

# Shuttered: An Examination of How the 2013 Chicago Public School Closings are Denying Special Education Students the Right to an Appropriate Public Education

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## I. INTRODUCTION

For centuries, individuals with disabilities have had to combat “biased assumptions, harmful stereotypes, and irrational fears.”<sup>1</sup> The stigmatization of being handicapped has repressed the group’s social and economic opportunities, and created an unsolicited form of societal paternalism that, in practice, has furthered their degradation.<sup>2</sup> Many individuals with disabilities

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\* Juris Doctor Candidate, May 2015, and Notes & Comments Editor of the *Northern Illinois University Law Review*. I am incredibly grateful to my family and friends for their support throughout the research and writing process. I would also like to thank Notes & Comments Editor Noah Menold for all of the guidance and critiques that he offered. Finally, I am thankful for the hard work and dedication provided by every member of the *Northern Illinois University Law Review* during the editing and publication process.

1. Anti-Defamation League, *A Brief History of the Disability Rights Movement*, [http://archive.adl.org/education/curriculum\\_connections/fall\\_2005/fall\\_2005\\_lesson5\\_history.asp](http://archive.adl.org/education/curriculum_connections/fall_2005/fall_2005_lesson5_history.asp) (last visited Sept. 26, 2013) [hereinafter *Disability Rights Movement*].

2. *See id.*

have been effectively rendered invisible in their communities and voiceless in the political process.<sup>3</sup> As a result, those with disabilities have long suffered the consequences of society's actions with little stake in the discussion. Despite many setbacks, however, disability rights advocates have achieved some important victories in the fight for equal rights.<sup>4</sup>

Prior to 1975, there was no federal legislation that guaranteed disabled students the right to a meaningful public education.<sup>5</sup> There were also no federal guidelines on how special needs students were to be educated.<sup>6</sup> Congress responded by passing the Education for All Handicapped Children Act of 1975 (EAHCA).<sup>7</sup> The EAHCA effectively required states to provide all special needs students with a free, appropriate public education in the least restrictive environment with any necessary supplementary aids and services.<sup>8</sup> In the decades since its passage, the EAHCA has undergone several revisions.<sup>9</sup> It has also been rebranded the Individuals with Disabilities Education Act (IDEA).<sup>10</sup> Nevertheless, the Act's most basic guarantees remain unchanged to this day.<sup>11</sup>

In May 2013, the Chicago Public School (CPS) system voted to close forty-nine elementary schools.<sup>12</sup> Forty-eight of the schools were slated to shutter just weeks after the vote.<sup>13</sup> Some five thousand special education students were affected by the closings and had to be transferred to new re-

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3. See Rebecca Shleifer, *Disabled and Disenfranchised*, HUFFINGTON POST (Nov. 5, 2012, 5:12 AM), [http://www.huffingtonpost.com/rebecca-schleifer/disabled-voting-rights\\_b\\_1853234.html](http://www.huffingtonpost.com/rebecca-schleifer/disabled-voting-rights_b_1853234.html).

4. The Am. Ass'n of People with Disabilities, *Disability Rights*, <http://www.aapd.com/what-powers-us/disability-rights/> (last visited Dec. 20, 2013).

5. See New Am. Found., *Background & Analysis: Individuals with Disabilities Education Act Overview*, <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-overview> (last visited Sept. 28, 2013).

6. See *id.*

7. See *id.*

8. See Education for All Handicapped Children Act of 1975, Pub. L. No. 93-112, 87 Stat. 355.

9. See generally Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103; Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

10. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

11. See *id.*

12. See Anita Padilla et al., *Board Votes to Close 49 CPS Schools, 1 High School Program*, FOX CHI. (May 22, 2013, 7:08 AM), <http://www.myfoxchicago.com/story/22383246/chicago-board-of-education-to-vote-on-cps-public-school-closings>.

13. See *id.*

ceiving schools.<sup>14</sup> The purpose of this Comment is to show how the CPS closings violated the IDEA by effectively denying special needs students the right to an appropriate public education. It will examine pertinent federal legislation, review important case law, identify key issues, and advocate for changes to ensure that special needs students continue to receive a meaningful education.

This Comment begins with a brief history of disability rights in the United States in Part II. It provides an overview of the challenges that individuals with disabilities faced in the founding years of this nation, progresses through the eugenics era, and concludes with an examination of the achievements and failures of the modern disability rights movement. It also reviews important disability rights legislation and examines the protections that are afforded to students under the IDEA.

Part III of this Comment examines the circumstances of the CPS closings. It begins with a brief history of disability rights in the Chicago Public Schools and subsequently investigates the events that instigated the 2013 CPS crisis. It then examines the CPS board's vote and the actual school closings. Part III concludes with a cursory analysis of the consequences of the closings on special students.

Part IV of this Comment concerns IDEA-related standing issues. It begins with a review of the statutory requirements for administrative and judicial proceedings under the IDEA. Part IV concludes by arguing that federal courts would have immediate jurisdiction over any claims relating to the 2013 CPS closings because administrative remedies could not have been exhausted under the school district's timeline for the closings.

Part V of this Comment addresses the burden scheme imposed on parents of disabled students who wish to trigger a judicial inquiry into the CPS's alleged violations of the IDEA. It begins by examining the burden scheme employed by the district court in two lawsuits that sought to enjoin the 2013 CPS closings. In *McDaniel v. Board of Education*<sup>15</sup> and *Swan ex rel. I.O. v. Board of Education*,<sup>16</sup> the court effectively forced parents to identify, prove, seek remedy for, and bear the cost of litigating an individualized education program (IEP) violation before requiring the school district to genuinely contest the claim. Part V highlights the issues with this burden scheme, and concludes with an examination of a burden scheme that would remedy the highlighted issues.

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14. See Jessica D'Onofrio & Sarah Schulte, *Chicago Public School Closings Fight Moves to Federal Court with Injunction Hearing*, ABC7 NEWS (July 16, 2013, 3:44 PM), <http://abclocal.go.com/wls/story?section=news/local&id=9173735>.

15. *McDaniel v. Board of Education*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

16. *Swan ex rel. I.O. v. Board of Education*, No. 13 C 3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013).

Part VI of this Comment focuses on IDEA-related issues. Section A examines how the CPS closings have effectively violated the IDEA by disrupting individualized education programs (IEPs). It argues that the sudden and chaotic transfer of more than five thousand disabled students' IEPs to new schools presented enormous challenges to accommodating each student's unique needs and analyzes how disabled students are inevitably being denied their right to an appropriate public education. Section B discusses how the CPS closings and layoffs have effectively violated the IDEA by both reducing the amount of qualified teachers to an unsustainable level and increasing the number of students per classroom. It argues that the layoffs cut the number of educators beyond the minimum needed to provide an appropriate public education and that the number of students flooding into receiving schools has extended class sizes to the point that disabled students are no longer receiving an appropriate education. Section C examines how the CPS closings and layoffs have violated the IDEA by inevitably worsening existing evaluation backlogs for new special education students. It examines the CPS's history of evaluation delays and argues that existing delays, which already jeopardize students' most formative years, will be compounded by a flood of new students who will need to be evaluated by a worsening shortage of professionals.

## II. BACKGROUND

### A. HISTORY OF DISABILITY RIGHTS IN AMERICA

The history of disability rights in the United States is perhaps most comparable to a pendulum swinging between horrific atrocities on the one end and significant achievements on the other. Beginning in 1773, the Public Hospital for Persons of Insane and Disordered Minds opened in Williamsburg, Virginia as the first facility dedicated to treating the mentally ill.<sup>17</sup> The Governor of Virginia, in pushing for the construction of the institution, spoke of the mentally ill as "a poor unhappy set of people who are deprived of their senses and wander about the countryside, terrifying the rest of their fellow creatures."<sup>18</sup> While startling today, the Governor's comments were far from unusual during this era. It was widely believed that those with mental illnesses and intellectual disabilities chose to be irrational.<sup>19</sup>

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17. See The Colonial Williamsburg Found., *Public Hospital*, <http://www.history.org/almanack/places/hb/hbhos.cfm> (last visited Sept. 27, 2013).

18. *Id.*

19. See *id.*

Proponents of institutionalization argued that confining the mentally ill would permit doctors to control their treatment and “restore to them their lost reason.”<sup>20</sup> In practice, Virginia’s Public Hospital for Persons of Insane and Disordered Minds functioned more like a dungeon than a health care facility.<sup>21</sup> The institution consisted of twenty-four cells, each possessing a “stout door with a barred window that looked on a dim central passage, a mattress, a chamber pot, and an iron ring in the wall to which the patient’s wrist or leg fetters were attached.”<sup>22</sup> Physicians prescribed treatments ranging from electrostatic shock to solitary confinement, bleeding, plunge baths, and strong drugs.<sup>23</sup> Later, the facility added two additional dungeon-like cells “under the first floor of the hospital for reception of patients who may be in a state of raving phrenzy [sic].”<sup>24</sup> Despite their ineffectiveness, physicians employed these torturous courses of treatment for the remainder of the Eighteenth Century.<sup>25</sup>

As the country progressed into the 1800s, the philosophy of moral management supplanted the more archaic, torture-driven treatment regimens.<sup>26</sup> In a reversal of past practices, moral management “emphasized kindness, firm but gentle encouragement to self-control, work therapy, and leisure activity.”<sup>27</sup> Good nutrition and socialization were recognized as important aspects of patients’ daily lives.<sup>28</sup> Patient care under the moral management philosophy was short-lived though. An increasing number of patients soon spread hospital resources thin and focus on the American Civil War effort forced the release of many patients.<sup>29</sup> Patient care reverted to pre-Revolutionary War conditions,<sup>30</sup> and those with disabilities were once again regarded as “meager, tragic, pitiful individuals unfit and unable to contribute to society.”<sup>31</sup>

In 1883, Sir Francis Galton laid the foundation for one of the darkest periods in human history with the introduction of eugenics.<sup>32</sup> Under Gal-

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20. *Id.*

21. *See id.*

22. *Public Hospital, supra* note 17.

