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MISSING THE “IDEA”: NEW YORK’S SEGREGATED EDUCATION SYSTEM

*Joseph A. Patella**

INTRODUCTION

The United States Supreme Court’s landmark decision in *Brown v. Board of Education*¹ marked the end of legal racial segregation in public schools. The Court found that racially separate educational facilities are “inherently unequal” and that their creation violates the Equal Protection Clause.² Forty years after *Brown*, a

* Brooklyn Law School Class of 1996. The author expresses gratitude to Brooklyn Law School Professor Eve Cary for her assistance in preparation of this Note. A very special thank you to Ellen Gallagher Holmes, Esq. for her guidance, encouragement and invaluable assistance from the inception of this Note through its final edits. A final note of thanks to my family for their love and continual support.

¹ 347 U.S. 483 (1954).

² *Id.* at 495. The Fourteenth Amendment states, in pertinent part: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

In reaching its decision in *Brown*, the Supreme Court went beyond a mere comparison of the tangible factors that contribute to an education, such as teachers, books, supplies and facilities, and looked at the effects of segregation. The Court stated that “[separate educational facilities] generate a feeling of inferiority as to [children’s] status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . [This] sense of inferiority affects the motivation of a child to learn [and] has a tendency to retard . . . educational and mental development.” *Brown*, 347 U.S. at 494; see WILLIAM STAINBACK & SUSAN STAINBACK, SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING: INTERDEPENDENT INTEGRATED EDUCATION 7 (1990) [hereinafter SUPPORT NETWORKS] (“If integration and equality for all people in society is desired, then segregation in the schools cannot be justified. . . . When a single person, who has not broken any laws, is excluded from the mainstream of school and community life, all of society becomes *vulnerable*.”) (emphasis added). The Supreme Court’s holding in *Brown* overruled the “separate but equal” doctrine

variation on the issue of segregation within the schools has emerged in light of the federal entitlements under the Individuals with Disabilities Education Act ("IDEA").³

The IDEA's purpose is to assure that all children with disabilities⁴ have access to a "free appropriate public education which emphasizes special education and related services designed to meet their unique needs."⁵ To qualify for federal financial assistance, states must ensure that school districts educate children with disabilities in the least restrictive environment ("LRE").⁶ The LRE requirement means that children with disabilities must be educated

established in *Plessy v. Ferguson*. 163 U.S. 537 (1896) (upholding a Louisiana law calling for "separate but equal" accommodations for White and Black railroad passengers).

³ Pub. L. No. 940-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1485 (1988 & Supp. V 1993)); see DIANE LIPTON, NATIONAL CTR. ON EDUC. RESTRUCTURING & INCLUSION, THE "FULL INCLUSION" COURT CASES: 1989-1994 2 (1994) ("Evolving from a growing body of research, experience with integration, a shift in public policy and consciousness about disability and civil rights, a second generation of integration issues has emerged in the 1990s.").

⁴ '[C]hildren with disabilities' refers to those children . . . having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities and who because of those impairments need special education and related services.

34 C.F.R. § 300.7(a)(1) (1994).

⁵ 20 U.S.C. § 1400(c). The term "related services" means:

transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(a)(17). Related services are also commonly referred to as "supplementary aids and services." See 20 U.S.C. § 1412(5)(B).

⁶ See 34 C.F.R. §§ 300.550-.556 (1994).

with nondisabled children “to the maximum extent appropriate.”⁷ School districts should not place children with disabilities in an educational setting that is entirely set apart from nondisabled students, unless the nature of their disability is so severe⁸ that school districts cannot satisfactorily educate these children in regular classes⁹ with the use of supplementary aids and services.¹⁰ Educating children with disabilities in a regular classroom with the use of supplementary aids and services is frequently referred to as “inclusion.”¹¹

To satisfy the LRE requirement, states must ensure that a “continuum” of educational placements is available to appropriately

⁷ 20 U.S.C. § 1412(5)(B).

⁸ The following three factors need to be considered to determine whether the nature of a child’s disability is so “severe” that the school district cannot satisfactorily educate the child in a regular class with the use of supplementary aids and services: (1) the extent in which the school had taken reasonable steps to include the child in a regular classroom; (2) a comparison between the educational benefits the child will receive in a regular classroom and the benefits the child will receive in a segregated special education classroom; and (3) the possible negative effect the child’s inclusion might have on the education of the other children in the regular classroom. *Oberti ex rel. Oberti v. Board of Educ.*, 995 F.2d 1204, 1216-17 (3d Cir. 1993).

⁹ The terms “general educational settings” and “regular classrooms” are used interchangeably throughout this Note to refer to classes that are predominately composed of children who are not disabled.

¹⁰ 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.550(b)(2).

¹¹ Integrating children with disabilities with children who are not disabled in regular classrooms was commonly known as “mainstreaming.” *See Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989). Many parents and educators now disfavor the use of this term because they believe that it suggests the shuttling of a child with a disability in and out of a regular class without altering the classroom to accommodate the child. *Oberti*, 995 F.2d at 1207. Instead, they prefer the term “inclusion” because it emphasizes the use of supplementary aids and support services within the regular classroom to facilitate the integration of children with disabilities. *Id.* Thus, the difference between “inclusion” and “mainstreaming” can be characterized as the difference between “full membership status” and “visitor status” in a regular educational environment. As a result, the term “mainstreaming” is still used to describe situations where a child with a disability spends part of the day in a regular education class.

educate children with disabilities.¹² These placements include: regular classrooms, special education classrooms, home instruction and instruction in hospitals and institutions.¹³ School districts must consider all of the various educational placements available before they create an individualized educational program ("IEP")¹⁴ for each child with a disability. The continuum of placements creates possible strategies to increase a disabled child's exposure to nondisabled students, such as placing the child in regular education for some academic classes, and in special education for others.¹⁵

¹² The Code of Federal Regulations provides that "[e]ach public [educational] agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities." 34 C.F.R. § 300.551(a). A "public educational agency" is a public board of education constituted within a state for administrative control or direction of public elementary or secondary schools in a city, county or school district. 20 U.S.C. § 1401(a)(8).

¹³ 34 C.F.R. § 300.17(a)(1)(i) (1994).

¹⁴ An "individualized educational program" ("IEP") is a program of instruction and related services specially designed to meet the unique needs of a disabled child. 20 U.S.C. § 1401(a)(20). New York State law mandates that the local board of education for each district appoint a Committee on Special Education ("CSE") to evaluate a disabled child and develop an appropriate educational program. N.Y. EDUC. LAW § 4402(1)(b)(1) (McKinney 1995). The membership of the CSE must consist of, at least, a school psychologist, a representative of the school district who is qualified to provide or administer special education, a school physician and a parent of a student with a disability residing in the district, provided that such parent is not employed by, or under contract with, the school district, the child's teacher and other such persons as the district shall designate. *Id.* The CSE creates an IEP document which contains information concerning the child's present level of performance, a statement of annual goals and short term instructional objectives, a statement of the specific educational services to be provided and the extent to which this can be done in the regular educational programs and the objective criteria for measuring the student's progress. 20 U.S.C. § 1401(a)(20). Every educational service listed in an IEP includes a particular student-teacher staffing ratio, which depends on the nature of the child's disability. *See* NEW YORK CITY PUBLIC SCHOOLS, EDUCATIONAL SERVICES: FOR STUDENTS WITH HANDICAPPING CONDITIONS 11 (1991) (describing the different educational services and their corresponding staffing ratios that the New York City Board of Education developed to meet the IDEA's continuum requirement) [hereinafter EDUCATIONAL SERVICES].

¹⁵ *Daniel*, 874 F.2d at 1050; *see* Mitchell L. Yell, *Least Restrictive Environment, Inclusion, and Students with Disabilities: A Legal Analysis*, 28 J. SPECIAL EDUC. 389, 401 (1995) (indicating that the continuum requirement is

Recent federal court decisions emphasize the states' obligation to meet the LRE requirement and highlight exactly what states must do to facilitate inclusion.¹⁶ New York State, however, continues to ignore its responsibility to meet the LRE requirement.¹⁷ Only seven percent of New York's special education students are placed full-time in regular classes.¹⁸ Furthermore, once school districts place special education students in restrictive environments, they remain there with little chance of developing academically or returning to regular education classrooms.¹⁹

premised on the theory that LRE is not an "all-or-nothing" proposition).

¹⁶ See *infra* part I; see also LIPTON, *supra* note 3, at 3 (stating that "courts have opened the doors to the regular education classrooms for many more children with disabilities"). "Because the federal appellate courts have shown consistency in applying the [least restrictive environment ("LRE")] principle in recent decisions, a standard has been established that seems to answer questions regarding application of the LRE mandate." Yell, *supra* note 15, at 392.

¹⁷ See ADVOCATES FOR CHILDREN OF NEW YORK, INC., SEGREGATED AND SECOND RATE: SPECIAL EDUCATION IN NEW YORK 24 (1992) [hereinafter SEGREGATED AND SECOND RATE] (stating that New York State has one of the lowest rates in the country in placing children with disabilities in the least restrictive environment).

¹⁸ U.S. DEP'T OF EDUC., IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: SIXTEENTH ANN. REP. TO CONGRESS tbl. AB8 (reporting the percentage of children age 6-21 placed in different educational environments during the 1991-92 school year) [hereinafter ANNUAL REPORT]. See *infra* notes 57-58 and accompanying text for an analysis of the number of children with disabilities in New York placed in each of the various educational environments and how New York's performance compares to the rest of the nation.

¹⁹ See Lynda Richardson, *Minority Students Languish in Special Education System*, N.Y. TIMES, Apr. 6, 1994, at B7 (indicating that students in special education are almost never "decertified" and allowed to return to regular education, most never finish high school, fewer than 5% graduate in four years and only 25% of those who remain in high school until they "age out" at 21 graduate with some kind of diploma); see also JAY GOTTLIEB & MARK ALTER, NEW YORK UNIVERSITY, REPORT TO THE NEW YORK STATE EDUC. DEP'T ON THE STUDY OF THE OVERREPRESENTATION OF CHILDREN OF COLOR REFERRED TO SPECIAL EDUCATION 19 (1994) [hereinafter OVERREPRESENTATION REPORT] (reporting that only 1.3% of the students who attended resource rooms or special education classes during the 1992-93 school year were decertified). A "resource room program" is defined as "a special education program for a student with a disability registered in either a special class or a regular class who needs

A number of factors account for New York's failure to educate children with disabilities in the least restrictive environment. A substantial barrier is the state's current special education funding formula, which provides reimbursement based on the type of placement—the more restrictive placements receive greater funding.²⁰ Another factor is the State Education Department's poor monitoring of school districts which masks the reality that regular classrooms lack the supplementary aids and services needed to create inclusion opportunities.²¹ More significantly, the process for determining special education eligibility is flawed due to unnecessary referrals,²² poorly conducted evaluations of those children referred, minimal parent involvement and a general lack

specialized supplementary instruction in an individual or small group setting for a portion of the day." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1 (1985).

