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I. INTRODUCTION

Prior to congressional legislation in the 1970s, there were more than eight million children with disabilities, most of whom were excluded from any educational opportunities.[1] Of those children with disabilities who were educated, almost seventy percent were taught in separate classrooms or buildings apart from non-disabled students.[2] Some states even carried the separation concept so far that they created legislation that barred a parent from appealing a school's decision refusing to allow a student with disabilities to attend.[3]

Education for students with disabilities has improved dramatically since the days when children with disabilities were excluded from educational opportunities. Despite improvements, however, debate still continues over the quality of the education provided to students with disabilities. Specifically, controversy remains over whether the best placement for a child with a disability is in a general classroom or in a separate educational setting. This question is often termed the inclusion debate.

The current controversy over inclusion can best be understood through a historical analysis of changes in legislation and shifts in judicial interpretation that have affected the education of students with disabilities. Congress first began to address the needs of children with disabilities in the Elementary and Secondary Education Act of 1965[4] and the Education of the Handicapped Act of 1970.[5] Following these statutes,

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1. Sen. Rpt. 94-168 at 8 (June 2, 1975).

2. Robert L. Hughes & Michael A. Rebell, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & Educ. 523, 524 (1996) (citing Mary Ellen Guzman, *Success for Each Child: A Research-Based Report on Eliminating Tracking on New York City Public Schools* 42 (1992)).

3. *See e.g.* 1965 N.C. Laws 641 (amending N.C. Gen. Stat. §§ 115–165 (1963)).

4. 20 U.S.C. § 6301 et seq. (2000), Pub. L. No. 89-10, 79 Stat. 27 (1965).

5. 20 U.S.C. § 1400 et seq. (2000), Pub. L. No. 91-230, 84 Stat. 121 (1970).

Congress implemented broad legislation specifically concerning the rights of students with disabilities in the Education for All Handicapped Children Act (EAHCA) of 1975.[6]

In 1990 EAHCA was reauthorized and renamed as the Individuals with Disabilities Education Act (IDEA).[7] IDEA includes a few fundamental conditions that have been a traditional focus of educating students with disabilities: (1) a free appropriate public education,[8] (2) an individualized education program for each student,[9] and (3) an education in the least restrictive environment.[10] These different principles, however, often exist in competition with each other. The question concerns how to rank their priority for educating students with disabilities. IDEA does not specifically define the parameters of these requirements or their relationship to each other. Indeed, IDEA does not use the term "inclusion," yet the dispute over full inclusion of students with disabilities into the general education classroom figures prominently in the policy debate regarding educational placement.

The Supreme Court has provided little guidance amidst these competing themes in the inclusion debate. The range of courts of appeals rulings still further complicate the debate over inclusion and the least restrictive environment provisions of IDEA by adopting a variety of tests to determine the appropriate placement and education for students with disabilities. The debate over the education of students with disabilities continues to be a battle over competing interests and priorities.

This article will demonstrate how the most recent federal legislation regarding IDEA, the reauthorization of the Individuals with Disabilities Education Improvement Act of 2004[11] (the 2004 Reauthorization), reinforces the historical tensions between access and process, and outcomes and accountability. The 2004 Reauthorization emphasizes the conflict between individualized treatment and general mandates for all students. The 2004 Reauthorization, with its focus on accountability, sets forth new amendments that continue to fuel the inclusion debate. Its emphasis on accountability stems from the promulgation of the No Child Left Behind Act of 2001,[12] which applies to both disabled and non-disabled students.

From the passage of the EAHCA to the 1990 reauthorization of

6. 20 U.S.C. § 1400 et seq. (2000), Pub. L. No. 94-142, 89 Stat. 773 (1975).
7. 20 U.S.C. § 1400 et seq. (2000), Pub. L. No. 101-476, 104 Stat.1103 (1990).
8. 20 U.S.C. § 1412(a)(1) (2000).
9. *Id.* at § 1414(d).
10. *Id.* at § 1412(5).
11. *Id.* at § 1400 et seq.
12. *Id.* at § 6301 et seq.

IDEA to the recent reauthorization of the 2004 Reauthorization, educating students with disabilities has been rather contentious. Throughout the legislations' development, competing themes of access versus accountability and process versus outcomes have shaped the inclusion debate. To what extent should children with disabilities be involved in general education classrooms, and to what extent should their curriculum be modified from that of their peers? In addition to these questions, legislators and special educators disagree as to the extent to which accountability standards should be used for students with disabilities and how these accountability measures reflect the effectiveness of the educational process for those students.

This article analyzes the controversies surrounding the full inclusion of students with disabilities into general education classrooms by looking at the interplay between IDEA's main educational priorities for students with disabilities. The article will also consider purposes behind the EAHCA, the courts' interpretation of IDEA, and the recent amendments to the 2004 Reauthorization and will demonstrate a recent shift in the educational priorities for students with disabilities from a focus on access to an increased attention on accountability. The article will then propose that further development of education policy for students with disabilities requires explicitly recognizing and balancing the tensions that exist among the laws that pertain to educating students with disabilities.

Part I of this article provides a brief overview of the legislative history of laws that address the education of students with disabilities, demonstrating the legislature's beginning focus on access to education and the initial tension within the requirements of IDEA. Part II analyzes judicial interpretations of the inclusion debate as well as the dispute in educational circles by focusing specifically on requirements for adhering to IDEA's least restrictive environment provision. Part III analyzes recent amendments to IDEA and the tension between individual-focused decision-making and general mandates on testing. Finally, the conclusion suggests proposals for refocusing the inclusion debate in order to mediate between conflicting priorities and create an educational environment where students can succeed.

II. HISTORY OF EDUCATING STUDENTS WITH DISABILITIES

A. The Legal Background

The emphasis on the education of students with disabilities developed from the foundation of the civil rights movement and

desegregation.[13] The country's focus on desegregation prompted many to consider another disregarded group of students, those with disabilities, who were largely excluded from the general educational system and placed in separate facilities or not even educated at all. Invoking the language of *Brown v. Board of Education*,[14] disability advocates claimed that "separate but equal"[15] was unequal for students with disabilities as well. Segregated schools for students with disabilities were seen as "substandard and inadequate."[16] The disability movement strived to develop an educational setting in which students with disabilities could have access to an education equal to that of their non-disabled peers. This preliminary focus on access to education for disabled students prompted the initial federal legislation in conjunction with prominent court cases.[17]

Following *Brown*, two cases in particular, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*[18] and *Mills v. Board of Education*,[19] led to the development of federal legislation specifically aimed toward students with disabilities. These cases provided the necessary legal authority to include children with disabilities into the public educational system; both decisions invoked the language of segregation and the need for equality in the educational environment.[20]

PARC involved a class action suit brought by the Pennsylvania Association for Retarded Children and the parents of thirteen mentally retarded students who argued that the state violated their due process and equal protection rights by refusing to provide them with a public education.[21] The court of the Eastern District of Pennsylvania agreed and ruled that students with disabilities were entitled to a public school education.[22] The court issued a consent decree and reasoned that many persons with disabilities were being denied public educational services altogether[23] and that "all mentally retarded persons are capable of benefiting from a program of education and training."[24] This action

13. *See* Hughes & Rebell, *supra* n. 2.

14. 347 U.S. 483 (1954).

15. *Id.* at 493.

16. Hughes & Rebell, *supra* n. 2, at 532–533.

17. *Id.* at 535.

18. 343 F. Supp. 279 (E.D. Pa. 1972).

19. 348 F. Supp. 866 (D.D.C. 1972).

20. *PARC*, 343 F. Supp. at 296; *Mills*, 348 F. Supp. at 875.

21. *PARC*, 343 F. Supp. at 281, 283.

22. *Id.* at 297.

23. *Id.* at 296. The court cites that between 70,000 and 80,000 mentally retarded school-age children were denied access to any public education. *Id.*

24. *Id.*

required Pennsylvania to provide each child with mental retardation a "free, public program of education and training appropriate to the child's capacit[ies]."[25] In doing so, the court was the first to recognize the rights of students with disabilities to an appropriate education. The holding in this case foreshadowed the federal requirements for a free appropriate public education for students with disabilities.

In *Mills*, the District Court for the District of Columbia also considered the due process rights of students with disabilities. The plaintiffs in this case were seven African American students with disabilities who were denied access to public schools.[26] The court held that the school board's actions in denying children publicly supported education violated the Due Process Clause of the United States Constitution.[27] According to the court, the Board of Education had the responsibility of providing "publicly supported education to all of the children of the District, including these 'exceptional' children."[28] The court also held that excluding children with disabilities from the public school system denied them equal protection.[29] The *Mills* ruling "established the principle that a lack of funding was not a sufficient reason to deny educational services to children with disabilities."[30]

Focusing on the educational gap for children with disabilities, Congress initiated legislation in the early 1970s that protected students with disabilities and ensured their right to a free appropriate public education.[31] In designing legislation, Congress cited the Supreme Court's language in *Brown*: "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 . . . is a right which must be made available to all on equal terms."[32] Congress also noted that the cost associated with educating these individuals would be offset by the future cost to society of not educating these students. Without educational opportunities, taxpayers and public agencies, would spend

25. *Id.* at 285.

