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## Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms

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# Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms

Kathryn E. Crossley \*

## I. INTRODUCTION

Congress enacted the Education for All Handicapped Children Act in 1975, requiring that children with disabilities be educated in the “least restrictive environment.”<sup>1</sup> Now entitled the Individuals with Disabilities Education Act (IDEA),<sup>2</sup> the statute’s least restrictive environment provision directs states to establish procedures for placing disabled children in a general education classroom setting.<sup>3</sup> Additionally, it requires schools to provide supplementary aids and services to accommodate the various disabilities.<sup>4</sup> Schools may use special classrooms and facilities only when disabled students cannot achieve satisfactory progress in a general educational environment.<sup>5</sup>

Courts typically refer to the IDEA’s policy of placing disabled children in the least restrictive environment as either “inclusion” or “mainstreaming.”<sup>6</sup> However, the terms are not interchangeable.

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1. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as 20 U.S.C. §§ 1401-1461 (1976)).

2. Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400-1491 (1994)).

3. The Education of the Handicapped Act of 1975 was passed in response to a serious concern that children with disabilities were being denied the opportunity for public education. 20 U.S.C. § 1400(C)(3). Thus, Congress passed the Act, requiring states to demonstrate that they have created a policy assuring every disabled child a right to free and appropriate education in order to receive financial assistance from the federal government. 20 U.S.C. § 1412(1).

4. 20 U.S.C. § 1412(5)(B). These provisions apply to individuals in institutions or other care facilities as well as to individuals in public schools and public facilities. *Id.*

5. *Id.* The least restrictive environment provision plays an important role in decisions regarding free and appropriate public education for all students with disabilities. *See infra* Part II.B.

6. The IDEA requires that children with disabilities be educated with children who are not disabled and that this requirement be met “to the maximum extent appropriate.” 20 U.S.C. § 1412(5)(B). This requirement by the IDEA initially resulted in a movement toward

Mainstreaming is the practice of placing disabled students into general educational classrooms with the appropriate supplemental support.<sup>7</sup> On the other hand, inclusion is the practice of simply integrating disabled children with children who are not disabled.<sup>8</sup>

Under the IDEA, inclusion first appeared educationally motivated.<sup>9</sup> However, the recent federal courts' trend is toward the placement of all children with disabilities into general education classrooms, regardless of the educational benefit received.<sup>10</sup> This

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mainstreaming. *Bd. of Educ. v. Holland*, 786 F. Supp. 874, 878 (E.D. Cal. 1992), *aff'd sub nom.*, *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994). Under the mainstreaming process, children primarily are placed in special education classrooms, but they are also placed into a general classroom for part of the day. *Id.* Now, however, the mainstreaming concept has evolved into a concept referred to as "inclusion." See Anne Profit Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775, 779 n.16 (1997) (citing *Mavis v. Sobol*, 839 F. Supp. 968, 971 n.7 (N.D.N.Y. 1993) (noting that there is a preference in the educational environment to use the term "inclusion")). Under inclusion, children with disabilities are placed in a general educational environment for the entire day.

7. The IDEA does not require mainstreaming in all cases; the IDEA simply requires that students be educated in the least restrictive environment. Thus, removal from the general classroom may be allowed only if it is absolutely necessary. 20 U.S.C. § 1412(5)(B).

8. "Inclusion" is a term of art that is not mentioned in the IDEA. Inclusion generally refers to a situation where the home base of the disabled child is the general educational classroom. The disabled student either receives special education in that classroom or the student is removed for a short period of time into a special classroom.

9. Before the enactment of the IDEA, disabled children were excluded from the general educational setting. The IDEA represents a federal effort to promote the education of children with disabilities and was passed as a result of Congress' apprehension that most children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (quoting H.R. REP. NO. 94-332, at 2 (1975)).

10. See Allan G. Osborne, Jr., *Is the Era of Judicially-Ordered Inclusion Over?*, 114 EDUC. LAW REP. 1011, 1012 (1997).

Beginning in 1989 federal appeals courts in several circuits started to order placements in inclusionary settings for students with fairly severe disabilities. These opinions indicated that an inclusionary placement should be the placement of choice and that a student with disabilities should be excluded from the regular educational environment only in the face of strong evidence that exclusion was required.

*Id.* See also Robert L. Hughes & Michael A. Rebell, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 524 (1996) (citing MARY ELLEN GUZMAN, SUCCESS FOR EACH CHILD: A RESEARCH-BASED REPORT ON ELIMINATING TRACKING ON NEW YORK CITY PUBLIC SCHOOLS 42 (1992)). Since the IDEA's enactment, the trend has been toward least restrictive environment placements. *Id.* Before the IDEA, nearly 70% of all children with disabilities were educated in a separate classroom or building. *Id.* Today, 34.9% of disabled children are educated in general classrooms, 36.3% in part-time programs, 23.5% in separate classrooms housed in regular school buildings, 3.9% in

process of inclusion can be difficult for both disabled children and children without disabilities. Some disabled children might not fare well in an environment not specifically tailored to meet their needs. Furthermore, the disabled children's struggle to adapt often impedes the education of children without disabilities in the classroom. Unfortunately, courts have concentrated on the appearance of inclusion instead of on the actual benefits received.

Part II of this Recent Development focuses on the history behind the call for inclusion of disabled children into a general educational environment and IDEA's consequential enactment. Part III discusses and analyzes the tests circuit courts use in determining when a disabled child should be mainstreamed into the general classroom. Furthermore, Part III reveals the courts' trend toward inclusion despite the negative effects inclusion often has on all involved parties.

After analyzing the various court decisions regarding inclusion, Part IV of this Recent Development proposes a clear test which will mainstream only those disabled children most likely to benefit academically from mainstreaming. Additionally, this proposed test ensures that inclusion enriches the children without disabilities as well as the children with disabilities.

