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The Uncertainties of Educating a Preschooler with Special Needs: Who Makes the Important Determinations? And, Who Should?

Kathryn A. Kuhlenberg*

I. INTRODUCTION

Quinn is a bright, outgoing, fun-loving three-and-a-half-year-old little boy.[1] Like most children his age, he is enrolled in a preschool program that is meant to prepare him for kindergarten.[2] Quinn had been attending his privately run preschool program for about a year when Quinn's teachers began to notice some behavioral, sensitivity, and anxiety characteristics that alarmed them. They referred Quinn and his parents to the local education agency (LEA), more commonly known as a "school district," for an evaluation. The LEA concluded that Quinn qualified to receive services through its state-run and federally funded special education program. The LEA outlined the services Quinn should receive in his individual education plan (IEP). These services were meant to close the developmental gap between Quinn and his peers.

Quinn's parents were concerned for their son, but they were very happy that he would now be able to get the services he needed. They contacted the school to work out the logistics of Quinn's services, but were instead confronted with a troubling choice. The school informed Quinn's parents

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* Kathryn taught in integrated preschools for more than eight years. She was also the preschool special education teacher for a school district in Colorado and the Child Find Coordinator for a county in Colorado prior to attending law school. Personal experiences and frustrations drove the creation of this piece.

[1] The author created this scenario based on personal experiences as an illustrative example.

[2] *See* COLLEGEBOARD, http://completionagenda.collegeboard.org/3-5-year-olds-enrolled-preschool-programs (last visited Nov. 21, 2010); *see also* 20 U.S.C. § 1414 (d)(1)(A)(i) (2006) (referring to preschool children participating in "appropriate activities").

that in order to receive the services outlined in his IEP, he would need to leave his current preschool to attend the district-run preschool. Quinn's parents were concerned for their son, as Quinn had experienced many challenges adjusting to his current preschool, but after a year he was comfortable and happy with his teachers and peers and, most importantly, making progress socially, emotionally, and academically. Moreover, Quinn's first preschool was specifically chosen for him based on his parents' preferences and views on what would be the best option for their son's education. Quinn's parents had looked at the district preschool in the past and chose not to enroll Quinn for a number of reasons—but they gave it one more chance and took Quinn to spend the day to see how he liked it. Quinn was anxious for most of the day. It was very difficult for the teachers to communicate with him and for him to connect with the teachers or his peers. For most of the time, he hid under the tables. Needless to say, Quinn's parents did not think it was a good fit for their son or their family.

Quinn's parents now face an enormous dilemma: Do they send Quinn to a new school that they do not really like and where he is uncomfortable in order to receive the services that he needs? Or, do they forgo special education services and keep Quinn in his current setting—one that was specifically chosen for him and in which he is thriving?

There is a classic and inherent tension in state-run education systems between the rights of parents to direct the education of their children and the rights of the state to direct the education of its citizens.[3] Compulsory education laws and a few major US Supreme Court decisions[4] have addressed this tension as it applies to most of the school-age population,[5] but these laws and decisions do not typically extend to preschool education.

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[3] *See* AMY GUTMANN, DEMOCRATIC EDUCATION (rev. ed. 1999); JOHN DEWEY, DEMOCRACY AND EDUCATION (New York: WLC Books 2009) (1916).

[4] *See* cases cited *infra* notes 42, 50, 58.

[5] *See id.; see also* Melodye Bush, EDUC. COMM'N OF THE STATES, *Compulsory School Age Requirements* (Apr. 2009), http://www.ecs.org/clearinghouse/80/44/8044.pdf.

Because of this, parents almost exclusively control the education of their preschool-aged children with little or no state interference.[6] Even when there are laws that address preschool education, there is no clear direction for how to address issues unique to preschool settings.

For example, under the Individuals with Disabilities Education Act (IDEA), the federal government mandates that schools receiving federal funds identify and serve all children ages three to five who qualify for special education services.[7] The IDEA also requires that all eligible children be provided a free and appropriate public education (FAPE) in the least restrictive environment (LRE), which means that the child should be educated with nondisabled peers to the greatest extent possible.[8] However, determining the LRE for a preschooler is a difficult task because there is no "typical" education setting for preschoolers equal to that of the primary and secondary levels.[9] Instead, there are several different preschool settings that may adequately prepare children for kindergarten.[10] In addition, when determining the LRE for a preschooler who qualifies for special education services, there is uncertainty as to whether the parents or the school should be making such a determination. These issues create uncertainty as to how situations like the one faced by Quinn's parents should be resolved.

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[6] *See infra* notes 152-53.

[7] *See* 20 U.S.C. § 1412(a) (2006) ("A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions"); *id.* § 1412(a)(1) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive"); *id.* § 1412(a)(5) ("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.").

[8] *See id.* § 1412(a)(5).

[9] *See generally* Theresa M. Demonte, *Finding The Least Restrictive Environment For Preschoolers Under The IDEA: An Analysis And Proposed Framework*, 85 WASH. L. REV. 157 (2010).

[10] *See* Alison Gopnik, Op-Ed., *Your Baby is Smarter than You Think*, N.Y. TIMES, Aug. 16, 2009, at WK10.

Preschool special education is fraught with uncertainties like those presented above. As a result, parents and schools inevitably must face and make many tough decisions. Specifically, what is the LRE and who makes that determination? Parents have retained much freedom of choice in the education of their children at the preschool level, but if the school is solely responsible for determining the LRE, then parents are necessarily stripped of the right to choose how, when, where, and if their child attends preschool. Does acceptance of an IEP remove from the parent that freedom of choice? And, if so, should it? Early childhood education and intervention is pivotal in the development of children and can have a huge impact on children's later educational success, especially for special education students.[11] Because early childhood education can have such a massive effect on the individual, the family, and the school, it does not make sense to give either the state or the parent total control. Thus, Congress can best address this issue by amending the IDEA to include either a clear set of standards for determining when a specific preschool will be suitable for delivering special education services or a requirement that states adopt clear standards that do the same.

This article addresses some of these ambiguities and explores the tension between parents and the state at the preschool level. First, it presents and analyzes competing theories regarding parent versus state control of education, with a broad, more philosophical focus. Second, it provides a brief history of the federal system of special education in the United States, focusing specifically on the three- to five-year-old preschool age group. Then, it provides a more in-depth discussion, using relevant information and arguments from the previous sections, of the special education issues

[11] *See* Leslie J. Calman & Linda Tarr-Whelan, *Early Childhood Education for All: A Wise Investment* (Apr. 2005), http://web.mit.edu/workplacecenter/docs/Full%20Report.pdf (recommendations arising from "The Economic Impacts of Child Care and Early Education: Financing Solutions for the Future," a conference sponsored by Legal Momentum's Family Initiative and the MIT Workplace Center 2005).

that arise in the unique system of preschool. The article also addresses the importance of early childhood education, especially in the special education context, to make clear that a solution to the issues presented is both necessary and desirable. Finally, it makes informed recommendations on how the IDEA should be amended to account for both parental and state interests in order to clear up the uncertainties that currently exist.

II. WHO SHOULD DIRECT AND CONTROL EDUCATION?

This fundamental question lies at the heart of Quinn's dilemma. As federal and state governments have become increasingly involved in the education process, this question has become more prevalent and complex. First, there exists a philosophical argument regarding the ever-present tension between parents and the state in controlling education. This argument is especially applicable in democratic states because of the extreme importance of education in a democratic society. There is also a legal argument regarding the right to care, custody, and control of one's child—as recognized by the federal judiciary—and the interaction of this right with public education to consider. Although neither the philosophy nor the cases are directly tied to preschool special education, each illustrates the tension between the rights of parents and the state in directing education. The philosophical argument analyzes this tension in the broadest sense because it considers the ideal balance for a democratic state. The cases and legal arguments illustrate that courts can address controversies as they arise to provide relief for individuals, and sometimes classes of people, through which common law and precedents are created. But, the philosophical and legal arguments are not sufficient to resolve the ambiguities that continue to exist. The common law and legal precedents are inconsistent, and judgments sometimes directly contradict one another. Similarly, great philosophers and legal minds have been unable to discern static boundaries

regarding where the parents' rights end and where the states' rights begin, and the debate has been a constant fixture in the education community.[12]

A. The Importance of Education in a Democratic Society—A Philosophical Argument

The philosophical argument regarding the need and importance of education in a democratic society can be traced back to the roots of democracy itself: ancient Greece. In fact, the Spartans were one of the first societies to impose a system of public education on their youth.[13] The Spartan government removed boys from the home at age seven to live and learn in the public education system[14] because the Spartan education system's goal was to create a "well-drilled military machine composed of soldiers who were 'obedient to the word of command, capable of enduring hardships and victories in battle.'"[15] Philosopher Amy Gutmann describes such a system as a "family state."[16] A family state is one in which the state completely and totally controls the education of all children in order to guarantee societal harmony.[17] Under this theory, "unless children learn to associate their own good with the social good, a peaceful and prosperous society will be impossible" to maintain.[18] This theory, and those that follow, rest on the notion that education is imperative for a healthy democracy because the electorate must be able to make an educated decision and discern among competing ideas for a democracy to properly function. This

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[12] MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION 62 (Pearson Educ., Inc. ed., 2d ed. 2006).
[13] *Sparta Reconsidered Education*, ELYSIUMGATES.COM, http://elysiumgates.com/~helena/Education.html (last visited Oct. 7, 2011).
[14] *The Legacy of Ancient Greece, Spartan Education,* CSUPOMONA.EDU, http://www.csupomona.edu/~plin/ls201/greece4.html (last visited Dec. 17, 2011).
[15] *Id.* (quoting PETER LEVI, THE GREEK WORLD 91 (1991)).
[16] GUTMANN, *supra* note 3, at 22–28. This type of system was first recognized by Plato. Plato supports such a system, and it is from Plato's writings that Gutmann makes her argument.
[17] *See id.*
[18] *Id.* at 23.

connection between education and democracy has received much attention from philosophical education scholars, such as John Dewey,[19] and its importance is the topic of much scholarship and thought.[20] In the "family state," children are taught that the current society is the best option, so when faced with a decision among competing ideals in democratic elections, the children will most highly value their current system and vote accordingly.

