

# Michigan Law Review

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Volume 113 | Issue 8

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2015

## Rethinking Special Education's "Least Restrictive Environment" Requirement

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### Recommended Citation

Cari Carson, *Rethinking Special Education's "Least Restrictive Environment" Requirement*, 113 MICH. L. REV. 1397 (2015).

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## NOTE

### RETHINKING SPECIAL EDUCATION’S “LEAST RESTRICTIVE ENVIRONMENT” REQUIREMENT

Cari Carson\*

*The federal Individuals with Disabilities Education Act promotes the education of students with disabilities together with their nondisabled peers, requiring education in the “least restrictive environment” (“LRE”). This requirement has long been subject to competing interpretations. This Note contends that the dominant interpretation—requiring education in the least restrictive environment available—is deficient and allows students to be placed in unnecessarily restrictive settings. Drawing from child mental health law, this Note proposes an alternative LRE approach that requires education in the least restrictive environment needed and argues that this alternative approach is a better reading of the law.*

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#### INTRODUCTION

The following hypothetical is representative of common types of cases that come before special education legal decisionmakers:

*Tricia, a teenage girl with reading difficulties and a tendency to act out, has languished in a failing public school since kindergarten. After identifying Tricia as special education eligible in the sixth grade, the school provides her with some—albeit sparse—special education supports. She makes very little reading progress over several years and her behavior deteriorates. A private educational evaluation notes that Tricia requires a structured reading program with a student-to-teacher ratio of not more than six-to-one. Tricia's mother and an attorney file a complaint with the school district and request a legal due process hearing. The hearing officer finds the district in violation of federal special education law; as a remedy, the hearing officer orders the district to pay for Tricia to go to a private special education-only day school because the district fails to show that it has programs that can meet Tricia's needs. The private day school, on the other hand, shows that it can provide the required services, though the evidence on the record does not speak to the academic effectiveness of the private school. Tricia will have no interaction with nondisabled students at the new school.*

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The idea of integration is central to U.S. disability law, including special education law.<sup>1</sup> Integration and inclusion refer to the participation of people with disabilities in activities with nondisabled individuals; in special education law, integration may be defined as the education of students with disabilities together with their nondisabled peers.<sup>2</sup> The centerpiece of federal special education law—the Individuals with Disabilities Education Act

1. See Civil Rights Div., U.S. Dep't of Justice, *Olmstead: Community Integration for Everyone*, ADA.gov, <http://www.ada.gov/olmstead> (last visited Feb. 9, 2015); see also, e.g., 28 C.F.R. § 35.130(d) (2014) (stating the integration mandate of the Americans with Disabilities Act, which provides that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”); 34 C.F.R. § 300.114(a)(2) (2014) (listing the requirements of the integration mandate of the Individuals with Disabilities Education Act).

2. Civil Rights Div., U.S. Dep't of Justice, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and*

(“IDEA”)—requires that students with disabilities be educated in the most integrated, least restrictive environment for those students.<sup>3</sup>

To meet the varying needs of students with a wide range of disabilities, special education services are offered on a continuum of placements, ranging from the least restrictive setting—a general education classroom—to the most restrictive placements in separate special education schools and institutions.<sup>4</sup> Tricia’s placement change from a public school setting to a private special education-only school (“private placement”) thus increases the restrictiveness of her placement and decreases her opportunity for integration in school. In the private placement, she will have fewer opportunities to interact with her nondisabled peers than she would have in a public school’s special education program. In the most restrictive settings such as separate schools, students do not have the opportunity to interact with nondisabled peers in elective classes, extracurricular activities, or at lunch, for example.<sup>5</sup>

Despite the requirement promoting integration, the hypothetical illustrates that integration takes a backseat to providing appropriate services at times. When this happens, a student with a disability may be harmed by not receiving the benefits of greater integration noted in the IDEA.<sup>6</sup> But the framework of America’s special education system presents a legal complexity by allowing for such a private placement result: if a student like Tricia has needs that could be met with additional or improved services in a regular school facility, the IDEA’s LRE requirement is not met by the hearing officer’s order even though the special education legal system allows for the officer’s order.

Whether the hypothetical hearing officer acted in compliance with the IDEA depends on one’s interpretation of the LRE requirement. Put simply, the LRE requirement can be interpreted in two different ways: to mandate a special education student’s placement in the least restrictive environment *needed* to meet the student’s needs, or in the least restrictive environment *available* to meet the student’s needs. In this Note, “needed” refers to the services necessary to specifically address a particular disability and provide a free appropriate public education (“FAPE”), the legally required standard of educational quality in special education law. It does not refer to what a student with a disability needs to fully thrive in his or her education. Additionally, in this Note, “available” refers to services currently in place at a school or in a district.

Legal and educational authorities have interpreted the IDEA’s LRE requirement along a spectrum between these poles and are deeply divided over

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Olmstead v. L.C., ADA.gov (June 22, 2011), [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm) [hereinafter *DOJ on Integration Mandate*]; see 34 C.F.R. § 300.114(a)(2).

3. 34 C.F.R. § 300.114(a)(2); see *infra* note 11.

4. 34 C.F.R. § 300.115.

5. *Cf. id.* § 300.107 (requiring integration in extracurricular and elective classes only for less restrictive environments, not for separate schools).

6. See discussion *infra* Section I.A.

its proper application.<sup>7</sup> Historically, courts have favored the “least restrictive environment available” approach or have minimized the LRE requirement in special education disputes that implicate private special education-only school placement.<sup>8</sup> The “least restrictive environment available,” however, may be more restrictive than a student needs; this may be true where a student can progress in a less restrictive setting with added supports, but the added supports are unavailable. The “least restrictive environment needed” approach is not satisfied with such an outcome. It recognizes that FAPE and LRE are not mutually exclusive requirements; both can be accomplished. This “necessity” approach requires additional efforts at integrating disabled students into settings with nondisabled students, potentially through added academic and behavioral supports. Because the “least restrictive environment needed” inquiry thus demands equally or more integrated placements than the “least restrictive environment available” approach, this Note contends that the necessity-based approach is the stronger interpretation of the LRE requirement.

The legal system has remained surprisingly passive in analyzing or addressing the discrepancies in educational institutions’ and legal decisionmakers’ approaches to the LRE requirement and their compliance with the IDEA. A critical framework analyzing the competing interpretations of the LRE requirement does not exist.<sup>9</sup>

While the number of students placed in private special education-only schools by hearing officers is small nationally, the implications of these competing interpretations are far-reaching.<sup>10</sup> How LRE considerations should factor into placement choices affects special education decisionmaking, even apart from due process hearings and placements in private special education-only schools. The approach to the LRE requirement also affects the allocation of resources in special education. Issues of how special education is delivered, the quality of that education, and which students benefit from certain services are all implicated. And from the standpoint of statutory interpretation, the internal consistency of the IDEA is in balance.

This Note asserts that a necessity-based interpretation of the LRE requirement better serves students with disabilities and more closely aligns with the IDEA than an availability-based approach. Part I provides a brief background of the LRE requirement and the benefits of integration. Part II

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7. See ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION 108–10 (1996) (providing examples of the historical range of courts’ approaches to the LRE requirement).

8. See discussion *infra* Section II.B.

9. Recent scholarship analyzes the wisdom of the LRE requirement as interpreted by courts to favor inclusion at the expense of student needs. See, e.g., Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006). Such scholarship notes that courts have interpreted and applied the LRE requirement in differing ways. See *id.* at 814–23. But an analytical framework of competing LRE interpretations does not appear to exist.

10. *Id.* at 794–96 (detailing the increased use of inclusive placements after the adoption of early special education law containing an integration presumption); see also *infra* note 142 and accompanying text.

argues that the “least restrictive environment available” interpretation, while legally viable and often followed, is a problematic approach to the IDEA’s LRE requirement. Part III analyzes hearing officer decisions from one jurisdiction, the District of Columbia, and illustrates how the “least restrictive environment available” approach may result in unnecessarily restrictive placements, depriving students of the benefits of greater integration. Part IV asserts that the LRE requirement may be strengthened by clearly incorporating the “least restrictive environment needed” approach of child mental health law into special education law. Part V identifies and addresses the benefits and practical and legal challenges to the proposed solution.

### I. A BRIEF OVERVIEW OF THE LRE REQUIREMENT

The U.S. special education system is governed primarily by the IDEA<sup>11</sup> and its implementing regulations.<sup>12</sup> Both include an LRE requirement.<sup>13</sup> Section I.A provides the rationale for and stated benefits of the LRE requirement and of integration as a fundamental value of the special education system. Section I.B details the LRE mandate and related parental rights under the IDEA and its implementing regulations.

#### A. Historical Rationale and Present Arguments for Greater Integration

The rhetoric of integration in the racial civil rights movement centered the early focus on integration as a normative good in the disability rights arena.<sup>14</sup> Integration provided an answer to the exclusion of students with disabilities from traditional public schools.<sup>15</sup> Early special education laws were created to remedy this exclusion.<sup>16</sup> Advocates for students with disabilities promoted integration as a means of moving students out of disability-only institutions that were substandard.<sup>17</sup> Decreasing the use of institutions that only enrolled students with disabilities was a common theme in the legislative history of early special education laws.<sup>18</sup> The presumption toward integration was so central to early special education laws that one scholar

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11. See generally 20 U.S.C. §§ 1400–09, 1411–19, 1431–44, 1450–55, 1461–66, 1470–75, 1481–82 (2012) (setting forth the requirements and provisions of the IDEA). The current IDEA was initially passed by Congress in 1997 and was amended by the Individuals with Disabilities Education Improvement Act of 2004. It was preceded by the Education of the Handicapped Act in 1971 and the Education for All Handicapped Children Act of 1975. RUTH COLKER, *DISABLED EDUCATION* 24–27, 93, 103 (2013).

