstate commerce interests, as the first instance of the Supreme Court recognizing the least restrictive alternative principle); Scott A. Fields & Benjamin M. Ogles, *The System of Care for Children and the Least Restrictive Alternative: Legal*

restrictive alternative principle proposes that government actions that deprive an individual of liberty or property should be narrowly tailored to achieve state interests or confer benefit to the individual, and that the least intrusive or stigmatizing means are preferred.<sup>95</sup> The least restrictive alternative principle finds roots in both procedural and substantive due process doctrines, as well as equal protection principles.<sup>96</sup> Courts began applying the least restrictive alternative principle to mental health contexts in the 1960s and 1970s by requiring proof that less restrictive settings were not appropriate before committing a mentally ill individual to an institutional setting.<sup>97</sup>

The least restrictive alternative principle spread to the field of special education as concerns grew that the purported benefits of exclusion did not outweigh the negative effects resulting from the stigma and lowered expectations associated with segregated settings.<sup>98</sup> These same concerns spurred Congress to adopt the least restrictive environment requirements in the 1975 Education for all Handicapped Children Act.<sup>99</sup>

*D. The LRE Requirement Reflects Congress's Preference for Educating Children in Regular Settings*

Like all children served by the IDEA, preschool children are entitled to participate in the least restrictive environment that meets their needs.<sup>100</sup> This Section examines how Congress has used the LRE principle to express a strong preference for regular settings through statutory language that prioritizes inclusiveness and endorses a continuum approach to determining a child's least restrictive learning

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*Origins and Current Concerns*, 5 CHILD. SERVICES: SOC. POL'Y, RES., & PRAC. 75, 76-77 (2002) (citing *Shelton v. Tucker*, 364 U.S. 479 (1960), holding that a law requiring teachers to divulge all memberships is more intrusive than is needed to meet the state's legitimate interest in assessing the competence of its schoolteachers, as the first instance of the Supreme Court recognizing the least restrictive alternative principle); David Zlotnick, *First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients to Refuse Treatment*, 83 W. VA. L. REV. 375, 385 (1981) (citing *Anderson*, 19 U.S. at 230-31, as first enunciating the least restrictive alternative principle).

95. See ELLIS, *supra* note 94, at 17.

96. *Id.* at 21-25.

97. See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972) (holding that Wisconsin's commitment procedures violated procedural and substantive due process and reasoning that the mentally ill cannot be deprived of their liberty without a showing that less drastic alternatives cannot achieve the same purposes of keeping the individual and society safe).

98. See Note, *Enforcing the Right to an "Appropriate" Education: The Education for all Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1119-20 (1978-1979).

99. See *id.* at 1121.

100. See 20 U.S.C. § 1412(a)(5) (2006).



environment. Despite Congress's expressed preference, preschool children with disabilities are included in regular and inclusive environments less often than school-age children with disabilities.

1. *The Statutory LRE Requirement Expresses a Strong Preference for Inclusive Settings*

The LRE provisions require a child's placement to be no more restrictive than necessary to effect an appropriate education. The strongly-worded primary LRE provision, which has remained essentially the same since 1975,<sup>101</sup> reveals Congress's concern for children educated in segregated environments:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>102</sup>

The statutory language, permitting removal "only when" the child's disability prevents the child from being satisfactorily educated in regular class, is mandatory.<sup>103</sup> The IEP team must describe the extent to which a child will not participate in regular classes, extracurricular offerings, and nonacademic activities as well as the reasons justifying removal.<sup>104</sup>

2. *The Department of Education Implementing Regulations Conceive Restriction as Occurring on a Continuum*

The IDEA assumes that a child's placement will be in the regular educational environment. But when a child cannot be educated satisfactorily in that environment, even with supplementary aids and

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101. Compare 20 U.S.C. § 1412(a)(5)(A) (2006), with 20 U.S.C. § 1412(5) (1976) (current version at 20 U.S.C. § 1412 (2006)). The only change has been that the words "disability" and "disabled" have been substituted for "handicap" and "handicapped." The 1975 version reads: "[T]o the maximum extent appropriate, handicapped children . . . 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."

102. 20 U.S.C. § 1412(a)(5)(A).

103. See *id.*

104. *Id.* § 1414(d)(1)(A)(i)(V).

services, removal is required *to the extent necessary* to achieve a free appropriate public education.<sup>105</sup> Special classes, special schools, and institutions are among the special environments available to meet the child's needs.<sup>106</sup>

In recognition that special environments are not equally restrictive, a regulation titled the "Continuum of alternative placements" conceptualizes placements as occurring on a continuum of restriction.<sup>107</sup> This regulation provides:

- (a) Each public agency must 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 . . . must (1) [i]nclude the alternative placements listed . . . (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and (2) [m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.<sup>108</sup>

This regulation obligates public agencies to make a continuum of alternative placements available.<sup>109</sup> The continuum, starting with regular classes and ending with institutions, is usually interpreted as moving from the least to the most restrictive settings.<sup>110</sup> Thus, the level of restriction increases as the child is removed from the "regular educational environment" and moved further along the continuum of restriction.

### 3. *Preschool Children with Disabilities Participate in Regular Classrooms Less Often than Their School-Age Counterparts*

The LRE provisions apply fully to preschoolers.<sup>111</sup> However,

105. *See Id.* § 1412(a)(5)(A) ("To the *maximum extent appropriate*, children . . . are educated with children who are not disabled . . . ." (emphasis added)).

106. 34 C.F.R. § 300.115 (2008).

107. *Id.*

108. *Id.* (formatting modified for brevity).

109. *Id.* § 300.115(a).