26. *Mills*, 348 F. Supp. at 868–870.

27. *Id.* at 876.

28. *Id.* at 871.

29. *Id.* at 875.

30. Charlene Quade, *A Crystal Clear Idea: The Court Confounds the Clarity of Rowley and Contorts Congressional Intent*, 23 Hamline J. Pub. L. & Policy 37, 47 (2001); *Mills*, 348 F. Supp. at 876.

31. Congressional findings report that more than half of the children with disabilities in the United States do not receive services that will provide them equal educational opportunity. Sen. Rpt. 94-168 at 41.

32. *Id.* at 6 (quoting *Brown*, 347 U.S. at 493).

billions of dollars servicing the handicapped population.[33] Providing education, on the other hand, would protect against forced institutionalization and allow children with disabilities to become productive and contributing members of society.[34] In addition, the congressional statements emphasized that

> Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the government to merely establish an unenforceable goal requiring all children to be in school . . . [The Government must] take[ ] positive necessary steps to ensure that the rights of children and their families are protected.[35]

B. IDEA

In 1975, Congress enacted legislation known as the Education for All Handicapped Children Act (EAHCA)[36] that identified requirements for educating students with disabilities. The key points of EAHCA included that all children with disabilities must be educated, education must be provided in the least restrictive placement, education must be individualized and appropriate to the child's unique needs, that it must be provided at no cost to the parents, and procedural protections are required to ensure that the requirements are met.[37] The EAHCA emphasized four goals:

> [1] to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [2] to assure that the rights of handicapped children and their parents or guardians are protected, [3] to assist State and localities to provide for the education of all handicapped children, and [4] to assess and assure the effectiveness of efforts to educate all handicapped children.[38]

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33. *Id.* at 9.

34. *Id. See also* Quade, *supra* n. 30, at 44.

35. Sen. Rpt. 94-168 at 9.

36. Pub. L. No. 94-142, 89 Stat. 773. Prior to the EAHCA, Congress authorized the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, which provided grants to meet special needs of educating disabled children. In 1970, Congress authorized the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121. Section 504 of the Rehabilitation Act, Pub L. No. 93-112, 87 Stat. 355 (1973), enacted in 1973, provided general civil rights to the handicapped with respect to federally assisted activities.

37. *See also* Richard Daugherty, *Special Education—Summary of Legal Requirements, Terms and Trends* 6 (Bergin & Garvey 2001); *see generally* 89 Stat. 773.

38. 89 Stat. 773. *See also* U.S. Dept. of Educ., *History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*,

With emphases and balances that have varied over the years, these principles continue to be the underlying goals of the legislation today.

Reauthorization of the EAHCA in 1990 resulted in a new name for the legislation: "IDEA." IDEA reemphasized EAHCA's founding principles. As with EAHCA, the original IDEA and its 2004 Reauthorization require that states provide students with disabilities a "free appropriate public education" (FAPE)[39] that focuses on educating students in the "least restrictive environment" (LRE),[40] which develops from an "individualized education program" (IEP).[41] These three elements are central to the core principles of IDEA. The task of educating students with disabilities has focused on providing these primary conditions. These conditions often exist in competition with each other and a central policy debate concerns their ranking priority.

1. Free appropriate Public Education (FAPE)

Although a free appropriate public education is at the heart of the Act, IDEA initially did not define the conditions that would properly constitute a FAPE for students with disabilities. Consequently, there has been much debate over what a FAPE includes. The Supreme Court clarified the requirements of a FAPE in *Board of Education v. Rowley*,[42] in which it defined a FAPE as "personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."[43]

IDEA currently mandates that a "free appropriate education is available to all children with disabilities residing in the state between the ages of 3 and 21," provided in conformity with an IEP.[44] Yet, courts have struggled in developing interpretations of a FAPE as it relates to the LRE requirement.

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http://www.ed.gov/print/policy/speced/leg/idea/ history.html (last modified Nov. 29, 2005) [hereinafter U.S. Dept. of Educ., *History*].

39. 20 U.S.C. § 1400(d)(1)(A).

40. *Id.* at § 1412(a)(5).

41. *Id.* at § 1414(d).

42. 458 U.S. 176 (1982).

43. *Id.* at 177.

44. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1401(9)(D). Though controversy surrounds the term "appropriate," the importance of equal opportunity in education can be inferred from congressional testimony stating that "a free public education is "basic to equal opportunity and is vital to secure the future and prosperity of our people." *Twenty-Fifth Anniversary of Education for All Handicapped Children Act*, 146 Cong Rec. H8003 (daily ed. Sept. 25, 2000) (available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2000_record&page=H8003&position =all).

2. Least Restrictive Environment (LRE)

IDEA states that a FAPE for a student with a disability must be provided in the least restrictive environment. Specifically,

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily.[45]

Congress promoted the social benefits of an integrated education when it first included the LRE provision in the EAHCA. Senator Robert Stafford illustrated such congressional intent when he said: "We are concerned that children with handicapping conditions be educated in the most normal possible and least restrictive setting, for how else will they adapt to the world beyond the educational environment, and how else will the nonhandicapped adapt to them?"[46] However, the Act does not define the least restrictive setting or the appropriate level of inclusion in a regular classroom.[47]

The debate over inclusion of children with disabilities revolves around the definition of the LRE and its relationship to a FAPE. Although Congress intended for students with disabilities to be educated in an environment with non-disabled peers, the LRE for a student with severe disabilities may or may not be in a classroom with non-disabled peers.

Although the LRE is not defined in the statute, the Department of Education promulgated regulations under IDEA to provide for a continuum of alternative placements when it stated that "in selecting the LRE, consideration [should be] given to any potential harmful effect on the child or on the quality of services that he or she needs."[48] The continuum ranges from the least restrictive to the most restrictive settings. Inclusion in a regular classroom is the least restrictive while a special education classroom, a special education school, home instruction, and hospital instruction or institutionalization are more restrictive placements.[49] Although the regulations acknowledge that a general education may not be appropriate for every child, the continuum

45. 20 U.S.C. § 1412(a)(5)(A).
46. 120 Cong. Rec. 58, 438 (1974).
47. 20 U.S.C. §§ 1400–1487.
48. 34 C.F.R. § 300.552(d) (2005).
49. *See id.* at § 300.551(b)(1).

of alternative placements is still based on the presumption that the LRE for a student with a disability is in a general education classroom. Because a student with severe disabilities may be more restricted in a general education classroom than a special education classroom, there is not simply one LRE for all children with disabilities. By providing a continuum of alternative placements, the regulations highlight the importance of an individualized inquiry and personalized evaluation when deciding which environment is the least restrictive for the student.[50]

3. Individualized Education Program (IEP)

An individualized education program (IEP) explains a student's FAPE and includes details of the student's placement.[51] An IEP is a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with [IDEA]."[52] Each school district is required to develop a written IEP for each child who receives special education services.[53]

As set forth in the 2004 Reauthorization, IDEA requires an IEP to be evaluated "periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved."[54] The IEP also requires "a statement of measurable annual goals, including academic and functional goals"[55] and an assessment of how those goals will be measured.[56] Specifically, the IEP must include statements on: (1) the child's present level of educational performance; (2) measurable annual goals; (3) the special education and related services to be provided to the child; (4) the extent, if any, to which the child will not participate with non-disabled children in the regular classroom; (5) any individual modifications in the administration of assessments that are needed for the child to participate in an assessment; (6) the projected date for the beginning of the services and modification, and the frequency, location, and duration of those services and modifications; (7) needed transition services at applicable ages; and (8) how the child's progress

50. Wrightslaw, *LRE: Questions & Answers on Least Restrictive Environment*, http://www.wrightslaw.com/info/lre.osers.memo.idea.htm (accessed Mar. 23, 2006).

51. The 1975 Committee Report explains that in order to derive any benefit an individualized planning conference must be held a minimum of three times per year. "The frequent monitoring of a handicapped child's progress throughout the year is the most useful tool in designing an educational program." Sen. Rpt. 94-168 at 11.

52. 20 U.S.C. § 1414(d)(1)(A).

53. *Id.* at § 1414(d)(2)(A).

54. *Id.* at § 1414(d)(4)(A)(i).

55. *Id.* at § 1414(d)(1)(A)(i)(II).

56. *Id.* at § 1414(d)(1)(A)(i)(III).

toward the annual goals will be measured.[57]

The IEP provides the basis for a student's placement decision,[58] and thus is tied intricately to the LRE requirement. The requirement that the IEP must contain "a statement of the specific special education and related services . . . to be provided to the child" [59] and the "extent . . . to which the child will not participate with nondisabled children in the regular class"[60] reinforces the preference for mainstreaming. The development of the IEP promotes an individualized, child-centered focus to meet the unique needs of each student.

