



Fall 9-1-2008

Don't Get the Wrong IDEA: How the Fourth Circuit Misread the Words and Spirit of Special Education Law-and How to Fix It

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Recommended Citation

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Don't Get the Wrong IDEA: How the Fourth Circuit Misread the Words and Spirit of Special Education Law—and How to Fix It

Michael T. McCarthy*

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I. Introduction

An old proverb claims that it takes a village to raise a child—everyone associated with a child must play a part in her upbringing. In the case of a child with a handicap that affects her ability to learn, it takes a village to educate that child. In other words, teachers, parents and everyone else responsible for a child's education must work together to ensure that she receives services that are "designed to meet [her] unique needs and prepare [her] for further education, employment, and independent living."¹ This is no small undertaking. As of the 2006 school year, 13.6% of students enrolled in American public schools received special education services due to a disability.² That amounts to nearly seven million children nationwide.³

1. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(d)(1)(A) (Supp. V 2005).

2. SchoolDataDirect, United States Public Schools & Districts, <http://www.schooldata.org> (follow "View National Page" hyperlink; then follow "School Environment" tab) (last visited July 14, 2008) (on file with the Washington and Lee Law Review).

3. See *id.* (follow "View National Page" hyperlink) (listing the total number of students enrolled in public schools in 2006 as 49,676,964 students).

School districts and corresponding public agencies bear the ultimate legal responsibility for implementing the individualized education programs (IEPs) developed for each of the United States' millions of disabled children.⁴ Nevertheless, Congress recognized the necessity of parental participation as it prepared the nation's first comprehensive piece of special education legislation.⁵ Congress stated that it purposely designed procedures to incorporate parents in the planning and drafting of their child's education plans to guard against possible bad faith on the part of state and local agencies.⁶ Congress continues to acknowledge that collaborative spirit today. The Individuals with Disabilities Education Act (IDEA)⁷ encourages alternative dispute resolution and considers Article III courts to be a last resort.⁸ The state educational agency must offer an administrative due process hearing at which the public agency or the parents can bring a grievance against the other.⁹ Prior to such a hearing, and consistent with the cooperative character of special education law, the parties must attend a resolution session in a preemptive effort to resolve their differences.¹⁰

In light of the extensive administrative attempts at resolution required before a trial can proceed, courts traditionally have understood Congress's vision of a collaborative venture and have acknowledged the exceptional nature of the special education process. As the Ninth Circuit stated: "Working out an acceptable educational program must, in the end, be a cooperative effort between parents and school officials; the litigation process is simply too slow

4. See IDEA, 20 U.S.C. § 1400(d)(1)(C) ("States, localities, educational service agencies, and Federal agencies [must] provide for the education of all children with disabilities.").

5. Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1482 (Supp. V 2005)).

6. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 208-09 (1982) ("By . . . [emphasizing] the process of parent and child involvement . . . the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child." (citing S. REP. NO. 94-168, at 11-12 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1435-36)).

7. See IDEA, 20 U.S.C. §§ 1400-1482 (Supp. V 2005) (governing how states provide educational services to children with disabilities).

8. See *id.* § 1415(e) (mandating that state and local educational agencies provide a mediation process overseen by a disinterested third party through which disputes between the agencies and parents can be resolved).

9. See *id.* § 1415(f)(1)(A) (requiring the state educational agency to establish an impartial due process hearing to receive all complaints brought under the IDEA).

10. See *id.* § 1415(f)(1)(B) (demanding that the local agency convene a resolution session with the pertinent members of the child's IEP team within fifteen days of receiving the parents' complaint); *infra* note 66 and accompanying text (describing the members of a child's IEP team).

and too costly to deal adequately with the rapidly changing needs of children."¹¹ Unfortunately, some courts cannot help but view school personnel and parents as adversarial parties in the IEP drafting process, instead of as collaborative partners.

*A.K. ex rel. J.K. v. Alexandria City School Board*¹²—a case that involved a dispute between a child's parents and a northern Virginia school district over the child's placement—is indicative of this trend. The Court of Appeals for the Fourth Circuit not only disregarded congressional intent, but misapplied accepted rules of statutory and regulatory interpretation to do so.¹³ By construing the IDEA's requirement that IEPs specify the anticipated "location" at which a child will receive services to mean that each IEP must identify "a particular school," the Fourth Circuit ignored congressional reports and Department of Education comments that indicate otherwise.¹⁴ Although its decision was somewhat of an anomaly, the result should not have been unexpected. The confusion, misinterpretation, and ignorance surrounding the use of "location" in the IDEA are common among educators and adjudicators.¹⁵

Without an unambiguous definition for "location"—and clear procedural guidelines for when and how to identify such a site—costly mistakes are likely to be repeated around the country. Under the current state of affairs, the *A.K.* decision could result in the invalidation of numerous otherwise acceptable IEPs and force school systems to reimburse disgruntled parents for tuition payments made to private schools of their own choosing. Ultimately, the real damage may be to the collaborative process itself—leaving school systems and parents at odds, with the quality of children's educations hanging in the balance. Unfortunately, the decision of the Supreme Court to deny the school district's petition for a writ of certiorari¹⁶ means that the court of appeals' decision is the law of the land in the Fourth Circuit and could be cited as persuasive precedent elsewhere.

11. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1400 n.5 (9th Cir. 1994).

12. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 681 (4th Cir. 2007) (holding that, as a matter of law, an IEP that does not identify a particular school is not "reasonably calculated to enable [the child] to receive educational benefits").

13. *See infra* notes 185–87 and accompanying text (discussing how the Fourth Circuit disregarded congressional intent and veered from accepted rules of regulatory interpretation).

14. *See infra* Parts IV.B.2–C (explaining the Fourth Circuit's interpretation of "location" along with interpretations of "location" provided by Congress and the Department of Education).

15. *See infra* Part IV (discussing various interpretations that have been given to "location" as used in the IDEA).

16. *Alexandria City Sch. Bd. v. A.K. ex rel. J.K.*, 128 S. Ct. 1123, 1123 (2008), *denying cert. to A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672 (4th Cir. 2007).

This Note begins with an exploration of the historical and procedural background of special education law, in an attempt to uncover how Congress truly intends the process to work. It then details the facts behind the *A.K.* case—to understand how sloppy procedural errors can be exploited when the collaborative process deteriorates—before delving into the mistakes made by the Fourth Circuit. In the end, this Note offers a clear-cut definition of "location" that reflects the traditional interpretation. It also suggests promulgation of a new procedural rule designed to encourage school personnel and parents to work together to ensure that disabled children receive an appropriate education. Hopefully, adoption of the new rule will present a workable solution to the current problem by taking into account the respective vulnerabilities of parents and public educational agencies. After all, the unique circumstances involved in educating a special needs child require all the villagers to work together.

II. *Special Education Law*

Four federal statutes control special education law in the United States.¹⁷ The IDEA,¹⁸ Section 504 of the Rehabilitation Act,¹⁹ the Americans with Disabilities Act,²⁰ and the No Child Left Behind Act²¹ each protect the rights of disabled schoolchildren.²² This Note focuses primarily on the IDEA because

17. ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, *SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS* 9 (2d ed. 2006).

18. IDEA, 20 U.S.C. §§ 1400–1482 (Supp. V 2005).

19. *See* Rehabilitation Act § 504, 29 U.S.C. § 794 (2000) (prohibiting activities and programs that receive federal funds from discriminating against disabled persons).

20. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000) (prohibiting discrimination against disabled persons in specified situations).

21. *See* No Child Left Behind Act, 20 U.S.C. §§ 6301–6578 (Supp. V 2005) (authorizing the establishment of federal programs to improve the effectiveness of primary and secondary schools throughout the nation).

22. *See* IDEA, 20 U.S.C. § 1400(d) (Supp. V 2005) (detailing the purpose of the IDEA); No Child Left Behind Act, 20 U.S.C. § 6301 (Supp. V 2005) ("[Ensuring] a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and [S]tate academic assessments . . . can be accomplished by . . . meeting the educational needs of . . . children with disabilities."); Rehabilitation Act § 504, 29 U.S.C. § 794 (2000) ("No . . . individual with a disability . . . shall, solely by reason of her or his disability, 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."); Americans with Disabilities Act, 42 U.S.C. § 12132 (2000) ("[No persons with a disability] . . . shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

the IDEA speaks most directly to disabled students' education and gives rise to the issues this Note specifically addresses.

*A. History of the IDEA*²³

In 1970, Congress passed the Education of the Handicapped Act (EHA),²⁴ the initial legislative ancestor of the IDEA.²⁵ The text of the EHA, which is more of a forebear in spirit than form, does not bear a close resemblance to the current format and wording of the IDEA.²⁶ After being amended in 1975, the EHA evolved into the Education for All Handicapped Children Act of 1975 (EAHCA).²⁷ Whereas the intent behind the EHA reflects that of later versions of legislation, the EAHCA's content bears a greater resemblance to today's IDEA. The EAHCA included most of the important foundational protections that the IDEA embodies.²⁸ The rights initially guaranteed to all disabled students by the EAHCA include a free

23. Although the initial listing of acronyms in this Note may seem overwhelming at first, this Note will be much easier to read with their aid than without. The acronyms introduced in the subsequent subparts are the same acronyms found in the text of the IDEA and used by special education professionals. *See, e.g.*, IDEA, 20 U.S.C. § 1414(d)(1)(A)(i) (equating "individualized education program" with "IEP" upon its initial introduction in the "Definitions" section); *see also* OSBORNE & RUSSO, *supra* note 17, at 23 (substituting FAPE for "free appropriate public education" and IEP for "individualized education program" after their first mention).

24. *See* Education of the Handicapped Act (EHA), Pub. L. No. 91-230 §§ 601-602, 84 Stat. 121, 175-88 (1970) (codified as amended at 20 U.S.C. §§ 1400-1482 (Supp. V 2005)) (extending assistance programs for elementary and secondary education).

25. *See* CTR. FOR EDUC. & EMPLOYMENT LAW, STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW 2 (23d ed. 2006) (referring to the adoption of the EHA as the original enactment of the IDEA).

26. *Compare* EHA, 84 Stat. at 175-88 (dealing mostly with the appropriation of funding for special education services), *with* IDEA, 20 U.S.C. §§ 1400-1482 (providing detailed definitions and procedures).

27. EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1482 (Supp. V 2005)).

28. *See* CTR. FOR EDUC. & EMPLOYMENT LAW, *supra* note 25, at 2 (noting that the EAHCA contained most of the important legislative protections that are today associated with the IDEA).

appropriate public education (FAPE),²⁹ due process rights,³⁰ an IEP,³¹ and education in the least restrictive environment.³²

Congress amended the EAHCA numerous times, most recently in 2004.³³ The 1990 amendments officially renamed it the Individuals with Disabilities Education Act.³⁴ All subsequent references in this Note to the EHA, the EAHCA, or any amended version of the IDEA will refer to the current version of IDEA.³⁵

The IDEA's text currently embodies the bulk of special education law.³⁶ It recognizes that children with disabilities need specialized educational services to ensure "equality of opportunity, full participation, independent living, and economic self-sufficiency."³⁷ A child qualifies as disabled under the IDEA if he or she has "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[,] . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities."³⁸ The child must also, by reason of that

29. EAHCA, sec. 3, § 601, 89 Stat. at 775 (current version at 20 U.S.C. § 1401(c)(1) (Supp. V 2005)).

30. *Id.*, sec. 5, § 615, 89 Stat. at 788 (current version at 20 U.S.C. § 1415 (Supp. V 2005)).

