HOW THE MAINSTREAMING PRESUMPTION BECAME THE INCLUSION MANDATE

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I. INTRODUCTION

The notion that the public school system has a duty to provide any type of education for students with disabilities is a rather recent phenomenon. From the founding of the United States through the late 1960s, the treatment of people with disabilities, children and adult alike, in this country and around the world, was based on the archaic and misguided assumption that the disadvantages faced by such persons "were the inevitable result of limitations stemming from the disability itself, rather than from societal barriers or prejudice."[1] As a result, the education of children with special needs was left to their parents, some of whom in turn placed their children in institutional environments whereas others provided home schooling.[2] The Civil Rights Movement, and the racial integration of the public school system that followed, provided the necessary impetus for change in America.[3] Parents and advocates of children with special needs perceived the holding of *Brown v. Board of Education*[4] to be as groundbreaking and revolutionizing as African American families and civil rights activists.[5]

The efforts of such parents and disability advocates ultimately prompted federal legislative action; Congress passed the Individuals with Disabilities Education Act (IDEA) into law in 1970.[6] The mandate of IDEA, stipulating that all students are entitled to a "free and appropriate public education"[7] in the "least restrictive environment,"[8] has forever improved the educational opportunities afforded to children with disabilities. The statistics that bear out this fact are staggering. Less than 800,000 students reportedly received special education services in public schools in 1976-1977.[9] While the Department of Education (DOE) reported that, for

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1. Laudan Aron & Pamela Loprest, *Disability and the Education System*, 22 THE FUTURE OF CHILD. 97, 99 (2012), *available at* http://futureofchildren.org/futureofchildren/publications/docs/22_01_FullJournal.pdf.

2. *See, e.g.*, Kathryn E. Crossley, Note, *Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms*, 4 WASH. U. J.L. & POL'Y 239, 241–42 (2000).

3. Ruth Colker, *The Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 792 (2006).

4. 347 U.S. 483 (1954).

5. *See* Colker, *supra* note 3, at 792.

6. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1491 (1999) (originally enacted as the Education for the Handicapped Act, Pub. L. No. 91–230, 84 Stat. 175 (1970)).

7. 20 U.S.C. § 1412(a). (As interpreted by the Supreme Court in *Board of Education v. Rowley* (458 U.S. 176 (1982))).

8. *Id.*

9. *See* Colker, *supra* note 3, at 794-795.

the 2008 school year, 5,660,491 students with disabilities received instruction in general education classrooms for at least part of the day.[10] The mandate, therefore, has had an indelible impact on public education in this country and continues to influence the educational policy decisions of today. Over the course of the last thirty years, the least restrictive environment standard has been fleshed out by the courts,[11] and further refined by Congress to require the integration of children with disabilities into general educational classrooms to the "maximum extent appropriate."[12] As a result, the integration presumption emerged. Subsequent litigation in the various federal circuit courts has strengthened the core IDEA requirements.[13]

The origins, purpose, and sources of the integration presumption have been, and continue to be, frequently and furiously debated among educational policy scholars and disability advocates. This is the direct result of inconsistent jurisprudence at the federal circuit level regarding the degree of deference to which decisions made by schools regarding placement of students with special needs should be given and the extent of the presumption.[14] As the Supreme Court has never directly defined the specific requirements of the least restrictive environment, nor provided a framework for school districts to apply, various tests have emerged at the federal circuit level that have had the effect of shifting the integration presumption to an inclusion presumption. The two concepts, while often used synonymously, are in reality quite different. Integration, or mainstreaming, involves the placement of students with special needs into a regular education classroom for part of the day for the benefit of social interaction,[15] whereas inclusion refers to the practice of placing students with special needs in a regular education classroom for most of the day.[16] Many of the federal circuit courts have similarly misapplied the *Rowley* Court's interpretation of what constitutes a "free and appropriate public education" when determining the suitable degree of integration.

This Note will present a proposal for a new framework under which the presumption can return to its original function and objective. Below, Part I discusses the history of special education in this country and the movement towards integration of students with special needs in the public school system. Part II introduces the Individuals with Disabilities Act, its legislative history and its mandates, as well as how it impacts the inclusion debate. Part III provides an overview of the judicial response to the IDEA and the integration presumption, beginning with the Supreme Court's landmark decision in *Rowley*, before exploring the subsequent decisions at the federal court level that have skewed the legislative objectives behind the IDEA. In conclusion, Part IV concludes with a proposed framework for the integration

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10. U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 2 (2010) [hereinafter THIRTY-FIVE YEARS OF PROGRESS], *available at* http://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf.

11. *See infra* Part III.B.1.

12. 20 U.S.C. § 1412(a)(5)(A).

13. *See infra* Part III.C.

14. *See infra* Part IV.A-D.

15. Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 B.Y.U. EDUC. & L.J. 189, 198 (2006).

16. *Id.*

presumption going forward, arguing that equal weight should be given to both the integration presumption and the determinations made by local educators; the general presumption should be in favor of mainstreaming the student during all non-academic school activities, while a much more individualized assessment ought to be incorporated when determining the student's placement for academic classes.

II. HISTORY

A. The Early American Experience

A review of human history reveals a rather disturbing trend of public disregard for the care and education of children with disabilities. For the most part, such children were consigned to the care of their families and were never afforded the opportunity to receive any formal education.[17] There were very few attempts to establish formal education programs for children with disabilities prior to the late eighteenth century, and those efforts were limited to the deaf and blind.[18]

The education of children with special needs in the United States followed this pattern. The first schools established in this country for persons with disabilities were those for the deaf. In 1817, Thomas Hopkins Gallaudet established the first American Asylum for the Education of the Deaf and Dumb[19] and, by 1860, twenty-three additional schools for the deaf had been founded.[20] The proliferation of such schools prompted education reformers to begin to develop institutions designed for children with other disabilities.[21] However, placement in these more general institutions provided little opportunity for substantive development and these facilities more closely resembled prisons rather than schools.[22] The care provided took place in "institutional settings"[23] and was often "custodial" in nature.[24] Strict segregation of the mentally retarded was encouraged by social Darwinist misgivings—"that society must be protected from the gene pool of 'the feeble minded.'"[25] Unfortunately, some took social Darwinist theory to its furthest logical conclusion:[26]the eugenics movement.[27] The eugenics movement viewed the disabled as "subhuman," and advocated that they should neither be accepted in the world nor permitted to

17. Michael A. Rebell & Robert L. Hughes, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 527 (1996).

18. *Id.* at 527–28 ("The first documented attempt to educate special students occurred in 1555, when the Spanish monk Pedro Ponce de Leon taught a small group of deaf students to read, write, speak, and to master the basic academic subjects. Other isolated educational programs for the deaf and blind remained the only forms of organized special education until the late eighteenth century.").

19. *Id.* at 528.

20. OLIVER SACKS, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF 24 (1989).

21. Rebell & Hughes, *supra* note 17, at 528 ("New Haven formed a class for misbehaved students in 1871; New York created a class for 'unruly boys' in 1871 and one for truants in 1874; and Cleveland established a class for students with discipline problems late in the 1870's.").

22. *See id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Pub. L. No. 105-17, 111 Stat. 37 (1997)

27. Rebell & Hughes, *supra* note 17, at 528–29 n.32.

procreate.[28]

It was not until 1896, in Providence, Rhode Island, that special education classes for children with disabilities were established in public schools.[29] While this development demonstrated some degree of progress, late nineteenth and early twentieth-century state supreme court decisions thwarted this expansion in many jurisdictions. In these opinions, state supreme courts frequently accorded substantial deference to the determinations made by local school officials which excluded certain disabled children from the public school system,[30] stating that any disabled child's interest in receiving a public school education "cannot be insisted upon when [the child's] presence therein is harmful to the best interests of the school."[31] This jurisprudential approach often had the effect of forcing families to home-school their disabled children or to place them in institutions for disabled persons.[32]

The public education model began to experience a transformation around the turn of the twentieth century. Brought on by the movement towards compulsory education and the influx in the number of children immigrating to the United States, enrollment in public schools increased exponentially and forced public school systems to dramatically alter the organization of their schools.[33] Public school administrators throughout the country began to develop and adopt "highly formalized procedures where students were expected to advance through a graded sequence of instruction, based on their age or degree of academic achievement."[34] This was particularly true for large urban school districts.[35] Students who could not keep up intellectually, who impeded the academic progress of other students, or who required an inordinate amount of individual instruction were classified as "mentally deficient."[36] These students were removed from regular classrooms and placed in special education classrooms.[37] Yet the results of a 1921 survey reveal the degree to which the classification process was plagued by xenophobic and classist anxieties: 75% of special education students, those characterized as "mentally deficient," in the New

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28. *Id.* The "nadir of this movement" was the enactment of compulsory sterilization statutes by state legislatures, which were upheld by the Supreme Court in *Buck v. Bell*, 274 U.S. 200 (1927). *Id.* In that opinion, Justice Holmes included the often recited phrase that "[t]hree generations of imbeciles are enough." *Buck*, 274 U.S. at 207.