²⁰ Committee on Education and the Law, *Creating Financial Incentives for the Inclusion of Students with Disabilities*, 48 ASS'N OF THE BAR OF THE CITY OF NEW YORK 230 (1993); see *infra* notes 92-96 and accompanying text (discussing New York's current funding formula).

²¹ OFFICE OF SPECIAL EDUC. PROGRAMS U.S. DEP'T OF EDUC., 1989 REVIEW OF N.Y. STATE EDUC. DEP'T (1990) [hereinafter FEDERAL MONITORING REPORT I]; OFFICE OF SPECIAL EDUC. PROGRAMS U.S. DEP'T OF EDUC., 1993 REVIEW OF N.Y. STATE EDUC. DEP'T'S IMPLEMENTATION OF PART B OF THE INDIVIDUALS WITH DISABILITIES EDUC. ACT (1994) [hereinafter FEDERAL MONITORING REPORT II]. See *infra* text accompanying notes 99-104.

²² A student suspected of having a disability is referred to the school district's CSE "for an individual evaluation and determination of eligibility for special education programs and services." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(a) (1985). School professionals (teachers, principals, etc.) make the bulk of the referrals (51%), followed by parents (28%) and outside sources (21%) such as doctors, family court and social service agencies. OVERREPRESENTATION REPORT, *supra* note 19, at 17, 23. The referred student is subject to an individual evaluation which guides the CSE in determining an appropriate educational placement for the child. 34 C.F.R. § 300.531, 34 C.F.R. § 104.35(a) (1994). The evaluation is conducted by a multidisciplinary team created by the district and consists of a physical examination, an individual psychological evaluation, a social history and other appropriate evaluations necessary to ascertain the physical, mental and emotional factors that contribute to the suspected disabilities. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b). If the evaluations indicate that the child needs some type of special education, the CSE creates an IEP for the child which is subject to approval by the board of education. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(c).

of understanding among teachers and school administrators as to what the special education law requires.²³

Parents of children with disabilities have successfully challenged their local school districts' recommendations for restrictive educational placements,²⁴ but these individual victories do not remedy the flaws of an entire educational system. Educators, from the outset, need to recognize the importance of honoring the LRE requirement. All children, disabled or nondisabled, will benefit when education is sensitive and responsive to individual differences.²⁵ Inclusive education creates "a sense of belonging" that cultivates a child's social awareness and minimizes the pressures inherent in an increasingly complex society.²⁶

²³ See *infra* notes 70-91 and accompanying text (analyzing New York's procedures for determining special education placements).

²⁴ See *Heldman v. Sobol*, 846 F. Supp. 285 (S.D.N.Y. 1994); *Mavis v. Sobol*, 839 F. Supp. 968 (N.D.N.Y. 1993); *In re Board of Educ. Baldwin Union Free Sch. Dist. v. Sobol*, 160 Misc. 2d 539, 610 N.Y.S.2d 426 (Sup. Ct. 1994); *In re Board of Educ. S. Lewis Cent. Sch. Dist.*, 20 INDIVIDUALS WITH DISABILITIES EDUC. LAW REP. 938 (1993); Board of Educ. Schalmont Cent. Sch. Dist., No. 90-19 (State Educ. Dep't 1991). See *infra* part III for a discussion of these cases.

²⁵ SUSAN STAINBACK & WILLIAM STAINBACK, CURRICULUM CONSIDERATIONS IN INCLUSIVE CLASSROOMS: FACILITATING LEARNING FOR ALL STUDENTS 7 (1992) [hereinafter CURRICULUM CONSIDERATIONS]; see also SUPPORT NETWORKS, *supra* note 2, at 5-7 (discussing the benefits of educating all students in general education settings).

²⁶ Another advantage [of inclusive education] is the ability to provide social and instructional supports for all students. Supports . . . are sometimes lacking in today's world due to changes in family structure and mobility in an increasingly complex society. The increasing pressures of drugs, gangs, suicide, and increased family breakup also add to the need for acceptance and a *sense of belonging*. Inclusive schools can provide this support and assistance since they focus on building interdependence, mutual respect, and responsibility.

CURRICULUM CONSIDERATIONS, *supra* note 25, at 7 (emphasis added).

When inclusive education is fully embraced, we abandon the idea that children have to become 'normal' in order to contribute to the world. Instead, we search for and nourish the gifts that are inherent in all people. We . . . begin to realize the achievable goal of providing all children with an authentic *sense of belonging*.

Part I of this Note examines the LRE requirement. Specifically, this section will discuss relevant federal court decisions that establish the legal standards for determining compliance with the LRE requirement. In part II, this Note will provide a detailed analysis of New York's performance in complying with the LRE requirement by reviewing federal monitoring reports and studies conducted by local legal agencies. Part III will highlight recent attempts by parents to ensure compliance with the IDEA's LRE requirement, and part IV offers recommendations on how New York State can effectively address the legal and educational rights of children with disabilities.

I. THE INCLUSION CASES

Although the U.S. Supreme Court has yet to consider the LRE requirement,²⁷ the Court's opinion in *Board of Education v. Rowley*²⁸ influenced the circuit courts to develop legal standards that assess school districts' compliance with the LRE requirement. The Sixth Circuit made the first attempt to establish such standards in *Roncker ex rel. Roncker v. Walter*.²⁹ However, the test adopted by the court failed to maximize inclusion opportunities for children with disabilities. The Fifth Circuit's test in *Daniel R.R. v. State Board of Education*³⁰ addressed this flaw and has since become the accepted standard for determining LRE compliance, as evidenced by the Third Circuit's recent adoption of this approach in *Oberti ex rel. Oberti v. Board of Education*.³¹

RICHARD A. VILLA ET AL., *RESTRUCTURING FOR CARING & EFFECTIVE EDUCATION: AN ADMINISTRATIVE GUIDE TO CREATING HETEROGENEOUS SCHOOLS* 37-39 (1992) (emphasis added).

²⁷ See Yell, *supra* note 15, at 392 (indicating that it is unlikely that the U.S. Supreme Court will rule on LRE in the near future, since the appellate courts essentially have been in agreement on the issue).

²⁸ 458 U.S. 176 (1982) (reversing the Second Circuit's decision directing the Board of Education to provide a sign language interpreter in the classroom of an eight-year-old deaf child).

²⁹ 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983).

³⁰ 874 F.2d 1036 (5th Cir. 1989).

³¹ 995 F.2d 1204 (3d Cir. 1993).

In *Rowley*, the Court ruled that the IDEA does not require states to maximize the academic potential of handicapped children "commensurate with the opportunity provided to other children."³² According to the Court, "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."³³ The Sixth Circuit relied on *Rowley* to establish a test that determines whether school districts have complied with the Act's LRE mandate. In *Roncker*, the mother of a severely mentally retarded child challenged the school district's decision to place her son in a county school which did not provide any contact with nondisabled children.³⁴ The Sixth Circuit held that where a segregated facility is considered superior to an integrated setting, the court should determine whether the services that make the placement superior could also be provided in an integrated setting.³⁵ If this is possible, placement in the segregated school would be inappropriate under the IDEA.³⁶

The *Roncker* test is consistent with *Rowley* because it does not require a placement that maximizes the academic potential of a child with a disability.³⁷ However, the *Roncker* test is flawed because it does not define a "superior placement,"³⁸ and it fails to consider the supplemental aids and services that can be used to accommodate children with disabilities in a regular classroom.³⁹

³² *Rowley*, 458 U.S. at 189-90.

³³ *Id.* at 201.

³⁴ *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1059-60 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983).

³⁵ *Id.* at 1063.

³⁶ *Id.*

³⁷ The Sixth Circuit held that "[i]n some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming." *Id.* at 1063.

³⁸ See Abigail Flitter, *A Progressive Construction of the Least Restrictive Environment Requirement of the Individuals with Disabilities Education Act*, 67 TEMP. L. REV. 371, 379 (1994) ("The language of the test is unclear in that the court does not state who determines whether a facility is superior.").

³⁹ Under the *Roncker* test, a court could find that it is not "feasible" to integrate a disabled child because it is the special education teacher who makes the segregated facility "superior," and it is too costly to place a teacher in a

A number of courts that subsequently applied the *Roncker* test ruled in favor of segregated placements.⁴⁰

In *Daniel R.R. v. State Board of Education*,⁴¹ the Fifth Circuit abandoned the *Roncker* test and adopted a new test that maximizes the potential for students with disabilities to be educated with nondisabled students.⁴² In *Daniel*, the parents of a six-year-old boy with Down's syndrome challenged the school district's decision that full integration was inappropriate.⁴³ The Fifth Circuit developed a test based on two inquiries: (1) whether education in the regular classroom can be satisfactorily achieved with the use of supplemental aids and services; and (2) if such education cannot be satisfactorily achieved and the school intends to remove the child from regular education, whether the school has mainstreamed the child to the maximum extent appropriate.⁴⁴

regular education class. *Id.* at 384. However, the school in question could feasibly provide such supplementary aids and support services as a teacher's aide, resource room instruction and modification of the curriculum, which would approximate the superior quality of the special education classroom in a regular education setting and thus render inclusion appropriate. *Id.*

⁴⁰ In *A.W. ex rel. N.W. v. Northwest R-1 Sch. Dist.*, the court applied the *Roncker* test and upheld the district's proposed placement of a mentally retarded child in a segregated facility. 813 F.2d 158 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987). The court determined that the services that made the segregated placement superior, namely a fully trained special education teacher, could not have been feasibly provided in a public school because of the prohibitive cost of employing such a teacher. *Id.* at 161-63. Yet, the school district focused only on this aid and failed to consider alternative aids and services available to facilitate some type of integrated experience for the child. Flitter, *supra* note 38, at 379. Similarly in *Devries ex rel. DeBlaay v. Fairfax County Sch. Bd.*, the court did not consider supplementary aids and services other than a teacher's aide to facilitate inclusion of a 17-year-old autistic student. 882 F.2d 876 (4th Cir. 1989); Flitter, *supra* note 38, at 380.