12. 34 C.F.R. § 300 (2014). The statutory authority for the issuance of these regulations is found in 20 U.S.C. § 1406(a).

13. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2).

14. Colker, *supra* note 9, at 792.

15. *Id.* at 802–03, 808.

16. COLKER, *supra* note 11, at 17–22; OSBORNE, JR., *supra* note 7, at 3–5.

17. Colker, *supra* note 9, at 796–97.

18. See *id.* at 805–06.

called it “the strongest substantive right contained in the special education laws.”<sup>19</sup>

The most recent iteration of the IDEA reasserts the value of integration. According to the law’s findings section, research shows that greater integration and the provision of special education services in less restrictive settings increase the effectiveness of educating students with disabilities.<sup>20</sup> It is unsurprising, therefore, that a central principle of the IDEA is the education of students with disabilities together with their nondisabled peers.<sup>21</sup>

### B. *Fundamentals of the LRE Mandate and Related Parental Rights*

Based on this central principle of integration, the IDEA’s implementing regulations mandate that “[e]ach public agency must ensure that—(i) to the maximum extent appropriate, children with disabilities . . . are educated with children who are non-disabled.”<sup>22</sup> The regulations further provide that “[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment [is to] occur[ ] *only if the nature or severity of the disability* is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>23</sup> Collectively, these provisions form the foundation of the LRE mandate.

The IDEA also provides the parents of a disabled child with significant legal rights, including rights to approve or deny initial receipt of special education services, to request an independent special education evaluation at a school district’s expense, and to participate in decisionmaking about the

19. COLKER, *supra* note 11, at 26.

20. 20 U.S.C. § 1400(c)(5)(A), (D) (2012) (“[T]he education of children with disabilities can be made more effective by . . . ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible [and by] providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate.”). *But cf.* Colker, *supra* note 9, at 811–24 (arguing that the integration presumption should not be read to eliminate the full range of educational placements for children with special educational needs, but should function primarily to steer the special education system away from disability-only institutions).

21. See 34 C.F.R. § 300.114 (2014).

22. *Id.* § 300.114(a)(2). A public agency “includes the SEA [state educational agency], LEAs [local educational agencies], ESAs [educational service agencies], nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.” *Id.* § 300.33.

23. *Id.* § 300.114(a)(2)(ii) (emphasis added). The regulations’ LRE mandate language closely tracks that of the IDEA:

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

20 U.S.C. § 1412(a)(5).

special education services their child will receive.<sup>24</sup> Additionally, parents have the right to challenge the identification, evaluation, provision of services to, and placement of their child with a disability.<sup>25</sup>

The most formal means of making a challenge is by filing a due process complaint, as in the hypothetical.<sup>26</sup> Most special education disputes are resolved before this stage, but filing a complaint remains a used and viable special education legal dispute resolution method.<sup>27</sup> A due process complaint may lead to a due process hearing, at which an administrative due process hearing officer adjudicates the matter in a formal legal proceeding.<sup>28</sup> While the IDEA is silent on the rules of evidence to be used in a due process hearing, disclosures of evaluations must be made within a predetermined timeframe.<sup>29</sup> Hearing officers issue legally binding decisions on whether the child in question has received a FAPE.<sup>30</sup> The decisions may dismiss the complaint, require a parent to take certain actions, or—if the district has denied the student a FAPE—require a school district to take certain actions; such a remedy may include an order for a district to revise a student's individualized education program ("IEP"), to pay for compensatory education, or to

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24. 34 C.F.R. §§ 300.501–.502 (“The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—(i) [t]he identification, evaluation, and educational placement of the child; and (ii) [t]he provision of FAPE to the child.”).

25. *Id.* § 300.507(a)(1) (“A parent . . . may file a due process complaint on any . . . matters . . . relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.”). A public agency may also make a challenge on any of these issues. *Id.*

26. *Id.*

27. A report from the U.S. General Accounting Office to the U.S. Senate provided the following:

Due process hearings, the most resource-intensive dispute mechanism, were the least used [dispute resolution mechanism] nationwide. . . . [N]ationwide, in 2000, about 5 due process hearings were held per 10,000 students with disabilities. According to the these [sic] data, over three-quarters of the due process hearings had been held in five states—California, Maryland, New Jersey, New York, and Pennsylvania—and the District of Columbia.

U.S. GEN. ACCOUNTING OFFICE, GAO-03-897, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 3 (2003), available at <http://www.gao.gov/assets/240/239595.pdf>.

28. 20 U.S.C. § 1415(f)(1)(A) (2012); 34 C.F.R. § 300.511. Due process complaints may also result in settlement or resolution through mediation or other nonadversarial means. *Id.* §§ 300.506, .510.

29. 20 U.S.C. § 1415(f)(2)(A).

30. 34 C.F.R. §§ 300.513–.514. To meet the FAPE requirement, a public agency must provide sufficient support services so as to allow a student to obtain some educational benefit. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982). Neither the IDEA nor its implementing regulations provide significant additional guidance on the execution of due process hearings; however, states have implemented their own guidance. See, e.g., D.C. PUB. SCH. SPECIAL EDUC. PROGRAMS STUDENT HEARING OFFICE, THE SPECIAL EDUCATION STUDENT HEARING OFFICE DUE PROCESS HEARING STANDARD OPERATING PROCEDURES (2011), available at [http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Due\\_Process\\_Hearing\\_Standard\\_Operating\\_Procedures.pdf](http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Due_Process_Hearing_Standard_Operating_Procedures.pdf).

pay for a student's placement in a more restrictive private special education school setting.<sup>31</sup> As in the hypothetical, a parent may request such a private school placement as a desired remedy. The private special education-only school does not need to present any data showing its educational efficacy, but the placement does need to be deemed appropriate and able to implement the services in a student's educational plan.<sup>32</sup>

Parties aggrieved by a special education due process hearing decision may appeal and bring a civil action in state courts of competent jurisdiction or in a U.S. district court.<sup>33</sup> After receiving the administrative record and hearing additional evidence as requested by a party, the court then makes an independent decision as to whether procedural and substantive standards were met, based on a preponderance of the evidence.<sup>34</sup>

## II. A PROBLEMATIC PREFERENCE FOR THE "LEAST RESTRICTIVE ENVIRONMENT AVAILABLE" APPROACH

The IDEA's LRE requirement can be interpreted as either based primarily on the needs of a student or on the availability of district resources.<sup>35</sup> Though both interpretations are textually viable, special education case law has exhibited a preference for the availability approach.<sup>36</sup> This Note argues, however, that the availability approach does not fully satisfy the IDEA and is not the better interpretation of the law. Section II.A explains how both the "availability" approach and the "necessity" approach are textually plausible readings of the IDEA's LRE requirement. Section II.B documents that many courts have come to favor the availability approach in special education legal decisionmaking, frequently overlooking the plausible necessity approach. Section II.C exposes several shortcomings of the availability approach.

### A. Textual Foundations of the "Least Restrictive Environment Available" Approach

Both the availability and necessity approaches to the LRE requirement are grounded in the IDEA's text. A lack of statutory clarity regarding what exactly the LRE requirement means allows for competing interpretations.

The LRE requirement's two-part text reads as follows:

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31. 34 C.F.R. § 300.513; Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 15–24 (2011).

32. 34 C.F.R. § 300.148; *cf.* *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 9–10 (1993) (finding that a court may order reimbursement for parental private placement even though the private placement does not meet all of the requirements of the IDEA but is otherwise proper).

33. 34 C.F.R. § 300.516(a).

34. *Rowley*, 458 U.S. at 205–07.

35. In this Note, a student's needs refer to those needs identified by the student's district-recognized special education planning or evaluation team.

36. See *infra* note 56.

Each public agency must ensure that—(i) [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) [s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>37</sup>

The regulations do not define one key phrase—“[t]o the maximum extent appropriate”—which allows for both the availability and necessity approaches to stand textually and to satisfy the LRE requirement.<sup>38</sup> Varying interpretations of this phrase could yield different placement decisions, as it is unclear how many resources a school district must devote to meeting a student's needs in a less restrictive environment.<sup>39</sup> For example, it is unclear in the hypothetical whether Tricia's school district is obligated to implement a reading program in the public school that satisfies her needs.

In a separate section of the IDEA, the statute establishes a remedy that seems to undermine its own LRE requirement, adding to the confusion about the proper interpretation of the LRE requirement.<sup>40</sup> The only remedy discussed thoroughly in the IDEA for breaches of the law's requirements is parental placement in a more restrictive environment.<sup>41</sup> A parent—practically speaking, one with sufficient financial means—may place his or her student in a private school (including a private special education-only

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37. 34 C.F.R. § 300.114(a)(2)(i)–(ii).

38. See *id.* § 300.114(a)(2)(i).

39. Vagueness in other clauses of the LRE requirement further muddies the requirement's interpretation. In the second clause of the regulation, for example, it is unclear what level of achievement, quality of student interaction, or other metric qualifies as a satisfactory education in the classroom. *Id.* § 300.114(a)(2)(ii). This “satisfactorily” standard is not explicitly cross-referenced with other IDEA language concerning minimum required quality, such as the FAPE requirement. See *id.* § 300.101 (stating the FAPE requirement). Even the clause stating that the LRE assessment is to be based on the nature or severity of a student's disability is unclear. *Id.* § 300.114(a)(2)(ii). The murkiness stems from the complex relationship between certain disability types and school performance. While students generally are not supposed to be found eligible for special education if their learning difficulties are caused by inadequate instruction, *id.* § 300.306(b)(1)(i)–(ii), there is a distinct correlation between school quality and identification of some disabilities, such as specific learning disabilities, emotional disturbance, and certain intellectual disabilities, *cf.* Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J.L. & EDUC. 129, 131 (2012) (asking whether schools found inadequate for properly diagnosed white children can serve or properly identify minority students improperly diagnosed or facing other undiagnosed types of intellectual or emotional challenges). It can be challenging to determine whether a student's disability is attributable to poor instruction. In the hypothetical, for example, the extent to which Tricia's disabilities are caused by enrollment in a failing school may be unclear. The LRE mandate is silent on this complexity, providing little guidance on whether school districts and legal decisionmakers may move a student to a more restrictive placement when the student's needs are due in part to the low educational quality of the less restrictive setting. See 34 C.F.R. § 300.114.