29. Rebell & Hughes, *supra* note 17, at 528–29. Once again the Europeans preceded the Americans: "the first special public school class for 'defective children' was formed in Halle, Prussia in 1895." *Id.* at 529 n.33.

30. *See, e.g.*, Watson v. City of Cambridge, 32 N.E. 864 (Mass. 1893) (affirming the local school committee's decision to exclude a mentally retarded child from the public school system l); State *ex rel* Beattie v. Bd. of Educ., 172 N.W. 153 (Wisc. 1919) (affirming the local school committee's decision to exclude a child inflicted with paralysis).

31. *Beattie*, 172 N.W. at 154.

32. *See* Crossley, *supra* note 2, 241–42.

33. *Id.* at 242.

34. Rebell & Hughes, *supra* note 17, at 529.

35. *Id.*

36. *Id.*

37. Crossley, *supra* note 2, at 242–43; *see also* Rebell & Hughes, *supra* note 17, at 529–30 ("The key concern was to remove children who did not meet their classmates' and teachers' conception of normality from the general classroom, and not on the appropriateness of the services they would receive; it was these children who were frequently funneled into 'special' classes and academic tracks.").

York City public school system had foreign-born parents.[38]

The number of special education classrooms continued to increase through the 1950s,[39] stimulated primarily by developments in medicine.[40] These advancements in medical technology enabled more children with disabilities to survive early childhood and correspondingly increased the demand for services for the disabled.[41] However, despite the growing number of classrooms, the context, design, and quality of the special educational services provided by public school systems remained woefully insufficient. Special education classrooms continued to be located primarily in separate facilities.[42] Further, the absence of any federal legislation specifically protecting the civil or constitutional rights of Americans with disabilities prior to 1970 significantly affected the quality and extent of special education opportunities throughout the country.[43] The statistics plainly demonstrate the disparity in treatment of Americans with disabilities through the 1960s: by 1967, almost 200,000 disabled children and adults were being housed in state institutions.[44] Poor, rural, and minority students with disabilities faced an even greater chance of being institutionalized.[45] The combined effect of the deference by the courts to local school administrators as well as the absence of any comprehensive federal laws on the subject resulted in only one in five children with disabilities receiving some form of a public education.[46]

B. *The Movement Toward Integration*

The movement towards integration, instigated by advocacy groups and educational reformers, was substantially influenced by the Supreme Court's landmark decision in *Brown v. Board of Education*.[47] In *Brown*, the Court held that the practice of segregating schools on the basis of race creates an inherently unequal system of education and thus is unconstitutional.[48] Advocates and reformers striving for the integration of students with special needs into the regular educational environment analogized that the use of separate facilities for students with disabilities was as patently unequal as racial segregation.[49]

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38. Crossley, *supra* note 32, at 242 n.17.

39. *See* Rebell & Hughes, *supra* note 17, at 530–31 ("Special education expanded even more dramatically in the decades following World War II. . . . [T]here was an 'explosion of new special classes and special schools' that increased the number of students enrolled in specialized programs from 442,000 in 1948 to 1,666,000 in 1963.").

40. Crossley, *supra* note 2, at 242 n.16.

41. *Id.*

42. Mark T. Keaney, Comment, *Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools*, 56 ST. LOUIS U. L.J. 827, 832 (2012).

43. Laudan Aron & Pamela Loprest, *supra* note 1, at 99.

44. THIRTY-FIVE YEARS OF PROGRESS, *supra* note 10, at 3.

45. Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities under the IDEA*, 77 WASH. L. REV. 809, 811 (2002).

46. *See* THIRTY-FIVE YEARS OF PROGRESS, *supra* note 10, at 3.

47. *Id.*

48. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

49. *See* Rebell & Hughes, *supra* note 17, at 532–33 ("[S] ome mainstreaming proponents argued segregated facilities for children with disabilities for children with disabilities were unequal, providing substandard and inadequate education resources. Others maintained that, even where adequate resources were

Throughout the 1950s and 1960s, federal legislation was introduced that provided improved programs and services for the disabled.[50] Examples of such initial legislation include the Training of Professional Personnel Act of 1959, providing training programs for school administrators and teachers of students with disabilities; the Captioned Films Act of 1958, which initially provided for subtitled versions of popular films for the deaf but was expanded to include support for the production and distribution of educational films; and the Teachers of the Deaf Act of 1961, providing training for instructional personnel for deaf children.[51] A major development occurred in 1966, when Congress amended The Elementary and Secondary Education Act of 1965 (ESEA) to include a new Title VI.[52] Title VI allocated funds for the improvement of educational opportunities for handicapped children, the definition of which included virtually all children with disabilities.[53] However, in 1970, Congress repealed Title VI of ESEA and replaced it with the Education of the Handicapped Act (EHA).[54] The EHA conditioned grants to the states on assurances that the states would create and implement "programs to 'meet the special educational and related needs of handicapped children.'"[55] Despite the lack of a mandate that states provide education to all children with disabilities and the insufficient specification regarding the manner in which such children should be educated, the law constituted an important moment in the disability movement.[56]

While the EHA provided resources for the education of students with learning disabilities, such instruction often occurred in segregated classrooms and facilities, and was frequently ineffective.[57] During the Congressional hearings that preceded the enactment of IDEA, it was established that up to half of all students with special needs were not receiving sufficient services, and more than one million other children with disabilities were forced to remain at home or in institutions that provided limited, if any, formal education.[58]

Throughout the late 1960s and early 1970s, special education reformers and advocates began to seriously consider the psychological effects of removing "defective" students from the regular classroom setting.[59] Approximately eight

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provided, any segregation on perceived disability was inherently unequal.").

50. *Id.* at 4–5.

51. *Id.* at 4; *cf. id.* at 5 ("By 1968, the federal government had supported: (1) [t]raining for more than 30,000 special education teachers and related specialists; (2) [c]aptioned films viewed by more than 3 million persons who were deaf; and (3) [e]ducation for children with disabilities in preschools and in elementary, secondary, and sate-operated schools across the country.").

52. Colker, *supra* note 3, at 803.

53. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89–750, §602, 80 Stat. 1191, 1204 (repealed 1971) ("As used in this title, the term 'handicapped children' includes mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education and related services.")

54. Colker, *supra* note 3, at 803.

55. *Id.* Additionally, "[t]his new law sought to consolidate the existing programs and establish[] the Bureau of Education of the Handicapped within the U.S. Department of Health, Education and Welfare (HEW)." *Id.*

56. *Id.*

57. *See, e.g.*, Farley, *supra* note 47, at 811; Colker, *supra* note 3, at 803.

58. *See* Rebell & Hughes, *supra* note 17, at 531.

59. *Id.*

million special needs students were being educated in the public school system by that time, although the system was essentially bifurcated on the basis of disability.[60] The education of children with disabilities at that time involved its own isolated system, consisting of separate facilities, administration, funding sources, as well as teacher certification requirements, instructional expectations, and strategies.[61] The corresponding stigma that the separation created prompted educators and advocates to determine whether, and to what extent, children with disabilities could be placed in a regular education classroom.[62] Authors Michael A. Rebell and Robert L. Hughes note in their article, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, "[A]s special education became a more prominent part of American education, reports of successfully mainstreaming autistic, severely learning disabled, mentally retarded, or cerebrally ill children increasingly appeared in the literature."[63] Based on these studies and reports, reformers and advocates began to challenge the system of segregation, while asserting that special needs students could be educated in a regular classroom.[64]

As skepticism about the purported "benefits" of educating children with special needs in segregated facilities became more widespread,[65] the issue of integration began to reach the courts. Beginning in the early 1970s, legal challenges to the segregated education of children with special needs began to appear in a number of state and federal courts.[66] Two federal district court cases, one in Pennsylvania and the other in the District of Columbia, involved plaintiffs alleging that the school systems' practice of excluding individuals with disabilities from their schools violated state law and federal law, namely the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.[67]

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (P.A.R.C.)[68] concluded with a consent agreement between the parties that was subsequently approved and adopted by the district court.[69] Clause Seven of

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60. *Id.*

61. *Id.*

62. Crossley, *supra* note 2, at 243; *see also* Rebell & Hughes, *supra* note 17, at 531–32 ("Because separate educational programs for students with disabilities historically resulted largely from a desire to remove 'defective' students from the regular classroom setting, separation of special education children created stigma. Even in the early days of special education in the public schools, many educators expressed doubts about the wisdom of establishing a separate educational system for children with disabilities and postulated that students identified with disabilities could be educated with their nondisabled peers.").

