

# The Implications of School Choice for Children with Disabilities

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Imagine two brothers, Mike and Tom. They both attend elementary school in a district that recently implemented a Magnet School Choice Program. Ideally, Mike and Tom, like all other children in the district, will have their choice of the seven elementary schools in their district. But Tom has a learning disability and a hearing impairment, and requires special teachers and resources available at only two schools. Therefore, although Mike can choose to attend any school in the district, only two schools can serve Tom's needs. While some readers will find this situation acceptable, others will find it an affront to principles of equality. Unfortunately, the courts and Congress have not provided any definitive answers to this dilemma.

Choice is a new beast. In 1975, when Congress adopted the Individuals with Disabilities Education Act,<sup>1</sup> no students were offered a choice among public schools. All students were assigned to schools that offered substantially the same educational programs. Today, however, the hot topic in education is choice: *choice* through vouchers for use at private schools; *choice* among public magnet schools; *choice* to give parents greater input in the process of educating their children. In light of this increasing focus on choice, it is surprising that advocates of choice-based reforms have not yet addressed the implications of their proposals for an important segment of school populations—students with disabilities.<sup>2</sup> In the past two decades, Congress and the federal courts have developed a substantial body of law governing the rights of children with disabilities in the realm of education. Proponents of school choice, however, have made little effort to demonstrate how choice schemes might comport with the policy goals of this body of law.

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1. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. IV 1992)). The statute was originally titled the Education of All Handicapped Children Act of 1975 (EACHA), amending the Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 121 (1970). It was most recently renamed the Individuals with Disabilities Education Act (IDEA) in the 1992 Amendments to the Act, Pub. L. No. 101-476, 104 Stat. 1141 (1990).

2. Disabled students are defined as children who have a learning disability (e.g., dyslexia); a speech impairment; a physical, health, hearing, or visual impairment; emotional disturbance; or mental retardation. Many disabled children contend with more than one of the above difficulties. SYLVIA FARNHAM-DIGGORY, *THE LEARNING DISABLED CHILD* 9-13 (1992).

Once a state or local school district decides to offer students and parents a choice among schools, to what degree must it make the same choice available to students with disabilities? The dilemma for the student with disabilities lies in the choice between a desired academic program at one school and necessary special services at another. The choice system precipitates the dilemma of either preparing every school to accommodate students with disabilities or denying these children admission to certain schools.<sup>3</sup>

The central object of this Note is to bring attention to the equal access issues the school choice debate raises for children with disabilities. Any decision to implement school choice must take into account existing legal requirements for the education of children with disabilities. This Note is divided into three parts. Part I examines some of the reasons why choice is posited as a response to the ailments of our education system. I describe some basic attributes of the five types of choice proposals most frequently discussed in the school choice debate, including the private school voucher model and the public magnet school model. Part II discusses the legal requirements regarding the education of students with disabilities. I review case law leading to the enactment of federal legislation affecting children with disabilities—section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA)—and subsequent court decisions interpreting them. In particular, I focus on the “mainstreaming” and “least restrictive environment” requirements of the IDEA and the values that underlie

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3. While critics of choice have made passing reference to its implications for the disabled child, few have examined the issue in any detail. See Joseph R. McKinney, *Special Education and Parental Choice: An Oxymoron in the Making*, 76 Educ. L. Rep. (West) 667 (1992) (addressing district level educational decisionmaking but not the new dichotomy under choice between mandates of law governing states and school districts and movement of all decisionmaking responsibility from state and district levels to individual schools); *Davis v. Grover*, No. 90-2576 (Wis. Cir. Ct. Aug. 6, 1990) (holding that private schools participating in Milwaukee Choice Plan are not obligated to provide education for children with disabilities because private schools do not receive federal aid); CLIFFORD W. COBB, *RESPONSIVE SCHOOLS, RENEWED COMMUNITIES* 65-66 (1992) (dedicating two paragraphs to discussion of federal law requirements regarding education of children with disabilities and problems these requirements present for choice scheme); MANHATTAN INST. FOR POLICY RESEARCH, *EDUCATION POLICY PAPER NO. 2, THE RIGHT TO CHOOSE: PUBLIC SCHOOL CHOICE AND THE FUTURE OF AMERICAN EDUCATION* 31 (1989) (asserting that children with disabilities should be included in a choice program, as should everyone, but not detailing means); Theresa E. Cudahy, *Federal Statutory Requirements for Accommodating Handicapped Students in School Choice Programs*, 1991 U. CHI. LEGAL F. 293 (discussing proposal of calibrated tuition vouchers for students with disabilities in voucher choice program); Julie K. Underwood, *Choice Is Not a Panacea*, 71 Educ. L. Rep. (West) 599, 606-07 (1992) (discussing section 504 of Rehabilitation Act of 1973 and hypothetical involving student with disabilities and decision whether or not to participate in a choice program); Gene I. Maeroff, *School Voucher Proponents Should Come Clean*, WALL ST. J., Dec. 3, 1992, at A15 (acknowledging that the education of students with disabilities is a responsibility borne by public schools but not private schools); Mitchell Miller, *Choice Proposal Under Scrutiny*, Apr. 18, 1989, available in LEXIS, Nexis Library, UPI File (quoting Maurice Berube, an education professor: “What choice does is actually create a new form of segregation, along class lines, among students at risk . . . minorities and the handicapped.”); *National PTA Opposes Wisconsin Judge’s Voucher Decision*, PR Newswire Ass’n., Aug. 8, 1990, available in LEXIS, Nexis Library, Currnt File (discussing national PTA’s opposition to Wisconsin judge’s decision that private schools that received public funds through an education voucher system did not have to provide education for children with disabilities).

them to demonstrate that they are not merely policy goals but mandates of federal law. Part III closely scrutinizes the possible incentives at work in a system of choice and explores the implications of choice-based reforms for the child with disabilities. I conclude that although courts would likely condone a carefully designed choice system, finding it compatible with the letter of section 504 of the Rehabilitation Act and the IDEA, even the most carefully designed choice system would have trouble complying with the spirit of these laws.

The IDEA is based on the principle that children with disabilities are entitled to the same educational opportunities as their nondisabled peers. But the IDEA holds states and local educational agencies, not individual schools, responsible for providing a “free appropriate public education” to all children with disabilities.<sup>4</sup> Moving decisionmaking power to the individual school level under a choice program creates a gap between who decides whether a school will offer special education and who federal law holds responsible for the education of children with disabilities. I argue that market pressures create a powerful disincentive for individual schools to provide special education programs. A choice school system that does not provide special education at every choice school does not provide children with disabilities equal access to the same educational opportunities as their nondisabled peers. Therefore, such a system violates the spirit of section 504 and the IDEA.

#### I. THE EMERGENCE OF CHOICE AS A MEANS OF SCHOOL REFORM

The educational system in the United States is troubled. Concerns for the health of our educational system first gained national attention with the release of the report *A Nation at Risk*.<sup>5</sup> The report indicated that America’s schools were “being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”<sup>6</sup> According to the National Commission on Excellence in Education, “[o]ur society and its educational institutions have lost sight of the basic purposes of schooling, and of the high expectations and disciplined effort needed to attain them.”<sup>7</sup>

Choice has recently emerged as one solution to the failings of the present system. Choice advocates argue that giving parents the ability to choose their children’s schools will inject free market competition and greater democratic control into the management and design of schools, thereby breaking the current government monopoly on public education. This new competition will spur schools to unprecedented excellence. Proponents of choice further contend

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4. 20 U.S.C. § 1400(c) (Supp. IV 1992).

5. NATIONAL COMM. ON EXCELLENCE IN EDUC., *A NATION AT RISK*, reprinted in *THE GREAT SCHOOL DEBATE: WHICH WAY FOR AMERICAN EDUCATION?* 23 (Beatrice Gross & Ronald Gross eds., 1985).

6. *Id.* at 23.

7. *Id.* at 24.

that if schools compete for their funding and students, as do other businesses, they will innovate and improve. A more efficiently run system and academic improvement will be the natural result.

#### A. *Objectives of Choice*

The primary objective of any choice plan is to improve schools—to maximize academic excellence. Although the current assumption is that every public school within a district provides roughly the equivalent education, in fact, tremendous inequalities exist among schools. Choice advocates argue that rather than passively accept the assignment of students to unequal schools, we should acknowledge and aspire to have differences in schools and allow parents and students to choose among them, thereby rewarding the good and weeding out the bad. As then Secretary of Education Lauro Cavazos explained:

[Choice will] offer opportunities to inject vitality into the education system. [Choice] programs encourage teachers and principals to become innovators and to structure curriculum to meet high academic standards. They also involve parents in the school and encourage students to become learners.<sup>8</sup>

The crux of choice plans is that schools are no longer assumed to be the same. Choice is meant to provide diversity within education. As school management decisions shift from the broader district level to the individual schools, each school provides its own special outlook and system of education to attract students to its classrooms. Difference among schools gives parents a reason to choose one over another. As Congressman Steve Bartless (R-Tex.) stated in a U.S. Department of Education report, choice systems provide a competitive marketplace for schools, “[s]o each school can offer a *unique educational opportunity* to all of its students and that will encourage students to come to school.”<sup>9</sup>

Advocates claim that choice will help achieve these goals in several ways. Proponents of choice focus first and foremost on parental involvement as a valuable contribution, as well as a mechanism of accountability.<sup>10</sup> Parents can

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8. U.S. DEP'T OF EDUC., CHOOSING BETTER SCHOOLS: THE FIVE REGIONAL MEETINGS ON CHOICE IN EDUCATION I (1990) [hereinafter CHOOSING BETTER SCHOOLS].

9. *Id.* (emphasis added).

10. MANHATTAN INST. FOR POLICY RESEARCH, *supra* note 3, at 12. Explaining the rationale behind choice and competition in the schools, John Chubb asserts:

The answer is simple: competition. Private schools, regardless of their objectives, must please parents. They are under competitive pressures to please parents. Because of those pressures, they are encouraged to delegate decision making down to the level where parents can be most effectively engaged, where the needs of parents can be understood, where a bond can be established between the school and the parent to ensure that the parent is happy enough to continue patronizing the school.