31. *Id.*, sec. 4, § 602, 89 Stat. at 776 (current version at 20 U.S.C. § 1414(d)(1)(A)(i) (Supp. V 2005)).

32. *Id.*, sec. 5, § 618, 89 Stat. at 792 (current version at 20 U.S.C. § 1412(a)(5)(A) (Supp. V 2005)).

33. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. § 1400-1482 (Supp. V 2005)). For previous versions and amendments, see Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587; Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103; Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, 102 Stat. 3289; Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357; and Education of the Handicapped Amendments of 1977, Pub. L. No. 95-49, 91 Stat. 230.

34. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 901, § 601(a), 104 Stat. 1103, 1141-42 (codified at 20 U.S.C. § 1400(a) (Supp. V 2005)).

35. *See id.*, sec. 901(a)(3), § 601(a), 104 Stat. at 1141-42 (codified at 20 U.S.C. § 1400(a) (Supp. V 2005)) ("Any other Act and any regulation which refers to the Education of the Handicapped Act shall be considered to refer to the Individuals with Disabilities Education Act.").

36. *See* OSBORNE & RUSSO, *supra* note 17, at 23 (noting that the IDEA "provides students with unprecedented access to public education").

37. IDEA, 20 U.S.C. § 1400(c)(1) (Supp. V 2005).

38. *Id.* § 1401(3)(A)(i).

disability, require "special education and related services."³⁹ Finally, to receive services, the disabled child must be at least three years old and not more than twenty-one years old.⁴⁰

B. Free Appropriate Public Education

1. Procedural Rights

The text of the IDEA primarily concerns the protection of procedural rights, and the provision of a FAPE is no exception.⁴¹ The IDEA seeks to provide a "free appropriate public education" to all children with disabilities.⁴² The legislation defines a FAPE as "special education and related services that":

- A. have been provided at public expense, under public supervision and direction, and without charge;
- B. meet the standards of the State educational agency;
- C. include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- D. are provided in conformity with the individualized education program required under section 1414(d) of this title.⁴³

The first requirement signifies that public school systems alone are responsible for providing students with special education services. Instances may exist in which a public school system is unable to provide the necessary services.⁴⁴ Under such circumstances, a child's IEP team may determine that the proper

39. *Id.* § 1401(3)(A)(ii).

40. *Id.* § 1412(a)(1)(A).

41. *See* OSBORNE & RUSSO, *supra* note 17, at 9–10 ("The IDEA includes an elaborate system of procedural safeguards to protect the rights of children and their parents."). The IDEA includes a rather lengthy section expressly dedicated to "Procedural safeguards." IDEA, 20 U.S.C. § 1415.

42. *See* IDEA, 20 U.S.C. § 1400(d)(1)(A) (identifying a basic purpose of the IDEA as the provision of a FAPE "that emphasizes special education and related services designed to meet [children's] unique needs and prepare them for further education, employment, and independent living").

43. *Id.* § 1401(9).

44. In the *A.K.* case, both the Alexandria City Public Schools (ACPS) and the parents agreed that ACPS could no longer serve as an appropriate placement for A.K. *See infra* notes 79–84 and accompanying text (explaining the events which preceded the decision that ACPS was no longer an appropriate placement for A.K.).

placement for a child is in some type of private school program.⁴⁵ If the child is placed in a private school at the direction of the public school, state agencies are responsible for reimbursing the parents for the payment of tuition.⁴⁶

The second requirement indicates that a FAPE must exceed the level of rights guaranteed by the IDEA if the state so mandates. Because states bear the primary responsibility for education, each has its own set of legislation governing special education.⁴⁷ These statutes can provide greater protection than the IDEA, but the IDEA will always trump a conflicting state statute.⁴⁸

The mechanics of the third and fourth requirements are less clear. Because the IDEA does not provide a substantive definition of an "appropriate" education, one must resort to case law. Working knowledge of the IEP process is also essential to the endeavor. Both the substantive requirements of a FAPE and the procedures associated with development and implementation of an IEP are discussed below.

2. Substantive Rights

The IDEA provides nothing beyond the above procedural definition. In 1982, when the Supreme Court first discussed the IDEA, it articulated what has become the substantive standard for whether a school system provides a disabled child with a FAPE.⁴⁹ In *Board of Education v. Rowley*,⁵⁰ the Court stated:

45. See IDEA, 20 U.S.C. § 1412(a)(10)(B) (Supp. V 2005) (providing for private school placement at the direction of the public school or agency); see also *infra* note 66 and accompanying text (elaborating on an IEP team's composition and role).

46. See *id.* § 1412(a)(10)(B)(i) (directing that a private school placement that results from a state or local educational agency referral must be provided "at no cost to [the child's] parents").

47. See OSBORNE & RUSSO, *supra* note 17, at 19 (noting that most of the state laws echo the scope and language of the IDEA). For an example of a state statute that requires a "free and appropriate education" for all disabled children, see VA. CODE ANN. § 22.1-214 (2006).

48. See OSBORNE & RUSSO, *supra* note 17, at 19 ("[S]everal states have provisions in their legislation that go beyond the IDEA's substantive and procedural requirements, in that they have set higher standards of what constitutes an appropriate education for a student with disabilities.").

49. See *id.* at 23 (noting that *Board of Education v. Rowley* is the first case to interpret IDEA legislation).

50. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) (holding that the IDEA's requirement of a FAPE is satisfied when a state provides special education services designed to enable the disabled child to benefit educationally from that instruction).

According to the definitions contained in the [IDEA], a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the [IDEA], the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP.⁵¹

To provide a more in-depth definition for "appropriate," the Court looked to the IDEA's legislative history.⁵² Relying on congressional reports, the Court determined that an "appropriate education" was one in which "personalized educational services are provided."⁵³ A child's education is personalized through the drafting of an IEP.

The *Rowley* decision also outlined the definitive test for whether a school district provides a FAPE. The Court held that in order to provide a FAPE, a school system must (1) "[comply] with the procedures set forth in [the IDEA]" and (2) develop an IEP that is "reasonably calculated to enable the child to receive educational benefits."⁵⁴ The first facet is straightforward enough. Thus, the key to whether a school system has violated the requirements of the IDEA can often be found in the text and drafting of a student's IEP.

C. Individualized Education Programs

Each child found eligible for special education services under the IDEA must have an IEP to receive a FAPE. An IEP is "a written statement for each child with a disability"⁵⁵ that must, for a child under the age of sixteen, include the following seven essential items: (1) "present levels of academic achievement;"⁵⁶ (2) "measurable annual goals;"⁵⁷ (3) "a description of how the child's progress toward meeting the annual goals . . . will be measured;"⁵⁸

51. *Id.*

52. *See id.* at 190 ("Although we find the statutory definition of 'free appropriate public education' to be helpful in our interpretation of the [IDEA], there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard.").

53. *Id.* at 197.

54. *Id.* at 206–07.

55. IDEA, 20 U.S.C. § 1414(d)(1)(A)(i) (Supp. V 2005).

56. *Id.* § 1414(d)(1)(A)(i)(I).

57. *Id.* § 1414(d)(1)(A)(i)(II).

58. *Id.* § 1414(d)(1)(A)(i)(III).

(4) "a statement of the special education and related services and supplementary aids and services . . . to be provided to the child;"⁵⁹ (5) "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and . . . activities;"⁶⁰ (6) "any individual appropriate accommodations . . . necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments;"⁶¹ and (7) "the projected date for the beginning of the services and modifications . . . and the anticipated frequency, *location*, and duration of those services and modifications."⁶² The inclusion of these components makes an IEP "reasonably calculated to enable [a] child to receive educational benefits."⁶³

Once a child has been identified as eligible to receive special education services, the IEP timeline and procedure swing into action.⁶⁴ Within thirty days of identification, an IEP meeting must be convened.⁶⁵ The composition of the IEP team, including school personnel and parents, reflects the crucial cooperative spirit of an IEP's production.⁶⁶ When one stops to consider that an IEP meeting requires the presence of so many different adults—most of whom are busy during the workday hours when IEP meetings are conducted—it is easy to imagine how difficult it can be to assemble all those people in the same place at the same time. Needless to say, patience and flexibility are essential when it comes to scheduling.⁶⁷ Nevertheless, the IDEA requires that a child's IEP be reviewed at least once a year to verify that the child is progressing as

59. *Id.* § 1414(d)(1)(A)(i)(IV).

60. *Id.* § 1414(d)(1)(A)(i)(V).

61. *Id.* § 1414(d)(1)(A)(i)(VI).

62. *Id.* § 1414(d)(1)(A)(i)(VII) (emphasis added).

63. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

64. *See* IDEA, 20 U.S.C. § 1412(a)(3)(A) (Supp. V 2005) (detailing the IDEA's "child find" procedures). The local educational agency (LEA) or equivalent state agency is responsible for the identification of eligible children. *Id.*

65. *See* 34 C.F.R. § 300.323(c)(1) (2007) ("Each public agency must ensure that . . . [a] meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services.").

66. *See* IDEA, 20 U.S.C. § 1414(d)(1)(B) (listing the requisite members of the child's IEP team as his parents, at least one regular education teacher, at least one special education teacher, a representative of the LEA, other individuals with knowledge of the child, and, when appropriate, the child).

67. *See* 34 C.F.R. § 300.322(a)(2) (demanding that an IEP meeting take place at a "mutually agreed on time and place"). The LEA or equivalent public agency must take several steps to ensure parent participation. The agency must provide sufficient notice of the meeting. *Id.* § 300.322(b). If both parents are unable to physically attend, the public agency must attempt other methods—such as a teleconference—to ensure full participation. *Id.* § 300.322(c). If it is mutually convenient, the parties may agree to other methods of communication, such as video conferences and conference calls. IDEA, 20 U.S.C. § 1414(f).

planned.⁶⁸ The local educational agency (LEA) must ensure that the services described in the IEP are implemented "[as] soon as possible following [the IEP's development]."⁶⁹ In addition, a child must begin each school year with a suitable IEP.⁷⁰

At a typical IEP meeting, school district representatives—who have the most frequent contact with the child in an educational environment and often possess more professional expertise than the parents—will usually begin by presenting a proposed IEP.⁷¹ After discussion amongst the team members, any needed alterations are made.⁷² If all goes as planned, the parties agree on the essential components and sign the document. In light of the myriad terms required to be included in an IEP, it is likely that the importance of one could be missed or glossed over by an IEP team—which under normal circumstances is devoid of legal experts.⁷³ In fact, confusion over the definition of a single word—"location"—leads to the current dilemma.

III. A.K. *ex rel.* J.K. v. Alexandria City School Board

Alexandria City Public Schools (ACPS) first identified A.K., as he is known in court documents, as eligible to receive special education benefits under the IDEA⁷⁴ when he was two years old.⁷⁵ He was initially diagnosed

68. See IDEA, 20 U.S.C. § 1414(d)(4)(A)(i) (requiring the IEP team to meet "periodically, but not less frequently than annually" to discuss the child's progress toward the annual goals specified in the IEP).

69. 34 C.F.R. § 300.323(c)(2).

70. See IDEA, 20 U.S.C. § 1414(d)(2)(A) (Supp. V 2005) ("At the beginning of each school year, each [LEA], State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an [IEP].").

