

A NUANCED APPROACH TO THE DISABILITY  
INTEGRATION PRESUMPTION

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In response to Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006).

In *The Disability Integration Presumption: Thirty Years Later*,<sup>1</sup> Professor Ruth Colker offers a revisionist interpretation of the part of the federal special education law that requires:

To the maximum extent appropriate, children with disabilities . . . [must be] educated with children who are not disabled, and [that] special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [must] occur[] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>2</sup>

Professor Colker would not apply this integration presumption, or would apply it only in the weakest possible form, when the school district complies with its additional obligation under the federal regulations to offer a continuum of services—regular classes, special classes, special school, home instruction, instruction in hospitals and institutions—and when the district provides for supplementary services, such as resource room or itinerant teachers, to be delivered in regular class placements.<sup>3</sup>

In this Response, I contend that Professor Colker's revision is unsupported and would be unwise. But that is not to say that a new way of looking at the integration presumption is wholly out of order. The integration presumption should not be applied in a simple-minded way to say that general education is always best under all circumstances. Instead, the presumption should operate as a presumption ought to: in the absence of other evidence, it should be the rule. If the school is arguing for integration, the presumption ought to carry

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<sup>1</sup> 154 U. PA. L. REV. 789 (2006).

<sup>2</sup> 20 U.S.C. § 1412(a)(5)(A) (2000).

<sup>3</sup> Colker, *supra* note 1, at 858-62.

some, though not very great, weight. If the parent is arguing for integration, the presumption should be much stronger.<sup>4</sup> More importantly, the second half of the language of the statutory provision embodying the presumption should be taken seriously. Separate classes should be used only when supplemental services cannot make general education work for a given child. The emphasis should be on the services, and the services should be broadly defined to include such things as co-teaching by special education professionals, aide services, assistive technology, behavior intervention, and initiatives to prevent harassment and mistreatment by teachers and peers. The services should be intense and individualized. When they are delivered separately, they should be temporary or provided outside of the regular school day.

This Response will first summarize and answer Professor Colker's contentions. Second, it will suggest what the focus of the discussion ought to be, that is, which services and protections are being offered to educate a child within general education. Finally, it will suggest that a more nuanced approach to integration fits well with the broader reform of special education law.

#### I. THE RESPONSE TO PROFESSOR COLKER'S ARGUMENT

Professor Colker's argument is that the original purpose of the integration presumption was "to hasten the closing of disability-only institutions."<sup>5</sup> She further contends that much of the case law under the provision applies the presumption too strongly in favor of integrating children with disabilities into regular classes,<sup>6</sup> that educational research does not support the application of a strong presumption in favor of integration,<sup>7</sup> and that an analogy to racial desegregation also does not support a strong disability integration presumption.<sup>8</sup> My

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<sup>4</sup> Regarding the various approaches to applying legal presumptions, see 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 344, at 443-59 (5th ed. 1999) (describing the "bursting bubble" theory and competing approaches advocating stronger effects such as shifts in the burdens of persuasion and instructions to juries).

<sup>5</sup> Colker, *supra* note 1, at 795.

<sup>6</sup> *Id.* at 811-12, 814-21 (discussing *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), and *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)).

<sup>7</sup> *Id.* at 825.

<sup>8</sup> *Id.* at 838. The transmission of disability culture, particularly the culture developed around the use of sign language at state schools, is sometimes cited as a ground to place children in separate institutions, but Professor Colker does not rely on this consideration in this paper, and elsewhere seems ambivalent. See Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1474

view is that the history of the provision does not have much to do with deinstitutionalization; the case law she cites is largely beside the point; educational research supports integration that is done properly; and the race analogy is not a persuasive argument against a strong integration presumption—indeed in some respects it supports it.

