Reasonable Measures": Giving "Due Deference" to School Boards' Decisions in Cases Involving the Individuals with Disabilities Education Act

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“REASONABLE MEASURES”: GIVING “DUE DEFERENCE” TO SCHOOL BOARDS’ DECISIONS IN CASES INVOLVING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

STEPHEN MONROE


INTRODUCTION

In our adversarial legal system, the common law is most often shaped by disputes involving parties that want different outcomes. Rarely do parties spend the time and resources to litigate because they want the same outcome. However, special education law involves such a common desire—providing students with disabilities an appropriate education. In this area, litigation often arises because of disagreements over what methods will best achieve that common desire, not over the ultimate outcome.

In 1976, Congress enacted what is today the Individuals with Disabilities Education Act (IDEA) under its Spending Clause powers. Its purpose is to provide students with disabilities a

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3 U.S. CONST. art. I, § 8, cl. 1.
meaningful education\(^4\) by requiring states receiving federal funding for special education to provide all eligible students with a “free and appropriate public education”\(^5\) (FAPE) in the “least restrictive environment”\(^6\) (LRE). Restrictiveness is defined as the degree to which the student with a disability interacts with others who do not have disabilities.\(^7\) These provisions standing alone, however, do not provide much guidance for the states or their school districts.

Yet it is likely that Congress intended to use such generalized language because the IDEA’s focus is on individual students. The Supreme Court recognized that the IDEA requires states receiving federal assistance to educate children with many different kinds of disabilities.\(^8\) Moreover, benefits for one child “at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”\(^9\) Because there is so much variance involved with the IDEA, Congress likely anticipated a high degree of litigation as parties disagreed over how the vague provisions applied to their individual situations. The dispute resolution process that the IDEA mandates also evidences this anticipation.\(^10\) The IDEA mandates mediation and the exhaustion of state-level administrative hearing processes prior to bringing action in federal court.\(^11\) These provisions, together with the IDEA’s focus on individual students, indicate that Congress intended the IDEA to be ambiguous.

When those disputes reach the judiciary, the courts of appeals have responded in different ways. Specifically, the appeals courts disagree over what constitutes an LRE. For instance, the Fifth Circuit engages in a two-part balancing test, asking whether a child can be

\(^7\) Lewisville Indep. Sch. Dist. v. Charles W., 81 F. App’x 843, 847 (5th Cir. 2003).
\(^8\) Rowley, 458 U.S. 176, 202 (1982).
\(^9\) Id.
\(^10\) See infra pp. 20–22.
\(^11\) Id.
educated satisfactorily in a regular classroom, and if not, whether the child has been “mainstreamed” to the maximum extent appropriate. The Sixth Circuit’s test directs reviewing courts in its ambit to consider whether the supplementary services offered in a segregated setting could be equally offered in a general education environment. The Ninth Circuit’s test incorporates the Sixth Circuit’s approach into a four-factor test, requiring its lower courts to (1) compare the benefits in the general education environment with those in the segregated setting; (2) consider the non-academic benefits of placement in the general education environment; (3) consider the impact of the student’s placement in the general education environment on the teacher and students without disabilities; and (4) consider the cost of the supplementary services that are needed for the student to be placed in the general education environment. The Third Circuit adopts the Fifth Circuit’s test and adds three factors to the first part of the test. The Seventh Circuit’s test asks whether the student with a disability received a satisfactory education in the general education environment, and if not, whether “reasonable measures” would have made it satisfactory.

The Department of Education’s regulations have fleshed out the LRE requirement to some extent. It requires for a “continuum” of arrangements that range from total inclusion in a general education classroom to placement in an institutional environment. The IDEA

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12 “Mainstreaming” is an educational term that refers to the placement of a student with a disability in a regular education environment with appropriate instructional support. Allan G. Osborne, Jr., Is the Era of Judicially-Ordered Inclusion Over? 114 WEST’S EDUC. L. REP. 1011, 1017 (1997). LRE is not synonymous with mainstreaming because placement in a regular education environment is inappropriate for some students with disabilities. Id.


14 Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

15 Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1400–01 (9th Cir. 1994).


17 Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 277 (7th Cir. 2007). See discussion infra Part III.A.

18 34 C.F.R. § 300.115 (2009).
requires that school boards place students with disabilities in a setting that will involve as much interaction with nondisabled peers “to the maximum extent appropriate.” Yet how the appeals courts determine what placement on that continuum is most appropriate is accomplished in starkly different ways.

Though different appeals courts apply their own respective tests, there are essentially two types: factor-based tests and reasonableness tests. The majority of circuits employ a factor-based test, while only the Seventh Circuit employs a reasonableness test. Both purport to better realize congressional intent, yet the former requires the projection of judicial review into classrooms, while the latter is much more deferential and uses a less exacting form of scrutiny. Cases with similar facts, therefore, can reach different outcomes. This difference in outcomes, when based on the same facts, must mean that one of these tests is misapplying the substantive provisions of the IDEA.

This Note contends that the reasonableness test better achieves congressional intent. It compares the Seventh Circuit’s reasonableness test from *Board of Education v. Ross* with the Third Circuit’s factor test from *Oberti v. Board of Education*. By examining the language of the IDEA and the limited Supreme Court precedent that has affected LRE interpretation, this Note argues for the abandonment of the factor tests that intrusively scrutinize school board decisions and the findings of state-level adjudicatory bodies set up under the IDEA. Courts should abandon the *Oberti*-type test because neither the language of the IDEA nor the relevant Supreme Court precedent

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20 See *infra* Part IV.
21 Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267 (7th Cir. 2007).
23 Of the different factor tests, *Oberti* is the prime example because it has been credited with starting the “era” of judicial intrusion upon placement decisions by school boards. Osborne, Jr., *supra* note 12, at 1017. Therefore, it serves as a satisfactory representative of the different factor tests used by the relevant appeals courts.
presumes that a student with a disability should be included in a general education environment. In addition, this Note will examine a United States district court case applying the Third Circuit’s factor-based test, and then will apply the Seventh Circuit’s reasonableness test to that case’s facts. By comparing the different outcomes, this Note argues that the outcome of the latter test better achieves congressional intent of providing all students with disabilities an education that is appropriate to their “unique needs,” especially in light of Supreme Court precedent and studies examining the effects on students with disabilities when they are misplaced in general education environments.

I. HISTORY AND DEVELOPMENT OF THE IDEA

Neither the federal government nor any state government provided meaningful educational service to disabled children until fairly recently. Before that time, people with disabilities were neglected and deprived of basic rights. In 1927, in the face of an equal protection challenge, the Supreme Court in *Buck v. Bell* upheld a Virginia act providing for the sterilization of people with disabilities. The act recited “that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives.” Writing for the Court, Justice Holmes rationalized the holding: “... [I]n order to prevent our being swamped with incompetence...[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” At least thirty states endorsed disparate

25 274 U.S. 200, 207 (1927). While this case has not been overruled, such a statute probably would not withstand present constitutional muster. The *Buck* Court employed rational basis review. In light of *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), which recognized that procreation is a fundamental right, the statute at issue in *Buck* would fail strict scrutiny.
26 *Buck*, 274 U.S. at 205.
27 *Id.* at 207.
treatment of people with disabilities, having at one time or another permitted their involuntary sterilization. That a majority of states has at one time or another provided for this constitutional violation indicates the hardship and prejudice that people with disabilities have faced during this nation’s history.

Another indication of this prejudice is that no state provided meaningful access to public schools until 1911, when New Jersey became the first state to provide special education classes. Before that, disabled children were largely left out of the educational environment entirely. During the nineteenth century, transportation to school was on horseback or on foot, imposing prohibitive hardships for those who were immobile or severely mentally disabled. Before the Civil War, “parents and officials often hid children” who would now be classified as entitled to special education services in “attics or poorhouses.” After the Civil War, many communities began adopting compulsory education laws. Those children who suffered from less severe disabilities than those who could not travel did gain some access to formal education. However, educators separated these children from the regular education environment, sometimes by creating separate classrooms or even separate schools. Such classification lacked any precision, and these students would be labeled simply as “deaf,” “feebleminded,” or “crippled.”

During the Progressive era, some cities began to recognize the educational needs of people with disabilities. Chicago, Boston, and

30 Id. at 871.
32 Id.
33 Burgdorf & Burgdorf, supra note 29, at 871.
34 Id.
35 Id.
Providence provided special classes for the mentally retarded in the late nineteenth and early twentieth centuries. Yet accommodations did not improve much until the 1920s, with classrooms for the mentally disabled coming into existence. Even still, those who did not show any progress in those programs were deemed “ineducable” and excluded from public schooling. Lacking any individual assessments, determinations of whether to include or exclude a disabled child from public schooling were based on intelligence tests. Such overbroad, generalized mechanisms of assessment failed to appreciate the complex and unique needs of any particular student afflicted with a mental disability.

As recently as the 1960s, no state provided formal services for children with disabilities. Many states continued to exclude students with disabilities. Those that were included were often put in programs that were inappropriate for their respective needs. Students with physical disabilities were placed in programs with students who suffered from mental disabilities. In 1974, roughly one million children were entirely excluded from the public schools because of some disability. It was also estimated that of the nearly six million children who were disabled and were attending public schools, half were probably receiving no special education services. Parents of the disabled began to push their respective states to address this neglect and were met with some success. Responding to parents’ efforts, some states passed laws providing for partial funding and required

36 Id. at 873.
37 Id.
38 Id.
39 Id.
40 Edwin W. Martin et al., The Legislative and Litigation History of Special Education, 6 Future of Child. 25, 25, 27 (1996).
41 Id.
42 Id.
43 Id.
45 Id.
46 Martin et al., supra note 38, at 27.
school boards to offer special educational services to children with disabilities. However, many laws were not enforced, or the funds themselves proved to be woefully insufficient.