71. See *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) ("[T]he school system may come to an IEP meeting with the draft IEP for discussion."). Although the agency cannot compel the parents to sign the initial draft, it should come prepared with a suggested placement. *Id.*

72. See IDEA, 20 U.S.C. § 1414(d)(2)(A)(ii) (describing the IEP revision process).

73. See *supra* note 66 and accompanying text (listing the essential members of an IEP team).

74. See IDEA, 20 U.S.C. § 1414(b)(4) (stating that a child is eligible for special education and related services under the IDEA if he is found to be "a child with a disability" under § 1401(3)). In somewhat circular reasoning, the IDEA defines "a child with a disability" as a child "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[.], . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities" who, as a result of such disability, requires special education and related services. *Id.* § 1401(3)(A).

75. A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd. (A.K. II), 484 F.3d 672, 675 (4th Cir.

with Semantic Pragmatic Language Disorder (SPLD)⁷⁶ with characteristics of a "nonverbal learning disorder."⁷⁷ A.K. attended ACPS from kindergarten through the seventh grade.⁷⁸

A. Initial Placement at Riverview School: 2003–2004 School Year

During the 2002–2003 school year, when he was in seventh grade, A.K. began to exhibit behavioral problems that, when coupled with the verbal and physical taunts of his classmates, made his school day increasingly difficult.⁷⁹ ACPS staff met several times with A.K.'s parents ("the parents") in an effort to resolve these conflicts, but the parties were unable to come to a decision before A.K.'s IEP team convened an eligibility reassessment in March 2003.⁸⁰ At that meeting, the IEP team determined that A.K. suffered from additional learning disabilities.⁸¹

As a result of these newly-diagnosed disabilities—including Asperger Syndrome (AS)⁸² and Obsessive-Compulsive Disorder (OCD)⁸³—A.K.'s eighth

2007).

76. See generally Caroline S. Bowen, Semantic and Pragmatic Difficulties, <http://speech-language-therapy.com/spld.htm> (last visited July 15, 2008) (describing the nature of SPLD and its distinguishing characteristics) (on file with the Washington and Lee Law Review). Children with SPLD have difficulty understanding the meaning of words and phrases, and they do not possess socially appropriate speaking skills for children of the same age. *Id.*

77. *A.K. II*, 484 F.3d at 675.

78. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. I)*, 409 F. Supp. 2d 689, 690 (E.D. Va. 2005).

79. See *id.* (describing A.K.'s increasing inability to behave and to co-exist with other students); see also *A.K. II*, 484 F.3d at 676 (focusing on A.K.'s abuse at the hands of his classmates).

80. *A.K. I*, 409 F. Supp. 2d at 689.

81. *Id.* Whether these disabilities had manifested themselves since the last assessment or were previously overlooked is irrelevant to the present discussion. The same is true as to the question of whether these new disabilities led to A.K.'s behavioral problems.

82. See generally Nat'l Inst. of Neurological Disorders & Stroke, NINDS Asperger Syndrome Information Page, <http://www.ninds.nih.gov/disorders/asperger/asperger.htm> (last visited July 15, 2008) (describing the nature of AS and its distinguishing characteristics) (on file with the Washington and Lee Law Review). "The most distinguishing symptom of AS is a child's obsessive interest in a single object or topic to the exclusion of any other. . . . Children with AS are isolated because of their poor social skills and narrow interests." *Id.*

83. See generally Nat'l Inst. of Mental Health, Obsessive-Compulsive Disorder, <http://www.nimh.nih.gov/health/topics/obsessive-compulsive-disorder-ocd/index.shtml> (last visited July 15, 2008) (describing the nature of OCD and its distinguishing characteristics) (on file with the Washington and Lee Law Review). "[OCD] is an anxiety disorder and is characterized by recurrent, unwanted thoughts (obsessions) and/or repetitive behaviors (compulsions). . . . [Performance of] so-called 'rituals' . . . provides only temporary relief, and

grade IEP recommended placement at a "therapeutic private day school."⁸⁴ All parties agreed that this would be the least restrictive environment in which to educate A.K.⁸⁵ When their efforts to locate an appropriate school near their home proved unsuccessful, however, the parents looked outside the immediate area.⁸⁶ The parents enrolled A.K. at Riverview School, a private residential school outside Cape Cod, Massachusetts, for the 2003–2004 school year.⁸⁷ To comply with an agreement between ACPS and the parents, the school district paid for a fraction of the Riverview tuition equal to the cost of tuition at a local private day school.⁸⁸

B. Disagreement over Future Placement: 2004–2005 School Year

In preparation for the 2004–2005 school year, A.K.'s IEP team—including ACPS staff members, Riverview staff members, and the parents⁸⁹—met for approximately nine total hours in late May and early June.⁹⁰ The bulk of the discussions involved A.K.'s performance at Riverview and the setting of

not performing them markedly increases anxiety." *Id.*

84. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. I)*, 409 F. Supp. 2d 689, 690 (E.D. Va. 2005).

85. See Reply Brief of Appellants at 5, *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672 (4th Cir. 2007) (No. 06-1130) ("A.K.'s parents agree that 'a private day placement in his community, not a boarding school elsewhere, is the least restrictive environment for [A.K.]'"). The IDEA mandates inclusion—educating disabled children with nondisabled children in a regular classroom or the most comparable alternative—whenever possible. See IDEA, 20 U.S.C. § 1412(a)(5) (Supp. V 2005) ("To the maximum extent appropriate . . . 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 . . . cannot be achieved satisfactorily.").

86. See *A.K. II*, 484 F.3d at 676 (noting the parents' fruitless search of the Washington, D.C. area for a school that could accommodate A.K.'s specific educational needs). But see *A.K. I*, 409 F. Supp. 2d at 690 (characterizing A.K.'s eventual placement as due more to the parents' disagreement with the IEP team's initial recommendation than the inability to find an appropriate school nearby).

87. *A.K. I*, 409 F. Supp. 2d at 690.

88. *A.K. II*, 484 F.3d at 676.

89. The composition of A.K.'s IEP team, which included his parents, ACPS teachers, ACPS special education personnel and Riverview personnel, accorded with proper IDEA procedures. See *supra* note 66 and accompanying text (detailing the essential IEP team members).

90. See *A.K. II*, 484 F.3d at 676 (describing the meetings of May 21, May 28, and June 9, 2004 as lasting "for a total of eight to ten hours"). The district court's opinion states that the second meeting took place on May 29 and that each meeting took approximately three hours. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. I)*, 409 F. Supp. 2d 689, 690 (E.D. Va. 2005).

future goals.⁹¹ The IEP team did not discuss A.K.'s placement until the last half hour of the final meeting.⁹² It quickly became apparent that ACPS and the parents possessed contrary views on the matter.⁹³ Without identifying a particular school, ACPS initially recommended placement at a local therapeutic private day school—the same placement it had suggested in the 2003–2004 IEP.⁹⁴ The parents disagreed, and A.K.'s mother reminded ACPS that she and her husband had, in the wake of the previous year's IEP, searched unsuccessfully for a local private day school that could accommodate their son's particular needs.⁹⁵

When pressed to name specific private day schools, Susan Sullivan, ACPS's "private placement specialist" and the chair of the IEP team, suggested the Kellar School (Kellar) and the Phillips School (Phillips).⁹⁶ A.K.'s mother dismissed Sullivan's suggestions.⁹⁷ The June 9 meeting ended without a resolution as to which particular local private day school would be an appropriate placement.⁹⁸ The final IEP draft discussed A.K.'s then current performance level, his future goals, and a transition plan from Riverview to a private day school.⁹⁹ It also listed A.K.'s placement as "Level II-Private Day School placement."¹⁰⁰ Partly because of the parents' continued dissatisfaction with the recommended placement, however, the IEP did not designate a particular school that A.K. would attend.¹⁰¹ Due to this omission, the parents declined to sign the IEP.¹⁰²

91. A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd. (A.K. II), 484 F.3d 672, 676 (4th Cir. 2007).

92. *Id.*

93. *See id.* (detailing the intransigent position of each party as to whether A.K. should remain at Riverview or should be placed at a private school closer to home).

94. A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd. (A.K. I), 409 F. Supp. 2d 689, 691 (E.D. Va. 2005).

95. A.K. II, 484 F.3d at 676.

96. *Id.*

97. *See id.* ("A.K.'s mother responded that she did not believe either [the Kellar School or the Phillips School] would be appropriate.").

98. *Id.*

99. *Id.* Under the IDEA, an IEP must include many specific details. *See supra* notes 55–62 and accompanying text (listing the necessary details).

100. A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd. (A.K. II), 484 F.3d 672, 676 (4th Cir. 2007).

101. *Id.*

102. *Id.* Eventually, the parents signed the IEP, but only with regard to the services it proscribed for the summer of 2004. *Id.* at 676 n.2.

In July, ACPS, on behalf of A.K., sent applications to five private day schools in the D.C.-metro area.¹⁰³ ACPS characterized its efforts as a means to resolve a conflict with uncooperative parents.¹⁰⁴ The parents, on the other hand, viewed their reluctance to assist in the application process as a reasonable response to the perceived unilateral actions of the school system.¹⁰⁵ Regardless of each party's true intentions, the process at this point was anything but collaborative. Three of the schools rejected A.K.'s application either because they could not provide him with a FAPE or because they had already reached maximum enrollment.¹⁰⁶ Either way, the only schools that remained were Kellar and Phillips.

In their responses to ACPS, Kellar and Phillips both relayed their belief that they could provide A.K. with a FAPE.¹⁰⁷ Both schools invited A.K. and his parents to visit their respective campuses for a tour.¹⁰⁸ In July 2004, A.K.'s mother toured Kellar and Phillips but did not bring A.K. for an interview as each school had requested.¹⁰⁹ A.K.'s mother concluded, as a result of her visits, that neither school could provide her son with a FAPE.¹¹⁰

103. See *id.* at 676 (listing the Lab School, the Ivymount School, Oakmont School, Kellar, and Phillips as the schools to which ACPS sent applications).

104. See Brief of Appellee at 12, *A.K. II*, 484 F.3d 672 (No. 06-1130) ("Although the Parents did not agree with the proposed IEP or placement in a private day school setting, the school system sent application packets on the Student's behalf to several local private day facilities . . .").

105. See Brief of Appellants at 9-10, *A.K. II*, 484 F.3d 672 (No. 06-1130) (emphasizing ACPS's lack of communication with the parents when and after it sent out the applications).

106. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 676 (4th Cir. 2007) (noting that the Lab School and Oakmont were concerned about their ability to accommodate A.K.'s multitude of disabilities). There is some disagreement between ACPS and the parents as to whether the Ivy School had room for A.K. or whether it, like the Lab School and Oakmont, could not handle a student with A.K.'s particular set of conditions. *Id.* at 676 n.3.

107. *Id.* at 676.

108. *Id.*

109. *Id.* at 677.

110. See *id.* ("A.K.'s mother . . . determined that neither school would be able to meet A.K.'s specialized needs."); Brief of Appellants, *supra* note 105, at 11 (basing A.K.'s mother's rejection of Phillips on "her tour of the school, her previous knowledge of the program, and her consultation with the experts who had long term involvement with A.K."); *id.* (attributing A.K.'s mother's concerns about Kellar to its drug-testing program and its lack of extended-day programs). As a result of her conclusion that neither Kellar nor Phillips could properly accommodate her son, A.K.'s mother turned down interview requests from both schools that ACPS staff relayed to her in August. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. I)*, 409 F. Supp. 2d 689, 691 (E.D. Va. 2005).