#### A. *History*

Professor Colker's position that Congress created the integration presumption to hasten the closing of inhumane disability-only institutions caused me to do a double-take.<sup>9</sup> I was a law student in the mid-to-late 1970s and worked on deinstitutionalization cases in a law school clinic. During that time, a close friend of mine was a special education teacher. We had many conversations about deinstitutionalization and about mainstreaming children in school, but the two topics were related only in the vague sense that both had to do with disability and the law. When she talked about applying "least restrictive environment" principles in her work, the conversation concerned such things as her attempts to persuade the regular education second-grade teacher to take a student with Down Syndrome for part, and then all, of the day. The point then, as now, was that special classes for students with disabilities—in the words of the statutory provision, "removal of children with disabilities from the regular educational environment"<sup>10</sup>—should occur only when education cannot be provided in the regular educational setting with extra help and services. True, schools and institutions that enrolled only children with disabilities existed then (and do now), but the idea that Congress wanted nothing more than to move children out of those institutions when it enacted § 1412(a)(5)(A) does not fit with reality.

A survey of the education literature affirms this conclusion.<sup>11</sup>

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(2007) (commenting on the possibility of offering deaf children with cochlear implants the chance to go to mainstream schools and preserving the ability of other deaf children to study in intensive sign language classrooms). For a discussion of the topic, see Mark C. Weber, *Inclusive Education in the United States and Internationally: Challenges and Response*, 3 REV. DISABILITY STUD. 19, 28-29 (2007).

<sup>9</sup> Professor Colker draws to some degree on personal experience in making her claims, and I will draw on personal experience as well.

<sup>10</sup> 20 U.S.C. § 1412(a)(5)(A) (2000).

<sup>11</sup> So does some of the history recounted in one of Professor Colker's more recent papers. See Colker, *supra* note 8, at 1427-28 ("In the 1960s and 1970s, educators began to publish articles questioning the effectiveness of self-contained schools and special education classes. Their work laid the foundation for the concept of 'least restrictive alternative'—that children should be educated in the most integrated setting possible.") (footnotes omitted).

Education sources from the era around the passage of the Education for All Handicapped Children Act of 1975<sup>12</sup> frequently discuss mainstreaming or least-restrictive-environment ideas. Although there are passing references to deinstitutionalization, the sources focus on the same topic my friend was discussing: getting students out of self-contained public school classes and into regular education classes, either part-time or full-time, with adequate support to enable the children to thrive there.<sup>13</sup>

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<sup>12</sup> 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2005) (now called the Individuals with Disabilities Education Act).

<sup>13</sup> See generally Evelyn Deno, *Summary of Presentations, in* MAINSTREAM SPECIAL EDUCATION: ISSUES AND PERSPECTIVES IN URBAN CENTERS 28, 31 (Philip H. Mann ed., 1974) [hereinafter MAINSTREAM SPECIAL EDUCATION] (describing conference discussions about the need to change regular education to accommodate children with mild and moderate disabilities); Albert H. Fink, *Implications for Teacher Preparation, in* MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN 101, 103 (A.J. Pappanikou & James L. Paul eds., 1977) (reporting on a conference held in February, 1975: “The thrust of the mainstreaming movement . . . has aimed at providing handicapped children with educational services that depend less heavily than in the past upon special self-contained classes, combined with a greater utilization of the regular classroom. The former placements have been viewed as inadequate for many handicapped children . . .”); Frank M. Hewett, *The Orchestration of Success, in* MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN, *supra*, at 80, 84 (discussing the potential for creative efforts by educators in regular classrooms to improve the educational experience of all children while accommodating children with emotional disturbance); Richard A. Johnson & Rita M. Grismer, *The Harrison-University Cooperative Resource Center, in* MAINSTREAM SPECIAL EDUCATION, *supra*, at 84, 84 (describing efforts from the mid-1960s to move children from Educable Mentally Retarded special class settings to regular classes); Philip H. Mann & Rose Marie McClung, *Training Regular Teachers in Learning Disabilities, in* MAINSTREAM SPECIAL EDUCATION, *supra*, at 110, 110 (discussing the need for regular classroom teachers to prepare to serve atypical learners); Charles A. Meisgeier, *The Houston Plan—Retraining of Regular Classroom Teachers To Work with Handicapped Children Within the Regular Classroom Setting, in* MAINSTREAM SPECIAL EDUCATION, *supra*, at 77, 77 (describing the training of master teachers in methods of serving children with disabilities in regular classrooms with personalized programs for all children); William C. Morse, *The Psychology of Mainstreaming Socio-Emotionally Disturbed Children, in* MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN, *supra*, at 18, 18 (“Special education professionals range in opinion about mainstreaming from seeing it as a loss of financial and operational control to helping children to the dawn of the new day when special education is about to direct and reform the total educational establishment.”); James L. Paul, *Mainstreaming Emotionally Disturbed Children, in* MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN, *supra*, at 1, 2 (“Mainstreaming, if taken in its narrowest sense of moving children from special classes to regular classes, raises some very basic questions.”); *id.* at 12-13 (“Children who are in special classes and could profit more from an instructional program in the regular classroom should be moved to the regular classroom with the necessary supportive services to make that adaptation successful.”); Phyllis F. Perelman & Wayne L. Fox, *Training Regular Classroom Teachers To Provide Special Education Services: The Consulting Teacher Program, in* MAINSTREAM SPECIAL EDUCATION, *supra*, at 134, 134 (noting that the rural nature of Vermont renders