## II. THE HISTORY OF INCLUSION

### *A. The Movement from Exclusion to Inclusion*

Prior to 1975 the public and the government were not concerned with the education of children with special needs.<sup>11</sup> Children with

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separate schools, 0.9% in residential facilities, and 0.5% in homebound or hospital programs. *Id.*

11. See LaDonna L. Boeckman, Note, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individual with Disabilities Education Act on Disabled and Nondisabled Students*, 46 *DRAKE L. REV.* 855, 860 (1998) (citing STEPHEN B. THOMAS & CHARLES J. RUSSO, *SPECIAL EDUCATION LAW: ISSUES & IMPLICATIONS FOR THE '90S* 3 (1995)). Access to public education was not a matter of serious concern: "Laws were enacted that restricted the rights of individuals with disabilities to immigrate, to vote, to obtain a driver's license, to purchase a hunting or fishing license, to hold office, and in the case of newborn infants, to live." *Id.* at 860 n.35 (quoting THOMAS & RUSSO, *supra*, at 2).

disabilities virtually were excluded from the first schools.<sup>12</sup> Instead, families educated their disabled children themselves because, traditionally, it was considered more convenient to exclude disabled children from the regular educational setting.<sup>13</sup> In 1893 the Massachusetts Supreme Court reinforced those beliefs by upholding the exclusion of a mentally retarded child from the public school system.<sup>14</sup> Moreover, in 1919 the Wisconsin Supreme Court extended the exclusion of disabled students to a child suffering from a particular type of paralysis.<sup>15</sup> Thus, society channeled those children who did not fit its impression of the “normal” child into special educational settings.

The number of special education classrooms increased at the beginning of the twentieth century.<sup>16</sup> The increase coincided with the movement toward compulsory education and the large number of children immigrating to the United States.<sup>17</sup> Enrollment in public school systems grew drastically and altered the organization of schools.<sup>18</sup> School systems developed formal procedures in which students advanced from one grade to the next on the basis of age or academic achievement.<sup>19</sup> Mentally deficient children or those who required special attention did not fit in this system; thus, these

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12. *Id.* at 864 (quoting BONNIE POITEAS TUCKER, FEDERAL DISABILITY LAW § 14.1 (West 1974)).

13. *Id.* at 860 n.34 (citing ALLAN G. OSBORNE, JR., LEGAL ISSUES IN SPECIAL EDUCATION 1 (1996)).

14. *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893) (affirming a school committee’s determination that a mentally retarded child could not benefit from the public school system because the school committee was in charge of the school).

15. *State ex rel Beattie v. Bd. of Educ.*, 172 N.W. 153 (Wis. 1919). The child suffered from paralysis of the limbs and of the vocal cords and often drooled as a result. *Id.* at 154. The Wisconsin Supreme Court determined that the boy’s interest in receiving a public school education “cannot be insisted upon when [the boy’s] presence therein is harmful to the best interests of the school.” *Id.*

16. *See Dupre, supra* note 6, at 784 (citing CAROLE MURRAY-SEEGERT, NASTY GIRLS, THUGS, AND HUMANS LIKE US 17 (1989)). Beginning in the 1950s, advances in medical technology enabled more children with disabilities to survive early childhood. *Id.* Thus, the need for services for the disabled also increased. *Id.*

17. *See Hughes & Rebell, supra* note 10, at 529 (citing SEYMOUR B. SARISON & JOHN DORIS, EDUCATIONAL HANDICAP, PUBLIC POLICY, AND SOCIAL HISTORY 138 (1979)). A 1921 survey indicated that 75% of special education students in New York City had foreign born parents. *Id.*

18. *Id.*

19. *Id.*

children were removed from general classrooms and funneled into “special” classrooms.<sup>20</sup>

Eventually, the sheer number of students with special needs required schools to create more special education programs.<sup>21</sup> As a result of the growing number of programs, schools began to receive federal financial assistance to aid in the training and education of the children with special needs.<sup>22</sup> Parents of disabled children pushed for even more programs<sup>23</sup> and set up organizations such as the National Association for the Advancement of Retarded Citizens and the Association for Children with Learning Disabilities.<sup>24</sup> By the 1970s approximately eight million children in the United States received some form of special education, primarily through separate educational facilities.<sup>25</sup>

As special education programs increased, a stigma attached to students placed in special educational settings.<sup>26</sup> Thus, educators conducted various experiments to determine if disabled children could be placed in a regular educational environment.<sup>27</sup> These experiments proved to be relatively successful, sparking a movement toward the inclusion of children with disabilities into general classrooms.<sup>28</sup>

The Supreme Court’s decision in *Brown v. Board of Education* bolstered the movement toward inclusion.<sup>29</sup> In *Brown* the Court held that racially segregating students of color results in inherently

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20. *Id.*

21. See Hughes & Rebell, *supra* note 10, at 531 (citing Maynard C. Reynolds & Sylvia W. Rosen, *Special Education: Past, Present, and Future*, EDUC. FORUM, May 1976, reprinted in SPECIAL LEARNING CORPORATION, READINGS IN SPECIAL EDUCATION 4, 6 (1980)).

22. *Id.* (citing Paul Irvine, *History of Special Education*, in 2 ENCYCLOPEDIA OF SPECIAL EDUCATION 785, 788 (Cecil R. Reynolds & Lester Mann eds., 1987)).

23. *Id.*

24. *Id.*

25. *Id.*

26. See Hughes & Rebell, *supra* note 10, at 531.

27. *Id.* at 532. Even in the early days of special education, educators expressed concern about educating disabled children in separate environments. *Id.* These educators believed that it might be more beneficial to educate disabled children with non-disabled peers. *Id.*

28. *Id.* (citing G.G. Newman, *The Assessment of Programs in the Treatment of Hyper-aggressive Children with Learning Disabilities within the School Setting*, 29 AMER. J. OF ORTHOPSYCHIATRY 633 (1959)). Several reports of successful mainstreaming of autistic, mentally retarded, or cerebrally ill children appeared in educational literature. *Id.*

29. 347 U.S. 483 (1954).

unequal education and is therefore unconstitutional.<sup>30</sup> Proponents of inclusion analogized that the use of separate facilities for students with disabilities was similarly unequal.<sup>31</sup>

In the early 1970s inclusion began to take shape in the courts with the case of *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*.<sup>32</sup> In *PARC*, the district court ordered a school to place a mentally retarded child in a general educational setting.<sup>33</sup> The district court explained that segregating the child violated the child's due process and equal protection rights.<sup>34</sup> Similarly, in *Mills v. Board of Education*, the D.C. district court held that a school's actions violated the due process rights of disabled children.<sup>35</sup>

Congress addressed the inclusion issue in 1975 by enacting the Education for All Handicapped Children's Act.<sup>36</sup> Congress' goal

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30. *Id.* at 495.