*Id.*

provide valuable input into the formulation of the education program for their children.<sup>11</sup> Having a greater voice in their child's education gives parents a greater stake in the success of the school.<sup>12</sup> If a school does not meet their standards, parents can move their children to another school, taking their child's funding with them. As schools lose their monopoly and guaranteed enrollment, they will have a greater incentive to meet parents' demands for improvement.<sup>13</sup> Furthermore, under choice, the number of families involved in selecting their children's schools will expand.<sup>14</sup> Choice advocates believe that parental involvement will translate into greater parental commitment to schools and to their children's education.<sup>15</sup>

Following this line of argument, the now famous team of John Chubb and Terry Moe propose choice and democratic control as the answer to the lack of consumer power over schools. In their view, today's schools are bureaucracies that were not designed to take into account the demands of their ultimate consumers, parents and children. Chubb and Moe posit that this lack of control accounts for our educational system's failure to meet the public's needs and wants.<sup>16</sup> Choice proponents believe that these proposals are necessary to change the structural and institutional problems of schools, which are now operating as dysfunctional public monopolies without market controls.<sup>17</sup> Because their interest lies in perpetuating themselves rather than in best serving their consumers, these monopolies are characterized by teacher job security, a guaranteed block of consumers, and publicly regulated curricula, rather than by innovation and improvement. Choice advocates fear that without competition to alleviate distortions, such as mismatched resources and needs, and without a check on schools' power, U.S. public education has little chance of improving.<sup>18</sup> Given these premises, one proponent of choice asserts that

11. CHOOSING BETTER SCHOOLS, *supra* note 8, at 11 (identifying program in Charlotte, N.C., in which parents help plan school improvements, and spend time in media center, cafeteria, playground, and classrooms).

12. CHOOSING BETTER SCHOOLS, *supra* note 8, at 10.

13. LAURO F. CAVAZOS, SECRETARY OF EDUCATION, A REPORT TO THE PRESIDENT, EDUCATING OUR CHILDREN: PARENTS AND SCHOOLS TOGETHER 2-3 (1989).

14. Edward B. Fiske, *Wave of Future: A Choice of Schools*, N.Y. TIMES, June 4, 1989, at A32 (asserting that liberals see choice as way to extend to the poor options that the wealthy already have through buying homes in good school districts); *see also* NANCY PAULU, U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH & IMPROVEMENT, IMPROVING SCHOOLS AND EMPOWERING PARENTS: CHOICE IN AMERICAN EDUCATION 21 (1989). Wisconsin's Governor Thompson stated, "Parental choice will provide an equal starting line of opportunity for all of our students, an elevator of opportunity for individuals from the inner city to have the same educational opportunities that your children and my children have." *Id.*

15. CAVAZOS, *supra* note 13, at 2-3 (claiming that if parents are involved in selecting the type of education their children will receive, they will become fundamentally involved in their children's schooling).

16. *See generally* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 20-24, 26-38 (1990).

17. CLINT BOLICK, THE HERITAGE FOUNDATION, A PRIMER ON CHOICE IN EDUCATION: PART I—HOW CHOICE WORKS 7 (1990).

18. Peter Brimelow, *Competition for Public Schools*, in THE GREAT SCHOOLS DEBATE, *supra* note 5, at 345, 351-52.

“the lessons of the 1980’s are clear: spending more money and fiddling modestly will not improve the performance of American students.”<sup>19</sup> Real progress and academic excellence will only come through competition.

### B. *Models of School Choice*

Despite the general consensus on broad objectives, choice comes wrapped in many packages. Some choice proposals incorporate both public and private schools, while others deal only with public schools. While choice proposals vary considerably in their mechanics, the promise of increased free market competition underlies them all.

Three proposals in particular focus strictly on providing choice within the public school system: the Magnet Schools Approach, the Open Enrollment Approach, and the Controlled Choice Approach. Originally developed to mitigate racial segregation in public schools, magnet schools offer special programs designed to attract students from all racial and socioeconomic backgrounds.<sup>20</sup> Today, magnet schools have received increasing attention as a means of improving school quality. Under the Magnet School Approach, school programs are designed to incorporate a specialized curriculum and to bolster the school’s academic reputation in order to draw students to the school’s classrooms. Magnet schools generally focus on particular themes, either through specialized academic courses such as math, science, or foreign languages, or through particular learning methods.<sup>21</sup> For example, one magnet elementary school in New York developed a special museum program to take advantage of its proximity to the Hudson River Museum. Other magnet schools in the same district are “devoted to government, performing arts, computers and gifted and talented classes.”<sup>22</sup> Such specialization is believed to be the key to increased academic excellence.<sup>23</sup>

The Open Enrollment Approach is another form of choice offered within the public school system. These programs, designed on intradistrict or interdistrict levels, allow students to apply to the school of their choice within a specified area. Again, the driving idea behind the Open Enrollment Approach

19. BOLICK, *supra* note 17, at 3.

20. Tim Duax, *Attrition at a Nonselective Magnet School: A Case Study of a Milwaukee Public School*, 25 J. RES. & DEV. EDUC. 173 (1992) (“By design magnet schools are curricular, instructional, or service specialty schools first established in the 1970’s to help rectify the inequalities caused by racial segregation in school systems; they were to accomplish that by ‘attracting’ an integrated school population.”).

21. BOLICK, *supra* note 17, at 4; *see also* Lynne Ames, *The View From: School No. 25 in Yonkers; A Natural Partnership When a Museum Is Down the Block*, N.Y. TIMES (Westchester County ed.), May 12, 1991, §12, at 2.

22. Ames, *supra* note 21.

23. BOLICK, *supra* note 17, at 4 (“The Education Department reports that 80% of the magnet schools in 15 urban districts showed higher achievement scores than their district averages.”); *see also* CHOOSING BETTER SCHOOLS, *supra* note 8, at 6 (noting success of Denver magnet schools).

is that parents are able to select their child's school and thereby create pressure for schools to improve in order to attract students.<sup>24</sup>

Minnesota was the first state to require interdistrict open enrollment. The Minnesota program commenced in 1987 and included all school districts in the state by 1990-91. The program allows students to apply to any school inside or outside their district. Individual schools may limit enrollment of interdistrict students only if it is necessary to ensure racial balance or to prevent overcrowding.<sup>25</sup> Funding is pivotal in open enrollment programs. As parents exercise their choice, the money that the state provides for their individual child's education "follows" the student to the new school. Thus, schools that attract a greater number of students have a greater level of funding.<sup>26</sup>

The Controlled Choice Approach is a version of the open enrollment model. Under this scheme, parents designate their first, second, and third choice schools, leaving administrators the authority to assign students to schools in accordance with administrative feasibility. Generally, students are assigned in accordance with both the parents' wishes and the goal of racial balance in the classroom. Though parental preference is a secondary concern in controlled choice, the fluid enrollment procedure nevertheless pressures schools to improve. Boston, for example, has operated such a controlled choice system since 1989.<sup>27</sup>

In addition to these public school choice prototypes, proponents of choice often argue that permitting private schools to participate in the system will accelerate the progress that choice can generate. Two main proposals for choice incorporate private schools: the Tuition Tax Credit System and the Voucher System. The central feature of both programs is that parents are allowed to use their share of public education funds to enroll their children in private schools.

Under the Tuition Tax Credit System, parents who enroll their children in a private school can take a tax deduction for a specified amount of the tuition they pay to the private school.<sup>28</sup> According to its advocates, the tax credit system alleviates the need for regulation of participating private schools because the public aid does not flow directly to the schools themselves,<sup>29</sup> but

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24. CHOOSING BETTER SCHOOLS, *supra* note 8, at 6 (describing intradistrict choice program); *see also* JEANNE ALLEN & MICHAEL J. McLAUGHLIN, THE HERITAGE FOUNDATION, A BUSINESSMAN'S GUIDE TO THE EDUCATION REFORM DEBATE 18 (1990) (lauding Milwaukee plan that promotes competition among schools for students and state funds).

25. BOLICK, *supra* note 17, at 5; *see also* CHOOSING BETTER SCHOOLS, *supra* note 8, at 6-7 (noting that schools are required to meet desegregation guidelines).

26. *See* BOLICK, *supra* note 17, at 5. Open enrollment and magnet schools are not necessarily mutually exclusive. In designing programs to attract students under open enrollment programs, schools may indeed become the equivalent of magnet schools. *But see* COBB, *supra* note 3, at 45 (noting low participation rate in Minnesota program in 1989-90—less than 0.5% (3,218) of student population—due to lack of differentiation between schools and school districts).

27. COBB, *supra* note 3, at 45.

28. CHOOSING BETTER SCHOOLS, *supra* note 8, at 8; *see also* COBB, *supra* note 3, at 59-61.

29. BOLICK, *supra* note 17, at 6-7.

rather to the families of students. Critics of tax credit proposals argue that although the reform is intended to aid low-income parents and their children, many families earn so little income that a tax credit will not reach them.<sup>30</sup>

Vouchers work somewhat differently. Parents who meet specified income requirements receive a voucher for use toward the education of their child in either a public or private school. The amount of the voucher is the individual student's pro rata share of state education funds. By providing the educational funds directly to parents, the plan allows parents, rather than the state, to determine which school is most appropriate for their child.<sup>31</sup> Under a fully developed voucher system, public schools are wholly dependent on attracting students for their funding. In such a system, public schools establish a "tuition" in order to compete with other private schools in the area. If parents wish to send their child to a school that costs more than the value of their child's voucher, they are free to supplement the voucher with private monies.<sup>32</sup> Again, as in the public school models, both tuition tax credits and vouchers maximize the role of students and parents as consumers and of the schools as suppliers in the education "market."

All of these types of choice—public and private—face certain difficulties as to the participation of students with disabilities. As discussed below, however, I use the Magnet Schools Approach throughout the remainder of this Note to highlight the implications of choice programs for the child with disabilities. I focus in particular on a system of nonselective, public magnet schools,<sup>33</sup> because this type of system poses the hardest questions for advocates of education for children with disabilities. The Magnet Schools Approach is the most attractive option for choice proponents because it does not suffer from many of the obvious defects of other choice models. For example, the nonselective public magnet school model cannot be criticized for accepting only the best and brightest, leaving the hard-to-educate out and thus behind.<sup>34</sup> Second, unlike in the voucher system, monies are not transferred from public schools to private schools. Finally, the Individuals with Disabilities

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30. *Id.* (acknowledging concern but noting that refundable tax credits could be used to assist families without tax liability); see also CAVAZOS, *supra* note 13, at 30 & app. at 39 (citing Minnesota Tax Deduction Statute).