That being so, there is no reason to be baffled at the integration presumption embodied in the consent decree in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania (PARC)*,<sup>14</sup> a prime influence on the federal special education law. The case, which was not about deinstitutionalization, concerned appropriate education for children with mental retardation who either were not in the public schools at all or were served in inadequate programs.<sup>15</sup> The parties drafted the decree in accordance with the advice of educators about the best approach to educating children with mental retardation, and so it came out adopting the same proposition as the contemporary educational literature<sup>16</sup> and, for that matter, my friend: place children in regular education whenever possible, giving them adequate services to make mainstreaming work.<sup>17</sup> It is no shock that there is no explanation in the

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special classes impractical in many areas); Maynard C. Reynolds, *Introduction to SPECIAL EDUCATION AND SCHOOL SYSTEM DECENTRALIZATION* 1, 6 (Maynard C. Reynolds ed., 1975) ("Mainstreaming is not a new concept although the term is new and has come into prominence only recently. For many decades, children with mild handicaps and learning problems had been admitted to regular classrooms where they were expected to keep up as well as they could with minimal or no extra assistance. . . . The current concept of mainstreaming embodies a supportive structure."); William C. Rhodes, *Beyond Abnormality: Into the Mainstream*, in *MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN*, *supra*, at 31, 36-37 (noting the contemporaneous deinstitutionalization movement, but primarily linking mainstreaming and deinstitutionalization as two among many phenomena tied to new progressive social consciousness); H. Rutherford Turnbull III, *Legal Implications*, in *MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN*, *supra*, at 43, 45-46 (stating that the mainstreaming preference arises from unequal educational opportunities because of the frequent placement of children with special needs in the worst facilities with the least capable teachers and poor funding, and drawing a comparison to racial segregation); *University Programs in Teacher Training*, in *MAINSTREAM SPECIAL EDUCATION*, *supra*, at 106, 106-09 (discussing five programs used to train regular classroom teachers in understanding aspects of disability and special education); Richard J. Whelan, *Human Understanding of Human Behavior*, in *MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN*, *supra*, at 64, 64-66 (noting that models of education for children with emotional disturbance developed in residential facilities but moved by the 1960s to public schools and day facilities); Ernest P. Willenberg, *The Three D's: Decategorization, Declassification, and Desegregation*, in *MAINSTREAM SPECIAL EDUCATION*, *supra*, at 21, 21-22 (noting that the phase of deinstitutionalization of children occurred after World War II, and describing the current phase as that of replacing special day schools, centers, and classes with mainstream instruction); Frank H. Wood, *Implications for Leadership Training*, in *MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN*, *supra*, at 89, 90 (explaining that the "least restrictive" situation principle encourages educators to remove children from regular school situations only "for the shortest possible time and to the shortest possible distance," such as in part-time resource rooms or special programs in the same building).