31. See Hughes & Rebell, *supra* note 10, at 532-33 (citing Note, *Enforcing the Right to an Appropriate Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1107 (1979)). Mainstreaming proponents argued that segregated schools for children with disabilities were unequal because they provided "substandard and inadequate" educational resources. *Id.* See also Dupre, *supra* note 6, at 784 (citing MURRAY-SEEGERT, *supra* note 6, at 17). Advocates for disabled children argued that the disabled children were a minority like certain racial groups and launched civil rights attacks, following the lead of advocates for racial minority groups. *Id.*

32. 334 F. Supp. 1257 (E.D. Pa. 1971). An advocate for disabled children brought a class action suit against the Commonwealth of Pennsylvania on behalf of mentally retarded children who were being placed in separate classrooms. *Id.* at 1259. The court issued a consent order which required Pennsylvania to provide free and appropriate public education, with the presumption that the general classroom setting is preferable to a special education environment. *Id.* at 1260.

33. *Id.* at 1258.

34. *Id.* at 1259. The *PARC* decision is considered to be the first "right to education" case involving disabled children.

35. 348 F. Supp. 866 (D.D.C. 1972). In addition to its application to retarded children, the holding applied to other "exceptional" children, such as children with behavioral problems and emotionally disturbed or hyperactive children. *Id.* at 866. The court stated that no child should be excluded from a public school unless that child is provided with "adequate alternative educational services suited to the child's needs . . . with a constitutionally adequate prior hearing." *Id.* at 878.

36. See *supra* note 1 and accompanying text. The IDEA addresses both the substantive and procedural rights of disabled children. *Id.* First, parents of disabled children may sue in state or federal court if their child is not placed in a general classroom for the entire day. 20 U.S.C. § 1415(e)(2) (1994). Second, there is a substantive requirement that in order to qualify for financial assistance from the federal government states must show they have a policy which ensures all children, disabled or not, a free and appropriate public education. § 1412(1). Additionally, the state is required to provide the disabled child with a "full educational opportunity." § 1412(s)(A). Thus, the IDEA mandates that schools develop Individual

behind the IDEA is to provide disabled children with a free and appropriate public education in the least restrictive environment that meets their needs.<sup>37</sup> Specifically, disabled children should be educated, to the “maximum extent appropriate,” with children who are not disabled.<sup>38</sup> To achieve this goal, Congress allocates federal funding to the states.<sup>39</sup> In return, the states must comply with the procedural requirements set forth in the IDEA.<sup>40</sup> In part, the IDEA requires that schools designate a group of individuals to establish an Individualized Educational Plan (IEP)<sup>41</sup> for each disabled child.

### *B. The Trend of the Courts*

To date, the courts have not provided a clear test to determine when it is appropriate to mainstream children with disabilities into a general classroom environment. The courts’ decisions, however,

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Education Programs for disabled children. § 1414(d). The school must notify the parents of a disabled child if the school plans to change or modify the child’s IEP. § 1415(b)(1)(c). The parent then can argue against the proposed changes and, if the situation is not resolved to the satisfaction of the parents, the parents are entitled to a due process hearing on the matter. § 1415(b)(2). The parents may appeal the decision to a state agency and again to a state or federal district court. § 1415(e)(2).

37. § 1401(a)(18). The free and appropriate public education requirement includes: (1) special education for the disabled child at no cost to the child’s parents; (2) other support services “as may be required to assist a child with a disability to benefit from special education.” *Id.*

38. *Id.*

39. *See supra* note 3.

40. *Id.*

41. 20 U.S.C. § 1414(d). The IEP is developed in a meeting which includes the teacher of the disabled student, a representative of the agency that supervises the child’s special education, the child’s parents, and possibly the child. *Id.* A written IEP is developed annually. *Id.* Requirements of each IEP include:

(A) a statement of the disabled child’s present levels of performance; (B) a statement of short-term objectives and measurable annual goals; (C) a statement of the educational services to be provided to the child; (D) and the extent of participation the child will have in the regular educational environment; (E) a statement of the transitional services the student will need beginning at an age no later than sixteen, and when appropriate, fourteen; (F) the projected date of the services to be provided to such student; (G) appropriate procedures for determining whether the various objectives set forth are being achieved, and in the case that the administrative agency fails to provide the services agrees upon, a new committee shall come together to form a new IEP for the disabled child.

*Id.*



appear to emphasize the non-academic benefits disabled children receive when they are mainstreamed into general settings.

In 1982 the Supreme Court announced a two-part standard for reviewing state compliance under the IDEA in *Board of Education v. Rowley*.<sup>42</sup> First, the court determines whether the state has complied with the procedural requirements of the IDEA.<sup>43</sup> Second, the court determines whether the IEP is sufficient to enable the disabled child to receive educational benefits.<sup>44</sup> If the state has satisfied both of these requirements, then the state has complied with the IDEA. The Court did not address the issue of mainstreaming, but instead focused on the role courts should play in the mainstreaming process.<sup>45</sup>

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42. 458 U.S. 176 (1982). In *Rowley*, the parents of an eight-year-old deaf child requested a due process hearing after their request for an interpreter was denied. *Id.* at 184. The child originally was placed in a regular kindergarten classroom and was provided with a hearing aid. *Id.* The child successfully completed kindergarten; however, her parents still felt that their child should be provided with a sign language interpreter for her first grade class. *Id.* The school district provided an interpreter for the child for two weeks during her kindergarten year, but the interpreter and the school district both agreed that the service provided was not necessary. *Id.* The case went to trial, and the Supreme Court determined that the IDEA did not require the states to maximize the potential of a disabled child. *Id.* at 198. The Court explained that a state has met the IDEA's requirements once it provides the disabled child with a free and appropriate public education and "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. Thus, the Court reaffirmed the *Rowley* dictate that courts leave educational policy to the schools. The Court declined to review whether the school had developed adequate placements for the disabled child as required by the IDEA. *Id.* at 202. The court stated that this type of educational decision went far beyond its scope. *Id.* See also *Lachman v. State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 164 (8th Cir. 1987). The *Lachman* court explained that the district court "correctly ascertained that *Rowley* is the definitive Supreme Court pronouncement to date as to the standard a school district must meet in order to satisfy its U.S.C. § 1412(1) obligation to provide all handicapped children with a free and appropriate public education." *Lachman*, 852 F.2d at 293.

43. *Rowley*, 458 U.S. at 203.

44. *Id.* at 206-07. The Supreme Court explained that, although the reviewing court should make its determination based on a preponderance of the evidence, the courts must also defer to state administrative proceedings and refrain from substituting "their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the method most suitable to the child's needs, was left by the Act to state and local agencies. . . ." *Id.* at 207.

