CONSIDERING THE COSTS: ADOPTING A JUDICIAL TEST FOR THE LEAST RESTRICTIVE ENVIRONMENT MANDATE OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA")[1] was implemented in 1990 as an update to the 1975 Education for All Handicapped Children Act ("EHA").[2] Both laws were passed in order to aid state and local governments in providing educational services to children with disabilities. They represent the cornerstone of federal legislation in the area of special education and are important markers in the development of special education programs in the United States that began in the second half of the twentieth century.[3]

IDEA, building on the core of EHA, includes a set of six elements to develop and guide effective special education programs. The first element is the use of individualized education programs ("IEP") for students with disabilities and special educational needs. The second element is that all students be provided with a free appropriate public education ("FAPE"). The third is that students be placed in the least restrictive environment ("LRE") for learning. The fourth is that appropriate evaluations are used to assess student needs and progress. The fifth is the requirement that teachers and parents participate in the planning and execution of a special education program. The sixth, and final, element is a set of procedural safeguards and rights for parents during the special education process.[4]

The law responds to the problem of segregation of students with disabilities that existed when the statute was passed. This reality is reflected in the observations of Senator Robert Stafford who stated that the EHA "represents a gallant and determined effort to terminate the two-tiered invisibility once and for all with respect to exceptional children in the [n]ation's school systems."[5] Thus, the concepts of

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1 Individuals with Disabilities Education Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. 1400 et seq. (2004)).

2 Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773; OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, (2000), http://www2.ed.gov/policy/speced/leg/idea/history.pdf (discussing the history of special education legislation in the United States).

3 *See* OFF. OF SPECIAL EDUC. & REHAB. SERVS., *supra* note 2.

4 Cynthia L. Kelly, *Individuals with Disabilities Education Act – The Right 'IDEA' for All Childrens' Education*, 75 J. KAN. BUS. ASS'N. 24, 27 (2006).

5 Robert T. Stafford, *Education for the Handicapped*: *A Senator's Perspective*, 3 VT. L. REV. 71, 72

inclusion and mainstreaming have been prominent in special education law since the beginning. The LRE mandate specifically responds to this spirit of inclusion and mainstreaming present in the statute. However, the parameters of the mandate and inclusion are not entirely clear and throughout the life of EHA and IDEA there have been issues with the application of the LRE mandate, reflected in the significant amount of litigation regarding the mandate.[6]

Despite school districts' best efforts to accommodate diverse educational needs with limited resources, many parents still find their children's learning environment to not be the "least restrictive" and resort to legal remedies. Courts thus have a unique challenge in determining and applying a standard to assess learning environments. Accordingly, there is an important open question as to what the best judicial test is for evaluating the IDEA LRE mandate as well as what principles should guide Congress when updating the statute.

In resolving that question, the interests of the key stakeholders in IDEA must be addressed. The litigation relating to the LRE implicates several key stakeholders. The first and most obvious are children and, by extension, their parents. As the focus of and primary participants in the educational system, children and their parents have a strong vested interest in an LRE standard that will maximize their educational potential. Another key stakeholder is the school district. As the purveyor of education and the designers of educational processes, school districts and their attendant boards, administrators, and staff have a vested interest in a standard that will allow them to execute their mission fully and efficiently. School districts also have increasingly complex special education programs that take up a substantial amount of public education resources.[7] Indeed, as an illustration of the significance of special education in a large American school district, the Chicago Public Schools budgeted $598,790,000 for "diverse learning" (the current district term for special education) from a total budget of $3.1 billion for the 2019 fiscal year.[8] Finally, teachers unions and professional organizations that represent the educational employees who run special education programming and work directly with students and parents to achieve educational goals are key stakeholders. The policy statements of the Chicago Teacher's Union[9] on special education as a local example and the National Education Association ("NEA")[10] as a national example demonstrate the degree of interest these professionals have in ensuring that a standard for the LRE mandate is feasible and helpful for the students.

(1978).

6 *See* Brian L. Porto, *Application of 20 U.S.C.A. § 1412(a)(5), Least Restrictive Environment Provision of Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400 et seq.*, 189 A.L.R. FED. 297 (last updated Oct. 2018).

7 *See* Maya Srikrishnan, *Special Education Costs are Rising*, NEW AM. WEEKLY (Feb. 8, 2018), https://www.newamerica.org/weekly/edition-193/special-education-costs-are-rising/ (discussing a 50% increase in special education costs over ten years in California public schools from 2005-2016).

8 *CPS Fiscal Year 2019 Budget*, CHI. PUB. SCH. https://cps.edu/fy19budget/Pages/schoolsandnetworks.aspx (last modified Aug. 9, 2018).

9 *See Special Education Task Force*, CHI. TEACHERS UNION, https://www.ctunet.com/for-members/committees/special-education-task-force (last visited Oct. 21, 2018).

10 *See Our Position & Actions on IDEA /Special Education*, NAT'L EDUC. ASS'N, http://www.nea.org/home/17673.htm (last visited Apr. 16, 2019).

The outcome of the litigation in which these parties are involved is determined by the court that hears the case. There is currently a circuit split in the federal court system among three primary tests that are used by federal courts to determine whether or not the LRE mandate has been met in a given case.[11] The Fourth, Sixth, and Eighth Circuits apply a one-factor test where courts weigh the benefits of a segregated learning environment with the feasibility of providing the same services provided in the segregated environment in a regular educational setting.[12] The Third, Fifth, and Tenth Circuits use a test introduced in the case of *Daniel R.R. v. Board of Education*.[13] The test has two prongs, the first being an assessment of whether a school can use additional aids and services to create an appropriate public education in a regular classroom for a child with special educational needs.[14] This prong involves the consideration of a variety of factors including the process utilized by the school district to create the educational environment and the educational benefit the plan provides for the child.[15] The second prong applies when an educational benefit in the regular classroom is not possible and asks if the student has been mainstreamed to the extent possible.[16] Finally, the Ninth, and Eleventh Circuits use a test that incorporates the *Daniel R.R.* test but adds an additional factor in the first step.[17] This test also explicitly considers the costs to the school district of providing special education services in a given case.[18]

It is also important to recognize that the LRE mandate is a mere portion of the complex IDEA regulatory scheme. The legal issues and questions surrounding the LRE mandate are closely related and often intertwined with those of other provisions of the statute. While the Supreme Court has not addressed a proper test or standard for assessing the LRE mandate, it has addressed another key area of IDEA. In the recent 2017 case *Endrew F. v. Douglas County School District*, the Court clarified the standard to be used when assessing another key provision: a free and appropriate public education.[19] That standard and the language of the Court's opinion in *Endrew* are helpful tools for assessing the effectiveness of LRE judicial tests. It is also helpful for establishing the general expectations of the Supreme Court in educational cases.

All of these factors demand a judicial standard that addresses the concerns of the stakeholders and the realities of the logistics and costs of modern education, while also reflecting Supreme Court precedent on IDEA. This Note argues that such a standard exists in the Ninth Circuit's existing LRE test.[20] In Part I, this Note will explore the history of IDEA and identify the purposes behind the law. Part II will

11 *See generally* Ian Farrell & Chelsea Marx, *Fallacy of the Choice: The Destructive Effect of School Vouchers on Children with Disabilities*, 67 AM. U. L. REV. 1797, 1828-30 (2018).

12 *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

13 Daniel R.R. v. Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989).

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *See* Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); Sacramento City Unified Sch. Dist., Bd. of Educ. v. Holland ex rel. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

19 Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

20 *See* Sacramento City Unified Sch. Dist., Bd. of Educ. v. Holland ex rel. Rachel H., 14 F.3d at 1400–01..

review key litigation concerning IDEA, especially the Supreme Court's *Endrew* decision, and identify the relevant stakeholders and their interests. Part III will analyze the statutory text and regulations of the LRE mandate. It will also examine the scholarly landscape of the LRE requirement and crystalize the interests of IDEA stakeholders as they pertain directly to the LRE mandate. This Part will assess the Supreme Court's approach to IDEA generally and specifically in the case of *Endrew* to establish guiding principles for analyzing LRE tests. Using these assessments, Part III will present an evaluative framework to analyze judicial standards for the LRE mandate. Part IV will provide a detailed introduction of the three primary LRE judicial tests used in the federal circuit split. Part V will then analyze the tests using the evaluative framework from Part III to determine which one best meets the purposes of IDEA presented in the legislative history and case law, as well as the concerns of the key stakeholders. Part VI will then examine the status of Congress reauthorizing IDEA and make a recommendation on appropriate Congressional action to help mitigate litigation regarding the statute.

I. INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This section will introduce IDEA and explore its history and purpose. It will also identify the key elements of the statute. In particular, the elements will be examined as to how they apply requirements to the school districts and grant rights to parents and children.

A. HISTORY AND LEGISLATIVE PURPOSE

The Individuals with Disabilities Education Act was an update to the Education for All Handicapped Children Act which was passed in the context of the federal government's increasing involvement in regulating education during the second half of the twentieth century. Beginning in the 1950s, the federal government began implementing laws to create and improve services for children with special educational needs. This process began with the Training of Professional Personnel Act of 1959[21] which provided for the training of educators to specialize in working with children with special needs. This progression included the Captioned Films Act of 1958[22] to provide films accessible to students with deafness and hearing difficulties as well as grants to states to fund the education of children with special needs. The increasing level of federal involvement in special education culminated in the passage of EHA in 1975.[23] EHA had four stated purposes and six substantive elements that are all central to IDEA and form the bedrock of federal special education law.

The four purposes of EHA animate the federal special education statutory scheme and provide policy makers and courts with a sense of the mission of special education in the federal context. The first purpose established in the law is "to assure

21 Training of Professional Personnel Act of 1959, Pub. L. No. 86-158,73 Stat. 339.

22 Captioned Films Acts of 1958, Pub. L. No. 85-905,72 Stat. 1742.

23 OFF. OF SPECIAL EDUC. & REHAB. SERVS., *supra* note 2 (stating the purposes outlined in the Education for All Handicapped Children Act of 1975, Pub. L. 94-142).

that all children with disabilities have available to them … a free appropriate public education which emphasizes special education and related services designed to meet their unique needs."[24] The second purpose is "to assure that the rights of children with disabilities and their parents … are protected."[25] The third purpose is "to assist States and localities to provide for the education of all children with disabilities."[26] Finally, the fourth purpose is "to assess and assure the effectiveness of efforts to educate all children with disabilities."[27]

These purposes illustrate the contours of special education law and policy in the United States. Through the language Congress passed and President Ford signed, the federal government recognizes a right to a "free and appropriate public education" for children with disabilities.[28] These purposes also show that the government has a clear interest in simultaneously protecting the aforementioned right and working with school districts to ensure that states, local governments, and school administrations have the resources necessary to provide appropriate special education services. Additionally, these purposes notably implicate all of the primary stakeholders—parents and children, schools, and professionals—while also placing a special emphasis on evaluating the efficacy of special education programs for individual children.

The purposes behind EHA remained significant when they guided a series of amendments to, and reauthorizations of, the law. One such amendment in 1990 changed its name to IDEA.[29] IDEA made a few additions to EHA by adding provisions for helping to transition students with special educational needs from high school to adult life.[30] Further amendments in 1997 strengthened the requirements for transition planning and the reporting requirements from the school to parents.[31] Next, parts of the Individuals with Disabilities Education Improvement Act of 2004[32] aimed to reemphasize student outcomes over administrative procedures, in an attempt to match aims with the No Child Left Behind Act of 2001[33]—which was the most significant piece of education legislation before this reauthorization.[34] Each iteration of this area of law is plagued by a similar problem: proper funding for special education programs. For a significant portion of the law's history, federal appropriations failed to cover even 10% of the excess costs that resulted from the requirements and mandates of the law.[35]

24 *Id*. (quoting the four purposes of Pub. L. 94-142).

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id*. (discussing the implications of Pub. L. 94-142).

29 *Id*. (discussing 1990 reauthorization).

30 *Id*.

31 *Id*. (discussing 1997 amendments).

32 Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108–446, 118 Stat. 2647 (codified as amended at 20 U.S.C. 1400 et. seq. (2004)).

33 No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425.

34 U.S. DEP'T EDUC., IDEA-REAUTHORIZED STATUTE – ALIGNMENT WITH THE NO CHILD LEFT BEHIND ACT, HTTPS://WWW2.ED.GOV/POLICY/SPECED/GUID/IDEA/TB-NCLB-ALIGN.PDF

(discussing aligning IDEA with the requirements of No Child Left Behind).

35 Kelly, *supra* note 4, at 26.

This legislative and amendatory history demonstrates that IDEA evolved over the decades in an attempt to meet changes in a complicated educational environment. These changes have occurred while trying to satisfy the key stakeholders and their sometimes inherently contradictory interests. It is clear that school districts will—in many cases—have cost concerns while working broadly on special education programming and budgeting. Concerns about costs run opposite to parents and teachers, who would understandably hope that a student's experience and growth potential is not limited by a federal, state, or local budget line item. The fact that funding has been a recurring problem throughout the history of the law further highlights that costs are a central concern. Given that this concern is so central, with a long history and direct connections to key stakeholders, funding should play a role in the identification of effective judicial standards for key provisions of the law.

B. PRIMARY ELEMENTS/PRINCIPLES OF IDEA

1. REQUIREMENTS OF THE SCHOOL DISTRICT

Of the six primary elements of IDEA, the free appropriate public education requirement is at the heart of the law and provides the "what" in terms of what IDEA tries to accomplish. FAPE establishes that special education is to be provided to students at no cost to the parents and sets a legal standard of "appropriateness" for the education provided to the student.[36] The statute explicitly defines FAPE as being provided at public expense under state supervision, meeting the educational standards of the state involved, matching roughly the levels of traditional education, and matching the goals and requirements of the IEP prepared for the student.[37] The FAPE element has been subject to much litigation as school districts and courts have struggled to parse out what constitutes a free and appropriate public education. The two most prominent cases in this area will be explored later in this Note.[38]

An individualized education program is the tool through which a FAPE and special education is documented and ultimately administered: it provides the "how" of IDEA's mission. The statute defines it as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title."[39] Section 1414(d) of IDEA lays out the substance and process requirements for the development of an IEP. The substantive requirements state that IEPs must identify measurable goals and details of services being provided to the student and provide explanations of the degree to which a student will not be included in regular classroom activities.[40] The process requirements state that IEPs be prepared annually by a team that includes special education professionals and the parents of the child.[41]

36 *Id*. at 27–28.

37 20 U.S.C. § 1401(9) (2012) (defining "free appropriate public education" in the definitions section of the statute).

38 *Infra* Part II.

39 20 U.S.C. § 1401(14) (2012).

40 20 U.S.C. § 1414(d)(1)(A) (2012).

41 20 U.S.C. § 1414(d)(1)(B) (2012).

The least restrictive environment mandate is an additional key element of IDEA, providing the "where" or logistical realization of IDEA's mission, which is also the focus of this Note. The statute provides that in order to meet the LRE mandate, a school district must ensure that a child with a disability is educated with his or her peers to the "maximum extent appropriate" through the providing of supplemental services.[42] This provision establishes a preference that children be "mainstreamed."[43] As will be analyzed later in this Note, the parameters of this requirement has been subject to different legal tests and remains an open legal question nationally.[44]

The last element that addresses the obligations of the school district under IDEA is the requirement that a proper evaluation be done for each child in order to determine appropriate services.[45] The statute provides that a parent's request or consent is generally required for initial evaluation.[46] There are additional requirements that evaluators be trained in the area of special education services and that school districts use a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent" to conduct the evaluation.[47]

2. RIGHTS OF THE PARENTS AND CHILD

The fifth key element of IDEA, and the first relating to the rights of parents and children, is the requirement that both teachers and parents participate in the planning and execution of a special education program. This requirement is expansive and removes the unilateral decision-making power from the school that it may have in other areas. Parents (and, when feasible, the students themselves) are to be included on the teams that prepare IEPs and determine placements for the student. Additionally, as mentioned above, parental request or consent is required to begin the process of evaluating a child for special education services unless the school district pursues a separate process.[48] Parents also have responsibilities to communicate to the school district when they are considering removing a student[49] or pursuing recourse against the school district.[50] Overall, this element of IDEA with its various rights and responsibilities for parents demonstrates that IDEA is built around consensus decision-making.[51] This notion of consensus is an important consideration when assessing legal tests as unlike many other statutory schemes, IDEA provides for the active participation of those affected in specific cases.