40. See 34 C.F.R. § 300.148.

41. See *id.*

school) and pay the tuition up front, when he or she asserts that the school district is not providing a FAPE.<sup>42</sup>

On its face, such a remedy would not appear to conflict with the LRE requirement, as it is public agencies—and not parents—that are subject to the LRE mandate.<sup>43</sup> The regulations, however, provide that a hearing officer may require a school district to reimburse a parent for the private school placement if (1) the district fails to make a FAPE available to the child and (2) the private placement is deemed appropriate.<sup>44</sup> In other words, the hearing officer may order the school district to pay for the private school tuition. This parental reimbursement remedy complicates the LRE legal calculus. The regulations make no explicit reference to assessing whether the private placement is the LRE for the child. The private placement also need not “meet the State standards that apply to education provided by the SEA [state educational agency] or the LEAs [local educational agencies].”<sup>45</sup>

### B. *Special Education Case Law Favors the “Availability” Inquiry*

In adjudicating special education placement cases, legal decisionmakers have had to contend with the competing availability and necessity interpretations of the LRE requirement.

Within a decade of enactment of the IDEA’s predecessor law, the Education for All Handicapped Children Act, legal challenges that implicated the role of the LRE requirement had begun.<sup>46</sup> Early cases quickly honed in on the parental reimbursement remedy and interpreted the IDEA as containing a loophole: requiring education in the least restrictive environment but allowing placement in a setting that is not the least restrictive environment a student needs.<sup>47</sup> This early interpretation laid the foundation for the dominance of the availability approach.

In *School Committee of Burlington v. Department of Education*, the U.S. Supreme Court held that a public school district could be ordered to fund a student’s placement in a private school if the private placement was proper and the district’s special education plan for the student was found to be inappropriate.<sup>48</sup> The administrative hearing officer in this seminal case had earlier found the private placement to be “the least restrictive adequate program *within the record*” to meet the needs of the student, who had learning, perceptual, and emotional difficulties.<sup>49</sup> Experts had recommended “a highly

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42. *See id.*

43. *See* 34 C.F.R. § 300.114(a)(2).

44. *Id.* § 300.148(c).

45. *See id.*

46. The predecessor law contained an LRE provision that required students with disabilities to be educated with nondisabled children to the “maximum extent feasible.” COLKER, *supra* note 11, at 40.

47. *See, e.g.,* Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359 (1985).

48. *Id.* at 370.

49. *Id.* at 362–63 (emphasis added) (internal quotation marks omitted).

specialized setting for children with learning handicaps . . . such as [the private school chosen],” and the chosen private special school was state approved.<sup>50</sup> The properness of the private placement itself was not further challenged.<sup>51</sup> Neither the Supreme Court nor any lower court appears to have further discussed the LRE mandate in their opinions, deciding the case on other grounds.<sup>52</sup>

*Burlington* thus set the foundation for jurisprudence that would often limit the LRE aspect of the appropriateness analysis to an “availability” approach. Specifically, the Court did not challenge the crucial language of the hearing officer’s report that conditioned the LRE assessment on the statement within the record of the district’s currently available services.<sup>53</sup> This seemingly innocuous fact laid the groundwork for the LRE mandate to be interpreted in one particular way: the least restrictive environment for a student is chosen from among the district’s currently available services.<sup>54</sup> If district counsel fails to articulate available service options within a public school when such services exist, or when services could be created for the same or lesser cost than the cost of a more restrictive placement, the student’s LRE could still shift to a more restrictive placement.

Similarly, if a district has the resources to provide needed services but has not implemented them, a student like Tricia could be assigned to a more restrictive placement as his or her LRE. Whether the student in *Burlington* could have succeeded in a regular school environment with more specialized supports remains unknown; the student remained in the private special education school until high school graduation.<sup>55</sup> In lower court decisions since *Burlington*, the courts have regularly continued to use a “least restrictive environment available” model, included other factors in the placement analysis, or neglected to consider LRE at all.<sup>56</sup>

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50. *Id.* at 362 (internal quotation marks omitted). *But cf. infra* note 128 and accompanying text.

51. *See Burlington*, 471 U.S. at 359–74.

52. *See id.*; *Burlington v. Dep’t of Educ.*, 736 F.2d 773 (1st Cir. 1984); *Doe v. Anrig*, 561 F. Supp. 121 (D. Mass. 1983).

53. *Burlington*, 471 U.S. at 359–74.

54. *See* discussion *infra* Section III.B.

55. COLKER, *supra* note 11, at 79.

56. For example, the D.C. District Court found only that a hearing officer must *at least consider* whether a private school is a child’s LRE. *N.T. v. District of Columbia*, 839 F. Supp. 2d 29, 34–35 (D.D.C. 2012). Other courts have found that LRE factors into private placement considerations but only as a secondary factor, *see P. v. Newington Bd. of Educ.*, 546 F.3d 111, 120 (2d Cir. 2008) (finding that schools must balance the need to educate a student in the LRE with providing an appropriate education to the student); *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005), belying the textually equal footing on which the IDEA places the FAPE and LRE requirements, *see infra* note 113 and accompanying text. More directly, the Fourth Circuit has held that providing a FAPE overrides LRE when the two principles conflict, *see Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), and the Ninth Circuit has recently found that whether a private placement is the LRE does not necessarily limit the family’s claim for reimbursement, *C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159–60 (9th Cir. 2011).

Even when courts and governmental authorities suggest that an availability approach alone may not suffice, a version of that approach still survives and often trumps a more necessity-based inquiry. For example, the U.S. Department of Education, in addressing an inquiry about LRE in 2007, provided a possible counter to the *Burlington* approach, writing that “placement decisions must not be made solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.”<sup>57</sup> Though explicitly denouncing an availability-only approach, the department left open the possibility of an availability-focused approach, stating that “[t]he overriding rule is that placement decisions must be determined on an individual, case-by-case basis, depending on each child’s unique needs and circumstances and based on the child’s IEP.”<sup>58</sup> The letter leaves the question of how availability of district resources might factor into a placement decision unanswered.<sup>59</sup>

### C. Shortcomings of the Availability Approach

Though the availability approach is dominantly used, it has several legal shortcomings that are often overlooked. First, use of a “least restrictive environment available” approach that is based primarily on a district’s currently available and activated resources provides a standard that may fall short of the integrationist objectives of the IDEA.<sup>60</sup> If a student can be successful in a less restrictive setting with supports but a district has not made these supports available, the availability inquiry—if taken to its logical conclusion—sanctions placement in a more restrictive setting. This outcome frustrates the IDEA’s widely acknowledged goal of achieving increased integration of students with disabilities.<sup>61</sup>

Second, the “least restrictive environment available” approach has the potential to result in race and class inequities. Students in lower-achieving schools are disproportionately poor students of color.<sup>62</sup> If a low-achieving

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57. Letter to Trigg, in 50 INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT 48 (OSEP 2007), available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2007-4/trigg113007lr4q2007.pdf>.

58. *Id.*

59. *Id.*

60. As used in this Note, “resources” may refer to physical resources, such as classroom space; programmatic resources, such as teaching staff; and monetary resources, including an educational agency’s current budgetary allocation plus any potential additional cost of funding a student’s placement in a private special education-only school if that remedy is an option. “Available and activated” refers to those resources that are currently implemented as part of the educational agency’s programming.

61. See *supra* Section I.A for a discussion of the integrationist objectives of the IDEA.

62. Cf. CHILDREN’S DEF. FUND, THE STATE OF AMERICA’S CHILDREN 2014 34–35 (2014), available at <http://www.childrensdefense.org/library/state-of-americas-children/2014-soac.pdf> (providing information about the race and class achievement gap in the United States and finding that children of color and poor children fare disproportionately poorly in the American school system).

school offers only limited or less-than-effective special education services,<sup>63</sup> an availability inquiry may find that the student needs a more restrictive placement simply because the lower-achieving school has not made needed services available. Use of an availability inquiry then threatens to track at-risk youth—often poor students of color—into more restrictive placements, depriving them of the noted benefits of education in less restrictive, more integrated settings.

Third, the availability inquiry does not provide a clear standard for how to conduct LRE analyses. By prioritizing resource availability but not clarifying the extent to which resource availability should be taken into account in placement decisions, the “least restrictive environment available” approach leaves decisionmakers with little guidance. While special education placement decisionmaking is meant to be individualized,<sup>64</sup> such a lack of clarity leads to inconsistencies and inequities.

### III. ILLUSTRATING SHORTCOMINGS OF THE “LEAST RESTRICTIVE ENVIRONMENT AVAILABLE” APPROACH IN HEARING OFFICER DECISIONS

The practical effects of the application of the “availability” approach and its shortcomings are illustrated most clearly in the orders of front-line special education decisionmakers: administrative due process hearing officers. While courts like those above provide binding authority for hearing officers in their respective jurisdictions, it is the hearing officers themselves who conduct the initial LRE analyses and make decisions concerning student placement as part of relief.<sup>65</sup> Many special education due process cases do not go beyond the hearing officer level.<sup>66</sup> But a close analysis of hearing officer decisions from one jurisdiction shows how courts’ use of the availability LRE inquiry allows for hearing officers to order student placement in more restrictive settings than may be needed. Section III.A details the rationale for choosing Washington, D.C. as the jurisdiction of analysis. Section III.B analyzes the LRE inquiries in the body of D.C. special education hearing officer decisions from June 2013 through September 2013.