45. The IDEA's mainstreaming requirement provides that:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular

*Rowley's* deferential standard of review shifted the focus of states' mainstreaming programs away from the IDEA's requirements and toward a new set of standards created by state courts.<sup>46</sup>

In *Roncker v. Walter*<sup>47</sup> the Sixth Circuit set forth its test for mainstreaming children with disabilities.<sup>48</sup> The court reviewed the district court's decision to place a severely retarded nine-year-old in a special school.<sup>49</sup> The *Roncker* court declined to apply the *Rowley* test

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classes with the use of supplemental aids and services cannot be achieved satisfactorily. . . ."

20 U.S.C. § 1412(5)(B).

46. After the Supreme Court set a deferential standard of review regarding state and local actions involving education in *Rowley*, several courts created different standards of mainstreaming review. These standards ended up decreasing the deference *Rowley* had given to the states while increasing the role of the courts in inclusion cases.

47. 700 F.2d 1058 (6th Cir. 1983). The mother of a nine-year-old mentally retarded child challenged her son's placement in a special school for the mentally retarded. *Id.* at 1060-61.

48. See also *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 877 (4th Cir. 1989). The parents of a seventeen-year-old autistic child wanted the child placed in a high school near their home. The court quoted *Roncker* with approval and held that the disabled student was appropriately placed by the school in a segregated program because the student would not receive an appropriate education in the mainstream facility even with the use of supplemental aids and services. *Id.* at 879-80. See also *Briggs v. Bd. of Educ.*, 882 F.2d 688 (2d Cir. 1989). An IEP committee proposed that a disabled child who suffered from a moderate hearing impairment and speech problems be placed in a special pre-school class which was contained in a regular educational building. *Id.* at 689. The committee believed that because of the child's educational difficulties the child's best interest would not be served in a general educational environment. *Id.* at 690. However, the parents of the disabled child believed that the child should have more interaction with non-disabled children and requested a due process hearing. *Id.* The hearing officer determined that the IEP was appropriate and the child's parents filed a lawsuit. *Id.* at 690-91. The federal district court applied the *Roncker* test and reversed the decision of the officer at the due process hearing. *Id.* at 690. The court stated that the child "could feasibly have been offered services in a much less segregated setting." *Id.* at 692. The Second Circuit reversed the district court's decision and explained that the district court should not have substituted its own judgment for that of the school district. *Id.* at 693. The court explained that experts already had reached a decision on what would be in the best interest of the child, and this decision was appropriate and guided by individuals familiar with the situation. *Id.*

49. *Rockner*, 700 F.2d at 1061. The district court determined that the school district had broad discretion in determining the placement of a child with a disability. *Id.* The court explained that the school district had not abused its discretion because the child required constant supervision, had a mental age of two or three, and had made no significant progress in the integrated environment. *Id.* at 1060-61. According to the court, the child "was not progressing in his present placement but was regressing. His ability to interact with the non-handicapped children was at best minimal. His opportunity to interact with non-handicapped children was also very minimal." *Id.* at 1064 (Kennedy J., dissenting). Relying on expert testimony, the court determined that the child would be better served by a segregated placement because the child was not progressing in the integrated environment. *Id.* at 1061.

because the court believed that the application of *Rowley's* standards is limited to cases which involve a controversy regarding the appropriate methods for educating a disabled child.<sup>50</sup> In contrast, *Roncker* involved the adequacy of the mainstreaming process itself.<sup>51</sup> Thus, the *Roncker* court established its own test for determining when to mainstream disabled children.<sup>52</sup> The court explained that even in cases where a segregated setting seems superior to meet disabled children's needs, the school district still should determine whether the same benefits could be achieved in a non-segregated setting.<sup>53</sup> The court held that the benefits of both settings then should be compared, along with the costs incurred in placing the disabled child in a general educational environment.<sup>54</sup>

In 1989,<sup>55</sup> in *Daniel R.R. v. State Board of Education*,<sup>56</sup> the Fifth Circuit similarly refused to follow the *Rowley* test and formulated its

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50. *Rockner*, 700 F.2d at 1061.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* After setting forth a new test for mainstreaming, the *Roncker* court remanded the case back to the district court to determine whether the child could be placed in a more mainstreamed setting. *Id.*

55. See Osborne, *supra* note 10, at 1012. Beginning in 1989 federal courts in many circuits began to order mainstreaming for children with disabilities. *Id.* The courts explained that mainstreaming should be the preferred choice of action and that a disabled student should be excluded from the regular educational environment only if there is strong evidence that the exclusion was necessary. *Id.* at 1018. Prior to 1989, however, litigation focused more on the educational aspect of inclusion. *Id.* at 1016. The least restrictive environment mandate of the IDEA appeared to be second to an appropriate education. Thus the courts ordered school districts to mainstream disabled children only when the courts were faced with evidence that the disabled child could be appropriately educated in the less restrictive environment and the benefits of the least restrictive environment outweighed the negative effects. *Id.* See also *St. Louis Developmental Disabilities Ctr. v. Mallory*, 591 F. Supp. 1416 (W.D. Mo. 1986); *Matthews v. Campbell*, 551 EHLR 264 (E.D. Va 1979). However, courts would approve placements in cases where an appropriate program was not available at the public schools.

56. 874 F.2d 1036 (5th Cir. 1989). At his parent's request, the school placed a six-year-old boy with Down's syndrome in a general kindergarten class for half of the day, and in a special education environment for the remainder of the day. *Id.* at 1039. The boy's capacity seemed to be no more than a child of two or three years, and his teacher reported that he could not comprehend any of the skills she tried to teach him. *Id.* Additionally, the teacher noted that her method of teaching would have to be substantially modified in order to reach the boy. *Id.* Consequently, the school recommended that the boy be placed in a special educational environment except during lunch and recess. *Id.* The boy's parents sued the school to force them to include their son in a general class. *Id.* at 1040.

own mainstreaming test.<sup>57</sup> The court affirmed the district court's decision to place a child with Down's syndrome in a special educational setting.<sup>58</sup> The court then articulated a two-part test for ordering inclusive placements.<sup>59</sup> The court stated that a school district first must determine whether or not a disabled child can be educated in the general classroom with the appropriate aids and services.<sup>60</sup> If not, the court examines whether the school mainstreamed the disabled child to the maximum extent possible.<sup>61</sup> The court noted that the application of this test does not contemplate that the school will provide every supplement and aid conceivable. In addition, the court must consider the effect the disabled child has on the other children in the general classroom.<sup>62</sup> The *Daniel R.R.* court emphasized the social benefits the disabled child might receive from placement in a general educational environment and explained that these benefits outweigh the possible academic benefits.<sup>63</sup>