23. *See id.*; Abigail Coy, *Mental Health in Colonial America*, THE HOSPITALIST (May 2006), [http://www.the-hospitalist.org/details/article/252399/Mental\\_Health\\_in\\_Colonial\\_America.html](http://www.the-hospitalist.org/details/article/252399/Mental_Health_in_Colonial_America.html).

24. *Public Hospital, supra* note 17.

25. *See id.*

26. *See id.*; Coy, *supra* note 23.

27. *See Public Hospital, supra* note 17; Coy, *supra* note 23.

28. Coy, *supra* note 23.

29. *See id.*

30. *See id.*

31. *Disability Rights Movement, supra* note 1.

32. *Perspectives on the Historical Treatment of People with Disabilities: Appendix 14C.*, TEACHING FOR DIVERSITY AND SOC. JUST. (2007),

ton's theory of eugenics, proponents believed they could improve "the quality of the human population by selecting for desirable traits, just as animal breeders would do for their livestock."<sup>33</sup> It was believed that "conditions such as mental retardation, psychiatric illnesses, and physical disabilities could be eradicated."<sup>34</sup> In order to work, however, society had to prevent so-called "unfit" individuals from procreating.<sup>35</sup> In 1907, Indiana became the first state to pass a law permitting state authorities to forcibly sterilize "confirmed idiots, imbeciles and rapists."<sup>36</sup> Twenty-nine other states passed similar laws in the following years.<sup>37</sup> The issue of forcible sterilization reached the United States Supreme Court in *Buck v. Bell* in 1927.<sup>38</sup> In an opinion written by the late Justice Oliver Wendell Holmes, the Court opined that it would be strange if the state could not forcibly sterilize those who were a burden upon it. Holmes reasoned, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."<sup>39</sup> He concluded, "Three generations of imbeciles are enough."<sup>40</sup> The horrors of eugenics in Nazi Germany soon reversed its popularity in the United States<sup>41</sup> and the Supreme Court effectively signaled a reversal in *Skinner v. Oklahoma*.<sup>42</sup> By the time eugenics completely tapered off in the 1960s, an estimated sixty thousand Americans had been forcibly sterilized by state authorities.<sup>43</sup>

Perhaps the first significant shift in public perception of disability rights in the United States followed the World Wars.<sup>44</sup> Millions of young men who answered the call to fight for their country returned home from

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<http://instructional1.calstatela.edu/dfrankl/CURR/kin385/PDF/History-of-Treatment-of-the-Disabled.pdf> [hereinafter *Perspectives*].

33. Karen Norrgard, *Human Testing, the Eugenics Movement, and IBRs*, NATURE (2008), <http://www.nature.com/scitable/topicpage/human-testing-the-eugenics-movement-and-irbs-724>.

34. *Id.*

35. *Id.*

36. Nat'l Consortium on Leadership and Disability for Youth, *Disability History: Timeline* (2007), <http://www.ncl-d-youth.info/index.php?id=61>.

37. See *Perspectives*, *supra* note 32.

38. See *Buck v. Bell*, 274 U.S. 200, 207 (1927).

39. *Id.*

40. *Id.*

41. See Pub. Broadcasting Service, *Eugenics Movement Reaches its Height*, <https://www.pbs.org/wgbh/aso/databank/entries/dh23eu.html> (last visited Jan. 3, 2013).

42. See *Skinner v. Okl. ex rel. Williamson*, 316 U.S. 535 (1942).

43. See Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. TIMES (Dec. 9, 2011), <http://www.nytimes.com/2011/12/10/us/redress-weighed-for-forced-sterilizations-in-north-carolina.html?pagewanted=all>.

44. See *Disability Rights Movement*, *supra* note 1.

battle disfigured and disabled.<sup>45</sup> Recognizing the magnitude of the sacrifices these heroes made, the public responded by strongly supporting disabled veterans.<sup>46</sup> The government, in turn, introduced comprehensive rehabilitation programs.<sup>47</sup> The government also created the first training programs for veterans with disabilities.<sup>48</sup> Investment in these programs continued into the 1950s.<sup>49</sup>

In the early 1960s, the American civil rights movement took hold. Despite its primary focus on equal rights for African Americans, many minority groups saw the movement as an opportunity to voice their struggles as well.<sup>50</sup> Those with disabilities were strong supporters of the American civil rights movement.<sup>51</sup> Like African Americans, the handicapped endured prejudice and marginalization.<sup>52</sup> Individuals with disabilities had little or no access to stores, bathrooms, public transportation, or telephones.<sup>53</sup> Many were unable to find employment because they could not overcome workplace barriers like staircases and narrow doorways that were not wheelchair accessible.<sup>54</sup> Those who were able to overcome the physical barriers still faced systemic employment discrimination.<sup>55</sup>

Congress sought to limit disability discrimination for the first time with the passage of the Rehabilitation Act of 1973. Section 504 of the Act provided, “No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>56</sup> While the anti-discrimination provision was limited to entities receiving federal funds, disability rights advocates lauded it as the first major milestone in the fight for equal rights.

In 1972, disability rights advocates set their sights on equality in the classroom. In *Pennsylvania Association for Retarded Children v. Pennsyl-*

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45. See Nat’l Pub. Radio, *Beyond Affliction: World War I Rehabilitation Highlight Page*, [http://www.npr.org/programs/disability/ba\\_shows.dir/work.dir/highlights/ww1.html](http://www.npr.org/programs/disability/ba_shows.dir/work.dir/highlights/ww1.html) (last visited Oct. 9, 2013) [hereinafter *Beyond Affliction*]; *Disability Rights Movement*, *supra* note 1.

46. See *Beyond Affliction*, *supra* note 45.

47. See *id.*

48. See *id.*

49. See *Disability Rights Movement*, *supra* note 1.

50. See *id.*

51. See *id.*

52. See *id.*

53. See *id.*

54. See *Disability Rights Movement*, *supra* note 1.

55. See *id.*

56. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 87 Stat. 775.

*vania*, the plaintiffs challenged state education statutes that excused the state board of education “from any obligation to educate a child whom a public school psychologist certifie[d] as uneducable and untrainable.”<sup>57</sup> The statutes also permitted the “indefinite postponement of admission to public school of any child who ha[d] not attained a mental age of five years.”<sup>58</sup> Before trial, the parties reached a consent decree providing disabled students with the right to a hearing before being assigned or re-assigned regular or special education status or excluded from public education altogether.<sup>59</sup> At the hearings, “parents ha[d] the right to representation by counsel, to examine their child’s records, to compel the attendance of school officials who may have relevant evidence to offer, to cross-examine witnesses testifying on behalf of school officials and to introduce evidence of their own.”<sup>60</sup> The decree effectively instituted a presumption that the state was obligated to provide all special education students with “a *free, public program of education and training appropriate to the child’s capacity*.”<sup>61</sup>

Three months later, *Mills v. Board of Education* handed down a second major special education victory.<sup>62</sup> In *Mills*, seven disabled students filed suit against the District of Columbia public school system for the school district’s refusal to admit and educate between twelve thousand and eighteen thousand special needs students.<sup>63</sup> The school district asserted it could not educate the special education students because of financial hardship and argued that the cost of educating disabled students would be inequitable to regular education students.<sup>64</sup> In a stronglyworded opinion, the court applied an equal protection analysis and concluded that the school system was blatantly “denying plaintiffs . . . not just an equal publicly supported education but all publicly supported education.”<sup>65</sup> The court rejected the school’s financial plight, declaring that “[t]he inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child than on the normal child.”<sup>66</sup>

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57. Pa. Ass’n for Retarded Children v. Pennsylvania., 343 F. Supp. 279, 282 (E.D. Pa. 1972).

58. *Id.*

59. *See id.* at 284-85.

60. *Id.* at 285.

61. *Id.* at 285.

62. *See Mills v. Bd. of Ed. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972).

63. *See id.* at 868-69, 875-76.

64. *See id.* at 875-76.

65. *Id.* at 875.

66. *Id.* at 876.

## B. LEGISLATIVE ACHIEVEMENTS FOR DISABLED STUDENTS

The landmark decisions in *Pennsylvania Association for Retarded Children* and *Mills*, coupled with a changing public perception of disability rights, set the stage for the first federal mandate requiring school districts to provide an appropriate education for all disabled students. In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA).<sup>67</sup> Among its findings, Congress noted that a majority of disabled students “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.”<sup>68</sup> The EAHCA intended to guarantee “all handicapped children . . . a free appropriate public education which emphasize[d] special education and related services designed to meet their unique needs[.]”<sup>69</sup> The EAHCA also sought “to assure that the rights of handicapped children and their parents or guardians [were] protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.”<sup>70</sup> While the EAHCA has been amended and rebranded as the Individuals with Disabilities Education Act (IDEA),<sup>71</sup> the Act’s promises remain virtually unchanged.<sup>72</sup>

The IDEA is written broadly to protect and provide services to as many children who depend upon its guarantees as possible. To that end, a “child with a disability” is any child:

with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health

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67. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 775.

68. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 179 (1982) (internal quotation marks omitted) (quoting H.R. Rep. No. 94–332, p. 2 (1975) (H.R. Rep.)).

69. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–112, 89 Stat. 775.

70. *Id.*

71. *See generally* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101–476, 104 Stat. 1103; Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105–17, 111 Stat. 37; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647.

72. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647.

impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.<sup>73</sup>

Of note in the definition is the term “other health impairments[] or specific learning disabilities.”<sup>74</sup> This language provides an essentially limitless number of conditions that could qualify students for protection under the IDEA.<sup>75</sup> The analysis for a qualifying condition turns predominantly on the individual child’s particular needs.<sup>76</sup>

A free, appropriate public education is defined as one that is:

provided at public expense, under public supervision and direction, and without charge . . . meet[s] the standards of the State educational agency . . . include[s] an appropriate preschool, elementary school, or secondary school education in the State involved; and . . . [is] provided in conformity with the individualized education program.<sup>77</sup>

While informative, reasonable persons argued over what constituted an appropriate education, and it became a point of frequent litigation. In *Hendrick Hudson School District Board of Education v. Rowley*, the Court clarified the definition of an appropriate education.<sup>78</sup> The Court controversially held that a child has received an appropriate education when he or she receives “services sufficient to provide some educational benefit.”<sup>79</sup>

The IDEA requires an individualized education program (IEP) for every disabled student.<sup>80</sup> The IEP is created by a student’s regular and special

73. *Id.*

74. *Id.*

75. See Nat’l Dissemination Center for Children with Disabilities, *Other Health Impairment* (August 2012), <http://nichcy.org/disability/specific/ohi>.

76. *See id.*

77. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647.

78. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 187 (1982).

79. Mark C. Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 41 J.L. & EDUC. 95, 99 (2012) (internal quotation marks omitted) (quoting *Rowley*, 458 U.S. at 200).

80. See 20 U.S.C. § 1414(d)(2) (2005).

education teachers, a representative of the school, the child's parents and other experts, as needed.<sup>81</sup> The IEP includes:

present levels of academic achievement and functional performance; a statement of measurable annual goals, both functional and academic; a description of how the child's progress toward meeting the annual goals will be measured; a statement of the special education and related services and supplementary services to be provided to the child or on behalf of the child; an explanation of the extent of the child's participation with nondisabled children in regular classes; a statement of accommodations necessary for the child on state and district assessments; and a variety of other items.<sup>82</sup>

The IDEA also requires disabled students to be educated in the "least restrictive environment."<sup>83</sup> States must establish procedures to ensure that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled[.]"<sup>84</sup> The provision of "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>85</sup> The preference for mainstreaming effectively acts as a rebuttable presumption. The presumption can only be overcome by demonstrating that the disabled student is causing significant disruption in the regular classroom or that education in the regular classroom is not meeting the disabled student's particular needs.<sup>86</sup>

Amendments to the IDEA introduced several other notable provisions. First, school districts are now required to provide graduate transition services starting at age sixteen.<sup>87</sup> The transition services are intended to assist disabled students with the "movement from school to post-school activities,

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81. See U.S. Dep't Educ., *Individualized Education Program (IEP), Team Meetings, and Changes to the IEP* (Oct. 4, 2006), <http://idea.ed.gov/explore/view/p/root,dynamic,TopicalBrief,9>.

82. Weber, *supra* note 79 (footnote omitted).

83. *See id.*

84. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37.

85. *Id.*

86. See *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989).

87. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.”<sup>88</sup> Second, school districts must now provide highly qualified special education teachers.<sup>89</sup> The requirement effectively cracks down on the ability of school districts to waive special education certification on an emergency, temporary, and provisional basis.<sup>90</sup> Highly qualified educators must possess at least a bachelor’s degree and a state certification to teach special education.<sup>91</sup> Third, school districts must now provide research-based instruction and more objective, assessment-based measures of progress.<sup>92</sup> These measures are intended to more closely align the IDEA with the No Child Left Behind Act.<sup>93</sup>

In sum, the history of disability rights in the United States has been both marred by horrific atrocities and celebrated for substantial achievements.<sup>94</sup> Disabled school children, in particular, suffered tremendous marginalization in past decades.<sup>95</sup> The passage of the EAHCA in 1975 was a laudable milestone and moved disabled students one step closer to the realization of equality in the classroom.<sup>96</sup> Today, the IDEA continues to guarantee special needs students the right to a free, appropriate public education in the least restrictive environment with all necessary supplementary aides and services.<sup>97</sup>

### III. CHICAGO PUBLIC SCHOOL CLOSINGS

The Chicago Public Schools have long been recognized as among the most troubled in the nation.<sup>98</sup> In 1987, United States Secretary of Education William J. Bennett stated bluntly, “I’m not sure there’s a system as bad as

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88. *Id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647.

93. *See* U.S. Dep’t of Educ., *Alignment With the No Child Left Behind Act* (Feb. 2, 2007), <http://idea.ed.gov/explore/view/p/root,dynamic,TopicalBrief,3,>

94. *See supra* cases and sources cited notes 15-59.

95. *See supra* cases and sources cited notes 50-59.

96. *See supra* cases and sources cited notes 60-65.

97. *See supra* cases and sources cited notes 66-86.

98. *See Reform Before the Storm*, CHI. MAG. (Oct. 2, 2012), <http://www.chicagomag.com/Chicago-Magazine/November-2012/Reform-Before-the-Storm-Chicago-Public-Schools-Timeline/>.

the Chicago system.”<sup>99</sup> Secretary Bennett’s comments followed the shocking revelation that half of the CPS’s American College Test scores ranked in the bottom one percent of the nation.<sup>100</sup> Around the same time, the school system risked losing more than fourteen million dollars in federal funding for failing to remedy repeated violations of federal special education laws.<sup>101</sup> While the CPS staved off the crisis, the drama of the late 1980’s was not the first, or the last, of its troubles.<sup>102</sup> Dating at least as far back as the 1960s, the Chicago Public Schools have struggled with segregation, funding, and overcrowding issues.<sup>103</sup>

This Comment’s central focus is on the CPS’s May 2013 decision to close forty-nine elementary schools. On May 22, 2013, the Chicago Public School board voted to shutter each of the schools, claiming the schools were underperforming, underutilized, or both.<sup>104</sup> The controversial decision was part of Chicago Mayor Rahm Emanuel’s “vision for a downsized school system” and was deemed necessary to “combat a massive budget deficit and allow the district to distribute scarce resources more efficiently.”<sup>105</sup> The number of schools closed was the largest in Chicago’s history and was “unprecedented in number for a major urban center[.]”<sup>106</sup>

The CPS made the decision to close the forty-nine elementary schools against the backdrop of a one billion dollar budget deficit.<sup>107</sup> While the school district has faced funding issues before, the situation deteriorated to a serious fiscal crisis in 2013. The driving issue of the crisis is an under-

99. *Schools in Chicago are Called the Worst by Education Chief*, N.Y. TIMES (Nov. 8, 1987), <http://www.nytimes.com/1987/11/08/us/schools-in-chicago-are-called-the-worst-by-education-chief.html>.

100. *See id.*

101. *See Jorge Casuso, Special-Ed Reports Delayed, U.S. Says*, CHI. TRIB. (Nov. 18, 1987), [http://articles.chicagotribune.com/1987-11-18/news/8703270001\\_1\\_school-days-chicago-public-schools-board-attorney](http://articles.chicagotribune.com/1987-11-18/news/8703270001_1_school-days-chicago-public-schools-board-attorney).

102. *See Whet Moser, Was There Ever a Golden Age of Chicago Public Schools?*, CHI. MAG. (Mar. 22, 2013), <http://www.chicagomag.com/Chicago-Magazine/The-312/March-2013/Was-There-Ever-a-Golden-Age-of-Chicago-Public-Schools/>.

103. *See id.*

104. *See Noreen S. Ahmed-Ullah et al., CPS OKs Massive School Closings*, CHI. TRIB. (May 23, 2013), [http://articles.chicagotribune.com/2013-05-23/news/ct-met-cps-school-board-closings-0523-20130523\\_1\\_chicago-teachers-union-one-high-school-program-byrd-bennett](http://articles.chicagotribune.com/2013-05-23/news/ct-met-cps-school-board-closings-0523-20130523_1_chicago-teachers-union-one-high-school-program-byrd-bennett).

105. *Noreen S. Ahmed-Ullah et al., CPS Approves Largest School Closure in Chicago History*, CHI. TRIB. (May 23, 2013), [http://articles.chicagotribune.com/2013-05-23/news/chi-chicago-school-closings-20130522\\_1\\_chicago-teachers-union-byrd-bennett-one-high-school-program](http://articles.chicagotribune.com/2013-05-23/news/chi-chicago-school-closings-20130522_1_chicago-teachers-union-byrd-bennett-one-high-school-program) [hereinafter Ahmed-Ullah et al., *Largest School Closure in Chicago History*].