C. Due Process Hearing

Long before A.K.'s mother toured and rejected Kellar and Phillips, unbeknownst to ACPS, the parents had re-enrolled A.K. at Riverview for the 2004–2005 school year.¹¹¹ On July 9, 2004, the parents filed for an administrative special education due process hearing, alleging that ACPS failed to offer their son a FAPE.¹¹² An IEP fails to offer a FAPE if it is not "reasonably calculated to enable the child to receive educational benefits."¹¹³ The parents, as the moving party, had the burden of proof.¹¹⁴

1. The Parents' Claim

Having agreed to the same placement in the previous year's IEP, A.K.'s parents had little chance of successfully challenging the therapeutic private day school placement suggested by ACPS in the June 2004 IEP. With this knowledge in hand, they approached the due process hearing with a novel argument. The parents claimed that the IEP denied their son a FAPE because it did not include a written record of a particular school at which special education services would be delivered.¹¹⁵ By doing so, the parents hoped to steer the hearing away from the substantive issue of Kellar and Phillips's ability to provide A.K. with a FAPE and into murkier procedural waters. The parents sought reimbursement of tuition paid to Riverview for the upcoming 2004–2005 school year in its entirety.¹¹⁶

An exhaustively comprehensive administrative hearing occurred over the course of three days in September 2004.¹¹⁷ During ACPS's testimony, school

111. See Brief of Appellee, *supra* note 104, at 9 (noting that the parents signed a contract to enroll A.K. at Riverview for the 2004–2005 school year on April 8, 2004).

112. A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd. (A.K. II), 484 F.3d 672, 677 (4th Cir. 2007). The procedures associated with a special education due process hearing are described in the IDEA, 20 U.S.C. § 1415(f) (Supp. V 2005).

113. Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982).

114. See Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 58 (2005) ("[T]he burden of persuasion lies where it usually falls, upon the party seeking relief.").

115. A.K. II, 484 F.3d at 677.

116. *Id.* The parents are eligible for tuition reimbursement if the IEP does not provide A.K. with a FAPE, and if Riverview, where they unilaterally placed him, is "appropriate to [his] needs." A.B. *ex rel.* D.B. v. Lawson, 354 F.3d 315, 320 (4th Cir. 2004) (citing Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985)).

117. Brief of Appellee, *supra* note 104, at 20 (noting that on September 13, 14, and 16, the hearing officer (HO) "heard ten witnesses, constituting over eight hundred pages of transcripts, and received ninety-seven documentary exhibits").

district personnel and other witnesses maintained that placement at either Kellar or Phillips would have been entirely appropriate to meet A.K.'s needs.¹¹⁸ The parents, however, offered the testimony of two expert witnesses who disagreed with ACPS's assessment of the situation at Kellar and Phillips.¹¹⁹

Cheryl Weitz, a licensed social worker,¹²⁰ testified to the disruptive nature of students at the Phillips school. Weitz opined that the "aggressive" nature of the other students at Phillips could cause A.K. to "regress into [a] fearful, anxious state where he would be more shutdown in self-protection."¹²¹ She also argued that Phillips's goal of improved behavior and motivation would be misguided in this instance because neither area was a distinct problem for A.K.¹²² Weitz voiced similar apprehensions about Kellar.¹²³

The parents also presented the testimony of Dr. William Stixrud, a neuropsychologist.¹²⁴ Dr. Stixrud supported Weitz's testimony and augmented it with findings of his own.¹²⁵ He agreed that placement at Kellar or Phillips "would be counter-productive in terms of [A.K.'s] availability for learning and

118. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 677 (4th Cir. 2007) (detailing the testimony regarding the "progressive level system" offered at Kellar and Phillips). Both Kellar and Phillips utilize an educational system whereby the students are encouraged to take on more independence and responsibility as their level of education and social interaction rises. *Id.* Kellar is smaller than Phillips and features team-based learning for middle and high school students. *Id.* During her testimony, Susan Sullivan reiterated her belief that Kellar would have provided A.K. with a FAPE. *Id.*

The classes at Phillips, a slightly larger school, are comprised mostly of fourteen- to eighteen-year-old students who are afflicted with a variety of disabilities. *Id.* Phillips specializes in "small group instruction, one-on-one intervention, speech and language development, and training in social and daily-living skills." *Id.* In addition to Sullivan, ACPS offered the testimony of Laura Heyer, Phillips's program supervisor and a former teacher at Phillips, at the due process hearing. *Id.* Heyer agreed with Sullivan's assessment of Phillips's ability to offer A.K. educational benefits. *Id.*

119. *Id.* at 677–78.

120. See *id.* at 677 (describing Weitz as a specialist in child psychotherapy and a frequent consultant in IEP development).

121. *Id.* at 677–78 (internal quotes omitted).

122. See *id.* at 678 (adding that focusing on the wrong issues could have the unfortunate effect of cognitive regression). But see *supra* note 79 and accompanying text (noting that behavioral problems contributed to the 2003 decision to remove A.K. from public school).

123. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 678 (4th Cir. 2007) (noting Weitz's observation that "Kellar educated many children with psychiatric problems who often are violent and attend the school for only a short period").

124. *Id.*

125. See *id.* (noting Dr. Stixrud's hesitation to recommend Kellar and Phillips because of the presence of a number of students with psychiatric and behavioral problems).

his ability to benefit from education that focuses on academics or adaptive behavior."¹²⁶

2. *The Hearing Officer's Decision*

Both of the parents' experts agreed that a private day school placement would be appropriate for A.K., but each expressed doubts that either Kellar or Phillips was such a school.¹²⁷ After hearing both sides' testimony, however, the Hearing Officer (HO) rejected the parents' claim without reaching a decision on the appropriateness of Kellar or Phillips.¹²⁸ According to the HO, in offering A.K. placement at a "private day school," ACPS had provided him with a FAPE.¹²⁹

Rather than viewing the absence of a specific school from the June 2004 IEP as a failure, the HO characterized it as ACPS's attempt to provide the parents with a multitude of options.¹³⁰ The HO also stressed the fact that, regardless of their exclusion in the physical document, at least two schools, Kellar and Phillips, had been discussed by the parties during the closing stages of the June 9, 2004 IEP meeting.¹³¹ Finally, the HO concluded that, under the IDEA, ACPS was obliged only to provide an appropriate placement, not a particular school.¹³² That the parents found none of the suggested schools to their liking did not constitute a denial of FAPE.¹³³ At this point, because A.K.'s parents exhausted their administrative remedies, they turned to the federal court system.

126. *Id.* (internal quotes omitted).

127. *See id.* (detailing Weitz's and Stixrud's dismissals of Kellar and Phillips as schools at which A.K. could receive educational benefits). Weitz stated that "A.K. could benefit educationally from a private day school" but discounted the appropriateness of Kellar and Phillips. *Id.* Dr. Stixrud believed that the number and complexity of A.K.'s disabilities "[required] a very specific type of learning environment in order for A.K. to make academic progress." *Id.* He concluded that no school in the surrounding geographic area provided such an environment. *Id.*

128. *Id.*

129. *Id.*

130. *See id.* ("The fact that ACPS did not specify a particular private day program suggests to me that ACPS wanted to give the parents as much flexibility as possible on this issue." (quoting the HO)).

131. *Id.*

132. *Id.* Such a conclusion does not directly address whether "location" means a "particular school" nor does it speak to whether A.K.'s IEP designated any kind of anticipated location—particular school or otherwise.

133. *See id.* (citing the HO's emphasis on the voluntary and unilateral nature of parents' refusal of ACPS's suggested schools because they did not find them "attractive").

IV. The Meaning of "Location"

A. Different Interpretations of "Location"

The three most important parts of a real estate decision are location, location, and location. The thought seems to be that the fundamental factors in choosing what house to buy are all one and the same. It seems straightforward enough—until one stops to consider how many different ways location can be interpreted.

Does "location" mean the general geographic locale where one is looking to buy? There is a sizeable cultural difference between what surrounds a rural farmhouse and what abuts an urban brownstone. Or does "location" mean the surrounding neighborhood? No matter how green the grass and fertile the soil, few want to purchase a house that sits next door to a military firing range. Or does "location" mean something even more specific, like the exact plot of land on which the house rests? After all, a property that lies within a prestigious gated community is worthless if it sits directly over a sinkhole.

When the *A.K.* case arrived in the federal judicial system, the issue before the courts was similar to the confusion over "location" in the real estate example. After failing to convince the HO that the exclusion of Kellar and Phillips in the IEP's text—regardless of any discussion at the meeting—denied their son a FAPE, the parents zeroed in on the IDEA's requirement that an IEP include the "anticipated . . . location" where services will be provided.¹³⁴ The question was now one of interpretation.

Although both the district court and the court of appeals attempted to do the same thing—define the term "location" as used in the IDEA—each arrived at different conclusions.¹³⁵ The U.S. Supreme Court's decision to deny ACPS's petition for a writ of certiorari means that the Fourth Circuit's conflation of "location" with "a particular school" in the context of the IDEA will stand.¹³⁶ Nevertheless, proper resolution of the issue remains extremely

134. IDEA, 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (Supp. V 2005).

135. Compare *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. I)*, 409 F. Supp. 2d 689, 691 (E.D. Va. 2005) (using "location" interchangeably with "educational placement"), with *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 679 (4th Cir. 2007) (characterizing 20 U.S.C. § 1414(d)(1)(A)(i)(VII)'s "location" requirement as calling for a "particular school"). In the context of the IDEA, "educational placement" has long been understood to refer to "points along the continuum of placement options available for a child with a disability." Placements, 71 Fed. Reg. 46,587, 46,588 (Aug. 14, 2006). The Fourth Circuit correctly distinguished "location" as being unique from "placement." *A.K. II*, 484 F.3d at 680. Nevertheless, this Note argues that the court of appeals defined "location" incorrectly.

136. See *A.K. II*, 484 F.3d at 679 (agreeing with the parents' assertion that the IDEA requires an IEP to include "a particular school" at which educational services are to be

difficult. As the above discussion illustrates, deriving a single meaning for "location" might not be as easy and straightforward as it seems at first glance.

A.K.'s parents, in their brief opposing ACPS's petition for a writ of certiorari, concluded that "[l]ocation is a clear and concise term which is not subject to more than one interpretation."¹³⁷ That is a gross mischaracterization—particularly in the field of special education law, where so many terms have interesting and nuanced meanings.¹³⁸ Because Congress did not provide a meaning for "location" within the IDEA itself, the administrators and educational professionals charged with putting the IDEA into action have been forced to fill in the blanks.¹³⁹ Therefore, it should come as no surprise that courts, administrators, and educators might differ on the proper interpretation.

B. Judicial Interpretation of "Location" in the A.K. Case

1. The District Court for the Eastern District of Virginia

A.K.'s parents filed a motion for summary judgment in the U.S. District Court for the Eastern District of Virginia, on grounds that ACPS failed to offer their son a FAPE.¹⁴⁰ Among the procedural violations cited by the parents as reasons for the denial was ACPS's failure to disclose specific private school programs at the IEP meeting.¹⁴¹ The district court rejected this argument,

received).

137. Brief in Opposition at 18, *Alexandria City Sch. Bd. v. A.K. ex rel. J.K.*, 128 S. Ct. 1123 (2008) (No. 07-541), *denying cert. to A.K. II*, 484 F.3d 672.

138. See *supra* Part II (discussing special education law's distinctive terminology).

139. See IDEA, 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (requiring that a student's IEP contain the "location" where special education "services and modifications" are to take place, but failing to provide a definition for "location"); see also *id.* § 1401 (providing definitions for many of the terms used in the IDEA, but failing to provide a definition for "location").

140. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. I)*, 409 F. Supp. 2d 689, 690 (E.D. Va. 2005).