110. *See, e.g.,* D.B. v. Ocean Twp. Bd. of Educ., 985 F. Supp. 457, 490 (D.N.J. 1997) ("Just as placement in a regular class with supplementary aids and services is at one end of the continuum of alternate placements required to be made available to special education students under IDEA, placement at a completely segregated, full time residential facility is at the other end of that continuum." (citing *Oberti v. Bd. of Educ.*, 801 F. Supp. 1392, 1400 (D. N.J. 1992), *aff'd*, 995 F.2d 1204 (3d Cir. 1993))).

111. 34 C.F.R. § 300.116 (2008) ("In determining the educational placement of a child with a

preschool-age children are not currently included in regular environments to the same extent as school-age children with disabilities.<sup>112</sup> For example, in its 2005 report to Congress on IDEA implementation, the Department of Education found that only 34% of preschoolers were served in settings designed for children without disabilities, and over one-third were served in classes designed primarily for children with disabilities.<sup>113</sup> In contrast, 60.3% of children in the six-to-eleven age bracket were served primarily in a regular class and only 15% were outside the regular class for more than 60% of the day.<sup>114</sup>

While some barriers have been identified, the reasons for this discrepancy between preschoolers and school-age children remain uncertain. Researchers and scholars have posited that barriers to placing preschoolers in less restrictive settings include lack of resources at the district level, stakeholder attitudes, and difficulty coordinating services.<sup>115</sup> In particular, the LRE requirement presents implementation challenges when preschoolers are involved because there is often no ready-made, publicly provided environment that clearly fits the bill as least restrictive. For school-age children, regular public school is the least restrictive environment possible.<sup>116</sup> No obvious analogue exists for preschoolers for two reasons. First, many school districts do not provide regular public education for preschool-age children because most states do not begin compulsory education until age six or older.<sup>117</sup> Second, it is uncertain that formal preschools are necessarily the “regular educational environment” for all nondisabled preschoolers because many children do not attend any preschool, while others wait until age four or five.<sup>118</sup>

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disability, including a preschool child with a disability, each public agency must ensure that— (a) the placement decision . . . [i]s made in conformity with the LRE provisions.” (emphasis added)).

112. TWENTY-SEVENTH ANNUAL REPORT, *supra* note 48, at 24–25.

113. *Id.*

114. *Id.* at 45.

115. See Virginia Buysse et al., *Implementing Early Childhood Inclusion: Barrier and Support Factors*, 13 EARLY CHILDHOOD RES. Q. 169 (1998); Eileen M. Borden, *Local Variations in Least Restrictive Environment Placements for Preschool Children with Disabilities: Results of a Pilot Study*, Presented at the 28th Annual Conference of the Northeastern Educational Research Ass’n (1997) (Ed.D. dissertation, State University of New York), [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/17/90/ab.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/90/ab.pdf).

116. *Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985) (“The [IDEA] contemplates that such education will be provided where possible in regular public schools . . . but the Act also provides for placement in private schools at public expense where this is not possible.” (citing statutory authority)).

117. See Education Commission of the States, *Compulsory School Age Requirements* (2005), <http://www.ecs.org/clearinghouse/50/51/5051.htm> (last updated September 2005).

118. In 2005, more than half of three-year-olds and one-third of four-year-olds were not enrolled

Many of these nondisabled preschool children instead participate in community settings such as the home or daycare.<sup>119</sup>

School districts trying to comply with the LRE requirement have grappled with the unique situation of preschoolers and have arrived at different solutions. To create access to nondisabled peers, some schools pay for tuition at private preschools or daycares.<sup>120</sup> Others create “mixed” special education center-based programs that invite participation from nondisabled children in varying ratios so that children with IEPs have exposure to nondisabled peers.<sup>121</sup> These schools are operating in the absence of clear guidance from Congress or courts as to which, if any, of these alternatives is the presumptive least restrictive environment for their students. This lack of clarity plays out in schools’ differing conclusions. This ambiguity can lead to disagreement between parents and schools, requiring the courts to review preschool placements to ensure compliance with the LRE requirement in light of Congress’s intent.

### III. COURTS APPLY THE LRE PROVISIONS INCONSISTENTLY WHEN PRESCHOOL PLACEMENTS ARE CHALLENGED

Only a handful of federal opinions directly address the LRE requirement as it applies to preschoolers. The outcomes can be roughly divided into two categories: those upholding segregated special education placements as the least restrictive environment, and those upholding inclusive preschools designed for nondisabled children as the least restrictive environment. This Part traces representative decisions to underscore the conflict.

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in a preschool education program. See W. Steven Barnett & Donald J. Yarosz, *Preschool Policy Brief: Who Goes to Preschool and Why Does it Matter?*, 15 NAT’L INST. OF EARLY EDUC. RES.: POL’Y BRIEF SERIES 1, 5 (2007), available at <http://nieer.org/resources/policybriefs/15.pdf>.

119. See *id.* at 5.

120. See, e.g., Editorial, *Improving Preschool Special Education*, N.Y. TIMES, Aug. 7, 1996, at A16.

121. See, e.g., Samuel L. Odom & Don Bailey, *Inclusive Preschool Programs: Classroom Ecology and Child Outcomes*, in EARLY CHILDHOOD INCLUSION: FOCUS ON CHANGE 253, 260–61 (Michael J. Guralnick ed., 2001) (discussing inclusive preschool programs with varying ratios of children with and without disabilities).