106. *Id.*

107. *See CPS Approves Budget Cuts; Dozens of Students Boycott School*, CBS CHI. (Aug. 28, 2013, 6:54 AM), <http://chicago.cbslocal.com/2013/08/28/cps-parents-students-to-stage-school-boycott-as-board-votes-on-budget-cuts/> [hereinafter *Boycott*].

funded pension system.<sup>108</sup> In fiscal 2003, the CPS's pension ratio of assets to liabilities was a healthy 81.2%.<sup>109</sup> That percentage dropped to just 54.5% by fiscal 2012.<sup>110</sup> Faced with both rising costs and declining revenues, the school district fueled the crisis even further by utilizing a state-authorized pension payment holiday beginning in 2010.<sup>111</sup> The holiday provided short-term relief from the school system's pension obligations over the course of three years.<sup>112</sup> When legislators declined to renew the pension relief holiday in 2013, the CPS faced enormous back payments.<sup>113</sup> The school system's pension obligation is projected to triple from \$196 million dollars in fiscal 2013 to \$612 million dollars in fiscal 2014.<sup>114</sup> The school system is simultaneously coping with declining state and federal financial assistance.<sup>115</sup> In fiscal 2013, state funding was slashed by \$56.8 million dollars.<sup>116</sup> Federal funding was reduced by roughly fifty-eight million dollars.<sup>117</sup> In total, \$114 million dollars in funding was lost between the state and federal cuts.<sup>118</sup>

In order to meet its fiscal obligations, the CPS slashed \$112 million dollars in central office expenses and reduced direct classroom spending by sixty-eight million dollars.<sup>119</sup> Over 3,100 teachers and support personnel were laid off as a result of the cuts.<sup>120</sup> Teachers and staff at the closing schools accounted for 855 of the lost jobs.<sup>121</sup> An additional 1,036 teachers and 1,077 support personnel were cut from other schools and administrative

108. *See id.*

109. *See* Greg Hinz, *CPS Finances Worse Despite School Closures*, *Civic Federation Says*, *CRAIN'S CHI. BUS.* (Aug. 22, 2013), <http://www.chicagobusiness.com/article/20130822/BLOGS02/130829936/cps-finances-worse-despite-school-closures-civic-federation-says>.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See* Ray Long, *CPS Pension Holiday Bill Fails*, *CHI. TRIB.* (May 31, 2013), [http://articles.chicagotribune.com/2013-05-31/news/chi-quinn-vows-to-veto-cps-pension-holiday-bill-20130531\\_1\\_pension-reform-northbrook-democrat-cps](http://articles.chicagotribune.com/2013-05-31/news/chi-quinn-vows-to-veto-cps-pension-holiday-bill-20130531_1_pension-reform-northbrook-democrat-cps).

114. *See* Chi. Pub. Schools, *Despite \$1 Billion Deficit and Lack of Pension Reform, Propose Budget Protects Student Learning* (July 24, 2013), [http://www.cps.edu/News/Press\\_releases/Pages/PR1\\_07\\_24\\_2013.aspx](http://www.cps.edu/News/Press_releases/Pages/PR1_07_24_2013.aspx).

115. *See* Chi. Pub. Schools, *Chicago Public Schools Fiscal Year 2013 Amended Budget*, <http://www.cps.edu/fy13budget/pages/BudgetOverview.aspx> (last visited Nov. 15, 2013).

116. *See id.*

117. *See id.*

118. *See id.*

119. *See* *Boycott*, *supra* note 107.

120. *See* Lauren Fitzpatrick, *CPS Layoffs Hit Arts, Specialty Subjects Hard*, *CTU Says*, *CHI. SUN-TIMES* (Aug. 4, 2013, 2:58 PM), <http://www.suntimes.com/news/education/21669834-418/cps-layoffs-hit-arts-specialty-subjects-hard-ctu-says.html>.

121. *See id.*

offices.<sup>122</sup> The school system increased its property tax levy to raise an additional forty-two million dollars and exhausted a one-time cash reserve of seven hundred million dollars to help close the deficit gap.<sup>123</sup> Despite drastic measures for fiscal 2014, the fiscal 2015 budget is still projected to bear a nine hundred million dollars deficit because of “flat or declining revenues and contractual and statutory obligations such as salary increases and rising health care costs.”<sup>124</sup>

In total, the school district decided to close forty-nine elementary schools and transfer more than twenty-seven thousand students to new receiving schools.<sup>125</sup> Special education students accounted for more than five thousand of the students affected.<sup>126</sup> Disabled students, in particular, are anticipated to face substantial obstacles as a result of the closings.<sup>127</sup> First, there is the challenge of transferring thousands of IEPs to new receiving schools and re-allocating available resources. In addition to the administrative burden, students with certain disabilities are anticipated to have a particularly difficult time adjusting to new schools with new teachers and classmates.<sup>128</sup> Second, there is the challenge of teaching more students per classroom with fewer educators as a result of the massive layoffs and closings.<sup>129</sup> Third, there is the challenge of evaluating disabled students in a timely manner to ensure a smooth transition from early intervention programs to preschool and primary education. The closings and layoffs threat-

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122. See Noreen S. Ahmed-Ullah & Kim Greiger, *CPS Lays Off More Than 2,000, Including 1,000 Teachers*, CHI. TRIB. (July 19, 2013), [http://articles.chicagotribune.com/2013-07-19/news/ct-met-cps-layoffs-20130719\\_1\\_pension-reform-cps-new-teachers-contract](http://articles.chicagotribune.com/2013-07-19/news/ct-met-cps-layoffs-20130719_1_pension-reform-cps-new-teachers-contract).

123. See *Boycott*, *supra* note 107.

124. Chi. Pub. Schools, *Chicago Board of Education Passes FY14 Operating Budget* (Aug. 28, 2013), [http://www.cps.edu/News/Press\\_releases/Pages/PR1\\_08\\_28\\_2013.aspx](http://www.cps.edu/News/Press_releases/Pages/PR1_08_28_2013.aspx).

125. See Kim Janssen, *Judge Delays Court Fight Over Closing Chicago Schools Until July*, CHI. SUN-TIMES (May 23, 2013, 1:08 PM), <http://www.suntimes.com/news/20295469-418/judge-delays-school-closure-fight-until-july.html>.

126. See Noreen S. Ahmed-Ullah, *Hearings Today on Lawsuits Against CPS School Closings*, CHI. TRIB. (July 16, 2013), [http://articles.chicagotribune.com/2013-07-16/news/ct-met-cps-federal-hearing-20130715\\_1\\_closings-today-chicago-teachers-union](http://articles.chicagotribune.com/2013-07-16/news/ct-met-cps-federal-hearing-20130715_1_closings-today-chicago-teachers-union) [hereinafter Ahmed-Ullah, *Lawsuits Against CPS School Closings*].

127. See Adeshina Emmanuel, *Public School Closings Could Harm Special Education Students, Critics Say*, DNAINFO CHI. (Feb. 21, 2013, 6:17 AM), <http://www.dnainfo.com/chicago/20130221/andersonville/cps-school-closings-could-harm-special-ed-students-critics-say>.

128. See *id.*

129. See Fitzpatrick, *supra* note 120.

en to expand the already existing backlog<sup>130</sup> and jeopardize some students' most crucial learning periods.<sup>131</sup>

The 2013 CPS closings prompted two lawsuits which argued, in part, that the school closings violated the IDEA.<sup>132</sup> The first, *McDaniel v. Board of Education*, was brought by the parents of two disabled African American students who sought to enjoin the closures on the basis of race and disability discrimination.<sup>133</sup> The court rejected the alleged IDEA violations by ruling that there was sufficient time between the school closings and the new school year to revise any adversely affected IEPs.<sup>134</sup> The court highlighted proactive measures taken by the CPS as compelling.<sup>135</sup> The court noted that school officials made phone calls to the families of disabled students and allocated funding for IEP meetings over the summer.<sup>136</sup> The court also emphasized the ability of parents to identify potential IEP issues and request meetings with school officials.<sup>137</sup> The court noted that at least some IEP meetings actually took place.<sup>138</sup>

A second lawsuit, *Swan ex rel. I.O. v. Board of Education*, challenged the CPS's ability to implement transferring IEPs at new receiving schools.<sup>139</sup> Plaintiffs also argued that support services for transferring students were not specified and alleged that the rushed timeline for the schools' closings created unavoidable academic setbacks for affected students.<sup>140</sup> The court upheld the adequacy of the IEPs, despite evidence of individual inadequacies, because the inadequacies failed to evince a class-wide issue for class action certification.<sup>141</sup> The court also ruled that the school district's phone calls to affected students' families, the allocation of funding for summer IEP meetings, and the fact that some meetings actually

130. See Motoko Rich, *Chicago Faulted on Learning Disabilities*, N.Y. TIMES (Jan. 7, 2013), <http://www.nytimes.com/2013/01/08/education/chicago-public-schools-faulted-on-assessing-learning-disabilities.html>.

131. See Rex. W. Huppke, *Watchdog Says Chicago School Officials Aren't Evaluating Special Education Students*, CHI. TRIB. (June 27, 2010), [http://articles.chicagotribune.com/2010-06-27/news/ct-met-special-education-complaint-20100627\\_1\\_special-education-evaluations-education-students](http://articles.chicagotribune.com/2010-06-27/news/ct-met-special-education-complaint-20100627_1_special-education-evaluations-education-students).

132. See *McDaniel v. Bd. of Educ. of Chic.*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013); *Swan ex rel. I.O. v. Bd. of Educ. of Chic.*, No. 13 C 3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013).

133. See *McDaniel*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

134. See *id.*

135. See *id.*

136. See *id.* at \*9.

137. See *id.*

138. See *McDaniel*, No. 13 C 3624, 2013 WL 4047989 at \*9 (N.D. Ill. Aug. 9, 2013).

139. See *Swan ex rel. I.O. v. Bd. of Educ. of Chi.*, No. 13 C 3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013).