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63. See JAY G. CHAMBERS ET AL., *CTR. FOR SPECIAL EDUC. FIN., DISTRICT REVENUES AND STUDENT POVERTY: IMPLICATIONS FOR SPECIAL EDUCATION RESOURCES AND SERVICES 3–4* (1995), available at <http://csef.air.org/publications/csef/briefs/brief5.pdf> (finding that lower-resource schools invested less in special education staffing and certain special education services than higher-resource schools).

64. 34 C.F.R. § 300.116 (2014) (detailing the multiple, individualized factors to be considered in placement decisionmaking).

65. *Id.* § 300.181–.182 (delineating the responsibilities of hearing officers and stating that hearing officers are to prepare the initial written decisions of due process hearings).

66. *Cf.* COLKER, *supra* note 11, at 211–12 (noting that in the two years between June 2009 and June 2011, only twenty-three federal court opinions were issued from D.C. special education due process hearing decision appeals, in contrast to the more than one hundred cases decided by D.C. hearing officers from November 2010 through March 2011 alone).

A. *Rationale for Choosing D.C. as the Jurisdiction of Analysis*

This Part focuses on special education decisions from the District of Columbia for two primary reasons. First, the collection of D.C.'s due process hearing decisions is one of the most robust in the country.<sup>67</sup> Nearly half of the due process hearings in the entire country are for D.C. children and are conducted under the auspices of D.C.'s state educational agency.<sup>68</sup> Additionally, all of D.C.'s hearing officer decisions from January 2009 through—typically—the most recently completed month are easily accessible on the D.C. state educational agency website.<sup>69</sup>

Second, awarding more restrictive private special education placements as a remedy appears to be substantially more common in D.C.'s hearing officer decision jurisprudence than in other jurisdictions.<sup>70</sup> And whether students are placed in private special education schools by hearing officers or district educational authorities, D.C. has significantly more students in private placements than the national average.<sup>71</sup> Additionally, the issue of changes in placement restrictiveness is highly salient in D.C. In 2011, D.C.'s mayor publicly endeavored to halve the number of students in private placements by 2014.<sup>72</sup> Financial considerations are frequently cited for this

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67. Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings Under the IDEA*, 302 EDUC. L. REP. 1, 4–5 (2014) (finding that D.C. and five other jurisdictions made up 80 percent of due process filings and 90 percent of due process adjudications). In the two-and-a-half years between January 2009 and June 2011, Florida produced only thirty-three hearing officer decisions, COLKER, *supra* note 11, at 160; D.C.—with a student population dwarfed in size by that of Florida—produced thirty-two in the month of April 2011 alone. Office of the State Superintendent of Educ., *April 2011 Hearing Officer Determinations*, DC.GOV, <http://osse.dc.gov/service/april-2011-hearing-officer-determinations> (last visited Feb. 9, 2015). Two duplicate cases existed in this sample; the textual count is an unduplicated count.

68. See Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 4–5 (2010) (finding that D.C. accounted for 43 percent of total national due process hearings during the 2008–2009 time frame).

69. Office of the State Superintendent of Educ., *Services*, DC.GOV, <http://osse.dc.gov/services?tid=59> (last visited Feb. 9, 2015).

70. More than twice as many D.C. parents were awarded private placement relief in the month of April 2011 than there were Florida parents who prevailed in requesting *any* type of relief between January 2009 and June 2011. Compare COLKER, *supra* note 11, at 160 (stating that parents were successful in five due process hearings in Florida from January 2009 through June 2011), with *April 2011 Hearing Officer Determinations*, *supra* note 67 (listing eleven hearing officer determinations in D.C. that resulted in private placement in April 2011).

71. See Lisa Gartner, *Parents: DCPS Forcing Special Needs Kids Into Unfit Public Schools*, WASH. EXAMINER (July 15, 2012, 12:00 AM), <http://washingtonexaminer.com/parents-dcps-forcing-special-needs-kids-into-unfit-public-schools/article/2502132>.

72. Emma Brown, *Council Looks at Special-Ed Goal*, WASH. POST, Apr. 22, 2013, at B3, available at [http://www.washingtonpost.com/local/education/council-questions-push-for-special-ed-students-in-dc-public-schools/2013/04/22/29ac6aaa-ab85-11e2-a8b9-2a63d75b5459\\_story.html](http://www.washingtonpost.com/local/education/council-questions-push-for-special-ed-students-in-dc-public-schools/2013/04/22/29ac6aaa-ab85-11e2-a8b9-2a63d75b5459_story.html); Gartner, *supra* note 71; see also Kavitha Cardoza, *DCPS Tries New Strategy in Educating Special Ed Students*, WAMU 88.5 (May 17, 2013), [http://wamu.org/programs/metro\\_connection/13/05/17/dcps\\_tries\\_new\\_strategy\\_in\\_educating\\_special\\_ed\\_students](http://wamu.org/programs/metro_connection/13/05/17/dcps_tries_new_strategy_in_educating_special_ed_students).

initiative.<sup>73</sup> In recent years, D.C. has spent over \$100 million per school year in funding private special education placements.<sup>74</sup>

Care should be taken in making broad conclusions based on one jurisdiction. Recognizing that D.C. has a high rate of private placements and hearing officer decisions, this Part's analysis below is meant only to illustrate the potential implications of an availability-focused inquiry in actual hearing officer decisions. But given the recognized value of integration and the existence of other jurisdictions with sizable numbers of hearing officer decisions,<sup>75</sup> there are many potential implications.<sup>76</sup>

B. *Evidence and Consequences of Use of the "Availability" Approach in D.C. Hearing Officer Decisions*

This Section analyzes seventy-four D.C. hearing officer decisions, comprising the body of such decisions filed from June 2013 through September 2013, and concludes that a weakened, availability-based LRE analysis may lead to unnecessarily restrictive placements. In all of the cases, a public school district was the respondent; in no case did the district bring the due process complaint.<sup>77</sup> Both the D.C. Public Schools district and public charter schools that serve as their own special education public agency appeared as respondents.<sup>78</sup> The sample included a range of student ages, disabilities, educational needs, and school types.<sup>79</sup> Neither the race nor economic status of the involved families were given, and the student and school names were redacted in the hearing officer decisions.<sup>80</sup>

The frequency with which parents sought private placement as relief suggests that restrictive placements may be seen as desirable, affirming *Burlington*-like case law and challenging early congressional foundations for the LRE requirement.<sup>81</sup> Private special education school placement was sought in thirty-eight—or more than 50 percent—of the seventy-four cases.<sup>82</sup>

Hearing officers frequently found in parents' favor and often granted parents' requests for more restrictive placements. Parents prevailed in receiving all or part of their requested relief of any type in 76 percent of cases

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73. See, e.g., Gartner, *supra* note 71.

74. See *id.*

75. See Zirkel, *supra* note 67, at 4–13 (listing and discussing the frequency and ranking of each state's and jurisdiction's due process hearing filings and adjudications).

76. See *supra* Section I.A.

77. See Office of the State Superintendent of Educ., *2013 Hearing Officer Determinations*, DC.gov, <http://osse.dc.gov/service/2013-hearing-officer-determinations> (last visited Feb. 9, 2015) (cataloging the decisions from June 2013 through September 2013).

78. See *id.*

79. See *id.*

80. Office of the State Superintendent of Educ., *Student Hearing Office HOD Redaction Policy*, DC.gov, <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/SHO%20Redaction%20Policy%20May%202013.pdf> (last visited Feb. 9, 2015).

81. See *supra* Section II.B.

82. See *2013 Hearing Officer Determinations*, *supra* note 77.

read.<sup>83</sup> Moreover, in this Note's sample, D.C. hearing officers granted 42 percent of requests for placement or maintenance of placement in a separate special education school or residential facility.<sup>84</sup>

While 58 percent of private placement requests were denied, hearing officers' reasoning for denial was not always based on LRE considerations. Five of the twenty-two denied private placement requests were rejected because the district was not found to have violated its non-LRE special education obligations.<sup>85</sup> Another four private placement requests were denied for non-LRE-related reasons.<sup>86</sup>

On the other hand, private placement was sometimes denied for reasons relating to LRE, illustrating how the IDEA and case precedent do leave room for an LRE role in private placement decisions. In three cases, the hearing

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83. See *id.* In contrast, a recent study of hearing officer decisions across select jurisdictions found that parents prevailed in only 5–18 percent of hearing officer decisions from a New Jersey sample and in just 35 percent of reviewed hearing officer decisions from California. COLKER, *supra* note 11, at 172, 177, 187. In that study, D.C. also far surpassed other jurisdictions in terms of percent of decisions in which parents prevailed. See *id.* at 211–12.

84. See *2013 Hearing Officer Determinations*, *supra* note 77.

85. See *Petitioner v. D.C. Pub. Sch. at 7* (D.C. Office of State Superintendent of Educ. Sept. 18, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2020.pdf>; *Parent v. D.C. Pub. Sch. at 4, 11, 13–14* (D.C. Office of State Superintendent of Educ. Sept. 16, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2022.pdf>; *Parent v. D.C. Pub. Sch. at 10, 15* (D.C. Office of State Superintendent of Educ. Aug. 5, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Aug%202013%20HOD%2003.pdf>; *Student v. D.C. Pub. Sch. at 13–17* (D.C. Office of State Superintendent of Educ. June 22, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2020.pdf>; *Petitioners v. D.C. Pub. Sch. at 28–40* (D.C. Office of State Superintendent of Educ. May 30, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2003.pdf>.