In *Greer v. Rome City School District*,<sup>64</sup> the Eleventh Circuit

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57. The court felt that the *Rowley* test was inapplicable to mainstreaming and developed its own mainstreaming standard. 874 F.2d at 1045-50. The *Daniel R.R.* court apparently based this decision on the Eighth Circuit's statement that the "*Rowley* test assumes that the state has met all of the requirements of the Act, including the mainstreaming requirement." *Id.* at 1045. In *Daniel R.R.*, the court noted that although the district court does not answer the second part of the *Rowley* test, the district court's determination that the segregated school provided an appropriate education incorporated the *Rowley* standard. *Id.* The Fifth Circuit explained that because *Rowley* did not directly address mainstreaming, the district court properly looked to *Roncker* for guidance. *Id.* at 1045-46.

58. *Id.* at 1052.

59. *Id.* at 1042.

60. 874 F.2d at 1048.

61. *Id.*

62. *Id.* at 1048-49. After applying the test, the court concluded that the school board had integrated the boy to the maximum extent appropriate by allowing him to interact with non-disabled children during lunch and recess. *Id.*

63. *Id.* at 1047. The *Daniel R.R.* court explained that the child could learn from the disabled children's conduct, and thus the actual benefit received was of lesser importance. *Id.* The educational achievement was not as important as the social benefits the disabled child could receive. *Id.* The court stated that the "academic achievement is not the only purpose of mainstreaming." *Id.* at 1049. Thus, the court focused on the "overall growth and developmental benefits gained from education." *Id.* at 1047 n.8. The court cited *Roncker* and explained that a disabled child may benefit from the "language models that his nonhandicapped peers provide for him." *Id.* at 1049. The possible social benefit "may tip the balance in favor of mainstreaming," even absent a clear educational benefit to the disabled child. *Id.*

64. 950 F.2d 688 (11th Cir. 1991). The school district proposed an IEP for a child with Down's syndrome which recommended a self-contained classroom because the child required more attention than the other children. *Id.* at 690-91. Additionally, the school psychologist

adopted and enlarged the test set out in *Daniel R.R.*<sup>65</sup> The *Greer* court explained that in order to determine whether a special classroom or a general classroom would be more appropriate for a child with a disability, the court should compare the educational benefits of each.<sup>66</sup> The court also noted that the cost of placing a disabled child in a general educational environment should be considered.<sup>67</sup> Applying this test, the court concluded that a nine-year-old student with Down's syndrome should be mainstreamed into a general kindergarten class.<sup>68</sup> The court reasoned that the student had progressed in the general classroom and that she did not disrupt other children.<sup>69</sup>

The Third Circuit built on the mainstreaming requirements of the aforementioned cases in *Oberti v. Board of Education of the Borough of Clementon School District*.<sup>70</sup> The court held that school districts

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explained that the child would benefit more from a specialized environment because the child had learning and communication disabilities that required special attention. *Id.* at 691.

65. The Eleventh Circuit adopted the *Daniel R.R.* test and held that the *Rowley* testis inapplicable to mainstreaming cases. *Id.* at 696. The court used a modified *Daniel R.R.* test and affirmed the district court's conclusion that the school had failed to consider whether the child could be mainstreamed into a general environment with the use of supplemental aids and services. *Id.* at 699. The court held that the district court did not meet the first prong of the *Daniel R.R.* test. *Id.*

66. 950 F.2d at 695-99.

67. *Id.* at 697.

68. *Id.* at 698. The court determined that the school had not complied fully with the IDEA because the school had not considered supplemental aids and services that it could have used to accommodate the child to help mainstream the child into the general classroom. *Id.*

69. *Id.*

70. 995 F.2d 1204 (3d Cir. 1993). Rafael Oberti was a child with Down's syndrome whose intellectual capacity placed him among the lowest 1% of the population for intellectual capacity. *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 801 F. Supp. 1392, 1395 n.1 (D.N.J. 1992). At the time of the appeal, Rafael was eight years old. 995 F.2d 1204, 1207. When Rafael reached kindergarten age, the school district recommended that he be placed in a special educational environment. *Id.* Rafael's parents objected to this placement and reached an agreement with the district where Rafael spent the morning in a developmental kindergarten classroom and the afternoon in a special education class. *Id.* Soon it became clear that Rafael needed additional aids and services, and the school hired a teaching aide. *Id.* at 1208. Neither party denied that Rafael had a history of serious behavioral problems, which included toileting accidents, hitting and spitting on other children, and temper tantrums. *Id.* The teacher's aide did little to alleviate Rafael's problems and Rafael's behavior disrupted both classrooms. *Id.* The school district proposed that Rafael attend a special class for the "educable mentally retarded," located in a different school district. *Id.* Rafael's parents objected again, and the school district gave Rafael another opportunity to be educated with other disabled children. *Id.* Although Rafael's behavior improved, the school district had no intentions of returning Rafael to his

have an affirmative obligation to consider the placement of disabled children into a general educational environment before the school district explores alternative placements.<sup>71</sup> The court stated that compliance with the goals of the IDEA required the district to maximize inclusion opportunities.<sup>72</sup> The district must provide supplements, aids, and services which sufficiently modify the general classroom into a classroom that can accommodate disabled children.<sup>73</sup> This presumption in favor of inclusion should be disregarded only if the disabled child will receive little or no benefit from mainstreaming or if the disabled child is so disruptive as to render it nearly impossible for the other children to conduct their studies.<sup>74</sup> Applying these principles, the court found that a segregated special education class was not the least restrictive environment for a child with Down's syndrome.<sup>75</sup>

In 1994, in *Sacramento City Unified School District v. Rachel H.*, the Ninth Circuit echoed the trend toward "full inclusion."<sup>76</sup> The

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original school for further mainstreaming opportunities. When Rafael's parents discovered this, they brought a due process complaint under the IDEA. *Id.* at 1209.

71. 995 F.2d at 1217-18.

72. *Id.* at 1216. The court explained that a school must consider the full range of supplemental aids and services appropriate to the child's disabilities, including speech and language therapy, special education training for the general classroom teachers, and behavior modification classes. *Id.* The court reasoned that a child might be disruptive simply because adequate aids and services were not provided for him. *Id.* at 1217. The court also noted that a school should try to "modify the regular educational program to accommodate a disabled child." *Id.* at 1216.