But, this theory has some drawbacks. Because the United States is a heterogeneous society, it would be almost impossible for the state to teach only one set of morals and values, or to even determine what would constitute such a set. Flowing from this quandary, it would also be nearly impossible to implement such a system unless the state was able to remove children from their parents' custody because, as part of an established society, most parents already have set morals and beliefs that they would like to pass on to their children.[21] Moreover, such an invasive form of education would almost certainly be an encroachment on parents' rights because the state's morals and values are probably not the same as the parents' in many instances. Therefore, the "family state" would be neither a desirable nor a practical model for most families or the states.

At the opposite end of the spectrum, Gutmann describes a theory known as the "state of families."[22] This theory solidly rests on the presumption that parents will always do what is in the best interest of their children, and thus places total control of education in the hands of parents.[23] In doing so, it

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[19] *See* DEWEY, *supra* note 3.

[20] *See generally* MICHAEL APPLE, ASS'N FOR SUPERVISION & CURRICULUM, DEMOCRATIC SCHOOLS, (June 1995); Edward L. Glaeser, *Want a Stronger Democracy? Invest in Education*, N.Y. TIMES, Nov. 3, 2009, http://economix.blogs.nytimes.com/2009/11/03/want-a-stronger-democracy-invest-in-education/.

[21] APPLE, supra note 20, at 25.

[22] *See id.* at 28–33. This theory is recognized and supported by John Locke. Other Catholic theologians also support this theory, as they believe the family is the most important actor within a child's life.

[23] *Id*. at 28.

permits "parents to predispose their children, through education, to choose a way of life consistent with their familial heritage."[24] Various current issues and events highlight what some see as the dangers of such an education style. For example, consider the recent interest in and investigation of Mormon compounds. The lifestyle lived and preached at these compounds illustrates how a "state of families" system would look and operate because the children are exclusively educated by their immediate family and those who have identical beliefs.[25] The children in these Mormon compounds are essentially isolated from exposure to competing ideas and lifestyles. So, although this theory is appealing because most parents cherish the opportunity to share their wisdom, knowledge, and lifestyle with their children, it also has extreme consequences in a democratic society dependent upon a well-educated electorate that can discern among competing notions and ideas.

Another theory, the "state of individuals," attempts to balance these interests.[26] Gutmann describes this theory as one that allows children to make their own choices without the influence of people who have already had the opportunity to live their own lives and make their own determinations.[27] This theory also responds to the criticisms of the "family state" and the "state of families" theories by elucidating two goals: opportunity and neutrality.[28] Opportunity means that children should be presented with all options of what a good life looks like and must be given every opportunity to choose freely among them.[29] Neutrality means that

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[24] *Id.*
[25] Miguel Bastillo, *400 Kids Removed From Compound*, SEATTLE TIMES, Apr. 8, 2008, at A4.
[26] *See* GUTMANN, *supra* note 3, at 15. John Stewart Mill wrote extensively on "the state of individuals," and described this theory as the best system of education. This theory is also supported by more current philosophers who cite to similar arguments of Kant and Bentham.
[27] *See id.* at 33–34.
[28] *Id.* at 34.
[29] *Id.*

throughout this process, children must be totally insulated from all cultural biases and prejudices.[30] The essence of this theory is that children should be exposed to any and all notions, ideas, and ideals, and that exposure should be done in such a way that does not impart any bias towards one or another. This sounds ideal because it would allow children to develop critical analytical skills and shield them from stereotypes, which allows for a more diverse and accepting society. However, it is nearly impossible to implement such a system, and it may not even be wise to do so because both parents and the state "have a legitimate interest in passing some of their most salient values onto their children."[31]

Finally, Gutmann describes her own theory that attempts to account for the shortcomings of the others: the "democratic state of education."[32] The premise of this theory is that each of the other theories contains a partial truth.[33] Although none of the theories are sufficient on their own to establish independent educational authority, a combination would capture the benefits or truths of each. Therefore, the "democratic state of education" theory "recognizes that educational authority must be shared among parents, citizens, and professional educators even though such sharing does not guarantee that power will be wedded to knowledge, that parents can successfully pass their prejudices on to their children, or that education will be neutral among competing conceptions."[34]

Gutmann emphasizes that this sharing of authority is critical in democratic states because it allows parents to predispose their children to particular morals and values, but does not insulate children from competing points of view.[35] This teaches them to critically analyze and deliberate

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[30] *Id.*
[31] *Id.* at 37.
[32] *See id.* at 41–47.
[33] *Id.* at 42.
[34] *Id.*
[35] *Id.* at 44.

among competing ideas.[36] Moreover, this authority sharing appreciates the state's desire to impart onto children a preference for democracy so that the electorate understands and exercises its democratic responsibilities.[37] This theory seems to be an ideal compromise between the competing interests, and, conceptually, it is. However, giving practical effect to this theory has proven difficult because parents and the state are continually struggling for additional influence and control over education.

The philosophical debate among these competing theories provides a framework for analyzing and criticizing the varying jurisprudence that has developed in the attempt to resolve this ever-present tension to which "there is no simple solution."[38] Although preschool education may not seem to be directly implicated by this discussion, it is. The tension between parental control and state control begins at birth, and if the state is allowed to exercise more control early on in the child's life, it has an even greater opportunity to impact the child.

B. The Constitutional Right of the Parent to the Care, Custody, and Control of One's Child—A Legal Perspective

The Federal Constitution does not grant children a right to education, nor does it explicitly grant parents a right to control the education of their children. Rather, the power to regulate and control systems of education is derived from the Tenth Amendment of the US Constitution.[39] Each state's constitution grants the right to education, which is further augmented by state compulsory education laws.[40] Thus, ultimate control over systems of education is reserved to the fifty states. States have the power to regulate and control their own systems of education, and at times these regulations

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[36] *Id.*
[37] *Id.* at 45.
[38] *Id.* at 32.
[39] U.S. CONST. amend. X.
[40] *See* MICHAEL REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS (2009); Bush, *supra* note 5.

conflict with the desires of parents. In addressing this conflict, the US Supreme Court has determined that the states cannot regulate systems of education any way they see fit because parents have constitutional rights to direct the care, custody, and control of their children.[41] However, these rights are not explicitly granted. Instead, they are gleaned from the rights that are specifically enumerated in the Bill of Rights and those that are natural to all persons.

One of the first major challenges to the power of states to control education came in *Pierce v. Society of Sisters.*[42] The Oregon state legislature passed a compulsory attendance law that required parents to send children to public school or face a misdemeanor conviction.[43] The US Supreme Court determined that by requiring students to attend public schools, Oregon infringed upon parental rights that are protected by the US Constitution. Despite the states' legitimate interest in regulating education, the Court held that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for future obligations."[44] The real issue in *Pierce* was not about requiring education through compulsory attendance laws, but about requiring education within the public school system, which would eliminate religious education institutions like the Society of Sisters. Eliminating these institutions would essentially give the states a monopoly over education, which, in conjunction with compulsory attendance laws, would severely limit a parent's opportunity to direct a child's education.

The Court did not decide, and arguments were not made, on other issues of regulation, including the state's right to

> regulate all schools, to inspect supervise and examine them, their teachers and pupils; to require that all children attend some school,

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[41] *See infra* text accompanying notes 42–66; U.S. CONST. amends. V, XIV.
[42] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
[43] *Id.* at 530.
[44] *Id*. at 535.

> that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[45]

The Court was also unclear about exactly where in the Constitution this right is derived because the right is not explicitly articulated. Some scholars posit that the right is derived from the Fourteenth Amendment's guarantee of liberty, while others maintain that the right is protected by the First Amendment's guarantee of freedom of speech or religion.[46]

Finally, consider an alternative analysis of the outcome of *Pierce*. Some scholars believe that the decision in *Pierce* actually rests not on the individual rights of parents, but on the desire to limit the reach of the states.[47] These scholars assert that if states monopolize education, then there is no competition, and the states have the unfettered, and possibly dangerous, "ability to mold the young."[48] Thus, the decision is not based on the existence of a parental right, but on the desire to limit possible state prerogatives to indoctrinate children.[49] If this analysis is correct, it further emphasizes the tension that exists between states and parents, and is evidence of the need for controlling law that accounts for this tension by providing clear standards.

Around the same time period that *Pierce* was decided, the US Supreme Court heard two other cases dealing with state regulation of education: *Meyer v. Nebraska* and *Farrington v. Tokushige*.[50] In both of these cases, the state attempted to regulate which languages could be used for instruction in schools. In *Meyer*, Nebraska outlawed instruction in German

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[45] *Id*. at 534.
[46] MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 16 (4th ed. 2002).
[47] Mark G. Yudof, *When Governments Speak: Toward the Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 888–91 (1979).
[48] *Id*. at 891.
[49] *Id.*
[50] Farrington v. Tokushige, 273 U.S. 284, 290 (1927); Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

to any child that had not passed the eighth grade, and any teacher instructing in German would be guilty of a misdemeanor.[51] After Robert Meyer, a teacher at a private school, was convicted under this law, he challenged the statute's validity.[52] The Court held that the regulation interfered with the teacher's right to instruct, the parents' protected right to "control the education of their own," and the students' protected right to opportunities for acquiring knowledge.[53] The Court applied the rational basis test,[54] determining that the regulation was "arbitrary and without reasonable relation to any end within the competency of the state" and, as such, invalid under the liberty guarantees of the Fourteenth Amendment.[55] *Farrington* involved a similar situation in the then-Territory of Hawaii. Because the territory was not yet an independent state, the Court reached its decision under the Due Process Clause of the Fifth Amendment as applied to the federal government.[56] Each of these decisions further supported the parental right first recognized in *Pierce*, and each gave weight to the notion that this parental right extends to the education of the child.