⁴¹ 874 F.2d 1036 (5th Cir. 1989).

⁴² *Id.* 874 F.2d at 1046; see LIPTON, *supra* note 3, at 4 (indicating that the *Daniel* decision contains an excellent framework for analyzing the application of the least restrictive environment requirement).

⁴³ *Daniel*, 874 F.2d at 1039-40.

⁴⁴ *Id.* at 1048. The second prong of the *Daniel* test is in accordance with the notion of a continuum of placements—the school must provide the child with as much exposure to nondisabled children as possible. Yell, *supra* note 15, at 394.

The *Daniel* test expands the *Roncker* court's analysis by considering the possibility of "partial" inclusion.⁴⁵ The test demands more than *Roncker* because it requires courts to scrutinize the possible uses of supplementary aids and services to assess a school district's compliance with the LRE requirement.⁴⁶ There is some question, however, as to whether the *Daniel* court accurately applied its new test because the court held in favor of the school's proposal to integrate Daniel with nondisabled students *only* during lunch and recess.⁴⁷

In *Oberti ex rel. Oberti v. Board of Education*,⁴⁸ the Third Circuit not only adopted, but fully implemented the *Daniel* court's analysis.⁴⁹ In *Oberti*, the court held that an eight-year-old boy with Down's syndrome could be educated with nondisabled students in a regular education setting with the use of supplementary aids and support services.⁵⁰ The court noted that three factors must be considered when applying the first prong of the *Daniel* test. First, a court must evaluate the extent in which the school had taken reasonable steps to include the child in a regular classroom.⁵¹ Second, a court must compare the educational benefits the child will receive in a regular classroom with the benefits the child

⁴⁵ Flitter, *supra* note 38, at 384.

⁴⁶ Flitter, *supra* note 38, at 373 (explaining the differences between *Roncker* and *Oberti ex rel. Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993), the latter of which followed the *Daniel* approach).

⁴⁷ *Daniel*, 874 F.2d at 1051. Beyond curriculum modification, the court did not consider the wide range of supplementary aids and services that the school could use to fully include Daniel in the general educational environment. Flitter, *supra* note 38, at 384.

⁴⁸ 995 F.2d 1204 (3d Cir. 1993).

⁴⁹ See Yell, *supra* note 15, at 400 (indicating that the U.S. Department of Education has identified the *Oberti* decision as the cornerstone of the federal government's position on inclusion).

⁵⁰ *Oberti*, 995 F.2d at 1207.

⁵¹ *Id.* at 1216. The IDEA "does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad." *Id.* (citing *Daniel*, 874 F.2d at 1048). The *Oberti* court thus placed a heavy emphasis on the use of supplementary aids and services as a means of accommodating a disabled child. LIPTON, *supra* note 3, at 6.

will receive in a segregated special education classroom.⁵² Lastly, the court must determine the possible negative effect the child's inclusion might have on the education of the other children in the regular classroom.⁵³

The *Oberti* court concluded that the school did not take reasonable steps toward inclusion. During the 1989-90 school year, the school district placed the child in a regular kindergarten class but failed to provide a curriculum plan, a behavior management plan or adequate special education support for the teacher.⁵⁴ The court also observed that the education benefits of inclusion for the child compared favorably to those that he could have received in a special education facility.⁵⁵ Finally, the court affirmed the district court's findings that the mentally disabled child would not present significant behavioral problems in a regular classroom, therefore inclusion would not adversely affect the education of the other students.⁵⁶

⁵² *Oberti*, 995 F.2d at 1216. In making this comparison of potential benefits, a court must pay special attention to those unique socialization benefits the child may obtain from inclusion which cannot be obtained in a segregated environment. *Id.* The benefit that a child receives from inclusion may tip the balance in favor of an inclusive educational setting even if the child cannot flourish academically. *Daniel*, 874 F.2d at 1049.

⁵³ *Oberti*, 995 F.2d at 1217. "While inclusion of children with disabilities in regular classrooms may benefit the class as a whole, a child with disabilities may be so disruptive in a regular classroom that the education of other students is significantly impaired." *Id.* (quoting 34 C.F.R. § 300.552 cmt.); see Yell, *supra* note 15, at 401.

⁵⁴ *Oberti*, 995 F.2d at 1220-21.

⁵⁵ *Id.* at 1221-22.

⁵⁶ *Id.* at 1223. Because the school did not satisfy the first prong of the *Daniel* test, the *Oberti* court did not have to apply the second prong of the test (whether the school included the child in programs with nondisabled children whenever possible). *Id.* "If the state has made no effort to [satisfy the first prong], our inquiry ends, for the state is in violation of the [IDEA's] express mandate to supplement and modify regular education." *Daniel*, 874 F.2d at 1048.

Other circuit courts have adopted the *Daniel* two prong test. See *Sacramento City Unified Sch. Dist. v. Holland*, 14 F.3d 1398 (9th Cir. 1994) (affirming the district court's holding that the school district's recommended half-day placement in a regular classroom was not appropriate for a moderately retarded second grade child who was entitled to a full-time regular education program with supplemental services); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir.

If states did not completely understand their responsibility when the IDEA was first enacted, the court decisions over the years, particularly *Oberti*, have made the law absolutely clear. States must educate children with disabilities with nondisabled children to the maximum extent appropriate. States can satisfy this requirement through the use of supplementary aids and services. To place a child with a disability in a segregated educational placement, states must demonstrate that the disability is so severe that they cannot satisfactorily educate the child in a general educational environment. The only question that remains is to what extent are states complying with the LRE requirement. New York provides a very interesting case study.

II. NEW YORK FAILS TO EDUCATE IN LEAST RESTRICTIVE ENVIRONMENT

A. *Separate and Unequal Educational Placements*

Despite the clearly defined LRE requirement, New York school districts have one of the lowest least restrictive placement rates in the country. Only 7% of the children served under the IDEA in New York are placed full-time in regular education classes with the use of supplementary aids and services, while the national median is approximately 36%.⁵⁷ Approximately 83% of the students with disabilities in New York are placed either in resource room programs or segregated classes.⁵⁸

1991) (affirming the district court's decision that the removal of a six-year-old child with Down's syndrome from a general education classroom and placement in a segregated special class did not meet the LRE requirement because the child remained capable of benefitting from a regular classroom placement with the use of supplementary aids and services).

⁵⁷ See ANNUAL REPORT, *supra* note 18, at tbl. AB8. Only Arizona and West Virginia rank lower than New York in providing such placements. In Arizona, 6.6% of the children age 6-21 served under the IDEA are placed in regular classes; the corresponding figure in West Virginia is 6.3%. ANNUAL REPORT, *supra* note 18, at tbl. AB8.

⁵⁸ Approximately 40% of the students with disabilities in New York State are placed in resource room programs, while 43% are placed in separate classes.

A major reason for the high number of special education placements is the extensive financial cutbacks in New York City's general education system.⁵⁹ The lack of necessary instructional resources and supportive services within regular education settings has sharply increased the number of children referred to and placed in special education classes.⁶⁰ With approximately one-half of the state's special education students concentrated in New York City, the drastic reduction in the city's general education services has caused statewide repercussions.⁶¹ The limitations on resources within general education settings have denied thousands of New York City students any reasonable opportunity to meet the minimum standards of educational quality and quantity set by the New York State Board of Regents.⁶² Specifically, students are

ANNUAL REPORT, *supra* note 18, at tbl. AB8. The remaining 10% are placed in home instruction programs, hospitals and institutions. ANNUAL REPORT, *supra* note 18, at tbl. AB8. See *supra* note 19 for a description of resource room programs.

⁵⁹ "There is little question . . . that the drastic \$750 million reduction in [New York City's] educational budget in 1991 and 1992 severely limited options and had to result in some cuts." RICHARD GREENSPAN ET AL., PRINCIPALS SPEAK: THE VITAL IMPORTANCE OF MENTAL HEALTH/SOCIAL SERVICES TO SCHOOL REFORM 49 (1993). "[I]n the current fiscal crisis . . . cutbacks are being confined almost entirely to regular classrooms." Joseph Berger, *Costly Special Classes Serving Many With Minimal Needs*, N.Y. TIMES, Apr. 30, 1991, at A1.

⁶⁰ GREENSPAN, *supra* note 59, at 37; See Joseph Berger, *For Misplaced Students, Special Education Can Disable Too*, N.Y. TIMES, Aug. 24, 1992, at B3 [hereinafter *Misplaced Students*] (stating that "[t]he special education juggernaut has channeled one of every eight New York children into handicapped classes").

⁶¹ The U.S. Department of Education reports that 285,836 children were served under the IDEA during the 1992-93 school year. ANNUAL REPORT, *supra* note 18, at tbl. AA16. New York City's special education system is composed of 130,000 students. Richardson, *supra* note 19, at A1.

⁶² Campaign for Fiscal Equity, Inc. v. State, 162 Misc. 2d 493, 498, 616 N.Y.S.2d 851, 855 (Sup. Ct. 1994). The Campaign for Fiscal Equity, Inc. ("CFE"), a not-for-profit corporation dedicated to promoting fiscal equity for all public school children in New York City, brought an action against the state challenging the constitutionality of the state's school financing formula. The CFE's complaint contained allegations of a widespread failure of New York City public schools to meet the statewide minimum standards of educational quality and quantity fixed by the Board of Regents due to inequitable funding. *Id.* The CFE first documented the poor conditions of New York City public schools one

denied the requisite number of teachers and facilities, and access to specific courses and instructional materials necessary for graduation.⁶³

Mental health and social service programs⁶⁴ within New York City public schools have also suffered from the fiscal crisis.⁶⁵ Financial cutbacks in such supportive services have increased the chances that “at-risk” children will become developmentally disabled.⁶⁶ At-risk children are those children who have a high

year earlier when it authored an amicus brief in a similar action that was subsequently dismissed. *See* Brief Amicus Curiae for Appellants, Reform Educ. Inequities Today, et al v. State, 199 A.D.2d 488, 606 N.Y.S.2d 44 (1993) (No. 92-08663) [hereinafter Brief Amicus Curiae]. The court held that the CFE’s complaint sufficiently alleged violations of the state constitutional mandate that the legislature adopt a systematic method for financing education to assure the provision of a sound basic education for all students throughout the state. *Campaign for Fiscal Equity*, 162 Misc. 2d at 498, 616 N.Y.S.2d at 855.