III. THE INCLUSION DEBATE

IDEA's provision for an "appropriate education" for the individual student in the "least restrictive environment" with a preference for mainstreaming has created an inherent tension in the debate over educational placement of students with disabilities. According to Martha Minow, "[t]his tension implicates the choice between specialized services and some degree of separate treatment on the one side and minimized labeling and minimized segregation on the other."[61]

The LRE requirement is often confused with mainstreaming and/or inclusion. But the LRE is the mechanism through which the child's individual needs are matched with a specific educational placement.[62] Inclusion and mainstreaming, though often used interchangeably, are two different concepts. Mainstreaming refers to integrating students with disabilities into the general education classroom for part of the day, typically during non-academic periods, for social interaction.[63] A mainstream situation usually occurs when students with disabilities are placed in general education classrooms with "appropriate instructional support" during certain periods of the day.[64] Inclusion is when students with disabilities attend regular classrooms for most of the day, usually

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57. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VIII).

58. Wrightslaw, *supra* n. 50.

59. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

60. *Id.* at § 1414(d)(1)(A)(i)(V).

61. *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1993) (citing Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 L. & Contemp. Probs. 157, 181 (1985)).

62. Ellenmorris Tiegerman-Farber & Christine Radziewicz, *Collaborative Decision Making: The Pathway to Inclusion* 6 (Merril 1998).

63. Jean B. Crockett and James M. Kauffman, *The Least Restrictive Environment: Its Origins and Interpretations in Special Education*, 27 (Lawrence Erlbaum Assocs. 1999).

64. Allan G. Osborne, Jr., *Is the Era of Judicially-Ordered Inclusion Over?*, 114 West's Educ. L. Rep. 1011, 1011 (1997).

with the homeroom being a general education classroom.[65] A related term, full inclusion, refers to educating students with disabilities, regardless of severity, in a regular education classroom with peers their own age.[66] While inclusion is a means to fulfill the LRE requirement, the law does not require it. Nor is inclusion always the LRE for every student.[67]

A. Judicial Approaches

IDEA litigation involving placement decisions often centers around the concept of inclusion. Though the Act does not use the term inclusion, the issue arises when interpreting the parameters of an appropriate education, and more specifically in determining the LRE provision. The underlying conflict that surrounds the inclusion debate stems from the discrepancy between what may be an appropriate education and what may be the most appropriate level of inclusion.[68] This is an issue that the courts have yet to resolve.

The Supreme Court first assessed the context of an appropriate education for students with disabilities in 1982 in the case of *Board of Education v. Rowley*.[69] Though *Rowley* focused on the boundaries of an appropriate education rather than on placement, the case established the legal analysis for placement decisions.

In *Rowley*, the parents of a deaf student, Amy Rowley, brought suit to object to the school district's refusal to provide a sign language interpreter for their daughter in a regular education classroom.[70] The student's IEP stated that she would be educated in a general education classroom, however, her parents insisted that she also be provided with an interpreter in order to benefit more from the general education instruction. After a two week trial period with an interpreter, the school decided that Amy did not need these services.[71] Following a hearing before an independent examiner and the New York Commissioner of Education, who both agreed with the school district's conclusion that an interpreter was not necessary, the Rowleys filed suit against the school

65. *Id.* at 1012.

66. Anne P. Dupre, *Disability, Deference and the Integrity of Academic Enterprise*, 32 Ga. L. Rev. 393, 427 (1998) [hereinafter Dupre, *Disability, Deference and Integrity*].

67. Osborne, *supra* n. 64, at 1012.

68. *See* Dupre, *Disability, Deference and Integrity*, *supra* n. 66, at 426 (stating that "[t]he inclusion decision does not state to the child: 'We are unable to teach you.' Rather, the inclusion decision is based on a determination that 'we are better able to teach you in a special classroom'").

69. 458 U.S. 176.

70. *Id.* at 184–185.

71. *Id* at 184.

district in district court.[72]

The district court found that although Amy's educational performance was above average, she could have learned even more without her disability.[73] The inconsistency between her achievement and potential led the court to conclude that the school was not providing a FAPE and that an interpreter was necessary.[74] A divided panel of the Court of Appeals for the Second Circuit affirmed.[75]

The Supreme Court, however, reversed the Second Circuit's judgment and in doing so provided a guiding definition of a "FAPE." The Court concluded that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction . . . the child is receiving a 'free appropriate education.'"[76] By thus defining a FAPE, the Court also delineated the requirements of EAHCA and the role of the courts. The Court ruled that the Rowleys did not have a right to an interpreter for their daughter's educational benefit and concluded that EAHCA does not require states to maximize the potential of a child with a disability, but only to provide for an appropriate education.[77] In addition, the Court emphasized the important role of educators in evaluating placement and noted that the role of the courts in reviewing cases based on a preponderance of the evidence was "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."[78]

In determining the standard for reviewing whether the state abided by EAHCA regulations, the Court provided a two-part test for future judicial review of state educational provisions for children with disabilities:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.[79]

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72. *Id.* at 185.

73. *Id.* at 185–186.

74. *Id. See also* Stephen B. Thomas and Charles J. Russo, *Special Education: Issues & Implications for the '90s* 49 (Natl. Org. on Leg. Problems of Educ. 1995).

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

76. *Id.* at 189.

77. *Id.* at 198.

78. *Id.* at 206.

79. *Id.* at 206–207.

Congress, the Court reasoned, did not intend a specific outcome by passing the EAHCA, but rather sought only to make public education available to children with disabilities.[80] The Court in *Rowley* thus focused on the importance of access to education instead of a specific outcome.

Since *Rowley* does not provide explicit guidance on how to fulfill the LRE requirement of IDEA, courts of appeals have created a variety of guidelines for educational placement for students with disabilities. Prior to 1989, courts often held that mainstreaming was not required for all students with disabilities, but should be provided to the maximum extent feasible.[81] Beginning in the 1990s, the Third, Fifth, Sixth, Ninth, and Eleventh Circuits adopted a presumption in favor of mainstreaming or inclusion whenever it is appropriate.[82] The Seventh Circuit and the Fourth Circuit, however, do not prioritize inclusion or mainstreaming as primary goals.[83] The following section reviews the various circuit decisions that propose tests for determining the placement for students with disabilities in order to adhere to the LRE requirement of IDEA. The cases also consider how the LRE provision relates to a student's appropriate education.[84]

Although each court decision discussed herein provides its own unique test for determining an appropriate placement, the tests have certain similarities. Each test compares the benefits of placement of the student in a general education setting versus a special education environment and considers the services provided to the student. The variation among the tests concerns the weight and priority given to each of the different factors or categories and whether there is a presumption in favor of mainstreaming. The courts also vary in the level of deference given to special educators and the role of the courts in determining educational placement.

1. Circuits that Give Priority to Inclusion

Instead of directly following the two-part *Rowley* test, the Sixth

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80. *Id.* at 192.

81. Alan J. Osborne, Hartmann v. Loudoun County: *Another Round in the Inclusion Controversy*, 125 West's Educ. Law Rep. 289, 292 (1998).

82. *See Oberti*, 995 F.2d 1204; *Daniel R.R. v. St. Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991).

83. *See Hartmann v. Loudann County*, 118 F.3d 996 (4th Cir. 1997); *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002).

84. *See Oberti*, 995 F.2d 1204; *Hartmann*, 118 F.3d 996; *Daniel R.R.* 874 F.2d 1036; *Roncker*, 700 F.2d 1058; *Beth B.*, 282 F.3d 493; *Rachel H.*, 14 F.3d 1398; *Greer*, 950 F.2d 688.

Circuit developed its own evaluation method for determining the appropriate placement for a student with a disability in *Roncker v. Walter*.[85] Under this model, the court evaluated whether placement was appropriate by looking at a variety of factors: (1) which facility was superior, a regular classroom or a special education classroom; (2) whether services could feasibly be provided in a non-segregated setting; (3) whether the disabled child would benefit from mainstreaming; (4) whether the benefits of mainstreaming were outweighed by the benefits of services that cannot be provided in the non-segregated setting; (5) the disruptive behavior of the child; and (6) the cost of providing services.[86]

Roncker concerned a nine-year old boy, Neil Roncker, who had severe mental retardation and frequent seizures.[87] Neil's school district placed him in a separate school that served only students with mental retardation. Neil's parents appealed the decision, claiming that this placement, with no opportunity to interact with non-disabled students, violated the LRE mandate of the EAHCA.[88] The district court affirmed Neil's placement in the separate county school and reasoned that the benefits of this placement "outweighed" the goals of mainstreaming.[89] The Sixth Circuit held that "where [a] segregated facility is considered superior [to a regular education setting], the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting."[90]

After articulating this standard, the court remanded the case and directed the lower court to consider whether the school could provide services in a more integrated setting.[91] Thus, the *Roncker* court articulated a preference for a general education setting and the need for the school to provide services in this setting whenever possible. The court focused on transferring the services that make the segregated facility superior to the general education facility. The court, in sum, prioritized the LRE provision's preference for educating the student in a general education classroom over the benefits of providing services provided in a segregated setting. The Eighth and Fourth Circuits have applied the *Roncker* test in subsequent rulings prior to 1997.[92]

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85. 700 F.2d at 1062.

86. Therese Craparo, Student Author, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. Legis. & Pub. Policy 467, 485 (2003).

87. 700 F.2d at 1060.

88. *Id.*

89. *Id.*

90. *Id.* at 1063.