63. Crossley, *supra* note 2, at 243 ("[E]ducators conducted various experiments to determine if disabled children could be placed in a regular educational environment. These experiments proved to be relatively successful, sparking a movement toward the inclusion of children with disabilities into general classrooms.").

64. *See* Rebell & Hughes, *supra* note 17, at 532.

65. *See id.* at 533. This skepticism "was reinforced by emerging research which questioned the reliability of intelligence testing, documented the detrimental impact of the stigma associated with removing children from the general education classrooms, and noted most programs failed to return children to the mainstream environment." *Id.*

66. *Id.* at 534.

67. *See* Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).

68. 334 F. Supp. 1257 (E.D. Pa. 1971).

69. *Id.* at 1257–58.

the consent decree included the first articulation of the integration presumption:

> It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.[70]

The presumption was indicative of the expansive nature of the consent decree, as it "went well beyond the court's findings."[71] As Ruth Colker states in her article, *The Integration Presumption: Thirty Years Later*, "[Clause Seven] created a presumption that placement in a regular class was preferable to placement in a special education class. It did not merely require the admission of children with disabilities to the public schools; it suggested where they should receive their education within the building."[72] Yet notably absent from the court's opinion was any justification for its novel presumption.[73] Regardless of this omission, the presumption thus created has come to play a defining role in determining the placement of special needs students in public school classrooms.

The legacy of the *P.A.R.C.* and *Mills v. Board of Education*[74] decisions ensure that children with disabilities will not be excluded wholesale and indiscriminately from the public education system and, where any degree of exclusion or differential treatment is being considered, due process is to be provided.[75] Compelled by these landmark decisions, Congress passed the Rehabilitation Act of 1973.[76] This legislation further reflected the shifting attitudes towards the treatment of Americans with disabilities, as it was the first federal law to declare that the exclusion or segregation of an individual with a disability constituted discrimination.[77] Section 504 of the Rehabilitation Act specifically established and extended civil rights to disabled persons,[78] "challeng[ing] the assumption that disadvantages faced by people with disabilities, such as low educational attainment or unemployment, were the inevitable result of limitations stemming from the disability itself rather than from societal barriers or prejudice."[79] Given the fact that nearly every public school receives federal funding, the Rehabilitation Act made substantial inroads into the

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70. *Id.* at 1260.

71. Colker, *supra* note 3, at 804.

72. *Id.*

73. *Id.*

74. 348 F. Supp. 866 (D.D.C. 1972).

75. MARK C. WEBER ET AL., SPECIAL EDUCATION LAW: CASES AND MATERIALS 2 (3d ed. 2010).

76. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified as amended in scattered sections of 29 U.S.C.).

77. *See id.* § 504; Laudan Aron & Pamela Loprest, *supra* note 1, at 99.

78. Rehabilitation Act of 1973 § 504.

79. Laudan Aron & Pamela Loprest, *supra* note 1, at 99.

education context by mandating that each and every child was entitled to an equal educational opportunity, irrespective of disability.[80] Thus, Section 504 provided increased access to the public education system for children with disabilities through the removal of both intentional and unintentional barriers and set the stage for Congress to establish substantive educational rights.[81]

III. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. Legislative History

The initial congressional response to the inclusion issue resulted in the enactment of the Education for All Handicapped Children Act (EAHCA)[82] in 1975.[83] According to a Senate Report, the EAHCA was created as a "comprehensive mechanism which [would] insure. . . maximum benefits to handicapped children and their parents."[84] Through recognition of the fact that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society,"[85] Congress endorsed a fundamental change to the manner in which society views and treats people with disabilities. In 1990, the EAHCA was amended and renamed the IDEA.[86] Despite the change in name and numerous amendments over the years, the major provisions of the IDEA have remained intact since 1975.[87] Improving educational opportunities for children with disabilities continues to be "an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[88]

Upon its enactment, the EAHCA included three implicit changes in the law, each having a profound effect on the education of children with special needs. First, the Act improved the manner in which children with disabilities were identified and educated; second, schools were evaluated on the success of these efforts; and lastly, the Act provided due process protections for children and families.[89] The financial incentives provided to enable states and municipalities to comply with these requirements sought to ensure that the law's goals were effectuated.[90] The IDEA,

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80. *Id.* The Act defined disability broadly "to include any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment." *Id.*

81. *Id.*

82. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§1400–1491 (2006 & Supp. 2011)).

83. *Id.*

84. S. REP. NO. 94-168, at 6 (1975), *reprinted* in 1975 U.S.C.C.A.N. 1425, 1430.

85. 20 U.S.C. § 1400(c)(1).

86. Farley, *supra* note 47, at 814. The IDEA "included a new mandate for transition services to help older students transition into post-school education, employment, or independent residential settings." *Id.*

87. *Id* at n. 44.

88. 20 U.S.C. § 1400(c)(1).

89. THIRTY-FIVE YEARS OF PROGRESS, *supra* note 10, at 5.

90. *See* 20 U.S.C. § 1412. States are eligible for federal assistance under the IDEA "if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that

therefore, is largely a procedural statute,[91] passed pursuant to Congress' spending powers.[92]

There are three elements that are central to the core principles of the IDEA. The law requires that states provide students with disabilities (1) a "free appropriate public education"[93] (2) in the "least restrictive environment,"[94] (3) which is determined through the creation and consideration of an "individualized education program."[95] However, the IDEA does not specifically define the parameters of these requirements nor does it establish a hierarchy among them.[96] Thus, these components often exist in competition with one another while courts and legislatures alike have struggled to determine which condition takes priority.[97]

B. The Mandates of the IDEA

1. "Free and Appropriate Public Education"

The first of the essential components of the IDEA is the requirement that all children with disabilities have available to them a *free and appropriate public education.*[98] Despite appearing to be the very essence of the Act, the IDEA initially did not expressly define the conditions that would properly constitute a free and appropriate public education for students with disabilities.[99] Regardless of whether this was the result of an innocent oversight or a deliberate omission, the absence of specificity generated a great deal of debate over what the requirement entailed as well as how it relates to the "least restrictive environment" requirement.[100] In *Rowley*, the Supreme Court provided some clarity, defining the free and appropriate public education requirement as "personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."[101] The lower courts have, for the most part, followed the lead of the Supreme Court and applied the "educational benefit" standard.[102]

The IDEA presently states that its guarantee of a "free and appropriate public

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it meets [the enumerated] conditions." *Id.*

91. *See* Anne P. Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775, 788 n.67 (1997) ("This trend toward procedural rights coincided with the general trend during the same period that IDEA was enacted toward the use of procedural guarantees as a constraint on government agencies").

92. U.S. CONST. art. I, § 8, cl. 1.

93. *See* 20 U.S.C. § 1412(a)(1).

94. *See id.* § 1412(a)(5).

95. *See id.* § 1412(a)(4).

96. Gordon, *supra* note 15, at 191.

97. *Id.*

98. *Id.* § 1412(a)(1). Under the IDEA, special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," and includes "instruction conducted in the classroom, in the home, in hospitals, and institutions, and in other settings" and "physical education." *Id.* § 1401(29).

99. Gordon, *supra* note 15, at 195

100. *Id.*

101. Bd. of Educ. v. Rowley, 458 U.S. 176, 177 (1982).

102. MARK G. YUDOF ET AL., EDUCATION POLICY AND THE LAW 746 (5th ed., 2012).

education" requires states to provide such an educational opportunity to all students with disabilities from age 3 to 21, regardless of the severity of the disability.[103] Such a guarantee was necessary because, as a 1975 Senate Report indicated, only 3.9 million of the 8 million disabled children were receiving an appropriate education, despite the prior attempts made by the legislature and judiciary.[104] In the context of the IDEA, "appropriate" does not mean that schools are required to maximize the educational opportunities for students with special needs.[105] Instead, schools must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[106]

2. "Least Restrictive Environment"

The second fundamental aspect of the IDEA is the mandate that children with disabilities receive a free and appropriate public education in the *least restrictive environment* commensurate with his or her needs.[107] This requirement functions as the legislative endorsement of the integration presumption. The current recitation of the least restrictive environment provision states:

> To the *maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[108]

The "to the maximum extent appropriate" language has been a staple of the least restrictive environment provision since the law was originally drafted and passed into law in 1975.[109] However, "the Act does not define the least restrictive setting or the appropriate level of inclusion in a regular educational classroom."[110] Thus, the debate over inclusion of children with disabilities revolves around the definition of the "least restrictive environment," and its relationship to a "free and appropriate public education."

Further contributing to the lack of clarity surrounding the least restrictive environment provision generally, and the integration presumption more specifically, is the debate over Congress' reasoning for enacting the provision. There are scholars

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103. 20 U.S.C. § 1412(a)(1).