See NEW YORK STATE BOARD OF REGENTS, ACTION PLAN TO IMPROVE ELEMENTARY RESULTS IN NEW YORK (1984) (describing the statewide minimum standards of educational quality and quantity against which educational opportunities in New York City can be measured). The Board of Regents is constitutionally empowered to exercise legislative and policymaking functions with respect to the state’s educational system. N.Y. CONST. art. XI, § 2; N.Y. EDUC. LAW § 207 (McKinney 1995). Statewide regulations are promulgated by the Commissioner of Education and approved by the Board of Regents. N.Y. EDUC. LAW § 207.

⁶³ *See* Brief Amicus Curiae, *supra* note 62, at 11-15.

⁶⁴ Mental health and social service programs “cover counseling of children and families, consultation to teachers and staff, improvement of school climate, assistance to children and families with problems of food, clothing, shelter, health and other practical needs that can alleviate stress and foster greater family stability.” GREENSPAN, *supra* note 59, at 20.

⁶⁵ The city fiscal crisis in the seventies caused deep cuts in education. . . . Almost all social workers, psychologists and psychiatrists were shifted out of *general education* and into special education Starting in the very late 80’s a small number of additional counselors were being brought back into the system, but this development was stopped in its tracks, pushed back by the severe \$750 million cutbacks in the N.Y.C. educational budget the past two years.

GREENSPAN, *supra* note 59, at 36.

⁶⁶ *See* Hearings on the Reauthorization of the Individuals with Disabilities Education Act Presented to the U.S. House of Representatives Committee on Education and Labor and Subcommittee on Select Education and Civil Rights,

probability of becoming developmentally disabled as a result of medical problems at birth or circumstances at home.⁶⁷ The financial cutbacks have limited important supportive services, such as day care programs, family therapy and after-school recreation programs, which seek to ensure an at-risk child's social growth and prevent the development of mental disabilities.⁶⁸

In the wake of the IDEA, New York City's budget cuts have not affected the special education system as school districts are required by federal law to ensure that all children with disabilities receive a "free appropriate public education" in the least restrictive environment.⁶⁹ The consequences of this disparate treatment between the two educational systems are alarming. School districts are unnecessarily stigmatizing children by classifying them as disabled so they can be placed in special education programs.⁷⁰

103d Cong., 2d Sess. 54 (1994) [hereinafter *Reauthorization Hearing*] (testimony of Diana M.T.K. Autin, Esq., Advocates For Children of New York, Inc.) (testifying that there are insufficient preventive and remedial services for at-risk children).

⁶⁷ ADVOCATES FOR CHILDREN OF NEW YORK, INC., IF YOUR INFANT OR TODDLER NEEDS EARLY INTERVENTION . . . A GUIDE FOR NEW YORK CITY FAMILIES 47 (1995); see also Myrna Rae Epstein, *Networking in a Rural Community Focuses on At-risk Children; Child Abuse*, 105 PUB. HEALTH REP. 428 (1990) ("One of the most pressing health care issues to be targeted by many agencies is identification of at-risk children—those who are abused or neglected, growing up in alcohol and other drug addicted families, and floundering in foster care as victims of dysfunctional families.").

⁶⁸ Providing early [intervention and preventive services such as] day-care programs, family therapy, after-school recreation programs, parenting programs, mentoring activities and education about family violence and substance abuse could prevent or mitigate later problems of . . . mental [disabilities].

Ruth A. Brandwein, *Child Aid Services Are Cash-Starved*, NEWSDAY, Feb. 24, 1993, at 89.

⁶⁹ 20 U.S.C. § 1400(c); 34 C.F.R. §§ 300.550-.556. See Berger, *supra* note 59, at A1 (reporting that special education is protected against cuts by a web of state mandates and court rulings).

⁷⁰ GREENSPAN, *supra* note 59, at 37.

[A]n incongruous consequence of [the passage of the IDEA is that] professionals are resigning themselves to giving children [who lag behind in reading skills or have shown incorrigible behavior] labels like learning disabled and emotionally disturbed. These professionals

The differences in the extent of resources and services available within the two educational systems are compounded by the fact that the New York City Board of Education receives greater federal and state aid for each student with a disability it educates, as compared to the amount it receives for nondisabled students.⁷¹ Thus, school districts have a tremendous financial incentive to place students in special education programs. "While thousands of the genuinely disabled belong in special classes, too often placement is not driven by one's disability, but by money and expedience."⁷²

Wide differences among states in the classification of children with disabilities support the contention that the special education system is arbitrary,⁷³ and also question the validity and effectiveness of the evaluations used to determine special education eligibility.⁷⁴ Special education referrals are a way for teachers to

know that only special education has the money and the force of law to guarantee the children the services they need.

Berger, *supra* note 59, at A1.

⁷¹ The New York City Board of Education benefits from the high number of children classified as learning disabled in terms of federal and state aid; a disabled child's schooling costs \$17,000 a year, almost three times as much as a mainstream child, thereby warranting greater financial assistance. *Misplaced Students*, *supra* note 60, at B3.

⁷² *Misplaced Students*, *supra* note 60, at B3.

⁷³ For example, in New York State, 14% of all children served under the IDEA are classified as emotionally disturbed, while the corresponding figure in California is only 3%. ANNUAL REPORT, *supra* note 18, at tbl. AA16. In Florida, 28% of all children served under the IDEA have a speech or language impairment, as compared to the 18% in Texas with the same classification. ANNUAL REPORT, *supra* note 18, at tbl. AA16. In Pennsylvania, 14% of all children served under the IDEA are classified as mentally retarded, while the corresponding figure in New Jersey is 2%. ANNUAL REPORT, *supra* note 18, at tbl. AA16.

⁷⁴ See Board of Educ. Carmel Cent. Sch. Dist., No. 94-21 (State Educ. Dep't 1994) (sustaining parents' appeal from the decision of an impartial hearing officer which upheld the CSE's recommendation that parents' 12-year-old daughter with Down's syndrome be instructed in a special education math class). The State Review Officer found that the CSE did not adequately assess the child's needs. *Id.* at 6. The child's IEP referred to a physical examination which described the child's health and vitality as good. *Id.* However, during the subsequent school year, the child's teachers expressed concern about the child's alleged avoidance behavior in class, such as putting her head on her desk. *Id.*

rid themselves of unmanageable students.⁷⁵ “While many who are classified as learning disabled have identifiable impairments—they might scramble letters, for instance—many are children of neglect and abuse.”⁷⁶ Teachers too often use special education as a “dumping ground for laggard readers or unruly students.”⁷⁷

See also Board of Educ. Ellenville Cent. Sch. Dist., No. 94-17 (State Educ. Dep’t 1994) (sustaining parents’ appeal from the decision of an impartial hearing officer which upheld the CSE’s recommendation that parents’ mentally retarded 9-year-old daughter be placed in a segregated special education class). The State Review Officer held that the CSE lacked adequate information to recommend an appropriate program for the child:

Although the CSE had the required evaluations performed, the information which such evaluations yielded was inadequate, especially in light of the discrepant information presented by the child’s counselor, special education teacher, pre-first grade teacher and the school psychologist with regard to the child’s socialization skills and the extent to which they should be addressed by special education and related services.

Id. at 8.

See *infra* notes 135-37 for an explanation of the system of review under the IDEA and New York State law.

⁷⁵ In a study of the overrepresentation of minority children referred for special education in New York City, the New York State Education Department interviewed teachers regarding why they referred one student but not another who rated similarly. OVERREPRESENTATION REPORT, *supra* note 19, at 21. The teachers’ responses fell into one of two categories: (1) the student was actually less capable than the comparison student; and (2) *the student did not differ from the comparison child, but a critical incident occurred that triggered the referral.* OVERREPRESENTATION REPORT, *supra* note 19, at 21-22 (emphasis added). Those teachers that described the “critical incident” invariably focused on misbehavior. OVERREPRESENTATION REPORT, *supra* note 19, at 22. *See* Berger, *supra* note 59, at A1 (interviewing a Brooklyn psychologist who believes that what determines whether a child is placed in special education is “how badly the teacher wants the child out of a regular class”).

⁷⁶ Berger, *supra* note 59, at A1. A retired school psychologist reported that “[t]he Board of Education has come to assume that any child functioning differently than his grade is learning-disabled.” Berger, *supra* note 59, at A1.

⁷⁷ *Misplaced Students*, *supra* note 60, at B3; *see* Joseph Shapiro et al., *Separate And Unequal*, U.S. NEWS & WORLD REP., Dec. 13, 1993, at 49 (reporting that special education classrooms have turned into convenient places for teachers to send the students that they do not want in their classrooms).

There is also a concern that special education classifications are motivated along racial lines.⁷⁸ Of those referred, children from certain ethnic backgrounds are significantly overrepresented in the most restrictive educational placements.⁷⁹ For example, eighty-nine percent of the students in self-contained special education classes are Black or Hispanic.⁸⁰ Children from certain ethnic backgrounds who cannot adequately speak English are likely to be classified as "learning disabled."⁸¹ Yet, their lack of proficiency in English may simply result from being raised in their native language, rather than from a disability. Many of the district evaluators are White Americans who lack sufficient training in culturally sensitive teaching techniques.⁸² Obviously, children cannot be adequately evaluated if they do not understand the

⁷⁸ In the Overrepresentation Study, the New York State Education Department confirmed the fears of those concerned with patterns of racially disproportionate special education placements. OVERREPRESENTATION REPORT, *supra* note 19, at 8. The study found that "as the percentage of White students in a school increases there is a corresponding increase in the percentage of Black students who are referred to special education, and as the percentage of Black students in schools increase, there is a corresponding increase in the percentage of White students who are referred." OVERREPRESENTATION REPORT, *supra* note 19, at 10.

⁷⁹ DIVISION OF SPECIAL EDUCATION NEW YORK CITY PUBLIC SCHOOLS, SPECIAL EDUCATION STUDENTS IN NEW YORK CITY PUBLIC SCHOOLS: A RACIAL/ETHNIC DISTRIBUTION 2-4 (1990) (identifying the types of placements in which Blacks and Hispanics are overrepresented). New York City schools are more likely to classify Black children as "emotionally disturbed" or "mentally retarded," while children with limited English proficiency are typically placed in the less stigmatizing disability classification of "speech impaired." Richardson, *supra* note 19, at B7.