31. CHOOSING BETTER SCHOOLS, *supra* note 8, at 8. The voucher approach tends to be the most controversial form of choice program, partly due to concerns about the use of public funds for private purposes and the fact that religious schools' participation in some choice programs might violate the Establishment Clause. U.S. CONST. amend. I; see also BOLICK, *supra* note 17, at 7 (stating vouchers are "most comprehensive and controversial" form of choice).

32. CHOOSING BETTER SCHOOLS, *supra* note 8, at 8.

33. "Nonselective" means that schools do not have the authority to turn students away through the admissions process. While this model is the primary focus of my Note, I occasionally refer to the impact that vouchers programs might have on education for children with disabilities.

34. School admission policies are explicitly tools of exclusion. But other policies or attributes, such as program development or physical facilities, may function as equally exclusionary tools in a nonselective public magnet school system.



Education Act unquestionably applies to the public school system, which must comply with all requirements of federal law.<sup>35</sup>

Most public school systems currently offer some form of choice or magnet schools.<sup>36</sup> Conceivably, a district could contain only a few magnet schools, or each of its schools could be a magnet.<sup>37</sup> Regardless of the benefits it offers to nondisabled children, however, a magnet school system would have difficulty offering the same array of school choices for children with disabilities. Any system that distributes educational benefits unequally among children may run afoul of federal legal requirements. It is to those requirements that I now turn.

## II. LEGAL REQUIREMENTS REGARDING THE EDUCATION OF CHILDREN WITH DISABILITIES

States and school districts receiving federal funds are not only prohibited from discriminating against children with disabilities;<sup>38</sup> they have an affirmative obligation to provide a free appropriate public education for every student with disabilities within their jurisdictions.<sup>39</sup> States therefore must demonstrate "a goal of providing full educational opportunity to all children with disabilities."<sup>40</sup> An appropriate education must include an individual educational plan developed by the child's parents, teachers, and school administrators,<sup>41</sup> and that education must take place in the least restrictive environment, with the child preferably being mainstreamed.<sup>42</sup>

In order for the state to meet the mainstreaming and the least restrictive environment requirements in providing a free appropriate public education, a child with disabilities must be educated with nondisabled children to the greatest extent appropriate for her learning capabilities. If this means that the child with disabilities can benefit from contact with nondisabled children only during recess and lunch, then that child must nevertheless be provided with that contact. Though the substance of a free appropriate public education varies with each individual child, children with disabilities must be given the opportunity to participate in and reap the benefits of regular educational

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35. See Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412 (1988 & Supp. IV 1992) (all schools that receive federal funds must comply; thus the Act reaches all public school systems, but not private school systems); Board of Educ. v. Rowley, 458 U.S. 175, 179-84 (1982).

36. *Public-School Choice: City by the Bay May Lead the Way*, DAILY REP. CARD (Am. Political Network, Inc.), Sept. 28, 1992, available in LEXIS, Nexis Library, Currnt File.

37. As I demonstrate below, the Magnet School Approach has troubling implications for students with disabilities, regardless of how many schools within a district become magnet schools.

38. Rehabilitation Act, 29 U.S.C. § 794(a) (1988).

39. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1988 & Supp. IV 1992).

40. 20 U.S.C. § 1412(2)(A)(i) (Supp. IV 1992).

41. 20 U.S.C. § 1412(4) (Supp. IV 1992).

42. 20 U.S.C. § 1412(5)(B) (Supp. IV 1992) (requiring that state have "procedures to assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled").

programs to the extent appropriate. School districts must provide the special services and resources necessary to ensure that the education of each individual with disabilities is meaningful, but undue segregation from nondisabled peers never can be part of an appropriate education.

A. *The District Court Decisions in PARC and Mills*

Before the development of federal statutory law specifically addressing the rights of children with disabilities to a public education, two cases began to lay the groundwork for greater educational equality and equal access to public education for children with disabilities. In *Pennsylvania Association for Retarded Children v. Pennsylvania*,<sup>43</sup> (*PARC*), a state association and a group of parents of children with mental retardation sought a declaratory judgment that four state statutes excluding children with mental disabilities from programs of education and training in the public schools were unconstitutional. The plaintiffs alleged that the statutes offended the children's due process rights in two ways. First, the schools could exclude children with mental retardation from public education or fundamentally alter their educational assignments without notice or a hearing. Second, the provisions arbitrarily and capriciously denied the children's right to education. Additionally, the plaintiffs argued that the provisions denied students with mental retardation equal protection of the laws because the Pennsylvania Constitution and state laws guaranteed an education for all children in the state.<sup>44</sup> The court enjoined the schools from denying any child with mental retardation access to a free public program of education and training to the extent that such education is provided for other students. This seminal case established that students with disabilities must have equal access to the education provided to other students, and that such education must be provided in a fashion most appropriate to the student's learning capacities.<sup>45</sup>

A second case, *Mills v. Board of Education*,<sup>46</sup> went even further. This case was brought on behalf of seven "exceptional" children labelled as children with behavioral problems, mental retardation, emotional disturbances, or hyperactivity. These children either were denied admission to District of Columbia public schools, or were excluded from regular public schools after admission and without any provision for alternative educational placement or review. The district court referred to Circuit Judge J. Skelly Wright's statement in *Hobson v. Hansen*, where the court had

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43. 343 F. Supp. 279 (E.D. Pa. 1972).

44. *PARC*, 343 F. Supp. at 282-83.

45. *Id.* at 302-03.

46. 348 F. Supp. 866 (D.D.C. 1972).

found that denying poor public school children educational opportunities equal to that available to more affluent public school children was violative of the Due Process Clause of the Fifth Amendment. *A fortiori*, the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.<sup>47</sup>

As a result, the court ordered the District of Columbia to "provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."<sup>48</sup> The court also determined that if no public school facilities could meet the needs of a student with disabilities, the school district must provide adequate alternative educational services.<sup>49</sup>

The courts in *Mills* and *PARC* did not confront directly whether states have an absolute responsibility to provide a quality public education for children with disabilities. These two decisions focused less on quality and more on equality—equality of access. Once a state decides to provide public education to its children, it may not exclude children with disabilities. Through a consent agreement and court orders, the *Mills* and *PARC* decisions established the following legal rights and principles:

(1) All children are capable of benefitting from education and training; (2) all children are entitled to free public education and training appropriate to their learning capacities; and (3) all children are entitled to as normal an educational placement as possible. That is, placement in a regular public school class is preferable to placement in a special public school class; placement in a special class in the public school is preferable to placement in a special school or program.<sup>50</sup>

Responding to mounting criticism of the educational trend of teaching students with disabilities separately from nondisabled students, the courts in *Mills* and *PARC* sought to enable children with disabilities to gain equal access to public education.<sup>51</sup> Prompted by these holdings, Congress took the next step by enacting the Rehabilitation Act of 1973, which guaranteed individuals with disabilities equal opportunity to government services.<sup>52</sup> Only two years later,

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47. *Id.*

48. *Id.* at 878.

49. *Id.*

50. Henry A. Beyer, *A Free Appropriate Education*, 5 W. NEW ENG. L. REV. 363, 365 (1983) (footnotes omitted).

51. Darwin L. Miller & Marilee A. Miller, *The Education for All Handicapped Children Act: How Well Does It Accomplish Its Goal of Promoting the Least Restrictive Environment in Education?*, 28 DEPAUL L. REV. 321, 322 (1979).

52. 29 U.S.C. § 701 (1988).

Congress adopted the Education for All Handicapped Children Act, later amended and renamed the Individuals with Disabilities Education Act (IDEA).<sup>53</sup>

B. *The Development of Federal Legislation Regarding Education for Children with Disabilities*

1. *Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973 states, "No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."<sup>54</sup> Under this statute, no state or locality that provides public education to its children can discriminate against any child with disabilities who wishes to enter its school doors.<sup>55</sup> In *Oberti v. Board of Education*,<sup>56</sup> the parents of Rafael, a boy with Down's Syndrome, brought suit under the Rehabilitation Act against their local school district, challenging Rafael's placement in a self-contained special education class located outside the district.<sup>57</sup> In discussing the applicability of the Rehabilitation Act, the court stated that section 504 "provides an independent source of rights for children with disabilities in addition to the IDEA." In its determination, the court used a four-factor test previously employed by the Second and Third Circuits in section 504 cases.<sup>58</sup> The court stated that a prima facie case of discrimination under section 504 is established if the plaintiff proves:

- (1) that he is a "handicapped individual" under the Act (2) that he is "otherwise qualified" for the position sought, (3) that he was excluded from the position sought solely by reason of his handicap, and (4) that the program or activity in question receives federal financial assistance.<sup>59</sup>

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53. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. IV 1992)). The EAHCA the Education of the Handicapped Act (EHA), and its title was changed to the IDEA in the 1992 Amendments to the Act. Pub. L. No. 101-476, 104 Stat. 1141 (1990); see also Nancy L. Jones, *Educational Rights of Handicapped Children*, 19 HARV. J. ON LEGIS. 287, 291 (1982) ("A second motive for [the IDEA] was a series of judicial decisions, including *PARC* and *Mills*, which indicated for the first time that handicapped children had a right to publicly provided education under the U.S. Constitution."). *Mills* and *PARC* not only established the foundation for the IDEA but also initiated a string of litigation across the country. Miller & Miller, *supra* note 51, at 330 n.19.

54. 29 U.S.C. §794(a) (1988).

55. 29 U.S.C. §794(b)(2)(B) (Supp. 1990); see also Cudahy, *supra* note 3, at 303.

56. *Oberti v. Board of Educ.*, 801 F. Supp. 1392 (D.N.J. 1992).

57. *Id.*

58. *Strathie v. Dep't of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983); *Doe v. New York Univ.*, 666 F.2d 761, 774 (2d Cir. 1981).

59. *Oberti*, 801 F. Supp. at 1405 (citing *Strathie*, 716 F.2d at 230).