Because of the unresponsiveness of the states, parents turned to the federal courts and to Congress. Two landmark cases, one coming out of Pennsylvania and the other out of the District of Columbia, provided the basis for what would become the Individuals with Disabilities Education Act that we have today. The first, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, was initiated by PARC and the parents of thirteen mentally disabled children for the children’s exclusion from public schools. The plaintiffs argued that the denial of a public education to children with mental retardation violated the Equal Protection Clause of the Fourteenth Amendment. They presented expert testimony to show that students with mental disabilities “are capable of benefiting from a program of education and training.” Because Pennsylvania had provided a free education, it could not deny students with disabilities access to a meaningful education. The plaintiffs submitted a consent agreement to which the state agreed. The agreement provided that “[e]very retarded person between the ages of six and twenty-one years . . . shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible.” The district court approved the agreement and adopted it as a decree, avoiding the constitutional question. This decree created the contours of the IDEA’s FAPE and LRE provisions.

In the other landmark case, from the District of Columbia, the district court reached the constitutional questions raised by the plaintiffs. In *Mills v. Board of Education*, the parents of poor minority

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47 Id. at 28.
48 Id.
50 Id. at 1258; see U.S. CONST. amend. XIV.
52 Id.
53 Id.
54 Id. at 1266.
55 Id. at 1266–67.
students with mental disabilities brought a class action lawsuit against the Board of Education of the District of Columbia for denying them a free public education. 56 Citing Brown v. Board of Education I 57 and Bolling v. Sharpe 58, the district court rejected the Board of Education’s argument that it did not have sufficient funding to provide for disabled children. 59 “Constitutional rights must be afforded citizens despite the greater expense involved.” 60

While Congress was prompted by these cases to pass legislation that would fundamentally change the public school environment, it had been involved with public schools before, albeit for reasons different from the preservation of constitutional rights. For instance, in 1958, Congress passed the National Defense Education Act (NDEA), in response to the Soviet Union’s outer space success with the launch of Sputnik-1 in September of 1957. 61 NDEA sought to improve science and math aptitude in the elementary grades. 62 This act began federal involvement in public schools at the elementary and secondary educational levels. 63 But it was not until after PARC and Mills that Congress passed legislation that enforced the newly recognized rights to a free public education for students with disabilities. 64

In 1965, Congress passed the Elementary and Secondary Education Act (ESEA), 65 the predecessor to the No Child Left Behind

57 347 U.S. 483 (1954) (holding that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment).
58 347 U.S. 497 (1954) (applying the Brown I rationale to the District of Columbia through the Due Process Clause of the Fifth Amendment).
60 Id. at 876.
61 Martin et al, supra note 40, at 26.
62 Id.
63 Id.
Act (NCLB).\textsuperscript{66} This act was significant because it marked the first time that Congress directly subsidized services to specified classes of students.\textsuperscript{67} As part of President Lyndon Johnson’s Great Society policies, ESEA gave the federal government a new role in shaping educational policies.\textsuperscript{68} It was intended to compel school districts to treat “disadvantaged students” more equally.\textsuperscript{69} One scholar argues that the ESEA was a consequence of a “compensatory”\textsuperscript{70} federal government, where government officials enacted policies based on the understanding that “the state could manage the economy and mitigate the social outcomes of the market without directly intervening in the operation of the marketplace.”\textsuperscript{71} The Johnson administration saw the state as a tool for combating poverty, and it considered education as an important factor in whether one could overcome poverty.\textsuperscript{72} The ESEA was one of many different policies the administration wielded in its “war on poverty,” and combating that war was ESEA’s main purpose.\textsuperscript{73} Though the Act did not specify students with disabilities, the same Congress amended Title I of the ESEA to include them.\textsuperscript{74} Title VI created an incentive for states to develop educational programs that benefitted students with disabilities.\textsuperscript{75} However, it did

\textsuperscript{66} In 2002, Congress amended the ESEA and reauthorized it as the NCLB. NCLB imposes upon States greater accountability to meet state academic standards, gauged through state testing systems, that meet federal requirements. See, e.g., STATE OF WASHINGTON OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION, http://www.k12.wa.us/esea/ (last visited April 28, 2010).

\textsuperscript{67} Martin et al., supra note 40, at 27.

\textsuperscript{68} Harvey Kantor, Education, Social Reform, and the State: ESEA and Federal Education Policy in the 1960s, 100 AM. J. EDUC. 47, 49 (1991).

\textsuperscript{69} Id.

\textsuperscript{70} Id. at 56.

\textsuperscript{71} Id.

\textsuperscript{72} Id. at 58.

\textsuperscript{73} Id. at 60.

\textsuperscript{74} Martin et al., supra note 40, at 27.

not include any specific mandates that would condition the receipt of funding.\textsuperscript{76}

Five years later, Congress replaced the amendment with the Education of the Handicapped Act (EHA),\textsuperscript{77} which replaced Title VI of the ESEA.\textsuperscript{78} Like its predecessor, EHA did not specify how states had to spend federal funds.\textsuperscript{79} Instead, it consolidated existing federal programs and established the Bureau of Education of the Handicapped within the U.S. Department of Health, Education and Welfare.\textsuperscript{80} Part B of the EHA was designed to help states begin special education programs, or expand and improve upon existing ones.\textsuperscript{81} But without specific mandates, it did not significantly improve the existing conditions for students with disabilities.\textsuperscript{82}

In 1973, Congress passed the nondiscrimination Rehabilitation Act. § 504 prohibits discrimination against “otherwise qualified” people with disabilities for employment in federally funded activities and programs.\textsuperscript{83} The Rehabilitation Act was enacted to help provide employment opportunities to people with mental and physical disabilities.\textsuperscript{84} In doing so, it became the “major federal mechanism . . . for statutory relief from employment discrimination.”\textsuperscript{85} But it did not contain any monitoring function, nor did it include any funding itself.\textsuperscript{86} Thus, for twenty years § 504 “was virtually ignored by local and state educational agencies.”\textsuperscript{87} Additionally, § 504 applied only to programs or buildings that received federal funding.\textsuperscript{88} It would not be

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Colker, \textit{supra} note 44, at 803.
\textsuperscript{79} National Council on Disability, \textit{supra} note 76.
\textsuperscript{80} Colker, \textit{supra} note 44, at 803.
\textsuperscript{82} \textsc{National Council on Disability}, \textit{supra} note 76.
\textsuperscript{85} Id. at 869.
\textsuperscript{86} Martin et al., \textit{supra} note 40, at 29.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
until 1990, with the enactment of the Americans with Disabilities Act (ADA), that discriminatory practices or policies against people with disabilities would be outlawed in employment, public accommodations, transportation, and telecommunications, regardless of any federal funding.\(^{89}\) The ADA’s scope includes public schools, and together with § 504, they provide a frequent basis for alternative remedies to the IDEA.\(^{90}\)

Two years later, however, after *Mills* and *PARC* expressly recognized the right of students with disabilities to a free and appropriate public education under the Equal Protection Clause, Congress passed the Education for All Handicapped Children Act (EAHCA)\(^{91}\). The Supreme Court described the EAHCA in *Smith v. Robinson* as a “comprehensive scheme . . . to aid the States in complying with their constitutional obligations to provide public education for handicapped children.”\(^{92}\) It established the requirement that states receiving federal funds for special education, as well as their school boards, provide a free and appropriate public education\(^ {93}\) to a student with a disability in the least restrictive environment.\(^ {94}\) First, however, states had to identify which students were in need of special education service.\(^ {95}\) To do so, school boards had to perform evaluations to assess the impact that a student’s disability had on his education.\(^ {96}\) Once a child was identified as disabled and in need of service, the school board had to develop and maintain an

\(^{89}\) *Id.*  
\(^{90}\) *Id.*  
\(^{91}\) The EAHCA has assumed different titles. It is also commonly referred to as Public Law 94–142. In addition, it is sometimes confusingly referred to as the Education for the Handicapped Act, or EHA, sharing the same title as the EHA that the ESEA was amended to include. The Supreme Court in *Smith v. Robinson*, 468 U.S. 992 (1984), referred to the EAHCA as the EHA. *Id.* at 994. But the two acts are not the same. For clarity purposes, this Note keeps the titles distinct.  
\(^{92}\) 468 U.S. 992, 1009 (1984)  
\(^{94}\) Martin et al., *supra* note 40, at 30.  
\(^{95}\) *Id.*  
\(^{96}\) *Id.*
individualized education program (IEP). The IEP had to be carried out in the least restrictive environment. The EAHCA was reauthorized in 1990 as the IDEA. The 1990 amendments made little substantive changes. For instance, it substituted all references to “handicap” with the term “disability.” It also replaced “disabled children” with “children with disabilities.” Mandates regarding FAPE and LRE were largely unaffected.

All fifty states now receive federal financial assistance under the IDEA. Since the IDEA became effective in 1976, the percentage of special-education students ages six through twenty-one has increased substantially. Between 1976 and 1994, this group increased from 23.8 percent to 51.1 percent of all students with disabilities. During the 1993-94 school year, 4,786,065 students ages six through twenty-one received services under the IDEA. That translates to 8.1 percent of the general population. As of 2004, the same age group increased in number to 6,033,425. The increase between 1993 and

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97 See discussion infra Part II.
98 Martin et al., supra note 40, at 30.
100 Id.
102 Id.
103 Schaefer, supra note 100, at 147.
106 Id.
107 Id.
2004 represented a full one percent of the general population, to 9.2 percent.109

Since the 1960s, people with disabilities have come a long way. For the entire nineteenth century, and well into the twentieth, people with disabilities were neglected and ignored. Those that were given access to public schools did not receive the personalized attention necessary for a meaningful education.110 The IDEA was passed in recognition of this nationwide failure.111 Today, students with disabilities, along with their parents,112 have enforceable rights that ensure at least an opportunity for a meaningful education, based on the unique needs of each of those students.