104. S. REP. NO. 94-168, at 8 (1975), *reprinted* in 1975 U.S.C.C.A.N. 1425, 1432. The Senate Report further stated that 1.75 million diasabled children were not receiving any educational services at all, and another 2.5 million disabled children were receiving an "inappropriate education." *Id.*

105. *Rowley*, 458 U.S. at 189–190.

106. *See id.* at 189–203.

107. *See* 20 U.S.C. § 1412(a)(5).

108. *Id.* § 1412(a)(5)(A) (emphasis added).

109. 20 U.S.C. § 1412(5)(B) (1975).

110. Gordon, *supra* note 15, at 196.

who argue that Congress sought to promote the benefits of an integrated education.[111] Those who support this position claim such an intent is evident from the statement of Senator Robert Stafford: "We are concerned that children with handicapping conditions be educated in the most normal possible and least restrictive setting, for how else will they adapt to the world beyond the educational environment, and how else will the non-handicapped adapt to them?"[112]

Alternatively, other scholars point to the lack of discussion or debate regarding the presumption in congressional hearings from 1973 through 1975.[113] For example, Professor Ruth Colker relies upon the fact that, during the 1973 hearings on the EAHCA, the draft of the bill then pending in the Senate included a presumption, yet there was little discussion of the requirement in the congressional reports.[114] What little discussion took place was "primarily concerned with the need to provide an appropriate education to children with disabilities in a non-institutionalized setting;" senators were "not considering the exact form that education would take within a public school."[115] Professor Colker also cites the lack of discussion and debate during consideration of the Education of the Handicapped Amendments of 1974 as well as prior to the passage of the EAHCA in 1975.[116] Colker concludes that, "based on the historical context, in which courts were beginning to understand the need to close disability-only institutions, it appears that Congress was primarily concerned with using the integration presumption as a vehicle to close disability-only institutions."[117]

While the Act does not define the least restrictive setting or the appropriate level of inclusion in a regular educational classroom, regulations promulgated by the DOE under the IDEA provide guidance for schools and parents. These DOE regulations require school districts to use "a continuum of alternative placements" as a guide when placing students with disabilities.[118] The regulations state that "[i]n selecting the [least restrictive environment], consideration [should be] given to any potential harmful effect on the child or on the quality of services that he or she needs."[119] While the regulations acknowledge that an education in a regular classroom may not be beneficial or appropriate for each special needs student, the continuum operates under the presumption that the least restrictive environment for a student with a disability is in a general education classroom.[120] The incorporation of this continuum emphasizes the significance of "an individualized inquiry and personalized

111. *Id.*

112. *Id.*

113. Colker, *supra* note 3, at 805–06.

114. *Id.* at 805.

115. *Id.*

116. *Id.* at 805–06.

117. *Id.* at 806. *But see* Samuel R. Bagenstos, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. PENNUMBRA 157 (2007); Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. 174 (2007).

118. *See* 34 C.F.R. § 300.551(a) (2006). This continuum must range from a default of regular classroom placement (least restrictive) to a completely segregated institution or hospital (most restrictive). *Id.* § 300.551(b)(1). The school is free to combine or choose intermediate settings along the continuum so as to best serve the child's individual needs. *Id.*

119. *Id.* § 300.552(d).

120. Gordon, *supra* note 15, at 196–97.

evaluation" when schools and parents are making the determination of which setting is the least restrictive for the student.[121]

3. "Individualized Education Programs"

The third essential element of IDEA is the right for every disabled child to receive an *individualized education program* (IEP) designed to meet the child's specific and unique learning needs.[122] An IEP is a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with [the IDEA]."[123] The IEP is considered the cornerstone of the IDEA:[124] "The purpose of the IEP is to tailor the education to the child; not tailor the child to the education."[125] In accordance with the procedural nature of IDEA, the IEP requirement obliges school officials and teachers to meet with the child's parents or guardians to prepare, as well as annually review, the IEP.[126]

Given that the IEP provides the basis for a student's placement decision, it is thus tied intricately to the least restrictive environment requirement. The requirement that the IEP must contain "a statement of the specific special education and related services . . . to be provided to the child"[127] and "an explanation of the extent . . . to which the child will not participate with nondisabled children in the regular class"[128] reinforces the preference for mainstreaming. The development of the IEP promotes an individualized, child-centered focus to meet the unique needs of each student.

C. The Inclusion Debate

The IDEA's mandate that all children with disabilities receive free and appropriate public education in the least restrictive environment has created an inherent tension in the debate over educational placement of students with special needs.[129] As some have noted, "[t]his tension implicates the choice between specialized services and some degree of separate treatment on the one side and

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121. *Id.*

122. *See* 20 U.S.C. § § 1412(a)(4) (2005).

123. *Id.* at § 1414(d)(1)(A).

124. Honig v. Doe, 484 U.S. 305, 311 (1988) (calling IEP "the centerpiece of the statute's education delivery system for disabled children").

125. S. REP. NO. 105-17, at 24 (1997).

126. *See* 20 U.S.C. § 1414(d)(1); *see also* Keaney, *supra* note 42, at 833. The IEP must include, at a minimum:

> a statement of the child's present level of educational performance, annual and short-term instructional goals, specific educational services to be provided, an estimated number of hours the child will spend in regular education classes, the projected date of initiation and duration of such services, and appropriate criteria and evaluation schedules for determining whether the stated goals are being met.

Keaney, *supra* note 42, at 833.

127. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

128. *Id.* § 1414(d)(1)(A)(i)(V).

129. Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d. Cir. 1993)

minimized labeling and minimized segregation on the other."[130] The tension revolves around two distinct, yet often confused for synonymous, placement methods, mainstreaming and inclusion—neither of which encapsulates the least restrictive environment requirement.

The least restrictive environment formulation is the "mechanism through which the child's individual needs are matched with a specific educational placement."[131] The specific mechanism employed may adopt aspects of mainstreaming or inclusion, but they are simply concepts of placement and are very different from one another.[132] "Mainstreaming" involves the integration of students with special needs into a regular education classroom for part of the day for the benefit of social interaction.[133] Often, a student will join the regular classroom for non-academic periods, but not necessarily in all cases; the determination is heavily dependent on an individualized assessment of the student's abilities and aptitude.[134] "Inclusion," on the other hand, refers to the practice of placing students with special needs in a regular education classroom for most of the day.[135] Similar to mainstreaming, an individualized assessment of the student is highly determinative for inclusion.[136] Full inclusion, obviously a related method, involves educating students with special needs, regardless of the severity of their disability, in a regular education classroom based solely upon the age of the student.[137]

In summation, both mainstreaming and inclusion are means by which school districts may fulfill the least restrictive environment requirement, yet the law does not explicitly require either.[138] Though the IDEA is frequently interpreted by both scholars and courts as having a clear preference for mainstreaming or inclusion, issues often arise regarding the degree to which a particular student with special needs is be integrated, the factors considered in the determination, and the manner in which those factors are evaluated.[139] Additionally, the federal circuit courts and educational scholars alike are not unanimous in their support for either practice or in the manner in which they should be employed.[140] Furthermore, the Supreme Court has to yet to consider the least restrictive environment requirement and the accompanying integration presumption, and thus there is no clear, uniform standard for school districts to comply with or lower courts to apply.[141]

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130. *Id.* at 1214 n.18.

131. Gordon, *supra* note 15, at 198.

132. *Id.* As author, Anne Dupre, notes in her article, "The inclusion decision does not state to the child: 'We are unable to teach you.' Rather, the inclusion decision is based on a determination that 'we are *better* able to teach you in a special classroom.'" Anne P. Dupre, *Disability, Deference, and the Integrity of Academic Enterprise*, 32 GA. L. REV. 393, 426 (1998).

133. Gordon, *supra* note 15, at 198.

134. *See id.*

135. *Id.* at 198–99. Generally, the homeroom is considered a regular classroom. *Id.* at 199.

136. *Id.*

137. Gordon, *supra* note 15, at 198.

138. *See id.* at 198–99.

139. *See infra* Part IV B-D.

140. *See infra* Part IV B-D.

141. *See infra* note 147.

IV. JUDICIAL INTERPRETATION OF IDEA

The underlying conflict that surrounds the inclusion debate stems from the discrepancy between what may be an appropriate education and what may be the most appropriate level of inclusion.[142] The issue frequently arises in litigation regarding placement decisions made under the IDEA as the fact the Act does not explicitly define the term inclusion necessitates that courts interpret and determine the parameters of an appropriate education, as well as the least restrictive environment requirement.[143]

Over the past thirty years, compliance issues under the IDEA have divided the circuit courts.[144] Nevertheless, the Supreme Court has not visited the topic of the IDEA mandates in over twenty years and has never decided the issue of how to determine whether a student is receiving services in the least restrictive environment.[145] The lack of guidance from the highest court has found the federal circuits developing a myriad of different tests, based on varying interpretations of the IDEA, which often highlight a strong preference for inclusion, based upon interpretations of congressional intent behind the enactment of the statute. The harm that follows from the absence of a uniform standard for interpreting the essential provisions of the IDEA is obvious: disparate treatment of children with disabilities based on jurisdiction, as well as different, and perhaps undesirable, factors being employed to make determinations regarding the placement of special needs students in regular education classrooms.