140. See *id.*

141. See *id.*

took place, satisfied the school district's obligations.<sup>142</sup> As in *McDaniel*, the court emphasized parents' ability to bring issues to the school system's attention and request IEP meetings.<sup>143</sup> The rulings in *McDaniel* and *Swan* were wrongly decided for reasons that will be discussed in the subsequent sections. In the analysis that follows, issues with the *McDaniel* and *Swan* decisions will be highlighted and solutions will be proposed.

#### IV. STANDING

Generally, "[t]he IDEA does not entitle private parties to bring an action before seeking administrative relief."<sup>144</sup> This requirement, also known as the exhaustion requirement, permits school districts the opportunity to remedy violations before they reach the courts.<sup>145</sup> Exhaustion of administrative remedies is not required when it is demonstrated that continuing through the administrative process would be futile or inadequate.<sup>146</sup>

The CPS scheduled the first school closings just twenty-eight days after the date of the school board vote.<sup>147</sup> Under IDEA regulations, school districts are entitled to up to seventy-five days from the filing of a complaint to the issuance of a final administrative decision.<sup>148</sup> Only then is a student traditionally permitted to begin litigation. Given the twenty-eight day window, it is evident that the school district failed to provide students with a reasonable amount of time to exhaust all administrative hearings and remedies before proceeding to the courts. Furthermore, closing the schools in a little over a third of the time allotted for a general administrative decision demonstrates the unusually quick timetable the CPS closings operated under.

Under these circumstances, the exhaustion requirement would be properly waived. Students could not have reasonably exhausted all administrative remedies in the four weeks that were provided. For the purposes of the following arguments, students asserting violations of their rights under

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142. *See id.*

143. *See id.*

144. *DL v. D.C.*, 450 F. Supp. 2d 11, 16 (D.D.C. 2006).

145. *See Charlie F. ex rel. Neil F. v. Bd. of Educ.*, 98 F.3d 989, 992-93 (7th Cir. 1996).

146. *See Honig v. Doe*, 484 U.S. 305, 326-27 (1988).

147. *See Michelle Relerford & Lisa Balde, First Wave of Chicago Schools Close for Good*, NBC CHI. (June 19, 2013, 9:22 PM), <http://www.nbcchicago.com/blogs/ward-room/First-Wave-of-Chicago-Schools-Track-E-Close-212126031.html>.

148. *See U.S. Dep't of Educ., Procedural Safeguards: Due Process Hearings* <http://idea.ed.gov/explore/view/p/root,dynamic,TopicalBrief,16>, (last visited Nov. 2, 2013).

the IDEA would be permitted to bypass the administrative remedy process and bring the claims in federal court.<sup>149</sup>

## V. BURDEN SCHEME

The rulings in *McDaniel*<sup>150</sup> and *Swan*<sup>151</sup> were wrongly decided, in part because the court employed an unjust burden scheme. The court's rulings essentially ratified a scheme that burdens inexperienced parents with the responsibility of identifying potential IEP issues. Additionally, parents must then seek some form of remedy for the violations alleged. For the following reasons, it is evident that this scheme placed an unfair burden on parents seeking a more thorough judicial inquiry into the CPS's actions.

First, many parents of students in the Chicago Public Schools lack the education and expertise needed to recognize violations of the IDEA. The Chicago Public Schools are almost ninety percent minority.<sup>152</sup> Among Hispanics in the city, a mere nine percent attained college or graduate degrees.<sup>153</sup> For African Americans, that same level of educational attainment was is eighteen percent.<sup>154</sup> This lower level of educational attainment impairs CPS parents' ability to understand complex legal statutes and regulations and hinders their ability to spot particularized educational issues.<sup>155</sup> These parents also possess little or no formal training in special education law.<sup>156</sup> They lack both the time and information necessary to identify potential issues. Instead of placing the burden of proving that there is a potential issue on parents, the school district should be required to demonstrate that contested IEPs are protecting students' educational potential in a fair and reasonable manner. The school district is in a better position to bear this burden because it already has formally trained educators, administrators, and other professionals on staff.

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149. See *Bowen v. City of New York*, 476 U.S. 467 (1986) (explaining that administrative exhaustion requirements may be waived when irreparable harm would occur from enforcement of such requirements).

150. *McDaniel v. Bd. of Educ. of Chic.*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

151. *Swan ex rel. I.O. v. Bd. of Educ. of Chi.*, No. 13 C 3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013).

152. See Chi. Pub. Schools, *Stats and Facts*, [http://www.cps.edu/about\\_cps/at-a-glance/pages/stats\\_and\\_facts.aspx](http://www.cps.edu/about_cps/at-a-glance/pages/stats_and_facts.aspx) (last visited Dec. 30, 2013).

153. See Moser, *supra* note 102.

154. See *id.*

155. See Christina A. Samuels, *Some States Shift IEP Burden of Proof to School District*, ED. WEEK (Jan. 28, 2008), <http://www.edweek.org/ew/articles/2008/01/30/21speced.h27.html>.

156. See *id.*

Second, parents of students in the Chicago Public Schools often lack the financial resources to effectively challenge the school district's decisions.<sup>157</sup> Some eighty-seven percent of CPS students come from low-income families.<sup>158</sup> In order to successfully litigate many IDEA claims, parents must hire both attorneys and expert witnesses.<sup>159</sup> The undertaking can become a monumental expense—an expense that clashes with the paycheck-to-paycheck lifestyle that many of these parents live. When the cost of litigation is weighed against paying the rent or putting enough food on the table, the desire to bring a lawsuit quickly diminishes and IEP violations are left unchecked.<sup>160</sup> Even for those families that can muster the initial financial capital, the battle is not over. Parents will likely endure a lengthy litigation with a formidable in-house legal department—a fight that inevitably increases total costs exponentially.<sup>161</sup> While prevailing parents may recover attorney fees under the IDEA,<sup>162</sup> *Arlington Central Board of Education v. Murphy* ruled that the often substantial expenditures on expert witnesses are not recoverable.<sup>163</sup> Moreover, parents who do not prevail are ultimately left to cover the full costs of the litigation.<sup>164</sup> This scheme presents a high barrier to bringing suit against all but the clearest violations of the IDEA, and school administrators are undoubtedly aware of it.

Third, even assuming parents have the expertise to recognize an IEP issue and possess the financial resources to fight for a remedy, the CPS is still in a better position to bear the initial burden of proving that all reasonable steps necessary to protect disabled students' academic potential have been taken.<sup>165</sup> School districts are the creators and proponents of their students' educational programs. They have greater access to information concerning the academic selections and a better understanding of students' achievement and needs.<sup>166</sup>

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157. See Chi. Pub. Schools, *Stats and Facts*, [http://www.cps.edu/About\\_CPS/At-a-glance/Documents/archiveStats\\_052014.pdf](http://www.cps.edu/About_CPS/At-a-glance/Documents/archiveStats_052014.pdf) (last visited Sept. 18, 2014).

158. *Id.*

159. IDEA Fairness Restoration Act, H.R. 1208, 112th Cong. (2011); IDEA Fairness Restoration Act, S. 613, 112th Cong. (2011); See Council of Parent Attorneys and Advocates, *Reinstate Prevailing Parents' Right to Expert Witness Fees*, <http://www.copaa.org/?page=ExpertWitness> (last visited Mar. 14, 2014) [hereinafter *Reinstate Prevailing Parents' Right*].

160. See *Reinstate Prevailing Parents' Right*, *supra* note 159.

161. See *id.*

162. 20 U.S.C. § 1415(i)(3)(B) (2012).

163. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006).

164. See *Reinstate Prevailing Parents' Right*, *supra* note 159.

165. See *Schaefer ex rel. v. Weast*, 546 U.S. 49, 64 (2005) (Ginsburg, J., dissenting).

166. See *Samuels*, *supra* note 155.

Under this burden scheme, the CPS would have to defend every aspect of a student's educational program. The school district would also have to satisfy to the court that the measures being taken are in the students' best interests and that they are not primarily financially motivated or for the purpose of mere administrative convenience. Put simply, the CPS would be forced to prove it fulfilled its most basic responsibilities as an institution of education. Only if that burden was satisfied would parents then have to present evidence rebutting the school system's actions.

The CPS would not have satisfied the high burden of proving the IDEA violations caused by the school closings were in students' best interests, unavoidable, and mitigated to the maximum extent reasonably possible. First, the decision to immediately shutter the elementary schools was motivated by the financial savings that the school system would achieve against its massive deficit.<sup>167</sup> While it would not be prudent to unilaterally bar school districts from operating more efficiently, any financially motivated measures affecting academics should be subject to a thorough judicial inquiry to make sure educational opportunity is not being sacrificed for the purpose of remedying fiscal irresponsibility.<sup>168</sup> Second, the CPS's failure to address transferring students' potential IEP issues in a meaningful way eviscerates the school system's claims of meeting of its burden. While the school system allocated funding for IEP meetings,<sup>169</sup> there is no evidence that school officials proactively reviewed IEPs to identify potential transition problems or issues at receiving schools. The CPS also failed to truly engage students and their families on an individual basis. Rather, the school district chose the quicker and more convenient alternatives of polling parental concerns by telephone and holding mass town hall meetings.<sup>170</sup> Under these circumstances, the CPS would probably fail to prove that it took all reasonable measures to ensure its students would not be harmed by its financially motivated decision to close so many elementary schools. The rulings in *McDaniel*<sup>171</sup> and *Swan*<sup>172</sup> permitted the CPS to cry ignorance to IDEA-related issues and jettison its special education students to new

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167. See B.J. Lutz & Michelle Releford, *CPS to Shutter 54 Schools in Closure Plan*, NBC CHI. (Mar. 21, 2013, 8:33 PM), <http://www.nbcchicago.com/blogs/ward-room/chicago-public-school-closures-199247301.html>.