II. THE IDEA’S STRUCTURE AND OPERATIONS

A student’s “individualized education plan” (IEP)113 determines the appropriateness of her education and the restrictiveness of her education environment.114 Practically, this plan serves as the basis for the child’s education and placement.115 The different provisions are meant to ensure that the unique needs of each child are identified and appropriately addressed.116

Therefore, the IEP is a critical component of the education of the child with a disability.117 When creating a program, the first step is

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1. This report is the most recent available report published by the Department of Education.
109 Id.
111 Id.
116 See id.

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evaluating the child’s needs. This evaluation cannot rely on any one criterion. It must be based on “a variety of assessment tools and strategies” used to compile “relevant functional, developmental, and academic information.” In fact, § 1414 of the IDEA provides strict requirements when evaluating a student, from ensuring that the evaluation is not racially or culturally discriminatory to employing trained professionals who can competently administer the evaluation. Multiple persons, known as the “[i]ndividualized education program team” (IEP team) conduct the evaluation. A student’s IEP team consists of the student’s parents, at least one regular education teacher, at least one special education teacher, a representative of the school board, someone who can interpret the implications of the results on instruction in the classroom, any other individuals the parents or school board may deem necessary to attend, and, when possible, the student. There must be parental consent to the evaluation. For an initial evaluation, if the parent does not consent or respond to a request for an evaluation, the school board can institute an evaluation under § 1415. However, services cannot be provided without consent from the parent or the student. After the evaluation is complete, the IEP team determines whether the child is disabled within the meaning of § 1401(3).

122 This representative must meet three criteria: (1) he must be “qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities”; (2) he must be “knowledgeable about the general education curriculum”; and (3) he must be “knowledgeable about the availability of resources of the local educational agency.” 20 U.S.C. §§ 1414(d)(1)(B)(iv)(I)–(III) (2006).
Upon the determination that the child is disabled and in need of special services, an IEP is prepared.\footnote{20 U.S.C. § 1414(d).} Pursuant to § 1414(a)(C)(i)(I), that determination is made in reference to § 1401, which defines a “child with a disability” as a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . who, by reason thereof, needs special education and related services.\footnote{20 U.S.C. § 1401(3)(A)(i)–(ii) (2006).} For children ages three through nine, this definition can include children who “experience[d] developmental delays” in at least one of the following areas: “physical development; cognitive development; communication development; social or emotional development; or adaptive development.”\footnote{20 U.S.C. § 1401(3)(B)(i) (2006).}

Once a child is determined to be disabled, his individualized education program is created.\footnote{20 U.S.C. § 1414(d) (2006).} It includes statements of the child’s current educational level of performance, annual goals for the child, the educational services the child needs, and how much the student will participate in regular educational programs.\footnote{34 C.F.R. § 300.324 (2009); see also Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204, 1213 n.16 (3d Cir. 1993).} These statements all strive to offer the student an appropriate education in the least restrictive environment, and they are tailored to that student’s unique habits and needs.\footnote{20 U.S.C. § 1414(d)(1)(B)(iv)(I) (2006).} For instance, the statements concerning the extent to which the student will participate in regular education programs would be directly pursuant to the least restrictive environment. By no

means does it create a presumption for mainstreaming. Its very title, “Individualized Education Program,”134 is itself a good enough indication that there are no places for presumptions when interpreting the IDEA. Presumptions fail to account for the unique challenges of each disability. If the evaluation and the IEP team determine that the student’s educational needs are better served entirely away from the regular classroom, that is entirely consistent with the IDEA.

The IDEA creates a “preference” for placing students with disabilities among their peers who do not have disabilities.135 Pursuant to that preference, school boards must provide a continuum of placement alternatives to the general educational environment.136 These alternatives recognize the individual nature of education, as they account for the varying needs of students with disabilities. The IDEA requires this continuum by providing that “[t]o the maximum extent appropriate, . . . [the student with a disability is] educated with children who are not disabled.”137 This language recognizes that there are “infinite variations”138 of appropriateness. For one student, attending a general education classroom with the aid of supplementary

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136 34 C.F.R. § 300.115 (2009); but see N.W. ex rel. A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987) (affirming district court holding that a school board was not required to create a new room designed for the specific needs of the student with a disability, even though the school board did not have a developed special education program, because a lack of funds prohibited placing a specially trained teacher in the student’s school without reducing the educational benefits provided to other handicapped students); Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994) (including cost of placement as a factor in determining whether a school board properly placed a student with a disability). Engaging in a cost analysis when determining whether a school board has failed to comply with the IDEA is not expressly provided for in the IDEA itself. Whether this approach is prudent in such an analysis is beyond the scope of this Note.
138 34 C.F.R. § 300.39(a)(1)(i) (2009) provides placement examples of what may suffice for meeting the “unique needs of a child with a disability” when providing him or her with a special education.
aid may be what is appropriate to the maximum extent. For another, the general educational environment may exceed the appropriateness for educational benefit, and the student may need to spend the full day in a segregated classroom. For still another, “reverse mainstreaming,” where students who do not have disabilities spend parts of their days in a segregated setting with students who have disabilities, may be what is most appropriate. The suitability of the placement is meant to be determined by an array of considerations, which are outlined by regulations promulgated by the Department of Education. These regulations seek to achieve the most suitable environment in which the individual student can be given an appropriate education reserved for by the IDEA.

Pursuant to achieving a suitable environment, and given a preference for mainstreaming, a student can be removed from the regular educational environment only when the disability “is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” Therefore, even when taking a student with disabilities out of the general educational environment, the school board is required to consider which placement on the continuum of alternatives is most suitable to ensure that she is being educated with her nondisabled peers “to the maximum extent appropriate.” Additionally, the school board must give preference to

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139 See Beth B. v. Van Clay, 282 F.3d 493, 496 (7th Cir. 2002).
141 34 C.F.R. § 300.116(a) (2009) provides that the decision is made by the parents, people “knowledgeable about the child, the meaning of the evaluation data, and the placement options.” The placement decision must be based on the child’s IEP and as close as possible to the student’s home, unless the IEP requires an arrangement that the school that she would normally attend cannot provide. 34 C.F.R. §§ 300.116(b)–(c). Attention must be paid to any “potential harmful effect on the child or on the quality of services” that may be needed. 34 C.F.R. § 300.116(d). The need to modify curriculum to accommodate a student who is disabled is not a valid justification for the student’s removal from the general educational environment. 34 C.F.R. § 300.116(e).
the school that the student with disabilities would attend if he did not have such disabilities. 144

Through such strict rules and regulations, the IDEA ensures that parents are active in the education of the student. The IDEA’s “extensive procedural requirements” ensure this participation. 145 First, when making the initial evaluation of students to determine whether they need IDEA service, the parents must consent. 146 Second, after an evaluation has been made, parents can still seek a reevaluation if they disagree with the evaluation conducted by the school board. 147 Third, after the IEP is created, the parents must be notified of any proposed change or of any refusal by the school board to initiate a change. 148 Fourth, before the student is placed in a special education program, parents must again give consent. 149 Fifth, in the drafting of the IEP, the school board must give the parents “[a]n opportunity . . . to examine all records . . . and to participate in meetings with respect to the identification, evaluation, and educational placement of the child.” 150 If there is disagreement about the child’s placement, there are multiple avenues for dispute resolution that the IDEA requires the states to create. 151 This system of dispute resolution has many different levels, from mediation 152 up to filing with a federal district court. 153 These different procedures require that the state ensure that parents are involved. If the parents refuse to get involved, or if the children are wards of the state, then surrogates will be appointed. 154

144 34 C.F.R. § 300.116(b)(3) (2009). This preference for placement at the student’s neighborhood school is based on the requirement that a placement be made as close to the student’s home as possible.
151 See generally 20 U.S.C. §§ 1415 (e)–(k).
With such overarching procedural requirements, the IDEA ensures that children in need of services have a person who is partial to their education.\textsuperscript{155}

To ensure that these procedural requirements are given effect, the IDEA requires recipient states to create the infrastructure that their school districts will use to provide the necessary services to children with disabilities. § 1412(a) requires them to submit plans that show how they will provide eligible students with the services necessary for appropriate education in the LRE.\textsuperscript{156} School boards must submit to their state “educational agency” plans on how they will meet the IDEA’s requirements.\textsuperscript{157} § 1413 comprises the spending specifications that were lacking in the ESEA of 1965 and the EHA of 1970. School boards must use federal funds only to pay for “excess costs of providing special education and related services to children with disabilities;” to “supplement State, local and other Federal funds and not to supplant such funds;” and to reduce the amount of local funds put towards providing special education services.\textsuperscript{158} Thus, the IDEA gives the states the “primary responsibility” for creating educational policies for children with disabilities,\textsuperscript{159} while ensuring that those programs meet certain federal standards through the extensive procedural requirements.\textsuperscript{160}

A critical part of those procedural requirements is the dispute resolution process. §§ 1415(e)–(i) outline the infrastructure that recipient states must construct for disputes that arise between school boards and parents of students with disabilities.\textsuperscript{161} First, the parties may seek to resolve their dispute through mediation.\textsuperscript{162} Even if that process is chosen, it does not preclude the parties from initiating a due

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\textsuperscript{159} Rowley, 458 U.S. at 183.
\textsuperscript{160} Id. at 182.
process hearing. If the parties decide to initiate a due process hearing in front of a disinterested “hearing officer,” who is independent from the state’s education agency or the involved school district and is capable of conducting a legitimate hearing. Any party is entitled to appeal before the state’s education agency. Decisions made in the hearing and on appeal are binding, but any party is entitled to file a civil action in federal district court.