Parents' procedural safeguards are the final key element of IDEA. This provision requires that parents be annually notified of their procedural rights under IDEA.[52]

42 20 U.S.C. §1412(a)(5) (2012).
43 Porto, *supra* note 6, at § 4.7.
44 *See infra* Part IV (recognizing the most significant standards of a circuit split).
45 20 U.S.C. §1414(a)(1)(A) (2012).
46 20 U.S.C. §1414(a)(1)(D) (2012).
47 20 U.S.C. §1414(b)(2)(A) (2012).
48 20 U.S.C. §1414(a)(1)(D).
49 20 U.S.C. §1412(a)(10)(C)(iii) (2012).
50 20 U.S.C. §1415(b)(7) (2012).
51 Kelly, *supra* note 4, at 34.
52 20 U.S.C §1415(d)(1)(A) (2012).

These rights include: the right to an alternative evaluation,[53] access to educational records,[54] the ability to present and work through due process complaints through hearings and mediation,[55] and the right to bring civil action in court.[56] These specific procedural rights reinforce the notion that IDEA is focused on a collaborative process and that parents and children have firm procedural and substantive rights related to the development and implementation of special education programs.

This brief survey of the key elements and provisions of IDEA illustrate the statute's many different parts and their different standards and requirements. This mosaic of provisions does have some key unifying characteristics. First, they are centered on a core goal of providing a child an opportunity to learn and develop in spite of a disability. Second, IDEA implements a consensus driven process that requires regular interaction between the school district and parents in a decision-making capacity. Finally, it is important to recognize these elements are not necessarily clear and distinct—they interact to achieve IDEA's goals. Thus, litigation and commentary on one component of IDEA will have a great impact on the understanding of another.

II. LITIGATION CONCERNING IDEA

A. CASELAW

A significant portion of the case law involving IDEA has unsurprisingly focused on the free appropriate public education requirement. While not directly addressing the least restrictive environment mandate, these cases provide an important context for understanding the LRE cases. In particular, they help identify what courts consider to be the key standards and tests to apply when there is litigation over special education programs. This subsection will address two key Supreme Court cases that deal with the standard for assessing the FAPE requirement.

1. *ROWLEY* (1982)

The first case where the Supreme Court ruled on a provision of IDEA (then the EHA) was *Board of Education of the Hendrick Hudson Central School District v. Rowley* in 1982.[57] The issue in the case was the determination of what constitutes a FAPE. The case involved Amy Rowley, a young student in New York with a hearing impairment. Rowley's IEP provided for the use of a hearing aide, with which she was able to perform well in her normal classroom setting. However, Rowley's parents believed that with an American Sign Language (ASL) interpreter, she would be able to perform much better. They provided test results of her academic performance with and without an interpreter to demonstrate how much better she performed with an interpreter. The Rowley family sued claiming that a FAPE for

53 20 U.S.C. §1415(d)(2)(A) (2012).
54 20 U.S.C. §1415(d)(2)(D) (2012).
55 20 U.S.C. §1415(d)(2)(E) (2012).
56 20 U.S.C. §1415(d)(2)(K) (2012).
57 Bd. of Educ. Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

their daughter would include the provision of an ASL interpreter.[58] The district court and the Second Circuit Court of Appeals determined that without an interpreter, Rowley was not receiving a FAPE. Specifically, the Second Circuit defined FAPE as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[59]

Writing for a 6-3 majority, then-Justice William Rehnquist reversed the judgment of the lower courts. The opinion laid out a different standard for determining a FAPE. The opinion stated that FAPE means that a student gains and benefits from the services provided. It rejected the idea that FAPE means the realization of full student potential.[60] Applying that standard to the case, the Court determined that, since Rowley was advancing normally through her education, she was clearly receiving an educational benefit from her IEP. Thus, under IDEA, the FAPE requirement had been met and the school district was not required to provide her with an ASL interpreter to meet its obligations under the Act.[61]

This standard for FAPE and the Court's opinion demonstrated two key points about the statute. First, the focus of IDEA is on a benefit to the student, but not a maximization of a student's learning experience. Second, the opinion implicitly recognizes the burden placed on school districts by IDEA and explicitly releases them from having to provide every potential resource in order to fulfill the FAPE requirement.

2. *ENDREW* (2017)

The Rowley standard for FAPE persisted for three more decades. However, it left open a question of degrees and how to distinguish the different types of benefits students could receive under a FAPE.[62] The Supreme Court responded to this question in 2017 with the case Endrew F. v. Douglas County School District. In Endrew, the petitioner was a student with autism whose parents placed him in a private school and applied for reimbursement per their rights under IDEA. The parents argued that the school district had not provided a FAPE for their son and thus they were entitled to reimbursement under IDEA. The school district argued that it had provided a FAPE and fulfilled its IDEA requirements.[63] The Tenth Circuit Court of Appeals ruled in favor of the school district, holding that so long as a "de minimis" benefit was provided by the IEP then the school district met the FAPE requirement and that the school district had done so in this instance.[64]

Chief Justice John Roberts wrote a unanimous opinion for the Court. The

58 *Id*. at 184–86 (1982).

59 *Id.* at 185–86 (citing Rowley v. Bd. of Educ. Hendrick Hudson Cent. Sch. Dist., 483 F.Supp. 528, 534 (1980)).

60 *Id.* at 203–04.

61 *Id.* at 209–10.

62 This question was demonstrated by the dissent in *Rowley* itself. *See id*. at 214 (White, J., dissenting) (arguing that the legislative history of IDEA establishes a FAPE standard of providing children with "an education opportunity commensurate with that given other children.").

63 Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 996–97 (2017).

64 *Id*. at 997–98.

opinion stated that the appropriate standard for assessing a FAPE is that the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[65] The Court made clear that this progress metric is fact intensive and is also a balance between the Tenth Circuit's de minimis interpretation and the more expansive interpretation argued for by the parents.[66]

The primary takeaway of Endrew is that the educational benefit necessary for a FAPE must include an element of progress. This notion of educational progress is important to recognize for the other elements of IDEA, as the Supreme Court makes clear it is the test for one of the core aspects of the statute.

The Supreme Court in both Rowley and Endrew demonstrated two key concerns for IDEA cases and general interpretation of the statute. First, they made clear that the purpose of the statute is to promote educational benefits for students with disabilities and specifically benefits with an element of progress. Second, the Supreme Court recognized that the requirements of IDEA do not amount to a guarantee of proficiency or growth. Inherent in that recognition is a concern that school districts cannot provide every possible resource to students. This concern implicitly acknowledges cost limitations—both financial and human—on what school districts can provide for students with disabilities. So, the Supreme Court's jurisprudence on IDEA presents the dual, and sometimes conflicting, concerns of progress and cost to consider when resolving cases dealing with provisions of the statute.

B. KEY STAKEHOLDERS IN IDEA LITIGATION

For the purposes of analyzing judicial standards for provisions of IDEA, an important first step is to identify the key stakeholders in litigation regarding the provisions. The FAPE cases are the primary Supreme Court precedents on IDEA and allow for a clear identification of the key stakeholders both at the national and local level. The primary stakeholders whose interests are relevant to the analysis of a workable standard for the LRE mandate are, first and foremost, students and parents. Secondly, school districts have a strong interest in a workable LRE standard. Finally, teachers and school professionals have a clear, vested interest in the standards applied to IDEA provisions and will be analyzed briefly here.

