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IDEA - The Third Circuit Sets Its Standards for Interpreting the Mainstreaming Requirement of the Individuals with Disabilities Education Act

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IDEA—THE THIRD CIRCUIT SETS ITS STANDARDS FOR INTERPRETING THE MAINSTREAMING REQUIREMENT OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Oberti v. Board of Education (1993)

I. INTRODUCTION

In an effort to assist states and localities to provide for the education of all disabled children, Congress enacted the Education of the Handicapped Act of 1975.[1] Today, this statute is known as the Individuals with Disabilities Education Act (IDEA).[2] In enacting the IDEA, Congress found that one million of the estimated eight million children with disabilities in the United States are entirely excluded from the public school system and will not be educated with their peers.[3] To remedy this problem, the IDEA provides that states receiving federal funding under the IDEA must ensure that disabled children[4] are educated in regular classrooms[5] with nondisabled children as much as possible.[6] The requirement of

1. 20 U.S.C. §§ 1400-1485 (1988 & Supp. V 1993). The express purpose of the Act is to assure that:

> [A]ll children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

Id. § 1400(c). For a general discussion of the IDEA, see John H. Kibbler, Comment, *The Education of the Handicapped Act: The Floor of Opportunity*, 12 J. JUV. L. 26 (1991) and Michael S. Treppa, Comment, *The Education for All Handicapped Children Act: Trends and Problems with the "Related Services" Provision*, 18 GOLDEN GATE U. L. REV. 427 (1988).

2. 20 U.S.C. §§ 1400-1485 (1988 & Supp. V 1993). The name of the statute was changed to the Individuals with Disabilities Education Act pursuant to an amendment effective October 1, 1990. *Id.* § 1400(a).

3. *Id.* § 1400(b)(4). Congress also found that "more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity." *Id.* § 1400(b)(3).

4. *Id.* § 1401(a)(1)(A) (defining "children with disabilities" as children "(i) with 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, or specific learning disabilities; and (ii) who, by reason thereof, need special education and related services").

5. The phrase "regular classroom" is commonly used in the cases interpreting the IDEA to mean a classroom of nondisabled children. *See, e.g.*, Oberti v. Board of Educ., 995 F.2d 1204, 1207 (3d Cir. 1993).

6. 20 U.S.C. § 1412(5)(B). To qualify for federal assistance under the IDEA, states must establish "procedures to assure that, to the maximum extent appropri-

integrating children with disabilities in regular classrooms is called "mainstreaming."[7]

In *Oberti v. Board of Education*,[8] the United States Court of Appeals for the Third Circuit addressed the mainstreaming requirement of IDEA for the first time. In Section II, this Casebrief reviews the background of the mainstreaming requirement of the IDEA.[9] Section III analyzes the test adopted by the Third Circuit for interpreting the mainstreaming requirement.[10] In Section IV, this Casebrief discusses the burden of proof and standard of review under the IDEA.[11] Section V then examines how the Third Circuit applied its newly-adopted test in *Oberti*.[12] Finally, in Section VI, this Casebrief concludes with a summary of the *Oberti* decision and guidelines for the Third Circuit practitioner involved in a case concerning the IDEA mainstreaming requirement.[13]

II. FREE APPROPRIATE PUBLIC EDUCATION AND THE MAINSTREAMING REQUIREMENT OF THE IDEA

As a condition to receiving federal funding under the IDEA, participating states must assure "all children with disabilities the right to a free appropriate public education."[14] In *Board of Education v.*

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ate, children with disabilities . . . are educated with children who are not disabled . . . ." *Id.*

7. *Oberti*, 995 F.2d at 1207. The Third Circuit in *Oberti* noted that some educators prefer the term "inclusion" rather than "mainstreaming." *Id.* at 1207 n.1. Because it is the more commonly used term, "mainstreaming" will be used in this Casebrief. *See* Steve Heise, Comment, *Mainstreaming of Handicapped Children in Education*, 8 J. JUV. L. 105, 110 (1984) (observing that "mainstreaming" is term for integrating disabled children into regular school program with nondisabled children rather than segregating them in special education settings for disabled children).

8. 995 F.2d 1204 (3d Cir. 1993).

9. For a discussion of the mainstreaming requirement of the IDEA, see *infra* notes 14-21 and accompanying text.

10. For a discussion of the mainstreaming test adopted by the Third Circuit, see *infra* notes 22-62 and accompanying text.

11. For a discussion of the burden of proof and standard of review under IDEA, see *infra* notes 63-83 and accompanying text.

12. For a discussion of the facts and analysis of *Oberti*, see *infra* notes 83-134 and accompanying text.

13. For a summary of the *Oberti* decision, see *infra* notes 135-43 and accompanying text.

14. 20 U.S.C. § 1412(1) (Supp. V 1993). The IDEA defines "free appropriate public education" as:

> special education and related services that- (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. § 1401(a)(18); *see also* Straube v. Florida Union Free Sch. Dist., 778 F. Supp. 774 (S.D.N.Y. 1991) (holding that "free appropriate public education" under IDEA re-

Rowley,[15] the United States Supreme Court interpreted the phrase "free appropriate public education" to mean special instruction that satisfies the unique needs of disabled children, and special services that enable disabled children to benefit from the instruction.[16] Subsequently, the Third Circuit construed *Rowley* to require states to offer disabled children individualized education programs (IEPs) tailored to meet their specific needs.[17] Among other things, the IEP must include "a statement of the child's current level of educational performance, annual goals for the child, specific educational services to be provided, and the extent to which the child will participate in regular educational programs."[18]

In addition to the free appropriate public education requirement, the IDEA provides that in order to qualify for funds, states must establish "procedures to assure that, to the maximum extent appropriate, children with

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quires personalized instruction with sufficient support services to permit disabled children to benefit educationally from that instruction).

15. 458 U.S. 176 (1982).

16. *Id.* at 188-89. The *Rowley* Court established a two-part test to determine whether a disabled child is receiving a free appropriate education: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive education benefits?" *Id.* at 181 n.4. *Rowley*, however, did not involve the mainstreaming requirement of the IDEA. The *Rowley* two-part test assumes that the IDEA mainstreaming requirement has been met. For this reason, *Rowley* is not helpful in deciding mainstreaming cases like *Oberti*. *See* Greer v. Rome City Sch. Dist., 950 F.2d 688, 695-96 (11th Cir. 1991) (observing that *Rowley* test was not intended to resolve mainstreaming issues); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) (same); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 n.7. (8th Cir.) (same), *cert. denied*, 484 U.S. 847 (1987).

17. *See* Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180-85 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). In *Polk*, the court observed that the individualized educational program (IEP) "consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining goals for the child's education and specifying the services the child will receive." *Id.* at 173; *see also* Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City Sch. Dist., 757 F. Supp. 606 (E.D. Pa. 1991) (holding that under IDEA, schools must consider individual needs of disabled children and design IEPs appropriate for those children).