The procedural requirements are robust, yet they leave discretion with the states to form educational policies. This “cooperative federalism” includes nothing about equal services from state to state. After all, the focus of the IDEA is the individual student. This focus is supported by the language of the IDEA. For instance, if Congress intended for each state to have the same amount of funding, and thus the same amount of services, it would not have used language such as “appropriate” or “individuals.” The level of generality that the IDEA uses also supports the notion that Congress’ focus was on individuals, not states. Therefore, the level of service for each state must be determined by the number of students within a state’s borders who are in need of special education services and by the amount of services that children need to ensure that they are receiving an appropriate education. Congress cannot create blanket national standards if it wants to ensure that each child with a disability is receiving the type of education that is appropriate for him or her.

Ultimately, the structure and operations of the IDEA must be interpreted in light of the preference for including children with disabilities among children who do not have disabilities. Many of the provisions operate in ways that ensure that school districts prefer placing the child with disabilities in regular education environments. A

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test that examines the reasonableness of a board’s decision in placing the student with disabilities in one environment or another adheres to this preference, keeps courts in the courthouses, and ensures that the IDEA’s procedural safeguards operate to keep parents or partial parties involved in that student’s education.

III. THE CURRENT CIRCUIT SPLIT AND HOW IT SHOULD BE RESOLVED IN LIGHT OF THE IDEA’S LANGUAGE AND SUPREME COURT PRECEDENT

A. The Seventh Circuit’s Reasonableness Test

In *Board of Education v. Ross*, the Seventh Circuit was asked to reverse the district court’s affirmance of an independent hearing officer’s finding that the school board did not violate the IDEA when it placed Michael and Diane Ross’ daughter, Lindsay, in a restrictive special education setting.171 Lindsay had Rett syndrome, which is caused by mutations on a gene found on the X chromosome that affects almost exclusively females.172 Lindsay was nonverbal, lacked a consistent ability to control her body and limbs, and had cognitive functioning equivalent to that of an eight-to-ten-month-old girl.173 Often, Lindsay’s hands would lock together, which would require a teacher to unlock them.174 In addition, Lindsay created loud vocalizations lasting from a few seconds to over a minute.175 She also inflicted injuries upon herself and sometimes struck others.176 Before high school, she attended a regular public school in her neighborhood, where she was mainstreamed.177

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171 Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 269 (7th Cir. 2007).
172 Id.
173 Id. at 271.
174 Id.
175 Id.
176 Id.
177 Id.
In light of these various disruptions, her IEP team convened to reevaluate Lindsay’s IEP. After much compromise, the parents agreed to place Lindsay in her local high school under a shortened schedule. After a year of modest improvement, Lindsay began to exhibit stress, fatigue, and overall regression while in the general education environment. The board decided to put Lindsay in a multiple needs program. The parents objected and initiated a due process hearing.

The independent hearing officer and district court both agreed that the school board complied with the IDEA’s LRE requirement. On appeal, the Rosses maintained that the school board failed to consider all supplementary aids and services that could be used at Lindsay’s neighborhood school. The board provided Lindsay with a special education teacher to work with her in between academic years, as well as another special education teacher and a teacher’s aide during the school year.

The Seventh Circuit declined to overturn the findings at the state or lower court levels, and in doing so, it devised its test for evaluating LRE compliance. The Court first noted that “it is not enough to show that a student is obtaining some benefit, no matter how minimal, at the mainstream school” in order to demonstrate that a board’s removal of a student with a disability violated the LRE requirement. To successfully challenge a board’s decision to remove a student with a disability from a mainstreamed setting, parties challenging a placement must show—after the reviewing court gives “due deference to the administrative findings”—that the student’s education was satisfactory and, if not, that “reasonable measures

178 Id.
179 Id. at 272.
180 Id. at 273.
181 Id.
182 Id.
183 Id.
184 Id. at 275.
185 Id. at 272.
186 Id. at 277 (emphasis in original).
would have made it so.”187 In other words, if the court determines that the general education classroom was satisfactory, the school district erred in removing the student with a disability.188 If the environment was not satisfactory but there were reasonable measures available to make it satisfactory, the school board erred in removing the student.189

Applying that inquiry, the Ross court concluded that the board did not err. First, the Rosses could not demonstrate that Lindsay was making “meaningful progress” in the general education environment.190 The IEP goals that she met were achieved in the segregated setting, not in the general education environment.191 During the spring of one year, she attended her English class for the full period only twice.192 She interacted with her peers minimally and disrupted the class with her loud vocalizations and physical interference.193 The court deferred to the opinions of experts who testified at the administrative and lower court levels. It found that the administrative findings and judgment, as well as the district court’s conclusion to uphold them, were reasonable and free from clear error.194 The services that the school board provided were reasonable, and the lower level fact-finders concluded that, because Lindsay was not receiving an appropriate education in the general education environment, even with those services, its decision to remove Lindsay did not violate the IDEA.195

B. The Third Circuit’s Multi-Factor Test

Oberti v. Board of Education was the first case in the Court of Appeals for the Third Circuit to interpret the LRE provision of the IDEA. Rafael Oberti was an eight-year-old boy afflicted with Down

187 Id.
188 Id.
189 Id.
190 Id.
191 Id.
192 Id.
193 Id.
194 Id. at 278.
195 Id.
Syndrome. His first IEP provided that he would attend a “developmental” kindergarten at his neighborhood school in the morning. In the afternoon, he would attend a special education class in another school district. In the developmental class, Rafael was disruptive. He routinely crawled and hid under furniture, and he was violent—on several occasions, hitting and spitting on other children, the teacher, and the teacher’s aide. However, during his special education class, he was not disruptive. Accordingly, his IEP Team proposed placing Rafael in a segregated special education class for the entire year. The parents objected to this decision, but the school board refused to modify its proposal. Through mediation, the dispute was resolved so that Rafael would attend a segregated class. While in the more restrictive environment, Rafael’s behavior improved and he began to make academic progress.

The Obertis objected to this placement when they learned that Rafael had no meaningful contact with his peers who were not disabled. They initiated a due process hearing. The administrative law judge (ALJ) heard testimony from both sides. The school board presented eight witnesses, all of whom had close contact with Rafael. They all testified to one degree or another that a segregated setting was more appropriate for Rafael. The Obertis presented two expert witnesses, a psychologist from Temple University and a special education specialist from Rafael’s

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197 Id.
198 Id.
199 Id. at 1208.
200 Id.
201 Id.
202 Id.
203 Id.
204 Id. at 1209.
205 Id.
206 Id.
207 Id.
208 Id. at 1209 n.7.
209 Id.
placement. They testified that Rafael could be mainstreamed with enough services. The ALJ discounted their opinions because they did not have the same degree of familiarity with Rafael as the school board’s witnesses. Concluding that Rafael was not ready for mainstreaming, the ALJ affirmed the school board’s decision to place him in the least restrictive environment.

The Third Circuit disagreed with the ALJ’s decision. At the beginning of its discussion on the LRE requirement, it cited the Fourteenth Annual Report to Congress on the Implementation of the IDEA from 1992, wherein the U.S. Department of Education reported that two-thirds of the states that received funding were not in compliance. In light of that report, it declared its “obligation to enforce the statutory provisions [of the IDEA].” Certainly, Congress gave the federal judiciary an important role in helping to ensure that the states complied with the IDEA. However, in light of the court’s use of this report, its interpretation of the LRE requirement as creating a presumption for mainstreaming, and the little deference it gave to the school board and the ALJ, the Oberti court seemed to give itself an affirmative role in ensuring that school boards mainstream students with disabilities.

The Fifth Circuit’s test in Daniel R.R. v. State Board of Education was adopted by the Oberti court. The Fifth Circuit’s test consists of two parts. First, the reviewing court must ask “whether

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210 Id. at 1209–10. The Obertis also presented their own testimony and that of a neighbor to support their argument that, with additional services and aids, Rafael was capable of progressing in a general education classroom. For purposes of the ALJ’s decision and the Third Circuit’s rejection of that decision, only the two expert witnesses are necessary.
211 Id.
212 Id. at 1210.
213 Id.
214 Id. at 1214 n.20.
215 Id. at 1214.
217 Oberti, 995 F.3d at 1216–17.
218 874 F.2d 1036 (5th Cir. 1989)
219 Oberti, 995 F.3d at 1215.
education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.”220 Second, if education cannot be achieved satisfactorily within the regular classroom, then the reviewing court must decide “whether the school has mainstreamed the child to the maximum extent appropriate.”221 For the first question, the *Oberti* court identified three factors. First, the reviewing court should examine the steps that the school took to try to include the child in a regular classroom.222 It based this factor on Department of Education regulations, which require schools to (1) provide a “continuum of placements”223 that offer alternatives to the regular education environment and (2) provide for additional services that aid a student with a disability placed in a general education environment.224 Courts consider this factor to weigh “particularly heavily against the School Board” because if a party shows that the school board failed to provide such services, the school board has most likely failed to provide an FAPE.225 Given this factor’s importance, it can be considered to provide grounds for the most intrusive scrutiny by courts employing this test.