Because Rafael had Down's Syndrome and met the age requirement for school, the court in *Oberti* held that Rafael's placement in segregated classes without any meaningful opportunity for mainstreaming denied Rafael the benefits of a program receiving federal assistance, in violation of section 504 of the Rehabilitation Act.<sup>60</sup>

Courts also use a disparate impact test in section 504 cases because the discrimination challenged is more often the result of negligence than of malice. In applying the disparate impact test in *Alexander v. Choate*,<sup>61</sup> a Medicaid benefits case, the Supreme Court held that section 504 prohibits programs that create a disparate impact when "an otherwise qualified handicapped individual [has not been] provided with meaningful access to the benefit that the grantee offers."<sup>62</sup> In guaranteeing meaningful access, section 504 "seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance."<sup>63</sup> It appears from the Court's holding in *Alexander* that a disparate impact test applies when: 1) people with disabilities were excluded from or denied meaningful access to a public program; 2) people with disabilities did not receive the intended benefits of the program; 3) the federal statutory scheme indicated that Congress would favor compliance with the required meaningful access for people with disabilities over the concession to state discretion in determining the appropriate level of access to be provided; and 4) the costs of a disparate impact test would not be unduly burdensome to the state.<sup>64</sup>

The holdings of *Oberti* and *Alexander* affirm that section 504 guarantees children with disabilities equal access to governmental services, including public education.

## 2. *The Individual with Disabilities Education Act*

The IDEA furthers the principles of nondiscrimination set forth in section 504 and the *Oberti* and *Alexander* cases by providing children with disabilities both procedural safeguards and a measure of equality in the substance of their education. The IDEA sets forth the federal requirement that all children with disabilities have access to a "free appropriate public education."<sup>65</sup> Congress enacted the IDEA to ensure that children with disabilities previously left out of public education would be provided with equal access to the same

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60. *Id.*

61. 469 U.S. 287 (1985).

62. *Id.* at 301 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)); *see also* Cudahy, *supra* note 3, at 305.

63. *Alexander*, 469 U.S. at 304.

64. *Id.* at 302-09; *see also* Cudahy, *supra* note 3, at 305-06 (stating that a disparate impact standard imposes liability whenever public education programs effectively exclude children with disabilities).

65. Although the IDEA imposes the duty to provide such access only on states that receive federal funding for education, all states currently receive such funding.

educational opportunities as nondisabled children.<sup>66</sup> In doing so, Congress intended to provide a "full educational opportunity to all children with disabilities."<sup>67</sup> The statute specifically states:

It is the purpose of this [Act] to assure 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 . . . .<sup>68</sup>

While the IDEA imposes on both state<sup>69</sup> and local educational agencies<sup>70</sup> an affirmative legal duty to provide a free appropriate public education for all children with disabilities, no such duty exists for individual schools. Local educational agencies such as school districts usually take the primary responsibility for developing the IDEA-mandated individual education plan ("IEP") for each student with disabilities, with the student's parents, teachers, and school administrators all contributing to the process. Ultimately, however, it remains the state and local educational agencies' legal duty to ensure that all children with disabilities receive a free appropriate public education.<sup>71</sup> Although individual schools participate in the process, they are not legally responsible for providing special education.

66. The enactment of the IDEA was driven by the understanding that disabled children were systematically prevented from receiving an adequate education. Reports of the floor debates in both the House and Senate reveal that legislators admitted that the bill "acknowledges that the handicapped have been denied their inherent right to full public education," 121 CONG. REC. 25, 538 (1975) (remarks of Rep. Cornell), and that the "legislation flows from . . . a spirit of concern for a group of children the country has far too long overlooked." *Id.* (remarks of Rep. Harris).

67. 20 U.S.C. § 1412(2)(A)(i) (Supp. IV 1992); see also Paul F. James, Comment, *The Education for All Handicapped Children Act of 1975: What's Left After Rowley?*, 19 WILLAMETTE L. REV. 715, 724 (1983) (IDEA "states that it will provide 'a full educational opportunity to all children with disabilities'").

68. 20 U.S.C. § 1400(c) (Supp. IV 1992).

69. A state educational agency is defined in the IDEA as "the agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or if there is no such officer or agency, an officer or agency designated by the Governor or by State law." 20 U.S.C. § 1401(a)(7) (1988).

70. According to the IDEA, a local educational agency is a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

20 U.S.C. § 1401(a)(8) (1988).

71. In *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), the court found that the state board of education was properly included in an injunction to modify the IEP of a student with spina bifida. Although the local school board had the primary responsibility to develop and revise the child's IEP under § 1414(a)(5), the state board of education was properly included because it had the responsibility under § 1412(b) to assure that the local educational agency carried out its responsibilities under the Act. See also *Kerr Center Parents Ass'n v. Charles*, 897 F.2d 1463, 1470 (9th Cir. 1990) ("Statute, regulations, and statutory history make clear that the state educational agency . . . has the ultimate responsibility for assuring that all handicapped children have the right to a free appropriate public education.").

Aside from designating which agency is ultimately responsible for formulating the educational program, the IDEA also prescribes criteria for choosing the setting for that program. The IDEA requires that children with disabilities be educated in the *least restrictive environment*—minimizing constraints on the child while maximizing the child's educational benefit.<sup>72</sup> The concept of least restrictive environment varies according to the severity of a child's disability and the difficulty of providing special services. A child with very severe disabilities may be placed in a separate school, while a child with a disability requiring less specialized attention may be able to participate fully in a regular classroom. The statute further states a clear preference for *mainstreaming*—educating children with disabilities in classrooms with nondisabled children.<sup>73</sup> Section 1412(5)(B) specifies that

to the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [should occur] only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>74</sup>

The principles of least restrictive environment and mainstreaming complement each other in important ways. In effect, the least restrictive environment principle requires the court to consider the degree to which a child with disabilities can be mainstreamed.<sup>75</sup> Thus mainstreaming is a process to satisfy the least restrictive environment requirement. A child is being educated in the least restrictive environment if she receives as much education in the "mainstream" (regular classroom) as is appropriate given her needs and abilities. Many educational environments are not suitable for children with disabilities, and segregated environments are particularly suspect.

Empirical research supports the value of mainstreaming, which lies at the heart of the IDEA. A study of programs for students with academic disabilities found that placement in full-time special education programs did not result in consistent benefits to the children; instead, such segregation may lead to an

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72. 20 U.S.C. § 1412(5) (Supp. IV 1992).

73. Judith D. Singer & John A. Butler, *The Education for All Handicapped Children Act: Schools as Agents of Social Reform*, 57 HARV. EDUC. REV. 125, 126 (1987) ("In order to qualify for federal financial support under the new law, states and local school districts were required to . . . ensure that handicapped students were placed in the 'least restrictive environment' commensurate with their needs."); see also Miller & Miller, *supra* note 51, at 324 n.6 ("Mainstreaming is the educational concept of putting the handicapped child back into the 'mainstream' of regular education, i.e. the handicapped child is put into the regular classroom with individual attention or supportive services. Mainstreaming is the appropriate method for putting a large number of students into the 'least restrictive environment.'").

74. 20 U.S.C. § 1412(5)(B) (Supp. IV 1992).

75. *Greer v. Rome City Sch. Dist.*, 762 F. Supp. 936, 942 (N.D. Ga. 1990).

inferior education for children both with and without disabilities.<sup>76</sup> Furthermore, the study found that full- or part-time placements of students with disabilities in regular classrooms resulted in improved achievement, greater self-esteem, and enhanced behavioral and emotional adjustment.<sup>77</sup> Fifty studies comparing the academic performance of mainstreamed and segregated students with disabilities found that "the mean academic performance of the integrated group was in the 80th percentile, while the segregated students scored in the 50th percentile."<sup>78</sup> The least restrictive environment benefits not only the child with disabilities but also the nondisabled students. A study conducted in Delaware examined the performance of children with disabilities whose special education program placed them in regular classes full-time.<sup>79</sup> The study found that the participating children with disabilities in grades K-6 experienced marked progress in reading, spelling, and math.<sup>80</sup> Furthermore, nondisabled children in the classrooms with the mainstreamed students with disabilities also consistently outperformed their peers enrolled in ordinary classes on statewide tests.<sup>81</sup>

A New York State Education Department evaluation of secondary education for students with disabilities found that, with the appropriate services, students with mild disabilities who are educated in regular classrooms succeed in school and graduate from high school. According to the Department's report, 98% of upstate students and 96% of New York City students participating in regular classrooms passed at least one class. Furthermore, these students achieved impressive scores on state competency tests.<sup>82</sup> This research demonstrates that the concepts of least restrictive environment and mainstreaming are not only legal principles, but also valuable policy tools that have proven effective in classrooms. Children with disabilities and their nondisabled peers all stand to gain from mainstreaming.

### *C. The Courts' Interpretation of Least Restrictive Environment and Mainstreaming: The Real Requirements*

The Supreme Court first addressed the issue of equal educational access for children with disabilities seven years after the enactment of the IDEA. In

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76. Alan Gartner & Dorothy K. Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367, 368 (1987).

77. *Id.* at 375.

78. *Id.*

79. HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, OPPORTUNITIES FOR SUCCESS: COST-EFFECTIVE PROGRAMS FOR CHILDREN, UPDATE 1990, 101ST CONG., 2D SESS. 94 (Comm. Print 1990).

80. *Id.*

81. *Id.*

82. "On their first attempts, 92% of upstate students passed reading, 84% passed writing, and 77% passed mathematics. For city students, 77% passed reading, 85% passed writing, and 54% passed mathematics." *Id.* at 95.



*Board of Education v. Rowley*,<sup>83</sup> the Court reaffirmed Congress' primary purpose in enacting the IDEA—providing equal access to public education for children with disabilities.<sup>84</sup>

*Rowley* involved a first grade student named Amy, who had a severe hearing impairment. When Amy was in kindergarten, it was determined that she did not need an interpreter to succeed in class, however, in developing her IEP the following year, Amy's parents were certain that Amy needed a sign language interpreter to derive the same educational benefits as her nondisabled classmates. Although the Court found that Amy was already performing better than her average classmate and thus did not need an interpreter, the Court did find that school districts must provide all children with disabilities a "basic floor of opportunity" in education consistent with equal protection. The court further held that this floor required equal access.<sup>85</sup>

Although it failed to establish a particular substantive level of education appropriate for children with disabilities, the Court did carefully evaluate the educational setting as a substantial part of what makes an education appropriate for a child with disabilities.<sup>86</sup> In so doing, the Court acknowledged that § 1412(5) of the IDEA requires that children with disabilities be educated in classrooms with nondisabled children "to the maximum extent appropriate," thus reinforcing the centrality of mainstreaming children with disabilities.<sup>87</sup> Under *Rowley*, school districts are not required to maximize the learning potential of every child with disabilities or to provide the best education possible for a child with disabilities, but they must provide *access* to educational opportunities commensurate with the opportunities provided for other children.<sup>88</sup> Since *Rowley*, the federal courts have elaborated on the "least restrictive environment" and "mainstreaming" requirements of the IDEA. Because any choice scheme must meet the least restrictive environment and mainstreaming principles, I will now focus on how school districts must comply with each.