18. *See* Oberti v. Board of Educ., 995 F.2d 1204, 1213 n.16 (3d Cir. 1993). The IDEA defines an "individualized education program" as a written document containing:

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, . . . (E) the projected date for initiation and anticipated duration of such services, and (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(20). The Third Circuit in *Oberti* referred to the IEP as the "centerpiece" of the IDEA. *Oberti*, 995 F.2d at 1213 n.16.

disabilities . . . are educated with children who are not disabled . . . ."[19] This mainstreaming directive of the IDEA further provides that disabled children should only be removed from the regular classroom if their disabilities are so severe that education in the regular classroom cannot be achieved satisfactorily.[20] Several courts have recognized that the language of the IDEA mainstreaming requirement indicates a strong congressional preference for integrating disabled children in regular classrooms.[21]

III. THIRD CIRCUIT STANDARDS FOR INTERPRETING THE IDEA MAINSTREAMING DIRECTIVE: THE TWO-PART TEST

In *Oberti v. Board of Education*,[22] the United States District Court for the District of New Jersey adopted a test for interpreting the IDEA mainstreaming requirement that was first set forth by the United States Court of Appeals for the Sixth Circuit in *Roncker v. Walter*.[23] In *Roncker*, the court stated: "In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement

19. 20 U.S.C. § 1412(5)(B) (1988). The federal regulations promulgated under IDEA echo this mainstreaming requirement, stating that children with disabilities must be educated in the "least restrictive environment." 34 C.F.R. §§ 300.550-300.556 (1993).

20. 20 U.S.C. § 1412(5)(B). Factors relevant in determining whether a placement is appropriate under the IDEA include: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom; (2) the nonacademic benefits to the child from interaction with nondisabled children; (3) the effect of the disabled child's presence on the teacher and other children in the regular classroom; and (4) the cost of supplementary aids and services necessary to mainstream the disabled child in a regular classroom. Board of Educ., Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992), *aff'd*, 14 F.3d 1398 (9th Cir.), *cert. denied*, 114 S. Ct. 2679 (1994); *see also* St. Louis Dev. Disabilities Treatment Ctr. Parents Ass'n v. Mallory, 591 F. Supp. 1416 (D. Mo. 1984) (noting that it is possible to provide free appropriate education within meaning of the IDEA in segregated classroom; mainstreaming is not proper for every disabled child), *aff'd*, 767 F.2d 518 (8th Cir. 1985); Thornock v. Boise Indep. Sch. Dist. No. 1, 767 P.2d 1241, 1251 (Idaho) (holding that school district may validly find mainstreaming disabled child inappropriate where educational experience would not be productive, or where it would disrupt classroom), *cert. denied*, 490 U.S. 1068 (1988).

21. *See* Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 878 (4th Cir. 1989) (observing that the IDEA denotes strong congressional preference in favor of mainstreaming disabled children into regular classrooms); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989) (same); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 295 (7th Cir.) (same), *cert. denied*, 488 U.S. 925 (1988); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 162 (8th Cir. 1987) (same); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.) (same), *cert. denied*, 464 U.S. 864 (1983); Cordero by Bates v. Pennsylvania Dep't of Educ., 795 F. Supp. 1352, 1359 (M.D. Pa. 1992) (same); Board of Educ., Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874, 878 (E.D. Cal. 1992) (same).

22. 801 F. Supp. 1392 (D.N.J. 1992).

23. *Id.* at 1401 (citing Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983)). *Roncker* was the first federal court of appeals case to interpret the IDEA mainstreaming requirement.

superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act."[24] The district court in *Oberti*, applying the *Roncker* test, found that the school district had violated the IDEA.[25] The United States Court of Appeals for the Third Circuit affirmed the district court's decision, but adopted a different, more stringent test.[26]

The Third Circuit, in *Oberti*, applied a two-part test to determine whether the school was complying with the IDEA mainstreaming requirement.[27] This test was modeled after the Fifth Circuit case of *Daniel R.R. v. State Board of Education*.[28] Under the first prong of the test, a court must determine whether a regular classroom supplemented with special-aids and services can provide a satisfactory education for the disabled child.[29] If the court finds that placement outside the regular classroom is warranted, then the court must still apply the second prong of the test and decide whether the school has attempted to mainstream the disabled child in school programs whenever possible.[30] This second prong is absent from the *Roncker* test.

The Third Circuit adopted the *Daniel R.R.* two-part test because the court determined that the test was faithful to the IDEA's directive to integrate disabled children with nondisabled children "to the maximum extent appropriate."[31] In rejecting the *Roncker* test, the Third Circuit, in *Oberti*, reasoned that the *Roncker* test was inadequate because it failed to

24. *Ronker*, 700 F.2d at 1063; *see Northwest R-1*, 813 F.2d at 163 (adopting Sixth Circuit *Roncker* test).

25. 801 F. Supp. 1392, 1402 (D.N.J. 1992).

26. Oberti v. Board of Educ., 995 F.2d 1204, 1215 (3d Cir. 1993). The Third Circuit adopted the two-part *Daniel R.R.* test because it felt that test closely tracked the language of 20 U.S.C. § 1412(5)(B), the IDEA mainstreaming requirement. *Id.*

27. *Id.*

28. 874 F.2d 1036 (5th Cir. 1989); *see also* Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991) (adopting Fifth Circuit two-part test and holding that school district did not comply with IDEA mainstreaming requirement because it failed to take steps during development of IEP to accommodate ten-year-old girl with Down's syndrome).

29. *See Daniel R.R.*, 874 F.2d at 1048. The Third Circuit in *Oberti* noted that "[e]ducation in the regular classroom, in this context, means placement in a regular class for a significant portion of the school day." *Oberti*, 995 F.2d at 1215 n.21. Thus the court allowed for some leeway in determining what constitutes "education in the regular classroom." *Id.* Presumably, a portion of the disabled child's school day may be spent receiving special education outside the regular classroom without failing the first prong of the test. The court in *Oberti* did not precisely define "significant portion of the school day."

30. *Oberti*, 995 F.2d at 1215 (quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989)).