<sup>14</sup> 343 F. Supp. 279, 306-16 (E.D. Pa. 1972) (presenting the amended consent agreement).

<sup>15</sup> *Id.* at 282-83.

<sup>16</sup> See sources cited *supra* note 13.

<sup>17</sup> *PARC*, 343 F. Supp. at 307.

opinion that accompanies the decree. The primary purpose of the opinion was to establish a colorable constitutional claim to give jurisdiction to the court for entering a decree at all. There was no reason to justify every term of what the parties agreed to.

There is not much discussion of the integration presumption in the legislative history of the Education of the Handicapped Act, as it was amended up until the Education for All Handicapped Children Act of 1975 (EAHCA). This absence, though, hardly supports the idea that deinstitutionalization was the objective of the provision.<sup>18</sup> The more logical explanation for the lack of lengthy discussion of integration in the legislative history of the EAHCA and its predecessors is that by the 1970s mainstreaming of children with disabilities in regular education classes had become best educational practice. This explanation is reinforced by a passage in the House Report on the EAHCA stating, "The [House] Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, *of course*, would be one in which the child is placed in a regular classroom."<sup>19</sup>

The point, then, is that the statutory presumption's pedigree is educational theory and practice; the presumption is only tangentially related to deinstitutionalization. It is better to assume that Congress meant what its language denotes than to attribute an unwritten meaning to limit the presumption's application to deinstitutionalization.

### B. *Case Law*

Not surprisingly, Professor Colker criticizes several cases interpreting the integration presumption on the ground that they apply it in accordance with a broad purpose rather than the more narrow purpose she attributes to it.<sup>20</sup> Surprisingly, however, Professor Colker's

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<sup>18</sup> In fact, closing institutions for children was the focus of a portion of the 1974 Education Amendments different from the provisions that eventually became the EAHCA. This initiative allocated impact funding to school districts receiving children discharged from state-operated schools and hospitals. The funding carried the express purpose of promoting deinstitutionalization. See H.R. REP. No. 93-805, at 24 (1974), reprinted in 1974 U.S.C.C.A.N. 4093, 4115 ("It is the Committee's hope that this provision will afford the greatest encouragement to the states to initiate and accelerate programs designed to de-institutionalize as many of these children as possible.")

<sup>19</sup> H.R. REP. No. 94-332, at 9 (1975) (emphasis added). The Department of Health, Education, and Welfare quoted this passage in the Federal Register pages explaining the proposed regulations under that law. Education of Handicapped Children and Incentive Grants Program, 41 Fed. Reg. 56,966, 56,972 (Dec. 30, 1976).

<sup>20</sup> None of the cases Professor Colker cites, nor any of the legislative history, sup-

survey of the relevant case law stops abruptly at the end of the 1980s, and contains only passing references to more recent cases. This omission prevents her from identifying the principal controversy over integration in the 1990s and 2000s.

The current controversy is not over whether application of the integration presumption should be broad, though from time to time writers have argued that the provision should be limited in accordance with cases such as *DeVries v. Fairfax County School Board*<sup>21</sup> and *A.W. v. Northwest R-1 School District*<sup>22</sup> (which Professor Colker criticizes for applying the presumption too weakly).<sup>23</sup> The current controversy is over the services to be provided in the regular classroom to make integration work. To a lesser degree, there are also controversies over using civil rights law to prevent harassment of students with disabilities (so as to make integration succeed and make it an attractive option for children and parents), and over how much deference to give school districts in decisions over integration. These issues are discussed in greater detail below.