73. *Id.* at 1216.

74. 995 F.2d at 1217.

75. *Id.* at 1218. *See also* Bd. of Educ. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992) (holding that a disabled child should be educated in a general classroom even if a separate educational facility would be academically superior).

76. 14 F.3d 1398 (9th Cir. 1994). The court found that a mentally retarded eleven-year-old child should be educated full-time in a general classroom. *Id.* The court of appeals adopted a four-factor test promulgated by the district court that incorporated the factors found in the *Roncker* and *Daniel R.R.* cases. *Id.* The four factors are: (1) the educational benefits of full-time placement in a regular educational environment; (2) the nonacademic benefits of such placement; (3) the effect of such placement on the teacher and students in the regular educational environment; and (4) the cost of such placement. *Id.* at 1404. The court of appeals upheld the district court's reasoning that a child with a disability should be educated in a regular educational environment even if a special education placement would be academically superior and the general classroom is not the best academic setting for the child. *See* Bd. of Educ. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd sub nom.*, *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).

court emphasized the IDEA's requirement that a child with a disability should be placed in a special classroom only if that child could not satisfactorily progress in a general educational environment.<sup>77</sup>

In *Hartmann v. Loudoun County Board of Education*<sup>78</sup> the Fourth Circuit also followed the principles delineated in the aforementioned cases. In *Hartmann*, the court held that a general classroom was not appropriate for an autistic child who was unable to speak or write and who was violent and disruptive in class.<sup>79</sup> The court explained that although the school district had done everything reasonable to mainstream the autistic child into the general classroom, the child received no benefits from these efforts.<sup>80</sup> The court concluded that the IDEA's presumption toward inclusion served no purpose in this case.<sup>81</sup>

### III. AN ANALYSIS OF INCLUSION CASES AND CONTROVERSIES

#### A. *The Trend*

The Supreme Court has yet to rule on the inclusion issue. Circuit courts struggle to formulate a clear test to determine when the placement of a disabled child into a general educational environment is appropriate.<sup>82</sup> The recent trend in the federal courts is toward

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77. *Rachel H.*, 14 F.3d at 1403 (citing 20 U.S.C. § 1412(5)(B)).

78. 118 F.3d 996 (4th Cir. 1997). The court examined an eleven-year-old autistic child who was unable to speak and had severe problems with his motor coordination skills. *Id.* at 999. The school placed the child in a general educational environment with a special aide and various support services. *Id.* To further accommodate the child, teachers were educated about autistic children and how to deal with them. *Id.* In addition, a special education teacher was assigned to the child to aid him with his curriculum. *Id.* Despite these efforts the child proved unable to cope in a general classroom. *Id.* The child disrupted the classroom and often engaged in hitting, biting, kicking, and removing his clothes. *Id.* The school finally decided to place the child in a separate educational facility. *Id.* at 1000.

79. *Id.* at 997.

80. *Id.* at 1005

81. *Id.*

82. See *Gillette v. Fairland Bd. of Educ.*, 932 F.2d 551 (6th Cir. 1991) (holding that a school may depart from Congress' preference for mainstreaming if the school provides sufficient evidence that the disabled student would not benefit from mainstreaming and that benefits received in a segregated setting would be superior to those received in an integrated environment); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991) (holding that the least restrictive environment mandate does not mean that the school has an absolute duty to

mainstreaming the majority of disabled children.<sup>83</sup> The courts' focus does not appear to be on the educational benefits of inclusion, but on the non-academic purposes mainstreaming might serve.<sup>84</sup>

Many of the circuits hold that a presumption toward inclusion should apply to a disabled child wishing to enroll in a general classroom.<sup>85</sup> The Third, Fourth, Fifth, Sixth, Ninth, and Eleventh circuits generally agree that mainstreaming should be the solution whenever it is appropriate.<sup>86</sup> However, the circuits differ on the meaning of the word "appropriate." Some circuits interpret the word so broadly that mainstreaming is appropriate in nearly all cases in which a disabled child wishes to enter a general classroom.<sup>87</sup> Other circuits narrowly focus on whether the child can benefit socially.<sup>88</sup>

### *B. Strengths of Inclusion*

Inclusion is the logical choice when a child's disabilities are so minimal that exclusion would be detrimental to his or her social and

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place the child in the school the student prefers to attend); *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989); *Briggs v. Bd. of Educ. of State of Conn.*, 882 F.2d 688 (2d Cir. 1989); *Liscio v. Woodland Hills Sch. Dist.*, 734 F. Supp. 689 (W.D. Pa. 1989) (holding that free appropriate public education in the least restrictive environment requires that a handicapped student be placed in classes for the mentally retarded for academic subjects, but mainstreamed with non-handicapped peers for nonacademic subjects); *Thornock v. Boise Indep. Sch. Dist. No. 1*, 767 P.2d 1241 (Idaho 1988) (holding that the school district had not provided a free and appropriate public education in the least restrictive environment when it failed to prepare an adequate IEP containing goals, objectives, and a statement of the possibility of mainstreaming).

83. See Martha M. McCarthy, *Inclusion of Children with Disabilities: Is it Required?*, 95 EDUC. LAW REP. 823, 830 (1995). "The judiciary is interpreting the IDEA as favoring inclusion, and courts seem less inclined to uphold segregated placements. If the school district has not taken steps to educate a child with disabilities in the regular classroom with appropriate support, an IDEA violation will likely be found." *Id.* The *Daniel R.R.* court, however, explains that courts still will examine each case on a case-by-case basis. *Id.*

84. The *Oberti* court stated that "a fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers." 995 F.2d 1204, 1216-17 (3d Cir. 1993). Other post-*Rowley* cases indicate that the courts are more concerned with improved socialization skills than with improved educational abilities. See, e.g., *Daniel R.R.*, 874 F.2d 1036, 1047-48 (5th Cir. 1989).

85. McCarthy, *supra* note 83, at 826-27.

86. *Id.* at 826-30.

87. See, e.g., *Oberti*, 995 F.2d 1204.

88. See, e.g., *Daniel R.R.*, 874 F.2d 1036.



educational growth.<sup>89</sup> Exclusion can stigmatize such a child because it can cause the child to view a disability as an implication that they are inferior to other children.<sup>90</sup> Including this type of child into a general educational environment could improve the child's self-esteem, and proponents of inclusion contend that this, in turn, could contribute to greater academic success.<sup>91</sup>

Advocates for inclusion also argue that mainstreaming a disabled child into a general classroom can help the disabled child cope with disability.<sup>92</sup> The disabled child may use the other children as role models and eventually come to realize that everyone is different in one way or another. As a result, the disabled child would not feel inferior but would feel like every other child.