31. *Id.* The Third Circuit specifically stated: "We think this two-part test, which closely tracks the language of [the IDEA] is faithful to IDEA's directive that children with disabilities be educated with nondisabled children 'to the maximum extent appropriate,' and to the Act's requirement that schools provide individualized programs to account for each child's specific needs . . . ." *Id.* (citations omitted).

include the second prong inquiry in its analysis.[32] That is, even if a disabled child cannot be satisfactorily educated in a regular classroom, the school must still attempt to include the disabled child in regular school programs. For example, the court noted that disabled children could be included in regular school activities such as music, art, lunch and recess, even if integration for the major portion of the school day could not be achieved satisfactorily.[33]

A. *The First Prong of the Mainstreaming Test*

In *Oberti*, the Third Circuit discussed several factors a court should consider in applying the first prong of the *Daniel R.R.* test (i.e. whether the disabled child can be educated satisfactorily in a regular classroom with supplementary aids and services).[34] These factors include: (1) the steps the school district has made to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class (with appropriate supplementary aids and services) as compared to the benefits provided in a special education class; and (3) the possible negative effects of mainstreaming the child on the education of the other students in the class.[35] Other factors, such as cost, may be relevant in determining compliance with the IDEA mainstreaming requirement.[36]

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32. *Id.* In adopting the two-part test, the Third Circuit noted that the benefits of mainstreaming were not limited to the academic classroom setting. *Id.* at 1216. As the court noted, children with disabilities can benefit from inclusion in such nonacademic classes as music, lunch, recess and assemblies. *Id.* Because the two-part test is concerned with the entire school day (not just academic class time), the Third Circuit found it preferable to the *Roncker* test. *Id.*

33. *Id.*; *see also* Liscio by Hippensteel v. Woodland Hills Sch. Dist., 734 F. Supp. 689 (W.D. Pa. 1989) (holding that school district was required to explore feasibility of mainstreaming mentally disabled child into classes for nonacademic subjects, even though child would have to take academic subjects in segregated special education classes), *aff'd*, 902 F.2d 1561 (3d Cir. 1990); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47 (D. Ala. 1981) (holding that IEP provided for severely retarded eighteen-year-old boy did not place him in contact with nondisabled students to maximum extent appropriate where he had virtually no contact with nondisabled students outside of his lunch period).

34. *Oberti*, 995 F.2d at 1216-18. The Third Circuit in *Oberti* noted that additional factors may be relevant in applying the first prong of the *Daniel R.R.* test; the list of factors discussed by the court is not exhaustive. *Id.* at 1218 n.25.

35. *Id.* at 1217-18; *see also* Board of Educ., Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992) (outlining relevant factors in determining whether placement of disabled child is appropriate under IDEA).

36. *Oberti*, 995 F.2d at 1218 n.25; *see* Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991) (noting that "[i]f the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate"); Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 154 (4th Cir.) (holding that Congress intended states to balance competing interests of economic necessity and special needs of disabled children when making placement decisions), *cert. denied*, 112 S. Ct. 175 (1991); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (observing that "cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped chil-

According to the Third Circuit, the first factor that should be considered in applying the first prong of the *Daniel R.R.* test is the extent to which the school made efforts to include the disabled child in a regular classroom.[37] Under the IDEA, schools are required to provide supplementary aids and services to enable children with disabilities to learn in a regular classroom whenever possible.[38] Such supplementary services include resource rooms,[39] itinerant instruction, speech therapy and behavior modification programs.[40] In addition to providing supplementary services, schools must also attempt to modify the regular education program to accommodate the unique needs of the disabled child.[41] If a school fails to include a disabled child in a regular classroom with supplementary services, and fails to modify the regular curriculum to accommodate the child, then it has most likely violated the mainstreaming requirement of the IDEA.[42]

The second factor discussed by the Third Circuit in determining whether a disabled child can be integrated into a regular classroom is the comparison between the benefits the child would receive in a regular classroom (with supplementary aids and services) and the benefits the child would receive in a segregated classroom.[43] The Third Circuit noted that

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dren"). The court in *Oberti* did not consider the cost factor because the parties did not raise the issue.

37. *Oberti*, 995 F.2d at 1216; *see also Greer*, 950 F.2d at 696 (noting that the "[court] must examine whether the school district has taken steps to accommodate the handicapped child in the regular classroom"); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (same).

38. *See* 34 C.F.R. § 300.551(a) (1993) ("Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."). The regulations further state that the continuum of placement must provide "supplementary services (such as resource room[s] or itinerant instruction) . . . in conjunction with regular class placement." *Id.* § 300.551(b)(2).

39. "Resource rooms" have been defined as special "instructional centers offering individual and small group instruction in place of regular classroom instruction" to disabled students. N.J. ADMIN. CODE tit. 6, § 28-4.3(c),(d) (1994).

40. *See Greer*, 950 F.2d at 696 (holding that under IDEA school district must consider entire range of supplementary aids and services, including resource rooms and itinerant instruction); *Daniel R.R.*, 874 F.2d at 1048 (noting that while schools need not provide every conceivable supplementary aid or service to assist disabled children, IDEA does not permit school districts to make token gestures to accommodate disabled students).

41. *Oberti*, 995 F.2d at 1216; *see also* 34 C.F.R. Part 300, App. C, Question 48 (1993) (stating that "[i]f modifications . . . to the regular program are necessary to ensure the child's participation in that program, those modifications must be described in the child's IEP . . . . This applies to any regular education program in which the student may participate, including physical education, art, music, and vocational education.").

42. *Oberti*, 995 F.2d at 1216; *see also Daniel R.R.*, 874 F.2d at 1048 (noting that even if states provide supplementary aids and services and modify regular education program courts must examine whether those efforts are sufficient).

43. *Oberti*, 995 F.2d at 1216; *see also Greer*, 950 F.2d at 697 (noting that in comparing benefits of regular classrooms with those of special education classrooms,

in comparing regular and segregated classrooms, courts must consider the benefits of integration that are not available in a segregated setting.[44] Several courts have recognized that mainstreaming children with disabilities into regular classrooms may be beneficial in and of itself.[45] For example, in *Daniel R.R.*, the Fifth Circuit observed that "a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his [or her] nonhandicapped peers provide."[46] The Third Circuit in *Oberti* also noted that disabled children can develop valuable social and communication skills from interaction with nondisabled children.[47]

According to the Third Circuit, a determination that a disabled child may make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom.[48] In other words, academic progress is not the sole consideration; other benefits such as social development and communication skills must be taken into account.[49] The Third Circuit in *Oberti* emphasized that children with

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school districts should be aware that academic achievement is not only benefit of mainstreaming); *Daniel R.R.*, 874 F.2d at 1049 (observing that court's inquiry extends beyond examination of educational benefits alone).

44. *Oberti*, 995 F.2d at 1216. The Third Circuit in *Oberti* noted that in addition to academic learning, "[l]earning to associate, communicate and cooperate with nondisabled persons is essential to the personal independence of children with disabilities." *Id.* at n.23; *see also* Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181 (3d Cir. 1988) (observing that in passing IDEA, Congress recognized importance of teaching skills that will enable children with disabilities to attain personal independence), *cert. denied*, 488 U.S. 1030 (1989).

45. *See, e.g.*, *Greer*, 950 F.2d at 697 (noting that integrating disabled students into nondisabled environment may be beneficial even if disabled students do not flourish academically); Board of Educ., Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874, 882 (E.D. Cal. 1992) (observing that placing mentally retarded child in regular classroom setting led to development of social and communicative skills and improved self-esteem).

46. *Daniel R.R.*, 874 F.2d at 1049; *see Greer*, 950 F.2d at 697 ("[A] determination by the school district that a handicapped child will make academic progress [faster] in a self-contained special education environment may not justify educating the child in that environment if the child would receive considerable nonacademic benefit, such as language and role modeling, from association with . . . nonhandicapped peers.").