1. STUDENTS AND PARENTS

The first stakeholders in IDEA litigation are obviously the students with disabilities and their parents. IDEA was devised as a legislative solution to discrimination against, and isolation of, students with disabilities.[67] Accordingly, these students and their primary advocates—their parents—have strong interests in

65 *Id*. at 999.

66 *Id*. at 1001 (holding that the standard the parents argue for, "an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities," is inconsistent with the holding of *Rowley*).

67 Stafford, *supra* note 5, at 72.

legal standards. A broad condition of IDEA is that, in order for a state to receive federal funding for special education programs, the state must establish a "goal of providing full educational opportunity to all children with disabilities."[68] This high goal guides the interests of the parents and students. This is particularly illustrated in arguments of the parents in *Endrew*, where they called for the definition of FAPE to be "an education that seeks to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society."[69] This interest in broad educational opportunities for a child with disabilities is clear in this single case involving a student with autism. However, it also belies the general overarching concern about such opportunities in a variety of contexts. This is best represented by the briefs in *Endrew* supporting the arguments of the parents. They make clear that judicial tests should comport with the purpose of IDEA and that demanding standards are called for by the statute.[70] There is also a call for as much specificity as possible in the legal standard given the gravity of the decisions that must be made for students with disabilities. Advocates for Children of New York and other organizations argued that specific standards are necessary for parents to plan and advocate for their children effectively.[71] So, in sum, parents and students are key stakeholders and have a clear interest in specific standards when it comes to the provisions of IDEA.

2. STATES AND THEIR SCHOOL DISTRICTS

The Douglas County School District, as the respondent in *Endrew*, represented the parents' natural opposition. States and their respective school districts have a series of mandates they must meet in order to receive federal funding for their special education programs. There is a natural assumption that since states and school districts provide education to thousands of students, they will be reticent about strict and demanding legal standards for the provisions of IDEA. Indeed, the briefs in *Endrew* make clear that this is their key interest in the determination of IDEA standards. The brief for the school district argued for the *de minimis* standard for FAPE and that IDEA's text, purpose, and history supported this standard since Congress was not explicit in setting high standards.[72] Additionally, amicus briefs for the school district argued that courts should stay out of the complex decision making of developing special education programs and allow greater deference to the states

68 *See* 20 U.S.C. §1412(a)(2) (2012) (establishing the "full educational opportunity goal" of IDEA).

69 Brief for Petitioner at 40, Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15-827), 2016 WL 6769009, at *40.

70 *See generally* Brief for Nat'l Disability Rights Network, et al. as Amici Curiae Supporting Petitioner, Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2016) (No. 15-827), 2016 WL 6916164.

71 Brief for Advocates for Children of N.Y., et. al. as Amicus Curiae Supporting Petitioner, Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15-827), 2016 WL 6892531, at *23–24.

72 Brief for Respondent, Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15-827), 2016 WL 7321785, at *37.

and school districts.[73] Specifically, the organizations of school management professionals argued that Congress, and not the courts, is the best actor to define standards for IDEA since Congress authored it, and the statute exists in a greater context of federal education funding.[74] Overall, school districts have a clear interest in IDEA standards that are limited, and give deference to the school district in how they make decisions and allocate resources.

3. SPECIAL EDUCATION TEACHERS

The final key stakeholder in IDEA litigation is separate from the immediately-clear adversarial parties in IDEA litigation. However, it is implicit given the structure of IDEA's requirements that the teachers will form a separate stakeholder group. While their professional obligations will orient them to maximizing student outcomes, the realities of working in education will make teachers sensitive to the funding and human demands of applying the law. The text of IDEA itself identifies teachers by establishing that IEP teams include teachers and specialists.[75] IEP teams include a distinct class of special educational professionals who for all intents and purposes are responsible for executing the goals of not only IDEA but also the established state and local education policies and goals. Since a significant portion of school districts have unionized teachers,[76] there is a centralized space for these professionals to articulate their interests in IDEA litigation. The NEA's brief in *Endrew* made clear that teachers consider it their professional and moral duty to ensure students with disabilities have educational opportunities and that those opportunities exceed *de minimis* standard at issue in the case.[77] Additionally, the NEA has identified a number of policy goals related to IDEA with a clear focus on the full funding of special education.[78] Special education teachers, with their unique role in executing the provisions of IDEA, have stated concerns regarding ensuring student progress but also securing funding and recognizing the limitations of financial resources. When compared to other stakeholders, this balanced approach has a moderating and pragmatic influence in discussions surrounding IDEA provisions.

In combination, these three interests of key stakeholders provide three of the necessary prongs to evaluate IDEA mandates and specific LRE judicial standards.

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73 *See* Brief of Amici Curiae Colo. State. Bd. of Educ. & Colo. Dep't of Educ. Supporting Respondent, Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15-827), 2016 WL 7450495 at *14 (arguing that IDEA is part of a greater educational funding statutory landscape and requires unambiguous standards and defers implementation to the States).

74 Brief of AASA, et al. as Amici Curiae Supporting Respondent, Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15-827), 2016 WL 7450494, at *7–14.

75 20 U.S.C. §1414(d)(1)(B) (2012) (statutory section identifying the requirements of an IEP team).

76 *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, BUREAU LABOR STAT., https://www.bls.gov/news.release/union2.t03.htm (last modified Jan. 19, 2018) (table detailing the unionization rates of various professions, "education, training, and library occupations" had a union representation rate of 38.2%).

77 Brief Amicus Curiae of Nat'l Educ. Ass'n. Supporting Petitioner, Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15-827), 2016 WL 6916168, at *3–4.

78 NAT'L EDUC. ASS'N, *supra* note 10 (background section discussing the NEA's top priority related to IDEA being fully funded special education programs).

III. LEAST RESTRICTIVE ENVIRONMENT MANDATE TEXT AND EVALUATIVE FRAMEWORK

IDEA has multiple key provisions that are bound by the statute's purpose of opening educational opportunities to students with disabilities. With the FAPE at the core, the other key provisions fit together as a mosaic of statutory mandates. Within this mosaic, the LRE mandate looms large. As addressed in the introductory material of this Note, the LRE mandate answers the all-important "where" of a special educational program. It is a logistical concept that involves spatial and staffing decision making and has a direct impact on a student's educational opportunities.[79] The significance of LRE within the greater framework of IDEA calls for a workable judicial standard, as has been provided for the FAPE requirement.

In order to evaluate and establish a workable standard for the LRE, a brief analysis of the statute itself and related case law is necessary. From there, an analysis of the scholarship on the LRE mandate and an assessment of the interests of the key stakeholders in IDEA litigation can be utilized to build a framework for evaluation of judicial standards for LRE. Additionally, because of the interconnectivity of IDEA provisions, and the fact that FAPE—but not LRE—has been directly litigated before the Supreme Court, the holding of *Endrew* can be used to help assess judicial standards as well. Together, this analysis provides an evaluative framework for judicial standards for LRE.

A. STATUTORY TEXT

The section of IDEA that articulates the language behind the LRE mandate reads:

> (A) In general
>
> > 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.
>
> (B) Additional requirement
>
> > (i) In general
> >
> > A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State

79 *See supra* Part I.B.1 (the six requirements of IDEA).

> distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.
>
> (ii) Assurance
>
> If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that it will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.[80]

This text establishes three core components of the LRE that are also spelled out in the federal regulations for IDEA.[81] First, students with special educational needs are to be educated with their peers to the extent possible.[82] The LRE mandate is generally read as requiring "mainstreaming" of students with special educational needs.[83] Second, there is an acknowledgement by the use of the term "satisfactorily" that there is a line for when students mainstreaming can be set aside in favor of a segregated learning environment.[84] Third, funding plans and limitations are specifically barred from creating a situation where a student is educated in an environment that does not meet the goals of mainstreaming.[85]

The LRE has been addressed in a variety of litigation in federal district and circuit courts over the last four decades. In these cases, the courts have broadly emphasized the need for mainstreaming students with disabilities while also recognizing IDEA requires individualized education plans and accommodations as manifested by the IEP requirement.[86] School districts have had difficulty balancing mainstreaming and individualized education, and this is where litigation has often occurred.[87] The point of diversion between the federal courts on the issue of assessing the LRE requirement is what factors to consider when evaluating specific cases.[88] Thus, there is no national judicial standard for applying the LRE mandate due to a circuit split on what the most important factors are in considering whether or not a learning environment is in fact the "least restrictive."

80 20 U.S.C. §1412(a)(5) (2012).

81 34 C.F.R. §300.114 (2006).

82 20 U.S.C. §1412(a)(5)(A) (2012).

83 Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L. J. 189, 198 (2006).

84 §1412(a)(5)(A).

85 20 U.S.C. §1412(a)(5)(B)(i) (2012).

86 *See infra* Part IV (discussing and identifying key LRE case law).

87 Porto, *supra* note 6, at §2[a].

88 Farrell & Marx, *supra* note 11, at 1828–30.

B. CONTEMPORARY SCHOLARSHIP

As with other aspects of IDEA, the LRE mandate is a common subject of legal scholarship by both law students and legal and educational academics. Using the 2004 reauthorization of IDEA as a starting point, there has been extensive scholarship addressing the fundamental ideas behind the LRE mandate and trying to develop a national LRE standard. Shortly following the 2004 reauthorization, Ruth Colker argued against a rigid integration presumption. Instead, she advocated for the inclusion of additional factors (which are open for debate) in determining placements.[89] This article offered a challenge to the foundation of the mainstreaming/integration presumption and advocated for a more thoughtful analysis of what constitutes the "least restrictive environment."

Colker's article prompted responses that favored maintaining the integration presumption. Samuel Bagenstos argued that there is a risk in abandoning the integration presumption that children may be inappropriately driven back into segregated placements.[90] Marc Weber's response argued the integration presumption should be kept in place but applied in a nuanced manner. Specifically, he recommended that when parents resist integrated settings, the presumption be given less strength, but when school districts resist integration, the presumption be applied strongly and the decisions of the school districts closely scrutinized.[91] These two responses along with Colker's article demonstrate the scholarly debate surrounding the integration presumption that continues decades after the passage of IDEA.

Other authors have also argued for rethinking the integration presumption at the heart of the LRE mandate. Taking a similar approach to Colker, Bonnie Spiro Schinagle and Marilyn J. Bartlett made the case that in the wake of the initial passage of IDEA, integration of students with special education needs into regular classrooms was a primary goal due to their prior isolation.[92] However, the authors argued that in the decades since IDEA was passed, inclusion is no longer as critical a concern as society and educational opportunities and services have changed. Rather, in their view, the LRE mandate should be applied in a "truly individualized" manner, with a rejection of an automatic presumption for mainstreaming.[93] This argument goes to the heart of the LRE mandate and calls for a rethinking of its rationale and application.

Similarly, Mark T. Keaney argued that teacher interests should be accounted for in a reconceptualization of the debate about integrating special and general education students. The argument rests on the idea that teachers—when given adequate resources, options, and input on the feasibility of placements—will be able to

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

90 Samuel R. Bagenstos, Response, *Abolish the Integration Presumption? Not Yet*, 156 U. PA. L. REV. ONLINE 157 (2007), https://scholarship.law.upenn.edu/penn_law_review_online/vol156/iss1/4/.

91 Mark C. Weber, Response, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. ONLINE 174 (2007), https://scholarship.law.upenn.edu/penn_law_review_online/vol156/iss1/6/.

92 Bonnie Spiro Schinagle & Marilyn J. Bartlett, *The Strained Dynamic of the Least Restrictive Environment Concept in the IDEA*, 35 CHILD. LEGAL RTS. J. 229 (2015).

93 *Id*. at 249.

implement plans to the benefit of all.[94] This argument also calls for a reevaluation of the mainstreaming presumption and specifically calls for an expansion of the considerations included in applying the LRE mandate.

Other scholarship has sought to evaluate the existing LRE judicial standards and determine which judicial standard best fulfills the purposes of IDEA.[95] While the scholarship reaches different conclusions, it illustrates an academic desire to clarify the LRE mandate. The scholarship also collectively seeks to establish real guidance for parents, children, teachers, and school districts as they navigate the IEP process. In sum, both the questioning of the foundations of the LRE mandate and the search for a workable judicial standard demonstrate that the LRE mandate is ripe for both judicial and legislative reevaluation.

C. IDEA Stakeholder Interests in LRE Cases

When assessing potential national judicial standards for the LRE requirement, it is important to include the interests of key stakeholders in the broader IDEA statute in any analysis used. Given that LRE cases exist in the educational legal space, there is a defined pool of litigants and directly affected parties that should be examined. Falling into the broader category of IDEA litigation, the key parties that are typically involved in LRE cases are the same as those that are involved in the FAPE cases: parents and children, school districts, and special education professionals. The central question for all of these parties is to what degree should a child with special educational needs be mainstreamed. This Section briefly identifies party specific interests relating to the LRE mandate to build prongs of an evaluative framework for an LRE judicial standard.

1. PARENTS AND CHILDREN WITH SPECIAL EDUCATIONAL NEEDS

Parents and their children who have special educational needs have a natural interest in an LRE standard that allows the child to be placed in a regular classroom and gives them educational and social growth opportunities available to other children. However, in the complex world of special education, there is a recognition that the decision of what classroom to educate a child in requires more thought than merely pushing a student into a regular classroom. Specifically, the Federation for Children with Special Needs ("FCSN") advises parents to ensure that LRE decisions are made "individually and carefully."[96] The FCSN also addresses that an LRE is

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

95 *See, e.g.*, Adam B. Diaz, Note, *How the Mainstreaming Presumption Became the Inclusion Mandate*, 40 J. LEGIS. 220 (2013–14) (arguing for a test that uses the second prong of the Fifth Circuit *Daniel R.R.* test but using the factors developed in the Ninth Circuit *Rachel H.* case); Sarah Prager, Note, *An "IDEA" to Consider: Adopting a Uniform Test to Evaluate Compliance with the IDEA's Least Restrictive Environment Mandate*, 59 N.Y.L. SCH. L. REV. 653 (2014) (advocating for the Fifth Circuit *Daniel R.R.* test); Megan McGovern, Note, *Least Restrictive Environment: Fulfilling the Promises of IDEA*, 21 WIDENER L. REV. 117 (2015) (arguing for a test resembling the Fifth Circuit *Daniel R.R.* test).

96 *What is Available by Law*, FED'N FOR CHILD. WITH SPECIAL NEEDS, https://fcsn.org/sepo/law/ (last visited Jan. 23, 2019).

based on the educational needs of a child, not the limitations or accommodations of his or her disability.[97] This guidance to parents demonstrates a strong interest in mainstreaming that, while significant, is tempered by a desire for their children to be educated in an environment in which they can succeed educationally.

A specific illustration of a potential reason parents may not want their children mainstreamed is the risk of bullying faced by children with disabilities. In a 2018 study, it was found that children with autism spectrum disorder ("ASD") in regular classrooms were 6.5 times more likely to have been bullied than those in special placements. This was in part due to social skill deficits and difficulties with emotional reactivity.[98] While in many ways obvious, the interest of parents and children to have an educational setting that will promote growth is critical for the establishment of an effective LRE judicial standard. In fact, given the purpose and history of the statute, the needs of the students to have an LRE established for their educational needs should be the primary factor in establishing a judicial standard.