While the Supreme Court in *Rowley* determined that the IDEA requires states to educate children with disabilities alongside nondisabled children whenever possible,<sup>89</sup> lower federal courts have noted that the mainstreaming requirement is not absolute, and mainstreaming may not be appropriate in

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83. 458 U.S. 176 (1982).

84. *Rowley*, 458 U.S. at 191-92, 193 n.15.

85. *Id.* at 200-01.

86. *Id.* at 202; 20 U.S.C. § 1412(5)(B) (Supp. IV 1992); see also *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 920 (D. Me. 1990) ("Congress made clear its preference that these federal funds be used to place children with disabilities in the 'mainstream' of American public education. As a result, removal of a child from the 'mainstream' educational environment is permitted only when education in regular classes cannot be achieved satisfactorily."); *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 916 (1st Cir. 1983) (stating the Act embodies a statutory preference for mainstreaming).

87. 20 U.S.C. § 1412(5)(B) (Supp. IV 1992).

88. *Singer & Butler*, *supra* note 73, at 143.

89. *Rowley*, 458 U.S. at 202.

every case.<sup>90</sup> Nonetheless, educators must take measures to ensure that each student with disabilities is mainstreamed to the maximum extent appropriate, which in some instances can mean only for lunch, gym, recess, and transportation to and from school.<sup>91</sup>

Federal court decisions in three cases help clarify the critical importance of the least restrictive environment and mainstreaming principles. In *Roncker v. Walter*,<sup>92</sup> the court reiterated the importance of the setting of a child's education and held that, in some cases, a child's need for mainstreaming may demand bypassing a placement that would otherwise be considered better academically so that the child may, on balance, receive the most "appropriate" education. In such cases, educators must determine whether the services in question could be provided in an integrated environment. If they can, placement in a segregated school is inappropriate under the IDEA.<sup>93</sup>

Six years later, in *Daniel R.R. v. State Board of Education*,<sup>94</sup> the Fifth Circuit established a two-part test to determine whether a child is being educated in the least restrictive environment and is therefore mainstreamed to the greatest extent appropriate. In formulating its test, the court acknowledged an implicit tension between two key provisions of the IDEA.<sup>95</sup> On the one hand, the Act requires school districts to seek mainstreaming for students with disabilities.<sup>96</sup> On the other hand, school districts must tailor their educational services to meet the educational needs of each student with disabilities.<sup>97</sup> To provide a beneficial and appropriate education for a child with disabilities, schools must strike a balance between the two. The court divided the mainstreaming issue into two questions. First, can satisfactory education in the regular classroom be achieved with the help of supplemental aids and services?<sup>98</sup> If the answer is negative, and the school system proposes removing the child from the regular classroom, the court must then ask the

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90. See *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). A nine-year-old boy with severe mental retardation was placed in a city school for children with retardation. Believing their son benefited from contact with nondisabled children, the boy's parents sought placement in a more integrated setting. See also 34 C.F.R. § 300.553 (1993) ("In the . . . provision of nonacademic and extracurricular services and activities, including meals, recess periods . . . each public agency shall ensure that each child with disabilities participates with nondisabled children . . . to the maximum extent appropriate to the needs of that child.").

91. *Roncker*, 700 F.2d 1058 (1983).

92. 700 F.2d at 1058.

93. *Id.* at 1063.

94. 874 F.2d 1036 (5th Cir. 1989). In *Daniel R.R.*, the parents of a six-year-old boy with Down's Syndrome objected to their child being removed from a regular pre-kindergarten program and placed in a special program in which he would be mainstreamed only for lunch and recess.

95. *Id.* at 1048.

96. 20 U.S.C. § 1412(5)(B) (Supp. IV 1992).

97. 20 U.S.C. § 1412 (1988 & Supp. IV 1992).

98. *Daniel R.R.*, 874 F.2d at 1048.

second question: Has the school mainstreamed the child to the maximum extent appropriate?<sup>99</sup>

Satisfying the *Daniel R.R.* two-step test requires courts to focus their analysis on an "individualized, fact-specific inquiry that requires [the court] to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs."<sup>100</sup> The court must examine whether the state has taken sufficient steps to accommodate the child with disabilities in regular education by providing supplementary aids and services and modifying the regular education program when necessary to mainstream students with disabilities. If the state has not made the effort to make such accommodations, the court's inquiry ends. In such an instance, the state is in violation of the Act's express mandate to modify its regular education.<sup>101</sup> Even if the state modifies its programs and provides supplemental services, however, courts must still determine whether or not those efforts suffice.<sup>102</sup>

A 1990 district court case, *Greer v. Rome City School District*,<sup>103</sup> reinforced the holding of *Daniel R.R.* both by relying upon the two-step test promulgated in *Daniel R.R.* and by reiterating that mainstreaming is not possible in all cases. The court held that whether or not the child was receiving an educational "benefit" was the crucial factor in determining whether a child was receiving an appropriate education in the least restrictive environment.<sup>104</sup> To determine what constitutes such a benefit, the court stressed the importance of focusing on whether the school provides sufficient special services to allow that child to benefit from the instruction. The court noted the distinction between what constitutes an appropriate education and whether that education is provided in the least restrictive environment.<sup>105</sup>

Section 504 of the Rehabilitation Act, the IDEA, *Rowley*, and subsequent case law combine to provide a clear mandate requiring states to provide equal access to public education for children with disabilities. The principle of equality embodied in the Rehabilitation Act's nondiscrimination provisions and the IDEA requirements of least restrictive environment and mainstreaming

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99. *Id.*; see also 20 U.S.C. § 1412(5)(B) (Supp. IV 1992) (requiring that children with disabilities be educated with nondisabled children to maximum extent appropriate).

100. *Daniel R.R.*, 874 F.2d at 1048.

101. *Id.* at 1048.

102. *Id.* The *Daniel R.R.* court rejected the test the *Roncker* court established to evaluate compliance with the IDEA's mainstreaming and least restrictive environment requirements. The court in *Daniel R.R.* believed that the *Roncker* test was too intrusive. The test developed in *Daniel R.R.* nevertheless requires a very fact-specific inquiry into the state's actions, even when the state has undertaken to modify its programs and provide services for its disabled students. Both decisions serve to reaffirm the mainstreaming and least restrictive environment requirements of the IDEA.

103. 762 F. Supp. 936 (N.D. Ga. 1990). In this case, a nine-year-old girl with Down's Syndrome was originally enrolled in a traditional kindergarten classroom. The school insisted that the child be moved, but her parents wanted her to remain in the kindergarten classroom.

104. *Id.* at 938, 947.

105. *Id.* at 941-42.

carry new importance once they are transported into the world of choice. Choice creates a new system of education. As discussed above, current law requires that children with disabilities be provided equal access to the educational opportunities provided to nondisabled children. If a state or school district decides to change fundamentally the educational system, the question of equal access must be reexamined. Equality of education? Equality of opportunity? Equality of choice? What new basic floor of opportunity exists in education under a choice system?

### III. IMPLICATIONS OF CHOICE FOR THE CHILD WITH DISABILITIES

In this Section of the Note, I address the legal concerns choice programs raise for the education of children with disabilities. Choice programs of the nature described in Part I of this Note present major concerns for students with disabilities. Many choice critics foresee a new segregation resulting from choice and competition in education. Because school systems have limited resources, these critics argue that magnet schools will "function as open markets with scarce resources, [and] elitist sorting processes will prevail."<sup>106</sup> Critics of choice fear that competition will serve only the advantaged while leaving those most in need of strong educational resources even more underserved than they are now.<sup>107</sup>

To some these fears seem alarmist and reactionary, while to others they appear commonsense. This Note attempts to demonstrate that the school choice debate raises serious equality concerns for children with disabilities. With this purpose in mind, I look now at the specific implications of choice for the child with disabilities.

#### A. *The Costs of Educating the Child with Disabilities*

In 1988, more than eight million children with disabilities lived in the United States. More than half of these children were not receiving appropriate educational services.<sup>108</sup> Although the IDEA made state and local educational agencies responsible for providing education for all children with disabilities, special education is expensive, and state and local governments often do not have the financial resources to meet the needs of all students with disabilities.<sup>109</sup> Congress tried to offset the IDEA's heavy financial burden by

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106. Educational Visions Seminar, *Progressive Federalism: New Ideas for Distributing Money and Power in Education*, in THE GREAT SCHOOL DEBATE, *supra* note 5, at 433.

107. See Dorothy Gilliam, *Voucher System's Bottom Line*, WASH. POST, Mar. 3, 1986, at D3; Lee A. Daniels, *Efforts To Allow Choice of Schools Stir Debate*, N.Y. TIMES, Mar. 1, 1989, at B7; Mitchell Miller, *Choice Proposal Under Scrutiny*, UPI, Apr. 18, 1989, available in LEXIS, Nexis Library, UPI File.

108. 20 U.S.C. § 1400 (1988).

109. For a recent treatment of the difficulties involved in local school finance, see Kirk J. Stark, Note, *Rethinking Statewide Taxation of Nonresidential Property for Public Schools*, 102 YALE L.J. 805 (1992).

contributing funds to the educational agencies responsible for special education under the IDEA.<sup>110</sup> Once a child is classified as having one or more disabilities, federal revenues are allocated to the school district on that child's behalf.<sup>111</sup> These funds do not go directly to individual schools, but rather are allocated to general special education budgets of the school districts. Federal financial contributions to education for children with disabilities are inadequate, however, leaving states and local governments to bear the brunt of these costs.