47. *Oberti*, 995 F.2d at 1216. According to the Third Circuit, "a fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers." *Id.* at 1216-17. The court also recognized that mainstreaming disabled children into regular classrooms can have reciprocal benefits to the nondisabled students in the class. *Id.* at 1217 n.24. Specifically, the court observed that teaching nondisabled students to work and cooperate with disabled students "may do much to eliminate the stigma, mistrust and hostility that have traditionally been harbored against persons with disabilities." *Id.*

48. *Id.* at 1217.

49. *See id.* at 1217; *Greer*, 950 F.2d at 697; *Daniel R.R.*, 874 F.2d at 1049.

disabilities may learn differently in regular classrooms, but this fact alone "does not justify exclusion from that environment."[50]

The third factor discussed by the *Oberti* court in determining whether a disabled child can be educated satisfactorily in a regular classroom is the potential negative effect that mainstreaming may have on the education of the other children in the regular classroom.[51] A child with disabilities may be so disruptive in a regular classroom that the education of other students is significantly impaired.[52] Moreover, if a child is being very disruptive, it is likely that he or she is not benefitting educationally from the regular classroom.[53] The Third Circuit also noted that courts should consider whether the disabled child's disruptive behavior demands so much of the teacher's attention that the teacher will be required to ignore the other students in order to tend to the disabled child.[54]

In determining the possible negative effect of a disabled student's disruptive behavior, courts must be mindful of the school's obligation to provide supplementary services to accommodate the child's particular disability.[55] The Third Circuit in *Oberti* emphasized that a well-conceived IEP (consisting of supplementary aids and services) may reduce the likelihood of disruptive behavior.[56] For example, a teaching assistant or aide

50. *Oberti*, 995 F.2d at 1217; *see Daniel R.R.*, 874 F.2d at 1047. The Fifth Circuit in *Daniel R.R.* observed that the IDEA "accepts the notion that handicapped students will participate in regular education but that some of them will not benefit as much as nonhandicapped students will." *Id.* The *Daniel R.R.* court therefore held, *inter alia*, that if a disabled child's individual needs make mainstreaming appropriate, the child may not be removed from the regular classroom setting "simply because his [or her] educational achievement lags behind that of his [or her] classmates." *Id.* Agreeing with the *Daniel R.R.* court, the Third Circuit in *Oberti* noted that states must address the individual needs of disabled students while recognizing that disabled students may benefit differently from their nondisabled classmates. *Oberti*, 995 F.2d at 1217.

51. *Oberti*, 995 F.2d at 1217; *see Greer*, 950 F.2d at 697 (observing that school districts may consider possible negative effects mainstreaming disabled children may have on education of other children); *Daniel R.R.*, 874 F.2d at 1049 (same).

52. *See* 34 C.F.R. § 300.552 (1993) ("[W]here a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs." (quoting 34 C.F.R. Part 104 App., ¶ 24)).

53. *Oberti*, 995 F.2d at 1217. If a disruptive child is not benefitting educationally in the regular classroom, it is likely that the child is not receiving a "free appropriate education" as required by the IDEA. *See* 20 U.S.C. § 1412(1) (Supp. V 1993).

54. *Oberti*, 995 F.2d at 1217. In *Daniel R.R.*, the Fifth Circuit also explained that if the disabled child "requires so much of the teacher['s] . . . time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education." 874 F.2d at 1049-50.

55. *See Oberti*, 995 F.2d at 1217; *Greer*, 950 F.2d at 697 (noting that "the school district must keep in mind its obligation to consider supplemental aids and services that could accommodate a handicapped child's need for additional attention"); *Daniel R.R.*, 874 F.2d at 1049 (same).

56. *Oberti*, 995 F.2d at 1217.

can help tend to a disabled child's needs, thereby reducing the burden on the teacher.[57]

B. *The Second Prong of the Mainstreaming Test*

In *Oberti*, the Third Circuit held that even if a court determines that a disabled child cannot be educated satisfactorily in a regular classroom, the court must still apply the second prong of the *Daniel R.R.* mainstreaming test.[58] That is, the court must decide whether the school district has included the disabled child in school programs with nondisabled students to the maximum extent appropriate.[59] As the Third Circuit explained, IDEA does "not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education."[60] Quoting the *Daniel R.R.* court approvingly, the Third Circuit in *Oberti* stated that "the school must take intermediate steps wherever appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess."[61] The Third Circuit concluded its discussion of the *Daniel R.R.* test by noting that mainstreaming options will vary from child to child, and may change as the child matures.[62]

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57. *Daniel R.R.*, 874 F.2d at 1049. To satisfy the mainstreaming requirement of the IDEA, schools must "hire various specially trained personnel to help handicapped children." Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 893 (1984). Schools must also assign a teacher's aide to the regular classroom, if necessary, to accommodate the unique needs of disabled students. *See, e.g.*, Department of Educ., State of Hawaii v. Katherine D., 727 F.2d 809, 813 (9th Cir. 1983) (ordering teacher's aide to assist child with cystic fibrosis), *cert. denied*, 471 U.S. 1117 (1985).

58. *Oberti*, 995 F.2d at 1218; *see Daniel R.R.*, 874 F.2d at 1050 ("If [the court] determine[s] that education in the regular classroom cannot be achieved satisfactorily, [the court] next ask[s] whether the child has been mainstreamed to the maximum extent appropriate"); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 296 n.7 (7th Cir. 1988) (noting that IDEA requires school districts to offer disabled children continuum of services (citing Wilson v. Marana Sch. Dist. No. 6 of Prima County, 735 F.2d 1178, 1183 (9th Cir. 1984))).

59. *Daniel R.R.*, 874 F.2d at 1050 (observing that school district fulfills mainstreaming obligation under IDEA only if district provides disabled students maximum appropriate exposure to nondisabled students).

60. *Oberti*, 995 F.2d at 1218 (quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989)); *see also* 34 C.F.R. § 300.551(a) (1993) (stating that "[e]ach public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities").

61. *Oberti*, 995 F.2d at 1218 (quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989)). The Fifth Circuit in *Daniel R.R.* noted that nonacademic classes include art, music and physical education. 874 F.2d at 1050 n.10.

62. *Oberti*, 995 F.2d at 1218 (citing Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989)).

IV. BURDEN OF PROOF AND STANDARD OF REVIEW OF THE MAINSTREAMING REQUIREMENT UNDER THE IDEA

A. *The Burden of Proof*

In *Oberti*, the Third Circuit held that the school district bears the burden of proving compliance with the IDEA mainstreaming requirement.[63] The school district contended that, while it may have had the initial burden (at the state administrative level) of justifying its educational placement, once the agency decided in its favor, the burden should have shifted to the parents when they challenged the agency decision in the district court.[64] In making this argument, the school district relied on the United States Supreme Court's ruling in *Rowley* that "due weight shall be given to [the state administrative] proceedings."[65] The Third Circuit disagreed with the school district and ruled that the burden of proving compliance with the IDEA mainstreaming requirement was properly placed on the school.[66]

According to the *Oberti* court, the "due weight" language of *Rowley* does not dictate that the burden of proof be placed on the party who challenges the agency decision.[67] Under the IDEA, district courts and state trial courts, review the decisions of state educational agencies must "receive the records of the administrative proceedings . . . hear additional evidence at the request of a party, and, basing [their] decision[s] on the preponderance of the evidence, . . . grant such relief as the court determines is appropriate."[68] *Rowley* interpreted this section of the IDEA to mean that courts should give "due weight" to the administrative proceedings.[69] However, as the Third Circuit pointed out, neither *Rowley* nor the IDEA itself specifically addresses which party bears the burden of proof at the district court level.[70] Therefore, the Third Circuit refused to rule that

63. *Id.* at 1219-20.