91. *Id.*

92. The Eighth Circuit in *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158 (8th Cir. 1983), used the *Roncker* test in ruling on the placement of an elementary school student with Down Syndrome.

Like the Sixth Circuit, the Fifth Circuit in *Daniel R.R. v. State Board of Education*[93] also declined to invoke the Supreme Court's appropriate placement test as set forth in *Rowley*. However, the Fifth Circuit also rejected the analysis proposed in *Roncker* and developed its own balancing test. The two-part test in *Daniel* evaluated two questions: (1) Can education in the regular classroom, with supplemental aids and services, be achieved satisfactorily? (2) If it cannot, and the school intends to remove the student from regular education, is the student then mainstreamed to the maximum extent appropriate?[94] The court then used a multi-factor analysis to evaluate the satisfactory education of a child with a disability in a regular education classroom: (1) whether the state had taken steps to accommodate the disabled child in regular education; (2) if so, whether those efforts were sufficient; (3) whether the child would receive an educational benefit from regular education; and (4) what effect the handicapped child's presence would have on the regular classroom environment, and thus, on the education that other students would be receiving.[95]

The *Daniel* court also focused on the benefits of mainstreaming and articulated that "a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide."[96] These factors and the overarching benefit of mainstreaming, the court determined, were extremely important in evaluating educational placement.

Daniel was a six-year old boy with Down Syndrome who was in a regular pre-kindergarten classroom. Daniel required constant attention from his teacher, and even after the teacher modified her teaching methods, Daniel was unable to master basic skills. The school district then assigned Daniel to a special education classroom where he interacted with non-disabled students only at recess and at lunch. Daniel's parents appealed the placement as a violation of the LRE provision.[97]

Similarly, the Fourth Circuit in *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989), used the *Roncker* test for determining appropriate education for an autistic child. The Sixth Circuit in *Age v. Bullitt County Schools*, 673 F.2d 141 (6th Cir. 1982), evaluated the placement of a deaf child in terms of the cost factor discussed in *Roncker* and determined that the school should not have to pay for an oral program at the child's neighborhood school, but must pay for transportation of the student to another school that did.

93. 874 F.2d 1036.

94. *Id.* at 1048.

95. *Id.* at 1048–1049.

96. *Id.* at 1049.

97. *Id.* at 1039.

Applying the two-part test described above, the court determined that Daniel would have received little benefit from the regular classroom and would require too much of the teacher's time. Both factors pointed toward special education placement.[98] The court then applied the second prong of its test to evaluate whether Daniel was mainstreamed to the greatest extent possible. The court agreed with the district court's conclusion that Daniel had been mainstreamed to the full extent feasible and upheld Daniel's placement in a special education classroom with daily mainstreamed involvement in non-academic activities such as lunch and recess.[99]

Although the court supported Daniel's placement in a special education classroom, the court's positive focus on mainstreaming and inclusion was evident throughout the ruling. In discussing the educational benefits of including students with disabilities in classrooms with their non-disabled peers, the court noted that "educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development."[100] Other courts have borrowed from these points in *Daniel* to support inclusionary placements.[101]

For example, the Eleventh Circuit in *Greer v. Rome City School District*[102] adopted and elaborated on the *Daniel* test. In *Greer*, the court assessed the educational placement of Christy Greer, a ten-year old girl with Down Syndrome and speech and learning disabilities.[103] Christy's parents contested Christy's placement in a special education classroom, which allowed her to be mainstreamed only for physical education, music and lunch.[104] To determine which educational environment would be the appropriate placement for Christy, the Eleventh Circuit compared the educational benefits of the general education classroom with special aids and services to those available in a special education classroom.[105] The court also looked at the educational effects on non-disabled students in the classroom and concluded that "[a] handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to significantly impair the education of other

98. *Id.* at 1050–1051.
99. *Id.* at 1050.
100. *Id.* at 1047–1048.
101. Osborne, *supra* n. 64, at 293.
102. 950 F.2d 688.
103. *Id.* at 690.
104. *Id.* at 691.
105. *Id.* at 698.

children."[106]

Like the Fifth Circuit in *Daniel*, the Eleventh Circuit in *Greer*, evaluated a range of factors to determine the appropriateness of a student's placement: (1) a comparison of the benefits in a regular classroom versus the benefits in a special education classroom, (2) the effect of the child with a disability on the regular class, and (3) the cost of the services needed for the child with a disability to benefit from education in a regular classroom.[107] The court held that to follow IDEA requirements sufficiently, the school district needed to consider a range of options regarding the appropriate placement for Christy, not simply a special education classroom option.[108] Since the school district did not offer any evidence about alternative educational methods for Christy, the court found that the school district had not met its procedural obligations under IDEA.[109] Though the test the court proposed evaluated a number of factors, the court based its decision on the school district's failure to provide options for Christy.[110]

The Third Circuit also adopted the *Daniel* test. The court's ruling in *Oberti ex rel. Oberti v. Board of Education*[111] implemented *Daniel*'s broad mainstreaming standards and was the first to emphasize the reciprocal benefits for students without disabilities, such as learning to communicate and interact with persons with disabilities.[112] Rafael Oberti was an eight-year-old boy with Down Syndrome. During his year in a regular kindergarten class, Rafael experienced a number of serious behavior problems such as temper tantrums, repeated toileting incidents, and hitting other children.[113] The school district removed Rafael from this classroom and placed him in a special education class. Rafael's parents brought suit arguing that Rafael was not mainstreamed to the maximum extent possible as required under IDEA.[114]

The court used a modified version of the *Daniel* analysis to determine the appropriate educational placement for Rafael. In evaluating the first prong—determining whether a child with a disability can be educated satisfactorily in a regular class with supplemental aids

106. *Id.* at 697.

107. *Id.* at 696–698.

108. *Id.* at 698.

109. *Id.* at 699.

110. *Id.*

111. 995 F.2d 1204.

112. Abigail Flitter, *Civil Rights—A Progressive Construction of the Least Restrictive Environment Requirement of the Individuals with Disabilities Education Act*—Oberti ex rel Oberti v. Board of Education, *995 F.2d 1204, (3d Cir. 1993)*, 67 Temp. L. Rev. 371, 386 (1994).

113. *Oberti*, 995 F.2d at 1208.

114. *Id.* at 1209.

and services—the court evaluated not only the factors identified in *Daniel*, but also considered several additional factors, including:

> (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of other students in the class.[115]

If a determination is made that the proper placement of the child is in a special education class, then the court should evaluate the second prong of the test, "whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate."[116] This analysis mirrors the *Daniel* test yet also adds several factors to the evaluation.

The Third Circuit agreed with the district court's finding that the school district had not made reasonable accommodations to place Rafael in a more inclusive program and thus had violated IDEA.[117] The court placed the burden of proving compliance with IDEA on the school board.[118] The court, furthermore, favored inclusion in a general education classroom over a special education setting despite Raphael's history of behavioral disruptions. The court stated that Rafael "would not have had such severe behavior problems had he been provided with adequate supplemental aids and services."[119] In focusing on the non-academic benefits of a regular placement education, the court emphasized the affirmative obligation of schools to consider the placement of students with disabilities in a general education environment before considering alternative placements.[120]

The Ninth Circuit also followed the trend toward prioritizing inclusion.[121] In *Sacramento City Unified School Disrict, Board of Education v. Rachel H.*,[122] the court incorporated the analysis from *Roncker* and *Daniel* to develop a more detailed four-factor test to determine the appropriate educational placement of a child with a

115. *Id.* at 1217–1218.

116. *Id.* at 1218.

117. *Id.* at 1224.

118. *Id.* at 1219.

119. *Id.* at 1223.

120. *Id.* 1217–1218.

121. *Rachel H.*, 14 F.3d 1398; Kathryn Crossley, *Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms*, 4 Wash. U. J.L. & Policy 239, 251 (2000).