### *C. Weaknesses of Inclusion*

While mainstreaming can be a benefit to some disabled children, this is not always the case.<sup>93</sup> Not all disabled children flourish in a general educational environment. Some disabilities are so severe that placement in a general classroom actually can hinder the child's growth.<sup>94</sup> These children are served better in a separate facility which is specifically equipped to accommodate the child's disability.

Advocates of inclusion argue that academic benefits should not be the only consideration; the social benefits that a child with a disability can achieve from placement in a general education

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89. Boeckman, *supra* note 11, at 873.

90. *Id.*

91. *Id.*

92. *Daniel R.R.*, 874 F.2d at 1047-48.

93. See McCarthy, *supra* note 83, at 830 (citing *Learning Disabilities Association Paper on Full Inclusion of All Students with Learning Disabilities in the Regular Educational Classroom*, LDA Newsbriefs (March/April 1993)). The Learning Disability Association of America took a stand against full inclusion and prefers several placement options. *Id.* Teacher's unions are also skeptical of inclusion. The American Federation of Teachers (AFT) called for a moratorium on the inclusion of disabled children into the general educational environment because the AFT wants to learn more about how to make inclusion work. *Id.* A 1994 study by the AFT revealed that three out of four teachers would object to a full-inclusion model. *Id.* Also, with the fiscal problems facing numerous school districts, many teachers believe that disabled children will be mainstreamed into a general educational environment without the adequate support necessary to make it beneficial to them. *Id.* at 831.

94. See, e.g., *Daniel R.R.*, 874 F.2d at 1051.

environment should be considered.<sup>95</sup> This analysis, however, minimizes the basic purpose behind education in the classroom—schools exist to educate. Placing a disabled child in a classroom merely to enhance that child’s social skills is contrary to this underlying purpose.

Another disadvantage of mainstreaming is the effect on the children who are already placed in a general educational environment. The courts and the advocates of inclusion pay little attention to the needs of the “normal” child. Courts only address the effect on the other children in the classroom if the disabled child is so disruptive that the child renders it nearly impossible to conduct class.<sup>96</sup> This threshold is too high. Courts should reconsider this threshold before concluding that inclusion is the most appropriate solution.

In addition, courts and proponents of inclusion should consider the costs of mainstreaming disabled children into a general educational environment.<sup>97</sup> Schools operate on limited budgets.<sup>98</sup>

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95. See Boeckman, *supra* note 11, at 873.

96. See, e.g., *Daniel R.R.*, 874 F.2d at 1049.

97. The Supreme Court has never addressed directly the issue of finance in regard to the IDEA. However, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the Court said that Congress could not impose financial burdens on the schools unless it did so unambiguously. 458 U.S. 176, 190 n.11 (1982). See also *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 886 (1984). In *Irving*, the Court had to decide whether a school needed to provide a disabled student with a Clean Intermittent Catheterization under the IDEA. *Id.* The Court looked to the definition of “medical services” provided in the IDEA regulations and determined that medical services included only those services provided by a licensed physician. *Id.* at 892. Thus, the Court ruled that “the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that well might prove unduly expensive and beyond the range of their competence.” *Id.* The circuits present no uniform approach to the cost issue. The First Circuit, in *Doe v. Arig*, determined that cost may be considered to determine whether a program for a disabled child is appropriate. 692 F.2d 800 (1st Cir. 1982). In *Doe*, the court concluded that a more costly program, where a child with Down’s syndrome remained in a residential placement instead of moving to a home environment, was more educationally appropriate. *Id.* at 806. See also *Hurry v. Jones*, 734 F.2d 879 (1st Cir. 1984); *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983). The Second Circuit also has considered the issue of cost. In *Detsel v. Bd. of Educ.*, the court upheld a lower court’s decision that a school had to provide a disabled student with constant supervision by a nurse. 820 F.2d 587 (2d Cir. 1987). The Third Circuit, in *Battle v. Pennsylvania*, explained that states cannot reject services for disabled children solely because they are costly. 629 F.2d 269 (3d Cir. 1980). However, the state may consider the effect of the cost on resource allocation. *Id.* at 283. See also *Benn H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987); *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443 (3d Cir. 1981); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981). The Fourth Circuit, in *Barnett*, explained that

Instead of using the aids and special educational services that already exist, inclusion requires schools to provide new services to accommodate the needs of disabled children in general classrooms.<sup>99</sup> When schools spend their funding to accommodate the needs of disabled children, the other students suffer because of the school's restricted ability to spend its resources on materials necessary for other students to thrive. Instead, schools spend money to supplement services and supplies they already possess.

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the term "appropriate" in free and appropriate public education "does not mean the best possible education that a school could provide if given access." 927 F.2d at 154. See also *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Bales v. Clarke*, 523 F. Supp. 1366 (E.D. Va. 1981); *Pinkerton v. Moye*, 509 F. Supp. 107 (N.D. Va. 1981). The Fifth Circuit, in *Crawford v. Pittman*, explained that when an agency seeks to limit the services to disabled children due to financial constraints, the agency must ensure that the limitations are imposed equally on children with and children without disabilities. 708 F.2d 1028, 1035 (5th Cir. 1983). See also *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1982); *Stacey G. v. Pasadena Indep. Sch. Dist.*, 547 F. Supp. 61 (S.D. Tex. 1982). The Sixth Circuit, in *Age v. Bullitt County Pub. Sch.*, reasoned that in order to comply with the purpose of the IDEA districts must mainstream disabled children with non-disabled children despite the associated possible burdens. 673 F.2d 141 (6th Cir. 1982). See also *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514 (6th Cir. 1984); *Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989). The Seventh Circuit, in *Darlene L. v. Ill. State Bd. of Educ.*, refused to place an emotionally disturbed child in a psychiatric hospital because of the financial burden. 568 F. Supp. 1340, 1345 (N.D. Ill. 1983). See also *William S. v. Gill*, 572 F. Supp. 509 (N.D. Ill. 1983). The Eighth Circuit in *A.W. v. Northwest R-1 Sch. Dist.* explained that courts can weigh the cost to the school district and the benefit to the child when determining whether the IDEA's mainstreaming requirement has been met. 813 F.2d at 163. The Ninth Circuit, in *Dept. of Educ. v. Katherine D.*, rejected a home-bound program for a child who required a tracheotomy tube to help her breathe. 727 F.2d 809 (9th Cir. 1983). The court explained that the schools need only make an effort to accommodate a disabled child and that effort simply must be within reason. *Id.* at 812. Finally, the Eleventh Circuit, in *Martinez v. School Bd. of Hillsborough County, Fla.*, concluded that courts must consider the financial burden imposed on the school district when providing services to disabled children. 861 F.2d 1502, 1506 (11th Cir. 1988), *on remand*, 711 F. Supp. 1066 (M.D. Fla. 1989).