64. *Id.* To support the argument that the district court improperly placed the burden of proof on the school district, the school district cited several cases. *See* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990) (holding that "the burden rests with the complaining party to prove that the agency's decision was wrong"), *cert. denied*, 499 U.S. 912 (1991); Briggs v. Board of Educ., 882 F.2d 688, 692 (2d Cir. 1989) (same); Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988) (same). The Third Circuit in *Oberti* found these cases to be unpersuasive. *Oberti*, 995 F.2d at 1219.

65. Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982) (construing 20 U.S.C. § 1415(e) (1988)).

66. *Oberti*, 995 F.2d at 1219-20.

67. *Id.* at 1219. The Third Circuit stated that the purpose of the *Rowley* "due weight" requirement is "to prevent the court from imposing its own view of preferable educational methods on the states." *Id.*

68. 20 U.S.C. § 1415(e)(2) (1988). The Third Circuit in *Oberti* construed this section of the IDEA to mean that due weight should be afforded to the administrative proceedings but "not to the party who happened to prevail in those proceedings." *Oberti*, 995 F.2d at 1219.

69. *Rowley*, 458 U.S. at 206.

70. *Oberti*, 995 F.2d at 1218.

giving due weight to the administrative proceedings is equivalent to placing the burden of proof on the challenging party.[71]

In placing the burden of proof on the school district, the Third Circuit noted that under the IDEA, the district court "must make an independent determination based on a preponderance of the evidence."[72] From this premise, the *Oberti* court maintained that if "the district court must independently review the evidence adduced at the administrative proceedings and can receive new evidence, [there is] no reason to shift the ultimate burden of proof to the party who happened to have lost before the state agency."[73] According to the Third Circuit, the "due weight" mandate of *Rowley* is simply designed to ensure that courts do not substitute their own views of appropriate educational methods for those of the states.[74] Moreover, the Third Circuit noted that the amount of "due weight" to be afforded the administrative proceedings is a matter within the discretion of the district court.[75]

To support its position that the burden of proof should be placed on the school district, the Third Circuit in *Oberti* used a policy argument based on the legislative purpose of the IDEA.[76] According to the Third Circuit, "[r]equiring parents to prove at the district court level that the school has failed to comply with the Act would undermine the Act's express purpose 'to assure that the rights of children with disabilities and

71. *Id.* The Third Circuit explicitly stated that the burden of proof at the district court level is "an issue . . . quite different from the district court's obligation to afford due weight to the administrative proceedings." *Id.*

72. *Id.* at 1219 (quoting Geis v. Board of Educ., 774 F.2d 575, 583 (3d Cir. 1985)).

73. *Id.*

74. *Id.*; Board of Educ. v. Rowley, 458 U.S. 176, 207 (1982) (stating that purpose of giving due weight to administrative proceedings is to prevent courts from substituting their views of appropriate educational methods for those of states); *see also* Rapid City Sch. Dist. 51-4 v. Vahle, 733 F. Supp. 1364, 1368 (W.D.S.D.) (holding that reviewing court must make independent determination of appropriateness of placement based on preponderance of evidence, but is cautioned not to substitute its own notions of educational policy for those of school authorities), *aff'd*, 922 F.2d 476 (8th Cir. 1990).

75. *Oberti*, 995 F.2d at 1219; *see* Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988) (noting that "the district court must consider the administrative findings of fact, but is free to accept or reject them").

76. *Oberti*, 995 F.2d at 1219. The express purpose of the IDEA is:

> to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. § 1400(c) (Supp. IV 1992). The Third Circuit in *Oberti* stated that "[i]n light of the statutory purpose of [the] IDEA[,] . . . when [the] IDEA mainstreaming requirement is specifically at issue, it is appropriate to place the burden of proving compliance with [the] IDEA on the school." *Oberti*, 995 F.2d at 1219.

their parents are protected.' "[77] The court also explained that placing the burden of proof on the school district is appropriate because the school district has certain tactical advantages in an IDEA mainstreaming dispute.[78] For example, the school district has "better access to the relevant information, greater control over the potentially more persuasive witnesses . . . and greater overall educational expertise than the parents."[79] For these reasons, the Third Circuit in *Oberti* held that the burden should be placed on the school district to prove compliance with the mainstreaming requirement of the IDEA.[80]

B. *The Standard of Review*

In *Oberti*, the Third Circuit held that the district court's findings of fact should be reviewed under the deferential "clearly erroneous" standard.[81] Findings of fact are considered "clearly erroneous" if, after reviewing the evidence, the appellate court is "left with a definite and firm conviction that a mistake has been committed."[82] In reviewing the findings of fact in an IDEA case like *Oberti*, the Third Circuit will also consider whether the district court has afforded "due weight" to the administrative agency proceedings.[83]

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77. *Oberti*, 995 F.2d at 1219 (quoting 20 U.S.C. § 1400(c) (Supp. IV 1992)). In making this policy argument based on the statutory purpose of the IDEA, the Third Circuit stated that the IDEA's strong preference for mainstreaming "would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." *Id.*

78. *Id.*; *see* Lascari v. Board of Educ., 560 A.2d 1180, 1188 (N.J. 1989) (placing burden of proof on school district is "consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens").

79. *Oberti*, 995 F.2d at 1219; *see also* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 187-94 (observing that parents are disadvantaged in mainstreaming dispute with school district because parents lack educational expertise and their views are often seen as biased).

80. *Oberti*, 995 F.2d at 1219-20.

81. *Id.* at 1220.

82. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). The Third Circuit in *Oberti* further enunciated this level of review by stating that "even if we might have come to different factual conclusions based on this record, we defer to the findings of the district court unless we are convinced that the record cannot support those findings." 995 F.2d at 1220.

83. *Oberti*, 995 F.2d at 1220. For a discussion of the *Rowley* "due weight" mandate, see *supra* notes 65-71 and accompanying text.