A. *Courts Upholding Segregated Placements Tend to Discount the Congressional LRE Mandate While Emphasizing the Burdens Schools Face in Placing Preschoolers in Regular Programs*

One of the first cases in which a segregated special education preschool classroom was held to constitute the least restrictive environment was *Mark A. v. Grant Wood Area Education Agency*.<sup>122</sup> Alleah A., a child with cerebral palsy, had been attending Handicare, a private integrated daycare dedicated to fostering interaction between children with and without disabilities.<sup>123</sup> When Alleah turned three, the local education agency recommended placement in a special education preschool program consisting entirely of children with disabilities but housed in a regular elementary school.<sup>124</sup>

Alleah's parents wished her to remain at Handicare and challenged the proposed placement.<sup>125</sup> The Eighth Circuit affirmed that the segregated placement was appropriate.<sup>126</sup> Notably absent from the opinion is a finding that Alleah's needs could not be met in the integrated setting; the court *assumed* that Alleah could receive meaningful educational benefit in either the segregated or integrated setting.<sup>127</sup> Reasoning that the public agency only had to provide an *appropriate*, rather than *best*, placement for Alleah, the court held that the special education preschool was an appropriate placement and that the LRE requirement did not dictate a contrary result.<sup>128</sup>

The *Mark A.* court pointed out that Alleah's class would be located within an elementary school that served nondisabled children.<sup>129</sup> The court also noted that Iowa, where Alleah resided, did not have integrated public preschool programs.<sup>130</sup> It concluded, "[w]hile the Act mandates that handicapped children receive, to the extent possible, an appropriate public integrated education, it does not compel the state to establish entire new levels of public education services to satisfy the Act's

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122. 795 F.2d 52, 54 (8th Cir. 1986).

123. *Id.* at 53.

124. *See id.*

125. *Id.*

126. *Id.* at 54.

127. *See id.* at 54 (implicitly acknowledging that Alleah's needs could be better met at Handicare: "[a]lthough Handicare may indeed offer the *best* educational opportunities" (emphasis in original)).

128. *Id.*

129. *Id.* ("Alleah, at the very least, will be educated *in the same school* with nonhandicapped children.").

130. *Id.*

mainstreaming requirements.”<sup>131</sup>

More than twenty years later, an unpublished decision from the U.S. District Court for the Middle District of Georgia adopted similar reasoning when it failed to acknowledge that regular preschool may be necessary to meet the LRE requirements for some children. In *M.W. v. Clarke County School District*,<sup>132</sup> M.W., a three-year-old boy with autism, was placed in a self-contained autism classroom consisting of at least three adults working with no more than six children.<sup>133</sup> After a few months, M.W.’s parents became concerned that he was imitating the idiosyncratic and repetitive behaviors of his classmates.<sup>134</sup> They requested a due process hearing<sup>135</sup> and unilaterally removed him from the autism preschool program after they became convinced that he was regressing.<sup>136</sup> They enrolled him in a private preschool and sought reimbursement for their expenses on the grounds that M.W. had been denied an education in the least restrictive environment.<sup>137</sup>

At the administrative hearing, M.W.’s mother testified that children in the autism preschool classroom were hitting, kicking, moaning, screaming, and crying; her testimony was bolstered by audiotapes of the classroom she had surreptitiously recorded while visiting.<sup>138</sup> The administrative law judge found that the recordings were not necessarily representative of the school day<sup>139</sup> and reasoned that “since the [school district] does not have its own public school program for non-disabled three-year-old students, within the continuum of services provided directly by the [district], M.W. was in the least restrictive environment.”<sup>140</sup>

On appeal, the district court reviewed the administrative judge’s findings and dismissed the complaint.<sup>141</sup> The district court, however, did not directly address the LRE issue—despite testimony that M.W. flourished in his private preschool among nondisabled children—because the court found that M.W.’s parents did not meet their burden in

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131. *Id.*

132. No. 3:06-CV-49, 2008 WL 4449591 (M.D. Ga. Sept. 29, 2008).

133. *Id.* at \*3.

134. *Id.* at \*4.

135. *Id.* at \*5.

136. *Id.* at \*6–7.

137. *Id.*

138. *Id.* at \*6.

139. *Id.* at \*6 n.11.

140. *Id.* at \*9 (citing Final Decision of the ALJ paragraph 92).

141. *Id.* at \*1–2 (granting Defendant’s motion to dismiss the complaint).

showing that the private preschool was an appropriate placement.<sup>142</sup> In a footnote, the court observed that the IDEA prefers public schools over private schools and that the district's autism program was calculated to provide educational benefits.<sup>143</sup> Therefore, the court reasoned, "it is unclear whether Defendant was required to consider private placement at all once it determined that its own direct services classroom would provide M.W. with FAPE."<sup>144</sup> The decision implies that so long as a child receives an education calculated to confer benefits, the LRE requirement does not have independent significance, at least at the preschool level where the only regular programs available may be private.<sup>145</sup>

*B. Courts Supporting Regular Preschool Placements Find Congress's Mandatory LRE Provisions Controlling, Despite the Difficulties Posed to Schools*

In contrast to the two cases discussed above, the Seventh, Third, and Tenth Circuits have applied different reasoning to hold that educational agencies must consider paying for private preschool programs when the only publicly run preschool programs available are designed for children with disabilities or academic difficulties.<sup>146</sup>

In the first of these cases, *Board of Education of LaGrange School District v. Illinois State Board of Education*,<sup>147</sup> the Seventh Circuit Court of Appeals considered the situation of Ryan B., a child with Down syndrome.<sup>148</sup> When Ryan was two, his parents placed him in a private preschool where he learned alongside nondisabled children.<sup>149</sup> After Ryan's third birthday, the school district determined he was eligible for services under the IDEA.<sup>150</sup> The district initially recommended placing Ryan in a program consisting entirely of disabled children but later offered to consider placing Ryan in a program designed for preschool

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142. *Id.* at \*9.

143. *Id.* at \*9 n.16.

144. *Id.*

145. *See id.*

146. *See* L.B. *ex rel.* K.B. v. Nebo Sch. Dist., 379 F.3d 966 (10th Cir. 2004); T.R. *ex rel.* N.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Bd. of Educ. of LaGrange Sch. Dist. v. Ill. State Bd. of Educ., 184 F.3d 912 (7th Cir. 1999).

147. 184 F.3d 912 (7th Cir. 1999).

148. *Id.* at 914.