2. SCHOOL DISTRICTS

School districts have a clear and strong interest in compliance with IDEA, and thus with ensuring students are placed in regular classrooms to the extent possible. The public statements and policies of school districts generally reflect this desire and aspiration for compliance.[99] However, in the LRE space, school districts have an inherent issue of also recognizing the educational needs of other students. The potential for classroom disruption when children with special education needs are placed in regular classrooms does exist.[100] School districts also have an obligation to parents and children without special educational needs,[101] which is generally recognized publicly with an inclusive, if generic, mission statement.[102]

Thus, the interests of school districts include a consideration of the impact placements have on the general education classroom at large. This should not be the primary consideration in evaluating LRE judicial standards because of school district's desire to comply with IDEA. However, in the broader scope of education, it is an important issue to be included as an additional concern so that implementation

97 *Id.*

98 Benjamin Zablotsky, *Bullying and Mainstreaming in the Schools*, AUSTISM SPEAKS (Sept. 28, 2018), https://www.autismspeaks.org/blog/bullying-and-mainstreaming-schools.

99 *See Diverse Learners – Special Education Support Services*, CHI. PUB. SCHS., https://cps.edu/diverse-learners/Pages/ServicesandPrograms.aspx (last visited Jan. 23, 2019) ("Special classes, separate schooling, or other placements that remove students from the regular education classroom occur only when specified by a student's Individualized Education Program (IEP).").

100 *See* Christina Samuels, *Does Inclusion Slow Down General Education Classrooms?*, EDUC. WEEK (Nov. 3, 2017), http://blogs.edweek.org/edweek/speced/2017/11/does_inclusion_slow_down_general_education.html (discussing an international study that found teachers with no students with disabilities spent roughly 12% more time teaching than those with a classroom including students with special educational needs).

101 *See generally Introduction – Our Mission*, CHI. PUB. SCHS., https://cps.edu/About_CPS/vision/Pages/mission.aspx (last visited Jan. 23, 2019) (stating the Chicago Public Schools system mission is to "To provide a high quality public education for every child, in every neighborhood, that prepares each for success in college, career and civic life.").

102 *See Equity and Excellence*, N.Y. DEP'T OF EDUC., https://www.schools.nyc.gov/about-us/vision-and-mission/equity-and-excellence (last visited Jan. 23, 2019) ("Every child deserves an excellent education").

of LREs does not overwhelm general education classrooms.

3. SPECIAL EDUCATIONAL PROFESSIONALS

The final key stakeholders in LRE cases are special education professionals. Much like the school district's legal obligation, these school employees have a professional obligation to ensure that students are placed in an educational environment where they can learn and grow. However, as demonstrated by the statements of the NEA and similar organizations, the fact that IDEA mandates are not fully funded by the federal government greatly complicates the situation.[103] Additionally, there is the reality that in order for IDEA to be executed properly, there needs to be a trained educational workforce capable of implementing it. A 2012 study found that nearly a quarter of special education teachers in the rural U.S. left their positions due to issues related to stress and lack of support.[104] The inherent stress of paperwork and coordinating with multiple professionals to plan and implement IEPs is compounded by a disconnect many special education professionals experience with regular educational teachers.[105] The funding shortfalls, and difficulties facing special education teachers, warrant including the practical feasibility of a learning environment for a student with special educational needs when considering a workable LRE judicial standard.

D. SUPREME COURT GUIDANCE FOR LRE

An additional important factor for an LRE evaluative framework is the guidance of the Supreme Court. While the Supreme Court has never ruled directly on an LRE standard, it has given guidance on other parts of IDEA. IDEA is notable in the educational community for its multiple critical pieces and their complicated interactions. The intricate interacting pieces of the statute[106] can be likened to a mosaic, and given its challenges, a puzzle.[107] Accordingly, when the Supreme Court gives guidance on one portion of the statute, this advice can reasonably be applied to the other pieces. The purpose of IDEA, to provide educational access for children with special educational needs, is only feasible when the different provisions inform and strengthen each other. The Supreme Court's standard for the critical FAPE component in *Endrew*, that the student's educational plan must include an element of progress, is applicable to the LRE requirement. The judicial standard for LREs should include a consideration of whether the learning environment or the degree of mainstreaming is suited for a student's educational progress. Much like the Supreme Court's analysis of the FAPE requirement, neither *de minimis* growth nor a static educational situation stemming from an LRE will meet the purposes of IDEA.

103 NAT'L EDUC. ASS'N, *supra* note 10.

104 Christina A. Samuels, *Why Special Educators Really Leave the Classroom*, EDUC. WEEK (Jan. 24, 2018), https://www.edweek.org/ew/articles/2018/01/24/why-special-educators-really-leave-the-classroom.html.

105 *Id*.

106 *See supra* text accompanying note 4.

107 *See* Allison Zimmer, *Solving the IDEA Puzzle: Building a Better Social Education Development Process Through Endrew F.*, 93 N.Y.U. L. REV. 1015, 1019 (Oct. 2018).

Further, such a situation ignores the explicit guidance of the Supreme Court on a closely related and essential provision of IDEA. If the LRE is not appropriate for real educational progress, then the other provisions of IDEA will be complicated, and the child will likely fall short of educational goals.

E. EVALUATIVE FRAMEWORK

A consideration of the Act's text, the interests of key stakeholders, and the guidance from the Supreme Court are all necessary for a workable LRE judicial standard. Together they comprise a framework that can be used to evaluate existing LRE judicial tests for their viability as a national standard. The framework is composed primarily of whether a standard is clearly oriented towards mainstreaming and ensuring a capacity for educational progress for the student with special educational needs. This component addresses the mainstreaming language of IDEA itself, the progress-oriented guidance of the Supreme Court, and the interests of parents. However, given the importance of other stakeholders in IDEA cases, the consideration of general feasibility (in terms of both finances and staffing resources) is included in the framework. This consideration addresses the interests of school districts and special education professionals, who are essential to the successful implementation of IDEA. So, in summary, a workable LRE judicial standard will include elements that are primarily oriented towards the concerns of student progress and mainstreaming, with a secondary concern of whether or not the LRE in the specific case is feasible logistically and financially.

IV. CIRCUIT SPLIT: THE THREE LRE JUDICIAL STANDARDS

There are three prominent LRE judicial standards worth examining using the evaluative framework constructed in Part III. They are the tests utilized by the various federal circuit courts when confronted with cases alleging a school district's failure to fulfill IDEA's LRE mandate. This Section will assess their cases of origin and identify the tests to be considered.

A. *RONCKER*

The Fourth, Sixth, and Eighth Circuits use an LRE test rooted in the 1983 Sixth Circuit opinion Roncker v. Walter.[108] In that case, Neill Roncker was a nine-year-old boy from Ohio who had severe intellectual challenges. In determining an appropriate placement for Roncker under IDEA, the school district made the determination to place him in a special county school. The school exclusively served children with severe intellectual disabilities and challenges. The result was that Roncker did not have any contact with non-challenged students.[109] Roncker's parents filed suit claiming that while their son required special educational instruction, it could be provided in a setting where he was in contact with children who did not have

108 *See* Roncker v. Walter, 700 F.2d 1058 96th Cir. 1983); N.W. *ex rel*. A.W. v. Nw. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987); DeVries v. Fairfax Cty. Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989).

109 *Roncker*, 700 F.2d at 1060.

intellectual disabilities, and thus the school district failed to meet the statutory LRE mandate. The district court found in favor of the school district, finding that IDEA (then the EHA) gave school districts broad discretion in determining placements for children with intellectual disabilities. The district court cited Rockner's lack of progress while temporarily in a school with children with and without intellectual disabilities as reason enough for the school district's decision.[110]

On appeal, the Sixth Circuit found that the district court's deference to the school district was not the appropriate standard for assessing whether a school district has met the LRE mandate. Rather, the court established a baseline of mainstreaming to the maximum extent appropriate, per Congressional preference.[111] As a standard and test, the court directed lower courts to determine whether the attributes and services that make a segregated learning facility superior for a given child can feasibly be provided in a non-segregated setting. If they can be, then the LRE mandate has not been met if the student is placed in the segregated facility. The Sixth Circuit remanded the case for application of this standard.[112] This amounts to a one factor test applicable when directly comparing a regular classroom placement with a segregated facility considered superior for that child's needs, wherein the feasibility of providing the services of a segregated facility in a non-segregated one is the determinative factor.