In the 1982-83 school year, the mean cost of providing regular education to a regular education student was approximately \$3800-\$4180.<sup>112</sup> The mean expenditure for special education students was almost twice that amount.<sup>113</sup> Speech-impaired children required the lowest level of extra expenditures, approximately \$5414 per year.<sup>114</sup> In contrast, children with learning disabilities required \$7172 per year, children with mental retardation required \$7853 per year, and children with emotional disturbances required \$8204 per year. Students with physical, hearing, visual, or health impairments were the most costly to educate, requiring a mean expenditure that reached \$10,791 per year.<sup>115</sup>

Educating children with disabilities entails additional costs for fixed assets, such as classroom space and materials, and special equipment.<sup>116</sup> Moreover, because of the least restrictive environment and mainstreaming requirements, children with disabilities incur all of the costs of a regular education student as well as extra expenses for necessary special education,<sup>117</sup> including special education teachers, speech therapists, physical therapists, and other specialists. The method of delivering these services greatly impacts special education costs. Under a choice system, if every magnet school provided special education, students with disabilities would likely be more dispersed than they are presently. Special education teachers and specialists are mobile and could move from school to school, dividing their time among the students requiring their services. However, because of the travel and set-up time required in

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110. 20 U.S.C. § 1400(b) (1988 & Supp. IV 1992).

111. 20 U.S.C. §§ 1411, 1414 (1988 & Supp. IV 1992).

112. Ellen S. Raphael et al., *Per Pupil Expenditures on Special Education in Three Metropolitan School Districts*, 11 J. EDUC. FIN. 69, 80 (1985).

113. *Id.* at 79.

114. *Id.*; see also FARNHAM-DIGGORY, *supra* note 2, at 13 (noting mean expenditures for different student groups).

115. Singer & Butler, *supra* note 73, at 127-29, 148. Five representative school districts provided these cost quotes: Charlotte-Mecklenburg Schools, N.C.; Houston Independent School District, Tex.; Milwaukee Public Schools, Wis.; Rochester City School District, N.Y.; and Santa Clara County Office of Education, Cal.; see also FARNHAM-DIGGORY, *supra*, note 2 at 12-13 (summarizing empirical data from five representative school districts).

116. See generally Darrell R. Lewis et al., *Cost Analysis for District-Level Special Education Planning, Budgeting, and Administrating*, 14 J. EDUC. FIN. 466 (1989). See also Raphael et al., *supra* note 112; Alan Slobojan, *Descriptive Cost Analysis of Special Education*, 12 J. EDUC. FIN. 99 (1987).

117. Lewis et al., *supra* note 116, at 479.

moving around the district, such an arrangement increases costs and limits the hours these teachers and specialists can devote to instructional services.<sup>118</sup> Moreover, the fixed assets required for special education are not mobile and would have to be provided at a larger number of schools. Economies of scale are currently achieved by centralizing students with similar disabilities within particular schools inside the district or within the neighboring district.<sup>119</sup> Under school choice, the cost efficiencies resulting from this concentration of resources would disappear if every magnet school in a district, and possibly each school in the district, had to spend money not only on current services but also on the start-up costs for special education.

Furthermore, there is no guarantee that there will be a steady stream of children with similar disabilities at a particular school from year to year—a further disincentive for schools to incur the expenses needed to attract and educate children with disabilities. The market for students with disabilities is unpredictable and fluctuates widely because children with disabilities have varied needs and comprise only eleven percent of the student population.<sup>120</sup> While one year a school may have several students with speech impairments, the next they may have two children with hearing impairments, one with paraplegia, and another with dyslexia. Many children suffer from multiple disabilities, and sometimes a child's special needs are not known at the outset.<sup>121</sup> The resources required to aid a blind child are very different from the resources needed to aid a child with Down's Syndrome. In concert, these factors make it difficult for schools to predict and prepare for the needs of their incoming students.

In short, regardless of how the school system is organized, it is difficult to address the educational needs of children with disabilities. Choice programs exacerbate these difficulties because such programs seek to promote the mobility of students and resources from school to school.<sup>122</sup> The premise of

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118. *Id.* at 477.

119. *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991). In *Barnett*, the court held that centralizing "cued speech" services for high school level students with hearing impairments in a particular high school in the county—effectively requiring such students to attend that high school—did not violate section 504 of the Rehabilitation Act, because, within the high school, the students were mainstreamed. To force the school board to provide the special services at the student's neighborhood school would be a "substantial modification" of the board's educational programs.

120. *Id.* at 10.

121. JOHN F. WITTE, FIRST YEAR REPORT MILWAUKEE PARENTAL CHOICE PROGRAM 27 (1991) (noting that schools not equipped to teach disabled students often find themselves doing just that because children's disabilities can be difficult to detect). For a general discussion of how special education costs effectively exclude children with disabilities from choice programs, see McKinney, *supra* note 3, at 667.

122.

An exploration of some of the unique fiscal considerations of choice programs relating to special education demonstrates that additional costs for special education may seriously and adversely impact opportunities for children with disabilities to participate in choice programs. The funding systems that states are employing have not been designed to assist or encourage the inclusion of children with disabilities in choice programs. The result is that educating children with disabilities in choice programs is disproportionately more expensive for students with disabilities than it is for educating non-disabled children.

competitive choice schools is that parents and children will be able to exercise their choice of school, thereby simultaneously serving families' preferences and imposing incentives for schools to improve. However, for a child with disabilities, this attractive theory runs into real-world obstacles. The funding that is attached to a nondisabled student is approximately the amount expended to educate that child in a school year. But the amount of funding provided for a child with disabilities often assumes that a program is already in place and that the child will only need additional funding for special education. So while a nondisabled student's funding can readily follow her to the school of her choice, the start-up costs required to educate the child with disabilities cannot easily move with the individual.

### B. *The Market Incentives at Work Under the Magnet Schools Approach*

Proponents of choice programs argue that market incentives will force schools to innovate in order to attract students, and that competition will result in better schools.<sup>123</sup> The truth of these claims remains unestablished and there are good reasons to doubt their validity.

The education system must meet special societal demands that are absent in markets for other consumer goods. We believe that everyone is entitled to receive some minimum amount of education. Although some children are more expensive to educate because they have disabilities, schools are nevertheless expected to put forth the extra dollars to educate these children. Analogously, in the market for medical insurance, society increasingly demands that all persons be insured against injury or sickness. And just as insurance companies have an incentive to avoid high-cost subscribers, i.e., those with questionable medical histories or those who are presently ill,<sup>124</sup> competitive schools may succumb to the incentive to avoid high-cost students.

This "creaming" of students can occur even in a system of magnet schools (or programs with open enrollment options), where the schools themselves do not control their own admissions and enrollment.<sup>125</sup> Schools will quickly learn how to win the contest to attract and educate the least expensive students. As a result, competitive-minded schools will race for the students who are lowest risk and least likely to be expensive or difficult to educate. Low-

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McKinney, *supra* note 3, at 672.

123. See generally BOLICK, *supra* note 17; CHUBB & MOE, *supra* note 16.

124. James A. Morone, *Hidden Complications: Why Health Care Competition Needs Regulation*, 10 AM. PROSPECT 40 (1992).

125. Educational Visions Seminar, *supra* note 106, at 432-33. Evidence demonstrates that selective admission schools did not provide services for disabled students. Furthermore, a five-city study conducted by a Chicago-based group indicated that magnet schools mainly admitted students who did not have learning problems. "This process has been referred to as a 'sorting process' or a weeding out of disabled students, thus severely limiting the opportunities disabled children have to participate in choice programs." McKinney, *supra* note 3, at 675 (citing D.R. Moore & S. Davenport, *School Choice: The New Improved Sorting Machine*, in CHOICE IN EDUCATION (W.L. Boyd & H.J. Walberg eds., 1990)).

problem, low-cost students offer the greatest potential for improving a school's reputation and prestige. In these terms, gifted students present the greatest payoff for minimal investment.<sup>126</sup> Furthermore, fewer dollars are needed to help a student who already performs well to perform better than to assist a child with disabilities to reach even the starting line.<sup>127</sup> And because gifted students are the most easily educable, schools able to attract them will have greater resources for other benefits, e.g., better science equipment, newer textbooks, computers, gym equipment, and teachers' aides. These additional benefits will in turn attract greater numbers of talented, more easily educable students. While programs designed to attract easily educable students do entail some costs, schools can more cheaply educate an easily educable student than a student with disabilities. Under competitive market pressures, a school's incentive is to maximize outputs so they may continually exceed inputs.

The natural consequence of these market forces is market segmentation and adverse risk selection. Because the goal of each school under the Magnet School Approach is to create a "magnet" to attract students, schools will improve by specializing. One school may sell itself as geared toward foreign languages (for future diplomats), while another will promote its focus on physical sciences (for future doctors and scientists). Still others might seek to market specialties in math and computer sciences (for future engineers) or perhaps in the arts (for future concert pianists and Shakespearean actors).<sup>128</sup> Because it is harder and more expensive to educate children with disabilities, schools are unlikely to design programs to incorporate their needs, leaving children with disabilities out of the mainstream of choice. Investing in magnet programs for the sciences or math creates returns year after year. But, unlike the fairly predictable demand for chemistry labs, the needs of students with disabilities change each year, even for each individual. Why should schools go to the expense of designing programs that will allow the children with hearing impairments to take advantage of the school's curriculum, when they can target children with a specific interest for less money and less structural change, while simultaneously obtaining a terrific reputation in the community? Schools will find it far easier simply to avoid the high-cost students—children with disabilities.

### C. *Requirements of Federal Law and the Dilemma for Choice*

This avoidance of high-cost students is easy enough to accomplish under a system in which every school is not required to provide a free appropriate

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126. See Morone, *supra* note 124.

127. Competitive schools will probably target students who can achieve marked academic improvement with only a modicum of extra effort on the part of educators. Like gifted students, such students are cost-effective because they provide a large payoff for a small investment.

128. See, e.g., Ames, *supra* note 21.



public education for every child with disabilities who wishes to enroll. But, according to the IDEA, states and school districts—not individual schools—are responsible for providing an appropriate education for all students with disabilities in their jurisdictions. The public policies underlying the IDEA and *Rowley* do not merely dictate who is responsible for ensuring children with disabilities receive an appropriate education but also support equal access for students with disabilities to the educational opportunities available to their nondisabled peers.<sup>129</sup> Equal access is the central legal issue for children with disabilities in any choice system.