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[51] *Meyer*, 262 U.S. at 397 (outlawing instruction in popular languages such as Spanish and French, but not outlawing ancient or dead languages).
[52] *Id.* at 396.
[53] *Id.* at 399–402.
[54] The rational basis test requires only that the regulation in question is rationally related to a governmental interest. *See* United States v. Carolene Products Co., 304 U.S. 144, 152–53 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").
[55] *Id.* at 403.
[56] The Hawaiian legislature passed Act 30, which regulated the teaching of foreign languages. The US Supreme Court affirmed the appellate court's holding that the Act violated the Fifth Amendment of the Constitution. The Supreme Court explained that the Act was an unnecessary intrusion on the rights of individuals, and there was no policy justification to support such an intrusion. *Farrington*, 273 U.S. at 47.

Most recently, challenges regarding parental rights to control the education of one's child have centered on religious convictions.[57] These challenges resemble *Pierce*, but there are also marked differences because there is no question of the mere existence of parochial schools in these cases. Instead, the issue focuses on exposing children to ideas different from those of their religious upbringing. These cases are reminiscent of Gutmann's "state of families" theory because the major argument made in these cases is that parents, not the state, should control instilling morals and values, particularly religious ones, in their children.

The US Supreme Court made one of its more famous decisions, *Wisconsin v. Yoder*, nearly fifty years after its initial recognition of parental rights in *Pierce*.[58] In *Yoder*, Amish parents challenged the state's compulsory education law beyond eighth grade, arguing that it violated their First and Fourteenth Amendment rights.[59] In a split decision, the Court ultimately concluded that the state's interest in educating children did not outweigh the parents' interest in directing the education of their children.[60] Throughout its opinion, the Court struggled to balance the competing interests of parents and the state, even though it clearly expressed that a state's interest in educating its citizens "ranks at the very apex of the function of the State."[61] On one hand, the Court recognized that parental interests in directing the religious upbringing of children have a "high place in our society" and that religious freedom has been "zealously protected, sometimes even at the expense of other interests of admittedly high importance."[62] On the other hand, the Court also recognized that

[57] *See* Michael E. Lechliter, *The Free Exercise Of Religion And Public Schools: The Implications Of Hybrid Rights On The Religious Upbringing Of Children*, 103 MICH. L. REV. 2209 (2005).
[58] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[59] *Id.* at 207.
[60] *Id.* at 234, 236–37.
[61] *Id.* at 213.
[62] *Id.* at 214.

compulsory education laws, like the one at issue in Wisconsin, "demonstrate our recognition of the importance of education to our democratic society" and supported the state's position.[63]

Finally, and most recently, in *Troxel v. Granville*, the US Supreme Court again recognized and reiterated the parental right that it determined was involved in all of these cases.[64] Although the case was not related to education, a plurality of the Court espoused the opinion that "the interest of the parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[65] Thus, this parental right is now clearly a constitutional right because the Court has consistently recognized that the right exists and is protected under the Due Process Clauses of the Fifth and Fourteenth Amendments. However, there is still much debate about what the right entails. Recall Quinn's educational dilemma. Based on these decisions, his parents have a constitutional right in his care, custody, and control. And, it is likely that the state has an interest in seeing that Quinn receives the services that he needs. However, states do not have compulsory preschool attendance laws, so it is difficult to define the interests of the state.[66] Regardless as to how the state's interest is defined, it must be weighed against the parental interest to determine whether or not the state can compel Quinn's parents to send him to a particular school.

III. A Brief History of Special Education in the United States

The IDEA and the protections and rights it provides did not always exist. It was the result of generations of hard-fought advocacy by parents and

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[63] *Id.* at 238.
[64] Troxel v. Granville, 530 U.S. 57, 71 (2000) (finding that parental rights did not extend to grandparents after paternal grandparents sought visitation rights after the death of their son, the father of the children).
[65] *Id.* at 65.
[66] *See* Bush, *supra* note 5.

educators, responsive state and federal judiciaries and legislatures, and a political climate that made the nation ripe for change. It is important to understand the genesis of this movement to fully appreciate the purposes of the current protections afforded to parents and their children and the emphasis that has been placed on early childhood and family-centered approaches throughout the evolution of our current system of special education. It is with this evolution of the law in mind that current issues must be considered if they are to be thoroughly and accurately assessed.

A. The National Campaign for Special Education

Many people throughout the United States believe that education is a right that has been granted to every child by the federal government.[67] However, the US Constitution does not explicitly grant this right; it is, instead, a power reserved to the states by the Tenth Amendment.[68] One reason for this confusion is that all fifty states currently have compulsory education laws that require children to attend school.[69] Although some states enacted compulsory attendance laws as early as the 1850s, children with disabilities were consistently excluded from the education system.[70] This intentional exclusion led parents to begin affirmatively fighting for their children's right to be educated.[71]

In the early 1900s, parents began a long battle with governmental agencies at both the state and federal levels to ensure that systems of public education no longer excluded children with disabilities.[72] Parents were on the frontlines of the battle because they witnessed and experienced the

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[67] *See generally* YELL, *supra* note 12.
[68] *Id.;* see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 93 S.Ct. 1278 (1973). Many states have also recognized an affirmative right to education under state constitutions. These rights have been established through individual challenges through what is known as educational adequacy litigation. *See* REBELL, *supra* note 40.
[69] *See* Bush, *supra* note 5.
[70] YELL, *supra* note 12, at 62.
[71] *Id.* at 63.
[72] *Id.*

impact that receiving little or no education had on their children.[73] The government's first major response was the White House Conference of 1910.[74] The goal of this conference was to "define and establish remedial programs for children with disabilities or special needs," and it resulted in a significant increase in the number of special segregated classes and support services within public schools.[75]

While segregated classrooms were less isolated than completely independent institutions, there remained a major problem: children with disabilities and special needs were still totally segregated from mainstream classrooms.[76] Moreover, support for special education services was waning in the face of both the financial ramifications of the Great Depression and the increasingly prevalent desire to establish and maintain an orderly citizenry that was not accepting of different behaviors and abilities.[77] As a result, students with disabilities were further segregated from the mainstream student population and ended up in environments that were more similar to custodial placements in institutions than to classroom settings.[78]

Again, parents began to fight back. In 1933, five mothers created the first special education advocacy group in Ohio and had great success in advocating for their children within the school system.[79] Following this model, small groups began to spring up throughout the states in the 1930s and 1940s, and finally national organizations began to assemble in the 1950s.[80] The National Association for Retarded Citizens, the Council for Exceptional Children, and the Association for Persons with Severe

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[73] *Id.* at 63–64.
[74] *Id.* at 63.
[75] *Id.*
[76] M.A. WINZER, HISTORY OF SPECIAL EDUCATION FROM ISOLATION TO INTEGRATION 370 (1993).
[77] *See id.*
[78] YELL, *supra* note 12, at 64.
[79] *Id.*
[80] *Id.*

Handicaps all greatly contributed to the national special education campaigns, but the major force was the group of parents that engaged in incredible advocacy for their children.[81]

B. Judicial Response

The next major stepping-stone in the move for a more complete special education system was intimately intertwined with the Civil Rights Movement and was also dependent upon the judiciary.[82] Following *Brown v. Board of Education*,[83] which established that racially segregated educational facilities are inherently unequal, the courts decided two major cases in 1972 that greatly extended equal opportunities to special education students. In each of these cases, the attorneys used the precedent of *Brown* to argue that the current system violated the Equal Protection Clause of the Fourteenth Amendment.

First, *Pennsylvania Association for Retarded Citizens v. Pennsylvania* established four critical points: (1) all children with cognitive impairments are capable of benefitting from an education program; (2) education encompasses more than just academic experiences; (3) students with cognitive impairments cannot be denied access to a free education because Pennsylvania agreed to provide a free education to all students; and, finally, (4) the earlier students with cognitive impairments are identified and served, the greater gains they can expect academically and socially.[84] This last point is probably the most important for the purposes of preschool special education because this concept naturally leads to the extension of services at the preschool age. Ultimately, the parties resolved the case by a consent agreement that required that children with cognitive impairments between six and twenty-one years of age must be provided a free education. The

[81] *Id.* at 64–65.
[82] *Id.* at 66.
[83] Brown v. Board of Education, 347 U.S. 483 (1954).
[84] *See* Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972).

parties also agreed that it was most desirable to educate these children in a program like those in which their peers were enrolled, which was a precursor description of the LRE.[85] However, this case had no impact on the preschool-age population.

Next, in the same year, the *Mills v. Board of Education*[86] court certified a class that represented more than eighteen thousand students with various disabilities who had been denied access to a free education.[87] Under the Due Process Clause of the Fifth Amendment to the US Constitution, the court found that because the District of Columbia provided a free education to all students, the complete exclusion of students with disabilities was unconstitutional, much like the exclusion of students on the basis of race.[88] The decision in this case was extremely important because the court outlined satisfactory due process procedures for labeling, placement, and exclusion of students with disabilities.[89] This later became the framework of the first federal legislation addressing special education.[90]

These cases provide insight into the basis of the movement because they arose out of notions of equal opportunity and protection—ideals nearly identical to those of the Civil Rights Movement of the 1950s and 1960s.[91] These ideals ultimately formed the basis for improving access to education for all children. However, because most states do not require preschool attendance or even provide free education to all students at the preschool level,[92] a due process argument would likely not be successful in most states

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[85] E.L. LEVINE & E.M. WEXLER, P.L. 94-142: AN ACT OF CONGRESS 39 (1981).
[86] Mills v. Board of Educ., 348 F. Supp 866 (D. DC 1972).
[87] *Id.* at 868; YELL, *supra* note 12, at 68.
[88] *Mills*, 348 F. Supp. at 875–76.
[89] *Id.* at 880–81.
[90] S*ee* J.J. Zettel & J. Ballard, *The Education For All Handicapped Children Act of 1975 (P.L. 94-142): Its History, Origins, and Concepts*, *in* SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 11–22 (Joseph Ballard et al. eds., 1982).
[91] YELL, *supra* note 12, at 67.
[92] *See generally* W. STEPHEN BARNETT ET AL., STATE OF PRESCHOOLS (National Inst. for Early Educ. Research 2009), *available at* http://nieer.org/yearbook/pdf/yearbook.pdf.

or at a national level. Nevertheless, this issue was ultimately circumvented by federal special education legislation.