122. 14 F.3d 1398.

disability.[123] These factors include: (1) the educational benefits available in a regular classroom with supplemental aids and services, compared to the benefits of a special education classroom; (2) the non-academic benefits of interaction with non-disabled students; (3) the impact of the student with a disability on the teacher and other children in the regular classroom; and (4) the cost of the supplementary aids and services required for mainstreaming the student.[124]

The court evaluated the placement of Rachel, a mentally disabled eleven-year-old child. Rachel's parents wanted Rachel to spend her entire day in a general education classroom rather than continue her existing placement in special education programs.[125] They brought suit against the school district for violating the LRE provision.[126]

Applying the four-factor test articulated above, the Ninth Circuit affirmed the district court's ruling that a general classroom was the appropriate placement in the LRE for Rachel.[127] The court reasoned that Rachel could be educated in a regular classroom with supplemental services satisfactorily,[128] that she could develop socially from placement in the regular classroom,[129] that she was not disruptive,[130] and that the school district did not demonstrate excessive cost.[131] Because there was no indication that Rachel's presence would negatively affect the classroom, the court did not need to factor this prong into its consideration of placement.[132]

2. The Fourth and Seventh Circuits' Shift away from Prioritizing Inclusion

Though many courts encourage inclusive placements and reject school districts' decisions to place a child in a special education classroom, the Fourth Circuit recently took an approach that is more deferential to the decisions of educators of students with disabilities. In *Hartmann v. Loudoun County Board of Education*,[133] the Fourth Circuit criticized the district court for overturning the recommendations of the

123. *Id.* at 1403–1404.
124. *Id.* at 1404.
125. *Id.*
126. *Id.* at 1400.
127. *Id.* at 1405.
128. *Id.* at 1400–1402.
129. *Id.* at 1401.
130. *Id.*
131. *Id.* at 1402.
132. *Id.* at 1404.
133. 118 F.3d 996.

school district and emphasized the role of educational experts.[134] The court concluded that "IDEA embodies important principles governing the relationship between local school authorities and a reviewing district court"[135] and that "IDEA does not grant federal courts a license to . . . disregard the findings developed in state administrative proceedings."[136] Furthermore, the court clarified IDEA's mainstreaming provision as "a presumption, not an inflexible mandate."[137]

In this case, Mark Hartmann was an eleven-year-old autistic boy who could not speak and had problems with his fine motor skills.[138] Mark was initially placed in a regular classroom for the second grade.[139] However, after his IEP team realized that he was making no academic progress, they recommended that Mark be placed in a classroom for autistic children and mainstreamed into the general class for non-academic activities.[140] The school district concurred, and its conclusions were affirmed at the administrative hearing level.[141] The district court found that the school district was not doing enough to include Mark in a regular classroom and reversed the findings of the school district and the hearing officer.[142] The Fourth Circuit reversed, holding that a general classroom was not appropriate for Mark and that he should be placed in a special education classroom.[143]

The Fourth Circuit's recent decision affording greater deference to school officials is only a slight shift from earlier decisions. The court still evaluated the potential benefits the student would receive in both a general and special education classroom. The court reasoned that even though the school district took necessary steps to mainstream the student in a general education classroom, the child was receiving no benefits, and therefore, a special classroom was the appropriate placement. Although the district court noted that Mark's social skills improved in a general classroom setting, the court found that "[a]ny such benefits, however, cannot outweigh his failure to progress academically in the regular classroom."[144]

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134. *Id.* at 1001.
135. *Id.* at 1000.
136. *Id.* at 999.
137. *Id.* at 1001.
138. *Id.* at 999.
139. *Id.*
140. *Id.* at 1000.
141. *Id.*
142. *Id.*
143. *Id.* at 1005.
144. *Id.* at 1002.

Similarly, a recent Seventh Circuit decision, *Beth B. v. Van Clay*[145] also emphasized the need for deference to school officials.[146] The case concerned a thirteen-year-old student, Beth B, with mental and physical disabilities.[147] Beth had Rett Syndrome, resulting in severe cognitive and physical disabilities.[148] Experts estimated that her cognitive ability ranged from twelve to eighteen months—she was nonverbal and relied on a wheelchair for mobility.[149] Beth's parents sued the school district alleging that Beth's placement in a special education classroom violated IDEA.[150] The district court granted summary judgment in favor of the school district's recommendation that Beth continue her schooling in a special education or Educational Life Skills program, and Beth's parents subsequently appealed.[151] The Seventh Circuit affirmed the district court's ruling.

In its analysis, the Seventh Circuit emphasized the importance of giving deference to the findings of the administrative hearing officer since "school authorities are better suited than federal judges to determine educational policy."[152] The court reiterated the conclusions put forth by the Supreme Court in *Rowley* that "Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children."[153]

Today, the courts of appeals still struggle over the proper interpretation of IDEA and its LRE provision. Most courts still prioritize inclusion, however, they vary in the extent to which they require mainstreaming.[154] Some weigh heavily the non-academic benefits of mainstreaming while others do not. It is important to note that the emphasis on inclusion sometimes comes at the expense of recognizing that the best educational placement for a child may not be in the most inclusive setting. In other words, the courts' preference for mainstreaming may at times conflict with the individualized needs of the student. This potential need to balance inclusion and the specific needs of

145. 282 F.3d 493.

146. *Id.* at 496.

147. *Id.* at 495.

148. *Id.* at 493.

149. *Id.* at 495. Conflicting experts place her level of cognitive ability as ranging from 12–18 months to 4 or 6 years.

150. *Id.* at 495.

151. *Id.*

152. *Id.* at 496.

153. *Id.* at 499 (citing *Rowley*, 458 U.S. at 181).

154. All courts evaluate the placement of a student with a disability by looking at a variety of factors and emphasizing the importance of supplemental aids and services. *See* Osborne, *supra* n. 64, at 1023.

each student demonstrates the importance of weighing all factors and policy priorities when determining the appropriate placement for children with disabilities.

B. The Split in Circuits Mirrors the Current Debate in Educational Policy Circles

The debate over the inclusion of students with disabilities not only concerns disagreements in following IDEA's requirements of a FAPE, LRE, and IEP, but also takes into account conflicting educational theories of attainment. Supporters and dissenters to the full inclusion movement view the education of students with disabilities from different perspectives and have opposing interpretations concerning the purpose behind the educational system.

1. Support for Inclusion

With the growth of the public education system and the rise in the numbers of students with disabilities in the public education system, many critics of the current special education system point to the disheartening academic trend for students with disabilities. In 1992, the National Association of State Boards of Education (NASBE) published a report detailing the problems with special education. The report documented the many ways in which separate educational classrooms were not working: forty-three percent of students in special education do not graduate; youth with disabilities have a significantly higher likelihood of being arrested than their non-disabled peers (twelve percent as compared to eight percent); and only roughly thirteen percent of youth with disabilities are living independently two years after leaving high school as compared to approximately thirty-three percent of the non-disabled population.[155] The report concluded that separate special education is failing students. As an alternative, the report endorsed a full inclusion method to improve public education of students with disabilities.[156]

NASBE followed a well-developed philosophy supported by full inclusion advocates who believe that students with disabilities should rarely, if ever, be educated outside the regular education classroom.[157] Proponents of full inclusion often use philosophical, moral, and ethical arguments as the center of their efforts to promote the education of

155. S.W. Educ. Dev. Laboratory, *Inclusion: The Pros and Cons*, http://www.sedl.org/change/issues/issues43.html (accessed Mar. 23, 2006).

156. *Id.*

157. *Id.*

students with disabilities in the general educational setting. The focus of these arguments is less on the individual student and more on the ideals of freedom, equality, and community.[158] Inclusion advocates emphasize the value of diversity within society and the importance of providing all children with a sense of belonging to a diverse community.[159]

Supporters of full inclusion highlight the social benefits of educating students with disabilities alongside their non-disabled peers and the importance of developing an inclusive curriculum.[160] Advocates of inclusion emphasize the positive effects of being situated in a room of peers and the development of social skills that develop from doing so.[161] Students often learn through observation and emulating the behavior of others. Placed in an environment with non-disabled students, students with disabilities learn though observing their peers and therefore develop the social skills necessary to succeed.[162] Thus. advocates propose that students with disabilities will experience an increase in self-esteem and academic achievement through full inclusion.[163]

Educating all students together also increases the general understanding of disabilities among the non-disabled population. In contrast, placing students with disabilities in special education classrooms separates these children at an early age and perpetuates the cycle of separation. According to full inclusion advocates, exposure to non-disabled children helps to cure the harm created by past separation.[164] Full inclusion supporters hope that with a better understanding of people with disabilities, more students will grow up and mature with a sense of what it is like to live with a disability and the stigma associated with having a disability will decrease.[165] Supporters believe that inclusive classrooms help develop an inclusive society, "which emphasizes social cognition, increased tolerance and acceptance of diversity, a development of personal values, friendships and social acceptance and self-concept."[166]

Full inclusion advocates also stress the moral imperative of educating students with disabilities alongside their non-disabled peers. "The true essence of inclusion is based on the premise that all individuals

158. *Id.*

159. Colleen P. Tomko, *What is Inclusion?*, http://www.kidstogether.org/inc-what.htm (accessed Mar. 23, 2006).

160. *Id.*

161. Crockett & Kauffman, *supra* n. 63, at 21.

162. *Id.*

163. Tiegerman-Farber & Radziewicz, *supra* n. 62.

164. *Id.* at 20.

165. *See* Osborne, *supra* n. 64.

166. Crockett & Kauffman, *supra* n. 63, at 21.

with disabilities have a right to be included in naturally occurring settings and activities with their neighborhood peers, siblings, and friends."[167] Supporters feel that emphasizing inclusion as a right elevates the inclusion debate from educational policy to that of a constitutional mandate. Organizations such as The Inclusion Network promote the socialization aspect of inclusion not only for the benefit of the student with the disability, but also for the development of a just society where all individuals are treated equally.[168]

In addition to the moral imperative, full inclusion supporters advocate a cost-benefit analysis under the theory that proactive spending now will save money in the future. They argue that children will benefit more in the long run with an inclusive education and that children with disabilities who are well educated are more likely to become productive citizens instead of dependents of the state.[169] Thus, proponents of full inclusion not only promote a rights-based argument, but also a cost-benefit analysis for including all students with disabilities into the general education classroom.