### C. Educational Literature

In her review of the literature, Professor Colker mostly argues that there are insufficient numbers of controlled studies of large populations to show that the educational benefits of regular instruction are greater than those of separate instruction.<sup>24</sup> Various experts in the field survey the literature and come to conclusions contrary to Professor Colker's on this point.<sup>25</sup> Professor Colker notes that many authori-

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ports the contention that § 1412(a)(5)(A) should magically vanish when the school has a complete range of placements available. That duty is an independent one under the federal regulations. Continuum of Alternative Placements, 34 C.F.R. § 300.115 (2007).

<sup>21</sup> 882 F.2d 876, 880 (4th Cir. 1989).

<sup>22</sup> 813 F.2d 158, 164 (8th Cir. 1987).

<sup>23</sup> There is a legal literature discussing integration and the integration presumption, but Professor Colker does not refer to it. The scholarship includes: Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775 (1997); Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189; Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL'Y 147 (2001); Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599 (1995); Joshua Andrew Wolfe, Note, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals with Disabilities Education Act*, 55 VAND. L. REV. 1627 (2002).

<sup>24</sup> See Colker, *supra* note 1, at 825 (stating that the available evidence is insufficient to warrant an integration presumption).

<sup>25</sup> See, e.g., Jose Blackorby et al., *Relationships Between the School Programs of Students*

ties supporting integration allow for use of resource rooms or other limited forms of separate instruction, and that is undoubtedly correct, although it appears that what resource-room services entail is not uniform. Primarily, she gathers authorities that stress that inclusive programs have to be designed carefully to be successful and must provide for significant assistive services and accommodations for mainstreamed students.<sup>26</sup> On this last proposition, I emphatically agree.

#### D. *The Race Analogy*

Professor Colker devotes twice as much page space to discussing literature about the educational benefits of racial integration as she does to discussing literature about the educational benefits of placing children with disabilities in the mainstream. As she acknowledges, the analogy between race and disability is flawed.<sup>27</sup> To the extent that it is relevant, what it suggests is that integration requires special efforts to be successful. Professor Colker says that, when applied to integration of children with disabilities, the lessons of racial integration are as follows:

- 1) Schools need to teach tolerance and promote cooperation.
- 2) Teachers in regular education need training in educating students with special needs.

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*with Disabilities and Their Longitudinal Outcomes*, in WHAT MAKES A DIFFERENCE? INFLUENCES ON OUTCOMES FOR STUDENTS WITH DISABILITIES 7-1, 7-7 (2007) (“Bivariate analyses show that, across measures, students with disabilities who took more academic classes in general education settings had greater academic success than peers who took fewer classes there.”); Rebecca A. Hines, *Inclusion in Middle Schools*, ERIC DIGEST, Dec. 2001, available at <http://www.ericdigests.org/2002-3/inclusion.htm> (collecting studies); Wayne Sailor & Blair Roger, *Rethinking Inclusion: Schoolwide Applications*, 86 PHI DELTA KAPPAN 503, 504 (2005) (“[T]he sum of available evidence overwhelmingly supports integrated instructional approaches over those that are categorically segregated, regardless of the categorical label or severity of the disability.” (footnote omitted)); see also Michael F. Giangreco, *Extending Inclusive Opportunities*, 64 EDUC. LEADERSHIP 34, 34-37 (2007) (providing a framework for how teachers should handle the inclusion of students with significant disabilities within mainstream classrooms); Annette Holahan & Virginia Costenbader, *A Comparison of Developmental Gains for Preschool Children with Disabilities in Inclusive and Self-Contained Classrooms*, 20 TOPICS IN EARLY CHILDHOOD SPECIAL EDUC. 224, 233-34 (2000) (reporting on two studies that show better performance in the socio-emotional domain for children in inclusive preschool settings); Patrick A. Schwarz, *Special Education: A Service, Not a Sentence*, 64 EDUC. LEADERSHIP 39-42 (2007) (reporting a case study about a wayward disabled student). See generally sources cited *supra* note 13 (collecting 1970s sources, which heavily support mainstreaming).

<sup>26</sup> See Colker, *supra* note 1, at 826-35.