C. Federal Legislative Response

Congress had already begun responding to the push for education for all children in the late 1950s and early 1960s by passing legislation that provided funds and helped to train educators of children with cognitive impairments.[93] However, it was not until 1965, when Congress passed the Elementary and Secondary Education Act (ESEA), that the federal government began to play a major role in education.[94] Up until this point, states had generally controlled education, as it is a reserved power under the Tenth Amendment. In order to require states to comply with the ESEA, Congress used its "power of the purse," the Taxing and Spending Clause in the Constitution, which is the basis for all current legislation related to education.[95] Essentially, Congress would not appropriate federal education funds to states that refused to comply with federal education legislation. Ultimately, Congress responded by progressively passing a series of federal laws, which at first made preschool special education optional (and were more lax on other points as well), but later mandated that states serve this population of children.

Soon after the passage of this initial education legislation, Congress amended the ESEA and replaced Title VI of that Act with the Education of the Handicapped Act (EHA) of 1970.[96] It also passed Section 504 of the Rehabilitation Act of 1973, which was the first civil rights law to protect the rights of persons with disabilities, and the Education Amendments of

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[93] YELL, *supra* note 12, at 69.
[94] Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. ch.70 (2002)).
[95] U.S. CONST. art. 1, § 8, cl. 1.
[96] Ann K. Wooster, Annotation, *What Constitutes Services that Must be Provided by Federally Assisted Schools Under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C.A. §§ 1400 et seq.)*, 161 A.L.R. FED. 1 (2000).

1974,[97] which amended the EHA with the purpose of requiring that all states receiving federal funds set a goal of providing educational opportunities to all children with disabilities.[98] All of this legislative action ultimately led to the passage of the Education for All Handicapped Children Act of 1975 (EAHCA)[99]—"the most significant increase in the role of special education to date."[100]

The EAHCA laid out five rights for all students with disabilities that have carried through to modern legislation: (1) nondiscriminatory testing, evaluation, and placement procedures; (2) education in the least restrictive environment; (3) procedural due process; (4) a free education; and (5) an appropriate education.[101] In drafting this legislation, Congress sought to codify the case law that was already controlling—including *PARC* and *Mills*—and the connection between these five rights and those laid out in *PARC* (referenced above) is very clear.[102] It is from this act that FAPE and LRE are derived.[103] While the EAHCA seems to require serving

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[97] *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2002)); Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified as amended in scattered sections of 20 U.S.C.).

[98] YELL, *supra* note 12, at 69–70.

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

[100] YELL, *supra* note 12, at 70.

[101] *Id.* at 71; *see also* Education for All Handicapped Children Act of 1975 (EAHCA).

[102] KATHARINE T. BARTLETT & JUDITH WELCH WEGNER, CHILDREN WITH SPECIAL NEEDS, 174 n.10 (Transaction Publishers 1987) ("The legislative history of the EAHCA is replete with references to PARC and Mills."); *see, e.g.,* S. REP. NO. 94-168, at 8 (1975), *reprinted* in 1975 U.S.C.C.A.N 1425, 1433 ("[O]ver the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy."); H.R. REP. NO. 94-322, at 3-4 (1975) (discussing PARC, Mills, and various state court decisions).

[103] *See* FESTUS E. OBIAKOR & SANDRA A. BURKHARDT, CURRENT PERSPECTIVES IN SPECIAL EDUCATION ADMINISTRATION 32 (2007) ("The EAHCA mandated the core guarantees that undergird today's IDEA: FAPE for all children with disabilities in the least restrictive environment (LRE) determined through non-biased assessment procedures and the development of an IEP for each child.").

preschoolers, the Act was deceptive because it actually allowed states to opt out of this requirement. For example, they could do so if providing services to preschoolers was inconsistent with state law or practice and the state was not abandoning services previously provided.[104] This was a point of much contention during the debate over the EAHCA; as a consequence, the House of Representatives proposed a version that mandated services for all children aged three to five.[105] However, despite the extensive testimony on the positive and lasting effects of early intervention, Congress decided that the increased costs of providing services to preschoolers outweighed the potential gains, so it dropped the preschool mandate.[106] Several senators dissented, emphasizing that despite the initial cost of providing services, the savings realized over the life of a child who benefits from early intervention justify mandatory preschool services.[107]

Ten years after the EAHCA was enacted, only twenty-one states and the District of Columbia provided services to preschoolers with disabilities.[108] Thus, a significant portion of children who needed special education services at the preschool level were not receiving them. Congress reacted in 1986 by amending the EAHCA to provide greater incentives to states that

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[104] *See* S. Rep. No. 94-168, at 18–19 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1442–43 (establishing the reasons for exemptions, but limiting exemptions to only those states that did not try to abandon providing services).

[105] Five senators dissented and made the argument that failing to provide a full mandate "diluted" the commitment of the Act to those children. They also cited studies showing the importance of early intervention. *Id.* at 81–82, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1479–80.

[106] *Id.*

[107] *Id.* at 81 ("We are cognizant of the concerns of the States regarding their financial capacity to provide full education services to this group of children. Nevertheless, we feel that it is imperative to point out that the benefits of early identification and education, both in terms of prevention of future human tragedy, and in the long-term cost effectiveness of tax dollars, are so great as to justify continued emphasis upon preschool education for handicapped children.").

[108] H.R. Rep. No. 99-860, at 42 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2401, 2444 ("Currently all states participate in that state grant program for children 6 to 17, but as of July 1985 only 21 states, 4 territories, and the District of Columbia served handicapped children from age 3.").

serve preschoolers immediately and to impose penalties on those states that failed to do so by 1991.[109]

In the same year, Congress reaffirmed its commitment to early intervention with the passage of the Infants and Toddlers with Disabilities Act.[110] This act essentially expanded coverage of the EAHCA to children from birth through two years of age.[111] However, a key difference between the Infants and Toddlers with Disabilities Act and the EAHCA was that infants and toddlers were provided services in the home to the maximum extent possible, while children under the EAHCA received services in the school.[112] This explicit directive on where services were provided for infants and toddlers eliminated many of the issues that plagued the system for three- to five-year-olds. Similarly, an explicit directive in the IDEA or by the states as to where preschoolers are to be educated would eliminate many of the uncertainties that surround preschool special education.

In 1990, the next major change came to federal special education legislation: Congress reauthorized and renamed the EAHCA.[113] Although

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[109] Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, § 201, 100 Stat. 1145, 1156 (1986) (current version at 20 U.S.C. § 1419 (2006)) ("[T]he Secretary shall make a grant to any State which . . . has a State plan . . . which includes policies and procedures that assure the availability under the State law and practice of such State of a free and appropriate public education for all handicapped children aged three to five, inclusive."); Pascal L. Trohanis, *An Introduction to PL 99-457 and The National Policy Agenda for Serving Young Children with Special Needs and Their Families*, *in* POLICY IMPLEMENTATION & PL 99-457: PLANNING FOR YOUNG CHILDREN WITH SPECIAL NEEDS 1, 13 (James J. Gallagher et al. eds., 1989) ("Failure to comply will result in loss of the new preschool grant money, as well as funds generated under Part B of the State Plan formula for this population group, as well as designated EHA discretionary grants, including those for research, training, and demonstration activities.").

[110] Amendments to the Education of the Handicapped Act, Pub. L. No. 99-457, 100 Stat. 1145 (codified as amended at 20 U.S.C. §§ 1431–44 (2006)).

[111] YELL, *supra* note 12, at 72.

[112] *Id.* at 72; 20 U.S.C. § 1436 ("[A] statement of the natural environments in which early intervention services will appropriately be provided, including a justification of the extent, if any, to which the services will not be provided in a natural environment.").

[113] YELL, *supra* note 12, at 73–74.

most of the law remained the same, the new moniker, the Individuals with Disabilities Education Act (IDEA), reflected an underlying change in society's view of individuals with disabilities. Most notably, "people first" language[114] was used throughout the IDEA—the term "handicap" was replaced with the term "disability"—and transition services were added to aid the student in smoothly transitioning into the larger community upon graduation.[115] Finally, in 1997, Congress reauthorized the IDEA and major substantive changes were made: first, the 1997 amendments required that all students, including preschoolers, make demonstrable academic improvements.[116] Second, and possibly more relevant to the current discussion, the amendments explicitly included an LRE requirement and affirmed its applicability to preschoolers.[117] Previously, the LRE requirement was only included in the implementing regulations, which were published by the US Department of Education, and did not carry the full force of enacted legislation.[118]

D. The Current Setting of Federal Special Education Legislation

In 2004, Congress made its most recent amendments to the IDEA, and these amendments reflect yet another changing focus on the integral role of

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[114] "People first" language means that the person is considered before the disability when referring to an individual. For example, instead of saying the "autistic child," one would say the "child with autism." It is more respectful, and it is meant to emphasize the person as individual independent of their disability.
[115] YELL, *supra* note 12, at 73.
[116] *Id.* at 74.
[117] Jean B. Crockett, *The Least Restrictive Environment and the 1997 Amendments to the Federal Regulations*, 28 J. L. & EDUC. 543, 552 (1999) ("There is no definition given in this section for the term LRE, but a cross-reference is made to Sec. 1412(a)(5)(A) where the term now appears, for the first time, within the text of the law. . . . The words 'least restrictive environment' have officially been transferred from the federal regulations into the statute."); *id.* at 555–56 ("References to the LRE provisions can be found explicitly in several sections of the reauthorized federal code. . . . A reference that these LRE provisions apply to preschool children with disabilities now appears in [then] Sec. 300.552.").
[118] *Id.* at 552.