A. *The Supreme Court Speaks: The* Rowley *Decision*

Decided in 1982, *Rowley* still stands as the only case the Supreme Court has heard to date on the substantive provisions of the EAHCA[146] Although the case was concerned with addressing the concept and boundaries of a free and appropriate public education rather than the least restrictive environment, the case has been consistently interpreted as having established the legal analysis for placement decisions as well.[147]

In *Rowley*, parents of a deaf child brought suit against the local school district, objecting to the district's refusal to provide a sign language interpreter for their daughter in the regular education classroom.[148] According to the Court, Amy Rowley had "minimal residual hearing and [was] an excellent lipreader.[149] The IEP developed by the school and Amy's parents provided that Amy should be educated in a regular

142. Gordon, *supra* note 15, at 199.

143. *Id.*

144. *See infra* Part IV B-D.

145. The Supreme Court denied certiorari on the least restrictive environment requirement in Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994), and Roncker v. Walters, 700 F.2d 1058 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983).

146. The EAHCA was not renamed IDEA until 1990.

147. Gordon, *supra* note 15, at 199.

148. Bd. of Educ. v. Rowley, 458 U.S. 176, 184–85 (1982).

149. *Id.* at 184.

classroom, should use a FM hearing aid, and should receive instruction from a tutor for the deaf each day and spending three hours a week with a speech therapist.[150] The Rowley's agreed with elements of the IEP, but were insistent that a sign language interpreter be placed in all of her academic classes in lieu of the other proposed IEP measures.[151] The school district had provided a sign language interpreter the year before, when Amy was in kindergarten, for a two-week experimental period, but the interpreter had reported that Amy did not require his services.[152] Based on their review of the interpreter's report and in consultation with the school district's Committee on the Handicapped, school administrators concluded that Amy did not require an interpreter in her first-grade classroom.[153]

The district court, relying upon the disparity between Amy's academic achievement and her potential,[154] ruled that she was not receiving a free and appropriate public education.[155] The lower court defined the term "free and appropriate public education" as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[156] A divided panel of the Second Circuit Court of Appeals affirmed.[157]

The Supreme Court reversed and determined that, contrary to the conclusions reached by the lower courts, the EAHCA "does expressly define 'free appropriate public education.'"[158] However, the Court characterized the statutory definition as "cryptic." [159] Regardless of whether the definition provided was "functional," the Court indicated that "it is the principal tool which Congress has given us for parsing the critical phrase of the Act."[160] The Court proceeded to then flesh out the definitions contained in the Act to determine the intent of Congress, eventually concluding that, "if personalized instruction is being provided with sufficient supportive services to

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150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 184–85. The school district's Committee on the Handicapped had "received expert evidence from Amy's parents on the importance of a sign- language [sic] interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf." *Id.* at 185.

154. *See id.* The district court found that, despite the fact that Amy was performing above average academically compared to her non-disabled peers, "she understands considerably less of what goes on in class than she could if she were not deaf" and was "not learning as much, or performing as well academically, as she would without her handicap." *Id.*

155. *Id.* at 185–86.

156. Rowley v. Board of Educ., 483 F.Supp. 528, 534 (S.D.N.Y. 1980). According to the lower court, "such a standard 'requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by non-handicapped children.'" *Rowley*, 458 U.S. at 186.

157. *Rowley*, 458 U.S. at 186.

158. *Id.* at 187–88. As the Court note, the IDEA defines "free appropriate public education" as "*special education* and *related services* which (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, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C. §1401(18) (1975) (emphasis added).

159. *Id.* at 188.

160. *Id.*

permit the child to benefit from the instruction, . . . the child is receiving a 'free appropriate education' as defined by the Act."[161]

In reaching this conclusion (and providing a functional framework for understanding the free and appropriate public education requirement), the Court succeeded in delineating both the requirements of the EAHCA[162] as well as the role of the courts in litigating such matters. The Court ruled that Amy did not have a right to a sign language interpreter,[163] and concluded that the EAHCA does not require states to maximize the potential of a student with special needs[164]—rather states must only provide "a basic floor of opportunity."[165] Furthermore, and of particular importance for the subsequent litigation of the "least restrictive environment" requirement, the Court emphasized that "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child."[166] The Court cautioned reviewing courts not "to substitute their own notions of sound educational policy for those of the school authorities which they review."[167]

Finally, the Court announced a two-part test for reviewing state compliance with the provisions of the EAHCA:

> 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.[168]

B. The Jurisprudence of the Integration Presumption

While the Supreme Court did not directly address the issues of mainstreaming or inclusion in *Rowley*, it did provide a framework for the role courts should play in the placement process.[169] The Court's deferential approach in that case to placement decisions made by local school boards, however, has been subsequently limited by a number of federal circuit court decisions, which have determined that *Rowley* only applies in circumstances where the appropriateness of educational methods are being

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161. *Id.* at 189.

162. As aforementioned, this was the original name given to the IDEA. *See supra* note 86 and accompanying text.

163. *Rowley*, 458 U.S. at 209–10.

164. *Id.* at 198.

165. *See id.* at 200–01.

166. *Id.* at 207.

167. *Id.* at 206. The Court explained that "[t]he very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought." *Id.*

168. *Rowley*, 458 U.S. at 206–07.

169. *See supra* notes 166–167 and accompanying text.

challenged under the IDEA.[170] As a result, federal appeals courts have established a variety of guidelines for educational placement for students with special needs.[171] These courts have tended to fall into one of two groups: those emphasizing the integration presumption above all else, and those who prioritize deference to the determinations made by local school boards.

C. *Circuits Emphasizing the Presumption*

1. *Roncker v. Walter*

In 1983, the Sixth Circuit was presented with the first opportunity to address the issue of integration. In *Roncker v. Walter*,[172] parents of a special needs student, characterized by the court as "severely mentally retarded,"[173] challenged the local school district's decision to place their son in a "county" school, a separate institution solely for students with disabilities who were completely segregated from their non-disabled peers.[174] On appeal, the Sixth Circuit declined to apply the *Rowley* test.[175] Based on their belief in a strong congressional preference for mainstreaming, the court decided that the *Rowley* two-step inquiry should not apply when placement of a child within the "least restrictive environment" is in question, as it was the case in *Roncker*.[176]The court distinguished *Rowley* on the determination that the present matter concerned the adequacy of the mainstreaming process itself, whereas the *Rowley* standards were limited in application to cases involving a controversy regarding the appropriate methods for educating a special needs student.[177]

The Sixth Circuit proceeded to develop its own test, declaring, "In a case where a segregated facility is considered superior, the court should determine whether the services which make that placement superior can feasibly be provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."[178] To determine feasibility, the court adopted a balancing approach. While continuing to emphasize the strong congressional preference for mainstreaming, the court held that the benefits of placement in a segregated institution must "far outweigh" any marginal benefits that would be received from mainstreaming.[179]

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170. *See infra* Part IV C-D.

171. *See infra* Part IV C-D.

172. 700 F.2d 1058 (6th Cir. 1983).

173. *Id.* at 1060.

174. *See id.* at 1060–61. County schools received "part of their funding through tuition for individual students, which is paid for by the school district." Id. They also receive from the state "by virtue of a mental retardation tax levy[,]" which is not available to public schools. *Id.*

175. *Id.* at 1061.

176. 700 F.2d at 1062. ("In the present case, the question . . . involves a determination of whether the school district has satisfied the Act's requirement that handicapped children be educated alongside non-handicapped children to the *maximum extent appropriate.*") (emphasis added).

177. *Id.*

178. *Id.* at 1063.

179. See *id.* ("Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated

Interestingly, the court in *Roncker* identified cost as an appropriate factor to be considered in analyzing feasibility, though it is no defense when "the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children."[180] The court then remanded the case to the district court to consider whether the school could provide the services in a more integrated setting rather than in a segregated facility.[181] Prior to 1997 and the amendments made to the IDEA, both the Eighth and the Fourth Circuits applied the *Roncker* test in subsequent rulings.[182]

2. *Daniel R.R. v. State Board of Education*

The Fifth Circuit was presented with its first opportunity to consider mainstreaming in *Daniel R.R. v. State Board of Education.*[183] That case involved parents of a six year old, Daniel, challenging the El Paso Independent School District's decision to place Daniel in a special education classroom.[184] The school district had previously determined that for his pre-kindergarten placement, Daniel, who was a victim of Downs Syndrome, would spend half of his day in a special education classroom and half in a regular classroom.[185] However, after Daniel had been in the regular classroom for a few weeks, the regular classroom teacher "began to have reservations about Daniel's presence in her class."[186] According to his regular classroom teacher, Mrs. Norton, "Daniel did not participate without constant, individual attention from the teacher or her aide, and failed to master any of the skills Mrs. Norton was trying to teach her students."[187] Thus, in November of that year, the school district decided to change Daniel's placement plan.[188] In the new plan, Daniel would be educated exclusively in the special education classroom and would only have contact with his non-disabled peers at recess every day and at lunch three days a week, "if his mother was present to supervise him."[189] Daniel's parents, after appealing to a hearing officer, filed an action against the school district in district court.[190] The district court "rel[ied] primarily on Daniel's inability to receive an educational benefit in [a] regular education" classroom, affirming the altered

in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.")