A system of magnet schools may or may not create an environment where the educational program differs distinctly from school to school. If the result of choice is to create a diverse spectrum of schools,<sup>130</sup> unless every school provides special services to allow children with disabilities to participate in each of the available curricula, then children with disabilities will not have equal access to the array of substantive educational choices available to nondisabled students. Students with disabilities would have access to only a subset of the varied educational opportunities.

Such a result would offend an important value of mainstreaming. Two values underlying mainstreaming are 1) the desire to encourage integration and contact between children with and without disabilities; and 2) the belief that children with disabilities derive important educational benefits by participating in mainstream educational programs. The first principle serves to prevent attaching stigma to disabilities and confers an educational benefit through the socialization process. The interaction with nondisabled children improves the ability of children with disabilities to learn.<sup>131</sup> Conceivably, even if children with disabilities were completely deprived of school choice, this first principle could still be satisfied by mainstreaming the children to the greatest degree appropriate within the school they do attend, thus still promoting a degree of integration and contact.

It is the second of these mainstreaming values that is more seriously endangered by a choice system. Implicit in the notion that children with disabilities learn better when they are mainstreamed is the notion that they receive an educational benefit not only from improved socialization, but also

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129. See *supra* notes 67, 88 and accompanying text; see also Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1394-95 (1993) ("In education, a pure civil rights policy seeking to guarantee maximum accessibility to students with disabilities was adopted. The Regulations state that children with disabilities are entitled to the same free public education as non-disabled children.").

130. This is not an unlikely outcome, since proponents of choice actually deem this result to be the strength of choice proposals. See CHOOSING BETTER SCHOOLS, *supra* note 8, at 9.

131. *Fischer by Fischer v. Rochester Community Sch.*, 780 F. Supp. 1142, 1145 (E.D. Mich. 1991). In *Fischer*, a kindergartner's IEP was designed to place the child in an integrated program "developed on the basis of the developing national thought that disabled children would benefit from socialization with their peers."; see also Gartner & Lipsky, *supra* note 76, at 370 ("[T]he law, in keeping with its philosophic acceptance of the concept of normalization expresses a strong presumption [for mainstreaming.]").

from the educational program itself in the integrated classroom.<sup>132</sup> Like their nondisabled peers, children with disabilities learn to read and write through the mainstream education program.

In the past educators and courts have focused on only the first of the two mainstreaming values because before choice was introduced, the two mainstreaming values were essentially intertwined. Children with or without disabilities were accorded equal access to public education, because of the notion of the common school.<sup>133</sup> Generally speaking, the curriculum for each grade level is intended to be roughly equivalent from school to school.<sup>134</sup> Although the educational format for a child with disabilities varies with his or her individual IEP, the objective is to have the child follow the same grade levels and curricula as nondisabled students in the system.<sup>135</sup> In a system in which it was assumed that every school provided the same education, it was unnecessary to examine the second principle, because a mainstreamed child received the benefits of both mainstreaming values simultaneously. Simply by being mainstreamed, a child with disabilities benefitted from the contact with her nondisabled peers and the ways that contact aided her learning, and, at the same time, she received equal access to the educational opportunities offered to her nondisabled peers. She was able to derive educational benefit from the same educational program as every other child in her school.

The crucial point of this Note is that under a choice system the educational framework would be completely reformulated, but the network of federal statutory and decisional law would remain the same. In the present system, all schools and students are governed by state and district level management. Under choice, the locus of decisionmaking would move from the district level to the individual school level. A new dichotomy would be established in which states and school districts remained responsible for the education of children with disabilities while each individual school exerted a new-found autonomy over curriculum, enrollment, hiring and other management issues. The IDEA currently mandates that *states* and *districts* ensure that children with disabilities have equal access to public education, but individual schools do not have a

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132. See *supra* notes 76-79 and accompanying text; see also Lewis et al., *supra* note 116, at 482 (stating that mainstreaming has educational and social value).

133. Horace Mann's concept of the "common school" symbolizes education available on common terms to all people. Under the common school philosophy, education is available to and equal for all. The common school provides the level of education necessary to meet the central purpose of developing an informed and productive citizenry, who can participate actively in a democratic society. The common school fulfills its purpose by educating citizens through instruction and interaction. Children of all creeds, classes, backgrounds and capabilities are welcomed by the common school. Thus, the school is "the funnel that turns a diverse, pluralistic society of many into one." Underwood, *supra* note 3, at 607-08.

134. Katherine T. Bartlett, *The Role of Cost in Educational Decision-Making for the Handicapped Child*, 48 LAW & CONTEMP. PROBS., 7, 20 ("The offering of common curriculum, indeed, has long been considered an important aspect of educational opportunity in American education. Standardization is to ensure that children are given educations that will enable them to achieve regardless of background.").

135. *Rowley*, 458 U.S. at 203-04.

similar mandate.<sup>136</sup> Because the law does not place the responsibility of special education directly upon each school, under choice, each school's administration can choose not to provide special educational programs. Unless *each individual school* is required to provide the special services needed to educate children with disabilities, individual schools will have a disincentive to provide such programs.

Equality of access arguments are more easily answered in a nonchoice world, in which all children—with or without disabilities—are restricted by state/district governance and each child is assigned to a school. For nondisabled students, this assignment is generally based on where they live. For a child with disabilities, the assignment is determined by the IEP and availability of special services. With a scheme of school choice, the equality argument becomes much more complicated. Assignment for nondisabled students will be directed by their parents' choice, but will the same be true for children with disabilities?

To be fair, even in a competitive system, schools may have some incentive to serve students with disabilities because if that market need is present, certain schools will likely decide to become magnet schools designed specifically to attract children with disabilities. The IDEA and subsequent federal cases make clear that mainstreaming and least restrictive environment are not merely policy goals, but mandates of federal law. If a district were to cluster all students with disabilities together in magnet schools devoted solely to children with disabilities, children attending those schools would be isolated from nondisabled students in a segregated educational system. As Part II of this Note demonstrates, such schools would violate the IDEA because students with disabilities would no longer be educated in the least restrictive environment.

Knowing that separate special education magnet schools would violate the IDEA, school choice programs face a dilemma: Either 1) children with disabilities will not have the same access to choice and the same educational opportunities that nondisabled children have; or 2) each and every magnet school will have to provide special services. The first alternative, though probably legal, is nevertheless undesirable because it contravenes the spirit of the equal access principle underlying section 504, the IDEA and *Rowley*. The second alternative, however, is likely infeasible, because its costs would put an enormous strain on school systems that are already strapped for cash.

### 1. *The Undesirable Possibility*

As Congress and the Supreme Court have articulated, children with disabilities are entitled to equal access to the same free public educational

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136. See *supra* notes 68-70 and accompanying text.

system as their nondisabled counterparts.<sup>137</sup> In providing this guarantee, Congress and the Court did not merely open the school doors to children with disabilities, but took measures to ensure that the children received an "appropriate" education,<sup>138</sup> meaning they received an "educational benefit."<sup>139</sup> In mandating the creation, maintenance and revision of an IEP for every child with disabilities<sup>140</sup> and requiring that children with disabilities be mainstreamed to the maximum extent appropriate,<sup>141</sup> Congress and the Court sought to ensure a certain quality of education for these children.<sup>142</sup>

In the present system, each school in each district provides roughly the same educational program. Choice abandons this framework. Thus, the equal access issue previously addressed by the Supreme Court and Congress must be reexamined. This equal access issue precedes any discussion or determination of what is an "appropriate" education, for before educators and the courts can determine what is "appropriate" for a child with disabilities, that child must first have equal access to the public education system. This equal access concern was the driving concern behind the *Mills* and *PARC* cases and critical to the passage of the IDEA and the Supreme Court's *Rowley* decision.<sup>143</sup> While at the time of *Mills*, *PARC*, the IDEA, and *Rowley*, choice

137. See *supra* note 88 and accompanying text.

138. 20 U.S.C. § 1412(3) (Supp. IV 1992).

139. *Rowley*, 458 U.S. at 200.

140. "Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 20 U.S.C. § 1414(a)(5)." 20 U.S.C. § 1412(4) (Supp. IV 1992).

141. See *supra* note 73; see also 20 U.S.C. § 1412(5) (Supp. IV 1992) ("[T]o the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled.").

142. Perry A. Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 482-84 (1983). Zirkel states:

A close reading of the Court's opinion reveals that it is not limited to access and procedures. Notwithstanding the majority's assertion that "[n]oticeably absent from the language of the statute is any substantive standard," the Court in effect accorded substantive status to its purportedly procedural standard by searching in the legislative history for "some *additional* substantive standard." Similarly, in stating that "the intent of the Act was *more* to open the door of public education . . . on appropriate terms than to guarantee any particular level," the Court not only left open the meaning of "appropriate," but also implicitly recognized that Congress intended a particular substantive level. This use of relative rather than exclusive language permeates the Court's opinion.

*Id.* at 482-83 (footnotes omitted). The *Rowley* Court did not address what access to public education would mean under a system of choice. The Court's opinion addressed only what access should be guaranteed to disabled children under the current system of public education.

143. Even under a narrow construction, *Rowley* guarantees children with disabilities equal access to a free appropriate education. James has explained:

As *Rowley* notes, the Act was passed in response to congressional concern that state and local authorities were doing an inadequate job of educating their handicapped children. In order to alleviate this condition, Congress explicitly stated its intention to "take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity."

James, *supra* note 67, at 724.

was not a concern, choice has now become an educational opportunity.<sup>144</sup> Therefore, any choice system requires a new examination of what equal access means.

Equal access does not mean that children with disabilities need to be provided with the best possible education.<sup>145</sup> Children with disabilities ought not to receive preferential treatment in a choice program. Equal access is not the same as equal educational benefit or equal education. Equal access mandates that children with disabilities be provided with the chance to take advantage of the same educational opportunities that nondisabled children are given, that they have the same choices as their nondisabled peers.

Choice is a new educational opportunity available to all nondisabled students. If magnet schools with unique educational programs develop without the resources necessary for educating children with disabilities, the child with disabilities and her parents would have less choice than her nondisabled peers. The parents could choose to forgo special services for their child in order to enroll her in a particular program (e.g., languages, sciences, music). Alternatively, they could choose to place their child in a school that provides special services but lacks the distinctive educational program provided at the first school. If a child with disabilities is precluded from participating in a meaningful way in the educational programs offered at a magnet school, she is unable to exercise the choice that her classmates and peers exercise in attending that facility. Not only is she denied equal access to the choice itself, the child is also deprived of access to the educational program provided to all nondisabled children by that magnet school.<sup>146</sup>

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144. See, e.g., McKinney, *supra* note 3, at 671 (“[School choice] is a service (and arguably a benefit!) provided by a recipient, and denying an otherwise qualified student with a disability access to the program discriminates against him-her solely due to the handicapping condition in violation of Section 504.”).