2. Critics of Inclusion

Critics of full inclusion argue that a one-size-fits-all standard for students with disabilities is impractical and runs counter to the individualized principles at the heart of IDEA.[170] They contend that full inclusion advocates place too little emphasis on the importance of an IEP by placing all students with disabilities in the regular education classroom, regardless of the disability.[171]

Seeking to refute the argument that separation is stigmatizing, full inclusion critics cite examples of separation based on difference that have not always stigmatized students. For example, differences can be empowering, as in magnet schools and gifted classes.[172] Thus, it is not

167. S.W. Educ. Dev. Laboratory, *supra* n. 155 (citing E.J. Erwin, *The Philosophy and Status of Inclusion*, Envision: A publication of the Lighthouse National Center for Vision and Development, 1, 3–4 (Winter 1993)).

168. Inclusion Network, *Welcome to the Inclusion Network*, http://www.inclusion.org (accessed Mar. 23, 2006).

169. Melissa George, *A New IDEA: The Individuals with Disabilities Education Act after the 1997 Amendments*, 23 L. & Psychol. Rev. 91, 110 (1999) (citing Kathryn Browning Hendrickson, *The IDEA: Conferring Rights on Disabled Children in Unilateral Private School Placements*, 4 W. Ky. Children's Rights J. 1, 8 (1996)).

170. Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 Wash. L. Rev. 775, 824 (1997) [hereinafter Dupre, *Disability and the Public Schools*].

171. Telephone Interview with Delsey Yancoskie, former teacher of deaf children and Spec. Educ. Placement Specialist for Miami-Dade County Public Schools and currently the Instructional Supervisor for Fla. Diagnostic & Learning Resource Sys. (May 10, 2004).

172. Dupre, *Disability and the Public Schools*, *supra* n. 170, at 818.

just the physical separation of different students that causes a stigmatization, these critics argue, but the belief that this difference lessens the individual's self-worth.[173]

Though full inclusion advocates emphasize socialization and assert that inclusion improves societal impressions of people with disabilities, many question whether these arguments are accurate. Skeptics question whether students with disabilities that are integrated into the social environment of a general education classroom actually adversely highlight disabled students' differences and actually create or perpetuate a stigmatizing effect.

Full inclusion opponents also point to the educational justifications for moving a child out of a general education classroom. Past research concerning students with disabilities in general education classrooms has demonstrated that these students were not receiving enough individualized attention and were struggling academically.[174] These struggles may be just as damaging to a student's self-esteem as social stigmatization and may contradict the argument that full inclusion programs increase self-esteem.

According to critics, full inclusion sacrifices educational attainment even though it may change the perception of people with disabilities by teaching non-disabled students and disabled students together. Anne Dupre, an avid critic of inclusion, emphasizes that the primary purpose of the public schools system is to create a "learning community for the transfer of knowledge where each student can and will obtain a serious education."[175] The issue should not be about "curing" the disabled child, Dupre argues, but rather about striving for "acceptance of people with disabilities regardless of where they receive their instruction."[176]

Finally, full inclusion critics also cite the burden that full inclusion places on already failing public school systems and teachers, both of which face increased difficulties due to growing budget cuts and larger class sizes. Many students with disabilities need more attention from classroom teachers. Without such individualized attention in the classroom, these students may not be able to achieve. A child with a severe disability may also disrupt the classroom to the extent that she or he may interfere with others' learning.[177] Also, the child may require too much of the teacher's time so as to hinder the teacher's ability to give

173. *Id.* at 837 (using the argument of invidious racial segregation).

174. *Id.* at 820.

175. *Id.* at 822.

176. *Id.* at 822 (citing Daniel P. Hallahan & James M. Kauffman, *Toward a Culture of Disability in the Aftermath of Deno and Dunn*, 27 J. Spec. Educ. 496, 506 (1994)).

177. *Id.* at 845.

attention to other students.[178]

Critics of full inclusion point to other costs of including all children with disabilities in the general education classroom. Some estimate that special education students cost approximately two times as much as regular education students.[179] With the funding cuts in education rapidly growing and Congress not fulfilling its promise to provide forty percent of the special education budget, critics argue that the costs of inclusion are becoming increasingly burdensome on local school districts.[180]

IV. RECENT DEVELOPMENTS: IS THE BALANCE SHIFTING?

As is evident in the above analysis of judicial oversight of school districts' decisions regarding the education of students with disabilities and the corresponding policy debates about appropriate placement, questions on how to balance priorities with respect to the inclusion issues have remained consistent over the past several decades. With initial legislation, advocates focused on access to an appropriate education through an IEP in an environment with other public school students. More recent legislation added the elements of evaluation and accountability. Emphasis on standardized evaluation created additional tension with the requirements for an individualized education program. The two most recent changes to the legislation, which occurred in 1997 and 2004, continue to fuel the debate over the nature of an appropriate education for a student with a disability.

A. 1997 IDEA Amendments

The 1997 Amendments[181] did not substantially change IDEA,[182]

178. Dupre, *Disability and the Public Schools*, *supra* n. 170, at 849–851.

179. Richard Whitmire, *Special Ed.: Is the Price Too High?*, USA Today D6 (June 17, 1996).

180. *Id.*

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

182. The Preamble to the 1997 Amendments explains the focus of the legislation:

> While retaining the basic rights and protections that have been in the law since 1975, the amendments strengthened the focus of the law on improving results for children with disabilities. The amendments accomplished this through changes that promote the early identification of, and provision of services to, children with disabilities, the development of individualized education programs that enhance the participation of children with disabilities in the general curriculum, the education of children with disabilities with nondisabled children, higher expectations for children with disabilities and accountability for their educational results, the involvement of parents in their children's education, and reducing unnecessary paperwork and other burdens to better direct resources to improved teaching and learning.

Off. of Spec. Educ. & Rehabilitative Services, Dept. of Educ., *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities*, http://www.cec.sped.org/law_res/doc/law/docs/preamble.php (accessed Nov. 30, 2005).

and were only intended to clarify and strengthen the Act.[183] However, they provided a precursor to more extensive revisions in the 2004 Reauthorization. The 1997 Amendments focused on improving the educational outcomes of children with disabilities to prepare them to lead "productive independent adult lives."[184] Although Congress acknowledged some improvements in educational outcomes, testimony also reported that the educational achievement of children with disabilities was still less than satisfactory.[185] The Senate report discussing the 1997 amendments noted the discrepancy in high school drop-out rates for non-disabled and disabled students, with almost twice as many students with disabilities dropping out as compared to non-disabled students.[186]

Congress, disappointed with this progress, enacted amendments that strengthened the procedural requirements and the role of parents in the IEP process. The 1997 Amendments required parents to be a part of the IEP team and also allowed students to have input, if possible, into an IEP decision.[187] With this requirement, educators must keep the student's parents informed as to the student's progress and must include parents in any educational decisions affecting the student's placement.[188] In addition, the 1997 Amendments expanded the IEP team to include not only the parents, the special education teacher, an administrator, and the student, if appropriate, but also the general education teacher.[189]

The 1997 Amendments continued to emphasize the importance of inclusion with a focus on the least restrictive environment requirement. Political leaders, both congressional supporters of the legislation and former President Clinton who signed the bill, stressed the importance of inclusion and the need for students with disabilities to be given "greater access to the general curriculum."[190] Thus, by adding general education teachers to the IEP team, Congress intended that students with disabilities would be included more into the regular curriculum. The 1997 Amendments first required that the IEP must include a statement that explains "the extent, if any, to which the child will not participate

183. Sen. Rpt. 105-17 at 4 (May 9, 1997).

184. *Id.* at 5.

185. *Id.*

186. *Id.*

187. Pub. L. No. 105-17 § 614(B)(i).

188. *Id.* at § 615(b)(2).

189. *Id.* at § 614(B)(i)–(iii).

190. Sarah E. Farley, *Least Restrictive Environment—Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 Wash. L. Rev. 809, 816 (2002) (citing statement by President William J. Clinton upon signing H.R. 5, 1997 U.S.C.C.A.N. 147).

with nondisabled children in the regular class,"[191] if the IEP team decides that student should not be in a general education classroom.

In summary, the 1997 amendments underscored IDEA's "commitment to individual child-centered decision-making, . . . lowering the costs of special education, increasing the influence of regular educators and administrators, and strengthening the capacity of American schools to effectively educate children with disabilities."[192] Though the 1997 Amendments began to point toward the importance of accountability, the focus on individual decisions remained the hallmark of the legislation.

B. 2004 Reauthorization

With the recent 2004 reauthorization requirements,[193] individual-based decision-making no longer seems to be a primary focus of IDEA. This former priority instead lags behind a new emphasis on accountability. The 2004 Reauthorization places a high priority on standardized achievement levels and strives to include children with disabilities in the accountability principles articulated in the No Child Left Behind Act (NCLB) of 2001.[194] Instead of focusing solely on access to education, the 2004 Reauthorization promotes accountability measures and standards that every child, regardless of disability, must meet. Although the 2004 Reauthorization[195] makes many changes to IDEA, this article analyzes only a few to demonstrate the priority shift: (1) alteration of the IEP content and evaluation process, (2) testing mandates for students with disabilities and their effect on a school's annual yearly progress, and (3) highly qualified teacher requirements for special educators. These changes again invoke the unresolved tensions between issues of inclusion and individualized approaches to education, as Congress and the administration place a greater emphasis on outcomes for students with disabilities. The dilemma these new amendments

191. Pub. L. No. 105-17 § 614 (d)(A)(III)(iv).

192. Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & Educ. 543, 544 (1999).