168. *Schaefer*, 546 U.S. at 65.

169. See *Swan ex rel. I.O. v. Bd. of Educ. of Chi.*, No. 13 C 3623, 2013 WL 4047734, at \*8 (N.D. Ill. Aug. 9, 2013).

170. See *id.*

171. *McDaniel*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

172. *Swan*, No. 13 C 3623, 2013 WL 4047734, at \*14 (N.D. Ill. Aug. 9, 2013).

schools with strange teachers, unfamiliar classmates, and different services.<sup>173</sup>

## VI. IDEA ISSUES

### A. IEP DISRUPTIONS

The crux of the IDEA is to ensure “access to a free appropriate public education” for all special education students and to “improv[e] educational results for children with disabilities.”<sup>174</sup> School districts must provide all disabled students with individualized education plans (IEPs).<sup>175</sup> IEPs are created by educators, parents, and other experts.<sup>176</sup> The IEP lists a student’s educational needs and goals.<sup>177</sup> IEPs are usually reviewed on an annual basis, but can be amended as needed.<sup>178</sup> The adequacy and implementation of an IEP must generally be agreed upon by all the parties.<sup>179</sup> If an agreement cannot be reached, the dispute is resolved through arbitration or the federal courts.<sup>180</sup>

The court in *McDaniel* and *Swan* wrongly rejected parents’ claims that the school closings caused academic harm amounting to an IEP disruption.<sup>181</sup> In its rulings, the district court found two academic studies particularly compelling.<sup>182</sup> The studies concluded that special education students were predicted to show academic improvement when transferred from lower performing schools to higher performing schools, especially those schools in the top quartile.<sup>183</sup> The court’s reliance upon these studies, however, is undermined in several ways. First, special education expert Dr.

173. See D’Onofrio & Schulte, *supra* note 14. *Chicago Public Schools Closings Fight Moves to Federal Court with Injunction Hearing*, ABC7 NEWS (July 16, 2013, 3:44 PM), <http://abclocal.go.com/wls/story?id=9173735>.

174. 20 U.S.C. § 1400(c)(3) (2012).

175. See 20 U.S.C. § 1414(d)(2)(A) (2012).

176. See 20 U.S.C. § 1414(d)(1)(B) (2012).

177. See 20 U.S.C. § 1414(d)(1)(A) (2012).

178. See United Fed’n of Teachers, *Amending the IEP After the Annual Review*, <http://www.uft.org/teaching/amending-iep-after-annual-review> (last visited Nov. 16, 2013).

179. See Nat’l Dissemination Ctr. for Children with Disabilities, *The Due Process Hearing, In Detail*, (Sept. 2012), <http://www.parentcenterhub.org/repository/details-dueprocess/>.

180. See *id.*

181. See *McDaniel v. Bd. of Educ. of Chi.*, No. 13 C 3624, 2013 WL 4047989, at \*11 (N.D. Ill. Aug. 9, 2013); See *Swan ex rel. I.O. v. Bd. Of Educ. of Chi.*, No. 13 C 3623, 2013 WL 4047734, at \*10 (N.D. Ill. Aug. 9, 2013).

182. See *McDaniel*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013); *Swan*, No. 13 C 3623, 2013 WL 4047734, at \*9 (N.D. Ill. Aug. 9, 2013).

183. See *McDaniel*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013); *Swan*, No. 13 C 3623, 2013 WL 4047734, at \*9 (N.D. Ill. Aug. 9, 2013).

Pauline Lipman testified that a mere 12.5% of special education students affected by the CPS closings were transferring to receiving schools in the top quartile.<sup>184</sup> Second, in an apparent attempt to mitigate concerns about the remaining eighty-seven percent of students transferring to schools in the lower three quartiles, the court relied on Dr. Lipman's statement that the students would show "no improvement, or no difference."<sup>185</sup> Dr. Lipman's prediction of *no improvement* or *no difference* for the remaining students is, however, an overstatement, at best. Contrary to Dr. Lipman's broad brush conclusion, the RAND Corporation study actually stated that "the transition to new schools can have an adverse effect on achievement gains for students from closed schools[.]"<sup>186</sup> Furthermore, although the RAND Corporation study was limited to just one school district, the students in the study were disproportionately impoverished and African-American with low test scores.<sup>187</sup> The description of the RAND study sample is remarkably similar to the students affected by the CPS closings. Because the two populations so closely mirror one another, CPS students would be expected to be adversely affected as well. The academic impairment flowing from the CPS closings could stunt students' progress toward their IEP goals and effectively deny the students their right to a meaningful public education.

While courts have traditionally exercised restraint in second guessing the expertise of school districts,<sup>188</sup> IEP disruptions are indeed violations of the IDEA.<sup>189</sup> A disruption in the consistency of students' educational programs can effectively prevent the implementation of IEPs and deny students access to their "free appropriate public education."<sup>190</sup> In *Noah D. ex rel. Lisa D. v. Department of Education Hawaii*, a budget shortfall caused the school district to implement furlough Fridays during which neither general nor special education students attended school.<sup>191</sup> The mother of a disabled student filed suit because the student's IEP did not provide for a four-day

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184. See *McDaniel*, No. 13 C 3624, 2013 WL 4047989; *Swan*, No. 13 C 3623, 2013 WL 4047734, at \*9 (N.D. Ill. Aug. 9, 2013).

185. *McDaniel*, No. 13 C 3624, 2013 WL 4047989, at \*10 (N.D. Ill. Aug. 9, 2013); *Swan*, No. 13 C 3623, 2013 WL 4047734, at \*9 (N.D. Ill. Aug. 9, 2013).

186. John Engberg et al., *Closing Schools in a Shrinking District: Does Student Performance Depend on Which Schools are Closed?*, THE SOC'Y FOR RES. ON EDUC. EFFECTIVENESS (March 4, 2011), <https://www.sree.org/conferences/2011/program/downloads/abstracts/34.pdf>.

187. *Id.*

188. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

189. See *Noah D. ex rel. Lisa D. v. Dep't of Educ. Haw.*, Civ. No. 12-00459 DKW RLP, 2013 WL 4482495, at \*7 (D. Haw. Aug. 20, 2013), *reconsideration denied*, Civ. No. 12-00459 DKW RLP, 2013 WL 5944367 (D. Haw. Nov. 5, 2013).

190. See *id.*

191. *Id.* at \*1.

school week and the alteration was claimed to be harming the child academically and socially.<sup>192</sup> The district court held that the “loss of 11 to 12 school days, and equally important, the disruption of the consistency of Student’s educational program, prevented several IEP provisions from being implemented, including mainstreaming, socialization, and communication.”<sup>193</sup> Because the “[s]tudent’s behavior program was not fully implemented and he could not receive the continuity of educational opportunities, services, and aids provided for in the IEP[.]” the school district failed to implement the student’s IEP and effectively denied him access to a “free appropriate public education.”<sup>194</sup>

The similarities between *Noah D.* and the CPS closings are significant. Students in both cases have been subjected to a material disruption in the continuity of their educational programs. In *Noah D.*, it was the loss of a single school day per week. For the students affected by the CPS closings, it has been the sudden and permanent loss of everything they knew to be normal. It was the shuttering of their old schools.<sup>195</sup> It was the provision of new teachers, services, and aids.<sup>196</sup> It was a new curriculum.<sup>197</sup> It was their placement among unfamiliar classmates.<sup>198</sup> Many of these students will suffer substantial impairment to their socialization and communication skills as a result of the upheaval and their sudden placement among strangers. The CPS did not provide for the continuity of these students’ educational programs. In fact, it did the exact opposite. Given the chaotic nature of the CPS closings, the court in *Noah D.* would likely recognize that the crisis caused both academic and social harm and caused IEP disruptions.

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192. *See id.*

193. *Id.* at \*7.

194. *Noah D. ex rel. Lisa D. v. Dep’t of Educ. Haw.*, Civ. No. 12-00459 DKW RLP, 2013 WL 4482495, at \*7 (D. Haw. Aug. 20, 2013), *reconsideration denied*, Civ. No. 12-00459 DKW RLP, 2013 WL 5944367 (D. Haw. Nov. 5, 2013).

195. *See CPS Closings Continue: 20 More Schools to Shutter for Good on Monday’s Final Bell*, HUFFINGTON POST (June 24, 2013, 12:42 PM), [http://www.huffingtonpost.com/2013/06/24/cps-school-closings-\\_n\\_3490834.html](http://www.huffingtonpost.com/2013/06/24/cps-school-closings-_n_3490834.html).

196. *See* Emily Feldman, *Specter of School Closings Weighs Heavily on Parents of Special Needs Students*, NBC PHILA. (Apr. 11, 2013, 10:40 AM), <http://www.nbcphiladelphia.com/news/national-international/NATL-School-Closings-Impact-Special-Needs-Students-198977761.html?akmobile=o>; Mark Konkol, *CPS Layoffs: More Than 1,000 Teachers, 1,000 Others to get Axed Friday*, DNAINFO CHI., <http://www.dnainfo.com/chicago/20130718/chicago/crisis-hit-about-1500-cps-employees-get-ax-via-email-friday> (last updated July 19, 2013).

197. *See* Feldman, *supra* note 196.