149. *Id.*

150. *Id.*

children at risk of academic failure.<sup>151</sup> After observing the “at risk” classroom, his parents requested a due process hearing, alleging that the school district did not offer Ryan a program that would provide an appropriate education in the least restrictive environment.<sup>152</sup> The district court agreed, and on the school district’s appeal the United States Department of Education filed an amicus brief supporting Ryan’s position.<sup>153</sup>

On appeal, the school district argued that the segregated classroom should be considered Ryan’s least restrictive environment because it was housed in a regular elementary school.<sup>154</sup> The school district stressed that the regulations suggested placing preschool children in Head Start as a way to meet the LRE requirement, and argued that the “at risk” program comported with this suggestion.<sup>155</sup>

The court of appeals rejected the school district’s arguments and held that a special class—even if housed in a regular school—was more restrictive than necessary because Ryan would benefit from a regular setting.<sup>156</sup> Moreover, the court decided that the “at risk” program was not the least restrictive environment for Ryan.<sup>157</sup> Refusing to analogize the “at risk” preschool to Head Start, the court noted that the children in the

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151. *Id.*

152. *See id.*

153. *Id.*

154. *See id.* at 915. In making this argument, the school district relied on implementing regulation commentary dealing with the least restrictive environment, providing:

Public agencies that do not operate programs for nondisabled children 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 nondisabled 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, based on the child’s IEP, and meets all of the other requirements of [relevant regulations].

*Id.* at 915–16 (citing commentary to 34 C.F.R. § 300.552). The school district contended that since it complied with this alternative, it was relieved of any further obligation under the LRE provision.

*Id.* This commentary has since been removed from the regulations.

155. *Id.* (noting that “[t]he School District argues that the Project IDEAL/At-Risk program is a FAPE because it is similar to Head Start, and thus meets the first alternative provided in the commentary to 34 C.F.R. § 300.552”).

156. *See id.* at 917 (“[W]e agree that the Brook Park placement is not a FAPE for Ryan within the meaning of the IDEA because it does not provide the least restrictive environment in which his individual needs can be met.”).

157. *Id.* (“[T]he At-Risk program offered by the School District was not sufficient to provide the least restrictive environment for Ryan, based on his unique needs.”).



“at risk” program were selected because they were all at risk of academic failure, while Head Start selected children based exclusively on income.<sup>158</sup> Because the “at risk” program—unlike Head Start—excluded all children expected to perform typically, it could not be a “regular” classroom.<sup>159</sup> The school district was required to pay for Ryan’s private preschool tuition because none of the school district’s proposed placements met the LRE requirement.<sup>160</sup>

On the heels of *LaGrange School District*, a Third Circuit decision applied similar reasoning to different facts and held that a mixed class including nondisabled children was not a “regular” class and therefore not the least restrictive environment. In *T.R. ex rel. N.R. v. Kingwood Township Board of Education*,<sup>161</sup> the board offered five-year-old N.R. a placement in a regular kindergarten, but N.R.’s parents wanted him to remain in preschool because state law did not require enrollment in kindergarten until age six.<sup>162</sup> The board did not provide any regular preschool programs, but did have a mixed special education preschool classroom in which half the children were nondisabled.<sup>163</sup> It was proposed that N.R. attend this classroom in the mornings and spend his afternoons in a resource room.<sup>164</sup> N.R.’s parents rejected this proposed placement and asked for tuition and supplemental services at N.R.’s private daycare center.<sup>165</sup>

The board requested a due process hearing to determine the validity of the proposed placement.<sup>166</sup> The hearing officer sided with the board; N.R.’s parents appealed to the district court, lost there, and appealed again.<sup>167</sup>

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158. *Id.* at 917 n.2. “Head Start is a national program that promotes school readiness by enhancing the social and cognitive development of children through the provision of educational, health, nutritional, social and other services to enrolled children and families.” About the Office of Head Start, <http://www.acf.hhs.gov/programs/ohs/about/index.html#factsheet> (last visited Dec. 18, 2009).

159. *LaGrange Sch. Dist.*, 184 F.3d at 917 n.2.

160. *Id.* The court concluded by noting that the tuition of seventy-five dollars per month was less than the amount the district had planned to expend in bussing Ryan to the segregated class, and “certainly less than the attorneys’ fees [the school district] presumably incurred prosecuting the appeal.” *Id.* at 918 (quoting the district court).

161. 205 F.3d 572 (3d Cir. 2000).

162. *Id.* at 576 & n.1.

163. *Id.* at 576.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

The court of appeals vindicated the parents' position, holding that the mixed classroom did not constitute the least restrictive environment.<sup>168</sup> The mixed class was designed to support children with disabilities, who constituted half the class; therefore the court found that it was more restrictive than a regular preschool class.<sup>169</sup> Because the record contained no evidence that N.R.'s IEP could not be successfully implemented in a regular class, the board had to consider that option.<sup>170</sup>

A few years later, the Tenth Circuit examined facts similar to those encountered in *Kingwood Township in L.B. ex rel. K.B. v. Nebo School District*.<sup>171</sup> K.B. was a preschool child with an autism spectrum disorder and, like N.R., was offered a placement in a mixed special education preschool which included between thirty and fifty percent nondisabled children who served as models to the children with disabilities.<sup>172</sup> K.B.'s parents rejected the proposed placement and instead enrolled her in a regular preschool with an aide and augmented her classroom experience with between twenty-five and thirty hours per week of additional therapy.<sup>173</sup> Seeking reimbursement, K.B.'s parents requested a due process hearing.<sup>174</sup> The hearing officer decided in favor of the school district and the district court affirmed.<sup>175</sup>

On appeal, the Tenth Circuit dismissed the school district's contention that K.B.'s reliance on her aide made the regular preschool more restrictive than the mixed class,<sup>176</sup> finding this argument belied by evidence that K.B.'s dependence had decreased and she was behaving appropriately at school with minimal prompts from her aide.<sup>177</sup> Because K.B. was the most academically advanced child at her regular preschool, the court viewed that setting as more likely to provide academic benefits to her than the mixed classroom, where the average student functioned at a lower level.<sup>178</sup> Therefore, the mixed classroom was not K.B.'s least

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168. *Id.* at 582.