B. *DANIEL R.R.*

The Third, Fifth, and Tenth Circuits use an LRE judicial standard developed in the 1989 Fifth Circuit case *Daniel R.R. v. Board of Education*.[113] The case involved Daniel R., a child with Down syndrome, who had mental and speech impairments. Daniel's parents wanted him to receive his education in a regular education classroom and he was initially placed in such a classroom for part of his pre-Kindergarten school day. However, shortly after the beginning of his school year, it became clear to the teacher and school administration that the regular classroom was not a viable option for Daniel as he required constant individual attention. In order for Daniel to comprehend the curriculum, it would need to be significantly altered. Thus, the school district's special education officials determined that Daniel would be taken out of a regular classroom setting.[114] Daniel's parents followed the procedural process to try to get their son back into a regular education classroom. However, the administrative hearing officers and district court all found for the school district on the grounds that Daniel was not receiving an educational benefit in the regular classroom.[115]

On appeal, the Fifth Circuit upheld the decision of the district court that the school district had met the LRE mandate for Daniel. The court came to this

110 *Id*. at 1061.

111 *Id*. at 1063.

112 *Id*.

113 *See* Daniel R.R. v. Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989); Oberti v. Bd. of Educ. of Clementon Sch. Dist., 995 F.2d 1204, 1215 (3d Cir. 1993); L.B. v. Nebo Sch. Dist., 379 F.3d 966, 977 (10th Cir. 2004).

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

115 *Id*. at 1040.

conclusion through the application of a multi-factor test constructed in the wake of *Rowley*. The court first considered how the school district took steps to accommodate the student in a regular education environment, while recognizing that there are limits to what a school district is required to provide.[116] The next two factors considered were: whether a child would receive an educational benefit in a regular education environment and a balancing of the benefits of both regular and special education for the child. The final factor was an assessment of what effect a child with special educational needs would have on a regular education environment and the learning of regular education students.[117] The court also articulated a second prong using language from the statute. If a court determines that "education in the regular classroom cannot be achieved satisfactorily," the court must look at whether the child has been mainstreamed to the extent appropriate.[118] After considering these factors, the court concluded that the school district took sufficient steps and made efforts to accommodate Daniel in the regular education environment by providing supplementary aides and services. They also determined that he received "little if any" educational benefit in the regular education classroom and that he was making some progress in a special education environment. Finally, they held that Daniel's presence in a regular classroom was unfair to the rest of the class since the teacher was required to spend a significant amount of time attending to just one student.[119]

Thus, the *Daniel R.R.* test has two prongs. The first prong considers four non-exhaustive factors: (1) the efforts of the school district to mainstream; (2) the educational benefit; (3) a balancing analysis; and (4) the impact a regular classroom placement has on the regular education students. The second prong, used when regular classroom placement is not workable, is whether the child has still been mainstreamed to the extent possible.

C. *RACHEL H.*

The Ninth and Eleventh Circuits also use a multi-factor test in assessing a school district's application of the LRE mandate that is a slight variation on the *Daniel R.R.* test. The test, adding a factor for cost, was first utilized in the Eleventh Circuit,[120] but is most clearly articulated in the 1994 Ninth Circuit case *Sacramento Unified School District v. Holland ex. rel. Rachel H.*[121] In that case, Rachel H., a nine-year-old student with moderate mental disabilities, had an IEP that placed her in a special education classroom for half the time and a regular education classroom for the other half. Her parents, seeking greater mainstreaming, requested that she spend more time in a regular education classroom. The school district declined by saying that Rachel

116 *Id*. at 1048 ("States need not provide every conceivable supplementary aid or service to assist the child").

117 *Id*. at 1049.

118 *Id*. at 1050.

119 *Daniel R.R.*, 874 F.2d at 1050–51.

120 *See* Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991); *See also* Sch. Dist. of Wis. Dells v. Littlegeorge, 295 F.3d 671, 672 (7th Cir. 2002) (acknowledging cost as a factor in evaluating the LRE mandate).

121 Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1400 (9th Cir. 1994).

H. would not benefit from being in a regular classroom fulltime.[122] The administrative hearing officers and district court found in favor of Rachel H. The district court applied the following four-factor test to conclude full mainstreaming was required:

> (1) the educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect of Rachel's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming Rachel in a regular classroom.[123]

On appeal, the Ninth Circuit determined the four-factor test was appropriate for LRE cases, with its inclusion of cost as a factor.[124] The court recognized its origins in *Daniel R.R.* but also followed *Greer* by adding the cost of mainstreaming as a consideration available to the courts.[125] Further, the court agreed with the district court's application of the test and affirmed the ruling in favor of Rachel H. The district court had found that Rachel received "substantial educational benefits" from being in a regular education classroom, developed social skills from her placement with non-disabled children, and was not a distraction in the classroom.[126] Additionally, at trial, the school district failed to demonstrate evidence supporting the idea that mainstreaming Rachel H. was more expensive than the segregated setting or was otherwise overly financially burdensome for the school district.[127] Thus, the Ninth Circuit established an LRE judicial standard that follows the main points of the *Daniel R.R.* standard, but added a clear consideration of costs.

V. ANALYSIS OF SIGNIFICANT LRE JUDICIAL STANDARDS

In order to determine the viability of the three current primary judicial tests as a national standard, they need to be analyzed under the evaluative framework constructed in Part III. This framework considers first elements that are primarily oriented toward enabling student progress and mainstreaming, an interest of parents and children primarily but also the other key stakeholders and consistent with Supreme Court precedent. The evaluative framework then has a secondary consideration of whether the LRE in the specific case is feasible both logistically and financially, reflecting the concerns of school districts and special education professionals.[128]

122 *Id*. at 1400.

123 *Id*. at 1400–01.

124 *Id*. at 1404.

125 *Id*. (acknowledging district court's reliance on *Greer*, 950 F.2d at 697 (including cost as a factor)).

126 *Rachel H.*, 14 F.3d at 1401.

127 *Id*. at 1401–02.

128 *See* discussion *supra* Part III.E (establishing the evaluative framework).

A. *Analysis of Roncker Standard*

The *Roncker* standard offers a comparative analysis for LRE cases. It requires courts to look at features of segregated learning environments and determine if they can be reasonably incorporated into a regular learning environment. Under the first prong of the evaluative framework, which requires a focus on progress and mainstreaming, this standard seems ambiguous. The *Roncker* standard does not explicitly state that the environment where advantageous features can work best will be the best one to provide educational progress. This lack of clarity leaves the test open to the problem the Supreme Court identified regarding the *Rowley* FAPE standard. Namely, the difference between the environments could be negligible, and in fact the movement of a child between such environments could pose a problem that impairs educational progress in such a scenario. While these situations are hypothetical, they demonstrate that the *Roncker* test does not clearly respond to the first prong of analysis regarding the strong emphasis on *Endrew*'s progress language.

The *Roncker* standard responds more favorably to the second prong of analysis in that it incorporates feasibility. By inquiring as to the applicability of features of a segregated learning environment to a regular one, it is giving the school districts a certain amount of discretion. It gives them the ability to look at their work force and resources and determine how to practically accommodate the needs of children with special educational needs. However, it falls short in that it does not explicitly consider financial costs, an issue that occurs in IDEA litigation. While this vagueness is not as significant as that in the first prong, it still falls short.

Overall, the *Roncker* standard is not a workable national standard for LRE litigation. It is too vague in key points of litigation: the need for real student progress and the consideration of financial costs. Further, it has limited use and would not necessarily be applicable to all LRE cases. As has been observed, it is only applicable if a segregated learning environment is determined to be superior.[129] Additionally, there are cases where the LRE issue centers on services provided (aides, technology, etc.) rather than the physical classroom space. Under such a standard, the key stakeholders will be left to struggle with the vagueness, and courts will be forced to compare two different educational environments, one potentially hypothetical, on a regular basis.