198. *See id.*

## B. LAYOFFS AND CLASS SIZES

The most basic guarantee of the IDEA is that all special needs students are entitled to access a “free appropriate public education” and ascertain educational benefit from it.<sup>199</sup> In order to benefit from a public education, students must be educated in an environment conducive to learning. More educators and smaller classrooms boost student achievement.<sup>200</sup> Students benefit academically as class sizes shrink because small classrooms are more engaging and offer students the ability to connect with teachers.<sup>201</sup> Reduced class sizes also offer students the chance to work more closely with their classmates in small groups.<sup>202</sup> Researchers have found that students in small classrooms stay more focused and misbehave less.<sup>203</sup> Primary students, in particular, benefit from small class sizes.<sup>204</sup> Smaller classrooms are also uniquely beneficial to African American and low-income students.<sup>205</sup>

Despite research showing the benefits of small classrooms, the CPS laid off thousands of educators and support staff in an effort to curb its deficit.<sup>206</sup> Teachers at closing elementary schools were hit the hardest.<sup>207</sup> Some 545 educators lost their jobs at the shuttered schools and schools slated to be *turned around*.<sup>208</sup> Another 161 teachers from the closing schools were laid off weeks later when the school district could not reassign them to new teaching positions.<sup>209</sup> Across the district, an additional 1,036 educators were laid off.<sup>210</sup> Over 1,700 teaching positions were eliminated in total.<sup>211</sup> Among the layoffs were about nineteen percent of the CPS’s special education teachers.<sup>212</sup>

199. 20 U.S.C. § 1400(d) (2012).

200. See Amanda Litvinov, *Budget Cuts+Teacher Layoffs=Larger Class Sizes*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/35617.htm> (last visited Dec. 30, 2013).

201. See Greg Toppo, *Size Alone Makes Small Classes Better for Kids*, USA TODAY (Mar. 24, 2008, 9:52 PM), [http://usatoday30.usatoday.com/news/education/2008-03-24-small-classes\\_N.htm](http://usatoday30.usatoday.com/news/education/2008-03-24-small-classes_N.htm).

202. See *id.*

203. See *id.*

204. See Andy Henion & Spyros Konstantopoulos, *Small Classes Have Long-Term Benefit for all Students*, MICH. ST. U. (Oct. 9, 2009), <http://msutoday.msu.edu/news/2009/msu-research-small-classes-have-long-term-benefit-for-all-students/>.

205. See Litvinov, *supra* note 200.

206. See Fitzpatrick, *supra* note 120.

207. See *id.*

208. *Id.*

209. *Id.*

210. See *id.*

211. Fitzpatrick, *supra* note 120.

212. *Id.*

The CPS closings and layoffs created a twofold problem. First, the transfer of thousands of students from closing schools to new receiving schools increased class sizes.<sup>213</sup> Second, the mass discharge of more than 1,700 teachers reduced the total number of educators.<sup>214</sup> With fewer teachers, there are inevitably fewer classrooms to educate students in. That leads to larger class sizes and less teacher-student interaction. Students suffer academically in these larger classrooms,<sup>215</sup> and the low-income African American students that the CPS educates are particularly disenfranchised.<sup>216</sup> The layoffs inevitably caused significant harm to the academic potential of special education students in the Chicago Public Schools.

It is a well-established principle that courts should exercise restraint when they risk “substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.”<sup>217</sup> There is, however, a clear difference between reasonable judicial restraint and irresponsible rubber-stamping of school administrators’ decisions. Here, the CPS recklessly charged into a financially motivated decision with far-reaching implications that were not fully understood at the time action was taken. While the extent of the academic harm caused to special education students in the Chicago Public Schools is not completely known, it is reasonable to assume it will be substantial.

The harm caused by increased class sizes and layoffs effectively denies students their right to an appropriate public education. Students are not legally entitled to the best education money can buy, but they should not suffer the consequences of irresponsible fiscal decisions by distant politicians and hands-off administrators. Students have a right to an appropriate education that balances their academic potential against real world constraints. The CPS failed to achieve this important balance and effectively stripped its special education students of their right to an appropriate education.

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213. See Noreen S. Ahmed-Ullah, *City Schools Poised to Feel Impact of Deep Cuts*, CHI. TRIB. (July 20, 2013), [http://articles.chicagotribune.com/2013-07-20/news/ct-met-cps-teacher-layoffs-20130720\\_1\\_49-elementary-schools-681-schools-cps](http://articles.chicagotribune.com/2013-07-20/news/ct-met-cps-teacher-layoffs-20130720_1_49-elementary-schools-681-schools-cps).

214. See Fitzpatrick, *supra* note 120.

215. See Litvinov, *supra* note 200.

216. See Center for Pub. Educ., *Class Size and Student Achievement: Research Review*, <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Class-size-and-student-achievement-At-a-glance/Class-size-and-student-achievement-Research-review.html> (last visited Dec. 31, 2013).

217. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 176 (1982).

### C. EVALUATION DELAYS

From birth until two years of age, children needing early educational intervention services receive assistance under Part C of the IDEA.<sup>218</sup> On a child's third birthday, the child transitions from Part C to Part B of the IDEA.<sup>219</sup> As part of the transition process, the IDEA requires that all children receiving early intervention services be evaluated no later than their third birthday.<sup>220</sup> The age requirement for evaluations is an essential component of the IDEA because it helps to prevent disabled students from falling behind as they begin formal schooling.<sup>221</sup> Delayed evaluations can create "huge gaps in what the child could have learned [to] become school ready."<sup>222</sup>

The CPS has a history of failing to evaluate special needs students by the federally prescribed deadline.<sup>223</sup> Complaints began mounting against the school district at least as far back as 1986.<sup>224</sup> At that time, parents alleged they faced excessive delays in getting their children evaluated.<sup>225</sup> Some even waited as long as "two and three years."<sup>226</sup> The delays were so severe, in fact, that the regional civil rights office of the U.S. Department of Education recommended terminating fourteen million dollars in federal aid if the CPS did not make changes to comply with federal special education laws.<sup>227</sup> In 1987, federal attorneys alleged that seventy-five percent of the CPS's disabled students were not evaluated by the federally mandated

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218. See 20 U.S.C §§ 1431-44 (2012).

219. See *id.*

220. See *id.*

221. See Rex Huppke & Azam Ahmed, *CPS Vows Overhaul of Special Education Program*, CHI. TRIB. (Mar. 29, 2010), [http://articles.chicagotribune.com/2010-03-29/news/ct-met-special-ed-0324-2-20100329\\_1\\_special-education-cps-district-spokeswoman-monique-bond/2](http://articles.chicagotribune.com/2010-03-29/news/ct-met-special-ed-0324-2-20100329_1_special-education-cps-district-spokeswoman-monique-bond/2).

222. Rich, *supra* note 130.

223. See generally Casuso, *supra* note 101; Jean Latz Griffin, *Group Says Schools Neglecting Disabled*, CHI. TRIB. (July 27, 1986), [http://articles.chicagotribune.com/1986-07-27/news/8602230837\\_1\\_special-education-chicago-public-schools-illinois-schools](http://articles.chicagotribune.com/1986-07-27/news/8602230837_1_special-education-chicago-public-schools-illinois-schools); Rebecca Harris, *Backlog in Special Education Leaves Some Children Without Services*, CATALYST CHI. (Jan. 18, 2011), <https://www.catalyst-chicago.org/news/2011/01/18/backlog-in-special-education-leaves-some-children-without-services> [hereinafter Harris, *Backlog in Special Education*]; Rebecca Harris, *Delays in Special Ed Preschool Placements Spark More State Monitoring*, CATALYST CHI. (Apr. 17, 2013), <http://www.catalyst-chicago.org/notebook/2013/04/17/20988/delays-in-special-ed-preschool-placements-spark-more-state-monitoring> [hereinafter Harris, *Delays in Special Ed*]; Huppke & Ahmed, *supra* note 221; Rich, *supra* note 130.

224. See Casuso, *supra* note 101.

225. See *id.*

226. *Id.*

227. See *id.*

deadline and that the school district had a backlog of more than four thousand students awaiting special education services.<sup>228</sup>

An investigation in 2010 revealed the ongoing existence of special education evaluation delays in the CPS.<sup>229</sup> The school district acknowledged a backlog of thousands of students and admitted some evaluations were delayed years beyond the federal deadline.<sup>230</sup> University of Chicago professor Peter J. Smith described the situation as “so ridiculously off the reservation that there’s just no question that they’re not doing what they should do.”<sup>231</sup> The CPS promised a “major reorganization” to correct the issue.<sup>232</sup> Almost a year later, the school district had a backlog of some 1,500 disabled students from the prior year alone.<sup>233</sup> School officials also admitted that they had lost track of many evaluations.<sup>234</sup> At least one student reported waiting three years for an evaluation.<sup>235</sup> In early 2013, the disability rights organization, Health & Disability Advocates, filed a formal complaint against the CPS for maintaining a backlog of more than two thousand disabled students awaiting evaluations.<sup>236</sup>

While the effect of the recent CPS closings on the evaluation backlog has not been formally studied, there is reason to believe that it has inevitably worsened as a result of the crisis. First, the school district has long suffered a shortage of staff to evaluate disabled students.<sup>237</sup> Evaluation teams require audiologists, psychologists, speech-language pathologists, social workers, occupational and physical therapists, vision specialists, regular classroom teachers, educational diagnosticians, and other experts, as needed.<sup>238</sup> This complex list of professionals is tough to afford, attract, and maintain in good times. The difficulty is amplified in times of fiscal crisis. Moreover, the CPS did not just maintain its staff; it cut some 3,168 jobs across all areas of the school system.<sup>239</sup> About nineteen percent of the CPS’s special education staff was laid off in those cuts.<sup>240</sup> Second, the flood of additional disabled students at fewer schools with fewer personnel will strain the remaining resources. If the school district struggled to evaluate

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228. *Id.*

229. *See* Huppke & Ahmed, *supra* note 221.