169. *See id.* at 579.

170. *Id.* at 579–80.

171. 379 F.3d 966 (10th Cir. 2004).

172. *See id.* at 968.

173. *See id.*

174. *Id.* at 969.

175. *Id.* at 969–70.

176. *Id.* at 977.

177. *See id.* at 972. Other factors that persuaded the court that the mixed preschool was not the least restrictive environment for K.B. included the fact that the private preschool had a more balanced gender ratio and a group of peers better suited to model appropriate social skills. *Id.* at 978.

178. *Id.* at 978.

restrictive environment, and the court further held that her parents were entitled to reimbursement for the costs of K.B.'s regular preschool.<sup>179</sup>

#### IV. WHEN DECIDING LRE CASES, COURTS SHOULD FIRST LOOK TO THE CHILD'S PRESUMPTIVE LEAST RESTRICTIVE ENVIRONMENT

A uniform approach to deciding preschool least restrictive environment cases is needed. To effectuate the LRE requirement, courts should identify the settings where a preschool child's peers are educated as that child's presumptive least restrictive environment. The child should be placed in his or her presumptive least restrictive environment unless that placement would be inconsistent with the child's right to an appropriate education.

##### A. *The Split Between Courts Considering the LRE Requirements for Preschoolers Suggests the Need for a Uniform Test*

The five cases discussed above represent two different approaches that are not reconcilable. The courts that found no obligation to provide services in more normalized settings engaged in fundamentally different inquiries than the courts that found otherwise. The *Mark A.* and *M.W.* courts—which upheld segregated placements—did so despite evidence that the child could succeed in an integrated setting.<sup>180</sup> These courts accepted a showing that segregated settings conferred some educational benefits as sufficient to fulfill the LRE requirement—a requirement they seemed to view as having no independent significance once the threshold of a substantively appropriate education was met. For example, once the court in *M.W.* determined that M.W. could receive an adequate education in the autism preschool program, the court was “unclear” whether the less restrictive preschool needed consideration.<sup>181</sup> Similarly, while the *Mark A.* court acknowledged that Alleah *could* receive an appropriate education in her daycare setting, it refused to require the state to provide that setting because it was not a publicly run program and her education in the segregated setting was adequate.<sup>182</sup>

In contrast, *L.B., Kingwood Township*, and *LaGrange School District*

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179. *Id.*

180. *See supra* notes 127–128, 142, and accompanying text.

181. *M.W. v. Clarke County Sch. Dist.*, No. 3:06-CV-49, 2008 WL 4449591, at \*9 n.16 (M.D. Ga. Sept. 29, 2008).

182. *Mark A. v. Grant Wood Area Educ. Agency*, 795 F.2d 52, 54 (8th Cir. 1986).

stand for the proposition that a school must justify placing a preschool child in a more restrictive classroom based on the child's needs. Courts following these decisions are likely to find that preschool programs composed of high numbers of children with disabilities, or children at risk of social or academic problems, are more restrictive than programs designed for and attended by nondisabled children who are developing normally.<sup>183</sup>

The latter cases represent a more correct analysis of the LRE provisions for two reasons. First, these cases are aligned with Congress's intent because they acknowledge that placing a child in a classroom designed for children with disabilities constitutes the "removal . . . from the regular educational environment" that demands justification *based on the child's needs*.<sup>184</sup> School districts should not remove disabled preschoolers from regular educational environments just because they decline to educate nondisabled preschoolers—administrative and logistical challenges are not sufficient justifications for segregation. Second, these cases implicitly recognize that the LRE requirement is analytically separate from the free appropriate public education requirement, and the IDEA mandates that states meet *both* requirements.<sup>185</sup>

Although these courts recognized that regular preschools are less restrictive than special preschools, their analysis was incomplete because they did not ask or answer the question of whether the regular preschools were in fact the presumptive least restrictive environment. Instead, they looked at the possibilities before them—regular and special preschools—and deemed the least restrictive option the more appropriate placement.<sup>186</sup> However, in determining the least restrictive environment

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183. *But see* A.U. *ex rel.* N.U. v. Roane County Bd. of Educ., 501 F. Supp. 2d 1134 (E.D. Tenn. 2007) (holding that placement in a "collaborative" Head Start/special education classroom with fifty percent typically developing children would provide a free appropriate public education in the least restrictive environment, even though the child's needs could have been met in a classroom consisting of nondisabled children).

184. 20 U.S.C. § 1412(a)(5)(A) (2006) ("[R]emoval . . . occurs *only when the nature or severity of the disability* of a child is such that education in regular classes . . . cannot be achieved satisfactorily." (emphasis added)).

185. Although the statutory language suggests that placement in the least restrictive environment is a component of determining whether a child has received a free appropriate public education, *see id.* §§ 1401(9), 1414(d)(1)(A)(i)(V), the *Rowley* substantive standard for "appropriate" education is distinct from whether or not that education also occurs in the least restrictive environment. *See* Bd. of Educ. v. *Rowley*, 458 U.S. 176, 201, 206–07 (1982). It is possible for a child to have an education that meets *Rowley's* substantive requirements of appropriateness in a variety of environments, but the IDEA additionally requires that the child be placed in the least restrictive option where he or she can receive this appropriate education. 20 U.S.C. § 1412(a)(5)(A).

186. *See supra* part III.B.

for a child, courts should instead first determine what the presumptive least restrictive environment is—what the IDEA refers to as the “regular educational environment”—for similarly aged nondisabled preschool children in the community, *before* determining whether placement in that environment would be appropriate for an individual child.