<sup>27</sup> *Id.* at 838 n.183.



- 3) Individualization matters.
- 4) Mainstreaming should begin early.
- 5) Parental involvement is crucial.
- 6) Smaller schools often work better than large ones.
- 7) And (almost as an afterthought), harassment has to be taken seriously.<sup>28</sup>

None of these revelations undermines the value of a broad integration presumption for children with disabilities. Moreover, as Colker notes, African-Americans are significantly overrepresented in the mental retardation and emotional disturbance disability categories.<sup>29</sup> That fact alone supports vigorous inclusion efforts so that placement in special education does not become racial resegregation. It does not warrant supplanting the disability integration presumption with the continuum-of-services requirement.

## II. THE REAL ISSUE

The real issue in the debate over the application of the disability integration presumption is the presence or absence of related services for the child in the integrated setting. The educational literature identifies related services as the means to success in a mainstreamed placement. The related-services issue emerges in current decisions from the courts, and it is the key to resolving the current controversies in the schools.

### A. *In the Courts*

The case law has come to reflect the true problem with regard to applying the disability presumption. Two critical cases from the 1990s are *Sacramento City Unified School District, Board of Education v. Rachel H.*<sup>30</sup> and *Oberti v. Board of Education.*<sup>31</sup> In *Rachel H.*, the Ninth Circuit required the placement of a child with mental retardation in a full-time regular education program with the help of a part-time aide and other assistance.<sup>32</sup> The school wanted to mainstream her for art, music, lunch, and recess, but not for academic subjects. The court placed weight on the testimony of the parents' experts and the child's

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<sup>28</sup> See *id.* at 850-53.

<sup>29</sup> *Id.* at 853.

<sup>30</sup> 14 F.3d 1398 (9th Cir. 1994).

<sup>31</sup> 995 F.2d 1204 (3d Cir. 1993). Professor Colker mentions these cases in a footnote discussing multifactor tests used in applying the presumption. Colker, *supra* note 1, at 812 n.90.

<sup>32</sup> The child's IQ was said to be 44. *Rachel H.*, 14 F.3d at 1400.

teacher in her mainstreamed setting, and relied especially on the child's progress in social and communication skills when in that environment. The court adopted a test that focused on, among other considerations, the "educational benefits available to Rachel in a regular classroom, *supplemented with appropriate aids and services*, as compared with the educational benefits of a special education classroom."<sup>33</sup> In *Oberti*, the Third Circuit required a school district to place a child with Down Syndrome in a mainstreamed class.<sup>34</sup> The court acknowledged that a mainstreamed class had previously been unsuccessful for the child, but stressed that no supplemental aids and services had been provided.<sup>35</sup> The evidence showed that the child could succeed if provided services, such as the assistance of an itinerant special education instructor, special education training for the regular education teacher, modification of the curriculum, parallel instruction, and part-time use of a resource room.<sup>36</sup>

The court in *Oberti* put the emphasis where it belongs, on the services to be provided:

One of our principal tasks in this case is to provide standards for determining when a school's decision to . . . place [a] child in a segregated environment violates IDEA's presumption in favor of mainstreaming. This issue is particularly difficult in light of the apparent tension within the Act between the strong preference for mainstreaming and the requirement that schools provide individualized programs tailored to the specific needs of each disabled child.

The key to resolving this tension appears to lie in the school's proper use of "supplementary aids and services" . . . .<sup>37</sup>

Courts have begun to recognize the need to act creatively to make integration work. *L.B. ex rel. K.B. v. Nebo School District* involved a child with autism, for whom the school district proposed a non-mainstreamed preschool placement with a few nondisabled children participating.<sup>38</sup> The program also featured speech therapy, occupational therapy, and eight to fifteen hours per week of applied behavioral analysis (ABA) services. The court rejected this proposal and upheld the parents' position that the child should continue in a pri-

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<sup>33</sup> *Id.* (emphasis added) (describing the district court's reasoning, as later adopted by the Ninth Circuit).