the family in education. Congress again emphasized the importance of tailoring educational programs to prepare students with disabilities to live their lives integrated into the community.[119] Such a goal entails education not just in the traditional sense, but also in the practical and functional sense. In its findings, Congress recognized that this necessarily includes meaningful participation on the part of families.[120]

The concept of family involvement is also evident in the IDEA itself, and it seems to be more valued at younger ages. Currently, under the IDEA, children ages three through twenty-one are served under Part B, while children from birth through age two are served under Part C.[121] Each part emphasizes the importance of family involvement, but that emphasis is more clearly ascertainable under Part C, which mandates the creation of an individualized family service plan (IFSP).[122] An IFSP includes statements regarding the strengths and weaknesses of the family that relate to the development of the child, as well as statements of expected outcomes for both the child and the family as a whole.[123] Moreover, as mentioned above, the preferred setting for delivery of services is the home.[124]

However, for preschool students under Part B, much of the emphasis on family is removed, and the focus is on the individual child through the creation of an IEP.[125] An IEP is required for each student identified as having a disability.[126] Creation of an IEP falls to a team that includes the

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[119] 20 U.S.C. § 1400(c)(1) (2006) ("Improving educational results of children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.").
[120] *Id.* § 1400(c)(5)(B).
[121] The chapter is divided into subchapters II and III. Subchapter II covers children ages three to twenty-one, and subchapter III covers children ages birth through two. Note that subchapters II and III are commonly referred to as Parts B and C. *See* 20 U.S.C. ch. 33.
[122] *Id.* § 1436.
[123] *Id.* § 1436(d).
[124] *See id.* § 1472.
[125] *See id.* §§ 1411–1419, 1431–1444.
[126] *Id.* § 1414(d)(1)(A)(i).

parent, the regular education teacher, the special education teacher, a representative of the LEA, other qualified individuals that may have specialized knowledge about the child, and, when appropriate, the child.[127] The teacher who writes the IEP generally conducts the meetings. The teacher begins by reviewing the child's "present levels of academic achievement and functional performance, including . . . for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities."[128] Then, the team discusses the child's annual measurable goals and the methods that will be used for their measurement.[129] Finally, and most importantly for the child, as required by the IDEA, the team reviews the special education and related services that will be provided to aid the child in (1) "advanc[ing] appropriately toward attaining the annual goals," (2) being "involved in and mak[ing] progress in the general education curriculum," (3) "participat[ing] in extracurricular and other nonacademic activities," and (4) being "educated and participat[ing] with other children with disabilities and nondisabled children in the activities described" in the IEP.[130] The IEP team also contemplates the extent to which the child will be educated in an environment that does not include his nondisabled peers—essentially, the team should note why the child is not being educated in the LRE at all times.[131]

Although the parents and the child are included in the annual IEP meeting, the presumptive LRE becomes a general education classroom with nondisabled peers, and FAPE is presumptively provided at state-run public schools.[132] If parents believe that the IEP and the school are failing to provide FAPE in the LRE, they retain the right to challenge the adequacy of the IEP and its implementation through mediation or a due process

[127] *Id.* § 1414(d)(1)(B).
[128] *Id.* § 1414(d)(1)(A)(i)(I)(bb).
[129] *Id.* § 1414(d)(1)(A)(i)(II) –(III).
[130] *Id.* § 1414(d)(1)(A)(i)(IV).
[131] *Id.* § 1414(d)(1)(A)(i)(V).
[132] *See* 34 C.F.R. § 300.114 (2006).

hearing.[133] If these remedies prove unsatisfactory, parents have a right of civil action in state or federal court on behalf of their child, as well as an independent action.[134] Moreover, parents may seek alternative placements for their child in private settings, and the school district may be required to cover those expenses.[135] Private placements like this have been the result of much litigation and are beyond the scope of this piece;[136] however, there is a certain level of interaction between private placement and preschool that will be discussed briefly below. Thus, although the focus swings slightly away from the family and towards the child as an individual, the parents retain significant influence and control over their child's education.

If you remember, Quinn is three-and-half-years-old, so he falls under Part B of the IDEA. Therefore, the IEP team worked together to create an IEP for Quinn—not an individualized family service plan—and Quinn's parents have the right to challenge the adequacy of that IEP.[137] However, because Quinn falls under Part B, it is also true that Quinn is to be served in the LRE and provided FAPE—which would presumably be in a regular education classroom with his nondisabled peers at a state-run public school. Although the guarantees of FAPE and the LRE are meant to protect children and provide them with the most meaningful and beneficial education, Quinn's parents fear that these guarantees will do the opposite. They fear that Quinn will not benefit, grow, or learn appropriately in the district preschool because the family was uncomfortable with the district preschool setting and Quinn is already making strides socially, academically, and emotionally in his current preschool. But should Quinn's parents be given deference in

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[133] 34 C.F.R. § 300.506–597 (2011); 20 U.S.C. § 1415(b)(5)–(7) (2006).
[134] 20 U.S.C. §1415(i)(2); *see also* Winkelman v. Parma City Sch. Dist., 500 U.S. 516 (2007).
[135] *See* 20 U.S.C. §1415(k).
[136] Several cases have arisen regarding private placement. Most recently, in *Forest Grove School District v. T. A.*, the Supreme Court held that parents are entitled to reimbursement for private school placement when the IEP fails to meet FAPE requirements. Forest Grove Sch. Dist. v. T. A, 129 S.Ct. 2484, 2496 (2009).
[137] Crockett, *supra* note 117.

making this determination? Or, was it Congress's will that states are supposed to make the decision, independent of the preferences of parents? This brings us back to the ever-present tension discussed in Part I, but it also illustrates some of the specific conflicts that can arise in the context of preschool special education.

IV. HOW THE UNIQUE SYSTEM OF PRESCHOOL COMPLICATES DELIVERY OF SPECIAL EDUCATION

Special education for preschoolers is delivered in accordance with Part B of the IDEA.[138] This means that preschoolers are entitled to a free and appropriate public education (FAPE) in the least restrictive environment (LRE). However, for numerous reasons, delivering these services to preschoolers is not as straightforward as delivering them to their school-age counterparts. First, as previously noted, there are no compulsory education laws for preschoolers in the United States, so requiring students to attend preschool to receive special education services necessarily encroaches upon a decision-making process that is currently reserved for parents. Second, there is great difficulty in determining the LRE for preschoolers because of the lack of a presumptive general education environment and curriculum.[139] Finally, related to both the first and second points, because there are no compulsory attendance laws for preschool, an expansive system of state-run preschools has not yet developed. As a result, preschool students are not only compelled to attend public schools, but they are also often compelled to attend certain private schools.

A. The Importance of Early Childhood Education

First and foremost, the preschool system is unique because of the incredible importance of early childhood education, especially for children who have special education needs. Recently, several states and the federal

[138] *See* 20 U.S.C. § 1414(d)(1)(A)(i).
[139] *See* Demonte, *supra* note 9, at 158.

government have recognized the critical importance of early learning and have implemented state and federal programs that seek to address the problems present in the current system, including a push for universal, or compulsory, preschool programs.[140] It is becoming clearer to educators and scientists that these formative preschool years can have an enormous impact on the future successes of all children both academically and economically.[141] This general notion seems to be even more true for preschoolers with special needs, whose ability to work and function within society may depend upon early intervention and services.

Countless studies outline the benefits of early intervention and early childhood education.[142] These studies tend to show that the earlier children are identified and provided services, the more likely they are to make greater gains educationally, socially, and emotionally.[143] The outcomes of early intervention are not only significant for individuals and families; early intervention can also save the state thousands of dollars over the lifetime of the child because a child who makes greater gains earlier will need fewer services and supports later.

To illustrate the impact of early identification and intervention, it is helpful to examine data recently released on the potential impacts that early

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[140] *See State Profiles*, PRE-K NOW, http://www.preknow.org/resource/profiles/ (last visited Dec. 17, 2011); Rachel Ryan, *Obama's Universal Preschool Book*, FRUM FORUM (July 27, 2010), http://www.frumforum.com/obamas-universal-preschool-push.

[141] *See* Deborah Lowe Vandall, et al., *Do Effects of Early Child Care Extend to Age 15 Years? Results From the NICHD Study of Early Child Care and Youth Development*, *in* 81 CHILD DEVELOPMENT 737-756 at 2 (May 13, 2010), *available at* http://nieer.org/pdf/Effects_of_Early_Child_Care_Extend_to_Age_15.pdf ("[A]ssociation between quality and achievement was mediated, in part, by earlier child care effects on achievement"); Julia B. Isaacs, *Impacts of Early Childhood Programs*, Brookings Institute (Sept. 2008), http://www.brookings.edu/papers/2008/09_early_programs_isaacs.aspx; David Leonhardt, *The Case for $320,000 Kindergarten Teachers*, N.Y. TIMES, July 27, 2010, http://www.nytimes.com/2010/07/28/business/economy/28leonhardt.html.

[142] *See* LYNN A. KAROLY ET AL., EARLY CHILDHOOD INTERVENTIONS: PROVEN RESULTS, FUTURE PROMISE 6–14 (2005).

[143] *See id.*

intervention can have for children who have been diagnosed with autism spectrum disorder (ASD).[144] The prevalence of ASD diagnoses has rapidly risen in recent years, which has garnered much attention from the education and medical communities.[145] At this point, "experts working with children with autism agree that early intervention is critical," and "the earlier that intervention begins in children's lives, the better the outcomes."[146] Because this intervention is so crucial, many studies have tried to discern exactly when and how the intervention should be conducted. Some metastudies compare the results of several others:

> These studies generally compare children who are older than four or five years with those who are younger than four or five years. One study comparing children younger than three years with those older than three years did not find age differences in improvement, which may suggest that four years of age is young enough to lead to significant gains.[147]

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[144] ASD encompasses a broad number of conditions characterized by widespread abnormalities of social interaction and communication, repetitive behaviors, and restricted interests. At one end of the spectrum are conditions that have a minimal impact on daily life, and at the other end are those that totally incapacitate the individual. (This was a definition the author developed with her aunt and that she used in parent handouts. Her aunt is the owner, director, and a lead teacher at a preschool that serves children ages two-and-a-half to five in Colorado. She has her masters in early childhood education, over thirty years of experience in the classroom and with children and families affected by ASD.)