86. See *Petitioner v. D.C. Pub. Sch. at 10–11* (D.C. Office of State Superintendent of Educ. Sept. 8, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2015.pdf> (finding that further evaluations were needed before other placement decisions could be made); *Student v. Local Educ. Agency Charter at 13, 29* (D.C. Office of State Superintendent of Educ. Aug. 10, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Aug%202013%20HOD%2007.pdf> (showing that a plan for a full-time, therapeutic placement was made before the hearing); *Parent v. D.C. Pub. Sch. at 11* (D.C. Office of State Superintendent of Educ. Aug. 7, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Aug%202013%20HOD%2005.pdf> (finding that the parties agreed that the private placement in question was not a good fit for the student moving forward); *Student v. D.C. Pub. Sch. at 26* (D.C. Office of State Superintendent of Educ. June 21, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2018.pdf> (taking into consideration the fact that the student did not want to be placed in the private placement).

officer cited a lack of evidence that a more restrictive setting was needed.<sup>87</sup> Private placement was denied in four other cases because public schools had programming sufficient to meet student needs; that is, the characteristics and services of the requested private placements had been incorporated into public school programs, which were found to be the LRE for certain students.<sup>88</sup>

Many of the decisions in which private placement was granted, however, illustrate an availability-focused LRE analysis and often cite case law that supports such an approach. In five of sixteen decisions granting private placement, LRE was not mentioned at all, or the LRE analysis was not described.<sup>89</sup> Such an omission is in keeping with D.C. jurisprudence that makes the LRE analysis largely optional in certain special education cases.<sup>90</sup> In four other decisions, private placement was acknowledged not to be the

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87. See *Parent v. D.C. Pub. Sch.* at 10–11, 15–16 (D.C. Office of State Superintendent of Educ. Sept. 8, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2009.pdf>; *Parent v. Local Educ. Agency at 9* (D.C. Office of State Superintendent of Educ. July 31, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/July%202013%20HOD%2017.pdf>; *Student v. D.C. Pub. Sch.* at 19–20 (D.C. Office of State Superintendent of Educ. July 26, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/July%202013%20HOD%2014.pdf>.

88. See *Petitioner v. D.C. Pub. Sch.* at 7–9, 17 (D.C. Office of State Superintendent of Educ. Sept. 22, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2016.pdf>; *Petitioner v. D.C. Pub. Sch.* at 7–8 (D.C. Office of State Superintendent of Educ. Sept. 12, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2014.pdf>; *Parent v. D.C. Pub. Sch.* at 12–16 (D.C. Office of State Superintendent of Educ. Sept. 4, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2007.pdf>; *Student v. D.C. Pub. Sch.* at 38–40 (D.C. Office of State Superintendent of Educ. July 15, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/July%202013%20HOD%2009.pdf>.

89. See *Petitioner v. D.C. Pub. Sch.* (D.C. Office of State Superintendent of Educ. Sept. 12, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2021.pdf>; *Student v. D.C. Pub. Sch.* (D.C. Office of State Superintendent of Educ. July 24, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/July%202013%20HOD%2013.pdf>; *Parent v. D.C. Pub. Sch.* (D.C. Office of State Superintendent of Educ. June 20, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2016.pdf>; *Student v. D.C. Pub. Sch.* (D.C. Office of State Superintendent of Educ. June 4, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2007.pdf>; *Parent v. D.C. Pub. Sch.* (D.C. Office of State Superintendent of Educ. June 2, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2004.pdf>.

90. See *Block v. District of Columbia*, 748 F. Supp. 891 (D.D.C. 1990) (analyzing the proper placement for a special needs child without considering the LRE requirement).

student's LRE but was allowed,<sup>91</sup> in keeping with the holding of the D.C. Circuit Court of Appeals in *Branham v. District of Columbia*.<sup>92</sup> LRE was not at issue in two cases.<sup>93</sup> Finally, a district's failure to show on the record that it could make a FAPE available was sufficient to award private placement in five other decisions.<sup>94</sup>

On the whole, this ability of a public school district to its capacity to provide an appropriate education in a less restrictive environment show on the record was one of most telling determinants of private placement request success and is reminiscent of *Burlington's* linkage of LRE to district resources.<sup>95</sup> When D.C. districts showed that they could meet a student's need in a longstanding or newly created special education program, hearing officers were more likely to state that a public school was the student's LRE. On the other hand, when districts did not have an appropriate program at the time of the due process hearing—or did not mention one on the record<sup>96</sup>—restrictive special education settings were more likely found to be the student's LRE. Thus, the LRE inquiry in D.C. hearing officer decisions was often satisfied by identifying the least restrictive environment available within the record rather than focusing on the least restrictive environment needed. The possibility remains that, within the analyzed sample, students placed in more restrictive settings could have had their needs met in less

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91. See *Parents v. Local Educ. Agency* at 12–13 (D.C. Office of State Superintendent of Educ. Sept. 11, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2018.pdf>; *Parent v. Local Educ. Agency* at 16–18 (D.C. Office of State Superintendent of Educ. July 8, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/July%202013%20HOD%2006.pdf>; *Parents v. D.C. Pub. Sch.* at 16–21 (D.C. Office of State Superintendent of Educ. June 5, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2008.pdf>; *Student v. D.C. Pub. Sch.* at 23–30 (D.C. Office of State Superintendent of Educ. May 31, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/June%202013%20HOD%2005.pdf>.

92. 427 F.3d 7, 12 (D.C. Cir. 2005) (espousing a balancing test making a school determination for special needs students contingent on factors other than the LRE requirement and leaving room for a determination that a school that is not the LRE is appropriate).

93. See *Parent v. D.C. Pub. Sch.* (D.C. Office of State Superintendent of Educ. Aug. 31, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2011.pdf>; *Petitioners v. D.C. Pub. Sch.* (D.C. Office of State Superintendent of Educ. Aug. 9, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Aug%202013%20HOD%2006.pdf>.

94. See, e.g., *Petitioner v. Pub. Charter Sch.* at 22–26 (D.C. Office of State Superintendent of Educ. Sept. 4, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2008.pdf> (finding—in the course of approving a private placement—that “in this case, there has been no evidence offered that [the respondent] is able or willing to make available to Student an appropriate program”).

95. See *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 362–63 (1985).

96. See, e.g., COLKER, *supra* note 11, at 210 (“[The school district] did not offer a vigorous defense of its proposed educational program at the due process hearing.”).

restrictive settings with certain added supports. To the extent that this occurred, it is unclear whether the IDEA's LRE requirement was met and, thus, whether students were denied the benefits of integration under the statute.

#### IV. THE "LEAST RESTRICTIVE ENVIRONMENT NEEDED" INQUIRY AS AN ALTERNATIVE, STRONGER APPROACH

While the "least restrictive environment available" approach suffers from the shortcomings identified and illustrated above, there is a workable, clear, textually plausible<sup>97</sup> alternative reading that more closely upholds the requirements of the IDEA: the "least restrictive environment needed" approach. Section IV.A describes how another area of American disability law—child mental health law—uses this alternative approach to meet an integration mandate similar to the IDEA's LRE requirement. Section IV.B proposes that hearing officers apply this alternative approach to special education law and asserts that the IDEA and its interpreting jurisprudence give hearing officers the authority to do so.

##### A. *Lessons Learned from Child Mental Health Law's Approach to Integration*

Subject to an integration mandate similar to special education's LRE requirement,<sup>98</sup> U.S. child mental health law shows that there is an alternative to special education law's LRE analysis.<sup>99</sup> Unlike in Tricia's allowed experience in the special education system in the hypothetical, unnecessary placement in a more restrictive setting to address failures in child mental health

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97. See *supra* Section II.A.

98. In a mandate known as the "integration regulation," Title II of the Americans with Disabilities Act of 1990 ("ADA") requires all public agencies—including child welfare and mental health agencies—to administer programs "in the most integrated setting appropriate to the needs of . . . individuals with disabilities." *Olmstead v. L.C.*, 527 U.S. 581, 592 (1999) (plurality opinion) (quoting 28 C.F.R. § 35.130(d) (1998)). This language was written to mirror the integration language of Section 504 of the Rehabilitation Act, which provided "recipients of federal funds to 'administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.'" *Id.* at 591–92 (emphasis added) (quoting 28 C.F.R. § 41.51(d) (1998)). The ADA requirement also contains language that could potentially weaken the integration regulation—a "reasonable-modifications regulation" mandates that public entities "make reasonable modifications . . . to avoid discrimination on the basis of disability," but stops short of requiring modifications that "would fundamentally alter the nature of the service, program, or activity." *Id.* at 592 (internal quotation marks omitted). Thus, the child mental health legal system is also faced with regulatory language marked by vagueness concerning what actions are "reasonable." See *id.* at 591–92.