141. See *id.* at 692 (introducing the parents' grounds on which they sought relief) (citing Brief in Support of Motion for Summary Judgment at 17, *A.K. I*, 409 F. Supp. 2d 689 (E.D. Va. 2005) (No. Civ. A. 05-229)). A.K.'s parents sought relief based on the following:

(1) [T]he parents had never been notified that private placements in the area would be considered, (2) specific programs were not disclosed by ACPS at the IEP meeting, and (3) no clear picture had been presented as to what services were available and how they [would] be provided to A.K.

Id. (internal quotes omitted). The district court's dismissal of the third ground and the reasoning involved are unimportant to the present discussion. The first two grounds, particularly the second, form the basis of A.K.'s "location" argument.

stating that ACPS "was not required to identify in writing any *specific* private school for [A.K.]'s placement in order to satisfy the requirements of the IDEA."¹⁴² The court did so by referring to an earlier decision that stated "a recommendation for a child's educational placement means a recommendation to the actual educational program and not the particular institution where the program is implemented."¹⁴³ Unfortunately, the district court appears to have equated the term "location" with "placement." The opinion only uses the word "location" once.

So although the district court used a perfectly acceptable description of the term "placement," it would be incorrect to associate it with "location." The terms are unique. The IDEA refers to them quite differently, and certainly not interchangeably.¹⁴⁴ Whereas Congress did not add "location" to the IDEA until 1997,¹⁴⁵ the term "placement" has been in the IDEA since 1975, when Congress passed the EAHCA.¹⁴⁶ Courts have traditionally identified "placement" with a broad type of educational setting—for instance, regular classes with consultation from special education, full-time special education instruction, or homebound instruction.¹⁴⁷ "Location," on the other hand, undoubtedly refers to something more concrete and tangible.¹⁴⁸

142. *A.K. I*, 409 F. Supp. 2d at 693.

143. *Id.* (citing *Jennings v. Fairfax County Sch. Bd.*, 35 IDELR 158 (E.D. Va. 2001)).

144. For the only mention of "location" in the IDEA, see 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (Supp. V 2005). In contrast, "placement" is mentioned throughout the IDEA. *See, e.g., id.* § 1414(e) (discussing "educational placement" and the necessity of parents' involvement in placement decisions); *id.* § 1415(b)(1) (describing the procedural safeguards available to parents, including the right to examine records concerning their child's educational placement); *id.* § 1415(j) (requiring the child to "stay-put" in her current educational placement during any administrative judicial proceedings).

145. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A)(vi), 111 Stat. 37, 84 (codified as amended at 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (Supp. V 2005)).

146. *See* EAHCA, Pub. L. No. 94-142, sec. 5, § 615, 89 Stat. 773, 788-89 (1975) (codified as amended at 20 U.S.C. §§ 1400-1482 (Supp. V 2005)) (containing the original versions of the procedural safeguard and stay-put provisions).

147. *See, e.g., AW ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 676 (4th Cir. 2004) ("[T]he term 'educational placement' . . . refers to the overall educational environment"); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) ("'Educational placement,' as used in the IDEA, means educational program—not the particular institution where that program is implemented."); *Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. N.Y. City Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir. 1980) ("[T]he term 'educational placement' refers only to the general educational program in which the handicapped child is placed").

148. *Cf. Wilson*, 372 F.3d at 681 (noting that designation of an "educational placement" does not include the "precise physical location" where the student is educated).

2. The Court of Appeals for the Fourth Circuit

The casual way in which the district court interchanged "location" and "placement" foreshadowed the verbal confusion that took place at the next level. The Fourth Circuit, in a decision that will affect school districts across Maryland, North Carolina, South Carolina, Virginia, and West Virginia—and quite possibly the nation—equated "location" with "a particular school."¹⁴⁹ Unlike the district court, which confused the terms, the court of appeals simply distinguished "location" from "educational placement."¹⁵⁰ Judge Gregory—who agreed with the majority's analysis of the "location" question but dissented on the issue of whether the flaw in A.K.'s IEP was substantive or procedural—directly addressed the definition of "location," assuming that it must mean something on a larger geographic scale.¹⁵¹ In the part of the opinion that makes the case for distinguishing "location" from "educational placement," the majority leaned most heavily on *AW ex rel. Wilson v. Fairfax County School Board*.¹⁵² If the Fourth Circuit held only that "educational placement" is not the same thing as "location," then the holding in *Wilson* would be sufficiently analogous. But the court's holding in the A.K. case—that "location" means "a particular school"—goes a step further.¹⁵³

In *Wilson*, AW's parents argued that the school district contravened the IDEA's stay-put provision when it moved him from his normal classroom to a similar classroom in a different school.¹⁵⁴ The court held

149. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 679–81 (4th Cir. 2007) (encompassing the majority's discussion of the IDEA's "location" requirement).

150. See *id.* at 682 (citing the distinction made in *Wilson* between "educational placement" and "location"). Although the *Wilson* court found that "educational placement" did not encompass a "precise location where the disabled student is educated," it did not define "location" in the context of 20 U.S.C. § 1414(d)(1)(A)(i)(VII). *Wilson*, 372 F.3d at 676.

151. See *A.K. II*, 484 F.3d at 683 (Gregory, J., dissenting) ("As it is used in the IDEA (and in common parlance) . . . *location* refers to something geographic in nature: a place or locale."). Judge Gregory relied on the same distinction made in *Wilson* as his colleagues. *Id.* (Gregory, J., dissenting).

152. See *AW ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 683 (4th Cir. 2004) (holding that moving a child between "materially identical settings" does not violate the IDEA's "stay-put" provision because "educational placement" refers to an "overall instructional setting," not the location of that setting).

153. See *A.K. II*, 484 F.3d at 681 ("Here, we hold as a matter of law that *because it failed to identify a particular school*, the IEP was not reasonably calculated to enable A.K. to receive educational benefits.") (emphasis added).

154. See *Wilson*, 372 F.3d at 678 ("AW asserts that his mid-year transfer by the [school system] violates the 'stay-put' provision of the IDEA"); see also 20 U.S.C. § 1415(j) (Supp. V 2005) ("[D]uring the pendency of any proceedings conducted pursuant to this section, unless the

that, because "educational placement" referred to a broader "instructional setting" instead of something more "precise," the school district did not violate the stay-put provision.¹⁵⁵ The *Wilson* opinion characterizes the contested move as a change in location, but the opinion never referred to "location" as it is used in the IDEA.¹⁵⁶ In AW's parents' perplexing interchange of "location" and "educational placement," they argued that the stay-put provision required him to remain in the same classroom, not just the same school.¹⁵⁷ Both AW's parents and the Fourth Circuit used "location" as a way to indicate some kind of position of specificity, not as a term of art as used in the IDEA. The Fourth Circuit did not assign any added significance to their use of "location" in *Wilson* until the *A.K.* case.

In arriving at *A.K.*'s conclusion that "location" means "a particular school," the Fourth Circuit made the following "logical" leaps of faith. First, it would be helpful to parents if they knew what school their child was to attend. Second, the IDEA requires that an IEP state the anticipated location where the child will receive special education services. Third, "location" does not mean "educational placement," but it does mean something precise—which *could* be a particular school. Therefore, the IDEA requires an IEP to include a particular school where services are to be received. When the court of appeals stretches its reasoning this far, the connective logic is bound to snap.

State or local educational agency and the parents otherwise agree, the child shall remain in the then-current *educational placement*" (emphasis added).

155. See *Wilson*, 372 F.3d at 683 ("In light of our conclusion that 'educational placement' fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting, we conclude that AW's transfer between such materially identical settings does not implicate the 'stay-put' provision.").

156. See *id.* at 676–83 (referring numerous times to the change in location of AW's classes, but never citing 20 U.S.C. § 1414(d)(1)(A)(i)(VII)).

157. See *id.* at 678 (introducing AW's first claim and his supporting arguments). The court wrote:

AW argues that the term "educational placement" encompasses not simply the particular school to which the student is assigned, but the very classroom in which he or she receives his or her instruction. According to AW, the "stay-put" provision thus requires the [school system] to keep him not only in the [gifted and talented (GT)] program, but to keep him in the specific GT program classroom to which he was originally assigned.

Id.

C. Legislative and Administrative Interpretation of "Location"

1. Statutory Interpretation

The Fourth Circuit, or any other court, should be used only as a last resort for interpreting an ambiguous statutory term. Despite A.K.'s assertion that "location . . . is not subject to more than one interpretation,"¹⁵⁸ the discussion in Part IV.A demonstrates that the proper definition of "location" is often in the eye of the beholder. The most basic tenets of statutory interpretation instruct a court to examine the language of the statute itself.¹⁵⁹ When common usage or the statute limits the term to a single interpretation, the process is quick and easy.¹⁶⁰ The A.K. case concluded that one or the other, or both, limits "location" to just one interpretation—a particular school.¹⁶¹ This contention is without merit.

"Location," although it undoubtedly indicates something of a precise positional nature, could be used to describe multiple spots in an educational setting. It could describe a particular school. It could also reasonably describe a particular classroom or other type of setting *within* a school. Exactly what the term means in the context of the IDEA would be apparent if Congress had included an explanation in the legislation. Unfortunately, when the term was added to the IDEA in 1997,¹⁶² its drafters failed to include any definition, even though there is a lengthy "definitions" section in the IDEA.¹⁶³

The Fourth Circuit resorted to the legislative history in an attempt to support its interpretation of Congress's intent.¹⁶⁴ Referring to the congressional report on the 1997 amendments, the majority noted that the "[the addition of anticipated frequency, location, and duration requirements] reflects the fact that the location 'influences decisions about the nature and amount of [special

158. Brief in Opposition, *supra* note 137, at 18.

159. See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says . . .").

160. See *id.* ("When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))).

161. See *supra* notes 149–51 and accompanying text (discussing the Fourth Circuit's interpretation of "location" as "a particular school").

162. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A)(vi), 111 Stat. 37, 84 (codified as amended at 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (Supp. V 2005)).

163. See IDEA, 20 U.S.C. § 1401 (Supp. V 2005) (providing definitions for many of the terms used in the IDEA, but failing to provide a definition for "location").

164. See A.K. *ex rel.* J.K. v. Alexandria City Sch. Bd. (A.K. II), 484 F.3d 672, 680 (4th Cir. 2007) (discussing the placement and significance of "location" in the IDEA).

education] services and when they should be provided."¹⁶⁵ This passage, taken alone, only speaks to the perceived importance of the location where a child receives services. It does not address whether the location is a particular school.

The subsequent sentence in the congressional report, however, provides a clue as to Congress's intent: "For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service and the regular educational program. For this reason, in the bill the Committee has added 'location' [to the IDEA's IEP requirements]"¹⁶⁶ Apparently, when it inserted "location" into the IDEA, Congress did not view the term as indicative exclusively of a particular school or building. Rather, it appears that when the drafters of the 1997 amendments contemplated a location's influence on the provision of a disabled child's educational services that they were thinking about a spot within the educational placement—something that is both more and less precise than, but certainly not the same as, a particular school.

Examples of a location within a placement might include "the regular math classroom" or "the special education resources room." Either would be an appropriate and useful description of the location of services within a part-time special education placement or a therapeutic private day school placement. In fact, determination of the child's proposed immediate physical surroundings could influence "the nature and amount of [special education] services"¹⁶⁷ to a much greater extent than could identification of a particular school.

2. Regulatory Interpretation

The preceding section should not be read to suggest that the Fourth Circuit was the only party to address directly the definition of "location." If that were the case, its interpretation of "location," as used in the IDEA, would be the standard definition. A court of appeals, however, is not the first, nor the most appropriate, governmental body to tackle the issue.