Second, the reviewing court should compare the benefits that a disabled child would receive from placement in a general education classroom with the benefits that she would receive from placement in a segregated setting.226 The *Oberti* court remarked that this factor’s analysis requires heavy reliance on testimony of educational experts and paying special attention to the “unique benefits” obtained from integration in a regular classroom.227 Interestingly, and unfounded in the language of the IDEA, the court concluded that “Congress understood that a fundamental value of the right to public education

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220 Daniel, 874 F.2d at 1048.
221 Id.
222 Oberti, 995 F.3d at 1216.
223 See 34 C.F.R. § 300.115 (2009).
224 Id.
226 Oberti, 995 F.2d at 1216.
227 Id.
for children with disabilities is the right to associate with nondisabled peers."

Third, the court should examine to what extent a disabled child’s placement in a regular classroom will “negatively” affect other children. The Oberti court was careful to emphasize that for this factor to provide grounds for the removal of a child with a disability from a general classroom, the disruption must be so significant as to “impair” other students from being educated satisfactorily. This question requires considering how much attention the teacher gave to the student with a disability and whether that attention reached a degree that caused her to ignore the other students. In its explanation of this factor, the court noted that it should be considered in light of the first factor described above, i.e., that the services that the school board has to provide might present some disruption. Therefore, the court seemed to imply that there will inevitably be some negative effects; the question is how much.

When the court applied these factors, it concluded that the school board had not complied with this mainstreaming requirement. For the first factor, it characterized the school board’s efforts as “negligible,” concluding that the board did not do enough to satisfy the factor because it did not provide a curriculum plan, a behavior management plan, or enough support to the teacher. Considering the importance that this factor has in the compliance analysis, the court’s conclusion could have rested on this failure alone. It remarked that the board’s failure to provide these services violated the IDEA.

The court concluded that the board did not meet the second factor because the benefits of integration outweighed the benefits of

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228 Id. at 1216–17.
229 Id. at 1217.
230 Id.
231 Id.
232 Id.
233 Id. at 1220–24.
234 Id. at 1220.
235 Id. at 1221.
It agreed with the district court’s finding, which relied heavily on testimony, some of which was not given at the administrative hearing. The board’s witnesses, as described above, testified that the most appropriate placement for Rafael was a segregated setting. Conflictingly, the Obertis’ witnesses testified that, with more services and the modification of the curriculum for Rafael, he could be included in a general education classroom. While the ALJ determined that the board had presented enough evidence to demonstrate appropriateness, the court concluded that the district court gave “due weight” when it heard different testimony, which resulted in the overturning of the ALJ’s determinations.

The court also concluded that the board failed to satisfy the third factor. It concluded that the behavior that Rafael exhibited while placed in the general classroom—throwing furniture, hitting other children and the teacher, hiding, etc.—was an inadequate justification for removal because the board did not satisfy the first factor. The district court found that if the board provided Rafael with additional support services, he would cause less disruption, which the court found not to be clearly erroneous.

The Ross test differs from the Oberti test in significant ways. Ross affords administrative findings and school board decisions greater deference than the Oberti test does. Under Ross, the district court and the appellate court are to give “due deference.” This language is in contrast to the Oberti test that, by its nature, allows a higher level of scrutiny by reviewing courts. Oberti requires the reviewing court to engage in a multi-factor test that inevitably puts the court in the classroom. This type of analysis is of the same character.

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236 Id. at 1222.
237 Id.
238 Id.
239 Id.
240 Id.
241 Id.
242 Id.
and on the same level as school boards’ placement determinations.\textsuperscript{243} The “due deference” weight under \textit{Ross}, in contrast, does not yield entirely to the findings of administrative hearings and school districts, but it does not intrude deeply upon the province of school officials because it is tempered by the “reasonable measures” standard.\textsuperscript{244} According to this language, a court will defer to the lower level findings insofar as it is not unreasonable to do so. As a result, a court will avoid engaging in analysis that the IDEA leaves for school boards.\textsuperscript{245}

\textit{C. Supreme Court Precedent and Pertinent IDEA Language

1. \textit{Rowley’s Impact

In \textit{Board of Education v. Rowley,}\textsuperscript{246} the Supreme Court held that an FAPE requires states receiving federal funding to “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”\textsuperscript{247} In \textit{Rowley}, the parents of a deaf student, Amy, sued the school board for violating the IDEA when it failed to provide their daughter with an education that did not maximize her potential.\textsuperscript{248} During elementary school, Amy progressed from grade to grade without problem and was an above-average student.\textsuperscript{249} During this time, she did not have an interpreter with her in the classroom.\textsuperscript{250} The school board determined that Amy did not need an interpreter to comply with the IDEA.\textsuperscript{251} The parents disagreed, arguing that her achievement could be much higher if she

\begin{itemize}
  \item \textsuperscript{243} \textit{See id.} at 1217–18.
  \item \textsuperscript{244} Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 277 (7th Cir. 2007).
  \item \textsuperscript{246} 458 U.S. 176 (1982).
  \item \textsuperscript{247} \textit{Id.} at 203.
  \item \textsuperscript{248} \textit{Id.} at 185–86.
  \item \textsuperscript{249} \textit{Id.} at 185.
  \item \textsuperscript{250} \textit{Id.}
  \item \textsuperscript{251} \textit{Id.} at 184–85.
\end{itemize}
had an interpreter and that, without one, the school board violated the FAPE requirement.252

The Supreme Court disagreed.253 In doing so, it devised a two-part test for determining whether a school board complied with the IDEA’s FAPE requirements. First, “has the State complied with the procedures set forth in the Act?”254 And second, is the IEP, “developed through the Act’s procedures[,] reasonably calculated to enable the child to receive educational benefits?”255 It concluded that a state was not obligated to maximize the potential of students receiving IDEA services; it is only obligated to provide “personalized instruction” with enough support services to allow the child to benefit from that instruction.256 The intent of the IDEA “was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”257

Applying this standard to the facts in Rowley, the Court found that the school board had complied with the FAPE requirement.258 As the district court found, Amy had been progressing from grade to grade with above average performance.259 The school board provided her with instruction and services that were tailored to her individual needs.260 Because of her demonstrated progress, the Court concluded that the school board did not have to provide her with a sign-language interpreter to comply with the IDEA.261

In its decision, the Court emphasized the importance of deference to school boards and to the administrative hearing process.262 While the Court was unwilling to go so far as to agree with the school board that Congress meant to give reviewing courts only

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252 Id. at 185.
253 Id. at 200.
254 Id. at 206.
255 Id. at 207.
256 Id. at 200 (quoting H.R. REP. NO. 94-332, at 14 (1975)).
257 Id. at 192.
258 Id. at 210.
259 Id. at 209–10.
260 Id. at 210.
261 Id.
262 Id. at 207–10.
“limited authority to review for state compliance,” and no authority to review a program’s substance, it was also unwilling to side with Rowley, who advocated for de novo review.\footnote{Id. at 206.} Instead, it concluded that the language of § 1415(i)(2)(C)(i), which provides administrative procedures for the reviewing court to follow, requires it to give “due weight” to the findings at the administrative hearing level.\footnote{Id. In 1982, this language was under § 1415(e). Its equivalent today is 20 U.S.C. § 1415(i)(2)(C)(i)–(iii) (2006), which provides:}

\begin{quote}
(C) Additional requirements. In any action brought under this paragraph, the court--
\begin{enumerate}
\item shall receive the records of the administrative proceedings;
\item shall hear additional evidence at the request of a party; and
\item basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.
\end{enumerate}
\end{quote}

It based its emphasis on the statutory structure and legislative history of the IDEA.\footnote{Rowley, 458 U.S. at 204–09.} It was unwilling to side with the school board because Congress provided that the reviewing court must “bas[e] its decision on the preponderance of the evidence.”\footnote{20 U.S.C. § 1415(i)(2)(C)(iii) (2006).} In addition, the legislative history indicated that Congress wanted the reviewing courts to make “independent decisions.”\footnote{Rowley, 458 U.S. at at 205 (quoting S. REP. NO. 94-455, at 50 (1975)).} This preponderance standard, in light of that history, indicated that Congress meant for the reviewing courts to have a fair amount of reviewing power, but an amount that fell short of de novo.\footnote{Id.} Given the highly detailed provisions of § 1415\footnote{Id.} that outline the administrative hearing process, in relation to the vague “substantive admonitions” of the IDEA, the Court determined that Congress meant for the procedural guidelines to...
ensure substantive compliance with the IDEA. These highly detailed procedural requirements ensured that the parents and the school boards were equally involved in the formulation of educational goals for the student with a disability. In addition, the IDEA requires that the district court “receive the records of the administrative proceedings.” This importance that “Congress has attached to compliance with certain procedures” would be undermined if a reviewing court used de novo review.

The Court also pointed to federalist principles for support in its decision to require courts to defer to the administrative hearing process. The IDEA left with the states, local educational agencies, and the students’ parents the principal responsibility of providing children with disabilities with an appropriate education. Local education agencies are responsible for providing to their Secretary of State plans that demonstrate their compliance with the IDEA. Moreover, states traditionally formulate and execute educational policy. Given this traditional role, coupled with clear statutory language, the Court refused to conclude that Congress intended to grant federal courts a degree of power that would allow them to overturn local boards’ decisions, affirmed by state administrative hearing processes, as easily as de novo would allow.