230. *See id.*

231. Casuso, *supra* note 101.

232. *Id.*

233. *See* Harris, *Backlog in Special Ed*, *supra* note 223.

234. *See id.*

235. *See id.*

236. *See* Rich, *supra* note 120.

237. *See* Harris, *Delays in Special Ed*, *supra* note 223.

238. Nat’l Dissemination Ctr. for Children with Disabilities, *Evaluating Children for Disability* (Sept. 2010), <http://nichcy.org/schoolage/evaluation>.

239. *See* Fitzpatrick, *supra* note 120.

240. *See id.*

students at a greater number of facilities with more resources, they now face the challenge of evaluating a flood of new students at fewer schools with even fewer resources. The CPS's backlog of evaluations was probably a violation of the IDEA before the 2013 closings. After implementing the recent cuts, the school system will inevitably rack up an even larger backlog with longer wait times. Delayed evaluations are a violation of the IDEA and jeopardize the educational potential and future success of disabled students in the Chicago Public Schools.

## VII. CONCLUSION

In recent decades, the United States has striven to ensure progressively greater equality for disabled individuals of all ages. Those with disabilities are no longer shackled and tortured in dark cells that used to be branded as hospitals.<sup>241</sup> Nor are handicapped individuals still forcibly sterilized by the state as threats to a so-called purer society.<sup>242</sup> It is with relief that the shameful era of employing violence and confinement to deal with handicapped individuals has passed. Success in achieving this peaceful shift, however, was just the first step. Victory in one battle does not signal the end of the war for equal rights.

Perhaps the saddest and most unjust casualties of modern disability discrimination have been the millions of special needs students across the country. Prior to 1975, the majority of disabled students in America "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out."<sup>243</sup> Congress sought to remedy the mistreatment with the passage of the Education for All Handicapped Children Act of 1975.<sup>244</sup> The Act guaranteed all handicapped students the right to a free, appropriate public education in the least restrictive environment with any necessary aids and supplementary services.<sup>245</sup> Although it has been amended and rebranded as the Individuals with Disabilities Education Act,<sup>246</sup> the legislation's assurances remain vir-

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241. See *supra* notes 9-14; *McDaniel v. Board of Education*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

242. See *supra* cases and sources cited notes 22-30.

243. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 191 (1982) (internal quotation marks omitted) (quoting H.R. Rep. No. 94-332, p. 2 (1975) (H.R. Rep.)).

244. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 87 Stat. 775.

245. See *id.*

246. See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103; Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

tually unchanged.<sup>247</sup> Laws, however, are just words on paper without enforcement. Their guarantees are meaningless without punishment for violation. The defining issue with the IDEA is that the law has not been sufficiently enforced to ensure its guarantees.

In May 2013, the Chicago Public School board voted to close forty-nine elementary schools and transfer the students to new receiving schools.<sup>248</sup> Some twenty-seven thousand students were relocated to new schools,<sup>249</sup> with more than five thousand special education students among them.<sup>250</sup> Two lawsuits that were filed to enjoin the closings ultimately failed.<sup>251</sup> Though the court found no violations of the IDEA,<sup>252</sup> the Act was effectively violated. In order to prevent future injustices, violations must be recognized and changes must be advocated.

First, the current burden scheme for proving violations of the IDEA unfairly prejudices parents.<sup>253</sup> The burden scheme employed by the court in *McDaniel* and *Swan* charged parents with the responsibility of identifying IDEA violations and then seeking remedy for the alleged violations.<sup>254</sup> Many parents of the children in the Chicago Public Schools lack the expertise to identify IDEA violations and the financial capital to advocate for change.<sup>255</sup> The courts should have used a burden scheme that charges the CPS with the high burden of first proving it has taken all reasonable steps to remedy or mitigate potential issues before the parents have to present a case.<sup>256</sup> The CPS is in a better position to carry this burden because it possesses both superior expertise and financial resources.<sup>257</sup>

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247. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

248. See Ahmed-Ullah et al., *Largest School Closure in Chicago's History*, *supra* note 105.

249. See Tina Sfondeles, *As School Closings Loom, 27,000 CPS Students Now Enrolling in New Schools*, CHI. SUN-TIMES (May 23, 2013, 5:37 PM), <http://www.suntimes.com/news/education/20304259-418/as-school-closings-loom-27000-cps-students-now-enrolling-in-new-schools.html>.

250. See Ahmed-Ullah, *Lawsuits Against CPS School Closings*, *supra* note 126.

251. See *Swan ex rel. I.O. v. Bd. of Educ. of Chi.*, No. 13 C 3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013); *McDaniel v. Bd. of Educ. of Chi.*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

252. See *Swan*, 2013 WL 4047734 (No. 13 C 3623); *McDaniel*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

253. See *supra* cases and sources cited notes 149-72.

254. See *Swan*, No. 13 C 3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013); *McDaniel*, No. 13 C 3624, 2013 WL 4047989 (N.D. Ill. Aug. 9, 2013).

255. See *supra* cases and sources cited notes 149-72.

256. See *supra* cases and sources cited notes 149-72.

257. See *supra* cases and sources cited notes 149-72.

Second, there is reason to believe the CPS closings caused widespread IEP disruptions that effectively denied students the right to an appropriate education.<sup>258</sup> The transfer of more than five thousand IEPs to new receiving schools took place in a matter of mere weeks.<sup>259</sup> There is no evidence that school officials made any effort to review individual IEPs for transition problems or issues at receiving schools.<sup>260</sup> Rather, the CPS haphazardly transplanted its special needs students to a new environment with different teachers and classmates.<sup>261</sup> The loss of consistency of education and the academic and social harm caused by the manner in which the closings were carried out would be recognized as violations of the IDEA by the court in *Noah D.*<sup>262</sup>

Third, there is reason to believe the Chicago Public School closings and layoffs reduced the number of educators and increased the size of classes to such an extent that an appropriate education is no longer being provided.<sup>263</sup> The CPS cut over 3,100 employees due to its fiscal crisis.<sup>264</sup> Over 1,700 of those laid off were teachers, including nineteen percent of the special education staff.<sup>265</sup> At the same time, the school district also flooded receiving schools with students transferred from the closing schools.<sup>266</sup> The result was more students per classroom with fewer educators.<sup>267</sup> Despite research highlighting the need for smaller classrooms, the CPS's measures inevitably increased special education class sizes.<sup>268</sup> The increased class sizes, coupled with fewer teachers, have effectively denied these students the right to an appropriate education.<sup>269</sup>

Fourth, there is reason to believe the CPS closings and layoffs reduced the number of evaluation personnel and increased the number of students to such an extent that the school district's existing violations of the IDEA evaluation deadline have been further worsened.<sup>270</sup> The CPS has a history of failing to evaluate children by the federally mandated deadline of the child's third birthday.<sup>271</sup> In the years immediately prior to the CPS closings, the school district was chided and formally reported for its repeated evalua-

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258. *See supra* cases and sources cited notes 173-85.

259. *See supra* cases and sources cited notes 173-85.

260. *See supra* cases and sources cited notes 173-97.

261. *See supra* cases and sources cited notes 173-97.

262. *See supra* cases and sources cited notes 190-97.

263. *See supra* cases and sources cited notes 198-216.

264. *See supra* cases and sources cited notes 198-216.

265. *See supra* cases and sources cited notes 198-216.

266. *See supra* cases and sources cited notes 198-216.

267. *See supra* cases and sources cited notes 198-216.

268. *See supra* cases and sources cited notes 198-216.

269. *See supra* cases and sources cited notes 198-216.

270. *See supra* cases and sources cited notes 217-38.

271. *See supra* cases and sources cited notes 217-38.

tion delays.<sup>272</sup> The school closings trigger both massive layoffs and an influx of new students to existing receiving schools.<sup>273</sup> This combination inevitably provided even fewer evaluation personnel to evaluate more students per school.<sup>274</sup> The evaluation delays that existed before the 2013 CPS closings were a violation of the IDEA. With even fewer personnel as a result of the recent crisis, the school district is undoubtedly violating the IDEA and jeopardizing some students' most formative years.<sup>275</sup>

While it is important to exercise a degree of judicial restraint in second-guessing the expertise of school districts,<sup>276</sup> the courts cannot forsake their responsibility to students. The 2013 CPS closings lacked both the planning and the execution that is expected of responsible school administrators.<sup>277</sup> As a result, the school district's most vulnerable students suffered individualized education program disruptions, displacement among new teachers and classmates in larger classrooms, and delays in receiving evaluations.<sup>278</sup> Parents who fought to enjoin the CPS's actions against their children saw their efforts stymied by an unfair burden scheme that granted an insurmountable degree of deference to the school district.<sup>279</sup> Despite the IDEA's strongly worded assurances, its promises were not realized for those affected by the 2013 CPS closings. If the Act is to be anything more than a shadow of the guarantees it once asserted, it must be wielded to benefit students over school districts.

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272. *See supra* cases and sources cited notes 217-38.

273. *See supra* cases and sources cited notes 217-38.

274. *See supra* cases and sources cited notes 217-38.

275. *See supra* cases and sources cited notes 217-38.

276. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

277. *See supra* cases and sources cited notes 107-31.

278. *See supra* cases and sources cited notes 173-238.

279. *See supra* cases and sources cited notes 149-72.