99. See, e.g., *Katie A. v. Bontá*, 433 F. Supp. 2d 1065, 1074–79 (C.D. Cal. 2006) (requiring California state agencies to provide certain intensive children's mental health services), *rev'd on other grounds*, *Katie A. v. L.A. Cnty.*, 481 F.3d 1150 (9th Cir. 2007); see also Cindy Mann, Ctr. for Medicaid & CHIP Servs. & Pamela S. Hyde, Substance Abuse & Mental Health Servs., *Joint CMCS and SAMHSA Informational Bulletin: Coverage of Behavioral Health Services for Children, Youth, and Young Adults with Significant Mental Health Conditions*, MEDICAID.gov (May 7, 2013), <http://medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-05-07-2013.pdf> (describing federal initiatives to meet the needs of children with serious mental health

service provision has been found to be a violation of the Americans with Disabilities Act (“ADA”).<sup>100</sup> Courts,<sup>101</sup> policymakers,<sup>102</sup> and advocacy groups<sup>103</sup> work to promote an array of evidence-based home, school, and community services that keep children with serious emotional disturbances out of restrictive mental health settings such as group homes and residential treatment facilities. Where such services do not exist, public agencies may be subject to legal action; legal authorities have often recommended or required that needed intensive services be created and implemented so that children can remain in less restrictive settings.<sup>104</sup>

An interpretation of the ADA’s integration requirement that focuses on children’s needs rather than available services is the foundation of this alternative approach. The integration analysis here looks at a child’s needs, asks whether the needs can be met in a less restrictive setting with appropriate (even if not yet existing) programming, and—if so—seeks to create or implement that programming. By not limiting the integration analysis to available programming (but rather requiring the implementation of needed services), child mental health law creates the opportunity for guidelines that suggest what services are “reasonable” to expect a public agency to create and implement.<sup>105</sup>

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conditions in less restrictive settings through the use of various intensive, home- and community-based support and policy options).

100. J.B. *ex rel.* Troupe v. Barbour, No. 3:10cv153HTW-LRA, 2011 WL 4590790, at \*2 (S.D. Miss. 2011).

101. See *Olmstead: Community Integration for Everyone*, *supra* note 1.

102. *Id.*; see also Mann & Hyde, *supra* note 99.

103. See, e.g., *Success for All Children*, BAZELON CENTER, <http://www.bazelon.org/Where-We-Stand/Success-for-All-Children.aspx> (last visited Feb. 9, 2015).

104. See, e.g., *Katie A.*, 433 F. Supp. 2d at 1070–71, 1074–79.

105. For example, several intensive community-based mental health services are designated as alternatives to institutional care for children receiving Medicaid funding. See Mann & Hyde, *supra* note 99, at 1–11 (describing intensive care coordination, wraparound services, peer services, intensive home-based services, mobile crisis response and stabilization services, and other supports as less restrictive alternatives for addressing the needs of children with significant mental health conditions). If a public agency places a child in an institutional setting when the child’s needs could be met through a designated community-based program, the agency risks legal action for violation of federal integration mandates. See, e.g., First Am. Complaint at 17–25, *Katie A. v. Bontá*, 433 F. Supp. 2d 1065 (C.D. Cal. 2006) (No. 02-05662). In the stipulated judgment pursuant to the *Katie A.* class action settlement agreement, the state defendants agreed to provide intensive care coordination and intensive home-based services, among other services, for children with significant mental health needs, and noted a goal of reducing reliance on restrictive placements. Stipulated Judgment Pursuant to Class Action Settlement Agreement at 6–7, 15–16, *Katie A. v. Bontá*, 433 F. Supp. 2d 1065 (C.D. Cal. 2006) (No. 02-05662). Notably, the child mental health legal regime leaves open the possibility of more restrictive institutional placements where a child requires more intensive services than community-based supports can provide; that some children need services in a restrictive, segregated setting is not in question. See *The Continuum of Care for Children and Adolescents*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Sept. 2008), [http://www.aacap.org/AACAP/Families\\_and\\_Youth/Facts\\_for\\_Families/Facts\\_for\\_Families\\_Pages/The\\_Continuum\\_Of\\_Care\\_For\\_Children\\_And\\_Adolescents\\_42.aspx](http://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/Facts_for_Families_Pages/The_Continuum_Of_Care_For_Children_And_Adolescents_42.aspx) (describing the child mental health continuum of care); *Residential Treatment Centers*, BAZELON CENTER, <http://www.bazelon.org/Where-We-Stand/>

B. *Applying a Necessity Inquiry to LRE in Special Education Law*

By applying child mental health law's alternative approach to a statutory integration mandate, special education law can rethink the LRE analysis and its use in practice. This Note proposes that legal decisionmakers who evaluate special education disputes focus primarily on the needs of students in a manner akin to that used in child mental health law and follow an individualized three-step process by: (1) identifying a student's educational needs, (2) assessing the availability of needed support services in the public school setting, and (3) requiring the creation and implementation of needed programs in less restrictive settings where reasonable. Hearing officers, the primary special education legal decisionmakers, should apply this alternative approach to the LRE inquiry, with judicial backing.

Reasonableness should be presumed when a student could gain educational benefit in a less restrictive setting with more supports, excepting the unlikely instance where the education of other students is unduly negatively affected by the integration. Since hearing officers may already order a school district to increase spending to provide FAPE to a student such as by paying for a private special education-only placement, reasonableness should also be presumed where the cost of providing more intensive services in a less restrictive setting is equal to or less than the cost of implementing those services in the more restrictive setting. When these conditions are not met, the reasonableness analysis should proceed on a case-by-case basis informed by principles of disability law, which, for instance, considers cost but does not allow currently appropriated budgetary restrictions to fully determine reasonableness.<sup>106</sup> More restrictive private settings would remain available for students whose needs could not be met even with added intensive services in the public school setting.<sup>107</sup>

The text of the IDEA provides legal authority for applying this alternative necessity approach in special education law. First, this proposal meets the law's FAPE requirement at least to the extent of the current availability

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Success-for-All-Children/Mental-Health-Services-for-Children/Residential-Treatment-Centers.aspx (last visited Feb. 9, 2015) (acknowledging that more restrictive child mental health placements may be used but should be reserved for children with the most dangerous behavior).

For an example of guidelines as to what constitutes a "reasonable" accommodation in the disability and employment law context, see *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC (Oct. 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html>.

106. See *DOJ on Integration Mandate*, *supra* note 2 (stating that "budget cuts can violate the [Americans with Disabilities Act] . . . when significant funding cuts to community services create a risk of institutionalization or segregation," finding that relevant resources in determining cost "consist of all money the public entity allots, spends, receives, or could receive if it applied for available federal funding to provide services to persons with disabilities," and otherwise discussing the role of cost in reasonableness analyses).

107. See *Olmstead v. L.C.*, 527 U.S. 581, 582–84 (1999) (plurality opinion) (noting that nothing in the Americans with Disabilities Act requires elimination of more restrictive settings).

approach, as the competing approaches result in the same types of services received but in potentially different settings. Second, the LRE mandate, read literally, states that the LRE analysis should be based on the “nature or severity of [a student’s] disability.”<sup>108</sup> The proposed approach, which focuses primarily on a student’s disability-related needs, is not only allowed by the LRE mandate but appears to more closely accord with it than the current availability approach does.

Additionally, the IDEA and corresponding case law give legal authority to this proposal to use hearing officers as primary actors in implementing an alternative approach to the LRE inquiry. Neither the IDEA nor its regulations limit what remedies a hearing officer or court may order, provided that they align with special education law.<sup>109</sup> Rather, courts are required to “grant such relief as the court determines is appropriate” in special education disputes.<sup>110</sup> Oft-cited case law confirms that courts have broad discretion to grant equitable relief under the IDEA.<sup>111</sup> This broad discretion can be and has been interpreted to extend to hearing officers.<sup>112</sup> As such, both a positive grant of authority and an absence of statutory constraints give hearing officers and courts the authority to order the broad array of remedies envisioned by the “least restrictive environment needed” approach.

The structure of the IDEA and its regulations also supports a shift to a “least restrictive environment needed” approach. Both the LRE and FAPE mandates are referred to as requirements and occupy equivalent levels within the law’s paragraph structure; they are framed as distinct requirements.<sup>113</sup> This positioning indicates that a student’s placement must be both appropriate and in the least restrictive environment. To the extent that the availability approach may result in placements that have appropriate services but may be more restrictive than a student needs, the availability approach wrongly prioritizes the FAPE mandate over the structurally equal LRE mandate.

Like in child mental health law, guidelines or recommendations for minimum efforts to meet a student’s needs in a public school setting should be issued by professional or governmental organizations. As a starting point,

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108. See 34 C.F.R. § 300.114(a)(2)(ii) (2014) (stating the integration mandate of the IDEA); see also 20 U.S.C. § 1412(a)(5) (2012).

109. See *id.* § 300.511(c)(1)(iv) (stating, as a qualification of hearing officer decisions, simply that hearing officers “[m]ust possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice”). See generally 20 U.S.C. §§ 1400–09, 1411–19, 1431–44, 1450–55, 1461–66, 1470–75, 1481–82 (setting forth the requirements and provisions of the IDEA).

110. 20 U.S.C. § 1415(i)(2)(C)(iii) (2012).

111. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993) (“Under this provision, ‘equitable considerations are relevant in fashioning relief. . . and the court enjoys ‘broad discretion’ in so doing . . . .” (citations omitted)).

112. *Reid v. District of Columbia*, 401 F.3d 516, 521–24 (D.C. Cir. 2005).

113. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 612(a)(1), (5), 118 Stat. 2647, 2676–78, available at <http://idea.ed.gov/download/statute.html>; see also 34 C.F.R. § 300.101, 114.

public school districts could be required to incorporate certain characteristics of private special education school settings when necessary to accommodate students whose needs could be met in a less restrictive setting. A sampling of some private special education school characteristics that public schools had failed to adequately provide gathered from a review of the analyzed D.C. hearing officer decisions includes the following: one-on-one assistance or individualized instruction; a smaller learning environment or class size; a therapeutic environment; intensive remediation; intensive reading and writing instruction; and use of a token economy behavior support system.<sup>114</sup> Guidelines could also consider requiring school districts to pay for those services by funds which would otherwise be spent on private placements.<sup>115</sup>

Finally, variations on this proposal have begun to be implemented outside of the due process hearing structure, giving the proposal more pragmatic authority. For example, public schools have created behavior support classrooms with low student-to-teacher ratios, therapeutic services, and de-escalation support for crisis situations as an alternative to private placement.<sup>116</sup> The formation and implementation of such programs show that at least some educational authorities find value in such programs, giving practical credence to the suggestion that hearing officers order certain minimum program formation and implementation as needed to satisfy the necessity analysis. Such programs are also expected to result in cost savings.<sup>117</sup> Utilizing hearing officers to spur the creation of such programs would likely encourage program growth to continue and would likely shield such program development from political pressures that may jeopardize their implementation.