Even though Rowley concerns the FAPE requirement of the IDEA, it should provide some guidance as to what constitutes an LRE. In fact, one court said that Rowley does have an impact on LRE, “demarcat[ing] an outer limit to the IDEA’s LRE preference.” While many courts have determined that Rowley’s two-part test is “not

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270 Rowley, 458 U.S. at 205–06.
271 Id. at 206. See discussion supra Part II.
273 Rowley, 458 U.S. at 206.
274 Id at 207.
275 Id.
277 Rowley, 458 U.S. at 208 n.30.
278 See id. at 205–08.
particularly useful” in determining whether the LRE requirement is satisfied, that determination does not mean that the opinion should be ignored outright when examining an LRE.280 As this Note will examine in greater detail in Part III.A.2, what is appropriate for an FAPE and for an LRE should be analyzed together.

This relationship is consistent with the IDEA’s language as interpreted in Rowley and the Seventh Circuit’s test in Board of Education v. Ross.281 In Rowley, the Court observed that Congress did not intend for there to be a rigid presumption for mainstreaming; it first characterized the Act’s language as creating a “preference for ‘mainstreaming,’” and then noted that the language even provides for some students with disabilities to be educated in an entirely segregated setting.282 Oberti’s characterization of LRE as requiring a presumption283 ignores this observation and how it should relate to the deference that the Rowley Court emphasized.

In addition, these characterizations of the IDEA interfere with the prerogatives of the states to formulate their educational policies that Rowley concluded remained with them. While the Rowley Court recognized that the IDEA “imposes significant requirements” on states, the greater part of the opinion is devoted to discussing how the IDEA left to the states the task of formulating educational policies that address the placement of a child with a disability.284 To impose upon the states a presumption, or to afford a student with a disability a “right” to being mainstreamed, usurps this responsibility of the states because it ignores the careful and highly detailed deliberations in which the IEP teams engage when formulating IEPs. These tests requiring school boards to rebut a presumption of mainstreaming or inclusion do not incorporate the deference that the Rowley Court found Congress intended courts to give to the states and their school boards.

281 See 486 F.3d 267 (7th Cir. 2007).
2. § 1412

Examining the pertinent language of the IDEA shows that Rowley should be considered when determining whether a school board has complied with the LRE requirement. The LRE provision of the IDEA, § 1412(a)(5)(A), provides that children with disabilities are to be educated with children without disabilities “[t]o the maximum extent appropriate.” As the Supreme Court observed, this language establishes at least a preference for including a child with a disability in a general education environment. Moreover, properly understanding the operative effect of the LRE provision requires reading it in light of the rest of the statute. The section immediately following it qualifies this mainstreaming requirement by providing:

A State funding mechanism shall not result in placements that violate the requirements of [§ 1412(a)(5)(A)], and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according


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

286 Rowley, 435 U.S. at 202–03.
287 See Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 523 (2007) (“a proper interpretation of the Act requires a consideration of the entire statutory scheme”). The Winkelman Court held that parents of students with disabilities are entitled to prosecute IDEA claims on their own behalf. Id. at 535.
to the unique needs of the child as described in the child’s IEP. 288

This language essentially provides that a state cannot fund money in any way that violates the mainstreaming requirement, or base the distribution of funds on a setting that is inappropriate for the particular child and would consequently fail to provide that child with an FAPE. First, this qualifying provision demonstrates that there is not a presumption for mainstreaming. If a state could base the disbursement of federal funds on placing a student with a disability in a general education setting, it would be in violation of this provision unless the school board rebuts a presumption for the placement. But as the language indicates, the setting must be tailored to the “unique needs” of the child. 289 By definition, a presumption does not take into account unique needs. The language of § 1412(a)(5)(B)(i) does not support such a scheme.

Second, this provision requires a recipient state to consider the placement of a student with a disability when determining whether the student is receiving an FAPE. As established above, a state cannot distribute funds based on the placement of a student with a disability in an environment that would deprive him of an FAPE. Therefore, because a school district has to certify to its Secretary of State that it has policies to comply with the IDEA, 290 that district has to show that it is placing students in environments that will not deprive them of FAPEs. This requirement necessitates a district to consider the FAPE and LRE in light of each other.

In this light, therefore, Rowley’s interpretation of an FAPE is relevant to an LRE determination. A reasonableness test better provides for this dynamic than an Oberti-type factor-based test that intrudes upon the province of school officials. First, a school board is charged with formulating educational policies for the individual students with disabilities. As §§ 1412(a)(5)(B)(i) and 1413 provide, a school district has to certify to its state government that it is complying

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289 Id.
with the IDEA,\textsuperscript{291} and to do so, it must draft policies that place
students with disabilities in environments that will not compromise their FAPEs. To satisfy these provisions, a school board will have to
carefully consider each student’s placement. This expertise provided
the main reason for the \textit{Rowley} Court’s emphasis on giving deference
to school board determinations.\textsuperscript{292}

A reasonableness test is sensitive to these considerations. It
gives the deference that is necessary to ensure that a school board’s
determinations are not disturbed unless a reviewing court finds that a
school board could have used “reasonable measures” to provide a
child with an FAPE in a general education environment, and it did not
do so.\textsuperscript{293} This largely deferential inquiry will leave intact the careful
deliberations in which schools boards are required to engage when
formulating IEPs. In addition, it will leave intact the judgments
rendered by the administrative hearing process that each state is
required to provide and that the Supreme Court concluded was a
mechanism in ensuring substantive compliance.\textsuperscript{294}

Conversely, an \textit{Oberti}-type factor-based test that is premised
on the misunderstanding that students with disabilities have a right to
be included in the general education environment intrudes into these
careful deliberations, and this can ultimately be counterproductive and
violative of the IDEA. For instance, if a student is violent towards his
peers and is destructive towards school property, and a school board
determines that such a student is disruptive and therefore should be
removed from the general education environment, that determination
is partially based on §§ 1412(a)(5)(B)(i) and 1413. If a reviewing
court, applying a test similar to the \textit{Oberti} test, overturns that decision
and puts the student with a disability back in the general education
environment, it puts that student in a placement that the school board
determined was inappropriate, which is inconsistent with the FAPE

\textsuperscript{291} \textit{See generally} 20 U.S.C. § 1413.
\textsuperscript{292} Bd. of Education of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458
\textsuperscript{293} Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 277
(7th Cir. 2007).
\textsuperscript{294} \textit{See Rowley}, 458 U.S. at 205–07.
requirement. This forced placement is contrary to the school board’s compliance with §§ 1412(a)(5)(B)(i) and 1413.

Moreover, school districts that are within the jurisdiction of a reviewing court that employs this type of test will be forced to formulate IEPs that would pass this test. To do so, the districts will place students in general education environments even when they might have done otherwise. This result is inconsistent with the operations of §§ 1412(a)(5)(B)(i) and 1413. However, a reasonableness test along the lines of Ross’s “reasonable measures” inquiry comports with these statutory provisions by virtue of its deference. It will not question the delicate decisions that school boards make when determining whether the placement of a student with a disability is appropriate in light of his or her FAPE.

Given the language of the IDEA, a Ross-type test is preferable. While a Ross-type test has its shortcomings, it is superior to an Oberti-type test under federalist principles as well. By its nature, Ross’s standard sets a lower bar for school districts than a factor-based test. Conceivably, a student with a disability could be placed in a more restrictive setting than is appropriate because a school board refuses to provide more services than it considers to be “reasonable.” However, in light of Supreme Court precedent that observed the federalism dynamic that the IDEA provides, a Ross-type test is more appropriate. Federalism precedent holds that when construing a statute, it should not be read to infringe on traditional realms of state power.295 Education is a traditional realm of state power.296 The Rowley Court concluded that the IDEA kept education with the states, even though it imposed conditions upon how federal funds were to be spent for special education.297 The Court did not conclude that the IDEA provided for federal intrusion into this realm of power, and without a “clear and manifest purpose” in a statute’s language, courts are not to interpret federal legislation to so intrude.298 An Oberti-type test intrudes too far into this realm, upsetting this traditional federalist

295 Dep’t of Revenue of Or. v. ACF Indus., Inc., 510 U.S. 332, 345 (1994)
relationship. Moreover, as demonstrated, it could potentially lead to results that conflict with the very statute that it is enforcing.

3. *Schaffer v. Weast*’s Impact

One ground for the presumption for integration in a general education environment was the understanding that a school board always had the burden of persuasion in cases involving the IDEA.\(^{299}\) The *Oberti* court made the same interpretation.\(^{300}\) But the Supreme Court has since rejected that interpretation, calling the integration presumption into questionable light that goes beyond the operations of §§ 1412(a)(5)(B)(i) and 1413.

In *Schaffer v. Weast*, the Court held that, instead of the burden always being placed on the school board, it would be “placed upon the party seeking relief.”\(^{301}\) Therefore, when students with disabilities seek to challenge their placements, they will have the burden of persuasion. In *Schaffer*, Brian suffered from learning disabilities and speech-language impairments.\(^{302}\) From preschool to seventh grade, he was placed in a private school, where he struggled academically.\(^{303}\) School officials informed his parents that the IEP team needed to reevaluate his IEP and place him in a setting that would “better

\(^{299}\) Bd. of Educ., Sacramento City United Sch. Dist. v. Holland, 786 F. Supp. 874, 880 n.7 (E.D. Cal. 1992), aff’d, 14 F.3d 1398 (9th Cir. 1994).

\(^{300}\) Oberti v. Bd. of Educ. of the Borough Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993).