V. FACTS AND ANALYSIS OF *OBERTI*

A. *Factual and Procedural Background*

Rafael Oberti, an eight-year-old boy with Down's syndrome,[84] was evaluated by the Clementon School District (school district) prior to his entry into kindergarten.[85] Based on its evaluation, the school district recommended that Rafael be educated in a special segregated class for the 1989-90 school year.[86] Rafael was subsequently placed in a developmental kindergarten class (for children not yet ready for kindergarten) at the Clementon Elementary School in the mornings, and a special education class in another school district for the afternoon session.[87]

While Rafael did make some academic and social progress during the year, he also exhibited certain inappropriate behavior in the developmental kindergarten class.[88] Rafael's behavioral problems included throwing tantrums, hitting other children and hiding under tables.[89] Rafael also had toilet training accidents in the developmental kindergarten class.[90] The school district attempted to contain Rafael's behavior, but its efforts did little to resolve Rafael's problems.[91] Although Rafael had problems in the developmental kindergarten class, he did not exhibit similar disruptive behavior in the afternoon special education class.[92]

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84. Down's syndrome is "a chromosome disorder characterized by . . . moderate to severe mental retardation . . . ." THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 1992 Supplement. This genetic defect "severely impairs [Rafael's] intellectual functioning and his ability to communicate." *Oberti*, 995 F.2d at 1207. Rafael therefore is a disabled child within the meaning of the IDEA. 20 U.S.C. § 1401(a)(1)(A) (Supp. IV 1992).

85. *Oberti*, 995 F.2d at 1207. The evaluation of Rafael was conducted by the school district's Child Study Team. *Id.* This group "was responsible for evaluating Rafael to determine his eligibility for special education and related services under the IDEA, and continues to be responsible for developing, monitoring and evaluating the effectiveness of his individualized education program." *Id.* at n.2. The IDEA provides that "all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services [must be] identified, located, and evaluated." 20 U.S.C. § 1412(2)(C) (Supp. IV 1992).

86. *Oberti*, 995 F.2d at 1207.

87. *Id.* at 1207-08. Before agreeing to this placement, Rafael's parents visited several special education classes recommended by the school district and found them all unacceptable. *Id.* at 1207.

88. *Id.* at 1208.

89. *Id.*

90. *Id.*

91. *Id.* The school district's efforts to contain Rafael's behavioral problems included attempting to modify the curriculum for Rafael, and hiring a teacher's aide (albeit four months after one was requested by the Obertis). *Id.* Aside from these minimal efforts, the school district's IEP for Rafael provided no plan for addressing Rafael's behavioral problems, and provided for no communication between Rafael's kindergarten teacher and his special education teacher. *Id.*

92. *Id.*

Based largely on Rafael's experience in the developmental kindergarten class, the school district proposed to place Rafael in an out-of-district, segregated, special education class for the 1990-91 school year.[93] Rafael's parents objected to this plan and requested that Rafael be placed in a regular kindergarten class in his home district of Clementon.[94] When this request was denied by the school district, the Obertis filed for a state due-process hearing.[95] As an alternative to the due-process hearing, the parties agreed to mediate the dispute.[96]

As a result of mediation, the Obertis and the school district agreed that, for the 1990-91 school year, Rafael would enter a special education class in a public elementary school in the Winslow Township School District (Winslow).[97] As part of the agreement, the school district promised to consider mainstreaming possibilities at Winslow and to consider future inclusive placement for Rafael in the Clementon Elementary School.[98]

Although Rafael made some behavioral and academic progress at Winslow, the school did not make any meaningful efforts to mainstream

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93. *Id.* At the end of the 1989-90 school year the school district's Child Study Team recommended that Rafael be placed in a self-contained special education class. *Id.* Because no such class was available in the Clementon School District, Rafael would have to travel to a different school district. *Id.*

94. *Id.* The IDEA contemplates active parental involvement in the educational placement decision. 20 U.S.C. § 1401(20) (Supp. IV 1992) (mandating parental participation in forming IEP); *Id.* § 1412(7) (stating that consultation with parents must be assured); *see also* Board of Educ. v. Dienelt, 843 F.2d 813, 815 (4th Cir. 1988) (holding that school officials who failed to involve disabled child's parents in preparing IEP did not provide child with "free appropriate public education" as required by IDEA).

95. *Oberti*, 995 F.2d at 1208. In an IDEA dispute between the parents of a disabled child and the school district, the parents have the right to resolve the disagreement through a state administrative proceeding called an "impartial due process hearing." 20 U.S.C. § 1415(b)(2) (1988). The IDEA specifically provides that "[w]henever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency." *Id.*

96. *Oberti*, 995 F.2d at 1208. The Obertis and the school district agreed to mediate the dispute pursuant to New Jersey regulations. N.J. ADMIN. CODE tit. 6, § 28-2.6 (1994).

97. *Oberti*, 995 F.2d at 1208. The Winslow school was approximately forty-five minutes by bus from Rafael's home. *Id.* The federal regulations promulgated under the IDEA require that each disabled child be placed "as close as possible to the child's home" and preferably "in the school which he or she would attend if nondisabled." 34 C.F.R. § 300.552(a)(3) & (c) (1993); *see also* Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 153 (4th Cir.) (holding that federal regulations do not impose absolute obligation to place disabled children in home district, but regulations do require schools to consider geographical proximity of placement), *cert. denied*, 502 U.S. 859 (1991).

98. *Oberti*, 995 F.2d at 1208. In discussing the agreement between the parties, the Third Circuit noted that "[a]lthough Rafael was placed in a school within the Winslow Township School District, the Clementon School District has remained responsible for Rafael's education under the IDEA because Rafael resides within the Clementon School District." *Id.* at n.4.

Rafael.[99] As a result of their disappointment with the Winslow program, the Obertis brought another due process complaint in January 1991.[100] A hearing was held in February 1991 before an Administrative Law Judge (ALJ) of the New Jersey Office of Administrative Law.[101] On March 15, 1991, the ALJ affirmed the school district's decision to place Rafael in the segregated special education class at Winslow.[102]

The Obertis, contending that Rafael should be mainstreamed into a regular class in Clementon, brought an action under the IDEA in the United States District Court for the District of New Jersey.[103] The district court held a bench trial in May 1992, receiving new evidence from both the Obertis and the school district.[104] To supplement the state agency record, both parties offered additional testimony.[105] Not surprisingly, the additional evidence regarding the appropriateness of mainstreaming Rafael was contradictory.[106]

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99. *Id.* at 1209. At Winslow, Rafael ate lunch and attended assemblies with nondisabled children, but otherwise had "no opportunity to socialize with the other children." *Id.* at n.5. Moreover, Rafael did not participate in any classes with nondisabled children. *Id.*

100. *Id.* at 1209. In bringing their second due process complaint, the Obertis renewed their request for Rafael to be placed in a regular class in his home district of Clementon. *Id.*

101. *Id.* Under the New Jersey regulations, an IDEA due process hearing is held before an Administrative Law Judge. N.J. ADMIN. CODE tit. 6, § 28-2.7(d)(4)(iv) (1994).