The grounding historical principle of LRE analysis—normal environments whenever possible—suggests that children with disabilities should participate in the same environments they would if they were nondisabled, so long as their educational needs can be met.<sup>187</sup> To effectuate this principle, courts should use a two-step process to identify the presumptive least restrictive environment for a preschool child. First, courts should consider the appropriate activities in which the child’s same-aged nondisabled peers in the community engage. These activities must be identified before placement can be addressed because the IDEA requires that, when appropriate, a preschool child’s IEP address the ways the disability affects participation in appropriate activities.<sup>188</sup> Second, courts should consider the settings in which these activities occur, because these settings will constitute the child’s presumptive least restrictive environment.

This process mirrors the reasoning implicit in Congress’s position that the regular class constitutes the presumptive least restrictive environment for school-age children,<sup>189</sup> for whom school-based education is not only universally available, but also compulsory, in all fifty states.<sup>190</sup> By contrast, there is no nationwide, standard educational environment for nondisabled three- to five-year-old children. Because the presumptive least restrictive environment for preschoolers is both age- and community-specific, no single option will be the presumptive least restrictive environment for all preschool children. Once the presumptive least restrictive environment is identified for a child, the court must determine if it is the child’s least restrictive environment appropriate to his or her needs—a determination that requires considering whether the child’s needs can be met in that environment

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187. *See supra* part II.C.

188. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(bb).

189. *See id.* § 1412(a)(5); *see also supra* Part II.D.3.

190. *See* National Conference of State Legislatures, Compulsory Education, <http://ncsl.org/default.aspx?tabid=12943> (last visited Dec. 21, 2009) (“Today, every state and territory requires children to enroll in public or private education or to be home-schooled. More than half—32 states—require students to begin their education by age 6. Some states’ [sic] set their age requirements as low as age 5 and as high as age 8. All children are required to continue their education into their high school years, with 26 states setting the cutoff age at 16. The remaining states require students to stay in school through age 17 or 18.”).

with supplementary aids and services.

*B. Preschool Children Engage in Appropriate Activities in a Number of Environments, Including Preschool Classes, the Community, and the Home*

As set forth in the Section above, the first step in identifying the presumptive least restrictive environment for a preschool child is to identify the appropriate activities<sup>191</sup> that same-aged preschool children in the child's community engage in. Although the IDEA does not define the meaning of appropriate activities, the statute's strong emphasis on participation in the general education curriculum, starting in kindergarten, anticipates that preschool education will focus on preparing children to participate in the general curriculum upon kindergarten entry.<sup>192</sup> Because of this focus, the IDEA's requirement that IEP teams consider how the disability impacts the child's participation in appropriate activities—before crafting goals addressing the child's educational needs resulting from the disability<sup>193</sup>—should be understood as a requirement to consider those abilities and activities that enable preschool children to enter kindergarten and progress in the general curriculum.

Nondisabled children who are kindergarten-ready have social, cognitive, and language foundations that they leverage for rapid learning. Generally, these children enter kindergarten largely fluent in their native language,<sup>194</sup> socially aware and able to learn in a group setting,<sup>195</sup> and competent in basic self-help and motor skills.<sup>196</sup> These are

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191. The IDEA refers to preschool children participating in "appropriate activities." See 20 U.S.C. § 1414(d)(1)(A)(i).

192. Congressional findings note that the education of children with disabilities can be made more effective by "having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to . . . be prepared to lead productive and independent adult lives, to the maximum extent possible." *Id.* § 1400(c)(5).

193. See *id.* § 1414(d)(1)(A).

194. See, e.g., Kimberly A. Powell, *Speech and Language: Causes, Milestones and Suggestions* (2000), <http://www.childrensdisabilities.info/speech/guidelines.html> ("A five-year-old typically understands 2500–2800 words, speaks in 5–8 word sentences, uses 1500–2000 words and tells long stories accurately.").

195. See Pamela C. High, *School Readiness*, 121 PEDIATRICS 1008, 1010 (2008) (noting that 77% of first-time kindergarteners "often" form friendships).

196. See, e.g., Ellen H. Parlapiano, *Ready for Kindergarten? Five Teachers Tell You What Preschoolers Really Need for Next Year*, <http://www2.scholastic.com/browse/article.jsp?id=701> (last visited Dec. 21, 2009).

some of the appropriate activities that enable nondisabled children to begin kindergarten prepared to participate in the general curriculum and benefit from regular education.

Significantly, nondisabled children can acquire most kindergarten-readiness skills without formal instruction of any kind.<sup>197</sup> Before age five, these children meet their developmental milestones and engage in activities that prepare them for kindergarten in a variety of environments, including home, daycare, and other community settings.<sup>198</sup> These settings, therefore, can all constitute the presumptive least restrictive environment for preschoolers with disabilities learning to engage in appropriate activities. Unlike the general curriculum delivered to school-age children, where instruction takes place almost entirely within the schoolhouse, preschoolers engage in appropriate activities throughout most of their waking hours. Although instruction in pre-academic skills may be a focus of preschool classrooms, pre-academic skills are a small and relatively unimportant slice of the myriad abilities preschool children must develop to begin a general curriculum by kindergarten—abilities that are largely acquired outside a formal preschool setting.<sup>199</sup>

In communities where a preschooler's nondisabled peers do not participate in a structured preschool program, educators should regard community settings where nondisabled children engage in appropriate activities, such as home and daycare, as constituting the presumptive least restrictive environment. Although the continuum regulation suggests that home is a fairly restrictive placement,<sup>200</sup> this suggestion

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197. NAT'L ASS'N FOR THE EDUC. OF YOUNG CHILDREN, SCHOOL READINESS: A POSITION STATEMENT OF THE NATIONAL ASSOCIATION FOR THE EDUCATION OF YOUNG CHILDREN, at 1 (1995), <http://www.naeyc.org/files/naeyc/file/positions/PSREADY98.PDF> ("Every child, except in the most severe instances of abuse, neglect, or disability, enters school ready to learn school content.").