[145] Alice Park, *Autism: The Numbers Are Rising The Question is Why?,* TIME (Dec. 19, 2009), *available at* http://www.time.com/time/health/article/0,8599,1948842,00.html; Brian A. Boyd et al., *Infants and Toddlers with Autism Spectrum Disorder: Early Identification and Early Intervention*, 32 J. EARLY INTERVENTION 75, 76 n.2 (March 2010) ("The prevalence of ASD has increased tremendously over the last two decades" from 1–2/10,000 between the 1960s and 1980, to 35–60/10,000 in 2005.).

[146] Christine M. Corsello, *Early Intervention in Autism, in* 18 INFANTS & YOUNG CHILDREN 74 (2005), *available at* http://depts.washington.edu/isei/iyc/corsello_18_2.pdf; Boyd at al., *supra* note 145, at 75.

[147] Boyd et al., *supra* note 145, at 75–77.

This comparison perfectly illustrates the extreme importance of the preschool years—if children are identified and provided services by four years of age, they are more likely to see significant gains.

As a result, there is currently a push in a number of states to implement a universal preschool program to which all children will have access. In 2006, the Illinois Congress passed the first law that establishes the goal of offering preschool to all of its residents, but it did not go so far as to make preschool compulsory for any of its citizens.[148] Other states, such as Oklahoma, New Jersey, and Georgia, have also been moving towards implementing a universal preschool program.[149] Additionally, Congress has consistently recognized the importance of early childhood education and intervention, especially in terms of special education.

Moreover, because of the wide range of preschool education settings available to parents and children, the current system makes it nearly impossible for states to adequately identify and serve preschoolers.[150] There is also evidence that without state or educational involvement in the form of public or private preschool professionals, parents are less likely to identify the special education needs of their child; thus, the child is more likely to remain unidentified and without access to special education services.[151] Because of the significant economic impacts of early identification and intervention, combined with the difficulty in accessing students in the current preschool systems, states have a substantial incentive to establish a

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[148] Matt Singer, *Illinois Joins Preschool For All Movement, Progressive States Network*, PROGESSIVESTATES.ORG (July 31, 2006, 9:40am), http://www.progressivestates.org/news/dispatch/illinois-joins-pre-school-all-movement.
[149] *Id.*; PRE-K NOW.ORG, *supra* note 140.
[150] *See* EARLY LEARNING FOR ALL, *Types of Early Care and Education Programs*, http://www.earlylearningforall.org/programs.htm (last visited Oct. 11, 2011) [hereinafter EARLY LEARNING]; *see also* 20 U.S.C. § 1414.
[151] *See* D.L. v. District of Columbia, 730 F. Supp. 2d 84, 99 (2010) (finding that without adequate education, outreach, and action on the part of the school district, only 3 percent of preschool-aged children were identified as needing services, but the average rate of preschool aged children that qualify is 6 percent).

preschool system that facilitates easier referral and identification methods so that state dollars can be spent most effectively and efficiently.

The impact of early childhood education and intervention is clearly substantial—and as such, it is further evidence of the unique and crucial position that preschool special education has in the United States. Depending on Quinn's diagnosis, the identification of his disability and the provision of services could have a dramatic impact on his development and, subsequently, the costs incurred by the school. Quinn's parents still have an interest—and they will probably want to do what is best for him—but because of the potential gains to be made and the costs to be saved, the state has a very strong interest as well. It is in the best interest of Quinn, according to the recent data, to receive services as early as possible. However, that does not mean Quinn's parents should be stripped of their interest in directing his education. Regardless of whether the state or the parents make the determination, there must be a quick resolution because Quinn is not alone. There are thousands of children, families, and schools throughout the United States that need a resolution to this complex issue.

B. Decisions Regarding Preschool Attendance Are Generally Left to Parents

All fifty states have a compulsory school attendance law, but none of those laws affect children below the age of five.[152] In addition, as described above, in order to receive federal funds through the IDEA, states must agree to serve all children with special education needs from birth through age twenty-one.[153] This means that all determinations of how, when, where, and if a child attends preschool are generally left to parents, unless that child is identified as being in need of special education services. The discretion retained by parents has led to the development of several different types of formal preschool programs, religious-based programs, home-based

[152] *See* Bush, *supra* note 5.
[153] *See* 20 U.S.C. §§ 1411–19, 1431–1444.

programs, play-based programs, and daycare programs.[154] Within each of these categories there are also many variations.

It is clear that Congress intended for children to be educated in the most inclusive setting available (and possible), as indicated by the LRE requirement, but because of the huge variations in preschool programs, it is difficult to determine which setting, formal or informal, is preferred by the IDEA.[155] This is because the general goal of preschool is to provide children with kindergarten-readiness skills, which include "social, cognitive, and language foundations that they leverage for rapid learning."[156] These skills can potentially be obtained in any of the settings mentioned above.[157] States face another difficulty as a result of the current preschool system because they must ensure that children in need of special education and related services, or children who are suspected of being in need of special education or related services, are identified, located, and evaluated.[158] Due to the many variations that exist in the preschool system, it is nearly impossible for the state to adequately complete this task because there is no way for the state to have a hand in all programs. A recent class action ruling in a case in the Federal District Court for the District of Columbia addressed the state's failure to identify and serve preschoolers. The court found that less than 3 percent of children in the District of Columbia were being served, but the average rate of children in need of services was closer to 6 percent.[159] The situation in the District of Columbia illustrates the problems faced by many school districts as a result of the wide variety of settings.

Consider these issues in light of Quinn, his parents, and the legal and philosophical arguments concerning the rights of parents and the state.

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[154] EARLY LEARNING, *supra* note 150.
[155] *See* 20 U.S.C. § 1414.
[156] Demonte, *supra* note 9, at 185.
[157] *Id.* at 186.
[158] 34 C.F.R. § 300.111 (2006).
[159] D.L. v. District of Columbia, 730 F. Supp. 2d 84, 99 (2010).

Quinn's parents were not subject to any state interference in their decisions regarding Quinn's education prior to his identification. They had complete and total freedom in determining how, when, where, and if Quinn was educated. But once he was identified and determined to be eligible, the school asserted an interest in Quinn's education. Due to this interest, the school required Quinn to attend the district preschool because it contended that this was Quinn's LRE. But there are many, many difficulties and uncertainties surrounding such a determination.

C. There Is No Presumptive Least Restrictive Environment (LRE)

Another major, and probably more difficult, issue facing schools and parents is the attempt to determine the LRE. For school-age children, the presumptive LRE is the general education classroom in public schools; and, for infants and toddlers (children from birth through age two) the cognate of the LRE is the home, to the maximum extent possible.[160] These standards are clearly established in legislation and through jurisprudence, although some litigation still arises, especially in regards to private placements.[161] But for preschoolers, there is no presumptive LRE, probably in part because of the diversity of programs discussed above.[162]

The IDEA requires that children are educated in the LRE to the maximum extent possible and that they are removed "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

[160] Sch. Comm. v. Dept. of Educ., 471 U.S. 359, 369 (1985) ("The [IDEA] contemplates that such education will be provided where possible in regular public schools . . . but the Act also provides for placement in private schools at public expense where that is not possible."); 20 U.S.C. § 1432(4)(G) (2005) (stating that early intervention services, "to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate").
[161] *See* Ralph D. Mawsley, *The Supreme Court's Reassessment of Parental Unilateral Placement Under the Idea: Forest Grove School District v. T.A.*, 251 EDUC. LAW REP. 1 (2010) (discussing past litigation and the most recent US Supreme Court determination).
[162] Demonte, *supra* note 9.

satisfactorily."[163] To fully comprehend the issues that arise in this stage of the evaluation process, it is important to better understand the Individual Education Program (IEP). Included in the IEP are statements of annual goals that are meant to help students bridge the educational gap created by their disabilities.[164] The IEP team is then required to describe this gap in terms of how the disability "affects the child's involvement and progress in the general education curriculum" or the curriculum used for general education children.[165]

Because there is no general curriculum for preschoolers, the IEP instead describes how the disability affects the child's participation in "appropriate activities."[166] The US Department of Education recognized that this term may have many meanings, and in response it released a statement explaining that appropriate activities include "age-relevant developmental abilities or milestones that typically developing children of the same age would be performing or would have achieved."[167] This definition is unclear. Therefore, there is uncertainty from the start in determining what exactly preschool children should be achieving.

The problem of unclear achievement goals is only exacerbated when the IEP team must determine the LRE because there is no presumptive LRE. This dilemma could be attributed to the lack of school-run preschool programs resulting from the absence of compulsory education laws for the preschool age group. Or, more problematic, it could be because there is a lack of certainty within the education and parenting communities about the necessity of a formal school environment for preschoolers. The uncertainty regarding the necessity of a formal school environment is probably due to

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[163] 20 U.S.C. § 1414(a)(5)(A).
[164] *See id.* § 1414(d)(1)(A)(i)(I)–(III).
[165] *Id.* § 1414(d)(1)(A)(i)(I)(aa).
[166] *Id.* § 1414(d)(1)(A)(i)(I)(bb).
[167] Assistance to the States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12405, 12471 (Mar. 12, 1999) (codified at 34 C.F.R. pt. 300).

the fact that many children do not attend preschool at all. Instead, many children participate in community-based home or daycare programs until they are four or five years old and ready to enter the public school system.[168] School districts have attempted to resolve this situation in different ways. Some have chosen to create altogether new programs that attempt to integrate special education and general education students.[169] Others choose to pay for the children to attend privately run preschools or daycares.[170] However, it is not clear that schools alone should be making this determination at all when so much uncertainty about placement still exists.