The IDEA guarantees the rights of disabled students and provides a fundamental framework of procedures for the protection of those rights.¹⁶⁸

165. *Id.* (quoting H.R. REP. NO. 105-95, at 101 (1997), as reprinted in 1997 U.S.C.C.A.N. 78, 99). The majority opinion incorrectly cites to Senate Report 105-17, which is not included in U.S.C.C.A.N. The citation to U.S.C.C.A.N., however, syncs up with the House Report.

166. H. REP. NO. 105-95, at 101 (1997), as reprinted in 1997 U.S.C.C.A.N. 78, 99.

167. *Id.*

168. See *supra* notes 36–48 and accompanying text (discussing the protections which the IDEA affords to disabled schoolchildren and some of the IDEA's basic procedural

These procedures are put into action by the U.S. Department of Education (ED) implementing regulations.¹⁶⁹ Generally, the federal regulations resemble the legislative language, but they tend to provide more in-depth guidance.¹⁷⁰ The regulations' wording is important primarily because each entry is written by administrators who either are or work closely with educators.¹⁷¹ In other words, regulations and other administrative publications provide significant insight into the meaning of vague legislation.

Like the equivalent section in the IDEA, the "definitions" section in the federal regulations lacks an entry for "location."¹⁷² In addition, the rule requiring the inclusion of a location in an IEP fails to elaborate on its meaning.¹⁷³ Nevertheless, the ED has provided some evidence for how it has interpreted "location" since the term's adoption.

During the public comment period of the rule-making process in 1999 and 2006, educators requested an explanation of just what was meant by "location."¹⁷⁴ When it first confronted the question, the ED provided a meaning similar to the one found in the 1997 congressional report.¹⁷⁵ The ED

requirements).

169. Assistance to States for the Education of Children with Disabilities, 34 C.F.R. pt. 300 (2007).

170. See OSBORNE & RUSSO, *supra* note 17, at 2–3 (explaining the difference between the "broad directives" of the IDEA and the detailed regulations by which the executive branch enforces those legislative protections); see also IEP Team, 34 C.F.R. § 300.321(e) (2007) (supplementing 20 U.S.C. § 1414(d)(1)(C)'s IEP meeting attendance policies with the requirement that excusal from such meetings be granted by the parents in writing). *But cf.* 34 C.F.R. § 300.321(a) (mirroring the necessary composition of an IEP team as listed in 20 U.S.C. § 1414(d)(1)(B)).

171. See OSBORNE & RUSSO, *supra* note 17, at 3 (emphasizing that the authors of each particular regulation are "well versed in their areas of expertise").

172. See 34 C.F.R. §§ 300.4–.45 (2007) (comprising the definitions used in 34 C.F.R. pt. 300). Note that the regulations contain several definitions that are not provided in the IDEA. See, e.g., 34 C.F.R. § 300.9 (providing a detailed definition for "consent," as used in the IDEA).

173. Definition of Individualized Education Program, 34 C.F.R. § 300.320.

174. See Content of IEP, 64 Fed. Reg. 12,591, 12,594 (Mar. 12, 1999) (noting two distinct schools of thought regarding how "location" should be defined). The ED reported that:

Some commenters requested that the term "location" be defined as the placement on the continuum and not the exact building where the IEP service is to be provided, especially if the service is not available in the LEA and must be provided via contract. Other commenters similarly stated that a note be added clarifying that "location" means the general setting in which the services will be provided and not a particular school or facility.

Id. Seven years later, the ED addressed similar concerns: "One commenter requested clarifying the difference, if any, between 'placement' and 'location.'" Placements, 71 Fed. Reg. 46,587, 46,588 (Aug. 14, 2006).

175. See *supra* notes 165–66 and accompanying text (referring to the congressional report

explained that "location . . . in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service."¹⁷⁶ The answer elaborated on that description, by citing "the child's *regular classroom* or . . . a *resource room*" as examples of such an environment.¹⁷⁷ The ED came to a similar conclusion seven years later, when it answered questions arising out of the 2004 amendments. In an effort to distinguish "placement" from "location"—a persistently difficult problem—the ED acknowledged that "[h]istorically, we have referred to . . . 'location' as the physical surrounding, such as the *classroom*, in which a child with a disability receives special education and related services."¹⁷⁸

Unlike Congress, which overlooked elucidation in the text of the legislation and buried a reference to the term's meaning in a congressional report, the ED directly addressed the issue. Educators, those charged with implementing the IDEA, asked for further clarification. The ED responded. A "location," in the context of the IDEA, is the immediate physical surrounding within a particular placement, such as a type of classroom.

D. Which Interpretation is Correct?

Congress failed to define explicitly "location" in the IDEA. The ED, when commenters asked it to fill in the legislative blanks, referred to types of classrooms as "locations." Other courts of appeals have not explicitly addressed the definition of "location" as it is used in the IDEA—focusing instead on substantive issues of placement.¹⁷⁹ The Fourth Circuit created the "particular school" description from its own impression of how the IEP process should function. Although the Fourth Circuit undoubtedly meant well, its decision to discount administrative interpretations and adopt its own meaning

in which a "regular classroom" was used as an example of a possible "location" for the provision of special education services).

176. Content of IEP, 64 Fed. Reg. at 12,954.

177. *Id.* (emphasis added).

178. Placements, 71 Fed. Reg. at 46,588 (emphasis added).

179. See, e.g., *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) (rejecting the parents' argument that the IDEA requires parental input in the determination of the location of services). *White* involved parents upset with their child's placement in a centralized facility instead of a neighborhood school. *Id.* at 375. The parents claimed that the IDEA mandated parental involvement in site selection. *Id.* The Fifth Circuit acknowledged that IDEA requires an IEP to include the location of services, but concluded that the "location" provision was "primarily administrative" and that it did not apply. *Id.* at 379. The Fifth Circuit did not, however, define "location" as it is used in that section.

for "location" was misguided. With the adoption of the *Chevron* Doctrine, the Supreme Court recognized the primacy of administrative construction.¹⁸⁰

The *Chevron* Doctrine calls for a court to employ a two-pronged analysis when faced with an agency's interpretation of a statute.¹⁸¹ First, a court must determine whether Congress has supplied a clear definition.¹⁸² Here, Congress has not provided a meaning for "location" as it is used in the IDEA.¹⁸³ Even if the court determines that there is no express legislative definition, it is not allowed to independently declare its own.¹⁸⁴ Rather, the second step calls for the court to examine the administrative interpretation.¹⁸⁵

When Congress explicitly excludes a meaning from the statute, the agency's interpretation will be cast aside only if it is "arbitrary, capricious, or manifestly contrary to the statute."¹⁸⁶ Congress expressly instructed the ED to answer questions from educators about the meaning of terms found in the IDEA.¹⁸⁷ With that in mind, the agency's reading of "location" to denote a type of classroom hardly falls within the bounds of what should be discarded by a reviewing court.

When considered alone, the Fourth Circuit's understanding that "location" should refer to a particular school is reasonable. But so is the ED's belief that "location" should refer to a type of classroom. When forced to choose between

180. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

181. *Id.* at 842.

182. See *id.* at 842-43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

183. See *supra* notes 162-66 and accompanying text (discussing the lack of a definition for "location" in the text of the IDEA and the somewhat indistinct manner in which "location" is used in a congressional report supporting adoption of the 1997 IDEA amendments).

184. See *Chevron*, 467 U.S. at 843 ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . .").

185. See *id.* ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

186. *Id.*

187. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 607(d)(1), 111 Stat. 37, 48 (codified as amended at 20 U.S.C. § 1406(f)(1) (Supp. V 2005)) ("The Secretary shall . . . publish in the Federal Register . . . a list of correspondence from the [ED] received by individuals . . . that describes the interpretations of the [ED] of [the IDEA] or the regulations implemented pursuant to [the IDEA].").

the two, the court of appeals should have cast aside its own interpretation in favor of the ED's. After all, a court should not overrule an agency's determination unless it runs contrary to Congress's intent.¹⁸⁸ Congress's only use of the term resembles the agency's analysis.¹⁸⁹ Instead of equating "location" with "a particular school," the Fourth Circuit simply should have deferred to the ED's "classroom" interpretation.

V. The Consequences of Misinterpretation

Notwithstanding the suitability of the court of appeals' method, the Supreme Court has given the Fourth Circuit's interpretation a virtual stamp of approval.¹⁹⁰ This decision will have very important, often negative, ramifications for school districts and parents—but most importantly, for the students themselves. What results from equating "location" with "a particular school" goes beyond approval of an incorrect method of statutory and regulatory interpretation. There are now serious legal and practical consequences for all parties involved in drafting an IEP.

A. Legal Consequences

The most obvious effect of the Fourth Circuit's ruling is that IEPs that would have previously passed muster may now violate the IDEA.¹⁹¹ Observers estimate that the number of IEPs that this decision could nullify may be in the thousands.¹⁹² Their fate hinges on the Fourth Circuit's determination of when a procedural violation of the IDEA causes a substantive denial of a FAPE.

188. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) ("[A] reasonable accommodation of conflicting policies . . . should not [be] disturb[ed] . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

189. See *supra* notes 165–66 and accompanying text (discussing Congress's construal of "location" in a 1997 congressional report).

190. See *Alexandria City Sch. Bd. v. A.K. ex rel. J.K.*, 128 S. Ct. 1123, 1123 (2008), *denying cert. to A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672 (4th Cir. 2007).

191. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 681 (4th Cir. 2007) (holding that A.K.'s IEP did not provide a FAPE solely because it did not "identify a particular school").

192. See Motion for Leave to File and Brief of Amici Curiae Nat'l Sch. Bds. Ass'n et al. in Support of the Petition for Writ of Certiorari at 7, *Alexandria City Sch. Bd. v. A.K. ex rel. J.K.*, 128 S. Ct. 1123 (2008) (No. 07-541) [hereinafter Brief of Amici Curiae] (placing the number of IEPs likely to be affected in the thousands); cf. Petition for Writ of Certiorari at 25, *Alexandria*

1. Substantive or Procedural Violation?

Even more significant than the Fourth Circuit's interpretation of "location" is its subsequent decision that the failure to include a particular school in an IEP is a substantive violation of the IDEA.¹⁹³ As discussed above, the text of the IDEA outlines the procedural demands of a FAPE, but the courts were burdened with distinguishing the substantive requirements.¹⁹⁴ In *Rowley*, the Supreme Court concluded that, in addition to its procedural components, the IDEA demands that a FAPE consist of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."¹⁹⁵ To determine whether or not an LEA has supplied a FAPE, a reviewing court must ask two questions:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.¹⁹⁶

In other words, to provide a FAPE, a school system must comply with both the procedural requirements (the first question) and the substantive requirements (the second question) of the IDEA.

If, as the Fourth Circuit claims, the IDEA requires an IEP to name a particular school, then there is no doubt that ACPS stumbles out of the starting blocks.¹⁹⁷ Whether the IEP clears the second hurdle, though, is debatable. In asking if his IEP had been "reasonably calculated to enable A.K. to receive educational benefits," the court of appeals determined that it had not.¹⁹⁸ Unlike with the meaning of "location," however, the Fourth Circuit was not unanimous on this point. Judge Gregory, in his dissent, stated that the failure to include

City Sch. Bd. v. A.K. *ex rel.* J.K., 128 S. Ct. 1123 (2008) (No. 07-541) (arguing that the court of appeals' decision would invalidate every IEP that did not include a particular school).

193. See *A.K. II*, 484 F.3d at 679 (agreeing with the parents' contention that A.K.'s IEP did not satisfy the substantive requirements of the IDEA because it did not include "a particular school").