102. *Oberti*, 995 F.2d at 1209. In concluding that Rafael was not ready for mainstreaming, the Administrative Law Judge (ALJ) relied on the testimony of Rafael's kindergarten teacher and other witnesses for the school district who testified to Rafael's behavioral problems in the developmental kindergarten class. *Id.* The ALJ found that because Rafael's behavior problems were so severe in that class, Rafael could not benefit from integration in a regular classroom. *Id.*

In concluding that the Winslow placement did not violate the IDEA, the ALJ discounted the testimony of the Obertis' expert witnesses. *Id.* at 1210. These witnesses testified that Rafael could be educated satisfactorily in a regular classroom with supplementary aids and services. *Id.* However, because the Obertis' witnesses did not have daily contact with Rafael, the ALJ effectively disregarded their testimony. *Id.*

103. *Id.* at 1210. In addition to the IDEA claim, the Obertis brought an unlawful discrimination claim under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *Id.* The district court denied cross summary judgment motions, finding "genuine questions of material fact . . . about the feasibility of including Rafael in a regular classroom setting now." Oberti v. Board of Educ., 789 F. Supp. 1322, 1336 (D.N.J. 1992).

104. *Oberti*, 995 F.2d at 1210. The IDEA provides that "[i]n any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2) (1988).

105. *Oberti*, 995 F.2d at 1210. At trial, both the Obertis and the school district introduced testimony of additional expert witnesses who had not testified at the administrative proceeding. *Id.* at 1210-12.

106. *Id.* at 1210-11. The Obertis offered the testimony of Dr. Lou Brown, a professor of special education at the University of Wisconsin; Amy Goldman, an

After reviewing the new evidence along with the evidence from the administrative hearing, the district court determined that the school district had failed to prove that its proposed placement of Rafael was consistent with the mainstreaming requirement of the IDEA.[107] The court refused to defer to the decision of the ALJ because it found that the ALJ's findings were based on Rafael's behavioral problems in the developmental kindergarten class without properly considering the inadequate level of supplementary aids and services provided by the school district.[108] The school district subsequently appealed the ruling of the district court to the United States Court of Appeals for the Third Circuit.[109]

B. *Third Circuit Analysis*

In reviewing the decision of the district court, the Third Circuit in *Oberti* adopted and applied the two-part *Daniel R.R.* test.[110] The first prong of the test is whether the disabled child can be educated satisfactorily in a regular classroom with supplementary aids and services.[111] The second prong of the test is whether the disabled child has been included in school programs with nondisabled peers whenever possible.[112]

In applying the first prong of the *Daniel R.R.* test, the Third Circuit considered three factors: (1) the steps the school district made to accommodate Rafael in a regular classroom; (2) a comparison of the educational

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expert in communication with disabled children; and Dr. Gail McGregor, a professor of education at Temple University and an expert in the education of disabled children. *Id.* Based on their evaluations of Rafael, these witnesses testified that Rafael could be satisfactorily educated in a regular classroom with supplementary aids and curriculum modifications designed to accommodate Rafael's disability. *Id.* at 1211. Addressing Rafael's previous disruptive behavior, Dr. Brown testified that if adequate supplementary aids and services were provided, Rafael would not likely exhibit such behavior. *Id.*

To counter the Obertis' witnesses, the school district offered its own expert, Dr. Stanley Urban, a professor of special education at Glassboro State College. *Id.* at 1212. After observing Rafael and reviewing Rafael's educational history, Dr. Urban concluded that Rafael could not be satisfactorily educated in a regular classroom, and that the Winslow placement was appropriate for Rafael. *Id.* In addition to Dr. Urban's testimony, the school district also offered the testimony of several of Rafael's teachers. *Id.* These teachers testified that Rafael exhibited inappropriate behavior, including hitting other children and running away from the teachers, during the summer and fall of 1991. *Id.*

107. Oberti v. Board of Educ., 801 F. Supp. 1392, 1404 (D.N.J. 1992).

108. *Id.* The district court concluded that the school district failed to take reasonable steps to mainstream Rafael in a regular classroom as required by the IDEA. *Id.* at 1403. Specifically, the court held that the school did not provide Rafael with appropriate aids and services, such as specially trained itinerant instructors, behavior modification programs and curriculum modification to accommodate Rafael's special needs. *Id.*

109. *Oberti*, 995 F.2d at 1212.

110. *Id.* at 1220. For a discussion of the *Daniel R.R.* two-part mainstreaming test, see *supra* notes 22-62 and accompanying text.

111. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

112. *Id.*

benefits available in a regular classroom and the benefits provided in the special education class at Winslow; and (3) the possible negative effects of Rafael's inclusion on the other children in the class.[113]

The Third Circuit began its application of the first factor of the test by considering whether the school district made reasonable efforts to include Rafael in a regular classroom with supplementary aids and services.[114] On this issue, the district court found that the school failed to consider less restrictive placements for Rafael's 1989-90 school year.[115] Specifically, the district court found that the school district violated the IDEA by not providing adequate supplementary aids and services during Rafael's year in the developmental kindergarten class.[116] The Third Circuit found little evidence in the record to contradict the conclusions of the district court.[117] Accordingly, the district court's finding that the school district made only negligible efforts to mainstream Rafael was not "clearly erroneous."[118]

Next, the Third Circuit examined the second factor of the test—a comparison of the educational benefits of the segregated Winslow class with the benefits Rafael could obtain in a regular class.[119] Before the district court, the parties called expert witnesses who disagreed on the relative benefits of a special, segregated class versus a regular, integrated class.[120] The Third Circuit explained that the district court was in a better position to evaluate the conflicting testimony of the parties.[121] Consequently, the Third Circuit deferred to the district court's finding that Rafael would benefit academically and socially from integration in a regular classroom setting.[122]

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113. *Oberti*, 995 F.2d at 1220. For a discussion of the factors considered in applying the first prong of the *Daniel R.R.* mainstreaming test, see *supra* notes 34-57 and accompanying text.

114. *Oberti*, 995 F.2d at 1220.

115. *Oberti*, 801 F. Supp. at 1402.

116. *Id.* The district court in *Oberti* concluded that the "School District placed Rafael in [the developmental kindergarten] class without a curriculum plan, without a behavior management plan, and without providing adequate special education support to the teacher." *Id.*

117. *Oberti*, 995 F.2d at 1221.

118. *Id.* The Third Circuit also noted that the district court did not fail to give due weight to the state administrative proceedings because, in Rafael's case, the ALJ did not even consider whether the school district took reasonable steps to mainstream Rafael in a regular classroom with supplementary aids and services. *Id.* For a discussion of the *Rowley* "due weight" requirement, see *supra* notes 65-71 and accompanying text.

119. *Oberti*, 995 F.2d at 1221.

120. *Id.* at 1210-12. For a discussion of the expert testimony offered by both the Obertis and the school district, see *supra* note 106.