⁸⁰ At the elementary and middle school levels, 12% of the students in special education classes are White, 40% are Hispanic and 46% are Black. OVERREPRESENTATION REPORT, *supra* note 19, at 6. The primary area of disproportion is with Black students, considering that they make up only 36% of all students attending New York City public schools. OVERREPRESENTATION REPORT, *supra* note 19, at 7.

⁸¹ "[A] number of Hispanic children, whose real handicap is not being able to speak English, [are] labeled learning disabled." *Misplaced Students*, *supra* note 60, at B3.

⁸² *Reauthorization Hearing*, *supra* note 66, at 54 (testimony of Diana M.T.K. Autin).

evaluator's instructions. Furthermore, federal regulators allow these classification problems to persist without penalizing the state.⁸³

Even when the evaluations are properly conducted, the Committees on Special Education ("CSE")⁸⁴ for each district often fail to ensure the implementation of comprehensive, yet flexible, goals when making a child's individualized education program ("IEP").⁸⁵ Annual reviews⁸⁶ of a child's program frequently result in a duplication of the same goals and objectives without sufficient consideration for the child's progress and with minimal parent involvement.⁸⁷

⁸³ *U.S. News & World Report's* analysis of 10,147 discrimination complaints reviewed by the U.S. Department of Education's Office of Civil Rights since 1987 found just *one* case in which the office went as far as revoking federal funds. Shapiro et al., *supra* note 77, at 49.

⁸⁴ See *supra* note 14 for a discussion of the composition of Committees on Special Education and their responsibility to create an IEP for each child with a disability.

⁸⁵ *Reauthorization Hearing, supra* note 66, at 56 (testimony of Diana M.T.K. Autin); see Board of Educ. Carmel Cent. Sch. Dist., No. 94-21 (State Educ. Dep't 1994) ("Three of the six annual goals in the child's IEP relate to the child's behavior and management needs. However, there is no indication in the IEP of the ways in which such goals are to be achieved."); see also Board of Educ. Eastport Union Free Sch. Dist., No. 94-18 (State Educ. Dep't 1994) (holding that the CSE did not make use of the results of a learning disabled child's private psychological evaluations, and the IEP did not identify the child's special education needs).

⁸⁶ "The [IEP] of each student with a disability shall be reviewed and, if appropriate, revised, periodically but not less than annually." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(e)(1).

⁸⁷ See, e.g., *In re Child with Disabilities*, 20 INDIVIDUALS WITH DISABILITIES EDUC. LAW REP. 455 (1993) (holding that a local school district committed procedural and substantive violations of the IDEA). The parents of a student with disabilities notified the district that they were unable to attend a meeting discussing their son's IEP and asked that it be rescheduled. *Id.* at 456. However, the district went ahead with the meeting, made changes in the child's IEP and sent a letter reporting these changes to the parents. *Id.* The IEP team simply carried over many of the goals and objectives from the previous year, failed to identify the portions of the school week that the student would spend in the various types of classroom settings and failed to develop a means for determining whether the student's short term goals and objectives could be met. *Id.* at 457.

Once children are finally placed in special education classes, their academic development often ceases and may even regress.⁸⁸ Special education classrooms resemble counselling centers rather than centers for academic learning, as the classes primarily focus on improving interpersonal behavior.⁸⁹ While such socialization skills are important for a child's overall development, academic learning is needed to enable the child to eventually return to a regular classroom setting. The unbalanced curriculum is compounded by the poorly equipped teachers assigned to special education classes. Recent studies indicate that teachers in general education classrooms are inadequately prepared to educate the one or two students with disabilities who may be included in their class.⁹⁰ Nevertheless, the rising number of children with disabilities in New York has forced these teachers to work in special education classrooms.⁹¹

New York City's fiscal crisis has thus channeled thousands of children into special education placements thereby affecting the state's overall performance in meeting the LRE requirement. The general education system has suffered greatly from the city's fiscal problems, while special education, wrapped in the entitlements of the IDEA, has been protected and adequately funded. However, the federal funding allocated to special education is not adequately used

⁸⁸ In 1992, only 2.5% of those students in self-contained classes read at grade level or higher when they complete the first two levels of schooling (elementary and middle) in New York City schools. OVERREPRESENTATION REPORT, *supra* note 19, at 28.

⁸⁹ "[T]he fact that students have severe social and emotional needs leads many professionals to view improvements in this sphere as the students' most pressing need. Consequently, many special classes . . . focus on interpersonal behavior rather than academic performance." OVERREPRESENTATION REPORT, *supra*, note 19, at 28; see Shapiro et al., *supra* note 77, at 49 (indicating that special education instructors often do as much social work as teaching).

⁹⁰ See Christopher A. Kearney & V. Mark Durand, *How Prepared Are Our Teachers for Mainstreamed Classroom Settings? A Survey of Postsecondary Schools of Education in New York State*, 59 EXCEPTIONAL CHILDREN 6 (1992).

⁹¹ New York City's fiscal crisis has created a situation in which the most difficult children are placed in classes with the least experienced teachers—only 50% of the teachers in special education programs are fully trained for it. Berger, *supra* note 59, at A1.

by New York State to create inclusive classrooms due to the state's special education weighted funding formula. New York's funding formula weights pupils with disabilities based on the intensity of service they receive and how much of the day or week the pupils remain segregated from their nondisabled peers.⁹² Thus, school districts have little incentive to devise and implement inclusive educational programs.⁹³ Furthermore, the formula's rigid prescriptions limit the program options⁹⁴ that school districts can implement to educate students with disabilities in the least restrictive

⁹² Committee on Education and the Law, *Creating Financial Incentives for the Inclusion of Students with Disabilities*, 48 ASS'N OF THE BAR OF THE CITY OF NEW YORK 242 (1993). New York's special education funding statute establishes four service-based weightings, which are not adjusted annually:

(1) [Students] who have been determined by a committee on special education either to require placement for sixty [percent] or more of the school day in a special class, or to require home or hospital instruction for a period of more than sixty days, or require special services or programs for more than sixty [percent] of the school day shall be multiplied by one and seven-tenths;

(2) [Students] who have been determined . . . to require placement for:
 (i) twenty [percent] or more of the school week in a resource room or to require special services or programs including related services for twenty [percent] or more of the school week . . . shall be multiplied by nine-tenths;

. . . .
 (3) [Students] who have been determined . . . to require direct or indirect consultant teacher services . . . shall be multiplied by nine-tenths;

(4) [Students] who have been determined . . . to require two or more sessions a week, consisting of at least thirty minutes each, of special instruction either in speech or in other special programs or services, including related services, shall be multiplied by thirteen-hundredths.

N.Y. EDUC. LAW § 3602(19)(b)(1)-(4) (McKinney 1995).

"Consultant teachers" provide direct or indirect services to a student with a disability, who attends regular education classes on a full-time basis, and also to such student's regular education teachers. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(1).

⁹³ SEGREGATED AND SECOND RATE, *supra* note 17, at 33.

⁹⁴ See *supra* notes 12-15 and accompanying text (discussing the "continuum" of placements that school districts are required to provide to children with disabilities).

environment.⁹⁵ No federal statute or regulation requires New York to adopt such a limited funding formula, yet the state legislature remains reluctant to acknowledge this flawed reimbursement system.⁹⁶

B. United States Department of Education Monitoring Reports

The federal government remains astonishingly passive in response to New York's failure to educate children with disabilities in the least restrictive environment. Over the past six years, the Office of Special Education Programs ("OSEP")⁹⁷ conducted two elaborate studies of New York's special education system and found that the state made little effort to improve its LRE performance. Specifically, OSEP found that the New York State Education Department ("NYSED") did not adequately monitor the procedures

⁹⁵ [F]unding is allocated for periods of special education service provided according to rigid prescriptions: 60 percent of the school day, 20 percent of the school week and two or more periods of specialized instruction or related services per week. Thus, if a school district wants to place a student in a special class for three periods a day and in a regular class for the rest of the day, the district cannot receive . . . funding for the student under the current system of weightings because s/he is spending only 37 percent instead of 60 percent of the school day in a self-contained program. The rest of the day is spent in regular class so the student would not be eligible for the . . . allocation for resource room instruction because the time spent in special education exceeds the 20 percent of the school week limitation on the resource room weighting.

PAULA J. HEPNER & PEGGY CRULL, PUBLIC EDUCATION ASSOCIATION, *MAINSTREAMING IN NEW YORK: CHILDREN CAUGHT IN THE CURRENTS* 48-49 (1984).

⁹⁶ *SEGREGATED AND SECOND RATE*, *supra* note 17, at 33-34.

⁹⁷ The Office of Special Education Programs ("OSEP") is a division of the U.S. Department of Education that conducts reviews of state education departments to determine whether they are ensuring that their local education agencies are administering programs for children with disabilities in a manner consistent with the IDEA. FEDERAL MONITORING REPORT I, *supra* note 21, at iv.

of each local educational agency⁹⁸ to ensure compliance with the IDEA, particularly the LRE requirement.⁹⁹

In its 1989 investigation, OSEP reviewed the procedures of these agencies and found that *none* of them addressed all of the LRE requirements.¹⁰⁰ Throughout this study, OSEP provided specific illustrations of the state's poor monitoring of school districts. For example, NYSED determined that a Specialized Instructional Environment V ("SIE V") program¹⁰¹ in a New York City public school did not have a problem providing inclusion opportunities.¹⁰² However, when OSEP reviewed student records and conducted interviews at the school, it found that over one-half of the special education students were provided with no opportunities to participate in nonacademic and extracurricular activities with nondisabled students.¹⁰³ Through this and other examples, OSEP illustrated that NYSED's monitoring efforts have been nothing but "lip-service" to the districts.¹⁰⁴

⁹⁸ See *supra* note 12 for a definition of a "public educational agency."

⁹⁹ See FEDERAL MONITORING REPORT I, *supra* note 21, at 35-45; FEDERAL MONITORING REPORT II, *supra* note 21, at 4-23.

¹⁰⁰ FEDERAL MONITORING REPORT I, *supra* note 21, at 9. See *supra* notes 6-15 and accompanying text (defining LRE and discussing the "continuum" requirement). Several agencies provided only a general statement indicating that it was district policy to educate handicapped students in the least restrictive environment. FEDERAL MONITORING REPORT I, *supra* note 21, at 9.

¹⁰¹ This specialized instructional environment is designed for students with disabilities, ages 14 to 21, who require special educational instructional services in a specialized environment to prepare for supported employment. The specialized environment provides a highly intensive management system that operates in the school, at work sites, and through activities conducted in the community. EDUCATIONAL SERVICES, *supra* note 14, at 195.