98. See Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost be a Factor in Special Education Cases?*, 71 EDUC. LAW. REP. 11 (1992). State and local educational agencies largely fund the programs and services. *Id.* at 11. The federal government is authorized to fund up to 50% of the average cost of schools' per pupil expenditures. However, this is not always the case. *Id.* The financial burden of providing programs and services to mainstream disabled children has led to a great deal of disputes involving the IDEA. *Id.* Additionally, IDEA entitlements to special education services and programs have increased and thus litigation of this issue continues to be a problem.

99. See Collins & Zirkel, *supra* note 98, at 11. The average cost of educating a disabled student is approximately two and one-half times greater than the average cost of educating a child without disabilities. *Id.*

## IV. PROPOSAL

Although the tests used by the circuits to analyze the question of inclusion vary, the circuits agree that mainstreaming is not appropriate in two situations. First, the courts will not mainstream a disabled child if the child will not receive any educational benefit from a general classroom.<sup>100</sup> Second, the courts will decline to mainstream a disabled child if the disabled child disrupts the activities in the regular educational environment.<sup>101</sup> While the courts have identified two situations where mainstreaming is not appropriate, they have not explained precisely how far they will be willing to extend these situations. The courts explain that the lack of an educational benefit will result in segregation of the disabled child.<sup>102</sup> However, the courts fail to define exactly what constitutes an educational benefit. Furthermore, the courts explain that a disruptive disabled student is not suited for mainstreaming; still, the courts never attempt to explain how disruptive a disabled child must be before the child is sent to a special environment. In *Oberti*, the disabled student was extremely disruptive; however, the court attributed the student's outbursts to a lack of appropriate services and concluded that an inclusive program with the necessary aids would be sufficient.<sup>103</sup> Still, is it enough to warrant a separate educational environment if the disabled child is disruptive but not threatening? The courts fail to explain how to resolve these issues.

As a result of the courts' inability to set forth adequate guidelines to evaluate questions of inclusion, courts often favor inclusive placements even though integration may not always be appropriate. The courts explain that the socialization benefits of inclusion justify these placements.<sup>104</sup> Thus, while the education of disabled children may not be furthered and a disruptive child may distract the rest of

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100. *Hartmann*, 118 F.3d at 1001; *Rachel H.*, 14 F.3d at 1400; *Oberti*, 995 F.2d at 1215; *Greer*, 950 F.2d at 697; *Daniel R.R.*, 874 F.2d at 1047; *Roncker*, 700 F.2d at 1063.

101. *Hartmann*, 118 F.3d at 1004; *Rachel H.*, 14 F.3d at 1404; *Oberti*, 995 F.2d at 1217; *Greer*, 950 F.2d at 697; *Daniel R.R.*, 874 F.2d at 1049.

102. *See, e.g., Daniel R.R.*, 874 at 1045-51.

103. McCarthy, *supra* note 83, at 826-30.

104. *See, e.g., Oberti*, 995 F.2d at 1217; *Greer*, 950 F.2d at 697; *Daniel R.R.*, 874 F.2d at 1047-48.

the class, the courts stretch their imprecise but established terms and conditions to rationalize the decisions they make. It is evident, however, that the courts' approach undermines the intent of the IDEA—to mainstream disabled children only when mainstreaming is appropriate.

In order to remedy these apparent inconsistencies, several conditions set forth by the courts must be clarified. However, before addressing these conditions it is important to acknowledge the interpretations of the IDEA that should remain unchanged. First, the courts' interpretation of the IDEA's least restrictive environment mandate should be retained. The courts generally agree that this provision simply means that whenever feasible disabled children should be placed in environments that are least restrictive to their needs.<sup>105</sup> Second, the courts recognize the necessity of the IEP for children with disabilities.<sup>106</sup> The majority of courts agree that these programs should be established on a case-by-case basis and that the IEP should strive to provide the most suitable placement for the child in question.<sup>107</sup> Finally, the courts consistently require disabled students to be mainstreamed to the "maximum extent possible."<sup>108</sup>

While the courts agree on the primary goals of the IDEA, they differ in their interpretations of when these goals have been achieved. Thus, new guidelines must be set. First, a disabled child should be removed from the general classroom if the educational benefits do not aid in academic advancement. Thus, approximately six months or one year after placement the child's intellectual capacity should be evaluated to determine if progress has been made. If the child's educational abilities are the same as when evaluated upon first entering the integrated environment, the school will remove the child from the general classroom for placement in an environment more closely tailored to meet the child's needs. Second, the school should remove a disabled child from the general classroom for disruptive behavior if on more than one occasion the child's outbursts cause the teacher to discontinue teaching, create an environment in which

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105. See, e.g., *Greer*, 950 F.2d at 695.

106. See, e.g., *id.* at 694-95.

107. See, e.g., *id.*

108. See, e.g., *Roncker*, 700 F.2d at 1063.

concentration is impossible, or threaten harm to other students in the class.

The removals are not considered permanent. The disabled child may be given the opportunity to return to the general classroom if the disabled student's special education teacher feels that the student is ready to try again.

## V. CONCLUSION

In inclusion cases, courts appear to have the disabled students' best interest in mind. It obviously is desirable to rectify the history of segregation that disabled children have been forced to undergo simply because of their disabilities. However, when courts attempt to remedy past problems by integrating disabled children into the general educational environment whenever possible, new problems surface. Many disabled children do not progress in general education classrooms and their presence is detrimental to the other students' education. The courts often justify these concerns with the loose guidelines they have set forth. However, instead of integrating a disabled child whenever possible, the courts should integrate only when integration is reasonable. This approach would benefit both disabled children and children without disabilities. Moreover, it would ensure that the focus of the classroom experience remains on education.