198. See Alison Gopnik, Op-Ed., *Your Baby is Smarter than You Think*, N.Y. TIMES, Aug. 16, 2009, at WK10. The author notes:

Schoolwork revolves around focus and planning. We set objectives and goals for children, with an emphasis on skills they should acquire or information they should know. Children take tests to prove that they have absorbed a specific set of skills and facts and have not been distracted by other possibilities. This approach may work for children over the age of 5 or so. But babies and very young children . . . aren't trying to learn one particular skill or set of facts; instead, they are drawn to anything new, unexpected or informative.

*Id.*

199. See High, *supra* note 195, at 1013 ("Three qualities that are necessary for children to be ready for school are intellectual skills, motivation to learn, and strong social-emotional capacity and support. These qualities are influenced by the health and well-being of the families and neighborhoods in which children are raised.").

200. See 34 C.F.R. § 300.115 (2009). The continuum regulation states that the continuum of alternative placements must include "instruction in regular classes, special classes, special schools,

should be considered inapplicable to preschoolers for two reasons. First, this regulation applies to children ages three through twenty-one; the majority of this population is school-age. Bolstering the notion that the regulation does not apply to preschoolers is the suggestion that the regular class is the normal environment for nondisabled children.<sup>201</sup> This presumption cannot extend to preschoolers for whom no standard “regular class” exists.

The full context of the IDEA suggests that this regulation should not be applied to preschoolers. The Act implies that preschoolers may have a different presumptive least restrictive environment than school-age children. For example, the statutory language providing that home and community settings are least restrictive environments for infants and toddlers,<sup>202</sup> and allowing a toddler’s service plan to remain in effect until age five,<sup>203</sup> strongly suggests that community settings, including the home, may be a child’s least restrictive environment from birth through

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home instruction, and instruction in hospitals and institutions.” *Id.* The continuum listed is generally considered to move from a least restrictive to most restrictive settings, suggesting that home is among the more restrictive. *See, e.g.,* D.B. v. Ocean Twp. Bd. of Educ., 985 F. Supp. 457, 490 (D.N.J. 1997) (“Just as placement in a regular class with supplementary aids and services is at one end of the continuum of alternate placements required to be made available to special education students under IDEA, placement at a completely segregated, full time residential facility is at the other end of that continuum.” (citing *Oberti v. Bd. of Educ.*, 801 F. Supp. 1392, 1400 (D.N.J. 1992))).

201. *See* 34 C.F.R. § 300.115 (2009). This presumption of the home as a highly restrictive environment makes sense with respect to school-aged children, because the normal environment for these children to learn the general curriculum is the regular class. The continuum becomes more restrictive as the setting becomes less and less like a regular class. For example, the next step on the continuum is a special class in a regular school, which although more restrictive than a regular class, at least has many of the same features that make the regular class the “normal” environment of instruction—a community of children, teachers, and a building dedicated to learning. Proceeding along the continuum, a special school also has many of the features of a regular class in a regular school, and is considerably less restrictive than home. By contrast, homebound instruction is an aberrant instructional environment for a school-age child because there is no participation in a “class” of any sort, which is the hallmark of formal schooling and delivery of the general curriculum. *See* Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,405, 12,638 (Dep’t of Educ. Mar. 12, 1999) (“Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children. For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery.”).

202. *See* 20 U.S.C. § 1432(4)(G) (2006) (noting that, to the maximum extent appropriate, early intervention services are “provided in natural environments, including the home, and community settings in which children without disabilities participate”).

203. *See id.* § 1414(d)(2)(B).



age five.<sup>204</sup> For preschoolers, learning at home may be normalizing instead of stigmatizing, and services should be more freely offered in this setting when appropriate and in line with the environments in which the child's nondisabled same-age peers participate.<sup>205</sup>

Where preschool is a community norm, there may be two concurrent least restrictive environments: a regular preschool will constitute the presumptive least restrictive environment for delivery of what might be called a "quasi-general curriculum," while community settings will likely be the presumptive least restrictive environment for engaging in some "appropriate activities."

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204. In 1997, the Department of Education issued a notice of proposed rulemaking in which it proposed a "continuum of alternative placements" regulation, identical to the one currently in effect with the exception of an explanatory note intended to follow the regulation. Assistance to States for the Education of Children with Disabilities, Preschool Grants for Children With Disabilities, and Early Intervention Program for Infants and Toddlers with Disabilities, 62 Fed. Reg. 55,026, 55,107 (proposed Oct. 22, 1997). The note stated that "[h]ome instruction is usually appropriate for only a limited number of children, such as children who are medically fragile and are not able to participate in a school setting with other children." *Id.* In response, some commentators requested that the note be modified to state that home instruction services may be appropriate for young children. Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,405, 12,638 (Mar. 12, 1999). The agency ultimately decided to omit the note, and included in its explanation of the deletion that "[i]nstruction at home may be the most natural environment for a young child with a disability." *Id.* To the extent that the proposed note gave the erroneous impression that home was not an appropriate placement for most preschoolers, it was corrected only partly by eliminating it. The Department should have gone farther and added a comment to the regulation, explicitly stating that the home may very well be the most natural environment for many preschoolers. By leaving this acknowledgement buried in a several-hundred page statement of basis and purpose in the *Federal Register*, the Department lost an opportunity to clarify the continuum of alternative placements so that it might be more apt for preschoolers.

205. Additionally, in responding to commentators' suggestions to the IDEA's regulations issued in 2006, the Department of Education noted that:

The LRE requirements in §§ 300.114 through 300.118 apply to all children with disabilities, including preschool children who are entitled to FAPE. Public agencies that do not operate programs for preschool children without disabilities are not required to initiate those programs solely to satisfy the LRE requirements of the Act. Public agencies that do not have an inclusive public preschool that can provide all the appropriate services and supports must explore alternative methods to ensure that the LRE requirements are met. Examples of such alternative methods might include placement options in private preschool programs or other community-based settings. Paying for the placement of qualified preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to public agencies to meet the LRE requirements. We believe the regulations should allow public agencies to choose an appropriate option to meet the LRE requirements. However, if a public agency determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child.

Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; Final Rule, 71 Fed. Reg. 46,540, 46,589 (Aug. 14, 2006).

C. *When a Preschool Classroom Is the Least Restrictive Environment for a Child, the Classroom Should Be No More Restrictive than Necessary*

Home and other community settings are not necessarily the presumptive least restrictive environment possible for all preschoolers. As the *Ryan B.* court suggested, the IDEA's regulations anticipate that regular preschool can be the presumptive least restrictive environment.<sup>206</sup> Whether regular preschool is a sufficiently normal environment such that it constitutes the least restrictive environment must be determined by looking to community norms for nondisabled children. In a community where the majority of children participate in formal preschool before kindergarten, the community has what might be described as a "quasi-general curriculum" for preschool-age children. In such a community, preschool attendance is likely to be viewed as an expected precursor to kindergarten. Furthermore, the absence of a preschool experience is likely to be perceived as a significant disadvantage because local schools count on incoming kindergarteners having more extensive pre-academic skills and exposure to formal preschool activities than might be expected in other communities where preschool is less common.

Because the LRE requirement looks first to what is normal for the general population, age is also a relevant factor when determining the least restrictive environment for a particular child. In a community where preschool attendance is expected, regular preschools are likely to constitute the least restrictive environment possible for children with disabilities of the same age as nondisabled attendees. Thus, if regular preschool is available to nondisabled children only when they turn three by the start of the school year, a disabled child whose third birthday is in December may not have a regular preschool become his presumptive least restrictive environment until the following fall. Likewise, if nondisabled children do not participate in preschool until their pre-kindergarten year, preschool may not be the presumptive least restrictive environment for a disabled child until age four in that community.

When preschool is the presumptive least restrictive environment, the preschool should be, to the maximum extent appropriate, one that is designed for nondisabled children.<sup>207</sup> If preschool possibilities were to be placed on a continuum from least to most restrictive, regular

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206. See *supra* notes 147–160 and accompanying text.

207. See 20 U.S.C. § 1412(a)(5)(A).

preschools designed for nondisabled children should be the presumptive least restrictive environment, while special preschools designed for and attended exclusively by disabled children should be considered highly restrictive. Mixed and at-risk programs would fall somewhere in between regular and special preschools.

In communities where the local school district or other educational agency does not provide regular preschool to nondisabled children, it is likely that the least restrictive preschool option will be private. This may mean that the school district or other educational agency must pay private tuition for those students who can receive a free appropriate public education in a regular preschool. The IDEA does not exempt educational agencies from the obligation to provide a free appropriate public education in the least restrictive environment on the grounds that the school district does not provide regular preschools.<sup>208</sup> In fact, the IDEA provisions anticipate that agencies will contract with private schools when necessary to achieve an appropriate education.<sup>209</sup> Agencies also have the option of creating public preschools, which could be financed at least in part by charging tuition to nondisabled children.

*D. The Proposed Framework First Identifies the Presumptive Least Restrictive Environment, then Asks Whether the Child Can Be Educated in This Environment*

Assuming that the IEP has substantively valid goals that are reasonably calculated to confer an appropriate education, courts reviewing preschool placement should ask three questions when trying to determine a preschool child's least restrictive environment.

First, is the presumptive least restrictive environment the home and community, or is it a preschool setting? The answer to this inquiry will depend on whether same-aged nondisabled children generally participate in a quasi-general curriculum in a structured preschool setting. If they do, then a preschool is the presumptive least restrictive environment. If the community does not have a quasi-general curriculum, then the presumptive least restrictive environment is the home and community—the same settings in which nondisabled preschoolers engage in appropriate activities.

After the presumptive least restrictive environment is determined, the second question should be: does the nature or severity of the child's disability prevent the child from being satisfactorily educated in this

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208. See *supra* note 206 and accompanying text.

209. See 20 U.S.C. § 1401(29).

environment, assuming the use of supplementary aids and services?<sup>210</sup> If the answer is no, then the presumptive least restrictive environment is the child's least restrictive environment and is the appropriate placement.

The final question should be: is the child included in the regular educational environment to the maximum extent appropriate?<sup>211</sup> For example, if a child requires a special preschool classroom, but could eat snack or play on the playground with the regular preschool class, then that child should be included in the regular preschool activities to the maximum extent appropriate to her needs, instead of remaining in a segregated setting.

By determining the presumptive least restrictive environment for a preschool child first, courts will ensure that preschool children with disabilities are being educated, insofar as appropriate, in the same environments that are normal for their nondisabled peers—which was Congress's primary aim when it enacted the LRE requirements.<sup>212</sup>

## CONCLUSION

Courts should reject the approach of the *Mark A.* and *M.W.* courts when assessing the least restrictive environment for preschoolers. However, they must dig deeper than the *LaGrange School District*, *Kingwood Township*, and *Nebo School District* courts, which did not require a showing that the child participated in the presumptive least restrictive environment to the maximum extent appropriate. Instead, courts should embrace a community-specific standard where the presumptive least restrictive environment is the setting in which a preschool child's same-aged nondisabled peers are being educated. When a child can be successfully educated in this setting with the provision of supplementary aids and services, the presumptive least restrictive environment will determine the child's placement.

By using the learning environments of same-aged preschoolers in the community as the norm by which the least restrictive environment is determined for a preschool child, courts can advance the congressional purposes of reducing segregation while remaining true to the child's educational needs.

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210. *See id.* § 1412(a)(5)(A).

211. *See id.*

212. *See supra* Part II.D.