¹⁰² FEDERAL MONITORING REPORT I, *supra* note 21, at 13.

¹⁰³ FEDERAL MONITORING REPORT I, *supra* note 21, at 14.

¹⁰⁴ In a report to one of its school districts, the New York State Education Department ("NYSED") stated that the district should consider the expansion of its continuum of special education services, but NYSED did not identify this as a noncompliance issue and did not require the district to take corrective action. FEDERAL MONITORING REPORT I, *supra* note 21, at 39. When OSEP reviewed this district's placement data, it found that the district did not provide *any* inclusion opportunities. FEDERAL MONITORING REPORT I, *supra* note 21, at 39.

Poor state monitoring hides the reality that New York school districts do not offer the specific programs and services needed to implement the IEP's of children with disabilities in less restrictive settings.¹⁰⁵ For example, the special education director of one New York State school district reported that all students from that district who required placements with a 6:1:1 or 12:1:3 (student-teacher-teacher's aide) staffing ratios were placed in a separate facility because such staffing ratios were not available in the district's regular schools.¹⁰⁶ The director estimated that approximately fifteen students from his district are annually placed in separate facilities.¹⁰⁷ Another administrator indicated that regular class placements were not even available to students with mild mental retardation because the district did not have the consultant teachers needed to facilitate inclusion.¹⁰⁸

Although OSEP adequately depicted New York State's failure to meet the LRE requirement, its recommendations were vague. OSEP required NYSED to establish a corrective action plan, but did not specifically describe what measures the state should undertake to meet its responsibilities.¹⁰⁹ OSEP's recommendations simply outlined the law and added that NYSED must take steps to ensure that it is satisfied.¹¹⁰ Consequently, New York's performance did not improve when OSEP conducted another study four years later. In fact, OSEP found that the state's noncompliance with the LRE requirement had reached alarming proportions.¹¹¹

¹⁰⁵ FEDERAL MONITORING REPORT I, *supra* note 21, at 10.

¹⁰⁶ FEDERAL MONITORING REPORT I, *supra* note 21, at 10. *See supra* note 14 (identifying staffing ratios as an important consideration when the CSE creates a child's IEP).

¹⁰⁷ FEDERAL MONITORING REPORT I, *supra* note 21, at 10.

¹⁰⁸ FEDERAL MONITORING REPORT I, *supra* note 21, at 11; *see supra* note 92 (defining consultant teachers).

¹⁰⁹ FEDERAL MONITORING REPORT I, *supra* note 21, at 12, 14.

¹¹⁰ For example, the first provision of "Corrective Action Plan II-B" stated that: "[N]YSED will take steps to ensure that children with handicaps participate with non-handicapped children, to the maximum extent appropriate to the needs of the child, in the various extracurricular and nonacademic services and activities provided by each responsible public agency." FEDERAL MONITORING REPORT I, *supra* note 21, at 14.

¹¹¹ In a memorandum to the Commissioner of the New York State Education

In its 1993 report, OSEP reviewed eleven New York local public educational agencies¹¹² and found that each one failed to meet all of the requirements regarding placement in the least restrictive environment.¹¹³ An assistant superintendent for one agency informed OSEP that the program option of full-time instruction in general education classes was not even available for consideration in making placement determinations for students with disabilities in the district.¹¹⁴ The administrator also informed OSEP that it is the policy and practice of the agency to determine a child's educational placement *before* completing the development of the child's IEP, including annual goals and short-term instructional objectives.¹¹⁵ A recommended placement could therefore turn out to be inadequate because it cannot accommodate the services that the CSE subsequently required in the child's IEP.¹¹⁶

Department preceding the monitoring report, OSEP "noted significant deficiencies related to placement in the least restrictive environment" that require "immediate attention." Memorandum from Thomas Hehir, Director, Office of Special Education Programs, to Honorable Thomas Sobol, Commissioner, New York State Education Department (Mar. 29, 1994) (attached to FEDERAL MONITORING REPORT II, *supra* note 21).

¹¹² OSEP did not specifically identify these agencies, but rather referred to them by letters. See FEDERAL MONITORING REPORT II, *supra* note 21, at 51.

¹¹³ FEDERAL MONITORING REPORT II, *supra* note 21, at 50-51. OSEP broke the LRE requirement into four components and found that all of the agencies failed to satisfy at least one of them. FEDERAL MONITORING REPORT II, *supra* note 21, at 51 tbl. VI. The four components were: (1) educating children with disabilities with children who are not disabled to the maximum extent appropriate; (2) establishing a continuum of alternative placements to meet the individual needs of children with disabilities; (3) basing the educational placement for each child on his or her IEP; and (4) ensuring that each child with a disability participates with children who are not disabled in nonacademic and extracurricular activities to the maximum extent appropriate. FEDERAL MONITORING REPORT II, *supra* note 21, at 51 tbl. VI.

¹¹⁴ FEDERAL MONITORING REPORT II, *supra* note 21, at 52-53. Such a program option cannot be considered if the district lacks the supplemental aids and services necessary for educating children with disabilities in a general education classroom. See *supra* notes 8-11 and accompanying text.

¹¹⁵ FEDERAL MONITORING REPORT II, *supra* note 21, at 53.

¹¹⁶ See Board of Educ. City Sch. Dist. of N.Y., No. 93-13 (State Educ. Dep't 1993) (sustaining parents' appeal from the decision of an impartial hearing officer which upheld the CSE's recommendation that parents' 16-year-old

The agency must then make a new determination at the cost of the child who, in the interim, will either be in an inappropriate educational environment¹¹⁷ or out of school.¹¹⁸

Another special education director openly informed OSEP that his district did not comply with the IDEA's LRE mandate which requires an individual determination of the maximum extent to which each student with a disability could appropriately participate with nondisabled students.¹¹⁹ The director abdicated his legal

daughter be enrolled on a 12 month basis in a specialized instructional environment with a student-teacher and teaching assistant ratio of 12:1+1). Holding that this placement was too restrictive, the State Review Officer noted that the CSE failed to offer the child a program in the least restrictive environment. *Id.* at 5. The Officer indicated that the notes made by the physicians who evaluated the child and received by the CSE *after* it made its recommendation "afford[ed] a basis for requiring the CSE to probe further and reconsider the child's physical needs." *Id.*

See also Board of Educ. City Sch. Dist. of Utica, Appeal 93-4 (State Educ. Dep't 1993) (sustaining parents' appeal from the decision of an impartial hearing officer which upheld the CSE's recommendation that parents' eight-year-old child, diagnosed as having cerebral palsy and tuberous sclerosis, be enrolled in a special education class). The child's IEP provided that she was to have access to a computer, however, her school did not have one available for her. *Id.* at 6. Furthermore, the school's staff did not have a common understanding of the services which the CSE intended that the child's aide provide. *Id.*

¹¹⁷ During the pendency of any evaluation and placement procedure, unless the school district and the parents otherwise agree, the child shall remain in the then current educational placement, or, if applying for initial admission to a public school, shall be placed in that school until all such proceedings have been completed. N.Y. EDUC. LAW § 4404(4) (McKinney 1995). *See infra* note 138 for the corresponding provision in the IDEA.

¹¹⁸ *See* Board of Educ. Baldwin Union Free Sch. Dist., No. 93-29 (State Educ. Dep't 1993) (sustaining parents' appeal from the decision of an impartial hearing officer which upheld the CSE's recommendation that parents' 10-year-old son with attention deficit hyperactivity disorder be placed in an unspecified special education class). In October, 1992, the CSE recommended that the child be placed in a special education class with a student-teacher and teaching assistant ratio of 12:1+1 on a 12 month basis. *Id.* at 4. In November, the child refused to attend school because he disliked the teacher. *Id.* at 4-5. The child's parents acknowledged that there was a child neglect proceeding pending because of the child's failure to attend school. *Id.* Yet, as of the last day of the hearing in this proceeding (May 11, 1993), the child still had not returned to school. *Id.*

¹¹⁹ FEDERAL MONITORING REPORT II, *supra* note 21, at 54.

responsibility to satisfy this mandate by stating that *parents* should be primarily responsible for providing inclusion opportunities, and that such opportunities need not be created at school.¹²⁰ The director did note that some of his students should be in a more integrated educational environment, but that there was no available space for them at these placements.¹²¹

OSEP also examined a District 75 program located in a regular elementary school. District 75 programs are citywide special education programs often housed within general education buildings.¹²² These programs serve children with disabilities that are so severe that their home district cannot accommodate their needs. Every IEP that OSEP reviewed indicated that the student in question was not integrated for any portion of the school day.¹²³ The program's administrator explained that the principals of the general education school that houses a District 75 program determine the extent to which students within the program can interact with nondisabled students, and that these principals do not provide many of these opportunities.¹²⁴ OSEP further learned that the decision-making process is set up in such a way that removal from a self-contained program to a regular education classroom is

¹²⁰ The director stated that students could participate in activities with nondisabled peers as part of activities initiated by their parents after school or on weekends. FEDERAL MONITORING REPORT II, *supra* note 21, at 54.

¹²¹ The director stated that some schools with available space do not accept students from other districts if they are not compelled to do so by the CSE. FEDERAL MONITORING REPORT II, *supra* note 21, at 54.

¹²² FEDERAL MONITORING REPORT II, *supra* note 21, at 55.

¹²³ The IEP form utilized by the agency that OSEP investigated includes a section for documentation of consideration of placement options, including each of the "continuum" options set forth in 34 C.F.R. 300.551(b)(1). Of those IEP's reviewed by OSEP, no option other than the District 75 placement was listed as considered for one student and only one other full-time self-contained option was listed as considered for the other students. FEDERAL MONITORING REPORT II, *supra* note 21, at 56.

¹²⁴ Less than one percent of all students in District 75 programs were mainstreamed during the 1992-1993 school year. OVERREPRESENTATION REPORT, *supra* note 19, at 33. The District 75 administrator interviewed by OSEP stated that some regular education facility principals will not even permit District 75 students to use the school gym or to eat with nondisabled students in the school cafeteria. FEDERAL MONITORING REPORT II, *supra* note 21, at 56.

virtually impossible. The CSE is the only body responsible for making decisions that involve moving a child out of the self-contained programs operated by District 75.¹²⁵ However, the CSE does not participate in the annual reviews of District 75 students which are conducted by a team composed of faculty from the general education facility.¹²⁶ Thus, the option of moving a District 75 student to a less restrictive placement is foreclosed.