Many parents have been unsatisfied with the determinations made for their children and have challenged the determinations through the appeals process. The case law that has resulted is both divided and weak. According to one researcher, the cases can be "roughly divided into two categories: those upholding segregated special education placements as the LRE and those upholding inclusive preschools designed for nondisabled children as the LRE."[171] The cases upholding inclusive preschools will be addressed first.

In *Board of Education of LaGrange School District v. Illinois State Board of Education*, the court held that special education classes, even when housed in regular schools, are more restrictive than necessary in terms of providing FAPE in the LRE when the child can benefit from a regular

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

[169] *See, e.g.,* Samuel L. Odom & Don Bailey, *Inclusive Preschool Programs: Classroom Ecology and Child Outcomes, in* EARLY CHILDHOOD INCLUSION: FOCUS ON CHANGE 253, 260–61 (Michael J. Guralnick ed., 2001).

[170] *See, e.g.,* Editorial, *Improving Preschool Special Education*, N.Y. TIMES, Aug. 7, 1996, http://www.nytimes.com/1996/08/07/opinion/improving-preschool-special-education.html.

[171] Demonte, *supra* note 9, at 178.

setting.[172] Because the child was not being educated in the LRE, the court required that the school district pay for the child's tuition to attend a private preschool.[173] Shortly thereafter, *T.R. ex rel. N.R. v. Kingwood Township Board of Education* was decided.[174] Based on similar reasoning, the court found that a mixed special education preschool, in which half of the children were disabled, did not constitute the LRE because there was no evidence that the child's IEP could not have been implemented in a regular classroom.[175] Thus, the school had to consider the option of placement in a regular preschool program.[176] Finally, in *L.B. ex rel. K.B. v. Nebo School District*, the court determined that a mixed special education preschool containing between 30 and 50 percent nondisabled children did not constitute the LRE for a child with autism spectrum disorder.[177] This decision seems the most expansive because the child required the assistance of a full-time aide in the regular preschool setting and an additional twenty-five to thirty hours per week of therapy; the school was required to pay for all of these services.[178] The courts decided each of these cases in a way that preferred an inclusive, integrated setting, with this last decision being the most far reaching. Thus, it seems that this precedent supports the idea of giving parents greater control in placement at this age.

However, at the opposite end of the spectrum in 2008, the court in *M.W. v. Clark County School District* upheld the school's decision to place a three-year-old boy in a self-contained, district-run, autism preschool classroom.[179] The boy's parents were dissatisfied with the decision and

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[172] Bd. of Educ. of LaGrange Sch. Dist. No.105 v. Illinois State Bd. of Educ, 184 F.3d 912, 918 (7th Cir. 1999).
[173] *Id.* at 918.
[174] T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 579 (3d Cir. 2000).
[175] *Id.* at 576, 579–80.
[176] *Id.*
[177] L.B. v. Nebo Sch. Dist., 379 F.3d 966, 978 (10th Cir. 2004).
[178] *Id.* at 968, 978.
[179] M.W. v. Clark Cnty. Sch. Dist., No. 3:06-CV-49, 2008 WL 4449591 (M.D. Ga. Sept. 29, 2008).

unilaterally moved him to a private placement to prevent him from regressing.[180] Subsequently, they sought reimbursement for the costs of the private program.[181] The court dismissed the parents' complaint and held that the district's decision adequately provided educational benefits and FAPE. Consequently, it was unclear whether the IEP team should have to consider private placement at all.[182] "The decision implies that so long as a child receives an education calculated to confer benefits, the LRE requirement does not have independent significance, at least at the preschool level where the only regular programs available may be private."[183] The reasoning for *M.W.* is very similar to another decision from twenty years prior, but until this decision, that reasoning had not been widely accepted or applied.[184] Thus, the case law is becoming equally as convoluted as it is inconsistent, and precedent seems to have little influence over subsequent decisions.

The case law is both confusing and enlightening because, while it reaffirms that there is not a presumptive LRE for preschoolers, there is also no clear pattern of holdings. Therefore, neither parents nor schools can be sure that a court will uphold their decision as to the best placement for the child. Moreover, challenges to school district determinations are both costly and time consuming for parents and school districts. Although there is a right to a due process hearing, the laws are difficult to navigate without legal assistance, so it can be an incredibly daunting task for a parent to challenge an entire school system. Thus, while there seems to be relief for some parents by way of litigation, this option may not be not available to everyone.

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[180] *Id.* at *6–7.
[181] *Id.*
[182] *Id.* at *9 n. 16.
[183] Demonte, *supra* note 9, at 178.
[184] Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52, 54 (8th Cir. 1986) (holding that the school district need only provide an appropriate placement for the child, and that the LRE requirement cannot dictate a contrary result).

As evidenced by the case law, parents such as Quinn's retain an interest in determining what the LRE for their child should be. By ultimately upholding the parents' determination of the LRE, these cases seem to imply that parents are in a better position (having spent three or more years one-on-one with their child) to know the individual needs of the child socially, cognitively, and linguistically. Yet, schools make the ultimate determinations regarding placement after they conduct only a standard evaluation of the child and hold an IEP team meeting. After this process, if the parents disagree with the school's determination, they must contest those determinations through costly due process hearings. In the IDEA, Congress was vague and ambiguous in its charge to states and schools. Despite its noble intentions, the judiciary has not been able to resolve these inconsistencies. This predicament has led to greater confusion about the determination of the LRE and the education of preschoolers with special needs, as well as to a possible encroachment upon the rights of parents, like Quinn's, in directing the education of their preschoolers.

D. There Is Not an Extensive System of State-Run Preschools, So Private Placement Becomes Inevitable

Finally, the lack of compulsory education and public programs at the preschool level leads to a situation where some states are paying for private preschool education in order to guarantee FAPE to eligible children. Private placement is allowed under the IDEA, but it is an issue that has been litigated extensively because of the potential costs for the schools.[185] Again, the main issue in the preschool setting is about who makes the placement determination, especially when there is a difference of opinion. The school may determine that it will only pay for education in certain settings, such as formal settings, but the parents may determine that it is in the best interest

[185] 20 U.S.C. § 1412(a)(10) (2006); *see generally* Joseph O. Oluwole, *Forest Grove School District v. T.A.: The Supreme Court, Tuition Reimbursement and Prior Receipt of Special Education Services Under the IDEA*, 266 ED. LAW. REP. 505 (2010).

of the child to remain in a home-based program. Because there is not a presumptive LRE or curriculum for preschoolers, there is no clear picture as to which determination should control.

Moreover, the cost of education may become a major point of contention between parents and schools. Many people believe that quality increases as cost increases, and parents are likely to seek the highest quality education for their child. But school districts are footing the bill, so there will inevitably be major disagreements regarding placement on the basis of cost. Finally, due to the lack of public preschool programs and the prevalence of religious-based preschool programs, there may be potential First Amendment issues regarding the separation of church and state.

This issue of private placement is inextricably linked to the tension between state and parental control of education because it is an attempt by the state to control the choices of parents in an area that is traditionally reserved for total parental control. The entire argument regarding parental placement is much more involved than this brief discussion, but those issues are beyond the scope of this article.[186]

V. HOW CAN, AND SHOULD, THESE CONFLICTS BE RESOLVED IN LIGHT OF THESE PHILOSOPHICAL AND LEGAL CONCERNS?

As Gutmann's theory of the "democratic state of individuals" posits, the responsibility to direct preschool special education must be shared between parents and the state. Both of these parties have a significant interest in the education of the child, yet neither can fully account for all of the interests of the child. These competing interests make it difficult to determine which concern should triumph over the other because there is no clearly dominant interest. Therefore, the resolution must accommodate the interests of

[186] This article deals primarily with preschool-aged children and the tension that exists between the parents and the states in determining placement generally for those children. The arguments surrounding private placement usually involve arguments concerning costs and the rights of parents to unilaterally choose a private placement for their child.

parents as well as the interests of the states. It must also comport with the constitutional rights of parents by not encroaching upon their guaranteed rights to care, custody, and control of their children. These complex issues, which have arisen within the system of special education as it relates to preschool, could be resolved with relatively simple amendments to the IDEA or to the implementing regulations of the IDEA. Undoubtedly, there will be much consideration and deliberation on any change that is made, but the substantive changes would not involve the same complexity that is involved with many of the more contentious provisions, typically relating to implementation of costs.

There are two broad routes that Congress could take to clarify the ambiguities and resolve the discrepancies. First, there could be an amendment to the IDEA that defines an appropriate preschool setting or the presumptive LRE for preschoolers. Second, more discretion could be left to the states, and the IDEA's regulatory provisions could be amended to include a requirement that all states clearly outline which settings constitute the LRE.

A. An Amendment to the IDEA

Congress could resolve many of the uncertainties by amending the IDEA to include a definition of appropriate preschools in which services could be delivered. The amendment could not, however, eliminate parents' decision-making power, and parents would continue to retain their constitutional rights. For example, as established in *Pierce*, creating a state monopoly over preschool education would be unconstitutional because, in conjunction with the requirement to attend a preschool imposed upon special education students, it would remove all control from the parents.[187] Therefore, it would be best for Congress to amend the LRE and provide a comprehensive list of minimum standards that preschool settings must have in order to

[187] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

satisfy the FAPE requirement. These standards should also contemplate the presence of appropriate activities in each preschool setting because this is what FAPE is meant to provide. In drafting these standards, it might be most efficient to require that satisfactory preschool settings must be accredited or licensed by the state. A provision like this would allow some flexibility within each state in establishing standards to be met in an otherwise rigid federal statute.