B. *Analysis of Daniel R.R. Standard*

The *Daniel R.R.* standard offers a more robust test as it evaluates the action of the school district to achieve mainstreaming, the educational benefits provided to the students, a balancing of special and regular education, and the impact on the regular classroom environment. Applying the Part III evaluative framework, the standard responds favorably to the primary progress and mainstreaming prong of analysis. *Daniel R.R.*'s test starts by examining how a given school district attempted to accomplish mainstreaming the student. The second and third *Daniel R.R.* factors focus on a real educational benefit and balance the benefits and detriments of special and regular education options. These factors respond favorably to the progress

129 Farrell & Marx, *supra* note 11, at 1830.

language of *Endrew* by bringing educational benefits to the forefront and allowing flexibility in comparing special and regular education.

In terms of the feasibility prong, the standard fares relatively well. The *Daniel R.R.* court's language recognizing the limits of what school districts could provide is incorporated into the first factor.[130] This provides protection to school districts from financial and labor crushing accommodations. It also critically acknowledges the impact of mainstreaming on the regular education classroom. This is an important feasibility consideration for school districts, both in terms of the capacity of their teachers and their responsibility to educate general education students.

Overall, the *Daniel R.R.* standard is viable under the Part III evaluative framework. The concerns of all the key stakeholders are addressed. First and most importantly, its focus on mainstreaming and educational benefits addresses the student progress goal of IDEA that is common to the stakeholders but chief for children and parents. By balancing the benefits available in different learning environments, they are giving school districts flexibility in figuring out different ways to accommodate students. Finally, by acknowledging the impact mainstreaming can have on a regular classroom environment, the standard is addressing the concerns of special education professionals by ensuring that mainstreaming does not inordinately strain educators or come at the expense of their professional responsibility to regular education students.

C. *ANALYSIS OF RACHEL H. STANDARD*

Derived from the *Daniel R.R.* standard, the *Rachel H.* standard also fares favorably under the evaluative framework. The first and second factors strongly reflect the first prong of the analysis. The first factor clearly reflects the mainstreaming goal of the statute and *Endrew*'s progress language by assessing educational benefits and providing a comparison between educational environments. The second factor strengthens the connection by providing for the consideration of non-academic growth. This is a recognition of the holistic aspect of the educational process that includes social growth and general human development—matching the spirit of *Endrew*.

The standard also fares very well under the feasibility prong. Like *Daniel R.R.*, the *Rachel H.* standard considers the impact of mainstreaming on the regular education classroom. This consideration provides for true feasibility, because it allows school districts and education professionals to consider their school community as a whole when determining placements. The fourth factor of the test is truly what sets *Rachel H.* apart in terms of the feasibility prong. By explicitly calling for the consideration of costs of mainstreaming, it allows school districts true flexibility when dealing with strained resources. It also addresses a key policy issue surrounding IDEA: proper federal funding. Thus, *Rachel H.* offers a comprehensive response to the feasibility concern. It allows for consideration of the complexity and challenges of administrating a school both in terms of obligations to maintain an effective learning environment for all students and the significant issue of financial

130 Daniel R.R. v. Bd. of Educ., 874 F.2d 1036, 1039 (5th Cir. 1989).

strain.

In sum, *Rachel H.* provides the most viable national LRE standard. It already incorporates the subsequent Supreme Court guidance on IDEA in *Endrew*, as well as the strong language favoring mainstreaming in the statute itself, and it offers real discretion and deference to educators and administrators by effectively incorporating feasibility. All the key stakeholders and their core concerns fare well under this standard. Parents and children get a focus on real and holistic educational progress and benefits. School administrators get to consider finances in an era when many school system budgets are strained. The cost consideration addresses a key policy concern of special education professionals (funding). Also, this group's interests are addressed with the consideration of professional responsibilities to all students by looking at the impact on regular education classrooms.

VI. LEGISLATIVE ACTION

The clarification of a judicial standard is important for resolving the open legal question of how to apply the LRE mandate. However, as a statute, the primary responsibility of clarifying and updating IDEA lies with Congress. Indeed, for a significant portion of the statute's history it did just that. The statute was regularly reauthorized through 2004. Since then, attempts to reauthorize the statute have failed. There have been proposals for reauthorization in Congress since then, primarily focused on fully funding special education programs through legislation, including the IDEA Full Funding Act. Yet, the various iterations of the IDEA Full Funding Act[131] have failed to advance in several Congresses.[132]

The failure of these reauthorization attempts is best understood with the context of Congress's struggle with the No Child Left Behind Act.[133] The Act, which was signed into law in 2002 was designed to improve educational opportunities for disadvantaged students and required states to administer standardized tests for evaluating school performance. Over time, the rigid federal standards and sanctions led to the law becoming very unpopular. For example, schools for at-risk students with 88% graduation rates were branded "low performance" under No Child Left Behind's standards.[134] Yet, it took until 2015 for Congress to finally remove the national provisions of the law and restore much of the control over public education to the states.[135] This fourteen-year span between the law's enactment and its repeal, despite strong criticism, demonstrates Congress's slow, if existent, pace with

131 IDEA Full Funding Act, H.R. 2902, 115th Cong. (2017); IDEA Full Funding Act S.130, 114th Cong. (2015); IDEA Full Funding Act, S. 2789, 113th Cong. (2013); IDEA Full Funding Act, S. 1403, 112th Cong. (2011); IDEA Full Funding Act, S. 1652, 111th Cong. (2009).

132 Andrew Ujifusa, *Full Funding for Special Education*, EDUC. WEEK (June 15, 2017), http://blogs.edweek.org/edweek/campaign-k-12/2017/06/special_education_full_funding_congress_bipartisan.html.

133 No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425.

134 Motoko Rich & Tamar Lewin, *No Child Left Behind Law Faces its Own Reckoning*, N.Y. TIMES (Mar. 20, 2015), https://www.nytimes.com/2015/03/22/us/politics/schools-wait-to-see-what-becomes-of-no-child-left-behind-law.html.

135 Lyndsey Layton, *Obama Signs New K-12 Education Law that Ends No Child Left Behind*, WASH. POST (Dec. 10, 2015), https://www.washingtonpost.com/local/education/obama-signs-new-k-12-education-law-that-ends-no-child-left-behind/2015/12/10/c9e58d7c-9f51-11e5-a3c5-c77f2cc5a43c_story.html?utm_term=.be45f68dd4d1.

updating education laws.

While the challenges to updating and reauthorizing IDEA in Congress are clear, it is still Congress's responsibility to ensure the law is responding to the needs of the American people. For the LRE mandate, Congress should take its first opportunity to codify the *Rachel H.* test and incorporate *Endrew*'s progress language. By doing so, Congress would greatly aid the application of IDEA and realization of its goals. Likewise, Congress can and should clarify the FAPE standard and expand upon *Endrew*'s holding. Additionally, addressing the funding of special education programs would meet the interests of key IDEA stakeholders. Overall, Congress must revisit IDEA to strengthen it and bring it into accordance with the needs and interests of children, parents, and schools.

CONCLUSION

Approaching five decades since its passage, IDEA is a noble and multifaceted statute that has certainly improved the lives of children with special educational needs. However, the "puzzle" construction of the provisions suggests that there is still significant judicial work to be done establishing clear standards for the different provisions. In particular, the least restrictive environment mandate of the statute does not have a national standard and the federal circuits have developed different frameworks. By addressing the legislative purpose of IDEA, the Supreme Court's precedent on the related free appropriate public education provision of IDEA, and the realities faced by the stakeholders of modern special education, the test developed by the Ninth Circuit in *Rachel H.* presents a viable national standard for LRE cases and can help resolve IDEA litigation. Additionally, *Rachel H.* provides a blueprint for Congress to clarify the LRE mandate once it eventually reauthorizes the statute. Doing so will fulfill Congress's responsibility to keep the statute up to date and ensure that IDEA becomes a more positive force in American education.