180. *Id.*

181. *Roncker* 700 F.2d, at 1062.

182. *See, e.g.* A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987); Devries v. Fairfax Cnty. Sch. Bd., 882 F.2d 876 (4th Cir. 1989).

183. 874 F.2d 1036 (5th Cir. 1989).

184. *Id.* at 1039–40.

185. *Id.* at 1039.

186. *Id.*

187. *Daniel R.R.*, 874 F.2d at 1039.

188. *Id.*

189. *Id.*

190. *Id.* at 1039–40.

placement plan.[191]

Like the Sixth Circuit, the court in *Daniel R.R.* declined to apply the *Rowley* test. The Fifth Circuit found that the Supreme Court's interpretation of the EAHCA failed to "add substance to the Act's vague terms," and that "instruction specifically designed to meet each student's unique needs [was] as imprecise a directive as the language actually found in the Act."[192] Additionally, the court in *Daniel R.R.* declined to follow the Sixth Circuit's analysis in *Roncker*.[193] The Fifth Circuit found that the *Roncker* test "necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local officials" and "makes little reference to the language of the [Act]."[194]

Upon rejecting these approaches and the district court's approach,[195] the court articulated its own two-part test for determining if inclusive placements comply with the mainstreaming requirement of the EAHCA.[196] First, the court must determine "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child."[197] If the court determines that education in a regular classroom cannot be achieved and "the school intends to either provide special education or to remove the child from regular education," the second prong of the test requires the court to ask, "whether the school has mainstreamed the child to the *maximum extent appropriate*."[198]

Characterizing their test as an "individualized, fact-specific inquiry,"[199] the court then proceeded to discuss potential factors that could be considered when faced with the mainstreaming issue.[200] The factors discussed by the Fifth Circuit included: (1) "whether the state has taken steps to accommodate the handicapped child in regular education;"[201] (2) if the state had taken steps to accommodate the disabled child, whether those efforts were sufficient;[202] (3) "whether the child will receive an educational benefit from regular education;"[203] (4) "the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child;"[204] and (5) "what effect the handicapped child's presence has on the regular classroom environment, and thus, on the education that other students are receiving."[205]

In the course of its analysis, the court emphasized the social, nonacademic

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191. *Id.* at 1040.
192. *Daniel R.R.* 874 F.2d at 1044.
193. *Id.* at 1046.
194. *Id.*
195. *Id.*
196. *Id.* at 1048.
197. *Daniel R.R.* 874 F.2d at 1048.
198. *Id.* (emphasis added).
199. *Id.*
200. *Id.* at 1048–50.
201. *Id.* at 1048.
202. *Daniel R.R.* 874 F.2d at 1048.
203. *Id.* at 1049.
204. *Id.*
205. *Id.* at 1049–50.

benefits of mainstreaming.[206] Stating, "academic achievement is not the only purpose of mainstreaming,"[207] the court focused on the "overall growth and development benefits gained from education."[208] Ultimately, the possible social benefit "may tip the balance in favor of mainstreaming," even absent a clear educational benefit to the disabled child.[209] However, the court's emphasis on the social benefits of mainstreaming was counterbalanced by its understanding of the potentially negative impacts associated with mainstreaming. Thus, the Fifth Circuit's test does not require schools to provide every conceivable supplementary aid or service to assist the child, only that schools make a genuine effort to modify and supplement their curriculum to reach the disabled child placed in a regular classroom.[210] The *Daniel R.R.* court also gave sufficient consideration to the potential negative impact that placement of a student with special needs would have on the other students in the class, for example, if the placement forced the teacher to focus her attention on one child to the detriment of the entire class.[211]

Applying this test to the facts of the case, the court found that Daniel commanded most of the teacher's attention and received little, if any, benefit from the regular classroom.[212] According to the court, these factors, among others, pointed toward special education placement.[213] The court proceeded then to the second part of its test to evaluate whether Daniel had been mainstreamed to the maximum extent possible. Despite rejecting the district court's analysis, the court agreed with the holding of the lower court that Daniel had been mainstreamed to the fullest extent possible and, therefore, upheld his new placement plan.[214]

Despite upholding Daniel's placement in a special education classroom, the *Daniel R.R.* opinion's positive focus on mainstreaming was plainly evident. The court noted that "educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from non-handicapped children may be essential or helpful to the handicapped child's development."[215] Other courts have adopted and borrowed similar language to support inclusionary placements.[216]

3. Adoption and Refinement of the *Daniel R.R.* Test

In the years following the ruling in *Daniel R.R.*, the Eleventh, the Third, and the

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206. *Id.* at 1047.
207. *Daniel R.R.* 874 F.2d at 1049.
208. *Id.* at 1047, n.8.
209. *Id.* at 1049.
210. *Id.* at 1048. (Re
211. Farley, *supra* note 47, at 824-825.
212. *Daniel R.R.* 874 F.2d at 1050.
213. *Id.* at 1051.
214. *Id.*
215. *Id.* at 1047–48. The court then stated, "In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment." Id. at 1048.
216. *See, e.g.*, Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); Oberti v. Bd. of Educ., 995 F.2d 1204, 1216–17 (3d Cir. 1993).

Ninth Circuits each adopted and refined the Fifth Circuit's two-prong test. The Eleventh Circuit, in *Greer v. Rome City School District*,[217] incorporated a comparison of the educational benefits of the general education classroom with special aids and services to those available in a special education classroom to determine which educational environment was the appropriate placement.[218] Further, building on the *Daniel R.R.* tradition of evaluating the educational effects of placements on non-disabled students in the classroom, yet placing greater emphasis on the congressional preference for mainstreaming rather than deference to the determinations made by the school board and lower courts, the court in *Greer* concluded that, "[a] handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to *significantly* impair the education of other children."[219] The Eleventh Circuit stated that, in order to satisfy the requirements of the IDEA, the school district must consider a range of alternative educational methods regarding appropriate placement of a student with special needs, and that only considering education in special education classroom was not sufficient.[220]

Following the Eleventh Circuit's decision in *Greer*, the Third Circuit subsequently held that school districts have an affirmative obligation to consider the placement of students with special needs in a general educational environment before exploring alternative placements.[221] Specifically, the court stated, "even if a child with disabilities cannot be educated satisfactorily in a regular classroom, that child must still be included in school programs with non-disabled students wherever possible."[222] The *Oberti* decision was thus the first to identify and underscore the reciprocal benefits of mainstreaming for students without disabilities, such as learning to communicate and interact with students with disabilities.[223] Additionally, the Third Circuit placed the burden of proving compliance with the IDEA on the school board.[224] Furthermore, the court greatly emphasized a presumption in favor of mainstreaming which could only be overcome by evidence demonstrating that the student with special needs will receive little or no benefit from the placement, or if the child is so disruptive that the other students' educational experiences are "significantly impaired."[225] Yet the court favored inclusion in this case despite the student's well-documented history of behavioral disruptions.[226]

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217. 950 F.2d 688 (11th Cir. 1991). In *Greer*, the court assessed the educational placement of a ten-year old girl with Downs Syndrome. *Id.* The parents of the ten-year old girl contested their daughter's placement in a self-contained special education classroom. *Id.* at 689.

218. *Id.* at 696–97.

219. *Id.* at 697 (emphasis added).

220. *See id.* at 698–99.

221. *Oberti ex rel. Oberti v. Bd. Of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993) ("If the school has given no serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, then it has most likely violated the Act's mainstreaming directive.").

222. *Id.* at 1215.

223. *Id.* at n.24.

224. *Id.* at 1219.

225. *Id.* at 1217.