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114. See, e.g., *Parents v. Local Educ. Agency at 9–10* (D.C. Office of State Superintendent of Educ. Sept. 11, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2018.pdf>; *Petitioner v. Pub. Charter Sch. at 9* (D.C. Office of State Superintendent of Educ. Sept. 4, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2008.pdf>.

115. Because the alternative approach is distinctly forward-looking, assessing the appropriate placement for a student, this proposal is not meant to cover cases strictly about tuition reimbursement for parental placement. But in the likely event that these reimbursement cases also discuss a student's future placement, the alternative approach of this proposal could be used.

116. See, e.g., *Parent v. D.C. Pub. Sch. at 13* (D.C. Office of State Superintendent of Educ. Sept. 4, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2007.pdf> (describing a public school setting with low student-to-teacher ratios, a de-escalation room, and other therapeutic services).

117. See *Cardoza*, *supra* note 72 (reporting that, in D.C., educating a student with disabilities in a private school is twice as costly as educating a student with disabilities in a public school. *But see* *Gartner*, *supra* note 71 (voicing concerns that D.C. public school programs may be insufficiently equipped to educate certain students previously enrolled in special education-only private schools). Such concerns illustrate the need to ensure that bringing more intensive services into less restrictive settings results in the provision of a FAPE.

V. BENEFITS AND IMPLEMENTATION CHALLENGES  
OF THE NECESSITY APPROACH

A necessity-based LRE approach would yield numerous benefits and would raise unique practical and legal implementation challenges. Section V.A details legal and policy arguments that support use of a necessity approach. Section V.B identifies, acknowledges, and addresses challenges to implementation of the “least restrictive environment needed” approach.

A. *Legal and Policy Arguments for Applying the Necessity Approach to Special Education’s LRE Requirement*

Application of child mental health law’s necessity approach to the special education LRE mandate is supported by its legal and policy advantages over the existing availability approach. First, the proposed solution is legally attractive because it accords more closely with the main components of the IDEA than the availability interpretation does. A FAPE is preserved by providing the same appropriate services as before, albeit in less restrictive settings where possible. The LRE requirement is also met more fully under the proposal. Currently, the LRE mandate may be met by placing a student in a more restrictive setting because needed services are not available in a less restrictive setting.<sup>118</sup> Such placement would not meet the LRE requirement under the necessity approach if needed services could be provided in less restrictive public settings or had been included in guidelines as to minimum reasonable program modifications. The proposal thus satisfies a more robust LRE mandate that requires public agencies to meet more student needs in less restrictive settings.<sup>119</sup>

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118. See generally *Parents v. Local Educ. Agency at 13* (D.C. Office of State Superintendent of Educ. Sept. 11, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2018.pdf> (allowing a special needs student to be placed in private school because the less restrictive public school failed to offer the services the student needed); *Petitioner v. Pub. Charter Sch.* (D.C. Office of State Superintendent of Educ. Sept. 4, 2013) (Hearing Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/September%202013%2008.pdf>.

119. In addition, the necessity approach better satisfies other sections of the IDEA. The statute’s findings section provides that “the education of children with disabilities can be made more effective by [ ] having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent *possible*.” 20 U.S.C. § 1400(c)(5) (2012) (emphasis added). This language is situated within a broadly sweeping introduction to the IDEA that emphasizes equal opportunity, high expectations, and nondiscrimination. 20 U.S.C. § 1400(c). Its use of the word “possible” rather than “appropriate” should be read to suggest that public agencies must make all possible efforts to provide students with needed services within less restrictive environments. Similarly, another section of the IDEA and its regulations mandates that a state must “establish[ ] a goal of providing full educational opportunity to all children with disabilities.” 34 C.F.R. § 300.109 (2014). Such broad language—taken together with the IDEA’s clear preference for integration—should be seen as implying that public agencies should focus on meeting students’ needs rather than giving resource availability such significant consideration when making decisions about students’ educational opportunities.

Employing a necessity approach to the LRE analysis is also likely to yield financial savings for school districts that could allow for broad systemic improvements. In both special education and other disability areas, providing services—even intensive services—in less restrictive settings is generally seen as more cost-effective than providing services in more restrictive settings.<sup>120</sup> Savings from providing services in less restrictive environments could then be reinvested into the special education system to improve services for more students in need.<sup>121</sup>

Furthermore, if a public school creates intensive services to remedy a FAPE violation for one child, those services could then be available for other students as well. The potential effect would be a net increase in the availability of specialized services for all students in need, including students who—due to lack of access to resources—may not otherwise have had the opportunity to obtain intensive service through legal proceedings.

### B. Addressing Legal and Practical Challenges

This Note advocates for a significant shift in placement decisionmaking by legal authorities and acknowledges that this shift may raise legal and practical challenges. Several of the most substantial concerns are addressed below, including legal obstacles due to dissimilarities between the child mental health and special education systems and practical implementation challenges.

Responding to the potential argument that the child mental health system is too unlike the special education system to serve as a model, the systems are sufficiently similar. There is overlap in the populations served

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120. See, e.g., DARCY GRUTTADARO ET AL., NAT'L ALLIANCE ON MENTAL ILLNESS, REINVESTING IN THE COMMUNITY: A FAMILY GUIDE TO EXPANDING HOME AND COMMUNITY-BASED MENTAL HEALTH SERVICES AND SUPPORTS 13 (2009), available at [http://www.nami.org/Template.cfm?Section=Research\\_Services\\_and\\_Treatment&template=/ContentManagement/ContentDisplay.cfm&ContentID=76200](http://www.nami.org/Template.cfm?Section=Research_Services_and_Treatment&template=/ContentManagement/ContentDisplay.cfm&ContentID=76200) (child mental health); Wendy Fox-Grage & Jenna Walls, *State Studies Find Home and Community-Based Services to be Cost-Effective*, 2013 AARP PUB. POL'Y INST. 1, available at [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/ltc/2013/state-studies-find-hcbs-cost-effective-spotlight-AARP-ppi-ltc.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/state-studies-find-hcbs-cost-effective-spotlight-AARP-ppi-ltc.pdf) (elder care); Robert A. Rosenheck & Michael S. Neale, *Cost-Effectiveness of Intensive Psychiatric Community Care for High Users of Inpatient Services*, 55 ARCHIVES GEN. PSYCHIATRY 459, 459 (1998), available at <http://archpsyc.jamanetwork.com/article.aspx?articleid=203887> (adult mental health); cf. Jay P. Greene & Marcus A. Winters, *Debunking a Special Education Myth*, EDUC. NEXT, Spring 2007, at 69, available at [http://www.manhattan-institute.org/html/mi-article.htm?id=4244#.UtS\\_XrRYSzE](http://www.manhattan-institute.org/html/mi-article.htm?id=4244#.UtS_XrRYSzE) (special education) (noting the higher costs of educating students in private placements under a conservative public school cost estimate, but noting that the cost savings of educating students in public rather than private schools may be smaller than estimated due to the difficulties in accurately making the calculation).

121. See, e.g., Brown, *supra* note 72 (noting D.C.'s plans to reinvest savings from reduced private placements into public school special education programs); cf., e.g., N.J. COUNCIL DEVELOPMENTAL DISABILITIES, STILL SEPARATE AND UNEQUAL: THE EDUCATION OF CHILDREN WITH DISABILITIES IN NEW JERSEY 22, 42 n.59 (2004), available at [http://www.edlawcenter.org/assets/files/pdfs/issues-special-education/Still\\_Separate\\_and\\_Unequal.pdf](http://www.edlawcenter.org/assets/files/pdfs/issues-special-education/Still_Separate_and_Unequal.pdf) (finding that paying to place special needs students in private schools detracts from the state's ability to build programs for those students in public schools).

between the systems: both systems must serve disabled children with intensive service needs who require a range of placements.<sup>122</sup> Children with serious emotional disturbance are also some of the most likely to be placed in restrictive special education settings.<sup>123</sup> As mentioned, both systems are governed by legislation that contains an integration mandate with wording that is substantially similar.<sup>124</sup> These similarities are those fundamental to using one system's approach to integration as a model for the other system.

A related counterargument may assert that, unlike in the child mental health system, restrictive special education placements are more effective than less restrictive settings and should be advocated for, especially when the public school district's existing special education program is seen as ineffective.<sup>125</sup> But there is often little data to suggest that private special education schools as a group are academically effective; many do not report assessment or accountability data, even for publicly funded students placed there.<sup>126</sup> Unlike many public school districts, several special education schools do not conduct or report studies that assess student outcomes after students leave their schools.<sup>127</sup> The state approval process for nonpublic special education schools that receive public funding at times requires no evidence of student progress.<sup>128</sup> While there are effective special education schools and such

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122. Mann & Hyde, *supra* note 99, at 1–11; *see also* 34 C.F.R. § 300.115 (2014) (describing the continuum of special education placements). Indeed, many children in the child mental health system may receive special education services and vice versa, due in part to the comorbidity of many learning and emotional difficulties. *See* Kenneth A. Kavale et al., *Defining Emotional or Behavioral Disorders*, in *HANDBOOK OF EMOTIONAL & BEHAVIOURAL DIFFICULTIES* 45, 51 (2005).

123. *See Fast Facts on Inclusion of Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=59> (last visited Feb. 9, 2015).

124. *See supra* notes 1, 98.