193. On December 3, 2004 President Bush signed the reauthorization of IDEA, known as the Individuals with Disabilities Education Improvement Act. 20 U.S.C. § 1400 et seq.

194. *Id.* at § 6301 et seq. "Our goal is to align IDEA with the principles of [NCLB] by ensuring accountability, more flexibility, more options for parents, and an emphasis on doing what works to improve student achievement." U.S. Dept. of Educ., *Paige Releases Principles for Reauthorizing Individuals with Disabilities Education Act (IDEA)*, http://www.ed.gov/news/pressreleases/2003/02/02252003.html (Feb. 25, 2003). *See also* Stephen Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 Hastings Women's L.J. 1 (2004).

195. The 2004 Reauthorization took effect in July 2005.

present concerns how to raise standards for students with disabilities while continuing to meet the unique needs of each child.

1. IEP Content and Evaluation

In addition to prioritizing accountability, the 2004 Reauthorization attempts to simplify IDEA's procedural requirements, specifically the IEP process and review. The 2004 Reauthorization alters the IEP evaluation process to "not more frequently than once a year unless the parent and the local educational agency agree otherwise, and at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary."[196] By reducing yearly requirements for IEP evaluations, the 2004 Reauthorization lessens the priority placed on this process.

Congressional intent behind this legislation focused on decreasing the administrative burden placed on special educators. In promoting this new requirement, the Department of Education emphasized the additional administrative time required by more frequent IEP evaluation and that "IDEA paperwork takes time away from important teaching responsibilities."[197] Educational evaluations estimate that the typical special education teacher spends over double the amount of time completing forms and administrative paperwork than the average general education teacher.[198] By reducing the frequency of IEP evaluations and by authorizing a pilot program that offers the option "of developing a comprehensive multi-year IEP, not to exceed three years,"[199] instead of annually, the 2004 Reauthorization changed the IEP process to a less onerous system.

Additionally, the 2004 Reauthorization also altered the content of the IEP. An IEP must now include "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments."[200] The 2004 Reauthorization also added a requirement that the IEP must consider "the academic, developmental, and functional needs of the child."[201]

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196. 20 U.S.C. § 1414(a)(2)(B)(i–ii).

197. American Youth Policy Forum and Center on Education Policy, *Twenty-Five Years of Educating Children with Disabilities: The Good News and the Work Ahead* 56 (Am. Youth Policy Forum and Ctr. on Educ. Policy, 2001) [hereinafter American Youth Policy].

198. *Id.*

199. The pilot program includes fifteen state trials to develop new procedures by monitoring the effect of reduced IEP administrative requirements on teachers. 20 U.S.C. § 1414(d)(5)(a)(i),(b).

200. *Id.* at § 1414(d)(1)(A)(i)(VI)(aa).

201. *Id.* at § 1414(d)(3)(A)(iv).

As discussed below, many changes to IDEA focused on including students with disabilities in new federal accountability measures. Switching IEP yearly requirements to once every three years as well as requiring the IEP to have a section on testing accommodations demonstrated a shift in priorities for special education legislation. By requiring the IEP to detail the appropriate accommodations needed for students to participate in evaluation measures, the 2004 Reauthorization strove to include students with disabilities in these testing mandates and calculations of progress.

Though the Department of Education still emphasizes the historical individualized approaches to education,[202] an unintended consequence of the 2004 Reauthorization was the de-prioritizing of an individual student's personal evaluation. The IEP, once the hallmark of special education, no longer remains the primary means of evaluating a student's progress, rather, standardized testing replaces yearly individualized evaluation.

2. Testing Requirements for Adequate Yearly Progress (AYP) and NCLB

The 2004 Reauthorization specifically requires IDEA regulations to work in conjunction with NCLB and links requirements for performance goals and indicators directly to the Act.[203] Earlier versions of IDEA required states to have performance goals for children with disabilities that "[were] consistent, to the maximum extent appropriate, with other goals and standards for children established by the state."[204] The 2004 Reauthorization now requires that performance goals for children with disabilities "are the same as the State's definition of adequate yearly progress" standardized tests.[205] The adequate yearly progress (AYP) is the minimum level of improvement that must be met every year.[206] Schools are evaluated based on the percentage of students achieving academic progress.

Before the 2004 Reauthorization, states were required to include

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202. "Teaching and learning that use individualized approaches to accessing the general education curriculum and that support learning and high achievement for all." U.S. Dept. of Educ., *History*, *supra* n. 38.

203. *See* Richard Apling & Nancy Lee Jones, *CRS Report for Congress, Individuals with Disabilities Education Act (IDEA): Overview of P.L. 108-446*, http://www.price.house.gov/UploadedFiles/IDEA%20overview.pdf (May 5, 2005).

204. Pub. L. No. 105-17 § 612(a)(16)(A)(ii).

205. 20 U.S.C. § 1412(a)(15)(A)(ii).

206. AYP is essentially the percentage of students who must achieve the state's definition of academic proficiency each year in order for all students to be proficient by the years 2013–2014. Council for Exceptional Children, *Council for Exceptional Children Public Policy Update*, http://www.cec.sped.org (accessed Sept. 7, 2005).

children with disabilities "in general State and district-wide assessment programs, with appropriate accommodations, where necessary."[207] The 2004 Reauthorization includes the NCLB testing requirements such that it now requires that all children with disabilities be included in all state and district-wide assessments, including assessments required under ESEA, with accommodations or alternative assessments if necessary as included in the student's IEP.[208]

The 2004 Reauthorization mandates that all students with disabilities be included in standards-based testing that is used to evaluate a school's accountability.[209] NCLB accountability provisions require states to test all students in reading and math in grades three through eight every year.[210] However, the 2004 Reauthorization provides states with the option of adopting alternative academic standards. The NCLB regulations allow for students to participate in alternative assessments, though the percent of alternative assessments used to calculate AYP is capped at 1%.[211] Thus, students with disabilities are no longer exempt from standards-based evaluation in calculating a school's progress.

Some critics argue that the process for assessing AYP is not adequate or fair for students with disabilities.[212] They point toward changes in the disability population rate from year to year as a serious flaw in the accurate calculation of AYP.[213] Since the population of students with disabilities changes constantly, with higher achievers leaving special education and lower achievers coming into special education, there is not an accurate measure of progress.[214] The constant change in the special education population is reflected in the declining proficiency rates for students with disabilities.[215] Therefore, including students with disabilities in the calculation of AYP without considering the changes in this population does not lend itself to an accurate progress report for each school. Data from Education Week Quality Counts 2004 indicated that the 2002–2003 proficiency rates for the disability subgroup was thirty-

207. Pub. L. No. 105-17 § 612(a)(17)(A).

208. 20 U.S.C. § 1412(a)(16)(A).

209. *Id.* There is a small exception to this requirement. When calculating the AYP, one percent of students may use alternative assessments designed to measure students' achievement of state standards. 34 C.F.R. § 200.13(D)(ii).

210. 20 U.S.C. § 6311(b)(3)(C)(v)(I).

211. 34 C.F.R. § 200.13(D)(ii).

212. John G. Herner, Michael J. Demczyk, & Michael L. Cox, *Leveling the Playing Field for Students with Disabilities: Flexibility in Calculating AYP for the Disability Subgroup* (Jan. 2005).

213. *Id.* at 3.

214. *Id.* at 4.

215. *Id.*

four percent in fourth grade and twenty-three percent in eighth grade.[216] Many critics question whether this finding is an accurate measure of students' attainment.

The mandatory testing requirements for every child also seem to contradict a purely individualized-based learning style. Critics of this cutoff emphasize that the new AYP reporting will "inadvertently undermine IDEA[']s individualization within the context of the IEP development process."[217] Some school districts are even suing the Department of Education, claiming that the accountability provisions violate IDEA.[218] By requiring schools to evaluate students with disabilities without the flexibility of alternative assessments, the 2004 Reauthorization places a greater emphasis on standards-based accountability rather than individualized evaluations.

However, the Department of Education argues that the inclusion of students with disabilities in the testing evaluations is essential so as to make schools accountable to this population. Because it is critical to ensure that students with disabilities are not excluded from state accountability systems, the final regulations provide that the same grade level academic content and achievement standards that apply to nondisabled students will be applied to alternative assessments within the state.[219]

The debate over appropriate assessments and school improvement calculations mirrors earlier discussions on appropriate placement. To what extent should students with disabilities be treated similarly to or differently from their peers? These issues still remain central to the inclusion debate, though now the focus has shifted from access to education to participation and evaluation in educational assessments.

3. Highly Qualified Teaching Requirements

To assist in helping students meet these testing requirements the 2004 Reauthorization also includes provisions focusing on teacher qualifications and teacher training. Schools must provide "high-quality,

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216. *Id.* at 2.