226. *Id.* at 1223. The court stated that the student "would not have had such severe behavior problems had

In *Sacramento City Unified School District v. Rachel H.*,[227] the Ninth Circuit continued the trend towards full inclusion.[228] The decision incorporated factors from the *Roncker*, *Daniel R.R.*, and *Greer* line of cases, resulting in a four-factor balancing test that the court used to ascertain the appropriate educational placement of a student with special needs.[229] The four factors included: "(1) the educational benefits of placement in full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect of [the disabled student] had on the teacher and children in the regular class; and (4) the cost of mainstreaming [the disabled student]."[230]

D. Circuits Prioritizing Deference

The holdings and analyses of the Third, Fifth, Ninth, and Eleventh Circuits on the mainstreaming issue reflect a jurisprudential determination that greater weight should be accorded to the congressional placement for mainstreaming (rather than the Supreme Court's deferential approach to the decisions made by local school boards and lower courts on the issue). However, based upon well-established principles of interpretation, the degree of deference to which the Supreme Court in *Rowley* afforded local school boards should have been applied to judicial interpretation of the IDEA as a whole. That is, regardless of the fact that subsequent circuit court decisions limited the holding of *Rowley* to the issue of what constitutes a "free and appropriate education" under IDEA, the circuits should have afforded the same degree of deference to the decisions made by local school boards regarding their interpretation of the "least restrictive environment" provision of the Act. The circuit court opinions discussed in the prior section each allude to the deference which is supposed to be afforded to local school boards[231]; yet, in establishing their own tests for the mainstreaming issue, each circuit systematically ignored the decisions and findings by the schools, districts, and district courts in the application of those tests.

Other circuits, however, have accorded greater deference to the judgments made at the local level. While still recognizing the congressional preference for mainstreaming, these courts tend to give equal weight to determinations made by school districts,[232] adhering to the Supreme Court's guidance in *Rowley* that courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review."[233] This section will examine two cases that follow this approach.

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he been provided with adequate supplemental aids and services." *Id.*

227. 14 F.3d 1398 (9th Cir. 1994).

228. *See id.* at 1403 ("We hold only, under our standard of review, that the school district's decision was a reasonable one under the circumstances of this case. More importantly, the Dis- trict's proposition that Rachel must be taught by a special education teacher runs directly counter to the congressional preference that children with disabilities be educated in regular classes with children who are not disabled.").

229. *Id.* at 1404.

230. *Id.* at 1404.

231. *See supra* Part IV.C.

232. *Id.*

233. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

1. *Hartmann v. Loudoun County Board of Education*

In *Hartmann v. Loudoun Country Board of Education*,[234] the Fourth Circuit applied an approach much more deferential to the decisions of educators and administrators regarding the placement of students with special needs. *Hartmann* involved a challenge by the parents of an eleven-year-old autistic child, Mark, to the school district's proposed placement plan, which the Hartmanns' believed failed to comply with the integration provision of the IDEA.[235] In kindergarten, Mark's spent half his day in a self-contained program for autistic students and the other part of his day in a regular education classroom.[236] Presumably based on his successes that year, the school amended Mark's placement for first-grade and placed in a regular education classroom for the entire day, albeit with a full-time aide to assist him.[237] The Hartmanns moved from Illinois to Loudoun County, Virginia after Mark's first grade year.[238]

Upon their move to Loudoun County, the Hartmann's enrolled Mark at a new school, Ashburn Elementary, for his second-grade year.[239] Based on his IEP from his previous school, Ashburn Elementary placed Mark in a regular education classroom.[240] To facilitate Mark's inclusion in a regular classroom, school officials "carefully selected his teacher, hired a full-time aide to assist him, and put him in a smaller class[room]" with students characterized as "more independent."[241] Halfway through the year, school officials assigned a special education teacher to provide Mark with three hours of instruction per week and to advise Mark's teacher and aide.[242] Despite these accommodations, the school was unable to adequately manage Mark's behavior, which included "daily episodes of loud screeching and other disruptive conduct such as hitting, pinching, kicking, biting, and removing his clothing."[243] Mark's outbursts had a detrimental effect on both Mark and his classmates, requiring his teacher and aide to divert their attention to calming and redirecting Mark and requiring additional time to get the rest of the class back on track after the disruption.[244]

By the end of Mark's second-grade year, the IEP team concluded that he was

234. 118 F.3d 996 (4th Cir. 1997).

235. *Id.* at 999–1000.

236. *Id.* at 999.

237. *Id.* Mark did receive speech and occupational therapy each week, but, aside from that, he was included in a regular classroom. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* Similar to his previous placement, Mark also received speech and language therapy from a qualified specialist five hours per week. *Id.*

241. *Id.* The court notes that "Mark's teacher. . . read extensively about autism, and both [his teacher and his aide]. . . received training in facilitated communication, a special communication technique used with autistic children." *Id.* Additionally, the Loudoun County Director of Special Education personally worked with Mark's IEP team, and provided in-service training for the Ashburn Elementary staff on autism and inclusion of disabled children in regular classrooms. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

making no academic progress in the regular classroom.[245] Therefore, the decided to amend his IEP for his third-grade year, placing him in a class specifically structured for autistic children at another school, Leesburg Elementary.[246] Unlike similar facilities in prior cases, specifically *Roncker*, Leesburg Elementary was not a segregated facility; rather, it was a regular elementary school that housed a class for autistic children "in order to facilitate interaction between the autistic children and the students who were not handicapped."[247] Under the proposed IEP, Mark would still be placed in a regular classroom for art, music, physical education, library, and recess.[248] Furthermore, "the Leesburg program. . . would have permitted Mark to increase the portion of his instruction received in a regular education setting as he demonstrated an improved ability to handle it."[249]

The Hartmann's refused to accept the proposed IEP and brought a legal challenge, claiming that the proposed IEP did not comply with the mainstreaming provision of the IDEA because Mark would not have been included in a regular classroom "to the maximum extent appropriate."[250] The hearing officer upheld the proposed IEP but was ultimately reversed by the district court, which "concluded that Mark could receive significant educational benefit in a regular classroom."[251] Most notably, the district court found that, based on the strong presumption in favor of inclusion under the IDEA, disruptive behavior *should not* be a significant factor when school officials are determining the appropriate educational placement for a disabled child.[252]

The Fourth Circuit reversed the ruling of the district court.[253] Citing *Rowley* for the proposition that the task of education belongs to the educators, the court stated that federal courts must give deference to the determinations made at the local level.[254] Further, the court emphasized that the IDEA establishes "a basic floor of opportunity"[255] for every student with special needs,[256] and that "the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate."[257] The court relied on Section 1412(5)(B) of the Act[258] for the limiting principle of the "maximum extent appropriate" requirement.[259] Moreover, the court

245. *Id.* at 1000.

246. *Id.*

247. *Id.* As noted by the court, "[t]he Leesburg class would have included five autistic children working with a special education teacher and at least one full-time aide." *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* The district court also found "that 'the Board simply did not take enough appropriate steps to try to include Mark in a regular class.'" *Id.*

252. *Id.*

253. *Id.* at 1005.

254. *Id.* at 1000.

255. *Rowley*, 458 U.S. at 201

256. *Hartmann*, 118 F.3d at 1001.

257. *Id.*

258. Codified as amended at 20 U.S.C. § 1412(a)(5)(A) (2004).

259. *See id.* Section 1412(5)(B) states that mainstreaming is not appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot

found that the district court had deserted Fourth Circuit precedent for when mainstreaming is not required.[260] The court had previously held in in *DeVries v. Fairfax County School Board*[261] that mainstreaming is not required where:

> (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly out- weighed by benefits which could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is a disruptive force in a regular classroom setting.[262]

In reviewing the district court's analysis, the court essentially accused the lower court of doing what the Supreme Court had explicitly prohibited in *Rowley* – substituting their own beliefs about sound educational policy for those of Mark's IEP team.[263] The court gave considerable weight to the efforts the school district went through to try and educate Mark in a regular classroom.[264] The evidence demonstrated to the court that, despite the efforts taken by Ashburn Elementary to mainstream Mark, Mark was not receiving any benefits in a regular classroom since he was not making academic progress, and therefore, a special classroom was an appropriate placement.[265]

The Fourth Circuit's decision can be seen primarily as a re-balancing of the integration presumption, as interpreted by the Supreme Court in *Rowley*. The court makes clear that, in this circuit, weight should be given to the congressional preference for mainstreaming, and deference should be afforded to the judgments made by local educators. Aside from this determination, the Fourth Circuit's analysis was similar to those conducted by other circuits in the previous section:[266] the court compared the potential benefits a student would receive in a special education classroom with those received in a regular classroom, and also considered the social benefits derived from mainstreaming. However, the court limited prior considerations of the social benefit, finding that "[a]ny such benefits, however, cannot outweigh his failure to progress academically in the regular classroom."[267]

2. *Beth B. v. Van Clay*

A more recent Seventh Circuit decision adopted an approach similar to the one

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be achieved satisfactorily." 20 U.S.C. § 1412(5)(B) (1990).

260. *See Hartmann*, 118 F.3d at 1001.

261. 882 F.2d 876 (4th Cir. 1989).

262. *Hartmann*, 118 F.3d at 1001.

263. *See id.* ("In effect, the [district] court simply substituted its own judgment regarding Mark's proper educational program for that of local school officials.")