125. *See* Brown, *supra* note 72; Cardoza, *supra* note 72; Gartner, *supra* note 71. All of these articles refer to D.C. schools which have traditionally been underachieving.

126. *See, e.g.*, D.C. Office of the State Superintendent of Educ., *Find a School*, LEARN D.C., <http://www.learndc.org/schoolprofiles/search> (last visited Feb. 9, 2015) (listing no private schools—including private special education schools at which special education students are placed at public expense—on the D.C. state department of education school information and accountability website).

127. Joseph Calvin Gagnon & Peter E. Leone, *Elementary Day and Residential Schools for Children with Emotional and Behavioral Disorders*, 26 *REMEDIATION & SPECIAL EDUC.* 141, 147 (May/June 2005), available at <http://amywagner.wiki.westga.edu/file/view/alternative+placements+EBD.pdf>; *cf.* 34 C.F.R. § 300.148(c) (2014) (stating that for parental reimbursement purposes, private schools—including private special education-only schools—need not prove they meet state educational standards).

128. *See, e.g.*, Conn. State Dep't of Educ., *Principles, Procedures, and Standards for the Approval of Private Special Education Programs*, CT.GOV (June 1998), <http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/PPS.pdf>; Office of the State Superintendent of Educ., *Nonpublic Monitoring Tool*, DC.GOV (Nov. 5, 2013), <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Nonpublic%20School%20Compliance%20Monitoring%20Tool%20SY2013-14v.11.05.2013.pdf>.

placements should be used when needed, it is not apparent that private special education schools necessarily provide higher quality services than intensive services in the public school setting would.<sup>129</sup>

Another challenge to implementation of a “least restrictive environment needed” approach in special education law is the individualized nature of special education legal proceedings. Unlike in child mental health law, special education legal violations may be less likely to be resolved through class action suits, relying instead on individual complaints.<sup>130</sup> As a result, it may be difficult to achieve systemic change in LRE decisionmaking through the courts or hearing officer decisions. Precedent that establishes a necessity LRE approach is unlikely to be obtained from decisionmakers who rarely hear systemic challenges in special education cases.

But the difficulties posed by the individualized nature of special education dispute resolution are surmountable. One way for legal decisionmakers to assess whether districts are reasonably meeting students’ needs is to import into special education law the “effectively working plan” standard of mental health law.<sup>131</sup> Under this standard, a public agency trying to provide a range of placements and services has met its duty as long as it “ha[s] a comprehensive, effectively working plan for placing . . . persons with . . . disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace.”<sup>132</sup> Applied to special education law, this would allow a public educational agency to meet its duty to provide intensive supports in less restrictive settings if the agency had an effectively working plan for doing so and if any waiting list for intensive services in less restrictive environments were moving along reasonably.

Additionally, where special education legal decisionmakers are limited by their lack of expertise in assessing student needs and district capabilities, they may be assisted—as they already are—by other experts. Just as the reports of educational experts often discern student needs, experts could assist in the development of the guidelines for school districts, lending them both practical knowledge and authority.

Successful implementation of a necessity-based LRE approach without systemic orders from a court would require buy-in from a network of involved stakeholders: families, advocates, expert educational authorities,

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129. The findings section of the IDEA implicitly affirms this concept, stating that special education should be a service rather than a place, 20 U.S.C. § 1400(c)(5)(C) (2012); the setting alone does not determine special education effectiveness; *cf.*, *e.g.*, Maia Szalavitz, *An Oregon School for Troubled Teens Is Under Scrutiny*, TIME (Apr. 17, 2009), <http://content.time.com/time/health/article/0,8599,1891082,00.html> (describing troubles faced by the private school at issue in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (a recent Supreme Court tuition reimbursement case)).

130. *See, e.g.*, *D.L. v. District of Columbia*, 713 F.3d 120, 124–29 (D.C. Cir. 2013) (vacating a class certification order and remanding to determine issues of commonality); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 485–86, 493–500 (7th Cir. 2012) (vacating a class certification order based on indefiniteness and lack of commonality).

131. *Olmstead v. L.C.*, 527 U.S. 581, 605–06 (1999) (plurality opinion).

132. *Id.*

policymakers, and legal decisionmakers. As such, this proposal is in keeping with the reality of the multi-actor collaboration that is often required in making educational change or improvements due to the decentralized nature of education law.<sup>133</sup>

Another challenge to implementation of a “necessity” LRE approach is that special education services cannot be delayed while waiting for appropriate intensive services to be developed in a public school setting.<sup>134</sup> This would deny the student an appropriate education and presents a problem not seen in child mental health law, in which system-wide injunctions may be phased in following a class action suit.<sup>135</sup> The proposal, however, is consistent with this need to provide the student with an appropriate education. More restrictive settings may be requested by parents or school personnel and used, though only as needed, under the alternative necessity approach.<sup>136</sup> Where intensive services do not yet exist, short-term placement in a more restrictive setting may be allowed while intensive services in the less restrictive setting are developed. Nothing in the IDEA requires students to remain in a more restrictive setting once placed there if appropriate intensive services become available in a less restrictive setting.<sup>137</sup> In fact, return to a less restrictive setting in which needed services are available is a goal of the IDEA.<sup>138</sup>

Furthermore, movement to a less restrictive setting with appropriate needed services may be ordered, even when a private placement is also acceptable.<sup>139</sup> Practically, a hearing officer—under this proposal—may order time-limited placement in a more restrictive setting, creation of needed services in the less restrictive public setting within that time limit, and prospective placement of a student in the less restrictive setting with needed services no later than the end of this time limit.<sup>140</sup> Where needed intensive services

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133. Cf. 20 U.S.C. § 1400(c)(5)–(6) (acknowledging the role of parents, families, local educational agencies, states, and the federal government in efforts to improve educational outcomes for students with disabilities).

134. OSBORNE, JR., *supra* note 7, at 122–23 (giving examples from case law in which it was found that delays in IEP implementation violated the IDEA); *see also* 34 C.F.R. § 300.323 (2014) (discussing when IEPs must be in effect).

135. *See* 34 C.F.R. § 300.112 (stating, within the free appropriate public education section of the IDEA’s regulations, a requirement for fulfillment of the “IEP in effect” provision of 34 C.F.R. § 300.323).

136. *See supra* note 105 and accompanying text.

137. OSBORNE, JR., *supra* note 7, at 123; *see* 34 C.F.R. § 300.116 (stating that a child’s placement must be determined *at least* annually).

138. OSBORNE, JR., *supra* note 7, at 123.

139. *N.T. v. District of Columbia*, 839 F. Supp. 2d 29, 34 (D.D.C. 2012) (“Although the [school district] must pay for private school placement ‘[i]f no suitable public school is available[,] . . . if there is an appropriate public school program available . . . the [school district] need not consider private placement, even though a private school might be *more* appropriate or better able to serve the child.’” (quoting *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991)); OSBORNE, JR., *supra* note 7, at 123).

140. Hearing officers may impose time limits in orders for relief. *See, e.g.*, *Parent v. D.C. Pub. Sch.* at 11 (D.C. Office of the State Superintendent of Education Aug. 2, 2013) (Hearing

are already available in the public school setting, hearing officers may simply require placement of a student in the less restrictive public school setting in order to receive appropriate needed services. Notably, this concern arising from a lack of needed intensive services within public school settings is likely to diminish significantly as implementation of the proposal continues. As school districts incorporate more services into public schools to meet intensive educational needs according to created guidelines, it will become increasingly likely that a district has the appropriate programs required to meet students' special educational needs in the future.<sup>141</sup>

One final counterargument to the proposal is that public school districts with relatively high rates of restrictive private special education placements are generally rare, as are states with high rates of due process hearings.<sup>142</sup> But the lessons and suggestions presented stand. In jurisdictions with relatively few due process hearings, this proposal could influence the actions of districts by suggesting the development of guidelines on minimum intensive services to be provided in less restrictive settings and by establishing a series of legal decisions that use an alternative approach to the LRE and placement inquiries. For jurisdictions with low private placement rates, the alternative approach to LRE in this proposal could be extended to placement decisions made by educational authorities within public school settings. Using the three-step placement decisionmaking model, schools may be more likely to assess whether needed services in more restrictive public school settings—such as self-contained special education classrooms—may be successfully brought into less restrictive settings. This inquiry allows school districts to meet both the “least restrictive environment available” and “least restrictive environment needed” interpretations of the LRE requirement, thus bringing school districts in more convincing compliance with the IDEA.<sup>143</sup>

#### CONCLUSION

The IDEA's LRE requirement reflects the central position of integration in U.S. disability law. But the LRE mandate is subject to competing interpretations. The availability interpretation, which gives strong consideration to the availability of district resources in placement decisions, has enjoyed

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Officer Determination), available at <http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Aug%202013%20HOD%2001.pdf> (ordering the school district to issue a letter within five business days of the order and to convene a meeting within ten school days of the completion of independent evaluations). Suggested time limits could also be part of any guidance issued under this Note's proposal.

141. See *supra* Section V.A.

142. Greene & Winters, *supra* note 120 (finding that private placement is “extremely rare”); Zirkel, *supra* note 67 (finding that jurisdictions, outside of the top six for due process adjudications, make up just 10 percent of total national due process adjudications). In 2009, only 5 percent of students ages six to twenty-one who were served under the IDEA nationally were in settings other than a regular public school. *Fast Facts on Inclusion of Students with Disabilities*, NAT'L CTR FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=59> (last visited Feb. 9, 2015).

143. See *supra* Section V.A.

prominence despite the fact that it is not the better reading of the law. This Note has borrowed from child mental health law to propose an alternative necessity-based approach to the LRE requirement. By requiring legal decisionmakers to assess a student's LRE based more on student need than on resource availability, this Note's proposal results in greater compliance with and bolstering of the IDEA's LRE requirement.