<sup>34</sup> 995 F.2d at 1206-07.

<sup>35</sup> *Id.* at 1220-21.

<sup>36</sup> *Id.* at 1222.

<sup>37</sup> *Id.* at 1214 (citations and footnote omitted).

<sup>38</sup> 379 F.3d 966, 968 (10th Cir. 2004).

vate, mainstreamed preschool class with the assistance of an aide, and with thirty-five to forty hours of ABA services delivered primarily at home.<sup>39</sup> The evidence showed that the extensive ABA services were necessary to enable the child to function in a mainstreamed school environment. Although eight to fifteen hours would have permitted some educational progress, the test the court applied was how many hours were needed to enable the child to succeed in a regular class.<sup>40</sup> The court thus required additional services—the ABA—but outside the regular school day, so that the child could be in the mainstream during the school day and thrive there. The task for the future is to make integration work through judicious use of intensive services, sometimes separate, sometimes temporary, and whenever possible outside of regular school hours.<sup>41</sup>

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<sup>39</sup> *Id.* at 977-79.

<sup>40</sup> *See id.* at 976-77.

<sup>41</sup> Many courts, though not all, have also begun to take seriously the problem of harassment of students with disabilities. Space does not permit a full development of this topic here, but it should be noted that many recent decisions have upheld damages claims and other remedies where schools have failed to take stern action against peer and staff harassment. *See* MARK C. WEBER, *DISABILITY HARASSMENT* 61-97 (2007) (discussing current case law). Unfortunately, many courts have barred relief for these claims, a reality that interferes immensely with the goal of integration. *See, e.g.,* Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 114 (2d Cir. 2007) (denying a tuition reimbursement remedy to parents who placed their emotionally disturbed child in a private school following his harassment in public school). Many courts have also been excessively deferential regarding school district decisions to place children in segregated settings, letting the general rule that public school officials have control over decisions of educational methodology override the specific congressional command in favor of integration. *See* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 41-45 (2006) [hereinafter Weber, *Reflections*] (discussing an example of inappropriate deference to public school decisionmaking in *School District of Wisconsin Dells v. Z.S. ex rel. Littlegeorge*, 295 F.3d 671 (7th Cir. 2002)). At the turn of this past century, systemic litigation also began to address service delivery procedures and how they impede or promote integration. *See, e.g.,* Reid L. v. Ill. State Bd. of Educ., 358 F.3d 511, 512-13 (7th Cir. 2004) (rejecting an effort to overturn a consent decree requiring integration and the provision of services to facilitate it); Reid L. v. Ill. State Bd. of Educ., 289 F.3d 1009, 1023 (7th Cir. 2002) (same); Gaskin v. Pennsylvania, 389 F. Supp. 2d 628, 631-36 (E.D. Pa. 2005) (approving a class action settlement to promote the placement of children in mainstream settings, expand related services and accommodations, and establish monitoring procedures); J.G. v. Bd. of Educ., 26 IDELR 114, 115 (W.D.N.Y. 1997) (entering a consent decree providing for the inclusive education of children with disabilities); *see also* Lopez v. S.F. Unified Sch. Dist., 385 F. Supp. 2d 981, 1002-04 (N.D. Cal. 2005) (awarding attorney's fees to the plaintiff in systemic litigation over the provision of services in the least restrictive environment).

*B. In the Schools*

As Professor Colker's personal reflections suggest, many parents resist efforts to integrate their children. Many school districts resist integration as well. I submit that the parental resistance is rarely due to sophisticated evaluation of the educational research. Parents' concerns about adequacy of education are usually based on information or beliefs about the specific integrated options being offered to their child. In many instances, the children are already in integrated public school programs, and whatever is happening is not good. Adequate support services may not be offered. Services promised may not be delivered. The general education teachers may not be cooperating. Class sizes may be too large. Physical or verbal harassment may be occurring. A disability-only school, particularly a private school, looks extremely attractive.