264. *See id.* at 1003, 1005. The court called in to question the district court's decision in this regard, stating that "[t]he district court's conclusion in remarkable of the extensive measures taken on Mark's behalf." *Id.* at 1003.

265. *Id.* at 1005.

266. *See supra* Part IV.C.

267. *Id.* at 1002.

employed by the Fourth Circuit in *Hartmann*. In *Beth B. v. Van Clay*,[268] parents of a thirteen-year old student suffering from Rett Syndrome sued the school district, alleging that their daughter's placement in a special education classroom was in violation of the IDEA.[269] The district court granted summary judgment in favor of the school district, upholding the school district's decision to keep Beth in a special education environment.[270]

The Seventh Circuit emphasized the importance of deferring to the findings of the administrative hearing officer since "school authorities are better suited than are federal judges to determine educational policy."[271] The court cited the Supreme Court's decision in *Rowley*,[272] which stated that "Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children."[273] Based upon this guidance for ascertaining the "to the maximum extent appropriate" element of the least restrictive environment requirement, the court affirmed the judgment of the district court.[274]

V. CONGRESSIONAL REVISIONS TO THE IDEA

A. 1997 Amendments

Given the dissimilar treatment of the IDEA at the federal circuit level, Congress amended the law in 1997 in an effort to provide greater clarity and strength.[275] These amendments, and the DOE regulations that followed, further emphasized the congressional preference for mainstreaming. In fact, it was in these amendments that the explicit term "least restrictive environment" appeared for the first time within the text of the law.[276] The stated focus of these amendments was to improve the teaching and learning experiences of children with disabilities so that they could lead more "productive independent adult lives."[277] Congress's sought "to strengthen the least restrictive environment requirement and participation of children with disabilities in the general curriculum and regular education classroom."[278]

The secondary goal of the amendments was to strengthen the role of families in

268. 282 F.3d 493 (2002).

269. *Id.* at 496. Rett Syndrome is "a neurological disorder that almost exclusively affects girls," and causes severe cognitive and physical disabilities. *Id.* at 495. Beth was nonverbal and restricted to a wheelchair as a result of this disease. *Id.* According to experts, Beth had "the cognitive ability of an twelve-to-eighteen month old infant." *Id.*

270. *Id.*

271. *Id.* at 496.

272. *Id.* at 499.

273. *Rowley*, 458 U.S. at n.4.

274. *Beth B.*, 282 F.3d at 499.

275. PUB. L. NO. 105-17, 111 STAT. 37 (1997).

276. *See* Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 552 (1999) ("With the 1997 Amendments to the Act, the words 'least restrictive environment' have officially been transferred from the federal regulations into the statute.").

277. S. REP. NO. 105-17, at 5 (1997).

278. 143 CONG. REC. E951-01 (daily ed. May 19, 1997) (statement of Rep. George Miller).

the special education process.[279] This goal was effectuated by requiring that parents be included in any discussion regarding potential changes to their child's placement,[280] and mandating that parents are "regularly informed" of their child's progress towards the stated goals of the IEP.[281] Further, if it could be determined that the child was so capable, the Amendments guaranteed students the opportunity to participate in the planning and placement process as members of their own IEP team.[282] In effect, the 1997 Amendments both "prenewed the importance of the [least restrictive environment] provision by providing that the regular classroom must be the default placement and emphasized the role of parent and student input into the decision-making process."[283]

The DOE regulations promulgated in 1999 for the implementation of the 1997 Amendments reinforced these priorities. Of particular importance is the requirement that the default placement on the "continuum of alternative placements"[284] *must* be the regular classroom.[285] Along with this default placement requirement, the regulations further stipulate that, if a disabled student is not able to be mainstreamed, they must still be included with their regular education classmates for non-academic activities, such as lunch and recess, to the maximum extent appropriate.[286] Thus, the 1997 Amendments to the IDEA and subsequent DOE regulations seemed to endorse and further the position taken by the Third, Fifth, Ninth and Eleventh Circuit—that great weight should be given to the congressional preference for mainstreaming. Ultimately, the 1997 Amendments did not substantially change the IDEA; rather they provided a precursor to the more extensive revisions of the 2004 Reauthorization.[287]

VI. THE FUTURE OF THE INTEGRATION PRESUMPTION

Today, the vast majority of scholars and policymakers agree that students with disabilities benefit from inclusion in an educational environment.[288] The debate, however, focuses on the extent to which they should be integrated, and the manner in which the level of inclusion should be evaluated.[289] The integration presumption of the IDEA has served an important function in shifting the education of children with disabilities from segregated facilities to regular schools. Yet, the IDEA, the

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279. *See* S. REP. NO. 105-17, at 4; H.R. REP. NO. 105-95, at 3 (1997).

280. S. REP. NO. 105-17, at 23–24.

281. *Id.* at 22.

282. 20 U.S.C. §§ 1414(d)(1)(B)(vii) (1997).

283. Farley, *supra* note 47, at 817.

284. *See supra* notes 118–121 and accompanying text.

285. See Farley, *supra* note 47, at 818. ("Before a child can be placed outside of the regular classroom, 'the full range of supplementary aids and services that if provided would facilitate the student's placement in the regular classroom setting must be considered.'")

286. *Id.*

287. This note does not discuss the reauthorization of the IDEA in 2004. Briefly though, the 2004 Reauthorization shifted the focus of the IDEA from individual-based decision-making to accountability. Gordon, *supra* note 15, at 216. The Reauthorization places a "high priority" on standardized test scores and accountability measures that every child, regardless of disability, must meet. *Id.*

288. *See supra* Part III.B.2.

289. *See supra* Part III.B.2.

Supreme Court, and the federal circuits have all proven unable to develop a sufficient evaluation method for determining and reviewing the placement of students with disabilities given their individual needs.

Going forward, it is the recommendation of this article that courts and Congress provide equal weight to the integration presumption as well as the decisions made at the local level by individual educators and school boards. In regards to mainstreaming, the goal should be to place a student with special needs in the regular classroom as frequently as possible. The "benefit" model should be used for determining whether the placement is appropriate, but it should be amended to be considered in two separate contexts: once for academic classes and activities, and once for non-academic classes and activities. This bifurcated analysis would provide a solution to the debate of whether to consider educational or social benefits when determining the benefit received. Such an inquiry would, first, incorporate the second prong of the test established in *Daniel R.R.*,[290] but would apply the test using the factors outlined in *Rachel H.*,[291] and, unlike the decision rendered by the *Oberti* court, would place the burden of proving that the school was not in compliance with the IDEA on the parents or guardians challenging their placement.

The proposed framework would focus on the degree to which the school has mainstreamed the child to the maximum extent appropriate. Absent a showing that a school or school district willfully sought to intentionally segregate students with special needs, this is the analysis that should apply. In the course of this evaluation, a court should consider: (1) the educational benefit available in a regular classroom with supplemental aids and services, compared to the benefits of a special education classroom; (2) the non-academic benefits of interaction with non-disabled students; (3) the impact of the student with a disability on the teach and other children in the regular classroom; and (4) the cost of the supplementary aids and services required for mainstreaming the student.[292] In considering the potential impact a student with special needs might have on a regular classroom, disruptive behavior should certainly be considered. In addition, the court should focus on the degree to which the school re-evaluates the placement of students with special needs, and whether the students that have made progress both academically and socially are being mainstreamed to a greater extent. Finally, significant deference should be given to the determinations made by the school board, provided they have mainstreamed the student in most non-academic programs.

This new analysis would improve the clarity of the law while ensuring students with special needs receive a valuable educational experience. In the context of special education, since the adoption of the IDEA, schools have consistently sought compliance with the federal mandate despite the ambiguous and wavering standards they had to meet. Deference should be afforded to their determinations. Once again, as the Supreme Court declared in *Rowley*:

> The primary responsibility for formulating the education to be accorded a

290. *See supra* Part IV.C.2.

291. *See infra* n.295.

292. Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).

> handicapped child, and for choosing the educational method most suitable to the child's needs, was left by [IDEA] to state and local agencies in cooperation with the parents or guardians of the child... [Reviewing courts should not] substitute their own notions of sound educational policy for those of the school authorities which they review.[293]

The framework proposed in this Note would return the integration presumption to its intended function and object: mainstreaming. The evaluation should thus be individually focused, mainstreaming to the fullest extent that the student is capable and comfortable. Older students should be included in this conversation. Of equal importance is that schools give students with special needs the opportunity to advance the degree to which they are mainstreamed and included in regular classrooms based on their development and academic success. Unique and innovative mainstreaming solutions adopted at the local level should be celebrated. The education of children with special needs has become a priority for the public school systems throughout the country. It is the judiciary's role to ensure that schools remain in compliance with the federal mandate of IDEA, yet have the flexibility and deference generally afforded in the education context in order for the system to be most effective.

293. *Rowley*, 458 U.S. at 207.

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