The recommendations specified in OSEP's 1993 report were more detailed than those stated in its prior report,¹²⁷ however, it is too early to determine their effect.¹²⁸ Even if successful, the current recommendations do not justify the years of lax federal enforcement and consistently low LRE placements. In response to this stagnant condition, parents of children with disabilities have brought legal actions against New York school districts, challenging what they consider to be overly restrictive, inappropriate special educational placements for their children.

III. PARENT CHALLENGES

Legal actions brought by parents of children with disabilities have not only advanced the goals of the IDEA in individual cases, they have also illuminated the federal statute's requirements to

¹²⁵ FEDERAL MONITORING REPORT II, *supra* note 21, at 56. "Decisions made without CSE involvement are limited to changes that can take place only within the District 75 self-contained placements." FEDERAL MONITORING REPORT II, *supra* note 21, at 56.

¹²⁶ FEDERAL MONITORING REPORT II, *supra* note 21, at 56.

¹²⁷ OSEP ordered the State Education Department to issue a memorandum to all local educational agencies informing them of their responsibilities for placing students in the least restrictive environment. FEDERAL MONITORING REPORT II, *supra* note 21, at 59. Furthermore, OSEP required the State Education Department to ensure that the local education agencies document all placement options considered in making a child's IEP, as part of the notice that must be provided to the child's parents. FEDERAL MONITORING REPORT II, *supra* note 21, at 59.

¹²⁸ The most recent statistics on educational placements, as reported by the U.S. Department of Education, are based on the 1991-92 school year. See ANNUAL REPORT, *supra* note 18.

educate in the least restrictive environment. In *Mavis v Sobol*,¹²⁹ parents brought an action against a New York State school district for failing to provide their mentally retarded daughter, Emily Mavis, with a free appropriate public education in the least restrictive environment.¹³⁰ At the start of the 1987 school year, the CSE classified Emily as "mentally retarded,"¹³¹ but recommended that she continue in a regular kindergarten setting with the assistance of a half-time aide.¹³² The CSE also recommended that the school provide Emily with speech therapy.¹³³ After Emily underwent a psychological evaluation a few months later, the CSE determined that Emily's primary placement would be in a segregated setting with inclusion opportunities in music, gym, lunch, assemblies and field trips.¹³⁴ Opposed to this dramatic change in Emily's education program, her parents exercised their right under the IDEA to an impartial due process hearing.¹³⁵ After the impartial hearing officer upheld the CSE's segregated placement recommendation, and the state review officer ("SRO")¹³⁶ affirmed

¹²⁹ 839 F. Supp. 968 (N.D.N.Y. 1993).

¹³⁰ *Id.* at 969-70. The court's decision came after five years of futile settlement negotiations between Emily's parents and the school district. At the time of the court's decision, Emily was almost 14-years-old and attending the sixth grade, whereas at the commencement of this lawsuit in August, 1989, Emily was nine-years-old and entering the first grade. *Id.* at 978.

¹³¹ A "mentally retarded student" is one who, "concurrent with deficits in adaptive behavior, consistently demonstrates general intellectual functioning that is determined to be [a certain standard] below the mean of the general population on the basis of a comprehensive evaluation which includes an individual psychological evaluation." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1.

¹³² *Mavis*, 839 F. Supp. at 971.

¹³³ *Id.*

¹³⁴ *Id.* at 972.

¹³⁵ *Id.* Under federal law, a parent has an opportunity to present complaints with respect to any matter relating to the educational placement of the child through an impartial due process hearing which shall be conducted by the local educational agency, as determined by state law. 20 U.S.C. § 1415(b). New York has a two-tiered system for the review of a child's IEP: after an impartial hearing officer conducts an initial hearing and makes a recommendation to the local board of education, that decision may be appealed by the parties to the state review officer. N.Y. EDUC. LAW § 4404(1)-(2).

¹³⁶ A "state review officer" is a subordinate to the Commissioner of

the recommendation, the Mavis' sought judicial review.¹³⁷ Meanwhile, Emily remained in the regular elementary school she initially attended in accordance with the IDEA's "stay-put" provision¹³⁸ and advanced from grade to grade.¹³⁹

Education and is designated specifically to conduct state review in compliance with written rules regarding impartiality. N.Y. COMP. CODES R. & REGS. tit. 8, § 279.1(b) (1985).

¹³⁷ Any final determination or order of a state review officer denying or limiting any special service or program to any child may be reviewed in a proceeding brought in the state supreme court. N.Y. EDUC. LAW § 4404(3).

¹³⁸ The IDEA "stay-put" provision requires that:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(e)(3).

¹³⁹ Before reaching the issue of Emily's placement, the district court addressed a few procedural issues. The court first ruled that a school district has the burden of showing that its proposed placement corresponds with the IDEA's statutory presumption in favor of inclusion. *Mavis*, 839 F. Supp. at 985. Specifically, the court stated that "the Act's strong presumption in favor of [inclusion] would be turned on its head if parents had to prove their child worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." *Id.* (quoting *Oberti ex rel. Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993)). School districts are better equipped to shoulder this burden since they have better access to relevant information and greater overall educational expertise than most parents. *Id.*

The *Mavis* court then analyzed the "due weight" standard that must apply to the impartial hearing officer's determinations. The Supreme Court in *Board of Educ. v. Rowley* interpreted the administrative review procedures of the IDEA, 20 U.S.C. § 1415(e) as requiring a "due weight" standard. 458 U.S. 176, 206 (1982). In determining exactly what constitutes due weight, the court "must consider the findings [of the administrative agency] carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole." *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984). The *Mavis* court thus concluded that, while it must acknowledge the impartial hearing officer's expertise, it can reserve for itself the option to accept or reject the findings in part or in whole. *Mavis*, 839 F. Supp. at 987.

The school district's central argument was that Emily's progress should be measured in the same manner as her nondisabled peers.¹⁴⁰ The court rejected this argument and held that the relevant inquiry is whether a student with a disability can achieve the goals specified in his or her IEP in a regular classroom with the assistance of appropriate supplementary aids and services.¹⁴¹ School districts must therefore tolerate a wide range of educational abilities in their classrooms.¹⁴² Based on this reasoning, the *Mavis* court concluded that Emily could satisfy her goals in a regular classroom, and that the school district did not take meaningful steps to create such an inclusion opportunity.¹⁴³

The *Mavis* court rejected the school district's contention that integrating Emily would be an undue burden because the general education curriculum would need modification.¹⁴⁴ The court also rejected the district's second argument, that Emily's behavior would disrupt other students in the class, because nothing in the record

¹⁴⁰ *Mavis*, 839 F. Supp. at 988.

¹⁴¹ Board of Educ. Schalmont Cent. Sch. Dist., No. 90-19 at 4 (State Educ. Dep't 1991). In determining whether a student's education can be provided in a regular education setting, it is *not* necessary to demonstrate that a disabled student will learn at approximately the same level as his or her non-disabled peers. *Id.* (interpreting *Daniel R.R. v. State Bd. of Educ.*, 847 F.2d 1036, 1046-47 (5th Cir. 1989)); *see Yell, supra* note 15, at 400 ("The most important factor to consider in determining the LRE for a particular student in a legally correct manner is his or her individual needs.").

¹⁴² *See Daniel*, 874 F.2d at 1047. The Fifth Circuit acknowledged that, although some children with disabilities may not be able to master as much of the general education curriculum as their nondisabled classmates, this does not mean that those children with disabilities are not receiving any benefit from regular education, nor does it mean that they are not receiving all of the benefit that their disabling condition will permit. *Id.* The court concluded that, if the child's individual needs make inclusion appropriate, "we cannot deny the child access to regular education simply because his educational achievement lags behind that of his classmates." *Id.*

¹⁴³ *Mavis*, 839 F. Supp. at 989 (criticizing the school district for making a "unilateral decision" and for failing to consider the "continuum" of less restrictive placements).

¹⁴⁴ The court held that "the need for modification is not a legitimate basis upon which to justify excluding a child from the regular classroom unless the education of other students is significantly impaired. The record is completely void in this case of any such showing." *Id.* at 990.

established such a showing.¹⁴⁵ The court concluded with a direct message to local school districts:

While [inclusion] surely requires readjustment and considerable effort on the part of educators, and on the part of the community in general, it is a small price to pay to increase the opportunity of individuals with disabilities to become fully-functioning, productive, and co-equal members of society. . . . Accordingly this is the price which we require of the school district today.¹⁴⁶

This message has “fallen on deaf ears” as New York school districts continuously fail to educate students with disabilities in the least restrictive environment.¹⁴⁷

School districts cannot justify their special education placement decisions if the IEPs they develop for each disabled child are substantively incomplete.¹⁴⁸ In *In re Board of Education South Lewis Central School District*, the state review officer upheld plaintiffs’ claim that the school district placed their health-impaired¹⁴⁹ ten-year-old son in an inappropriate environment because his IEP was inadequate. The IEP contained only a minimal description of his needs, as determined by test results, and it did not address his behavioral needs or reveal the basis for some of his short-term goals.¹⁵⁰ Concerns identified by the child’s teachers,

¹⁴⁵ *Id.* at 991.

¹⁴⁶ *Id.* at 992.

¹⁴⁷ See *supra* notes 97-128 and accompanying text discussing the most recent federal monitoring reports conducted by the Office of Special Education Programs, which found that New York State has failed to adequately educate children with disabilities in the least restrictive environment.

¹⁴⁸ See *In re Board of Educ. S. Lewis Cent. Sch. Dist.*, 20 INDIVIDUALS WITH DISABILITIES EDUC. LAW REP. 938, 941 (1993) (“An appropriate program begins with an IEP which accurately reflects the results of evaluations to identify the child’s needs, provides for the use of appropriate special education services to address the child’s needs, and establishes annual goals and short-term objectives which are related to the child’s educational deficits.”).

¹⁴⁹ When he was two-years-old, the child contracted encephalitis (inflammation of the substance of the brain) and experienced seizures. As a result, the child’s behavior regressed and tubes were inserted into his ears to correct a substantial loss of hearing. *Id.* at 938.