Most importantly, Congress must ensure that the provisions are not so narrow that all control over educational choices is effectively removed from parents. Therefore, Congress must not include provisions to eliminate a certain type of preschool setting that would otherwise provide appropriate activities, such as a play-based program, because the elimination of otherwise acceptable programs would impede on parental rights. Any provision that requires a particular curriculum or set of educational goals and standards would likely eliminate entirely play-based settings. Therefore, despite the current push for achievement, educational benchmarks should be avoided at the preschool level because the inclusion of such standards would eliminate an entire class of settings from those currently available to all parents.

Instead, the list of minimum standards should be broad enough to include all settings that adequately provide the child with the opportunity to participate in appropriate activities, even those that are not following a set curriculum. First, there should be a requirement that the preschool is state-licensed or accredited. This requirement will be discussed in greater length below. Following that, the list should include requirements regarding minimum teacher- and director-education requirements; student to teacher ratios; general education student population to special education student population ratios; the availability of facilities like playgrounds, open space, kitchens, age-appropriate bathrooms, and therapy spaces for use by service providers; and, the total number of students per classroom. In order to determine appropriate standards, Congress should look to current state

licensing and accreditation standards for guidance and should consult with early childhood education research authorities, like the National Institute for Early Education Research. Requirements beyond these minimum standards may be advisable, but Congress must be careful not to get too specific and impose on the parental rights.

One way to ensure that parents retain some control would be for Congress to require that the IEP team meeting include a discussion regarding the specific placement of a preschooler. Such a requirement would most likely be an amendment to the IDEA section on IEP meetings. Then, Congress could elaborate upon the requirements of the discussion and placement offerings by asking the Department of Education to amend the Code of Federal Regulations. A review of every possible preschool setting, along with the pros and cons of each, should be included in that discussion. Under the current legislation, these pros and cons must be related to the implementation of the child's IEP, and there must be consideration of which possibilities can constitute the LRE for the child.

A single list of possible preschool settings would be hard to create because, undoubtedly, it will be nearly impossible to account for every type of setting. In light of the importance of early childhood education, it is essential that the described settings include quality programs. Flowing from this, it seems almost certain that the list should be limited to state-accredited or licensed facilities, which should also be a standard included in the amendment to the IDEA as discussed above. This is desirable because it leaves the state some discretion regarding preschool education. Moreover, this allows the state to more carefully craft the requirements of licensing and accreditation so that the number of schools that qualify is limited. This may even result in states creating separate requirements for preschools and childcare centers, which could potentially be very beneficial for early childhood education.

On the basis of this first accreditation requirement, there should be a district-run preschool option if available. Following that, there should be

options for nonprofit preschool settings, parochial preschool settings, and privately run preschool settings, because this type of diversity in settings would preserve parental rights by allowing choice among competing alternatives. Although this seems expansive, there could be a "feasibility clause" put into place. This would allow the school and the parents to take into account the feasibility of sending the child to each setting. Feasibility should be defined to include the costs, the distance to and from the child's home, the practical ability for providers to serve the child in the setting, and any other logistical considerations. For example, if a child qualifies for several hours of services per week, and the service providers must travel to and from the child's school to make those services available, then the school may be justified in requiring that the parent choose a preschool within a certain geographical distance, so long as there are sufficient options within that distance. Such a clause would immediately narrow the scope of the list. Additionally, as discussed above, states may intentionally choose to narrow the scope by requiring stricter standards for licensing or accreditation. It is important to remember that throughout all of these discussions, the requirement of LRE still applies and will also narrow the scope of possible placements. Finally, it is crucial to include reference to "appropriate activities," so that the amendment is consistent with current IDEA requirements.

There are some negative consequences of adopting an amendment like the one proposed. For example, a set of standards may initially lead to litigation because there are bound to be uncertainties that must be resolved, like what is "feasible." However, this may prove to be positive in the long run as there should be a decrease in litigation surrounding preschool placements because there would be a controlling statute that parents and schools could look to for the determination. Additionally, there may be initial backlash from both parents and school administration because each will feel that they are in the best position to be making placement determinations.

Despite these drawbacks, an amendment to the IDEA, including the provisions proposed above, would still be a desirable solution to the issue of preschool special education placement because it would eliminate any variance in application among states and provide parents and states with definite, fixed standards that must be adhered to. However, an amendment, like the one proposed, would not completely eliminate the tension discussed and analyzed throughout this article because parents and schools will inevitably continue to compete over the right to control education. Instead, an amendment would provide a concrete and legal set of standards that takes into account the competing interests of both parties, eliminating the need for additional costly litigation in this area of law and allowing each party to retain some control.

B. Require Clear State Standards to Be Set

Another method of solving the current problem is to require each state to set clear standards regarding what constitutes a preschool for purposes of the IDEA. Under this solution, Congress would also allow the states to retain broader discretion than they currently possess by requiring them to adopt their own standards. Such a solution would again necessitate an amendment to either the IDEA itself or a change in its implementing regulations. This amendment would not be substantive, however. Instead, it would simply be a requirement that states adopt clear standards regarding which settings they determine will expose preschool children to appropriate activities, thus satisfying the FAPE requirement.

The actual requirements adopted by each state would likely vary dramatically and reflect the unique characteristics of individual states. For example, a more rural or mountainous state may want to require that children attend a state-run preschool because of the difficulty in physically getting to all of the different possible settings to serve children. But, in states where the population is more concentrated in urban settings, it may be less costly to send providers to existing preschools instead of actually

operating a completely new school. Or, states may want to allow localities to make these determinations depending on their individual needs.

Regardless of what the states ultimately choose, the amendment should make clear that states must come up with a set of applied standards that comport with IDEA requirements, specifically the requirement that preschoolers are learning appropriate activities. This is imperative because, without a concrete set of standards, many potential ambiguities would still exist. Included in the standards should be a definition of settings that satisfy the preschool requirement. Similar to how an amendment to the IDEA would have to contemplate appropriate activities, so too must state standards.

The likely result of this approach is a broad range of definitions of preschool that are unique to each state, but that also maintain parental rights. Some states may institute a definition that greatly limits parental choice, while others may institute definitions that allow for a lot of discretion on the part of parents. Still, others may try to create a definition that more equally balances the interests of each. No matter where the standards fall on this spectrum, the states must ensure that the standards still comport with the constitutional rights of parents.[188] Therefore, states will not be able to completely remove control from parents, and they must be careful in drafting the standards so as to not violate parental constitutional rights.

This solution of individualized and consistent state standards is desirable because it will allow states to adopt solutions that they feel are most appropriate for their citizens. This evokes a classic federalism argument: those closest to the problems should retain the power to address the problems. It also allows those states that have already begun the process of revamping or centralizing preschool education to create standards that will work in conjunction with other state programs. Furthermore, states would

[188] *Id.* at 534.

be able to experiment with different standards, definitions, and statutory schemes, which would allow each state to learn from the trials and errors of the other states. Ultimately, the most successful schemes will likely be adopted by many states. This is also a classic federalism argument—states can act as "laboratories of democracy"[189] by deciding for themselves what is most appropriate for their citizens, which allows citizens to choose states that pass laws consistent with their own desires.

However, this solution also has drawbacks because there may be confusion among states and parents. Additionally, the IDEA, a federal law, would not be applied equally to all children and families. A solution that provides more power to the states may also result in protracted challenges to the constitutional legitimacy of the different standards because a constitutional right is involved. Ultimately, it seems that the benefits of such a solution would again outweigh the costs because there would be some guidelines where there are currently none. Again, the tension between the schools and the parents would not be resolved, but at least some of the interests of each would be accounted for and represented in the legislation. Further, this solution would ensure that for a child like Quinn, the decision would not come down to only two competing alternatives. Even if his preferred school did not meet the state standards, he and his parents would have additional options in finding a school that is right for him.

VI. CONCLUSION

The education and future of many children depend on the prompt resolution of the issues presented throughout this article. At this point in time, there are no compulsory education laws for preschoolers in any state. Therefore, parents retain a significant interest in the education of their

[189] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

preschool children. Despite this fact, the state still retains a significant interest in the education of preschool children, especially preschool children who require special education or related services, because of the crucial importance of this stage of development. This tension is ever-present and without an easy solution because if parents or the states are given too much control, the interests of the other can be quickly forgotten. Ultimately, parents and states need to collaborate to determine the best educational setting for children—so the children have the benefit of learning in a way that reflects the interests of each. It is too risky to grant parents complete control, but it is too great an infringement on the rights of parents to strip them of all control. The IDEA and the accompanying federal regulations need to contemplate this tension between parents and the state, but also the importance of this determination.

In doing so, drafters should choose one of two broad options: (1) create national preschool standards or (2) require individual states to draft standards. The first option seems to be the most desirable and effective because it would codify a single definition of preschool for the purposes of the IDEA and also incentivize early childhood education reform by the fifty states. Additionally, national preschool standards would ensure that the definitions are not contradictory to other provisions of the IDEA. It simply makes more sense in our increasingly mobilized society to create one rule that can be interpreted in light of different state laws, rather than to have fifty rules that could be as broad or as specific as the state so chooses.

Consider Quinn one last time. If a set of minimum national preschool standards were enacted before Quinn was placed on an IEP, his parents may not have been faced with such a complicated decision, assuming his first preschool met the minimum standards set out in the legislation. Quinn would have been able to receive services in the preschool setting he was used to and comfortable in. He would have been able to receive the early intervention and education that could have potentially had a broad impact on his long-term academic, social, and economic achievements. And, most

importantly, Quinn's parents and other parents in similar situations could know before choosing that initial preschool whether they would have to face a tough decision like the one Quinn's parents faced, and they would not have to pursue costly litigation to preserve their protected rights. Finally, Quinn and his parents would enter into an untainted relationship with the public school system in kindergarten because there would not have been any prior controversy. This would allow the school and Quinn's parents to collaborate more effectively when meeting as a team to develop his IEP and when simply communicating on a day-to-day basis.

Thus, although there will always be a very real and philosophical tension between the state and parents regarding the education system, that tension need not result in massive disruptions to the education process. The legislature can efficiently and effectively amend the current legislation in a way that will limit the negative consequences of this tension and support the provision of quality preschool education and services to children who qualify.