217. Ltr. from Deborah A. Ziegler, Asst. Exec. Dir. for Pub. Policy, Council for Exceptional Children, & David Egnor, Sr. Dir. for Pub. Policy, Council for Exceptional Children, to Jacquelyn C. Jackson, Acting Dir., Student Achievement & Sch. Accountability Program, U.S. Dept. of Educ. (Sept. 5, 2002) (available at http://www.cec.sped.org/Content/NavigationMenu/PolicyAdvocacy/CECPolicyResources/CEC_Resp_to_NCLBnprm1008.doc).

218. *See* Christina A. Samuels, *Suit Says NCLB's Demands Conflict with Those of IDEA*, 24 Educ. Week (Feb. 16, 2005).

219. U.S. Dept. of Educ., *Accountability for Students with Disabilities: Accountability Plan Amendments for 2004 05*, http://www.ed.gov/policy/elsec/guid/raising/disab-acctplan.html (May 10, 2005).

intensive preservice preparation and professional development for all personnel who work with children with disabilities" so all school staff have the "skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities"[220] These professional development requirements mirror those in NCLB.[221]

A recent amendment concerns "highly qualified teachers" (HQT). The HQT[222] provision requires that special education teachers be certified in the subject areas they teach, which is similar to new requirements for general education teachers.[223] During the 2004 Reauthorization hearings, the HQT provision developed in part because of the new focus on the importance of every child deserving a high quality education, and "children with disabilities are no exception."[224]

Highly qualified requirements for special educators, as defined by the 2004 Reauthorization, require that each special educator has "[a] full State certification as a special education teacher (including certification obtained through alternative routes to certification), or [has] passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher."[225] In addition to the above requirement, the special education teacher who teaches core academic subjects must meet the HQT requirements.[226]

These new requirements may promote more inclusion of students with disabilities as well as more inclusive teaching methods. Schools adhering to the HQT requirement may consequently shift more students into general education classrooms regardless of whether the placement is appropriate. If current special education teachers cannot meet the HQT requirements, their students may be forced into regular classrooms to satisfy the legislation. Alternatively, the HQT requirements may promote more team teaching between general educators and special educators who may not be certified in particular subject areas. This team teaching might allow for more inclusive classroom environments, which is another result of the 2004 Reauthorization.

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220. 20 U.S.C. § 1400(c)(5)(E).

221. *Id.* at § 6319.

222. *Id.* at § 6319(a)(1).

223. *Id.*

224. Jess Butler, *Conference Committee Votes on IDEA Reauthorization: The Inside Story*, http://www.wrightslaw.com/news/04/idea.1118.htm (Nov. 18, 2004) (quoting remarks made by Rep. John Boehner on November 17, 2004 at the House-Senate Conference Committee).

225. 20 U.S.C. § 1401(10)(b)(i).

226. *Id.* at § 6319(a)(2).

V. RECOMMENDATIONS

The inclusion debate focuses not only on the interpretation of IDEA, but also on controversial areas such as the goals of education for the individual student and the goals of the public educational system for society. Critics of full inclusion propose that the "emphasis on inclusion over instruction has threatened at times to overshadow the central mandate of the Act: the provision of a [FAPE]."[227] As evidenced from early congressional statements and current literature put out by the Department of Education, one main purpose of IDEA is to assist in the development of citizens. Yet, the controversy over the best educational method for educating students with disabilities is often debated. An analysis of tensions underlying shifting and competing policy priorities during IDEA's first three decades suggests the following recommendations to guide future discussion.

A. Promote Inclusion without Ignoring Individualized Approaches

IDEA was not intended as a "one-size-fits-all" approach to the educational placement of students with disabilities. As evidenced by the IEP requirement, a detailed personal assessment for each child is required to comply with IDEA regulations.[228] The very nature of an IEP implies that each child has a different and unique set of needs.[229]

Judicial decisions have yet to provide a consistent legal standard for evaluating the least restrictive placement. Some commentators advocate the development of a nationwide standard for determining compliance with IDEA's LRE provision.[230] The argument follows that with a uniform test, students would be ensured adequate protection by IDEA.[231] Other commentators oppose judicial presence within the realm of educational placement.[232] These critics question the role of the courts in the inclusion controversy and believe that special educators, rather than

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227. Crockett, *supra* n. 192, at 544.

228. Marissa L. Antoinette, *Examining How the Inclusion of Disabled Students into the General Classroom May Affect Non-disabled Students*, 30 Fordham Urb. L.J. 2039, 2043 (2003) (citing Joanne L. Huston, *Inclusion: A Proposed Remedial Approach Ignores Legal and Educational Issues*, 27 J.L. & Educ. 249, 251 (1998)).

229. *Id.* at 2049 (citing Tamera Wong, Student Author, *Inclusion: Placing Socialization Over Individualized Education*, 5 U. Cal. Davis J. of Juv. L. & Policy 275, 281 (2001)).

230. Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities under the IDEA*, 77 Wash. L. Rev. 809, 832 (2002).

231. *Id.*

232. *See* Dupre, *Disability, Deference and Integrity*, *supra* n. 66 (emphasizing flawed legal analysis and negative trend in the courts to overrule the determinations by teachers and other experts).

the courts, should hold the responsibility of evaluating student placement.

Though it is the role of the courts to interpret legislation, the Supreme Court's emphasis on deference in *Rowley*, as well as the recent Seventh Circuit decision in *Beth B.*, has accurately interpreted the role of the judicial system in evaluating the requirements of IDEA. In order to preserve the individual evaluation of special education placements, the courts should continue to develop their own tests rather than a mandated nationwide determination of placement.

Although judicial enforcement of full inclusionary practices runs contrary to assessing the individual needs of each child, the goals of inclusion should be encouraged. Therefore, courts should continue to evaluate suits on a case-by-case basis. Each student with a disability requires a unique set of services for educational success.

B. Change the Structure of the Debate to Include Both Theory and Practice

The inclusion debate should no longer be perceived as an "all-or-nothing" solution to educating students with disabilities. A sense of inclusion and community is of great value, but merely placing a student with a severe disability in a general education classroom will not alone solve longstanding problems of discrimination for people with disabilities. Full inclusion advocates must not emphasize inclusion solely as a right whereby all students should be included in all of the school day in every school setting.[233] Similarly, critics of full inclusion must not fully discount the benefits of inclusion "as being [a] panacea, with a blatant disregard for the individual differences inherent in the population classified as disabled or within any one of the disability categories."[234] Strong positions on either side of the debate go too far.

Shifting the debate by focusing on developing inclusive school programs for students where appropriate would allow both sides of the inclusion debate to work together to improve the education for all students. Inclusive school programs should involve both general education teachers and special education teachers as co-teachers rather than separate teachers. This collaborative approach should be modeled on a larger scale. It is this type of collaboration that is also needed among the policy leaders in this area. Refocusing the debate toward an end goal

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233. *See* James McLeskey & Nancy Waldron, *Responses to Questions Teachers and Administrators Frequently Ask about Inclusive School Programs*, http://www.pdkintl.org/kappan/kmcl9610.htm (last updated May 16, 1997).

234. Dupre, *Disability, Deference and Integrity*, *supra* n. 66, at 429 (citing Donald L. MacMillan, et al., *The Social Context of Dunn: Then and Now*, 27 J. Spec. Educ. 466, 477 (1994)).

of developing inclusive school programs that benefit all students would best assist the educational achievement of students with disabilities.

C. Continue to Evaluate IDEA

The education of students with disabilities has improved since the days when students with disabilities were segregated out of public education altogether. In 1970, only an estimated twenty percent of children with disabilities were educated in regular schools.[235] With the increased attention on children with disabilities and the passage of the EAHCA, this number increased dramatically to ninety-six percent of children with disabilities being educated in regular public schools by 1997–98.[236] In addition, students with disabilities are spending more time in regular classrooms. Over the past 15 years, coinciding with the push for inclusion, many more students are spending at least 80% of the school day in regular education classrooms: thirty-one percent in 1988–89 and forty-six percent in 1997–98.[237]

However, there is still a need for improvement. The graduation rate of students with disabilities remains very low. Students with disabilities drop out of high school at twice the rate of their peers.[238] States with high school exit exams graduate fewer students with disabilities than states that do not have testing graduation requirements.[239]

Congress should evaluate legislation that assists with the education of students with disabilities more often, and in collaboration with all stakeholders, namely, teachers, parents, students, and administrators. As the push toward inclusion of students with disabilities into regular classrooms increases, there is an even greater need to develop more research and better practices for future endeavors. Advocating for more funding will also assist in the improvement of supportive procedures to help teachers educate students with disabilities so these students can learn and grow as individuals.

As demonstrated throughout this article, the tension between an individual-centered approach and one that promotes mandatory standards has been a recurring theme throughout the history of educating children with disabilities. With the 2004 Reauthorization, this controversy is heightened. The new regulations, however, should stress the importance of continued individual evaluation through IEP review, appropriate

235. American Youth Policy, *supra* n. 197, at 18.

236. *Id.*

237. *Id.* at 20.

238. *Id.* at 50.

239. *Id.*

placement decisions, and specific attention to personal needs of each student, while advancing the achievement of students with disabilities.