\(^{301}\) 546 U.S. 49, 62 (2005). Its holding applied only to the “burden of persuasion.” *Id.* at 56. The Court found it necessary to explain the term “burden of proof” as “one of the slipperiest member[s] of the family of legal terms.” *Id.* (internal quotations omitted). “Burden of proof” contained two different burdens: “burden of persuasion,” “*i.e.*, which party loses if the evidence is closely balanced,” and the “‘burden of production,’ *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding.” *Id.* (quoting Dir., Office of Workers’ Comp. Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994)). The Court was careful to say that *Schaffer* concerns “only the burden of persuasion.” *Id.*

\(^{302}\) *Id.* at 54.

\(^{303}\) *Id.*
accommodate his needs."304 Brian’s parents contacted the local school board, which evaluated Brian and developed an IEP that placed him in either of its two middle schools. 305 Brian’s parents disagreed; they believed that Brian needed “smaller classes and more intensive services.”306 They unilaterally placed Brian in another private school, initiated a due process hearing challenging the school board’s IEP, and sought compensation for the cost of Brian’s tuition at the private school. 307

After a rather complex procedural history, in which the case went up and down the judicial ladder twice, the Fourth Circuit held that there was no persuasive reason for always resting the burden of persuasion with the school district.308 The Supreme Court affirmed. It rejected the parents’ argument that a school board should always have the burden of persuasion, even when it is not seeking relief.309 Traditionally, the party seeking relief has the burden of persuasion. Cases in which the burden of persuasion is placed on the opposing party at the beginning of a proceeding are rare, and without express direction from Congress, the Court was unwilling to depart from that traditional rule.310

Consequently, since Schaffer, the Oberti presumption for integration, as embodied in its factor test, stands in questionable light. Its placement of the burden on the school board provides one basis for its presumption. Indeed, the United States District Court for the Eastern District of California remarked that the presumption for integration rested on the school board bearing the burden of persuasion.311 The court cited a federal regulation that implemented the Rehabilitation Act of 1973 as its basis for this presumption.312 It

304 Id.
305 Id.
306 Id. at 54–55.
307 Id. at 55.
308 Id.
309 Id. at 59.
310 Id.
311 Bd. of Educ., Sacramento City United Sch. Dist. v. Holland, 786 F. Supp. 874, 880 n. 7 (E.D. Cal. 1992), aff’d, 14 F.3d 1398 (9th Cir. 1994).
312 Id.
even noted that “[a]lthough this regulation is not promulgated under the IDEA, it reflects the same strong preference for mainstreaming.”

Of course, this obscure federal authority, promulgated to implement an unrelated piece of legislation, is unworthy of such reliance in light of Schaffer.

The Oberti court did not rely on such tenuous authority, but instead relied on what is today § 1412(a)(5), the provision for mainstreaming. However, as previously established, § 1412(a)(5) does not provide for a presumption because of § 1412(a)(5)(B)(i)’s requirement that FAPE and LRE be examined together. Even if one disagrees with this interpretation of §1412(a)(5)(B)(i) and the operative result it has with § 1413, the burden of persuasion can no longer provide a basis for an integration presumption. Thus, standing alone, the Schaffer holding casts Oberti’s presumption for inclusion into doubt. Because the Oberti test was created partially because of this presumption, it too is cast into doubt by the Schaffer holding.

When one considers the statutory provisions of §§ 1412(a)(5)(B)(i) and 1413, which brings in the Rowley opinion, together with Schaffer, such a factor test rests on shaky foundations.

IV. AN INAPPROPRIATE OUTCOME UNDER OBERTI

Oberti’s intrusive consequences can be demonstrated by examining A.S. ex rel. S. v. Norwalk Board of Education, a district court case from the Second Circuit that applied the Oberti test. In A.S., A. was in a segregated facility until the fourth grade. After that time, she was mainstreamed with an aide and an independent

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313 Id.
315 See supra Part III.C.2.
316 Id.
319 A.S., 183 F. Supp. 2d at 537.
After behavior problems escalated, the school board recommended placing A. in a segregated setting by the time she reached high school. The parents objected, and both sides agreed to place A. in a general education setting with the same IEP plan for the previous year. During that year, A.’s behavior problems continued, and the board renewed its proposal to place A. in a segregated setting while mainstreaming her in certain non-academic courses. When each side refused to compromise, they filed separate due process hearings. The IHO concluded that A.’s placement in a general education setting was inappropriate. Applying Oberti, it also found, however, that the board’s proposal did not satisfy the IDEA’s LRE. Consequently, the IHO ordered both parties to reconvene to generate a new IEP that met A.’s needs appropriately. It concluded that the board had to compensate A.’s parents for their use of expert consultants during the failed attempts at creating a new IEP. The board appealed, but the district court, reviewing the IHO’s application of the Oberti factors, upheld the finding.

A. Oberti’s First Factor

Looking at the first factor, “whether the school district has made reasonable efforts to accommodate the child in a regular classroom,” the court determined that the board had not considered enough degrees of services. The school board provided a special education teacher, educational consultants, a behavioral consultant, a

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320 Id.
321 Id.
322 Id.
323 Id.
324 Id. at 538.
325 Id.
326 Id.
327 Id.
328 Id. at 539.
physical and occupational therapist, a speech and language therapist, and a teacher of the visually impaired. The IHO concluded that the board failed to consider more services that might have allowed for A. to continue in a regular education environment, and the court agreed. It also found that the board did not consider providing A. with “direct special education services” in the regular classroom, “rather than leav[ing] the student to receive educational directions from an aide or a regular education teacher who does not have the expertise of a special education teacher.”

The court agreed and found that the school should have considered peer tutoring, scripting, additional staff training and extracurricular activities.

In its decision, the court said that Oberti required a school board to consider every possibility and provide whatever service might help a child achieve academic progress in a regular education setting. It relied on § 1412(a)(5)(A)’s language that schools must include students with disabilities with students who do not have disabilities “to the maximum extent appropriate.” “[T]he plain language of the IDEA and its related regulations do not limit the scope of supplemental aids and service to be provided to disabled children in a regular education setting.”

However, as demonstrated above, the text of the IDEA does not provide a basis for this reading when examining §§ 1412(a)(5)(A), 1412(a)(5)(B), and 1413 together. As previously established, § 1412(a)(5)(A) does not stand alone and needs to be read in light of the funding and certification requirements. These concomitant operations require that in an LRE inquiry, the reviewing court examine the student’s FAPE. Because an FAPE is included in the

331 Id. at 543.
332 Id.
333 Id.
334 Id.
335 Id. at 545.
337 Oberti, 183 F. Supp. at 545.
338 See supra Part III.C.2.
339 Id.
determination of whether the LRE requirement has been complied with, *Rowley* must apply. *Rowley* held that a disabled child is entitled to “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”* It refused to require school boards to provide disabled children with educational services that would maximize their potential. If it can be said that any particular student’s LRE requires a consideration of that student’s FAPE, then the *A.S.* court incorrectly interpreted § 1412(a)(5)(A)’s “[t]o the maximum extent appropriate” language. To require a school board to consider *and provide* all possible services that would achieve a student’s FAPE would require the board to maximize that student’s education potential in a general education environment. This application is beyond the calling of the IDEA and *Rowley*, even if the *A.S.* court is addressing an LRE question.

Under *Ross*, however, the school board’s efforts would have most likely passed muster. In *Ross*, the school board provided Lindsay with half the services that the school board in *A.S.* provided *A*. Lindsay received special education services from two special education teachers, one in the summer and one during the school year, and a teacher’s aide to supplement the regular teacher’s services while she was mainstreamed. In addition, Lindsay received services from the school’s special education program for the half of the day that she was not in the general education classroom. *A.* received considerably more services: a special education teacher, educational consultants, a behavioral consultant, a physical and occupational therapist, a speech and language therapist, and a teacher of the visually impaired.

Certainly, if the *Ross* court upheld a decision to remove a student receiving less service than *A.*, it would similarly uphold the decision of the school board.

341 *Id.* at 198.
342 Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 272 (7th Cir. 2007).
B. Oberti's Second Factor

To satisfy this factor, the A.S. court remarked that “the appropriate yardstick is whether A., with appropriate supplemental aids and services, can make progress towards her IEP goals in the regular education setting.” The court concluded that A. could be mainstreamed, so long as she had additional services beyond the consultants and aides that she already had. The school board argued that the lack of academic progress indicated that the more appropriate placement for A. was in a more restricted setting. The court, along with the IHO, disagreed, saying that the board should have offered more services.

This conclusion raises a fundamental question: in light of this decision, how much service is “appropriate”? As established above, the A.S. court, applying Oberti, required the school board to provide every possible service. However, research has shown that such a degree of services can be counterproductive. Feelings of inferiority and self-consciousness may arise among students with disabilities placed in regular education environments, and such feelings contribute to disruptive behavior and the impairment of academic progress. Two social scientists found that older students with disabilities, possessing more cognitive ability than younger students or those suffering from more severe disabilities, and thus able to better articulate their feelings, preferred less time with their peers because it was “less embarrassing than having a specialist come into the classroom.” Another scholar notes that these feelings may arise from an “unwarranted integration presumption,” i.e., placing students with

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344 Id. at 546 (emphasis added).
345 Id. at 545–549.
346 Id. at 546.
347 Id. at 545.
348 See supra p. 45.
350 Colker, supra note 44, at 833.
disabilities in general education classrooms before there has been sufficient demonstration that the student will respond by showing academic progress, which is an important factor in determining whether the child is receiving an FAPE. In any event, this evidence at least shows that the deference that the IDEA requires reviewing courts to give to the findings of administrative hearings should be greater than the third factor of the Oberti test. If empirical data, as well as findings at the state level, show that disruption is caused by inappropriate integration, a reviewing court, given limited authority to overrule those findings under Rowley, should not apply a level of scrutiny that discounts them.