194. See *supra* Part II.B (detailing the procedural and substantive requirements of a FAPE).

195. Bd. of Educ. v. *Rowley*, 458 U.S. 176, 201 (1982).

196. *Id.* at 206-07.

197. See *supra* notes 99-102 and accompanying text (detailing the written contents of A.K.'s June 2004 IEP).

198. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 681 (4th Cir. 2007).

Kellar and Phillips in the written copy of the IEP amounted to little more than a harmless procedural error.¹⁹⁹ Judge Gregory based this argument on the premise that the discussion of Kellar and Phillips during the IEP team meeting was substantively analogous to their written inclusion in the IEP document.²⁰⁰ "Because A.K.'s parents were given notice that the Phillips and Kellar schools were locations under consideration, ACPS's failure to write this information on his IEP did not deny A.K. an educational opportunity."²⁰¹

The sufficiency of the discussion of Kellar and Phillips turns largely on whose version of events the observer accepts—ACPS's or the parents'. ACPS characterizes the June 9 mention of the two schools as an offer of private day schools that could possibly accommodate A.K.²⁰² The parents, on the other hand, frame the situation as a desperate and uninformed attempt on the part of ACPS to respond to the parents' repeated requests for more information.²⁰³ Clearly, the majority accepted the parents' account and the dissent accepted ACPS's.²⁰⁴ Either decision could be appropriate under the described circumstances.

If the Fourth Circuit's interpretation of "location" stands, it is imperative that a particular school at least be offered verbally. Failure to include the location of services in the written IEP, while undoubtedly a procedural violation, may not always be a substantive violation. Judge Gregory attempts to mark a distinction between the two based on the consequences of the

199. See *id.* at 684–85 (Gregory, J., dissenting) (claiming that Susan Sullivan's mention of Kellar and Phillips during the June 9, 2004 IEP team meeting provided the parents with sufficient notice of the anticipated location of A.K.'s placement).

200. See *id.* at 684 (Gregory, J., dissenting) ("In A.K.'s case, this oral notice was equivalent to the written notice the IDEA requires.").

201. *Id.* at 684 (Gregory, J., dissenting).

202. See Petition for Writ of Certiorari, *supra* note 192, at 4 ("During the final IEP meeting, School Board staff suggested to the Parents two specific private day programs that could implement the IEP: Phillips School and Kellar School."); Brief of Appellee, *supra* note 104, at 12–13 ("Both Phillips and Kellar were . . . discussed at the IEP meeting in June 2004 as possible private day schools for A.K.").

203. See Brief in Opposition, *supra* note 137, at 22 (emphasizing that Kellar and Phillips were "mentioned" as mere "examples"); Brief of Appellants, *supra* note 105, at 9 ("No one at the IEP meeting could provide the name of a placement which could implement the IEP as written; however, after repeated requests for the names of potential schools, Susie Sullivan referenced several 'potential' placements without any substantive discussion.").

204. Compare *A.K. II*, 484 F.3d at 681–82 (referring to the mention of Kellar and Phillips during the meeting and their absence from the written IEP as equivalent to "no offer at all"), with *id.* at 684–85 (Gregory, J., dissenting) ("[A]fter Sullivan's suggestions were made, A.K.'s parents knew with a reasonable degree of certainty where ACPS proposed to educate their child . . .").

violation.²⁰⁵ The majority also appears to suggest that such a difference could exist, but is noncommittal.²⁰⁶ The court alludes to a possible standard—triggered if the parents are uncertain that the particular school could provide the appropriate services²⁰⁷—but leaves the door open for any procedural violation to trigger a denial of a FAPE.²⁰⁸ Public school systems must now accept the majority's insinuation that the Fourth Circuit is likely to find any failure to include a required term in the text of an IEP to constitute a denial of a FAPE—regardless of the extent of discussion at the meeting.

2. Monetary Ramifications

The court of appeals decision could have serious negative implications for a public school system's pocketbooks.²⁰⁹ If an IEP that does not include a particular school deprives a child of educational benefit, LEAs could be on the hook for considerable tuition payments. If placement is made in a private school at the suggestion of the public school system, the public school and/or state agency is responsible for payment of private school tuition.²¹⁰ Under normal circumstances, parents who unilaterally place their child in a private school must make the tuition payments out of their own pockets.²¹¹ However, when a school district fails to provide a FAPE, HOs and judges can force the

205. See *id.* at 684 (Gregory, J., dissenting) (suggesting that an examination of "the consequences of the violation of the IDEA requirement in question" is the best way to determine whether that violation is procedural or substantive).

206. See *id.* at 682 ("We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided.").

207. See *id.* ("[C]ertainly in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE.").

208. See *id.* at 682 n.12 (refusing to limit the scope of the holding and noting that it could be broadened at a future date).

209. See Petition for Writ of Certiorari, *supra* note 192, at 25 ("[The Fourth Circuit's decision] unnecessarily and unexpectedly exposes local school systems to substantial monetary claims under IDEA . . .").

210. See IDEA, 20 U.S.C. § 1412(a)(10)(B)(i) (Supp. V 2005) (directing that a private school placement that results from a state or local educational agency referral must be provided "at no cost to [the child's] parents").

211. See *id.* § 1412(a)(10)(C)(i) (noting that an LEA is not required to pay for a child's private school tuition when it provides a FAPE and the parents choose to place the child in a private school).

school district to reimburse the parents for the cost of the private school tuition.²¹²

To determine whether or not a disabled child's parents can recover payments previously made to a private school, the Fourth Circuit directs reviewing courts to administer a two-part test. "The parent may recover if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parents were appropriate to the child's needs."²¹³ In the *A.K.* case, the second portion of the test was easier to pass. Although many would argue that a residential program was far from the least restrictive environment, to contend that Riverview offered A.K. less than an appropriate education would be difficult.²¹⁴ It makes sense that more unique opportunities become available as one moves further away from the ideal placement of inclusion in a regular classroom.²¹⁵ The less restrictive budgets and limited enrollments of private schools allow them to offer more educational programs than might be available at public schools.²¹⁶ The same is true when comparing residential schools, like Riverview, to private day schools, like Kellar and Phillips.

In light of the Fourth Circuit's opinion, the first prong of the test—a potential pothole on the road to reimbursement—transforms into a mere speed-bump. As already discussed, an IEP provides a FAPE unless it violates the procedures of the IDEA to the extent that it does not offer educational benefits.²¹⁷ According to the Fourth Circuit, failure to include any number of IDEA-mandated procedural terms—such as the location where services are to

212. See *id.* § 1414(a)(10)(C)(ii) (providing for reimbursement of private school tuition in situations when the parents place the child in a private school and a hearing officer or court later determines that the LEA did not offer a FAPE in a timely manner); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 320 (4th Cir. 2004) ("When a state receiving IDEA funding fails to provide a FAPE, the child's parent may remove the child to a private school and then seek tuition reimbursement from the state." (citing *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369–70 (1985))).

213. *Lawson*, 354 F.3d at 320.

214. See *supra* notes 84–88 and accompanying text (detailing the agreement between ACPS and the parents to place A.K. at Riverview for the 2003–2004 school year). Even the parents acknowledged that Riverview was not the least restrictive environment in which to educate A.K. See Reply Brief of Appellants, *supra* note 85, at 5 (noting the parents' agreement with ACPS that a "private day placement" was the least restrictive environment).

215. See *supra* note 85 (discussing the IDEA's preference for education in the least restrictive environment).

216. See *OSBORNE & RUSSO*, *supra* note 17, at 38 (noting that some public school districts are unable to afford specialized education programs, causing students to look elsewhere—namely, private schools).

217. See *supra* note 196 and accompanying text (stating the criteria upon which to determine whether an LEA has supplied a FAPE).

be provided—in the written IEP will deprive a disabled child of a FAPE. Now, parents embittered by a school system's refusal to agree to their desired private placement—and burdened by the resultant hefty tuition payments—may find fiscal relief in the *A.K.* decision. If they discover that their child's IEP does not designate a particular school, they could successfully sue the LEA for reimbursement of tuition payments made while that IEP was in effect.²¹⁸

B. Practical Consequences

More important than any result this decision might have in the courtroom is the effect it could have in the classroom. The education of a disabled child requires the cooperation of school officials and parents. Central to that concept is the drafting of an IEP. The Fourth Circuit's decision compromises IEP development in a way that could affect the quality of education that a disabled child receives.

In ruling that an IEP must identify a specific school, the Fourth Circuit was especially mindful of parental interests. The court stated that naming a particular school shows parents "that the school district has carefully considered and selected a school that will meet the unique needs of the student."²¹⁹ It contrasted that state of affairs with one where the IEP does not include a particular school and concluded that the latter could prove harmful to the parents' efforts at meaningful participation.²²⁰

This view fails to account for the reality of choosing a particular private school. Courts cannot expect public agencies to come to a meeting with a single location in mind. Although school districts can assign students to a type of classroom within the district with a fair degree of certainty, that confidence cannot extend to schools outside the district's control. It is inconceivable that a school near a large metropolitan area, like ACPS, would have access to an up-to-the-minute accounting of the projected class sizes and services offered by

218. Of course, any such suits would have to be brought within the respective jurisdiction's statute of limitations. The Fourth Circuit held that a state's "catch-all" limitations statute governs special education due process hearings. See *Manning ex rel. Manning v. Fairfax County Sch. Bd.*, 176 F.3d 235, 238–39 (4th Cir. 1999) (concluding that Virginia's personal actions statute of limitations applies to administrative proceedings brought under the IDEA). In Virginia, all personal actions for which there is not a given limitation must be brought "within two years after the right to bring such action has accrued." VA. CODE ANN. § 8.01-248 (2006).

219. *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 680 (4th Cir. 2007).

220. See *id.* ("Conversely, an offer that fails to identify the school at which special educational services are expected to be provided may not be sufficiently specific for the parents to effectively evaluate.").

every nearby private day school. In addition, there is no guarantee that an otherwise appropriate private school would be willing or able to accept a specific student.²²¹

The court of appeals' concern for parents is admirable. Parents, normally, are not experts in the law or in education. They can be easily pressured or manipulated by unscrupulous school officials. Fortunately, the vast majority of educators want the same thing that parents of disabled children seek—an appropriate education for their child. Unfortunately, the Fourth Circuit's decision to require every IEP to include a particular school encourages antagonism, not cooperation, between school officials and parents.

Rather than arriving at an IEP meeting prepared to discuss several possible options for the delivery of a child's educational services, schools are now encouraged to pigeonhole a student into a certain school in order to ensure that a specific school is listed in the IEP's text.²²² This discourages school districts from offering several possible schools, regardless of the fact that more than one could be appropriate. Likewise, parents who want to see their child placed at a specific school—similar to A.K.'s parents' desire that he remain at Riverview—could sabotage the LEA's good faith efforts. Parents could ignore suggestions of several schools, no matter how well they match their child's needs, and unilaterally place their child in the private school of their choice.²²³ So long as none of the suggestions are committed to writing in the IEP, the parents can feel confident in knowing that their tuition payments will be reimbursed because of a procedural error that causes a substantive denial of a FAPE.

When the process breaks down, the children suffer the most. When it comes to education, most parents want their children to have the absolute best—but the IDEA offers "a serviceable Chevrolet," not a flashy Cadillac.²²⁴

221. See, e.g., *supra* note 106 and accompanying text (noting that the Ivymount School informed ACPS that they would not be able to accommodate A.K. because maximum enrollment had already been reached). A.K.'s mother claims that Ivymount representatives informed her that they would be unable to provide the proper services anyway. *Id.* This is irrelevant to the present discussion. Regardless of the appropriateness of the services, ACPS could not know whether Ivymount had room for A.K. until after it applied on his behalf. And A.K.'s application could not be sent to Ivymount before the IEP team determined his placement.