121. *Oberti*, 995 F.2d at 1222. The Third Circuit again noted that the district court did not fail to give due weight to the state administrative proceedings because the district court's findings were based on newly received evidence that was not before the ALJ. *Id.*

122. *Id.*

Concluding its application of the first prong of the *Daniel R.R.* test, the Third Circuit considered the third factor—the possible disruptive effect of Rafael's inclusion on the other students in the class.[123] The record again contained conflicting testimony on this issue.[124] Arguing that Rafael would be too disruptive in a regular class, the school district presented several witnesses who testified to Rafael's behavior problems in the 1989-90 developmental kindergarten class.[125] Rebutting the school district's evidence, the Obertis' expert witnesses testified that, in their opinion, Rafael would not exhibit disruptive behavior if provided adequate supplementary aids and services, and if the curriculum were modified to accommodate his disability.[126]

Presented with this contradictory evidence, the district court was persuaded by the Obertis' witnesses.[127] Accordingly, the district court found that "[t]here is nothing in the record which would suggest that at this point in time [two years after the 1989-90 school year] Rafael would present similar behavior problems if provided with an adequate level of supplementary aids and related services within the matrix of a regular education class."[128] Deferring once again, the Third Circuit held that the findings of the district court were not "clearly erroneous."[129] Reasoning that there was sufficient evidence to support the district court's ruling, the Third Circuit concluded that the potential negative effects of mainstreaming Rafael did not warrant the school district's decision to exclude him from the regular class.[130]

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123. *Id.*

124. *Id.* The school district presented several witnesses who testified as to Rafael's disruptive behavior in the developmental kindergarten class and in other settings. *Id.* at 1212. The Obertis, on the other hand, offered experts who stated that Rafael's disruptive behavior was the result of a poorly conceived IEP that lacked the appropriate supplementary aids and services to meet Rafael's unique needs. *Id.* at 1211.

125. *Id.* at 1212. Dr. Urban, the school district's chief expert witness, testified that "Rafael's behavior problems could not be managed in a regular class, that a regular teacher would not be able to communicate with a child of Rafael's ability level, and that it would be difficult if not impossible to . . . accommodate Rafael without adversely affecting the . . . other children in the class." *Id.*

126. *Id.* at 1211. Dr. Brown, one of the Obertis' expert witnesses, testified that Rafael could be effectively mainstreamed into a regular classroom with supplementary aids and services. *Id.* Dr. Brown also described several curriculum modification techniques that could facilitate Rafael's inclusion. *Id.* These included modifying the curriculum to accommodate Rafael's disability and "modifying only Rafael's program so that he would perform a similar activity or exercise to that performed by the whole class, but at a level appropriate to his ability." *Id.*

127. Oberti v. Board of Educ., 801 F. Supp. 1392, 1403 (D.N.J. 1992).

128. *Id.* The district court found that the disruptive behavior Rafael exhibited in the developmental kindergarten class during the 1989-90 school year was "exacerbated and remained uncontained due to the inadequate level of services provided there." *Id.*

129. *Oberti*, 995 F.2d at 1223.

130. *Id.* The Third Circuit also noted that the district court did not fail to give due weight to the administrative proceedings on this issue. *Id.* The court

After applying the first prong of the *Daniel R.R.* test, the Third Circuit held that the school district had violated the mainstreaming requirement of the IDEA.[131] Affirming the district court's decision, the Third Circuit concluded that the school district failed to satisfy its burden of proving that Rafael could not be educated in a regular classroom with supplementary aids and services.[132] Because the court decided the case based on an application of the first prong of the *Daniel R.R.* test, the court did not reach the second prong.[133] The Third Circuit noted, however, that even if it is determined in the future that Rafael cannot be satisfactorily educated in a regular classroom, the school district will still be obligated under the IDEA to mainstream Rafael in regular school programs whenever possible.[134]

VI. CONCLUSION

In *Oberti*, the Third Circuit established a clear preference for mainstreaming children with disabilities into regular classrooms. The two-part test adopted by the court closely tracks the language of the IDEA mainstreaming requirement and creates a presumption against excluding disabled children from the regular classroom setting.[135] In addition to applying the two-part test, the Third Circuit will place the burden of proof on the school district in an IDEA mainstreaming dispute.[136] Therefore, to justify segregating a disabled child, a school district will be required to show that mainstreaming the child is inappropriate.

Furthermore, the Third Circuit in *Oberti* applied the deferential clearly erroneous standard to the district court's findings of fact.[137] Because the court adopted this level of review, mainstreaming cases will often be won or lost at the trial court level. In *Oberti*, the Third Circuit demonstrated its deference by accepting all of the district court's findings of fact.[138]

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held that the ALJ's decision not to mainstream Rafael was improperly based on Rafael's behavioral problems in the developmental kindergarten class where he received an inadequate level of supplementary aids and services to meet his unique needs. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* In addition, the court did not address the Obertis' claim under § 504 of the Rehabilitation Act of 1973.

134. *Id.* at 1223-24.

135. For a discussion of the mainstreaming test adopted by the Third Circuit, see *supra* notes 22-62 and accompanying text.

136. For a discussion of the allocation of the burden of proof in an IDEA mainstreaming case, see *supra* notes 63-80 and accompanying text.

137. For a discussion of the standard of review applied by the Third Circuit, see *supra* notes 81-83 and accompanying text.

138. *Oberti*, 995 F.2d at 1221-23.

The testimony of educational experts is crucial in mainstreaming cases. *Oberti* was no exception.[139] At trial, the district court was presented with several expert witnesses. Both parties offered their own experts to bolster their arguments, and often the testimony conflicted. Given the Third Circuit's deference to the district court and its decision to place the burden of proof on the school, such conflicting testimony may be devastating to a school district. If the district court is confronted with conflicting, equally credible evidence, the court must resolve the issue in favor of the parents. Then, if the case is appealed by the school district, the Third Circuit will apply the deferential clearly erroneous standard to the district court's findings. This scenario was played out in *Oberti*, and it proved to be an insurmountable obstacle for the school district.

Finally, it is important to note that no two IDEA mainstreaming cases are exactly alike. In *Oberti*, the school district contended that the facts were analogous to those of *Daniel R.R.*, where the Fifth Circuit had held that placing a six-year-old boy with Down's syndrome in a segregated special education class was appropriate under the IDEA.[140] However, as the Third Circuit explained, the mere fact that both Daniel R.R. and Rafael have Down's syndrome does not equate the two cases.[141] The mainstreaming directive of the IDEA requires "an individualized, fact-specific inquiry" into the particular needs and abilities of each child.[142] This individualized inquiry is essential to the IDEA goal of increasing the "opportunity of individuals with disabilities to become fully-functioning, productive, and co-equal members of society."[143]

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139. *Id.* at 1216. The Third Circuit noted that "[t]he court will have to rely heavily . . . on the testimony of educational experts." *Id.*

140. *Id.* at 1223 n.28 (discussing Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050-51 (5th Cir. 1989)). The Third Circuit in *Oberti* distinguished *Daniel R.R.* by noting that in *Daniel R.R.*, the district court granted summary judgment based on the administrative proceedings, whereas in *Oberti*, the district court held a bench trial and received new evidence. *Id.*

141. *Id.*

142. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

143. Oberti v. Board of Educ., 801 F. Supp. 1392, 1407 (D.N.J. 1992).