This particular problem was at issue in L. ex rel. Mr. F. v. North Haven Board of Education, an LRE case out of Connecticut. L. suffered from Down syndrome, the same disability as Rafael’s in Oberti. In class, she was as disruptive as Rafael, acting violently towards her peers and teachers, and destructive of her peers’ personal property and school property. One incident involved her throwing a chair at her teacher. This behavior was triggered only when academic demands and expectations that arose from the general education environment were placed on her. While there were times when L. would behave well in class and get along with others, as soon as she received instruction, she became disruptive. The court heard testimony from Area Cooperative Education Services (ACES), which assessed L.’s behavior.

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352 624 F. Supp. 2d 163 (D. Conn. 2009)
353 Id. at 174.
354 Id. at 169.
355 Id.
356 Id.
357 ACES is an organization in Connecticut that provides assistance to school boards in developing “cost effective programs and services.” AREA COOPERATIVE EDUCATION SERVICES, http://www.aces.org/about/index.aspx (last visited Apr. 30, 2010). Its purpose is to help school boards improve their education, including special education. Id.
358 North Haven, 624 F. Supp. 2d at 172.
ACES’ assessment attributed her violent behavior to her placement in the general education environment. The report concluded that her disruptive behavior “stemmed from a frustration about her inability to successfully communicate her feelings and a desire to escape a potentially punishing situation.” A psychiatrist hired by L.’s parents attributed her violent behavior to her feelings of “vulnerability associated with her intellectual impairment.” He ascribed this vulnerability to L.’s awareness of the “disparity between herself and her peers” and the fact that as she becomes more aware of this disparity, she is likely to become more disruptive.

The Ross test avoids any result where a panoply of service providers are enlisted just to ensure that a student is kept in a regular education environment. By asking whether the school board used “reasonable measures” to educate a student satisfactorily, the court defers to administrative and trial court findings. Once findings are made at the state-level administrative hearing, the reviewing court asks whether the decision was “rational.” A decision is rational when the reviewing court determines that the school board used reasonable measures. In the context of Ross, the court concluded that the board’s use of three different types of services constituted reasonable measures. Therefore, the court largely deferred to the school board’s determinations. Deferring to school boards in this context is important because schools are in better positions than courts to evaluate the effect that these services have on students with disabilities when they are placed in a general education environment. The Ober test, by application, puts courts too far into areas that require intimate knowledge and understanding that only school boards can possess.

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359 Id. at 170.
360 Id.
361 Id.
362 Id.
363 Bd. of Educ. of Twp. Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 278 (7th Cir. 2007).
364 Id. at 277.
365 Id.
Moreover, the results that the Oberti test creates might propel stereotypes. As humans, we tend to distinguish “characteristics;” naturally, therefore, it is human nature to perceive differences in people, for better or for worse.\footnote{Robyn M. Dawes, The Nature of Human Nature: An Empirical Case for Withholding Judgment—Perhaps Indefinitely, 16 Pol. Psychol. 81, 81 (1995) (“We understand only characteristics of entities or processes. A claim to understanding the entities or processes themselves is based on an ability to combine our understanding of their characteristics with sufficient accuracy that we can predict their behavior with a probability not too distant from certainty.”).} And when differences become stigmatizing, any institutionalization of them should be avoided. For instance, one scholar has observed that American society has developed in ways that stigmatize disabilities, and she points to one particular feature of our society that is a seemingly indispensable part of everyday life: steps. She argues that someone in a wheelchair is “different only in relation to those who are mobile on foot.”\footnote{Id.} This difference is significant only because institutions “make this difference matter” by requiring people in wheelchairs to gain access differently from people who are not in wheelchairs.\footnote{Id.} This difference can create a stigma; by eliminating different treatment for people with disabilities, we as a society can help to eliminate any perceived differences.\footnote{Id.}

Congress had this effect in mind when it enacted the IDEA. As Oberti noted, mainstreaming teaches “nondisabled children to work and communicate with children with disabilities,” so as to “eliminate the stigma, mistrust and hostility” that has been directed towards people with disabilities.\footnote{Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204, 1216 n.24 (3d Cir. 1993).} Looking at the language of the IDEA, however, Congress was aware that for some students, mainstreaming would be ineffective—hence the term “appropriate education.”\footnote{See 20 U.S.C. § 1412(a)(1)(A) (2006) (emphasis added).} If Congress meant for all students to be included in classrooms, it is doubtful that it would have chosen such language. The Supreme Court
recognized the import of this terminology when it remarked, when referring to the LRE requirement, that Congress understood that general education environments would not be appropriate for some students. 372 Arguably, at least, when the application of a federal appeals court test results in, as the A.S. court determined, the implementation of over six separate types of services (and as much as ten, as the A.S. court counted 373), just to keep the student included in the classroom, his placement there may be inappropriate. This large number of services may actually propel stigmatic perceptions towards students with disabilities. One student, disabled enough to require an aide and a special education teacher, but cognizant enough to articulate his feelings, preferred that his services be provided outside of the regular classroom because he felt inferior. 374 If receiving two types of service engendered this perception, a fortiori ten types of services could reach the same result. 375 While A. may have lacked the cognitive ability to articulate her discomfort with the providers’ presence, students with less severe disabilities do have the mental capacity to be aware that other students are not receiving services. 376 The L. court found this dynamic as well. 377 The more appropriate the placement in a general education environment, the less stigmatizing the result. Under Ross, school officials, in touch with students with disabilities every day, have the ability to make this determination free from any intrusive factor test.

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375 See A.S., 183 F. Supp. 2d at 544.
377 Id.
C. Oberti’s Third Factor

The A.S. court concluded that the school board also failed to satisfy the third Oberti factor.\textsuperscript{378} The third Oberti factor requires courts to ask what “possible negative effect the child’s inclusion may have on the education of the other children in the classroom.”\textsuperscript{379} It also requires the courts to consider the effect that additional services would have on the behavior of a student with a disability.\textsuperscript{380} The court rejected the school board’s evidence that A. had a history of disruption.\textsuperscript{381} The court agreed that the evidence showed some disruption, but it found that the record did not clearly indicate whether behavioral problems caused the disruption or negative effects to the regular education environment.\textsuperscript{382} While the court seemed to say that the student’s behavior would have improved with more services provided, as the first prong requires, this factor was not a major issue of contention.\textsuperscript{383}

While the facts of A.S. do not involve a serious examination of the third factor, its reliance on the first factor puts the school board in a disadvantaged position. Conceivably, under Oberti’s reading of the IDEA, a school board can never argue that a student was too disruptive for placement in a regular classroom unless it uses all possible types of services. Thus, a district might not ever satisfy this factor unless it provides a wealth of services. Congress did not provide for this result, even though it could have readily done so. By providing simply that a student with disabilities has to receive “supplementary aids or services,” and not expressly providing for “unlimited” or “maximum” supplementary aids or services, Congress’ meaning is vague.

\footnotesize{\textsuperscript{378} A.S., 183 F. Supp. 2d at 549.  
\textsuperscript{380} Id.  
\textsuperscript{381} A.S., 183 F. Supp. 2d at 549.  
\textsuperscript{382} Id.  
\textsuperscript{383} Id.}
Advocates for a presumption of mainstreaming would contend that this silence should be read in favor of including kids in general education classrooms, over school boards’ contrary determinations. Oberti reached this result.384 However, this reading goes against Supreme Court precedent. The Supreme Court has long maintained that when interpreting the breadth of a statute, it should not be read to “impinge[] upon or pre-empt[] the States’ traditional powers.”385 Without a “clear and manifest purpose,” the Supreme Court has refused to give a federal statute an overly intrusive scope.386 In effect, the Oberti test, as demonstrated by the result in A.S., intrudes into traditional realms of state power without relying on express congressional direction to do so.

While the IDEA provides for federal judicial review, which is a mechanism to gauge compliance,387 the Oberti test’s intrusion goes beyond that grant of power.388 The Ross test provides for a much more limited ability to question state action in its traditional realms of power. Reviewing courts applying Ross will reverse local and state determinations only when they have clearly violated the IDEA by not using “reasonable measures” to educate the student with disabilities satisfactorily.389 This test ensures that courts do not “impos[e] their views of preferable educational methods upon the states.”390 Given that the IDEA governs education—a responsibility traditionally left to the states—and that the legislation is silent on the degree of services that had to be used, a test that imposes upon the states only when there

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384 Oberti, 995 F.2d at 1219.
385 Dep’t of Revenue of Or. v. ACF Indus., Inc., 510 U.S. 332, 345 (1994).
386 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating that a statute will be interpreted to pre-empt the traditional state powers only if that result is “the clear and manifest purpose of Congress” (quoting Napier v. Atl. Coast Line R. Co., 272 U.S. 605, 611 (1926))).
388 See discussion supra Part III.C.1.
389 Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 277 (7th Cir. 2007).
390 Rowley, 458 U.S. at 207.
has been a clear IDEA violation is consistent with the IDEA’s language and Supreme Court precedent.

CONCLUSION

The purpose behind the IDEA is to provide a meaningful education for students with disabilities. One component of that education is placement in an environment that is conducive to instruction. A reasonableness test is more suitable to achieving this result because it better accounts for the relevant IDEA language and applicable Supreme Court precedent. Factor-based tests, as demonstrated, give the judiciary more scrutinizing authority than Congress intended. A test that is delicate to determinations that are sensitive to the peculiar needs of any individual student with a disability is more appropriate than a factor test that rests on a presumption of mainstreaming. It is a question of institutional competence, and as institutions, courts are better left in the courtroom, while schools are better left in the classroom.