145. Beyer, *supra* note 50, at 371.

146. This point is further emphasized in a hypothetical formulated by Underwood:

J.J., a learning disabled student who has difficulty disseminating written information, is presently enrolled in the Milwaukee Public Schools. He is receiving assistance from a resource teacher who tutors J.J. and translates written information orally for him. The resource teacher also is teaching J.J. how to de-code written information for himself. For all other purposes J.J. participates in the regular curriculum in the regular classroom. Before his diagnosis with this learning disability, J.J. was failing his classes. Now, with the aid of his resource teacher he is passing in every subject. J.J.’s parents hear of a public magnet school in their district that [has a special computer program. J.J. has demonstrated a real interest in computers and] his parents would like to send him to the choice school. When the choice school finds out that J.J. is learning disabled, they explain to his parents that they have no resources teacher for J.J., nor are they willing to provide one. J.J.’s parents know that without the appropriate educational services he will again fail in school. J.J. and his parents must choose—do they want to participate in the choice program and take advantage of the particular focus this school provides and allow J.J. to fail academically, or do they want to allow J.J. to remain in his current public school, forgo the special [computer] curriculum and still receive the services necessary for him to succeed academically?

Underwood, *supra* note 3, at 606-07. J.J.’s parents’ choice is distinctly different from the choice that parents of nondisabled children face. It is not a question of whether J.J. has the opportunity to have the best available education. The problem is that J.J. does not have equal access to the educational opportunity provided by the magnet school. J.J. has no choice. *Id.* Underwood uses the hypothetical in a discussion of

Section 504 of the Rehabilitation Act requires that an otherwise qualified person not be discriminated against solely on the basis of handicap. Age is the only requirement for participation in public education: therefore, school-age children with disabilities are "otherwise qualified persons" in the education system.<sup>147</sup> Furthermore, these children are just as capable of benefitting from public education system as their nondisabled peers. Choice programs that do not provide for the needs of children with disabilities prohibit the participation of otherwise qualified individuals in their schools.

Examining choice systems under the *Oberti* and *Alexander* tests for section 504 of the Rehabilitation Act demonstrates that if choice schools are not fully equipped with the special teachers and services necessary to educate students with disabilities, these students are denied equal access to the choice education system. Under the *Oberti* test, if a child with disabilities meets the age requirements for school and is denied the ability to select any choice school, a prima facie case of discrimination in violation of Section 504 exists.<sup>148</sup> The burden then shifts to the school to demonstrate why it would be unduly burdensome to allow children with disabilities equal access to school choice on the same terms as it is provided for all nondisabled children.<sup>149</sup> Under the *Alexander* test the same conclusion follows. First, if children with disabilities are not able to choose their schools as do nondisabled children, they are "excluded from or denied meaningful access to a public program."<sup>150</sup> Second, since the purpose of these systems is to provide a better education to those children who take part, if children with disabilities are unable to participate, they cannot receive the benefit the program is designed to provide. Last, it can be argued that Congress favors ensuring equal access to the educational benefits provided through the public system over state discretion, because the legislature enacted the IDEA with several explicit requirements for the education of children with disabilities.<sup>151</sup>

Under both *Oberti* and *Alexander*, schools may escape from the section 504 requirements only by demonstrating that fully incorporating children with

the Milwaukee Choice Program, which uses private school vouchers rather than a public magnet school model, her example illustrates equally well the inherent problems under either model.

147. The *Oberti* court cited 34 C.F.R. § 104.3(k)(2) (1992):

Qualified handicapped person means . . . with respect to public preschool, elementary, secondary or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons or (iii) to whom a state is required to provide a free appropriate public education under [§ 1412] of [the IDEA].

*Oberti*, 801 F. Supp. at 1405. Because all public schools today receive federal money, the requirement that the program receive federal funds would also be satisfied.

148. See *supra* note 59 and accompanying text.

149. *Oberti*, 801 F. Supp. at 1405 ("[O]nce the plaintiff has established a *prima facie* case that he has been discriminated against, the defendant must present evidence to rebut the inference of illegality.") (quoting *New York State Ass'n for Retarded Children Inc. v. Carey*, 612 F.2d 644, 649 (2d Cir. 1979)).

150. *Alexander v. Choate*, 469 U.S. 287, 302-09 (1985).

151. See *Cudahy*, *supra* note 3, at 305-06; see also *supra* text accompanying notes 64-73.

disabilities into school choice is unduly burdensome.<sup>152</sup> However, in ascertaining whether an undue burden is imposed upon the schools, federal regulations incorporate the same principles as the IDEA and mainstreaming by providing that "such a showing is subject to a 'least restrictive environment' requirement."<sup>153</sup> Thus, the *Oberti* court held that Section 504 places limits on the "undue burden" escape clause because the financial burden is secondary to the least restrictive environment. Costs can be considered when selecting between two educational programs that are both in the least restrictive environment.<sup>154</sup> However, cost is not a factor that permits a school district to place a child in a more restrictive environment.<sup>155</sup>

It is likely that courts would find that children with disabilities who are mainstreamed in any school, even though outside the choice system, are nevertheless afforded an education in the least restrictive environment. This is because courts' definition of the least restrictive environment in any particular case asks whether a student is mainstreamed to the maximum extent appropriate. This evaluation has traditionally focused on the first mainstreaming principle. Because courts would probably accept that children with disabilities were being educated in the least restrictive environment, they would probably release the schools from the mandates of section 504 upon the finding that the expenses of providing special education programs in every school were unduly burdensome. Even though a choice system that excludes children with disabilities may thus meet the letter of section 504 and the IDEA, considering that students with disabilities comprise approximately eleven percent of all students, school choice has the potential to exclude over eight million children.<sup>156</sup>

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152. *Oberti*, 801 F. Supp. at 1406; see also *Alexander*, 469 U.S. at 302-09.

153. *Oberti*, 801 F. Supp. at 1406; see also 34 C.F.R. § 104.4(b)(2) (1992) ("For purposes of this part, aids, benefits, and services to be equally effective are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.").

154. *Oberti*, 801 F. Supp. at 1406.

155. *Roncker*, 700 F.2d at 1063. It may be helpful to think of the following situations. The first involves two possible placements, both in mainstreamed classrooms. If the desired program were more expensive, the "undue burden" clause might provide an escape from providing this more costly program as long as the alternative placement was also in the least restrictive environment. However, if the choice lay between a segregated facility and a mainstreamed classroom and the mainstream program were more expensive, the school district would have to pay the higher costs to provide the child an education in the least restrictive environment.

156. 20 U.S.C. § 1400(b)(1) (1988) (findings of Congress); see also FARNHAM-DIGGORY, *supra* note 2, at 10 (stating that about eleven percent of all children in the public schools receive special education).

## 2. *The Infeasible Alternative*

The only way to provide children with disabilities equal access to a choice system is to outfit every choice school with the resources necessary to accommodate every type of disability. This would be financially infeasible.

The linchpin of choice is a reliance on school-based management and innovation, which should push the requirements of the IDEA from the district level to the individual school. The logical consequence of this shift is that every school would have to be equipped to educate the children with disabilities who choose to attend. Because each disability requires different services, the costs of having resources to aid every type of child in every school would be exorbitant.<sup>157</sup> As noted previously, the costs of educating children with disabilities are not predictable, and the demand for such services is unstable. The greatest obstacle in such a system is that the costs taken on by such programs are not easily transferable because each program requires start-up costs and then individualized resources for each child's disabilities. These factors make long-term planning difficult, if not impossible. If the costs become excessive, the "unduly burdensome" language in both the *Oberti* and *Alexander* tests provides a limited escape.<sup>158</sup>

The result of these complications is that in promoting free market competition and decisionmaking at the individual school level, choice will likely marginalize students with disabilities and their educational needs. The likely implications of choice for children with disabilities are not good. Either children with disabilities will no longer have equal access to the educational opportunities provided all other children, or schools will face unrealistic expenditures to ensure that children with disabilities have the choice that nondisabled children have.

## IV. CONCLUSION

Decentralizing the schools, giving parents greater input into their children's education, and fostering greater communication between teachers and parents are admirable goals of choice programs. Improving our schools and better educating our children are admirable goals of society. But creating a new segregation is not. If choice is deemed the answer to some of the ailments of public education, it cannot ignore the rights of children with disabilities in the process. Within the choice debate, the implications of such programs for children with disabilities must be addressed openly and honestly. It is possible for a choice system, even the Magnet School Approach, to conform to the formal requirements of federal law. Choice systems could strive to meet only

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157. See FARNHAM-DIGGORY *supra* note 2, at 10-13.

158. See *supra* note 152 and accompanying text.



the minimum standards required by the IDEA, making certain that children with disabilities are allowed access to a free and appropriate public education that comprises a subset of the educational opportunities available to nondisabled children.

The argument can be made that disabled students would not be harmed by choice, because they would continue to receive the same education they currently receive. But the relevant question is how different student groups fare *comparatively* under a new educational system based upon choice. It is unlikely that the added benefits that choice purports to offer will be made available to children with disabilities. While schools would give nondisabled students a voice in their education and let them select the schools they attend based upon their multiple needs, students with disabilities would be denied the same choice. Instead, it will be left to the schools to choose them. Such a system might be able to meet the letter of the section 504 and the IDEA but would undoubtedly violate their spirit—and at the very least would prove a highly undesirable policy decision. It would mean condoning the notion that the rights of one group of children can legitimately be ignored for the benefit of another.

If the concerns of children with disabilities are not adequately addressed, we may witness a new system of education that is again separate and unequal. In the seminal decision *Brown v. Board of Education*, the Supreme Court explained:

Education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made *available to all on equal terms*.<sup>159</sup>

Today those same words ring true for another student population. Students with disabilities are as deserving of equal access to educational opportunities, including choice, as are nondisabled children. It is our responsibility to provide the foundation of good citizenship for all.

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159. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