222. See Brief of Amici Curiae, *supra* note 192, at 8 (warning that the desire to avoid a fate similar to that of ACPS could force LEAs to recommend schools ill-suited to a child's needs).

223. See *id.* at 7–8 (noting that parents who have their sights set on a specific school have little incentive to work together with the school system).

224. See *Doe ex rel. Doe v. Bd. of Educ.*, 9 F.3d 455, 459 (6th Cir. 1993) (holding that an IEP is adequate as long as it is "reasonably calculated to provide educational benefits"). The court colorfully states:

[The IDEA] requires that [school systems] provide the educational equivalent of a

If some parents abuse the IEP process to place their children in appealing private schools and gamble on tuition reimbursement, other children will suffer when public school systems make bad faith offers to avoid litigation based on procedural defects. Ultimately, children may be placed at locations that, instead of being chosen for their ability to provide a FAPE, will be chosen out of pure convenience to the school or the parents.

VI. A Proposed Solution

A. A Definition with Clarity

The Fourth Circuit's decision undoubtedly presents problems for school districts. But it reflects a widespread misunderstanding of—sometimes bordering on outright disregard for—the IDEA's requirement that an IEP include the anticipated location of services.²²⁵ Due to this confusion, which is pervasive among jurists and educators, the IDEA needs a substantive definition for "location." The location of services is an important factor for the IEP team to consider, and it would not have been added to the 1997 amendments if Congress had thought otherwise.²²⁶ Courts, though, should not overstep their bounds to fasten new meanings to statutory terms as a result of excessive concern for one party's interests. Legislative drafters are also similarly ill-suited for this exercise because the IDEA is more concerned with broad procedural frameworks than precise definitions. The legislative process is also

serviceable Chevrolet to every handicapped student. Appellant, however, demands that the . . . school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average . . . student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.

Id. at 459–60.

225. See, e.g., *supra* notes 142–43 and accompanying text (describing the district court's conflation of "location" with "placement"); *supra* notes 149–53 and accompanying text (noting the Fourth Circuit's misinterpretation of "location" as "a particular school"); *supra* notes 174–78 and accompanying text (referring to the ED's responses to educators confused by the meaning of "location").

226. See H.R. REP. NO. 105-95, at 101 (1997), as reprinted in 1997 U.S.C.C.A.N. 78, 99 ("The location where special education and related services will be provided to a child influences decisions about the nature and amount of these services and when they should be provided to a child."). But see *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) (characterizing the identification of a location as "primarily administrative"). "[T]hat parents must be involved in determining 'educational placement' does not necessarily mean they must be involved in site selection." *Id.*

too slow and laborious to address our immediate concerns. Instead, administrative experts at the ED should promulgate a rule that defines "location" once and for all.

The ED possesses both the power and the expertise to define terms used in the IDEA.²²⁷ A suitable definition should read as follows:

Location means the site within an educational placement where the child receives special education and related services.

This relatively easy solution takes the guesswork out of any attempted interpretation. Simply by supplying a definition, it ceases any and all confusion of the terms "location" and "placement." A "location" is a spot within the child's designated educational placement. The suggested definition also leaves little room for readings by which a "location" could be interpreted as "a particular school." It reflects earlier ED interpretations that cited types of classrooms as examples.²²⁸ The definition also asserts that a "location" is something *within* a placement—not something on a larger geographic scale, as Judge Gregory suggested.²²⁹

More importantly, the insertion of a substantive definition in the regulations will end the reigning uncertainty. Disgruntled parents and misguided judges can no longer construe "location" to mean something broader than was originally intended. Instead, school districts and parents are put on notice as to what exactly the IDEA means when it calls for the inclusion of a "location" in a child's IEP.

B. A Procedure with Substance

Despite a new definition, IEP teams would still be faced with a significant problem identified by the Fourth Circuit: Some limited scenarios justify the inclusion of a particular school in the IEP. The Fourth Circuit was correct in assuming that the site of a particular school could play a key role in the parents' thought process. After all, a school district should not be able to impose a

227. See *supra* note 187 and accompanying text (noting that the 1997 IDEA amendments expressly authorized the ED to interpret the terms used therein). It is not unusual for the regulations to contain definitions that were not included in the legislation. See *supra* note 170 and accompanying text (describing the broader range of terms included in the regulatory "definitions" section than in the corresponding section of the IDEA).

228. See *supra* notes 175–78 and accompanying text (discussing ED interpretations of "location" as used in the IDEA).

229. See *A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 683 (4th Cir. 2007) (Gregory, J., dissenting) ("As it is used in the IDEA (and in common parlance) . . . *location* refers to something geographic in nature: a place or locale.").

difficult-to-reach campus when it recommends a private placement. Whereas the old regime allowed school districts and parents greater flexibility in searching for and choosing a particular school, the Fourth Circuit envisions a scenario in which the LEA presents a location ready-made for the parents' acceptance. Such an approach is not feasible.

Placing a child in a private school outside an LEA's direct, everyday supervision should not be undertaken lightly. It requires careful consideration of a number of factors, including the private school's enrollment, facilities, available services and—of course—geographic locale. For similar reasons as stated above, the ED is the most appropriate governmental body to tackle this problem—it possesses the necessary tools and the power to promulgate a rule that takes into account the vulnerabilities of school systems and parents.²³⁰ An apt rule should read as follows:

Every IEP shall include the projected date for the beginning of the special education services and modifications, and the anticipated frequency, location, and duration of those services and modifications.

- a) If the IEP team determines that the child's educational placement will be a program within the local educational agency, the IEP should identify the anticipated type of classroom environment.
- b) If the IEP team determines that the child's educational placement will be a program outside the local educational agency, the IEP should identify the anticipated type of classroom and at least one potential school.
 1. Within a reasonable period of time after the IEP's approval, the educational agency shall take the steps necessary to determine whether any of the schools identified in subpart (b) can provide the child with the appropriate educational placement.
 2. Within 30 days after the IEP's approval—and before the beginning of the subsequent school year—the IEP team should reconvene to amend the IEP by identifying a particular school.

230. See IDEA, 20 U.S.C. § 1406(a) (Supp. V 2005) (empowering the Secretary of the ED to prescribe regulations "necessary to ensure . . . compliance with the specific requirements of [the IDEA]").

This new rule has several advantages for school districts and parents, and solves many of the problems inherent in the present scheme.

First, the proposed rule recognizes that school districts and parents may have a limited functional knowledge of placement opportunities outside the LEA's direct control. Although a school district's special education coordinator may find it easy to classify a child's placement as a residential private school, it is not so easy to guarantee that the parents will agree to the placement or to ensure that enrollment in a particular school has not yet reached its limit. Woe is the school system that might list Riverview as the anticipated location of special education services in the IEP, only to discover that Riverview has no room at the proverbial inn. Allowing the initial IEP to contain more than one anticipated location avoids such gaffes. Likewise, parents are given extra time to research multiple locations suggested by the LEA, rather than being restricted to a single suggestion.

Second, the proposed rule ensures that the child will be educated in the least restrictive environment. The IDEA demands that disabled students be educated with nondisabled students to the greatest extent possible.²³¹ As one moves further and further along the continuum of placements away from the regular classroom, the segregation from the general student population increases. Nevertheless, in order to guarantee early acceptance of a particular location, school personnel might be tempted to list a location in a more restrictive environment that they know is likely to register the child. For instance, ACPS might have recommended placement in a residential private school program for A.K. despite the appropriateness of a private day school—the least restrictive environment. By allowing thirty extra days for applications and interviews, the proposed rule encourages school systems and parents to thoughtfully consider several schools that could provide an educational program in the least restrictive environment.

Lastly, and most importantly, the new rule encourages cooperation between the school district and the parents by providing another barrier between the IEP process and the courts. As some courts have recognized, an easier path to litigation promotes discord and harms the child:

[L]itigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful [in special education cases], since parents and school officials must—despite any bad feelings that develop between them—continue to work closely with one another [W]hen combat

231. See *supra* note 85 and accompanying text (explaining the IDEA's preference for inclusion).

lines are firmly drawn, the child's interests often are damaged in the ensuing struggle.²³²

The thirty day exploratory period allows LEAs to escape the pressure of naming a particular school for the sole purpose of blocking a lawsuit. Parents cannot be pressured into rubberstamping a particular school because they do not have sufficient information on hand. Also, parents cannot hold the school system hostage by unilaterally enrolling their child in a preferred school and hoping that a procedural oversight will allow them to seek reimbursement.

C. The A.K. Case with the New Rule

Regardless of the proposed rule, in some situations, disagreements between the members of a child's IEP team remain inevitable. Given their seemingly intractable desire that he remain at Riverview, it is unlikely that A.K.'s parents would have ever agreed to enroll him at a local private day school.²³³ With an unambiguous definition in place, however, ACPS and the parents would know what the IDEA means when it demands inclusion of a "location" in the child's IEP. ACPS would have been forced to identify a type of classroom environment within its suggested placement. If A.K.'s IEP lacked such a designation, the HO, the district court, and the court of appeals would have all found a procedural violation. Then, the real issue would have been whether or not that procedural violation was sufficient enough to deny A.K. a FAPE.

Likewise, with clearer guidelines for placements outside the LEA's jurisdiction, ACPS would have likely included Kellar and Phillips as potential schools in the text of A.K.'s IEP, rather than simply discussing them at the June 9 meeting. Instead of being forced to decide whether a largely inconsequential procedural error denied A.K. a FAPE, the courts would have been able to confront the substantive issue at the heart of the dispute—could either Kellar or Phillips have actually implemented A.K.'s IEP?

232. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1400 n.5 (9th Cir. 1994).

233. *See A.K. ex rel. J.K. v. Alexandria City Sch. Bd. (A.K. II)*, 484 F.3d 672, 686 (4th Cir. 2007) (Gregory, J., dissenting) (discussing the parents' predetermination that A.K. would attend Riverview for the 2004–2005 school year and their stubborn refusal to consider Kellar or Phillips).

VII. Conclusion

As it currently stands, IEP team members do not have a clear standard by which to determine when a child's IEP must identify a particular school. The scope of a term that had been interpreted by educators and courts in a narrow fashion—if acknowledged at all—has been unreasonably and arbitrarily broadened. Under the regulations this Note proposes, "location" would return to its original limited meaning. A clear line would be drawn between when an IEP must identify potential schools and when such a designation is unnecessary. And most importantly, parents and school personnel will be encouraged to work together to find and communicate with potential schools in an effort to uncover the most appropriate site to effectuate a child's educational placement.

Unfortunately, no rule can mandate a cooperative relationship. If, after thirty days, the parents remain dissatisfied with all of the LEA's proposals, the collaborative process has finally been exhausted. The IDEA's due process protections should not become the means of dispute resolution prior to that point in time. Public school systems and parents must work together to provide disabled students with an appropriate education. As was the case in *A.K.*, though, the collaborative process sometimes breaks down. When that happens, courts—prone to imposing their own interpretations of terms and means of dispute resolution on this unique administrative process—can turn cooperative partners into adversaries. The more time administrative agencies allow school personnel and parents to work through their differences together, the better the outcome for the students whose educations are at stake. And if its members get the most appropriate education possible, the village—students, parents, and school personnel—will be better and stronger for it.