¹⁵⁰ *Id.* at 942.

such as his disorientation in finding his way to and from class, or recognizing his own space and that of others, were also not addressed in the IEP.¹⁵¹ The school district also failed to include required evaluation procedures for determining whether the child's short-term instructional goals were being achieved.¹⁵² In addition, the child's parents noted that the district committed a number of procedural violations, including inadequate notice of the CSE's recommended placement.¹⁵³ Based on these facts, the court remanded the case to the CSE with specific instructions to modify the child's IEP and to create a placement in the least restrictive environment.¹⁵⁴

If the child's parents were not satisfied with the state review officer's decision, the IDEA entitles them to seek judicial review in state court.¹⁵⁵ However, courts usually accord a great deal of deference to administrative findings.¹⁵⁶ In *In re Board of Education Baldwin Union Free School District v. Sobol*,¹⁵⁷ another case in which parents successfully challenged a school district's

¹⁵¹ *Id.*

¹⁵² *Id.* The IEP for each child must include "appropriate objective and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved." 34 C.F.R. 300.346(a)(5) (1994).

¹⁵³ *In re Board of Educ. S. Lewis Cent. Sch. Dist., 20 INDIVIDUALS WITH DISABILITIES EDUC. LAW REP. 938, 941 (1993).* A committee on special education that

recommends a change in or continuation of the classification, educational placement or educational program of a student . . . shall give written notice to the parent of its recommendation to the board of education or trustees including a description of the program and placement options considered and a rationale for rejecting those options not selected.

N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(4)(i)(b) (1985).

¹⁵⁴ The court found no basis in the record for excluding the child from regular education classes and thus concluded that, even if the child's IEP had been appropriate, its ruling in favor of the child's parents would still stand. *South Lewis Cent., 20 INDIVIDUALS WITH DISABILITIES EDUC. LAW REP. at 942.*

¹⁵⁵ 20 U.S.C. § 1415(e).

¹⁵⁶ See *supra* note 139 and accompanying text for a discussion of the "due weight" standard of review for administrative findings under the IDEA.

¹⁵⁷ 160 Misc. 2d 539, 610 N.Y.S.2d 426 (Sup. Ct. 1994).

restrictive placement for their child, the trial court deferred to the state review officer's decision. The school board recommended that a fifth grade student with attention deficit disorder be placed in a segregated special education class.¹⁵⁸ The child's parents opposed this placement and removed him from school.¹⁵⁹ The state review officer held that the school district should educate the child in a regular classroom because his academic skills were adequate for such a placement.¹⁶⁰ The trial court affirmed the SRO's decision, stating that it "must take great care to avoid displacing the educational policy judgments made by the SRO."¹⁶¹

While district courts should accord deference to administrative findings, they must take into account the possibility of biased decisions by hearing officers. For example, in *Heldman v. Sobol*,¹⁶² the court granted relief to a parent of a disabled child who challenged a systemwide violation of the IDEA. The parent argued that the New York State hearing officer selection system was inherently biased because the local school boards for each district selected and paid some of the officers.¹⁶³ These boards could therefore exert undue influence over the officers' findings and threaten their impartiality.¹⁶⁴ Before the court reached a decision, the New York State Legislature amended its procedure for the appointment of impartial hearing officers.¹⁶⁵ Under the new law, former school board employees cannot serve as hearing officers until two years after leaving such employment.¹⁶⁶ The law also requires the State Commissioner of Education to establish procedures for the dismissal of hearing officers and maximum pay

¹⁵⁸ *Id.* at 540-41, 610 N.Y.S. at 427.

¹⁵⁹ *Id.* at 541, 610 N.Y.S.2d at 427.

¹⁶⁰ *Id.* at 542, 610 N.Y.S.2d at 427-28.

¹⁶¹ *Id.* at 544, 610 N.Y.S.2d at 429. The court noted that the SRO's decision was "not arbitrary or capricious nor based on error of law." *Id.* at 545, 610 N.Y.S.2d at 429.

¹⁶² 846 F. Supp. 285 (S.D.N.Y. 1994).

¹⁶³ *Id.* at 287.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* See N.Y. EDUC. LAW § 4404 (McKinney 1995).

¹⁶⁶ N.Y. EDUC. LAW § 4404(1). The two-year requirement is scheduled to be fully adopted by July 1996. *Id.*

rates for such officers.¹⁶⁷ *Heldman* served as the catalyst for this amended state law.¹⁶⁸

The previous cases discussed in this section are not like *Heldman*. Rather than procedural claims, these actions addressed specific LRE violations by various school districts throughout New York. To ensure that these districts adequately comply with the LRE mandate, a systemic change in the special education system is required. Such a change can only be achieved by a collective effort involving the federal and state governments, school administrators, teachers, advocates and parents.

IV. RECOMMENDATIONS

Although the segregation of children with disabilities in New York schools is a significant problem, it is not an insurmountable one. The purpose of this section is to provide a starting point for improving New York's efforts to educate children with disabilities in the least restrictive environment. These recommendations will not remedy all the ills of the current system, but will hopefully have the dual purpose of creating some initial progress and stimulating further ideas of improvement.

A critical first step is for the New York State Legislature to revise its reimbursement formula to provide incentives for supporting placements in general education settings.¹⁶⁹ For example, the New York State Board of Regents recently proposed a new formula in which state aid would be based on the expenses of each district,

¹⁶⁷ *Id.*

¹⁶⁸ *Heldman*, 846 F. Supp. at 290; compare *Heldman v. Sobol*, 846 F. Supp. 285 (S.D.N.Y. 1994) with *Jacky W. v. New York City Bd. of Educ.*, 848 F. Supp. 358 (E.D.N.Y. 1994) (parent's claim that impartial hearing officers are not properly independent under the IDEA barred due to her failure to exhaust administrative remedies).

¹⁶⁹ See NEW YORK STATE EDUCATION DEPARTMENT, LEAST RESTRICTIVE ENVIRONMENT IMPLEMENTATION POLICY PAPER 10 (1994) (stating that the State Education Department will undertake a number of steps to accomplish statewide implementation of LRE, including the development of a formula which funds special education programs and services based on student needs, rather than the type and intensity of the program provided).

rather than the *type* of placement implemented by the districts.¹⁷⁰ Expenses would be defined as all those necessary to implement school programs, including staff development, interagency collaboration and support services for students.¹⁷¹ Currently, the amount of aid that a district receives is dependent on its "wealth," which is calculated by adding up the income and property wealth of the district and dividing it by the number of pupils within the district.¹⁷² Under the proposed formula, students with disabilities would receive additional weighting in the count of pupils in the district, so it will appear that the district has a higher enrollment and a lower wealth.¹⁷³ Lower wealth results in greater funds. The new formula would provide districts with aid to meet the additional cost of educating students with disabilities without making a direct connection between educational setting and funding. This would avoid the consequence of the current formula which establishes a fiscal incentive to place students in more restrictive settings. OSEP clearly found the current funding formula deficient and a major reason for New York's noncompliance with the least restrictive environment requirement.¹⁷⁴ However, OSEP did not effectively take action against the state.¹⁷⁵ Considering that New York State has one of the lowest rates of least restrictive special education placement in the country, the time for enforcement on the part of the federal government is now.

Another important step is for the New York State Education Department to improve its monitoring efforts. At a minimum, NYSED should reinforce the districts' legal obligation to place students in the least restrictive environment. The Department should also investigate inclusive models that are successful in other states and adopt those that can feasibly be implemented in New York.

¹⁷⁰ NEW YORK STATE EDUCATION DEPARTMENT, *LEVERAGING CHANGE: PROVIDING THE MEANS FOR SPECIAL EDUCATION* (1994) (Board of Regents 1994-95 proposal on state aid to schools for special education).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See FEDERAL MONITORING REPORT II, *supra* note 21, at 50.

¹⁷⁵ See *supra* notes 109-11 and accompanying text criticizing OSEP's vague Corrective Action Plan in its 1989 monitoring report.

Finally, NYSED should revise the curriculum offered in teacher training institutions so that it addresses strategies that work well for children with disabilities. However, this type of training alone is not enough. Considering the many challenges teachers face in educating children with a wide range of disabilities, teachers must be given continuous opportunities for technical assistance, in-service training and state-of-the-art informational materials which devise alternative teaching strategies. NYSED must lead the way in promoting a major attitudinal shift among teachers with regard to inclusion. Through this assistance, teachers will no longer view inclusion as a cumbersome undertaking, but rather as a mutually rewarding experience.

Local school districts should also foster informational networks for teachers as well as develop programs through which parents can take an active role in the education of their children. However, the major concern with regard to local school districts is their evaluation of children. The Committee on Special Education for each district should be required to document all the placement options considered in making a child's individualized educational program, including placement in regular classrooms, and explain their reasons for rejecting the various placement options. School districts must clearly demonstrate that their recommendations correspond to evaluation results, justify any decision to remove children from an inclusive setting into a segregated class, establish inclusion opportunities during nonacademic periods and work toward the ultimate goal of decertifying students with disabilities. School districts should also consider making changes within regular classrooms so that they can better accommodate children with disabilities. For example, a limitation in class size would provide the students with a greater degree of individualized attention and also give the teacher additional time to work with the disabled students in the classroom.

CONCLUSION

With the exception of two states,¹⁷⁶ New York places the *least* number of children with disabilities in regular education classes. Economic considerations, culturally biased decision-making and the conception of special education as a “dumping ground” for problem children account for the high placement of students in special classes. While many of these children have identifiable impairments, a substantial number of children are unnecessarily stigmatized as “learning disabled.” The U.S. Supreme Court’s fear in *Brown v. Board of Education*, that educational segregation affects a child’s motivation to learn, is a reality in light of New York’s extremely low decertification and graduation rates for special education students. Although federal courts have clearly established the standards that a state must follow to satisfy the LRE requirement, New York State fails to recognize its responsibility to educate, to the maximum extent appropriate, children with disabilities with nondisabled children. Moreover, the federal government continues to watch this problem persist without taking any significant action.

Meanwhile, parents and educators continue to battle against each other in the judicial arena. While parents are defending the rights of their disabled children to be educated in regular classrooms, school districts continue to place these children in segregated settings without proper justification. The solution lies in making educators recognize their legal obligation and the rights of children with disabilities and their families. It is the duty of the federal and state governments to alert school districts that the provisions of the Individuals with Disabilities Education Act are *not* optional, and it is the duty of advocates and parents to keep this issue on the minds of local officials by conveying to them the dismal status of special education in New York and the urgent need for a resolution. If a collective effort is given by the federal and state governments, school administrators, teachers, advocates and

¹⁷⁶ See *supra* note 57 and accompanying text.

parents, New York will see that inclusion is not a lofty, unattainable goal, but a realistic expectation.