When parents resist for these reasons, one is hard-pressed to say they are wrong. Perhaps they should fight for integration that works, but their children are growing up rapidly, and the adaptive preference of a separate program makes sense for them. Law often imposes presumptions based on an unscientific calculation of which position is more frequently justified. When parents resist integration, the presumption in favor of the integrated option proposed by the public schools should not be a strong one. It should be dispelled by evidence that the school's specific proposal, as likely to be implemented, will not be successful for a given child.<sup>42</sup>

When the school authorities resist parental efforts to obtain more integrated settings for their children, it may be because they think that effective services cannot be provided in the mainstream. It may be, however, that the services could be given there but would be costly, and the state's allocation of special education funding favors services in separate settings.<sup>43</sup> It may also be that general education personnel resist having the child in an integrated class. For many educators, special education remains a place to send the child, rather than a bundle of services to help the child. When the public school resists integration and the parents push for it, the balance of prob-

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<sup>42</sup> This is a different rule from what Professor Colker advocates. The question is not whether the school has a continuum of services available. It is how good the chosen option is for a specific child.

<sup>43</sup> This appears to have been much of the motivation in *Rachel H.* See *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994) (addressing the school district's claim that it would lose funding if Rachel H. spent less than "51% of the day" in a special education class).

abilities tips in favor of the parents' position. There is enough risk that the district is motivated by cost, internal politics, or standard operating procedure to call for a strong presumption in favor of the integrated option.<sup>44</sup>

#### CONCLUSION: A NUANCED APPROACH

The integration presumption should stay, but it should be applied in a nuanced fashion. The integration need not always be total, or at least temporarily not total. The focus should be on the intensity of services provided to facilitate success in the mainstream. When parents resist integrated settings for their children, it is crucial to scrutinize the quality of the services offered and assess whether they truly will enable the child to succeed in general education. When schools resist providing the integrated setting, it is crucial to look hard at the school's motivations.

A nuanced approach to applying the integration presumption fits well with meaningful reform of special education law. Children with disabilities, except for the small minority with verifiably severe cognitive impairments, should be achieving at grade level with their peers, and even those with severe cognitive impairments should be on a parallel track. The way to attain equal achievement is not to separate the students with disabilities, and certainly not to send them away for long periods of time to segregated classes where expectations inevitably decline. The way to equality is to provide extra services, technology, and accommodations in regular classes so that the children with disabilities do not fall behind. Any removal should be temporary and specifically targeted to help the children thrive in general education settings. Whatever one thinks of the testing regime established by the No Child Left Behind initiative,<sup>45</sup> it is essential to have the special education subgroup attain the same level of educational success as the general

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<sup>44</sup> The approach I advocate would not employ any presumption that the school district is correct simply because it is the school district. See Weber, *Reflections*, *supra* note 41, at 44. Professor Colker criticizes my approach because it looks at the probabilities in contested cases. Colker, *supra* note 1, at 861 n.258. What the courts are doing with the presumption is, of course, applying it to contested cases. But even in cases that are not contested, the educational research confirms that integrated programs with full support services are the best option for the vast range of students. See sources cited *supra* note 23. Thus, the probabilities on the whole support the presumption.

<sup>45</sup> 20 U.S.C. § 6311 (Supp. IV 2004). It may be argued that the application of group standards undermines the individualized focus of IDEA, see Gordon, *supra* note 23, at 219-20, but the idea that grade-level achievement ought to be a minimum expectation for everyone is not inconsistent with individualized instruction to achieve that goal or other individual goals.

population, and that ought to be the job of the school system as a whole. The President's Commission on Excellence in Special Education was correct in declaring that "[c]hildren placed in special education are general education children first. . . . Qualifying for special education [ought to be] . . . a gateway to more effective instruction and strong intervention."<sup>46</sup> Special education should mean support, not exile.

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<sup>46</sup> PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 7 (2002) (emphasis omitted).